# PATHS OF RESISTANCE TO OUR IMPERIAL FIRST AMENDMENT

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## INTRODUCTION

In the campaign finance realm, we are in the age of the imperial First Amendment.[1] Over the past nine years, litigants bringing First Amendment claims against campaign finance regulations have prevailed in every case in the Supreme Court.[2] A conservative core of five justices has developed virtually categorical protections for campaign speech and has continued to expand those protections into domains that states once had the authority to regulate. As the First Amendment's empire expands, other values give way.

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1. Paul Carrington was the first scholar to refer to the First Amendment in imperial terms. *See* Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167 (2001). While Carrington criticized the Supreme Court's expansion of First Amendment protection to commercial advertising, *id.* at 1188–92, my focus is on the Court's expansion of virtually categorical First Amendment protection to more forms of campaign finance. "Imperial" as used here refers to the current Supreme Court's tendency to expand the reach of First Amendment protection to speech previously subject to governmental regulation.

2. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014) (striking down the Federal Election Campaign Act's aggregate limits on campaign contributions to candidates); Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012) (per curiam) (striking down a Montana statute banning independent expenditures by corporations "in connection with a candidate or a political committee that supports or opposes a candidate or a political party" (quoting MONT. CODE ANN. § 13-35-227(1) (2011)) (internal quotation marks omitted)); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011) (invalidating Arizona campaign finance law providing matching funds for publicly funded candidates facing privately funded opposition); Citizens United v. FEC, 558 U.S. 310, 339–41, 365 (2010) (striking down the federal Bipartisan Campaign Reform Act bar on independent corporate expenditures for electioneering communications); Davis v. FEC, 554 U.S. 724, 743–44 (2008) (striking down the "Millionaires' Amendment" to the Bipartisan Campaign Reform Act, which relaxed fundraising limits for opponents of self-financed candidates); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007) (striking down the Bipartisan Campaign Reform Act's prohibition on electioneering communications as applied to the respondent's campaign advertisements); Randall v. Sorrell, 548 U.S. 230, 236 (2006) (invalidating Vermont's campaign-

Four key cases from this era illustrate the reach of this imperial First Amendment. In *Wisconsin Right to Life, Inc. v. FEC*, the Court held that the state could regulate only the most obvious forms of express advocacy for a candidate, thus expanding the space in which First Amendment rights categorically trump other state interests.[3] In *Citizens United v. FEC*, the Court held that corporations have the same First Amendment rights as individuals and limited dramatically the state's capacity to protect the integrity of the democratic process.[4] Only the narrow interest in preventing quid pro quo corruption or the appearance of such corruption could justify independent corporate expenditure regulations.[5] When the state of Montana in *American Tradition Partnership v. Bullock* offered evidence of such corruption to support its regulation of independent corporate expenditures, the Court simply presumed that the regulation did not in fact protect against this type of corruption.[6] This decision raised the possibility that no state actor would be able to support a campaign finance restriction with evidence of a compelling purpose. Finally, in *McCutcheon v. FEC*, the Court expanded this First Amendment regime from campaign expenditures to campaign contributions, holding that only quid pro quo corruption and the appearance of such corruption could justify contribution limits.[7] The Court then simply concluded as a matter of logic that the regulation did not protect against such corruption in the face of legislative evidence to the contrary.[8]

Members of the public, scholars, and dissenting justices have resisted this First Amendment imperialism. Some criticize the line the Court has drawn between the electoral domain, where speech can be regulated, and the political domain, where it cannot.[9] These scholars advocate for a broader

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contribution limits to candidates as too low). The state has succeeded only in sustaining disclosure requirements. *See Citizens United*, 558 U.S. at 366–71 (upholding the Bipartisan Campaign Reform Act's disclosure requirement).

3. 551 U.S. at 469–70 ("[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

4. 558 U.S. at 349–51, 359–60 (rejecting the state interest in preventing distortion and unfair influence in the political process).

5. *Id.* at 359.

6. 132 S. Ct. at 2491 (holding, without reasoning in a per curiam opinion, that the arguments in favor of the Montana campaign finance law "were already rejected in *Citizens United*"). *But see id.* at 2491–92 (Breyer, J., dissenting) ("Montana's experience . . . casts grave doubts on the Court's supposition that independent expenditures do not corrupt or appear to do so.").

7. 134 S. Ct. at 1441 ("Any regulation must . . . target what we have called '*quid pro quo*' corruption or its appearance.").

8. *See id.* at 1452 ("If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801 . . . ."); *id.* at 1470 (Breyer, J., dissenting) (pointing to legislative evidence that the regulation would protect against corruption).

9. *See* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1778–79 (1999) (arguing for the necessity of drawing a line between the election and politics spaces and suggesting one that Congress partially adopted when it enacted the

electoral domain and for applying a different form of First Amendment scrutiny for speech in this domain.[10] Others lament the Court's narrow conception of the state's compelling interest in regulating speech. They point to the widespread public cynicism about politics, a cynicism arising from the sense that the rich and powerful have unfair political influence through campaign contributions and expenditures, even if they do not bribe candidates directly.[11] The public has also directed anger at the Court's decision to treat corporations like people under the First Amendment.[12] Many argue for lesser constitutional protections for corporations because the special legal protections they receive in the economic marketplace provide them with unique capacities to amass wealth and to use it to distort the democratic process.[13] But all of this resistance thus far has been futile.[14]

In his new book, *Citizens Divided: Campaign Finance Reform and the Constitution*, Yale Law School Dean Robert Post[15] proposes a new path for resisting the imperial First Amendment. Synthesizing history and doctrine, Post develops a First Amendment theory and proposes a framework to reconcile First Amendment values with the demands of self-government (pp. 5, 90–94). Post explains that public opinion has emerged as the principal means by which the people communicate with their representatives in our system of self-government.[16] Speech is the primary input in the ongoing process of public-opinion formation. When elections produce representatives who are responsive to public opinion, people who can contribute to

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Bipartisan Campaign Reform Act); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 Tex. L. Rev. 1803, 1828 (1999) (suggesting that a doctrinal line between election-related speech and non–election related speech is just as feasible as any other doctrinal line the Court has to draw and proposing such a line). *But see* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 674–75 (1997) (contending that any effort to draw the line would be impossible because elections are "seamlessly connected to the informal political debates that continue in the periods between them").

10. *See, e.g.*, Schauer & Pildes, *supra* note 9, at 1805 ("If electoral exceptionalism prevails, courts evaluating restrictions on speech that is part of the process of nominating and electing candidates would employ a different standard from what we might characterize as the normal, or baseline, degree of First Amendment scrutiny.").

11. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 507 (2007) (Souter, J., dissenting) (pointing to public opinion polls suggesting "pervasive public cynicism" about the political process arising from the effects of money in politics).

12. This is captured in the popular slogan that "corporations are not people." *See generally* Jeffrey D. Clements, Corporations Are Not People: Why They Have More Rights Than You Do and What You Can Do About It (2012).

13. This is the basis for the antidistortion argument that served as a compelling justification for campaign finance regulations before *Citizens United*. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 205 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–60 (1990).

14. After *McCutcheon*, major news media outlets resignedly pronounced that the remaining contribution limits could no longer prevent the "few people with the most money [from being] the loudest voice in politics." Editorial, *The Court Follows the Money*, N.Y. Times, Apr. 3, 2014, at A26, *available at* http://www.nytimes.com/2014/04/03/opinion/the-court-follows-the-money.html.

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16. *See* pp. 31–43.

public-opinion formation through speech experience democratic legitimation (p. 60). The people develop a sense of ownership over their government. The First Amendment should therefore protect the right of every citizen to participate in democratic discourse.

After broadly defining the First Amendment right, Post departs from the imperialists. The Court has balanced away the state interest in democratic integrity, which Post reframes as electoral integrity, in favor of the superior right to freedom of speech (pp. 60–61). Post argues that this approach is misguided because electoral integrity is an essential precondition to First Amendment rights. Electoral integrity "presupposes . . . public trust in the responsiveness of representatives to public opinion" (p. 61). To the extent that the people do not perceive their representatives to be responsive to public opinion, speech as democratic legitimation is undermined. Courts should therefore evaluate campaign finance laws according to whether the laws protect against threats to electoral integrity.

In many respects, Post's theory and framework are quite persuasive. He fulfills his goal of providing "a constitutional framework of analysis in which First Amendment doctrine and campaign finance reform can be connected to each other in a coherent and theoretically satisfactory manner" (p. 5). He offers a basis for reconciling "our republican tradition . . . with our commitment to discursive democracy" (p. 6). And ultimately, he presents a compelling case for how the Court in *Citizens United*, which serves as the focal point of the book, deviated from First Amendment principles. Given that the liberal justices decided to adopt many of the elements of Post's theory and constitutional framework in their *McCutcheon* dissent, Post's work could represent the future of First Amendment doctrine in the campaign finance realm.[17]

But Post's constitutional framework is unlikely to convince the Court's current conservative majority. Insofar as Post's theory of the First Amendment is grounded in history, his stylized and synthetic account is unlikely to persuade those who demand greater rigor. But perhaps more importantly, Post's constitutional framework is flawed because it fails to account for a linchpin in the Court's recent campaign finance jurisprudence: the concern about chilling constitutional speech. A path of resistance to the imperial First Amendment will need to account for this concern. In this Review, then, I offer an alternative path forward that builds from Post's theory and constitutional framework but addresses concerns about chilling speech. This proposal shifts the responsibility for complex fact-based judgments from courts conducting case-by-case adjudications to agencies issuing advisory determinations.

This Review proceeds in three parts. In Part I, I explore Post's historical survey of self-government and anticipate critiques of this account. In Part II, I review Post's proposed First Amendment theory and constitutional framework for adjudicating challenges to campaign finance regulations. In Part

17. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1467–68 (2014) (Breyer, J., dissenting) (citing Citizens Divided 7–16, 80–94).

III, I focus on the omission in Post's constitutional framework—his failure to address the Court's concern about chilling constitutional speech. I then offer another path forward that builds from Post's framework but accounts for the Court's concern about chilling effects.

## I. A History of Self-Government

Dean Post's book is the product of the prestigious Tanner Lectures on Human Values, which he delivered at Harvard Law School in 2013. In addition to the lectures, the book includes commentaries from Stanford Law Professor Pamela Karlan, Harvard Law Professors Lawrence Lessig and Frank Michelman, Columbia Political Science Professor Nadia Urbinati, and a reply by Post. This Review focuses on the two lectures by Post that form the core of the book. In the first lecture, "A Short History of Representation and Discursive Democracy," Post provides a "quick and stylized survey of the history of self-government" (p. 6). He relies on this history to develop his First Amendment theory. In the second lecture, "Campaign Finance Reform and the First Amendment," he uses the theory to construct a constitutional framework for reviewing challenges to campaign finance regulation that reconciles freedom of speech and self-government.

Post begins his historical account at the founding of the American Republic. The founders, according to Post, believed that " 'representation' required a 'chain of communication between the people, and those, to whom they have committed the exercise of the powers of government.' "[18] "The chain of communication needed to be 'sufficiently strong and discernible' to sustain the popular conviction that representatives spoke for the people whom they purported to represent." The chain proves central to what Post refers to as *representative integrity* (pp. 8, 15–16). Representative integrity is a core value of representative government and requires "trust and confidence between representatives and constituents, such that the latter believe that they are indeed 'represented' by the former" (p. 16; footnote omitted).

In the republic's early days, when the community entitled to participate in the political process was small and the relationship between representatives and constituents was closer, representative integrity was maintained through elections (pp. 7–10, 17). When the political community expanded in the Jacksonian era due to increasing population and a broadening of the franchise, personal connection with and knowledge of the representative could no longer sustain trust and confidence between representatives and constituents (p. 17). In this era, the party system emerged as the principal tool to maintain the chain of communication between representatives and constituents (p. 21). Parties supported elected officials who advanced the party's ideologies in performing their representative duties, and candidates who ran on the party's platform (p. 21). Party affiliations therefore meant something in terms of what the representative stood for. And ultimately,

18. P. 8 (quoting James Wilson, Commentaries on the Constitution of the United States of America 30–31 (1792)).

"[b]y voting for a party, the electorate could seek to make government responsive to the principles espoused by the party" (p. 22).

In the decades after the Civil War, the chain of communication between representatives and constituents, previously maintained through the party system, began to break down (p. 24). Parties in the latter part of the nineteenth century abandoned ideology and principle in favor of gaining and preserving political power by whatever means (p. 24). Ideological parties evolved into party machines that did whatever it took to secure more votes for their preferred candidates (pp. 26–27). As a result, the party label provided less information to the voters about what representatives stood for and whether they were responsive to the electorate. As ideological parties declined, powerful and wealthy corporations became increasingly prominent in the economic marketplace (pp. 26–28). These corporations took advantage of the break in the chain of communication and used their wealth to influence political parties and politicians to "produce laws that would give them an economic edge" (pp. 26–28).

The Progressive Era in the early twentieth century arose in part as a response to this breakdown in representative integrity (p. 28). Legislatures sought to stem corporations' capacity to influence politics, enacting laws to prohibit corporations from contributing to campaigns with money from their general treasuries. Other changes increased the people's capacity to hold representatives directly accountable (pp. 29–30).

The development of these more direct methods for holding representatives accountable would seem to suggest that elections reemerged as the principal tool for maintaining representative integrity. But Post argues that in fact it was public opinion that moved to the forefront (pp. 31–43). Representative integrity was preserved through "institutional forms in which public opinion could directly express itself, without the need of intermediation" (p. 31). Public opinion replaced political parties as the principal tool for maintaining a " 'chain of communication' through which the public could hold candidates accountable" (p. 34). These changes represented a shift from party democracy to what Post labels *discursive democracy* (p. 36).

In this discursive democracy, the people participate in the formation of an " 'essentially active' public opinion that is 'always in the making.' "[19] Public opinion "surrounds and envelops government, holding it continuously but indirectly accountable. [It] is the incessant muffled voice that elected officials always strain to hear and interpret" (p. 36). The people through their participation in public-opinion formation and the establishment of "institutions designed to make government continuously responsive to public opinion . . . develop a 'sense of ownership' of 'their' government" (p. 36). Post defines as "democratic legitimation" the discursive process by which people enjoy the benefits of self-government (p. 36). In order for representative integrity to be secured within discursive democracy, "[a]ll must be entitled to participate 'in deliberation' because 'political decisions are

19. P. 35 (quoting Herbert Croly, Progressive Democracy (1914)).

characteristically imposed on all.'"[20] The First Amendment opens the channel for this participation by protecting communicative rights that "define the processes that produce public opinion as such" (p. 38; emphasis omitted).

Post then turns to First Amendment doctrine. He points to language in Supreme Court opinions suggesting that the doctrine has evolved to safeguard the demands of discursive democracy and representative integrity (pp. 39–41). The Court, he shows, has repeatedly described "speech concerning the public affairs [as] the essence of self-government."[21] According to the Court, the "First Amendment exemplifies a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'"[22] Through advancing this national commitment, the Court has said, "the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[23] On the basis of this jurisprudence and the history of self-government, Post contends, the design of First Amendment doctrine must be understood "as protect[ing] the processes of democratic legitimation required for discursive democracy" (p. 41).

Post concludes his first lecture by offering a First Amendment theory derived from this history of self-government. He explains that the historical account he offers, if accurate, means that "controversies [about the First Amendment] should be adjudicated according to the needs of democratic legitimation" (p. 41). Democratic legitimation requires, at the very least, that the First Amendment protect the right of every citizen to act as "a potential participant, a potential politician" in democratic discourse.[24] Public opinion is formed in this democratic discourse, and governmental institutions are expected to be responsive to it.

The First Amendment theory that Post articulates in *Citizens Divided*, with its focus on discursive democracy and democratic legitimation, is not entirely new. In fact, Post developed many aspects of this theory in a series of law review articles that established an esteemed place for him among First Amendment scholars.[25] But what is unique about Post's First Amendment theory in *Citizens Divided* is the means by which he derives it. In his past work, Post derived his First Amendment theory mostly through interpreting

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20. P. 37 (quoting Bernard Manin et al., *On Legitimacy and Political Deliberation*, 15 Pol. Theory 338, 352 (1987)).

21. P. 40 (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)) (internal quotation marks omitted).

22. P. 40 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

23. P. 40 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982)) (internal quotation marks omitted).

24. P. 41 (quoting Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 310 (1983)) (internal quotation marks omitted).

25. *See, e.g.*, Robert Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477 (2011) [hereinafter Post, *Participatory Democracy*]; Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000) [hereinafter Post, *Commercial Speech*]; Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249 (1995).

doctrine and employing logic. He relied on this method of constitutional-meaning elaboration to argue that a First Amendment theory premised on the value of self-government better accounts for doctrine than alternative theories premised on the value of individual autonomy.[26] He has also relied on doctrine as the basis for opposing one of the leading theories of the First Amendment offered by Alexander Meiklejohn, who suggests that "the value of democratic self-governance lies in informed democratic decision making."[27] Post has argued, by contrast, that the right to be informed is merely a derivative right that stems from the First Amendment value of self-governance.[28] The core value of self-governance that the First Amendment protects is the right of speakers to participate in public discourse.[29]

In *Citizens Divided*, Post continues to look to doctrine but he also relies on a historical account of self-government as an additional foundation for his First Amendment theory. Post may have chosen to focus more on the history of self-government because First Amendment doctrine has developed without establishing any clear hierarchy among three fundamental values: autonomy, democratic self-governance through informed decision-making, and democratic self-governance through participation in public discourse.[30] If we understand doctrine as reflecting the constitutional commitments of the people, as Post does, it appears that the people have not decided how to prioritize these values.

Post's choice to focus on external history may also reflect fundamental shifts in constitutional theory over the past thirty years or so. Both originalists and nonoriginalists frequently rely on histories external to doctrine to support accounts of constitutional meaning. Originalists have increasingly coalesced around an approach to constitutional-meaning elaboration that focuses on the public meaning of words or phrases at the time the

26. Post, *Participatory Democracy*, *supra* note 25, at 479–82.

27. *Id.* at 482–89.

28. Post, *Commercial Speech*, *supra* note 25, at 25 (suggesting that the First Amendment value of "speech merely for the information it conveys" is subordinate to the value of "speech as a form of participation in public discourse").

29. Post, *Participatory Democracy*, *supra* note 25, at 489 ("I believe that the First Amendment commitments we have historically inherited plainly place the protection of public discourse at the core of the First Amendment . . . .").

30. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (describing as "the fundamental rule of protection under the First Amendment" the speaker's "autonomy to choose the content of his own message"); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 806 (1978) (White, J., dissenting) (describing one of the functions of the First Amendment as protecting "the right to hear or receive information" to advance "the interchange of ideas"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (describing as a fundamental principle of the First Amendment "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means" (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)) (internal quotation marks omitted)).

constitutional provision in question was written.[31] By contrast, nonoriginalists, including Post, derive their constitutional understandings from translations of the convictions of constitutional culture and the demands of social movements into case law.[32] Both approaches to constitutional-meaning elaboration, however, demand a rigorous historical examination: by looking at a specific moment in history, originalists might ask how the public used or understood a constitutional term or phrase, while nonoriginalists might probe the convictions of the people or claims of social movements.

As a "quick and stylized survey," the first lecture was not designed to rigorously engage with externalist history (p. 6). The reader is nonetheless left wondering what history was excluded that might have added complexity to and created uncertainty regarding the requirements of self-government and their relationship to freedom of speech. Post's history is not a thorough one. His contribution is instead to open up a new frame for thinking about the history of self-government that he or other scholars can elaborate upon in future work.

A more sustained historical inquiry might look more closely at how the American people have conceived the meaning of freedom of speech and self-government, and the relationship between the two, from the framing period onward. Such an inquiry might also try to identify how popular constitutional convictions and social-movement claims about the meaning and form of this relationship evolved over time. These historical accounts might seek evidence from popular deliberation and from dialogue between the people and the Court about how First Amendment values should be prioritized and the reasons for such prioritization. Since a hierarchy of First Amendment values is central to Post's constitutional framework, evidence that the people prioritized certain values in their conceptualization of the First Amendment would be helpful. These are just some of the opportunities for future exploration suggested by Post's historical account.

## II. The Constitutional Framework for Campaign Finance Regulations

In the second lecture, "Campaign Finance Reform and the First Amendment," Post constructs from "our fundamental constitutional commitment to self-governance" a First Amendment constitutional framework applicable to campaign finance cases (p. 7). In articulating the framework, Post starts

31. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 621 (1999) (describing original meaning as focused on ascertaining the meaning "that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment").

32. *See, e.g.*, Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 Suffolk U. L. Rev. 27, 28 (2005) (identifying past social movements that "profoundly shaped judicial interpretations of the American Constitution"); Robert Post & Reva Siegel, Essay, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 379–80 (2007) (describing the importance of the "constitutional ideals" of the people to judicially elaborated constitutional meaning).

in the direction of a First Amendment imperialist. He broadly defines First Amendment rights in the campaign finance realm and argues that state interests in democratic integrity are incompatible with First Amendment values (pp. 45–51). Post then shifts away from First Amendment imperialism by offering the protection of electoral integrity as a compelling basis for state regulation of campaign finance (p. 60). In this Part, I describe Post's framework and explain how he applies it to *Citizens United*.

### A. *Post as a First Amendment Imperialist*

In several respects, Post approaches the question of the meaning of the First Amendment in the campaign finance context from the perspective of a First Amendment imperialist. He begins by acknowledging the potentially unlimited reach of the First Amendment. Post explains that "[h]uman interaction everywhere characteristically occurs through the medium of communication. . . . On their face, therefore, First Amendment rights apply to almost all human transactions" (p. 45). The First Amendment can thus provide a basis for "constitutionaliz[ing] vast stretches of social life" (p. 45). Rather than retreat from this broad conception of speech, Post appears to embrace it in his assessment of why money is speech (pp. 45–46).

Several scholars suggest that money should be treated as speech because it facilitates speech—and Post agrees with this assessment, but only as a secondary matter. As a primary matter, Post explains that the First Amendment limits the regulation of money because "the First Amendment restrains government action that is enacted for constitutionally improper purposes" (p. 46). He offers, as a hypothetical, a case in which the state adopts expenditure bans that apply to Democrats and not Republicans (p. 45). He explains that the law would raise "serious First Amendment question[s] . . . because the legislation would naturally arouse suspicion that it is motivated by the improper purpose of distorting the free formation of public opinion" (pp. 45–46).

That assessment certainly seems right. But Post's account of the improper purpose test lacks the nuance necessary to differentiate between impermissible regulations of expenditures as speech and permissible regulations of expenditures as non-speech under the First Amendment. Consider the more difficult hypothetical involving a shareholder-protection statute that bans corporate expenditures on political activities.[33] Should the ban be subject to First Amendment scrutiny as a regulation of speech? While Post's improper purpose test is not fully fleshed out in the book, one can surmise from his broad acceptance of campaign expenditures as speech that he would consider such a ban on expenditures to be a regulation of speech. But John Hart Ely provided a more robust tool for addressing whether a

33. A bill introduced in the House of Representatives in 2010 required "shareholder authorization before a public company may make certain political expenditures, and for other purposes." H.R. 4790, 111th Cong. (2010).

regulation was enacted for a constitutionally improper purpose that provides an appropriate limit on Post's expansive understanding of the reach of the First Amendment. For Ely, the crucial issue is whether

> the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.[34]

It is the causal connection between the interests the state asserts and the communicative content of the speech that provides a basis for making sense of seemingly inconsistent Supreme Court decisions.[35] In cases decided in the late 1960s and early 1970s, the Court extended First Amendment protection to children wearing armbands in school as a form of protest during the Vietnam War,[36] and the Court similarly protected an individual wearing a jacket with the message "Fuck the Draft" on its back.[37] But the Court refused to extend such protections to individuals burning draft cards during a protest.[38] Ely argues that what distinguishes the cases is the nature of the harm the state seeks to avert. In the two cases extending First Amendment protection to wearing an armband and to wearing a jacket with an expletive on it, the state's regulation of each act arose out of fear about the message's effect on the audience.[39] In the case denying First Amendment protection to the burning of draft cards, by contrast, the Court determined that the state interest in preserving selective service records was unrelated to the communicative content associated with the act.[40]

Is the corporate expenditure ban more analogous to banning armbands and a profane jacket or to prohibiting the burning of a draft card? It depends on the harm that the state seeks to avert with the regulation. The protection of the interests of corporate shareholders is a possible justification for the hypothetical corporate expenditure ban. The state could determine that the fiduciary duties of a corporate director require that any money spent from the corporate treasury advance the financial interests of the corporation and that campaign expenditures are not consistent with that goal. This justification for banning corporate expenditures, like the justification for prohibiting

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34. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975).

35. *Id.*

36. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (A group of children "publicize[d] their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting").

37. Cohen v. California, 403 U.S. 15, 16 (1971) ("The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft." (quoting People v. Cohen, 81 Cal. Rptr. 503, 505 (Ct. App. 1969)) (internal quotation marks omitted)).

38. United States v. O'Brien, 391 U.S. 367, 369 (1968) ("O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs . . . .").

39. Ely, *supra* note 34, at 1498.

40. *Id.*

the burning of draft cards, is at least arguably unrelated to the communicative content of the expenditure. Viewed in this light, the corporate expenditure ban does not appear to have been enacted with a constitutionally improper purpose. A case can therefore be made for not treating certain expenditure bans as regulations of speech subject to First Amendment scrutiny.

But if expenditures are always considered speech, the question becomes how the First Amendment should apply. The First Amendment can have an impressive reach, but little bite, if other interests trump it in those far-reaching domains. As in his determination of the First Amendment's reach, Post approaches the question of how the amendment should apply very much from the vantage point of a First Amendment imperialist. He evaluates the three main state interests employed to justify campaign finance laws—promoting equality, preventing distortion, and curbing corruption—according to whether they are consistent with the First Amendment values of discursive democracy and democratic legitimation (p. 47).

In advancing these interests, state actors seek to redress variations of the concern that certain individuals or entities unfairly influence the political process, or are perceived to do so, through their campaign contributions and expenditures. Post argues that these state interests are incompatible with discursive democracy (p. 47). Discursive democracy, he explains, involves communicative processes of public-opinion formation "that are incompatible with decision making" (p. 49). Because there is no decision and no outcome from the process of public-opinion formation, no person's speech influence can ever be known (p. 54). Rather than equal influence over outcomes, the individual right to participate in public-opinion formation serves as the core component in a discursive democracy (p. 49). Through this participation, a process of democratic legitimation can occur in which "persons believe that government is potentially responsive to their views" (p. 49). The function of the First Amendment is "to guarantee that each person is equally entitled to the possibility of democratic legitimation" (p. 49). This function requires that individuals be given the meaningful opportunity to participate in public-opinion formation "in a manner of their choosing" (p. 50). Campaign finance regulations impede democratic legitimation insofar as they limit the opportunity for meaningful participation in their quest to protect against unfair influence (p. 51).

A central premise of Post's theory of discursive democracy seems questionable, however: that no person's speech influence can ever be known. If that is indeed the case, the argument that campaign finance regulations protect against unfair influence loses a great deal of its force. But there is much to suggest that, even if we assume that public opinion serves as the conduit through which speech influences outcomes, the sources of influence on public opinion can be known and directly connected to particular outcomes. Views become associated with entities, groups, and associations during the process of public-opinion formation. Corporations advocate for tax breaks or favorable regulations; civil rights groups promote aggressive racial-equality measures; and unions advance messages favoring greater protection for

workers. Aside from its speech, each entity, group, and association will also be active in favoring the candidates that support its views through get-out-the-vote campaigns, sponsorships of candidate appearances, and other actions. While individuals may also share those views and engage in speech advancing a particular message, it is often the organized groups that act as a major force in politics, mobilizing diffuse and sometimes politically disinterested members to advocate for particular causes.[41]

To the extent that decisionmakers hear these messages when learning of public opinion and this public opinion ultimately influences their decisions, the people will likely attribute the message and its effect on the ultimate decision to the organized catalysts. In addition, as a means of demonstrating political clout, these organized catalysts will often claim credit for the message and the outcome.[42] The communicative processes of public-opinion formation are, therefore, not always entirely impersonal or invisible; in some cases, they are very much personalized and attributable to particular sources. If that is the case, we may be concerned about the influence of speech on decisionmaking even when the speech is channeled through the ongoing process of public-opinion formation. And we may value regulations of speech in the discursive space to ensure greater equality of influence in the decisionmaking process, or, at the very least, we may value regulations that limit the degree of unfair influence in the decisionmaking process.

Post contends, however, that discursive democracy is separate from representative government (p. 59). Whereas discursive democracy involves the ongoing process of public-opinion formation divorced from actual decisions, representative government "requires constant and recurring episodes of decision making" (p. 59). In discursive democracy, the people are invisible, while in representative government "the people must become visible so that their will can be represented" (p. 59). Given these differences between discursive democracy and representative government, concerns about unfair influence that are incompatible with the former are relevant to the latter. It is through this distinction between discursive democracy and representative government that Post begins to build a path of resistance to First Amendment imperialism. That path relies heavily on the argument that the integrity of elections (within the realm of representative government) must be protected to advance the values surrounding the formation of public opinion (within the realm of discursive democracy) (p. 60).

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41. Public choice theory suggests that smaller groups are able to overcome collective-action problems to organize and engage in concerted activity to secure favorable laws through lobbying and through campaign contributions and expenditures. *See* Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 9–36 (1965); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. Econ. J. 224, 231–32 (1967) (discussing the rent-seeking behavior of particular interest groups).

42. *See* Christopher Hood, The Blame Game, Spin, Bureaucracy, and Self-Preservation in Government 9 (2011) (describing how politicians, organizational leaders, and government employees seek credit "to increase their chances of re-election, reappointment, promotion, and favorable repute during or even after their lifetimes").

### B. *Post's Path of Resistance to First Amendment Imperialism*

In constructing a path for resisting First Amendment imperialism, Post starts by explaining that discursive democracy ultimately depends on elections, the principal tool used to secure representative government. "Elections underwrite discursive democracy by focusing and prompting public opinion" (p. 59). People engage in the process of public-opinion formation because they ultimately know that public opinion can influence decisionmaking through elections (p. 60). In an effective democracy, elections select representatives who are responsive to public opinion, and this inspires the continuing process of public-opinion formation after elections. If elections do not function to select representatives responsive to public opinion, or if they are not perceived by the people as functioning in this way, "the link between public discourse and self-government is broken" (p. 60). This breakdown in the connection between communication and self-government in turn undermines democratic legitimation.

What Post terms *electoral integrity* therefore serves as an essential precondition of First Amendment rights and the discursive democracy values that underlie them (p. 60). Elections must be structured so that they "select for persons who possess the 'communion of interests and sympathy of sentiments' to remain responsive to public opinion."[43] Electoral integrity refers to the condition in which elections "have the property of choosing candidates whom the people trust to possess this sympathy and connection" (p. 60). Electoral integrity thus "presupposes . . . public trust in the responsiveness of representatives to public opinion" (p. 61).

In recognizing electoral integrity as an essential precondition to First Amendment rights, Post diverges from the Supreme Court's recent First Amendment imperialist jurisprudence. In Post's framework, unlike in the Court's jurisprudence, First Amendment values do not simply trump state interests. Instead, the state interests in avoiding unfair influence and the perception of such influence that are in tension with First Amendment rights are also essential to electoral integrity—a precondition for those same rights (pp. 62, 65–66). If the people believe that representatives are unfairly influenced by personal and corporate wealth, the people will lack "public confidence that elections are structured to produce officials who are attentive to public opinion" (p. 62). And ultimately, "Americans cannot maintain the blessings of self-government unless they believe that elections produce representatives who are responsive to public opinion" (p. 63). Campaign finance regulations should therefore be understood as "seeking to ameliorate the widespread perception that elected representatives are responsive to personal and corporate wealth, but not to public opinion" (p. 62). Or, in other words, campaign finance regulations should be understood as efforts to preserve electoral integrity—and thus to preserve the First Amendment itself.

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43. P. 60 (quoting Jack Dennis & Diana Owen, *Popular Satisfaction with the Party System and Representative Democracy in the United States*, 22 Int'l Pol. Sci. Rev. 399, 401 (2001)).

Post acknowledges that the Court in its recent First Amendment jurisprudence has not entirely ignored concerns about electoral integrity. The majority in cases like *Citizens United* has recognized that the state interest in protecting against quid pro quo corruption or the appearance of such corruption is compelling because of the threat corruption poses to electoral integrity.[44] The problem, according to Post, is that the Court has treated the existence of such corruption as "a question of law rather than of social fact" (p. 64). Instead of examining the evidence of corruption that legislative bodies have collected, the Court has simply denied corruption's existence (pp. 63–64). Post points to the decision invalidating Montana's restriction on corporate independent expenditures as a prime example.[45] In that case, the Montana Supreme Court upheld the law on the basis of extensive legislative findings about the corruption arising from corporate campaign expenditures.[46] The court considered this evidence sufficient to justify the corporate campaign expenditure ban.[47] The U.S. Supreme Court disagreed, however.[48] Without accounting for any of the state's evidence of corruption, the Court simply held that *Citizens United* governed the case.[49] By invalidating the Montana law without evaluating the evidence, the Court indicated that claims of corruption and the appearance of corruption would be treated as a matter of law rather than social fact (p. 64).

Post explains that electoral integrity should not be evaluated in this way. Since "[e]lectoral integrity depends upon how Americans believe elections actually work," the facts about the relationship between campaign restrictions and electoral integrity should be evaluated as part of the constitutional determination (p. 64). And legislatures should have the authority to regulate campaign speech to the extent that it poses an "actual threat[ ] to electoral integrity" (p. 66).

As a second step in the path of resistance to First Amendment imperialism, Post argues that values advanced by the First Amendment should differ on the basis of the speaker's identity. The Court in *Citizens United* determined that discrimination based on speaker identity is impermissible under the First Amendment.[50] Corporations, the Court explained, have the same right to speak as individuals irrespective of their capacity to distort the political process through campaign expenditures made with the wealth they have amassed in the economic marketplace.[51] Post disagrees. He argues that the

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44. *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010).

45. P. 64 (discussing Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490 (2012) (per curiam)).

46. W. Tradition P'ship v. Att'y Gen., 271 P.3d 1, 10–11 (Mont. 2011), *rev'd sub nom.* Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012) (per curiam).

47. *Id.* at 6, 13.

48. Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012) (per curiam).

49. *Id.*

50. Citizens United v. FEC, 558 U.S. 310, 340 (2010).

51. *Id.* at 350.

First Amendment rights of corporations are distinct from those of individuals because, as artificial entities, "[corporations] cannot experience the value of democratic legitimation" (p. 69). As a consequence, they do "not possess an equal right to participate in public discourse" (p. 69).

Corporations can, however, "serve as a proxy for the First Amendment rights of natural persons" (p. 69). They can "assert the rights of persons who make up the corporation, or . . . assert the rights of persons who are strangers to the corporation" (p. 69). When corporations function in this way, they should be treated as expressive associations, and their speech should be classified as part of public discourse entitled to the same speech protections granted to individuals' speech (pp. 69–70). But to the extent that corporations do not operate as expressive associations, their speech advances the derivative First Amendment value of informing the audience (pp. 71–72). "Th[is] derivative right of an ordinary commercial corporation to contribute to informed decision making does not involve the 'supremely precious' value of democratic legitimation" (p. 73). Ordinary corporations' First Amendment right to speak therefore extends only to the point at which "such information . . . may be useful to natural persons who seek to participate in public discourse" (p. 74). "[I]f the speech of an ordinary commercial corporation fails to inform public decision making, the speech may be regulated" (p. 74).

Post draws on Meiklejohn's First Amendment theory to identify when the speech of ordinary corporations may be regulated. Meiklejohn viewed the primary purpose of freedom of speech as advancing the marketplace of ideas, and he emphasized the rights of listeners to be informed of ideas.[52] Meiklejohn argued that, if the goal "is to allow 'all facts and interests relevant to the problem [to] be fully and fairly presented,' we must adopt procedures that enable 'facts and interests' to be presented 'in such a way that all the alternative lines of action can be wisely measured in relation to one another.'"[53] The function of such procedures is not to ensure that everyone can speak but rather "that everything worth saying shall be said."[54]

This distinction on the basis of the speaker's identity leads to a third step on the path of resistance to the Court's First Amendment imperialism. At this step, Post advocates for a broader managerial domain of elections in which campaign speech can be regulated (p. 79). In domains where speech is valued for the information it provides to the decisionmaker, Post points out that procedures must be established that discriminate on the basis of the speaker's identity (pp. 77, 79). For example, in legislatures, courts, prisons, and schools, procedural rules are often established that "discriminate among speakers based upon whether they are 'in order' or 'out of order'; whether they intend to speak about relevant or irrelevant matters; whether they are

52. Alexander Meiklejohn, Free Speech and its Relation to Self-Government 82–89 (1948).

53. P. 76 (quoting Alexander Meiklejohn, Political Freedom 26 (1965)).

54. P. 76–77 (quoting Alexander Meiklejohn, Political Freedom 26 (1965)) (internal quotation marks omitted).

disruptive or orderly; whether they are repetitive or original; and so on" (p. 77). These procedures for managing speech allow the institutions to perform their functions (pp. 80–81). Procedures that provide teachers with the capacity to manage student speech, judges to manage lawyer and witness speech, or correctional officers to manage prisoner speech allow these institutional actors to perform their respective functions of educating students, adjudicating cases, and maintaining order. Post refers to these institutions as "managerial domains [in which] speech may be regulated in order to achieve the instrumental goals of the domain" (p. 81). These managerial domains should be considered distinct from public discourse where "speech must be kept free in order democratically to determine what those goals should be" (p. 81).

Elections, Post suggests, are managerial domains analogous to schools, courtrooms, and prisons.[55] Procedures to manage speech must be established within the election domain to achieve the instrumental goal of electoral integrity (p. 82). This means that, when an ordinary corporation's speech undermines electoral integrity, a state must be able to establish procedures that discriminate against that corporation, even when its speech is valued because of the information it provides (pp. 84–86).

As Post acknowledges, this account of managerial domains poses a challenge: it is difficult to identify the end of the managerial domain (where speech can be regulated) and the beginning of public discourse (where it cannot) (p. 83). Separating the managerial domain from public discourse is even harder for an amorphous domain like elections compared to domains that reside in physical institutions, such as courts, schools, and prisons. For example, Congress in the Bipartisan Campaign Reform Act attempted to draw a line separating speech in the election domain from speech in public discourse.[56] This line focused on the words used in the advertisement, as well as the timing and distribution of the advertisement. The Court in *FEC v. Wisconsin Right to Life* rejected Congress's line; instead, it narrowed the regulable election domain by establishing a presumption that advertisements are in public discourse rather than in the election domain unless there is clear evidence to the contrary.[57]

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55. P. 81. Other scholars advocate analogous arguments in favor of managerial domains in which speech is subject to greater regulations. Professor Schauer advanced the case for an institutional First Amendment more than twenty years ago. He argued that "First Amendment doctrine [should be] subdivided along institutional lines [so that it] would be better poised not only to capture important institutional differences, but also to recognize the potentially distinct First Amendment status that the arts, universities, libraries, and journalism . . . possess." Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 118 (1998) (footnote omitted). Schauer and Professor Pildes later advocated for the demarcation of an election domain in which different First Amendment principles would apply. Schauer & Pildes, *supra* note 9, at 1805–07.

56. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 § 201(a), 116 Stat. 81, 88–90 (2002) (codified in pertinent part at 2 U.S.C. § 434(f)(3)(A) (2012)).

57. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007).

Post rejects both Congress's and the Court's approaches. For him, "The boundaries of the managerial domain associated with an election should be determined by the requirements of achieving" electoral integrity and the promotion of informed decisionmaking (p. 86). The question of whether corporate speech undermines these objectives "can be determined only on the basis of a working knowledge of the material facts" and not by "abstract doctrinal rules" (p. 86). If material facts indicate that corporate speech undermines electoral integrity or fails to promote informed decisionmaking, such speech operates within the managerial domain of elections (p. 86).

### C. *Applying Post's Framework to* Citizens United

Post illustrates his path of resistance to the Court's First Amendment imperialism through examining how the Court deviated from that path. He identifies five ways in which *Citizens United* departed from the constitutional framework that he advances.

First, the Court did not properly address the concern with electoral integrity (p. 63). Rather than merely being a compelling interest to be balanced against First Amendment rights, Post argues, electoral integrity should have been treated as a fundamental precondition for such rights (pp. 64, 86).

Second, the Court failed to evaluate properly the relationship between campaign expenditures and electoral integrity. Instead of treating the question of whether the regulation undermined electoral integrity as one of law, the Court should have addressed it as an issue of social fact and examined actual evidence to ascertain the speech's effect (pp. 63–64, 86).

Third, the Court erred in its application of strict scrutiny to the statutory prohibition on independent corporate expenditures (p. 87). Since corporations are not natural persons, they do not engage in the democratic-legitimating communicative processes in public discourse (pp. 69, 71). Their speech, therefore, "merely provide[s] constitutionally valuable information to the public" (p. 87). Since this speech advances a derivative First Amendment value, the Court should have given it less constitutional protection than speech by natural persons or corporate expressive associations (pp. 71–72).

Fourth, the Court failed to consider the possibility that the speech of ordinary corporations might be part of the managerial domain of elections, which Congress should have greater authority to regulate in order to maintain electoral integrity (p. 87). The Court should have defined this domain according to whether the corporate speech undermines electoral integrity (p. 87).

Fifth, assuming that the statutory prohibition "actually produces a less informed public," the Court should have balanced the loss of information "against whatever gains in electoral integrity [the statute] . . . promote[s]" and assessed the constitutionality of the law on that basis (p. 87). The conclusion from Post's application of his framework to *Citizens United* is that a

lesser form of scrutiny than strict scrutiny should have applied to the campaign finance regulation, with empirically based balancing tests determining the outcome (pp. 87, 91–94).

### D. *Extending the Path of Resistance Beyond* Citizens United

If Post had simply criticized the Court's doctrine as applied to corporate expenditures and offered a doctrinal framework providing less constitutional protection for such expenditures, his theory would have been an important, but limited, intervention into the Court's First Amendment imperialism. It would have been limited because Post's constitutional framework does not seem to constrain the capacity of corporations to spend money from segregated funds in the form of political action committees ("PACs"). Nor does it constrain the ability of wealthy individuals to spend as much of their own money as they choose to support a campaign independently. Given the strong case under Post's framework for PACs to be treated as expressive associations, their speech, along with the speech of wealthy individuals, would likely be construed as advancing the more precious First Amendment value of democratic legitimation, which Post sees as entitled to virtually categorical First Amendment protection (pp. 69, 73–76).

Yet this conclusion would be concerning. The speech of PACs and wealthy corporate owners can do as much to undermine electoral integrity as corporate spending from general-treasury funds. In assessing whether to trust that the electoral process will yield representatives responsive to the people, the people are unlikely to distinguish between the effects of expenditures from Chevron or Chevron PAC. Similarly, Sheldon Adelson's $20 million expenditure through a super PAC supporting Newt Gingrich in the 2012 Republican presidential primary, or the Koch brothers' expenditure of hundreds of millions of dollars to favor Republican candidates in state and federal elections,[58] is just as likely to create the perception that the chain of communications between representatives and constituents is broken as would huge campaign expenditures by Bank of America.

Post recognizes this tension between the First Amendment values of democratic legitimation—which demands that individuals and expressive associations be able to spend money in whatever manner they choose—and that of electoral integrity. He explains that this tension raises a deep paradox (p. 91). "If we prevent government control over independent expenditures, we diminish the very democratic legitimation that uncontrolled independent expenditures are meant to enable. But . . . if we prohibit persons from expressing themselves in the manner they believe best, we also circumscribe the possibility of democratic legitimation" (p. 91). Post's response to this deep paradox parallels other prescriptions in his constitutional framework.

58. Nicholas Confessore, *Campaign Aid Is Now Surging into 8 Figures*, N.Y. Times, June 14, 2012, at A1, *available at* http://www.nytimes.com/2012/06/14/us/politics/sheldon-adelson-sets-new-standard-as-campaign-aid-surges-into-8-figures.html; Editorial, *The Koch Party*, N.Y. Times, Jan. 26, 2014, at SR14, *available at* http://www.nytimes.com/2014/01/26/opinion/sunday/the-koch-party.html.

Courts, he argues, should engage in a fact-based judgment to ascertain "whether the dangers to electoral integrity of government inaction outweigh the risks to democratic legitimation of potential government regulation" (p. 91). He acknowledges that this will be a "difficult, fraught, empirically based calculus," but he believes that courts are up to the task (p. 91).

Post concludes with a broad critique of the Court that predicts the end of its First Amendment empire. He explains that the Court, "[b]arricaded behind formidable formal First Amendment rules like strict scrutiny or antidiscrimination, . . . has failed to appreciate, much less to consider, the true First Amendment stakes that underlie contemporary campaign finance legislation" (p. 94). This misguided jurisprudence "about matters of such fundamental importance to American politics is a frightful thing" (p. 94). But at the end of the day, "self-government will not be denied. It does not require a prophet to foresee a constitutional impasse of potentially tragic proportions" (p. 94).

Post may be right that the irrepressible desire of the American people for self-government could eventually end the Court's First Amendment imperialist adventure. But Post's path of resistance must confront a critical doctrinal hurdle before his enterprise can succeed. In the next Part, I argue that the Supreme Court's chilling effect doctrine poses a barrier to its accepting Post's program. I then discuss how administrative agencies can help address some of the Court's main concerns about these chilling effects.

## III. The Obstacle: Chilling Effects

Post's constitutional framework makes Herculean demands on the judiciary. He asks that courts engage in several difficult fact-based judgments in adjudicating First Amendment challenges to campaign expenditure restrictions. These empirical judgments include whether the corporation is an ordinary corporation or an expressive association; the effect of the corporate speech on electoral integrity; the effect of the campaign finance regulation on the flow of information; whether speech was in the electoral domain or in public discourse; and, most importantly, whether the dangers to electoral integrity of governmental inaction outweigh the risks to democratic legitimation of potential governmental regulation (pp. 70–92). These judgments are certainly not impossible. They might not even be outside the norm of what courts do in a variety of other legal contexts. The problem, however, is that Post's demand that courts make these empirical judgments is in tension with the Supreme Court's recent chilling effect doctrine.

While the chilling effect doctrine has been part of the Court's First Amendment jurisprudence for over half a century,[59] in recent campaign finance cases it has morphed into a new form. Chilling effect doctrine has traditionally been concerned with overbroad and vague laws that regulate

59. *See* Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 Vand. L. Rev. 1473, 1485–89 (2013) (identifying the origin of the chilling effect doctrine in First Amendment cases decided in the 1950s).

First Amendment protected and unprotected speech.[60] A chilling effect on speech occurs when individuals "seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."[61] This deterrence arises from an individual's uncertainty about whether the law applies to her speech and from her fear of being prosecuted for violating the law.[62] Under the traditional chilling effect doctrine, a party subject to prosecution for violating a law can, in a petition for injunctive or declaratory relief, prove that the law would be unconstitutional as applied to other people.[63] This exception to the ordinary standing requirements is designed to combat the deterrent effect that overbroad and vague regulations can have on protected speech.[64] When courts adjudicate these suits and evaluate a law's constitutionality as applied to third parties, they sometimes employ the type of context-based balancing test that Post suggests for his constitutional framework.[65]

In its more recent campaign finance cases, the Court has broadened the contours of the conventional chilling effect doctrine. It has determined that a chilling effect arises simply from the requirement that a litigant prove that a law violates the First Amendment as applied. According to this modified doctrine, a speaker's need to obtain a lawyer to determine whether speech is constitutionally protected results in a chilling effect because not all speakers are willing to incur the costs of legal representation.[66] Vagueness and overbreadth in legislation, then, are no longer the only problems with speech regulations. Blurry, context-based constitutional standards created by the judiciary also raise chilling concerns if they leave the speaker unable to determine whether his speech is protected without the assistance of a lawyer.

The Court's campaign finance decisions illustrate the conservative justices' deep concern about chilling effects, a concern that drives the Court's First Amendment imperialism. The Court has consistently invoked these potential chilling effects to justify rejecting blurry standards and empirical judgments in favor of sharper, categorical rules that privilege speech rights. For example, in *Wisconsin Right to Life*, the Court explained that a First

60. Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1652–53 (2013) (examining the relationship between the chilling effect and vague or overbroad statutes).

61. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978) (emphasis omitted).

62. *See id.* at 694 (describing, as the source of the chilling effect on speech, legal uncertainty arising from the possibility of error in the legal process combined with the fear of punishment).

63. Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 820 (1969).

64. *Id.*

65. *See id.* at 822 ("[W]hen the issue is whether the law is unconstitutional, the fact that it incidentally deters speech or association has no absolute effect. Rather the Court continues to employ a balancing test.").

66. Kendrick, *supra* note 60, at 1653–54 (describing, as a source of chilling effect, a speaker's need to "obtain[ ] legal advice prior to speaking").

Amendment standard "must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. . . . And it must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.'"[67] Later, in *Citizens United*, the Court declined "to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned" because such an approach could have a chilling effect on political speech.[68]

From the chilling effect doctrine's perspective, the problem with Post's proposed constitutional framework is that he assigns difficult empirical judgments to courts in a pluralist judiciary in which judges are likely to evaluate evidence differently and therefore reach different conclusions even on the same or similar sets of facts. Uncertainty about how courts will evaluate laws necessarily increases when courts are forced to make empirical judgments. And the more numerous and difficult these judgments are, the greater the degree of legal uncertainty.

Under Post's constitutional framework, it is easy to imagine a speaker feeling uncertain about whether a court will decide that her corporation is an ordinary corporation or an expressive association. If the court deems the speaker a corporation, the speaker will not know for certain whether the court will find that the speech is within the managerial domain of elections or public discourse. If the speech is considered to be in the domain of elections, the speaker will not know how the court will assess the speech's effect on electoral integrity or how it will decide whether the speech adds to the flow of information. If the speaker is considered an individual or expressive association acting in the managerial domain of elections, the speaker will be mostly in the dark about how the court will weigh the dangers to electoral integrity of governmental inaction against the risk to democratic legitimation of potential governmental regulation. Even if some predictions about the court's empirical judgments can be made on the basis of legal research into past decisions, the Supreme Court deems troubling from a First Amendment perspective the requirement that speakers consult lawyers before they speak.

One does not need to be a First Amendment imperialist to recognize the value of ensuring that constitutional speech is not deterred. This desire to avoid deterrence would seem to be applicable both to speech that serves the First Amendment value of democratic legitimation and to speech that serves the First Amendment value of informing the public.

But it cannot be the case that fact-based judgments are verboten under the First Amendment. As troubling as the concern about chilling speech may be, exclusively relying on formal categorical First Amendment rules also seems problematic. Insofar as categorical First Amendment rules favor

67. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (alteration in original) (citation omitted) (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).

68. Citizens United v. FEC, 558 U.S. 310, 329 (2010).

speech, countervailing state interests—such as the integrity of the democratic process—will be undermined. We need not agree with Post's argument that electoral integrity is a precondition to First Amendment rights to recognize that protecting speech used to engage in quid pro quo corruption will destroy our democracy. The questions of *when* speech corrupts and *whose* speech corrupts will often require assessing contexts and balancing factors. As Post suggests, these are questions of fact, not of law.

Assuming the validity of the new chilling effect doctrine, can a context-based doctrinal inquiry—an inquiry necessary to avoid an imperialist First Amendment—emerge given the Court's concern about the chilling effects of such inquiries? One way of resolving this dilemma would be by looking to agencies rather than courts as key institutional actors in assessing the facts underlying the First Amendment inquiry. The Federal Elections Commission ("FEC"), for example, can use its expertise to make the context-based judgments necessary under Post's constitutional framework while avoiding chilling effects. The agency can do so by providing relatively low-cost advisory determinations about the constitutionality of campaign speech before the speaker incurs the risk of punishment.[69]

Post's constitutional framework does not appear to rely on agencies, however. Courts are the central institutional actors responsible for making the empirical judgments that his theory demands. From the perspective of the new chilling effect doctrine, this singular focus on the courts is problematic. Since federal courts are limited to deciding actual cases or controversies and are constitutionally prohibited from issuing advisory opinions,[70] the speaker pays the cost of obtaining legal representation and incurs the risk of punishment when she engages in speech and then seeks judicial relief from prosecution. Unlike courts, though, agencies can and do issue advisory opinions about how a law might apply to a particular act before an individual commits that act. As noted above, the FEC, which is responsible for enforcing campaign finance laws, issues advisory opinions responding "to questions regarding the application of Federal campaign finance law to specific factual situations."[71] This advisory opinion process provides a low-cost means for speakers to determine the legality of their speech without any risk of punishment.

Given its ability to issue advisory opinions, the FEC should be charged with making the fact-based judgments that Post proposes in his constitutional framework. Campaign finance laws are written against the background of the Constitution. Thus, even if campaign finance law does not directly address constitutionally relevant distinctions between types of speakers, questions of electoral integrity, or the managerial domain of elections, the FEC should be willing to rule on these matters in issuing advisory

69. *See Advisory Opinions*, Fed. Election Commission, http://saos.fec.gov/saos/searchao (last visited Dec. 30, 2014).

70. *See* William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 247–48 (1988) (identifying the origins of the constitutional prohibition on advisory opinions).

71. *Advisory Opinions*, *supra* note 69.

determinations about the permissibility of certain speech acts. The agency has the authority to make these determinations as a delegate to Congress enforcing the First Amendment pursuant to Section 5 of the Fourteenth Amendment.[72] In this enforcement role, the FEC should not redefine the substance of the constitutional principles advanced in the Court's First Amendment jurisprudence.[73] But the agency should be given leeway to make its own independent factual assessments about how First Amendment principles and standards apply to a particular case.

On the basis of the Court's past jurisprudence and scholarly theorizing, First Amendment principles might include protecting speech to promote democratic legitimation or to inform the electorate, with electoral integrity considered an essential precondition to First Amendment rights. While legislatures would then have the discretion to adopt statutes that are animated by constitutional principles, legislatures cannot address specific factual contexts with general rules. The FEC can remedy this shortcoming by issuing advisory opinions with specific guidance on a range of topics, including whether a particular speech act is considered electioneering communications; whether a particular corporation falls within the class of ordinary corporations whose speech is subject to greater federal regulation; and whether the expenditures of wealthy individuals or expressive associations undermine electoral integrity.

Of course, speakers can still bring a lawsuit in court challenging a law as applied to their speech. It is important to recognize, however, that the manner in which courts review an agency determination will prove just as critical to avoiding chilling effects as issuing the advisory determination in the first place. Courts should defer to the agency's judgment so long as it provides empirical support for the advisory determination. Such empirical support, which the FEC provides after considering public comments as part of its advisory-opinion process, includes specific showings of how the determination advances First Amendment principles. When courts review this evidence, the question should not be whether it proves persuasive—such a standard would exacerbate the problem of legal uncertainty that creates the chilling effect. Instead, the question should be whether the agency has provided adequate evidence in the record about how the statute or regulation advances the constitutional principle. There will surely remain some residual legal uncertainty arising from this adequacy determination, but there will be substantially less uncertainty than that which would result from a heightened standard of persuasiveness or from the difficult and fraught empirical judgments that Post asks courts to make on first impression in his constitutional framework (p. 91).

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72. *See* U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

73. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.").

Concerns about the FEC's institutional gridlock and dysfunction represent one obvious objection to any attempt to use that agency to reconcile the new chilling effect doctrine with the need for context-based empirical judgments. The FEC is a bipartisan agency composed of an equal number of members from each party.[74] While this design may have been intended to ensure more deliberative decisionmaking, it has produced deadlock and delay.[75] Unless there is a mechanism in place to break these deadlocks, the critics might contend, the party seeking advice on the permissibility of a speech act finds itself back at square one: It can speak, obtain a lawyer, and defend the speech's constitutionality in court. Or, it can refrain from speaking altogether. The Supreme Court would probably respond to this dilemma by establishing categorical rules to provide parties with clearer guidance on the constitutionality of their speech—rules that would likely come at the cost of countervailing state interests in electoral integrity. But Professor Nou offers a way around this institutional deadlock. She argues that courts should look below the deadlocked commissioners and give some deference to the expert guidance that agency staffers provide to the commission.[76] To be sure, Nou's proposal is far from a perfect solution, since courts reviewing agency staffers' guidance will evaluate the guidance on the basis of its persuasiveness—a lower standard of agency deference that could produce greater uncertainty for parties trying to assess the permissibility of their speech. But if the goal is to reduce the legal uncertainty that might otherwise chill protected speech, some judicial deference to an advisory determination is certainly better than no deference at all.

For Post's constitutional framework to have any hope of being embraced by the Supreme Court's conservative majority, it must address the obstacle posed by the Court's new chilling effect doctrine. This Review offers a potential, though still preliminary, means of overcoming that obstacle, by highlighting the crucial role that agencies might serve in issuing advisory opinions about the legality of certain forms of speech.

## Conclusion

*Citizens Divided* is a valuable contribution to the debate about First Amendment doctrine in the campaign finance realm. Dean Post identifies an alternative constitutional approach to campaign finance laws, one that resists the Court's First Amendment imperialism. It is a path that importantly integrates concerns about electoral integrity into the assessment of the meaning of First Amendment rights. And yet from the perspective of the

74. *See* 2 U.S.C. § 437c(a)(1) (2012) (establishing a six-member commission and providing that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party").

75. *See* Jennifer Nou, *Sub-Regulating Elections*, 2013 Sup. Ct. Rev. 135, 151 (suggesting that independent election commissions are "structured to deadlock").

76. *Id.* at 160–62.

current Supreme Court majority, Post's path would create too much uncertainty in First Amendment doctrine. By adding a new element in his constitutional framework, though—incorporating a distinct decisionmaking body, agencies, in addition to courts—Post might very well succeed in reconciling the Court's First Amendment concerns with the needs of self-government.