COLLECTIVE GOODS AND THE COURT

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ABSTRACT. Not everything is or should be for sale. Collective goods such as our democracy and parts of our natural environment would be destroyed if they were transformed into commodities to be bought and sold in commercial markets. This Article examines a discrete and unexplored topic within the larger literature on commodification: the extent to which the U.S. Supreme Court participates in the commodification of collective goods. The Court shifts market boundaries, we argue, through interpretations of the Constitution that glorify commodities and exalt individual rights at the expense of collective goods in which we all share. Examining two lines of cases holding that "money is speech" and "waste is commerce," the Article contributes to theoretical understanding of the nature of collective goods and their commodification through interpretation of the Constitution, and makes recommendations for how the Court and our larger society should address these issues in the future.

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INTRODUCTION

Collective goods cannot be bought or sold without destroying their essential nature.[1] For example, to divide a national park such as Yosemite into parcels of real estate would destroy its value as a collective good meant for the enjoyment of all citizens in perpetuity. To reduce a political democracy to a regime of purchased loyalties and official actions procured only by bribery or corruption would change the nature of our democratic government into something else.

This Article contends that the United States Supreme Court has failed in some important decisions to give sufficient attention and respect to collective goods. Consider, for example, cases that have declared that "money is speech"[2] and "waste is commerce."[3] The Court's pronouncements in these cases have unjustifiably shifted the boundaries of markets, and they have subverted collective goods by converting them into commercial commodities.

The Court effects these transmutations by treating "contested commodities,"[4] such as elements of the natural environment, as marketable, or instead by treating existing commodities, like money,[5] as worthy of the same level of protection that non-market constitutional values like speech receive. In other words, constitutional commodification occurs through *judicial constitutional determinations* about the scope and substance of commercial markets. In this Article, we uncover, trace, and critique this phenomenon of judicial interpretation, which we call *constitutional commodification*.

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[1] We provide an account of collective goods in Part I. *See also* JOSEPH RAZ, THE MORALITY OF FREEDOM 208 (1986) (defining a group right as a right to a collective good); Jean Hampton, *Free-Rider Problems in the Production of Collective Goods*, 3 ECON. & PHIL. 245 (1987) (analyzing a series of collective action problems arising in the production and preservation of collective goods); Jeffrey A. Hart & Peter F. Cowhey, *Theories of Collective Goods Reexamined*, 30 WESTERN POLITICAL Q. 351 (1977) (reviewing various economic conceptions including those of Mancur Olson and Paul Samuelson). *Cf. also* LESLIE GREEN, THE AUTHORITY OF THE STATE 207-09 (1988) ("shared goods"), JEREMY WALDRON, LIBERAL RIGHTS 339-69 (1993) ("communal goods"); Andrei Marmor, *Do We Have a Right to Common Goods?*, 14 CAN. J.L. & JURISPRUD. 213 (2001); Joseph Raz, *Rights and Politics*, 71 IND. L.J. 27, 35-6 (1995) ("shared goods"); Paul Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387-89 (1954) ("public goods").

[2] Buckley v. Valeo, 424 U.S. 1, 262 (1976) (White, J., concurring in part and dissenting in part) (rejecting the Court's "argument that money is speech"). *See also* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?,* 85 YALE L.J. 1001 (1976) ("The Court told us [in *Buckley v. Valeo*], in effect, that money is speech."). *See also infra* Part II.

[3] Philadelphia v. New Jersey, 437 U.S. 617 (1978), and its progeny. *See also* Christine A. Klein, *The Environmental Commerce Clause,* 27 HARV. ENVTL. L. REV. 1, 8 (2003) (noting how "the Supreme Court has held that garbage is an article of commerce"). *See also infra* Part III.

[4] MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).

[5] Traditionally, money was considered to be a commodity only when it was made from material that was itself a commodity (*e.g.*, gold coins) or backed by a commodity valuable in its own right (*e.g.,* the gold standard). Today, however, it is standard to understand money (technically "fiat money") as a commodity—indeed even a "pure commodity," in the sense that it is the measure of value for all commodities in commerce. *See, e.g.*, Benjamin Graham, *Money as Pure Commodity*, 37 AMER. ECON. REV. 304, 305 (1947). *See also* GEOFFREY INGRAHAM, THE NATURE OF MONEY 3-10, 15-37 (2004) (conceiving money as a "universal commodity" or a "neutral symbol" of all other commodities).

We are not the first to question the lines that are drawn between the world of commercial markets, in which everything is "for sale," and the world of non-market interactions and values, in which some things and activities are "not for sale."[6] We focus, however, on two aspects of commodification that have gone unnoticed.[7]

First, much of the commodification literature contemplates the effects of marketization on *individuals* and the products and experiences they need to live flourishing lives. To take one example, theorists worry that prostitution reifies female subordination[8] and degrades sex among intimates.[9] While we share their worry, we start from the premise that the commodification of *collective goods* raises distinctive concerns, and threatens adverse consequences not only for individuals but also for *the polity as a whole*. Collective goods cannot survive subjection to unfettered market forces. This is because the commercial market is paradigmatically a place for transactions among owners with unilateral dominion over the goods and services they sell. Collective goods are intrinsically held in common, however; no private person exercises exclusive dominion over them. As such, the commodification of collective goods necessarily overlooks, and may even betray, the interests of those not a party to the commercial transaction.

The commodification of collective goods warrants attention for a second reason. Their marketization has often been facilitated and ratified through the courts—the least favorable branch for determining the limits of markets. Like the two-party transactions contemplated in much of the commodification literature, the Court acts as a proving ground for two adversarial parties. Protection of collective goods may not always be considered adequately in two-party adjudications, however. Notably, the term "collective good" is nowhere to be found in Supreme Court jurisprudence,[10] and courts have generally been inhospitable to understanding constitutional protections as collective rights.[11]

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[6] *See, e.g.,* MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012); DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2010). *See also* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Erdman & Joan C. Williams eds. 2005).

[7] *See infra* Part I.B.

[8] *See, e.g.*, Debra Satz, *Markets in Women's Sexual Labor*, 106 ETHICS 63 (1995).

[9] *See, e.g.,* ELIZABETH ANDERSON, VALUE AND ETHICS IN ECONOMICS 155-56 (1995).

[10] A Westlaw search of the Supreme Court database turns up zero cases containing the term "collective good." The term "public good" appears in 403 cases but, in these cases, the Court is not referring to a distinct class of goods but is instead using the term "public good" as a shorthand for "what is in the interests of the public," often in an economic rather than philosophical sense. *See, e.g.*, *Kelo v. New London*, 545 U.S. 469, 485 (2005); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017). *See also infra* Part I.B.2 (distinguishing collective goods and public goods). Compare the prevalence of the term "efficiency" which appears in 1,093 Supreme Court cases.

[11] *See, e.g.*, Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1282 (1983) (arguing that a "libertarian conception of first amendment principle has become popular not by force of reason, but by default."). *But see Red Lion v. FCC*, 395 U.S. 367, 390 (1969) (discussing the sense in which citizens have a "collective right" in freedom of speech). *See also infra* notes 123-27 and accompanying text. For the view that the Court's focus on individual rights occludes "civic[] and collective responsibilities," see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE xi (1991).

Given the mismatch between collective goods and two-party adjudication,[12] one might have expected the Court to abstain in many cases implicating collective goods, recognizing that Congress or state legislatures should address their disposition.[13] If anything, though, the Court has often taken the lead in cases affecting the scope of commercial markets. It has commodified objects or activities whose value may be better captured non-monetarily, or elevated paradigmatic commodities such as money to constitutional status, and thereby insulated them from regulation motivated and informed by non-economic collective values.[14]

As we show here, the Court had engaged in constitutional commodification, a process of interpreting the Constitution in two different but complementary directions. First, the Court sometimes assimilates a commodity (e.g., money) to a genuine constitutional good (e.g., speech). We call this the *constitutionalization of a commodity*,[15] and we elaborate it primarily through the line of cases, beginning with *Buckley v. Valeo*,[16] that equate money and political speech.[17]

Second, the Court sometimes treats collective goods as commodities whose value may be better captured non-monetarily. For example, beginning with *Philadelphia v. New Jersey*,[18] waste has been constitutionally determined to be "in commerce" rather than a noncommercial byproduct that would make it eligible for comprehensive environmental regulation by the states.[19] In these cases, a commercial interest in a collective good not otherwise obviously or previously treated as a commodity gains protection through interpretation of a constitutional provision. We refer to this interpretive approach as *commodification by constitutional implication.* By implication of the Court's decision, a collective good is treated like any other item in commerce, and economic transactions involving this newly constitutionally protected commerce are thereby immunized from certain kinds of regulation.

Although we are not market skeptics, we nonetheless worry about both kinds of constitutional commodification because both threaten some collective non-commercial values—in our two leading examples, the value of democratic government and the value of an unpolluted natural environment. We use these examples to explicate a theory of constitutional commodification with an eye toward the preservation of these collective goods.

In short, this Article offer two theoretical innovations. First, it extends commodification theory in order to elucidate when and why the law's treatment of

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[12] *See* U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560-61 (1992) (standing requires an "injury in fact" that is "concrete and particularized" and can be redressed by judicial decision).

[13] Another alternative, which sometimes occurs, is for a representative of the government or a third-party organization representing a collective good or value to intervene in a case or offer a broader social perspective via amicus curiae briefs. These third-party contributions should often give the Court the opportunity to consider broader implications involving collective goods in their deliberations.

[14] *See infra* Parts II & III.

[15] For background on treating money as a commodity, see *supra* note 5.

[16] 424 U.S. 1 (1976).

[17] 424 U.S. 1 (1976). *See also infra* Part II.

[18] 437 U.S. 617 (1978).

[19] *See infra* Parts III.A and B.

collective goods risks problematic commodification. Second, our examination of the phenomenon of constitutional commodification represents a theoretical contribution in its own right. Identifying the interpretive mechanisms through which the Court shifts market boundaries allows us to see why these developments are troubling both as a matter of substantive policy and institutional prerogative.

Our Article proceeds as follows. Part I traces the historical and philosophical literature on commodification. We argue that the existing theories do not track the harms that can befall collective goods when their constituent elements are commodified. We extend commodification theory to address collective goods.

Parts II and III provide two case studies that exemplify constitutional commodification. Part II reviews the line of cases that chart the Court's march to an ever more commodified conception of political speech and an ever greater insistence that money spent on political speech deserves the same protection as political speech itself. Part III considers a different line of cases decided under the negative or "dormant" Commerce Clause[20] that have restricted states from adopting various measures to protect their natural environment from the importation and disposal of solid and hazardous waste. We show that the Court has wielded the Commerce Clause in these cases to protect an emergent interstate market in waste disposal at the expense of traditional prerogatives and recognized jurisdiction of state governments.

We conclude by identifying further areas of application of our account, and begin the process of adumbrating possible institutional responses, including legislative solutions, to protect and preserve collective goods.

I. A THEORY OF THE COMMODIFICATION OF COLLECTIVE GOODS

We first consider historical and philosophical accounts of commodification to establish that they cannot track the unique harms arising from commodifying collective goods. We next offer the requisite supplementation. We then examine how these discussions map onto the landscape of legal understanding.

A. *Commodification in Historical Perspective*

Commodification on a grand scale has been part of the historical process moving society from the pre-industrial to the industrial age and beyond. Modern capitalism arose from what the economic historian and social theorist Karl Polanyi called "a great transformation."[21] This included a foundational shift in treating land and labor as commercial commodities, namely as real estate and employment. Prior to this transformation, in feudal societies in Europe and elsewhere, these relationships were subject more often to a political economy of "status" (e.g., systems of lords and

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[20] U.S. CONST. art. I, § 8, cl. 3.

[21] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 71-80 (1944) (2001). *See also* MARK BLYTH, GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY (2002) (revisiting and updating Polanyi's historical analysis).

serfs) rather than purchase and sale through commercial "contracts."[22]

The rise of business enterprises and the institutional markets supporting them produced compelling social pressures for change, resulting in what Polanyi called a "double movement" of expanding commodification (including of land and labor) and reactive regulation (including land use and labor laws).[23] This kind of "double movement" continues today as new areas of life become commodified, such as with the rise of the so-called gig economy, and regulatory responses, either through attempts to suppress the likes of Uber and AirBnb by established taxi and hotel companies or the adoption of new regulations that legitimate the new business and market practices.[24] The expansion of global markets and the potential for "backlash" against this expansion may also be characterized as a contemporary example of a Polanyian "double movement" of market expansion and responsive regulation.[25]

Take, for example, the problem of air pollution. Most environmental economists argue in favor of either cap-and-trade regimes or taxes that amount to the "commodification of pollution."[26] These regulatory approaches create markets that may have positive outcomes, namely the reduction of various kind of pollution, such as sulfur dioxide which causes acid rain, in a manner that minimizes the costs.[27]

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[22] *See* HENRY MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 182 (1861) (noting a general evolution from "status" to "contract"). *See also* Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941 (1971) (critically examining the concepts of "status" and "contract" in terms of the changing of roles of individuals and law in modern society); Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987) (discussing the concept of "status" and "contract" in the context of Robert Cover's jurisprudence and the history of slavery and post-slavery cases in the United States).

[23] POLANYI, *supra* note 21, at 79-80. *See also* Blyth, *supra* note 21, at 1-7, 274-75 (extending Polanyi's account of the "double movement" to contemporary political issues).

[24] *See, e.g.,* Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES SCI. & TECH. 61 (2016). *See also* Erez Aloni, *Pluralizing the "Sharing" Economy*, 91 WASH. L. REV. 1397 (2016); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016); Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL'Y REV. 309 (2016); Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501 (2016).

[25] *See, e.g.*, Brian Burgoon, *Globalization and Backlash: Polanyi's Revenge?* 16 REV. INT'L POL. ECON. 145 (2009). Organizational, economic, and technological changes can also render previous regulatory responses ineffective, demanding new approaches and innovations. The decline of unions and the increasing irrelevance of major labor legislation in the United States provides an example. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016). *See also* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017); Nicholas Colin & Bruno Palier, *The Next Safety Net: Social Policy for a Digital Age*, 94 FOREIGN AFF. 29 (2015).

[26] *See, e.g.*, Partha Dasgupta, *The Environment as a Commodity*, *in* ECONOMIC POLICY TOWARDS THE ENVIRONMENT 25-39 (Dieter Helm ed. 1991). *See also* Jonathan Remy Nash & Richard L. Revesz, *Markets and Geography: Designing Marketable Permit Schemes To Control Local and Regional Pollutants,* 28 ECOLOGY L.Q. 569 (2001) (providing an overview and assessment of various regulatory methods of "establishing market rights in pollution"). The most recent innovation is a carbon fee and dividend approach, a version of which has been introduced in Congress. See Citizens Climate Lobby, *The Basics of Carbon Fee and Dividend*, https://citizensclimatelobby.org/basics-carbon-fee-dividend/.

[27] The acid rain trading scheme, for example, adopted in the United States under the leadership of President George H.W. Bush is generally regarded as a success story. *See, e.g.*, Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 188 (2004). *Cf.* Christopher H. Schroeder, *Prophets, Priests, and Pragmatists*, 87 MINN. L. REV. 1065, 1090 (2003) (describing the acid rain training program as a "success story," but one that should not be overdrawn). *But see* Jody

Others object that to sell "rights to pollute" is an immoral extension of economic markets—the equivalent to selling indulgences in medieval Europe as an amelioration of bad behavior. Pope Francis and others have adopted this critical attitude.[28] The fact that policymakers and commentators disagree about whether to address particular problems through market expansion underscores the controversial nature of commodification, and the importance of determining which institutional actors are best suited to make these policy decisions.

B. *Commodification and Collective Goods*

The contemporary literature critical of commodification adduces three kinds of harms. First, market transactions unfolding against background circumstances of injustice can undermine our individual status as equals.[29] Second, distributing some resources, such as emergency healthcare, only according to one's ability to pay can lead to intolerable inequality.[30] Third, transacting in contested commodities can adversely affect our conception or valuation of individuals who bear a relationship to those commodities by what has been called a "domino effect."[31]

None of these accounts of the harms of commodification, however, can adequately capture what is uniquely problematic about the commodification of collective goods. The first two—status diminishment and material inequality—are straightforwardly harms that affect individual market participants. The domino effect contemplates commodification's consequences for those beyond the two parties to a transaction, but the consequences are nonetheless noteworthy because of the ways they affect individuals. On this account, for example, prostitution is problematic not only because it degrades sex and objectifies the prostitute, but also because it perpetuates a conception of *all* people as objects of use for sex, women especially.[32] These are troubling consequences, but they all concern the impact of

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Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 814-16 (2005) (arguing that the acid rain trading program has a "mixed" record of success). *See also infra* notes 190-91 and accompanying text.

[28] POPE FRANCIS, LAUDATO' SI: ON CARE FOR OUR COMMON HOME (2015) (encyclical letter). *See also* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 183 (2004) ("Some environmentalists question[] the morality of creating tradeable 'property rights to pollute' at all."); SANDEL, *supra* note 6, at 72-79 (expressing moral reservations about pollution trading regimes such as proposed for climate change regulation).

[29] *See* SATZ, *supra* note 6, at 93-97 (identifying the harm of commodification in terms of exploitation or coercion).

[30] *See* MICHAEL WALZER, SPHERES OF JUSTICE 26 (1983) (arguing for "need" as one distributive principle of justice); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1835 (2003) ("[C]ertain basic public goods like education, environmental quality, sanitation, housing, and policing should be provided on a relatively equal basis regardless of individuals' private resources. The normative intuition that it is unjust to distribute public services based on ability to pay animates the fair housing, school funding equalization, and environmental justice movements.").

[31] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1922 (1987).

[32] Deborah Satz and Elizabeth Anderson both resolutely argue that prostitution disproportionately and uniquely harms women. *See* ANDERSON, *supra* note 9; Satz, *supra* note 8. Others note the rising trend of women buying men for sex too, and the objectification all people might result. *See, e.g.,* Carol M. Rose, *Whither Commodification? in* RETHINKING COMMODIFICATION, *supra* note 6, at 406

prostitution on individuals.

The problem of commodifying collective goods cannot be captured in these conceptual frameworks. As we further discuss below, the commodification of collective goods does not undermine the status of the parties to the transactions, and it does not obviously degrade the transacted goods. Commodifying collective goods threatens harm to others, but the interests it harms are in the first instance socially shared, not individually owned.

We turn now to articulating a theory that will better explain the troubling effects of the commodification of collective goods.

1. Market Individualism and Commodification

The commercial market, or at least the ideal market, is a place of economic exchange between two parties, whether individual persons or organizations. The nature of markets presupposes a set of norms consonant with individual ownership.[33]

First, consider that commercial markets are neutral as between individuals' preferences for the kinds of things anyone buys or sells, in what quantities, at what prices, and for what ends. *Consumerism* entails that we turn to the market for purposes of satisfying our wants and needs, amassing and then preserving or consuming the commodities we acquire as we see fit.[34] To treat something as an object of consumption is to conceive of its value mostly in instrumental terms.[35] Take, for example, our attitude toward breakfast cereals. Their value lies in the

(observing that "we live in a second-best world" in which "sexual services are in fact bought and sold," and "[e]ven women have started to buy them from men, apparently gleefully"). *But see also* Ann Lucas, *The Currency of Sex: Prostitution, Law, and Commodification, in* RETHINKING COMMODIFICATION, *supra* note 6, at 254 (arguing that "commodified sexual pleasure [may] represent an advance over noncommodified nonpleasure").

One might also argue that legalized prostitution affects collective goods of families and marriages. *Cf.* Dirk Bethmann & Michael Kvasnicka, *The Institution of Marriage*, 24 J. POPULATION ECON. 1005 (2011) (providing an economic argument for marriage based on assurances of male paternity). *But cf.* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012) (describing marriage as an institution used primarily for disciplining women). Some restrictions of commodification of sex may therefore rise to the level of effects on general concerns such as children's welfare and public health. Even in these cases, however, the consequences amount to an aggregation of harm to individuals and not "collective goods" in the sense that we are using the term here. Few would argue that sex itself is somehow a "collective good."

[33] Property and trade are therefore prerequisites of markets, and markets are subject to "the rules of the game" of property ownership and trade that legal regimes establish. Note also that organizational persons created by law, such as nation-states and business enterprises, may also transact as "persons" in markets. *See generally* ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (rev. ed. 2015).

[34] *See* LIZABETH COHEN, A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2003) (providing an historical account of the rise of consumer interests in the United States).

[35] Although objects with intrinsic value might enter the stream of commerce at some point in their existence, what distinguishes them from commodities is, precisely, that they are not goods for consumption. Thus, no one denies or decries the fact that great works of art are bought and sold. We allow for their commodification to this extent—but only to this extent. *Cf.* RADIN, *supra* note 4, at 102-120 (describing a relationship to commodities with intrinsic value as "incomplete commodification").

nutritional benefits and gustatory enjoyment they provide.

Our orientation toward market goods is also usually *atomistic*. Absent a food shortage, no one has any ground to complain about the quantity of cereal any one person acquires or consumes. We enter and operate in this market as private citizens, concerned to satisfy our own interests and desires, whatever these may happen to be.[36] The market itself makes us beholden to no one with respect to our choices, though obligations incurred elsewhere—in the home, in the workplace, through friendships, civic ties, and so on—may operate as extrinsic constraints on our market activity. Put differently, a paradigmatically commodified good is one over which its owner's dominion is complete. An owner might choose to alienate, or "unbundle," one or more of the entitlements to which ownership gives rise, but the owner is the ultimate authority over the good's disposition.[37]

Atomism and consumerism both sustain and follow from what has been called the *coarseness* of commercial markets.[38] We do not typically turn to these markets for social solidarity or spiritual uplift; still less do we conceive of market activity as an end in itself. The market is where we do our business, in both the literal and colloquial senses of the word. It is a site for satisfying some further set of ends, so we do not need or expect it to be morally elevating or fulfilling in its own right.[39] Commercial markets are not, then, the place to determine entitlements to collective goods that deserve more solicitous treatment than the market can confer, and whose disposition should not be governed by the norms of atomism and consumerism characteristic of market activity. The market, that is, should not determine whether collective goods should be commodified.

2. Commodification of Collective Goods

The collective goods most familiar to us are *public goods* and so we begin our analysis with them. In the economics literature, public goods are not considered commodities because no one person can claim exclusive dominion over them. Instead, public goods are, by definition, non-excludable and non-rivalrous.[40]

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[36] *See, e.g.*, ANDERSON, *supra* note 9, at 146.

[37] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

[38] *See, e.g.,* Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 205 (2000); J.G.A. Pocock, *The Mobility of Property and the Rise of Eighteenth-Century Sociology*, *in* VIRTUE, COMMERCE AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY 103, 104 (1985).

[39] *Cf.* Shirley Woodward, *Debt to Society: A Communitarian Approach to Criminal Antiprofit Laws*, 85 GEO. L.J. 455, 486 (1996) ("The market is an amoral venue that provides rewards and incentives independently of the moral worth of the activity involved.").

[40] *See, e.g.,* Paul Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387-89 (1954) (identifying these two characteristics); William D. Nordhaus, *Paul Samuelson and Global Public Goods*, *in* SAMUELSONIAN ECONOMICS AND THE TWENTY-FIRST CENTURY 88 (Michael Szenberg, et al. eds. 2006) (crediting Samuelson for the insight). *See also* Tyler Cowen, *Introduction in* PUBLIC GOODS AND MARKET FAILURES: A CRITICAL EXAMINATION 1, 3 (Tyler Cowen ed., 1992) (using similar terminology); Tyler Cowan, *Public Goods*, *in* THE CONCISE ENCYCLOPEDIA OF

Fireworks displays and public parks are public goods because it is practically impossible to limit access to them (hence they are non-excludable), and enjoyment of them is not diminished by their being shared by others (hence they are non-rival). Natural resources, such as a lake used for swimming or forestland used for hiking, qualify as public goods for the same reason.[41]

Much of the economics literature is agnostic about the intrinsic value of public goods.[42] Thus the Grand Canyon,[43] bald eagles,[44] or collective self-government[45] might be taken to be public goods, but so too might municipal waste collection[46] and national defense.[47] From this perspective, the defining feature of public goods is that they do not readily yield the incidents of private ownership. Because they are non-rivalrous and non-excludable, it is not possible for any one person to internalize fully whatever value they hold, and so no one has an incentive to seek to control, manage, or protect them.[48] It is for this reason that the disposition of public goods falls to the government,[49] and partly for this reason that nation-states exist.[50] Or so the standard economic story goes.[51]

ECONOMICS, http://www.econlib.org/library/Enc/PublicGoods.html ("Nonexcludability is usually considered the more important of the two aspects of public goods."). *But see* Harold Demsetz, *The Private Production of Public Goods,* 13 J.L. & ECON. 293, 295 (1970) (noting a key feature of a public good is that "it is possible at no cost for additional persons to enjoy the same unit of a public good.").

[41] *See* WILLIAM NORDHAUS, MANAGING THE GLOBAL COMMONS: THE ECONOMICS OF CHANGE (1994) (analyzing elements of the natural environment as global public goods). Of course, the fact that it is possible for everyone to enjoy a public good in perpetuity does not entail that everyone's use will in fact preserve it in perpetuity: hence, the tragedy of the commons. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). *See also* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (correcting and updating Hardin's approach); Stephen M. Gardiner, *The Real Tragedy of the Commons*, 30 PHIL. & PUB. AFF. 387 (2001) (same).

[42] *See, e.g.*, Gary North, The Fallacy of "Intrinsic Value," Foundation for Economic Education, Jun. 1, 1969, https://fee.org/articles/the-fallacy-of-intrinsic-value/ (quoting as a statement of what the author takes to be the correct view the words of the J. Enoch Powell: "'If people value something, it has value; if people do not value something, it does not have value; and there is no intrinsic about it.'").

[43] *See, e.g.*, ROBERT SERRANO AND ALLAN M. FELDMAN, A SHORT COURSE IN INTERMEDIATE MICROECONOMICS WITH CALCULUS 327 (2012).

[44] *See, e.g.,* BARRY C. FIELD, NATURAL RESOURCE ECONOMICS: AN INTRODUCTION 48 (2d ed. 2008).

[45] *See, e.g.*, Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 175-76 (2008) (asserting that "democracy is not about individual self-government, but about collective self-determination"). *Cf.* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986) (arguing that free speech doctrine should focus not on protecting autonomy but instead on enriching public debate).

[46] *See, e.g.*, George Klosko, *The Natural Basis of Political Obligation* in, NATURAL LAW AND MODERN MORAL PHILOSOPHY 99, 103 (Fred D. Miller & Jeffrey Paul eds.) (2001).

[47] David Schmidtz, *Contracts and Public Goods*, 10 HARV. J.L. & PUB. POL'Y 475, 475 (1987) ("Many economists and political philosophers answer that national defense is a *public good*.")

[48] This is, of course, a restatement of "the tragedy of the commons." *See supra* note 41.

[49] *See, e.g.,* Joseph Heath, *Three Normative Models of the Welfare State*, 3 PUBLIC REASON 13, 26-28 (2011).

[50] *See* PAUL D. MILLER, ARMED STATE BUILDING: CONFRONTING STATE FAILURE, 1898-2012 (2013) ("The performance of functions and provision of public goods is how a state enacts its claim to legitimacy….").

[51] *See, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 1-2 (1965). *But see* Dan M.

This story is incomplete, however. It assumes that, if only one could limit access and charge a fee for use, public goods would be fair game in the marketplace (as some economists apparently believe all goods and services should be).[52] By contrast, from a non-economic perspective, the fact that some goods are public might *enhance* rather than detract from their value, because the use or enjoyment of a public good might be constituted in part *by its public nature*.[53] For example, the pleasures one takes in a cultural event, such as a community baseball game or a public concert, may be heightened by—indeed may even depend on[54]—one's sharing the experience with others. At this deeper conceptual level, most contemporary economists miss the irreducibly collective nature of the value of public goods due to a pre-commitment to methodological individualism, or the view that the proper unit of analysis is always the individual.[55]

More specifically, the economics literature tends to focus on the experience of the individual *qua* end-user of the public good instead of individual *qua* participant in the production, preservation, transmission, use, enjoyment, and benefit of the public good. This focus is consonant with the consumerist and atomistic market norms discussed above.[56] A more encompassing view of goods like the baseball game would recognize that they are not merely goods that individuals enjoy alongside one another (an individualist view); at least some such goods are those to which individuals contribute together in a collective fashion (a collectivist view).[57] By cheering at the baseball game or rock concert, for example, we together, collectively, make the event what it is. It is the raucous, infectious, exhilarating, and shared nature of the experience that distinguishes watching the game or concert live from watching it in the confines of one's home alone. We are a part of the event

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Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71-72 (2003) ("[A]s a wealth of social science evidence now makes clear, Olson's *Logic* is false. In collective-action settings, individuals adopt not a materially calculating posture but rather a richer, more emotionally nuanced reciprocal one.").

[52] *See, e.g.*, Elisabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (assuming that anything that can be bought and sold will and should be bought and sold). These features are salient to economists because they explain why collective goods are "market failures." *See also* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 45-49 (1988); Francis M. Bator, *The Anatomy of Market Failure*, *in* THE THEORY OF MARKET FAILURE 35, 55 (Tyler Cowan ed., 1992).

[53] A note about taxonomy: We do not insist on a sharp distinction between public and collective goods, though we are inclined to use the term "public good" when referring to the kinds of goods economists have in mind—*e.g.*, vaccination programs or fireworks displays—and collective goods where we are contemplating goods whose value is constituted in part by their being shared—*e.g.*, a rock concert or self-government in a democratic republic. For a more pointed distinction between the two, see Waheed Hussain, *The Common Good*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed.) (Spring 2018), https://plato.stanford.edu/archives/spr2018/entries/common-good/.

[54] *Cf.* Denise Reaume, *Individuals, Groups and Rights to Public Goods*, 38 U. TORONTO L.J. 1 (1988).

[55] *See* LARS UDEHN, METHODOLOGICAL INDIVIDUALISM: BACKGROUND, HISTORY AND MEANING (2001); Kenneth J. Arrow, *Methodological Individualism and Social Knowledge*, 84 AM. ECON. REV. 1 (1994). Geoff Hodgson, *Behind Methodological Individualism*, 10 CAMBRIDGE J. ECON. 211 (1986).

[56] *See supra* Part I.B.1.

[57] *Cf.* Arrow, *supra* note 55, at 8 (concluding that "social variables, not attached to particular individuals, are essential in studying the economy or any other social system").

inasmuch as the players or musicians feed off our energy, but also inasmuch as we feed off one another's energy. This is why watching our team's "away" game on the Jumbotron in our home stadium is a communal event even though the team cannot hear or see us, and so cannot benefit from the live cheering of its fans.

The element of joint production can, but need not, be constitutive of the value of collective goods. Indeed, the two contested commodities of central interest here—collective self-government and elements of the natural environment—require our contributions to their maintenance and preservation, but our enjoyment of them does not necessarily depend on their being enjoyed by others too. For example, part of the pleasure of a public park might come from the opportunities it affords to see and be seen, both of which require others to participate and observe too.[58] Other environmental goods are best enjoyed in the company of just a few others, or even alone.[59] In a similar vein, civic republicans describe collective self-government in the way that we have described attendance at rock concerts: as both an enjoyable and virtuous pursuit, and a pursuit whose joys and virtues are partly constituted by their communal or collective aspects.[60] Even a less exuberant view of democratic government recognizes it as a public project, in the sense that our government is ours collectively and acts in a collectively organized institutional manner.[61]

It is this social aspect of collective goods that makes plain just how unsuitable the consumerist and atomistic orientations are to their dispositions. Consumerism and atomism entail unilateral decision-making by each individual person, with self-regard, self-interest, and self-defined preferences as their primary guide.[62] By contrast, and very broadly speaking, collective goods require collective governance by the citizens whose goods they are. We jointly preserve, protect, produce, maintain, regulate, oversee, and support these collective goods. We adopt an attitude

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[58] This is captured, for example, in George Seurat's masterpiece, *A Sunday on La Grande Jatte* (Art Institute of Chicago) (1884-86).

[59] *See, e.g.*, HENRY DAVID THOREAU, WALDEN, OR LIFE IN THE WOODS (1854).

[60] *See, e.g.*, Hannah Arendt, *What Is Freedom?*, *in* BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 154 (1968) (arguing that political participation is constitutive of the good life).

[61] Larry Lessig, channeling Robert Post, offers an encomium to collective self-government that captures this thought: "In [the domain of democracy], I, and others, collectively determine what our governments will be, and to some extent, what our communities will be. Here is the place where collective, and reflective, judgment is to occur, not at the level of an individual's life, but at the level of a collective. Here is where the rules get made, through a process of collective judgment about what the rules ought to be. The domain of democracy is the place where one is critical, where one steps outside of a particular life, or of a particular community, into a life set upon thinking reflectively about how we should live." Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1427 (1996) (book review) (summarizing Post's view). *See also* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 80 (1995).

[62] This is not to say that individual persons—including organizational persons—cannot and do not make moral determinations and set moral limits (or preferences) for themselves when acting in markets. However, it is fair to say that a principal and generally accepted view of markets assumes individual participants acting in their own self-interest. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 18 (Edwin Cannan ed. 1976) (1776) ("[I]t it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.").

of stewardship toward them.

Further, it is in virtue of their common ownership that these goods warrant more thoughtful and respectful treatment than commercial markets can provide. The market's coarseness encourages moral indifference to the transactions there.[63] However, we cannot afford to be morally indifferent to the disposition of at least some collective goods. This is why endangered species, for example, are prohibited from being bought and sold, and indeed may not be exchanged in any way that would inure to the financial benefit of their purveyor.[64] National parks and national symbols receive the same hallowed treatment. Once we recognize the special protection from market forces that collective goods require, we can appreciate why constitutional commodification can be wrong.

C. *Constitutional Commodification in the Supreme Court*

Commodification occurs through social, political, and legal decisions about the structure and scope of commercial markets. In the history of the expansion of labor markets at the dawn of the Industrial Revolution in England, for example, a combination of the repeal of legal protections for former serfs and an enclosure movement converting open fields to fenced-in or hedged arable land forced people into labor markets.[65] Ever since, questions have arisen concerning what human activities and which parts of the natural environment should become subject to expanding markets, and which should not. Our interest here, however, does not primarily concern the general political and philosophical question of what should be commodified or not. Instead, we focus on the particular role that the Supreme Court has played in recent years in what we diagnose as constitutional commodification.[66]

In our view, the Court has not been sufficiently attentive to the special nature of collective goods. Instead, it has at times—especially recently[67]—operated with an apparent fervor for markets. In so doing, it has subsumed the value of some our highest constitutional goods to the potential coarseness and amorality of commercial markets. We turn now to consider two case studies that allow us to spell out these dynamics, and to draw larger lessons from them.

II. MONEY IS SPEECH

The Court's campaign finance jurisprudence can be accurately described as a

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[63] *See, e.g.,* Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 205 (2000).

[64] Endangered Species Act, sect. 9, 16 U.S.C. § 1538 (1988).

[65] *See* POLANYI, *supra* note 21, at 36-37, 75-79, 81-107. As Polanyi notes, this was not a benign process: "Enclosures have appropriately been called a revolution of the rich against the poor. The lords and nobles . . . were literally robbing the poor of their share of the [previously] common [land], tearing down the houses which, by the hitherto unbreakable force of custom, the poor had long regarded as theirs and their heirs'" *Id.* at 37. Polanyi agrees, though, that "[i]n the end the free labor market, in spite of the inhuman methods employed in creating it, proved financially beneficial to all concerned." *Id.* at 81. *See also supra* Part I.A.

[66] *See supra* text accompanying notes 4-18.

[67] *See* Parts II & III. *See also infra* notes 215-17 (discussing recent cases).

stalwart march to ever more permissive rules about spending money on political speech. This increasing permissiveness relies on a sometimes implicit, sometimes explicit equivalence between money and speech.[68] Countless scholars have aimed to identify why the equivalence is wrong—morally, conceptually, and as a matter of constitutional law.[69] We argue here that their accounts are sometimes incorrect and sometimes incomplete. A conception of political speech as a collective good of democratic self-government, we contend, is necessary for elucidating the problem with unlimited spending on political speech. From this perspective, we urge the Court to halt its march toward the complete constitutional commodification of political speech, and perhaps begin to reverse it.[70]

We begin by reviewing the cases equating money and political speech. We then argue that the supposed equation turns on an individualist conception of the First Amendment, which we contest. We advance a conception of political speech as a collective good, and then fit this argument into our theoretical framework of constitutional commodification.

A. Buckley *to* McCutcheon *and Beyond*

Buckley v. Valeo[71] was the first case where the Court ruled on the constitutionality of the Federal Elections Campaign Act (FECA) of 1971,[72] which was at the time "by far the most comprehensive reform legislation passed by Congress concerning election[s]."[73] Among many other features, the FECA limited how much money an individual could contribute to any one federal political campaign ($1000), how much they could contribute to campaigns overall within a given year ($25,000), and how much they could spend on independent political speech ($1000).[74]

In *Buckley*, the Court upheld the caps on campaign contributions, but it found unconstitutional the restrictions on independent expenditures for political speech.[75] This speech includes radio or television ads expressly advocating the election or defeat of a candidate for office, paid for by individuals unconnected with the

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[68] *See infra* Part II.D.

[69] *See infra* Part II.B.2.

[70] We appreciate that *stare decisis* may prevent complete reversal, at least in the near future.

[71] 424 U.S. 1 (1976).

[72] Pub. L. 92–225, 86 Stat. 3, enacted February 7, 1972, 52 U.S.C. § 30101 et seq.

[73] Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975), *rev'd*, 424 U.S. 1 (1976).

[74] These are the original dollar amounts. The statute provides for periodic increases to the caps to control for inflation and the passage of time. *See* 424 U.S. at 88 (citing statute).

[75] 424 U.S. at 51. *Citizens United v. FEC*, 558 U.S. 310 (2010), extended the right to spend unlimited amounts of money on political ads to corporations, which had been until then prohibited from spending their own funds on some kinds of political speech.

As Robert Post has noted, the Court's distinction between "contributions" and "expenditures" was "arbitrary" and is now "unravelling" into "chaos" because of a lack of a theoretical basis. ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 6 (2014). Our analysis here does not depend on this distinction, and our critique applies in principle to treatments of both contributions and expenditures.

candidate's campaign, and mounted without the candidate's input or support.[76] Importantly, the Court assessed the FECA's limits not as restrictions on conduct (such as donating or spending) or restrictions on the means to produce or disseminate speech (including advertisments or airtime), but as *restrictions on speech* in the first instance.[77] As a result, all of the restrictions were subject to strict scrutiny.[78] The campaign contribution limits survived because they narrowly served the government's compelling interest in preventing quid pro quo corruption or the appearance of such corruption.[79] *McCutcheon v. Federal Election Commission* later scaled back even these restrictions, overturning overall campaign contribution caps on the ground that limits on contributions to individual campaigns were sufficient to forestall corruption or the appearance of corruption.[80]

In contrast with its approach to campaign contributions, the *Buckley* Court was hostile to limits on independent expenditures because the Court believed they posed far less threat of corruption,[81] and the Court was unwilling to consider that the restrictions might be justified on other grounds—namely to prevent wealthy citizens from exerting a disproportionately greater influence on electoral outcomes.[82] In this connection, the Court announced its now famous edict that "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[83]

Consider, however, the Court's argument supporting this claim. The first premise states that the First Amendment was "designed to secure the widest possible

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[76] 11 C.F.R. 100.16(a).

[77] Thus the Court distinguished the FECA restrictions from the prohibition against destroying one's draft card challenged in *United States v. O'Brien*, 391 U.S. 367 (1968), arguing that "it is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'" *Buckley*, 424 U.S. at 17 (citing *O'Brien*, 391 U.S. at 382).

[78] *Buckley*, 424 U.S. at 14.

[79] *Id*. at 29

[80] 572 U.S. 185 (2014).

[81] *Buckley*, 424 U.S. at 45.

[82] *Id.* at 49-50. Charles Fried aptly summarizes the Court's mistaken logic here: "it is only the five Pollyannas on the Supreme Court who would have us believe that those who have unlimited cash to spend on elections will not call the tune. Why else, after all, would the superrich spend their money on candidates instead of buying another Damien Hirst pickled sheep?" Charles Fried, *Justices 5-4 Void Key Spending Cap in Political Races*, N.Y. TIMES, Apr. 3, 2014 (letter to the editor), https://www.nytimes.com/2014/04/04/opinion/the-courts-ruling-on-political-spending.html?src=rechp.

We now know that unlimited spending does more than enhance the franchise for some relative to others. It also produces legislation more favorable to the wealthy, thereby enhancing the power of the wealthy still more. *See, e.g.*, LARRY LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND HOW TO STOP IT 89-213 (2012) (describing a corrupt "economy of influence" caused by "so damn much money" in politics); Elizabeth Drew, *How Money Runs Our Politics*, N.Y. REV. BOOKS, Jun. 4, 2015 ("If people are concerned about the gaping and growing disparity of wealth in this country, the pattern of political donations is one place to look for its source."); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 997 (1998) ("To allow the regulated to capture the regulators threatens the entire system.").

[83] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

dissemination of information from diverse and antagonistic sources."[84] Then the Court argues that spending restrictions "*necessarily reduce*[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[85] Therefore, the Court reasons, spending restrictions are incompatible with the First Amendment.[86]

The Court is surely right to say that the First Amendment aims to guarantee the greatest audience for the greatest range of views.[87] The problem arises in the second premise of the Court's argument, where it contends that quantity and diversity go hand-in-hand.[88] Even as an intuitive matter, the claim that more speech means that more people will hear more viewpoints is flawed.

To see this, imagine that, under a regime with spending restrictions, Smith and Jones, who support roughly the same candidates and policies, can now each spend only half of what each would have spent had there been no restrictions. As a result, we have half as much speech from each of them as we would have had otherwise. But this means that there is now more time and more space, for, say, Nash to offer her views, completely distinct from the Smith-Jones set of views.[89] All other citizens would then have a better chance of hearing each of Smith, Jones, and Nash in a regime with spending restrictions because the airwaves will be less clogged and the newspapers or websites less crammed with Smith's and Jones's ads and speech.[90]

Although this argument is admittedly theoretical rather than empirical, it is also commonsensical. With spending restrictions, we may well have *more* speech on *more* topics reaching *more* people.[91] Indeed, this is just the line of thought on which the Canadian Supreme Court based its support for rigorous restrictions on both campaign contributions and expenditures.[92]

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[84] *Id.*

[85] *Id.* at 19 (emphasis added).

[86] *Id.* at 50.

[87] *Id.* at 48-49.

[88] *Buckley*, 424 U.S. at 19. *See also* Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) (noting "the Court in *Buckley* explained that expenditure limits 'represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech'") (quoting 424 U.S. at 19) (Kennedy, J., dissenting).

[89] It is also likely that, under the original regime, where Jones and Smith would each have offered twice as much speech, lower-resourced citizens might decline to speak at all. After all, what would be the point of spending money on political speech that would never get heard? In this way, unlimited spending can lead to *less* diverse speech, rather than more, especially with respect to citizens differentiated by class, wealth, and relative income.

[90] *Cf.* Citizens United v. FEC, 558 U.S. 310, 472 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that members of the public do not have "infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere").

[91] Theorists often offer the negative version of this claim, arguing that, without spending restrictions, fewer viewpoints will reach a wide audience. *See, e.g.*, Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412 (1986) ("the rich or powerful . . . [have] the resources at their disposal . . . to fill all the available space for public discourse with their message."); *The Supreme Court 1999 Term: Leading Cases, Constitutional Law: Freedom of Speech and Expression*, 114 HARV. L. REV. 299, 304 (2000) ("If money talks, then America's campaign finance system leaves the poor and the working class voiceless.").

[92] Harper v. Canada (A.G.), [2004] 1 S.C.R. 827, 872 ("If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be

Furthermore, the Court offers no evidence to undercut, let alone falsify, this commonsense prediction for how spending restrictions may in fact enhance First Amendment values. The Court correctly notes that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[93] But that observation entails only that individuals ought to be permitted to spend some money on speech, not that they must be permitted to spend *unlimited* amounts of money.[94] The Court needed to adduce evidence showing that *any* spending restrictions would undermine the First Amendment's goal of ensuring robust debate on as diverse a number of issues and viewpoints as possible, and the Court did not do so.[95] Moreover, the Court probably could not have done so because there is almost no empirical research on the effects of unlimited spending on elections, as scholars have long lamented.[96] In short, the Court was simply incorrect to say that the objective "to secure the widest possible dissemination of information from diverse and antagonistic sources" requires unlimited spending.[97]

B. *Individualist Approaches to Campaign Finance*

The problems with the Court's campaign finance jurisprudence do not end with

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drowned out. . . . This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views."). *See also* R. v. AM [1997] 3 S.C.R. 569, 598-99 (Can.) ("Owing to the competitive nature of elections, . . . spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard."); POST, *supra* note 75, at 48 (describing "the full-throated expression" of "the principle of equality" in Canadian campaign finance law).

[93] *Buckley*, 424 U.S. at 19.

[94] *Cf.* Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 796 (1998) (arguing that the supposed equation between money and speech may hold true at lower levels of spending, but not at extremely high expenditure levels); E. Joshua Rosenkranz, *The Dangers, and Promise, of* Shrink Missouri, 24 HARV. J.L. & PUB. POL'Y 71, 77 (2000) (same).

Note also that the claim that speech costs money does not entail that each speaker must then be permitted to spend *her own* money on speech. We might instead give each citizen a political speech allowance or taxpayer-funded vouchers. *See* BRUCE ACKERMAN AND IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002) (describing government-funding "Patriot dollars" system); LESSIG, *supra* note 82, at 264-75 (2012) (describing various decentralized people-funding options). A theory of collective goods, by the way, justifies these public-financed regimes.

[95] In addition to safeguarding "robust debate," the Court argues that the First Amendment aims "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" 424 U.S. at 49. This argument is subject to the same critique: whether speech restrictions hinder or benefit "unfettered interchange" is an empirical matter the Court does not explore.

[96] *See, e.g.*, Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 230 (1989) ("In support of its acceptance of contribution limits, the *Buckley* Court claimed that such limits have a limited impact on speech. This is a claim, however, which science does not sustain."); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1479 (2015) ("This literature only now is emerging because the techniques for measuring voters' and officeholders' preferences previously did not exist."); *id.* at 1494 ("I am unaware of any empirical evidence on the impact of expenditures on candidates."); Prithviraj Datta, The Flawed Reasoning of the *Citizens United* Opinions 13 (working paper, 2017) (manuscript on file with authors).

[97] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

its unsupported empirical foundations. The voluminous case law following from *Buckley* is beset by another conceptual disconnect. On one hand, the Court repeatedly identifies as a key rationale the notion that robust political speech is of great importance to the *polity*. On the other hand, the Court evaluates political speech restrictions in light of their effect on *individual speakers'* rights. In this way, the Court decides on the permissibility of speech restrictions without regard for a key rationale for protecting political speech in the first place.

The Court's position across these cases might be termed *laissez-faire*.[98] Its *egalitarian* critics, however, are no less beholden to individualist commitments.[99]

1. Laissez-Faire Free Speech

The Court has become increasingly hostile to laws limiting the amount of money individuals can spend on political speech, especially where these aim to level the playing field between wealthy and non-wealthy citizens, or well- and poorly-funded candidates. In *Buckley*, the Court deemed this ambition "wholly foreign to the First Amendment,"[100] and it has repeatedly rejected leveling measures in subsequent cases.[101] In eschewing measures that would equalize access to audiences as between political speakers, the Court's approach has been decidedly individualistic.[102]

More specifically, the Court conceives of equalizing measures in the campaign finance context as those that would deny one person, say, Peter, the full strength of his voice in order to enhance the voice of Paul, *for Paul's sake*,[103] or measures that would have Peter subsidize Paul's speech, again *for Paul's sake*.[104]

In response, consider first that the polity as a whole might have an interest in hearing from both Peter and Paul, and spending restrictions might be aimed at serving *that* interest, rather than Paul's interest alone. Put differently, the Court's anti-egalitarian jurisprudence disregards the notion of political speech as a collective

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[98] *See, e.g.*, David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE LAW & POLICY REVIEW 236 (1991). Elsewhere, this approach to campaign finance has been termed "libertarian." *See* Pasquale, *supra* note 24, at 600.

[99] *See* Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?* 83 MICH. L. REV. 939, 944 (1985) (book review) (labelling this position "egalitarian")

[100] 424 U.S. at 48-49.

[101] *See, e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724, 742 (2008); Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 749 (2011); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014).

[102] *See* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 82 (2012) ("Current First Amendment doctrine has moved decisively toward the individualist justification for expressive freedom"); *id.* at 82 (noting that the Court's preference for individualist justifications of the First Amendment "emerges most strongly from the Court's approach to . . . campaign-finance regulation").

[103] *See, e.g.,* Citizens United v. FEC, 558 U.S. 310, 340–41 (2010) ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.").

[104] *See* Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 737 (2011) ("Once a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent.").

good, and focuses only on the individual right.

Second, there is a problem, evident even within the individualist context, in that the Court presupposes a contestable baseline. Thus, Peter has a right to drown out Paul if Peter has the resources to do so. But, if one instead understands the First Amendment as conferring "a right of equal participation" in political debate, then Paul would have a right to insist that the state limit Peter's speech.[105] The Court can champion Peter's rights at Paul's expense only because it implicitly eschews an egalitarian campaign finance regime.[106]

2. Egalitarian Free Speech

For egalitarians, one's wealth should not determine the effectiveness of one's voice.[107] Egalitarians therefore criticize *Buckley* and its progeny,[108] and they advocate measures, including restrictions on political spending, that would equalize the strength of individual voices.[109]

In contrast to the unsupported *Buckley* contention that the greatest quantity and diversity of speech emerges where there are no spending restrictions, the concern that the wealthy will drown out the poor has empirical support. We know that well-funded candidates "inundate" the airwaves with ads casting them in the best possible light.[110] We know that Republican candidates have in recent years generally received far more money than have Democrats,[111] candidates align with their donors and spenders,[112] and Republican-sponsored policy tends to favor wealthy constituents.[113] The overall effect is to confer an advantage on the wealthy.[114]

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[105] R. v. AM [1997] 3 S.C.R. 569, 598-99 (Can.).

[106] *Cf.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 809–10 (1978) (White, J., dissenting) ("not to impose limits upon the political activities of corporations would have placed [the state] in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities.").

[107] *See, e.g.*, John Rawls, *The Basic Liberties and Their Priority*, 3 THE TANNER LECTURES ON HUMAN VALUES 10 (1982) ("[T]hose with relatively greater means can combine together and exclude those who have less from the limited space of the political process"); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994) (arguing that "there is no good reason to allow disparities in wealth to be translated into disparities in political power"); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 637 (1982).

[108] *See, e.g.*, Sunstein, *supra* note 108, at 1392 (observing that "it is most troublesome if people with a good deal of money are allowed to translate their wealth into political influence").

[109] *See, e.g.*, Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994).

[110] *E.g.,* Datta, *supra* note 97, at 10-11.

[111] *See Which Presidential Candidates Are Winning the Money Race?*, N.Y. TIMES, Jun. 22, 2016, https://www.nytimes.com/interactive/2016/us/elections/election-2016-campaign-money-race.html.

[112] *See* Stephanopolous, *supra* note 97.

[113] *See* Greg Sargent, *The GOP's Party-of-The-Rich Problem, In Two Charts*, WASH. POST, Feb. 4, 2016, https://www.washingtonpost.com/blogs/plum-line/wp/2016/02/04/the-gops-party-of-the-rich-problem-in-two-charts/?utm_term=.a859f6f9a93a.

[114] Christina Pazzanese, *The Costs of Inequality: Increasingly, It's The Rich and the Rest*, HARV. GAZETTE, Feb. 8, 2016, http://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-

One might have thought that the disparity in political influence as between wealthy and poor would suffice to justify some spending restrictions, allowing for the egalitarian position to triumph. Yet the egalitarian position has been notoriously difficult to defend. This is partly because money is not the only resource that can be converted into political influence. Time and fame can also augment a person's voice and influence, and each of them, like wealth, is unequally distributed across the electorate. For example, college students can spend many more hours on social media than can parents who work full-time; celebrities like Will.I.Am can reach many more people with their messages than can the average Joe.[115]

This poses a problem for the egalitarian because there looks to be no principled basis for treating money differently from time and prominence. Egalitarians must then either accept restrictions on all of the elements that confer an advantage on the speaker unconnected with the merits of the content of their speech—which might well involve intolerable limits on individual liberty[116]—or resign themselves to having no restrictions on individuals' wielding their time, prominence, oratory powers, good looks, or money in an unequal manner.

There is a way out of this conundrum, but it appears only once one realizes that the egalitarian and laissez-faire positions share the same flaw. Both conceive of free

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increasingly-its-the-rich-and-the-rest/. Sandy Levinson has argued that it is not unlimited spending per se that troubles egalitarians but instead the viewpoints likely to be disseminated by those with the most money to spend. Consider the following hypothetical: "If both political views and the propensity to spend money on politics were distributed randomly among the entire populace, it is hard to see why anyone would be very excited about the whole issue of campaign finance. It is only because we know there is no such randomization that we are concerned about spending by the rich." Levinson, *supra* note 100, at 945 . In response, note that the concern about too much speech is not necessarily dependent on the content of that speech: we want all viewpoints to be heard, and unlimited spending might overwhelm us, leaving us with nothing but cacophony. However, our commodification critique draws out a further concern. If each of us has equal resources and can spend as much as he or she likes, we might be less inclined to aim for the most powerful or persuasive rhetoric, preferring quantity to quality, or choosing to spend money on ads instead of engaging in arguably more meaningful forms of political participation. In other words, unlimited spending may cheapen and degrade political speech. *See also infra* Part II.D.

[115] Will.I.am famously stumped for Barack Obama, including creating a YouTube video, "Yes We Can – Barack Obama Music Video," https://www.youtube.com/watch?v=jjXyqcx-mYY (posted Feb. 2, 2008) that was viewed by over 26 million people. *See also* Davis v. Fed. Election Comm'n, 554 U.S. 724, 742 (2008); Joel L. Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 458-65 (1973); Levinson, *supra* note 100, at 148-50. *Cf.* David W. Adamany, *Money, Politics, and Democracy: A Review Essay*, 71 AM. POL. SCI. REV. 289, 295 (1977) (noting the same set of disparities when it comes to the appeal of different candidates).

[116] *See* Levinson, *supra* note 100, at 951 (proposing a hypothetical and disturbing world in which "no person will be allowed to spend more than two hours a week (or 100 hours per year) on political activity," and concluding that "[c]learly, it would be hard to imagine a proposal more offensive to traditional civil libertarians."). Robert Post also rejects just such a regime, writing that the processes for participation must "offer a *meaningful* opportunity to shape the content of public opinion." POST, supra note 61, at 50. He opposes proposals where the opportunity to participate is regulated in a manner of one-size-fits-all, such as in a regime where each citizen is given five minutes on public access television. *Id.*. Post is surely right that we don't have to standardize access in this way to achieve generally equal participation. He shows that equality of access is not sufficient for guaranteeing meaningful participation, but this does not disprove that some degree of equality of access is necessary.

speech only in terms of the right of the *individual person* to participate in politics. To be sure, the two positions differ with respect to what factors ought to be permitted to condition the effectiveness of the individual person's exercise of that right, with the egalitarian thinking that the right is respected only if everyone has an equal (or at least a fair) chance of being heard, and the laissez-faire theorist thinking that the right is respected only if it is unrestricted. But both share the view that political free speech is first and foremost a right of and for *the individual*.

Consider instead that it is in the interest of *all of us*—that is, the polity as a whole—to hear from all citizens. This is precisely the interest that *Buckley* took to lie at the First Amendment's foundation when the Court proclaimed that "the First Amendment . . . was designed to secure the widest possible dissemination of information from diverse and antagonistic sources."[117] We have this collective interest because we are joined together as citizens in the collective project of self-governance. As Robert Post has argued, "a primary purpose of the First Amendment is to make possible the value of self-government."[118] We want to enable people to speak about political matters not only because we care about their self-expression, but because having a wide variety of views available will allow us together to arrive at the best solution or approach, or at least the most democratic compromise.[119] The Court has failed to see this because it has mistakenly abandoned a jurisprudential understanding of political speech as a collective good.[120]

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[117] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

[118] POST, *supra* note 75, at 4.

[119] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 55 (1960) (arguing that "the First Amendment . . . is single-minded. It has no concern about the 'needs of many men to express their opinions.' It provides, not for many men, but for all men.") (quoting ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 14 (1942)).

Recent work in political theory suggests that democratic governance and deliberation make wiser and more efficient, as well as more just, decisions than alternative approaches. *See* COLLECTIVE WISDOM: PRINCIPLES AND MECHANISM (Hélène Landemore & Jon Elster eds. 2012); HÉLÈNE LANDEMORE, DEMOCRATIC REASON: POLITICS, CREATIVE INTELLIGENCE, AND THE RULE OF THE MANY (2013).

[120] Although we have construed the egalitarian rationale as distinct from, and sometimes in tension with, the collective self-governance rationale, others have sought to synthesize these two rationales into one vision of the First Amendment's purpose. *See, e.g.*, Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004). Jeffrey Blum articulates and defends a First Amendment principle of "equal liberty and collective right." Blum, *supra* note 11, at 1339-45. He deploys this principle to argue that a campaign finance regime without spending restrictions is likely to corrupt democratic politics by undermining government's autonomy from private market forces. In this way, Blum identifies a persuasive justification, consistent with the end of promoting collective self-governance, for spending restrictions. However, this justification is not alone sufficient. To see this, suppose that the state turned to public financing of campaigns and allowed for no independent expenditures at all. That arrangement might quell Blum's anti-corruption worries, but it wouldn't necessarily best serve the goal of collective self-governance, especially if the amount of money each candidate received under the public financing scheme was insufficient to allow the citizenry to encounter the full range of views on all matters of political importance. For this reason, we believe that our conception of what the "collective good" requires is better suited to the project of collective self-governance. *See infra* Part II.C.

C. *Political Speech as a Collective Good*

Not long ago, the Court recognized the value of political speech as a collective good. It did so not only in cases that were avowedly "collectivist,"[121] but also in cases that otherwise resolutely conceived of free speech as an individual right.[122]

The high-water mark of the Court's collectivist orientation to free speech is *Red Lion Broadcasting Co. v. FCC*,[123] where the Court identified as controlling "the First Amendment goal of producing an informed public capable of conducting its own affairs."[124] It framed the public's interest as a "collective right."[125] On these grounds, the Court upheld a requirement of equal access to the airwaves for politicians on both sides of a controversial public issue.[126] *Red Lion* thus "interpreted the First Amendment rights of the public in light of the constitutional imperative of informed public decision making."[127]

In another formative case, *Whitney v. California*,[128] Justice Brandeis advanced an even more powerful vision of political speech as a collective good.[129] He cast robust political speech not only as an individual right but also as a civic "duty," thereby suggesting that political speech is something the individual undertakes not only for their own sake but also for the collective good of the polity.[130]

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[121] *See* POST, supra note 61, at 280 (describing the *Red Lion* case as "the one decision of the Supreme Court that unambiguously relies on the collectivist theory" of the First Amendment).

[122] *See* Blum, *supra* note 11, at 1339 (describing "a growing judicial recognition of the idea of collective right" in the First Amendment context); Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience As First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839 (2010) ("[A] core purpose of the First Amendment is to foster the ideal of democratic self-governance. In fact, First Amendment doctrine has been consciously fashioned to reinforce this ideal.").

[123] 395 U.S. 367 (1969).

[124] *Id.* at 392. *See also* Garrison v. State of La., 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); United States v. Automobile Workers, 352 U.S. 567, 593 (1957) ("Under our Constitution it is We The People who are sovereign. . . . . The people determine through their votes the destiny of the nation. It is therefore important—vitally important—. . . that the people have *access to the views of every group in the community*.") (Douglas, J., dissenting) (emphasis added); Marjorie Heins & Eric M. Freedman*, Foreword: Reclaiming the First Amendment: Constitutional Theories of Media Reform,* 35 HOFSTRA L. REV. 917, 922 (2007).

[125] *Red Lion*, 395 U.S. at 390 ("[T]he people *as a whole* retain their interest in free speech by radio and their *collective right* to have the medium function consistently with the ends and purposes of the First Amendment.") (emphasis added). *See also* FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) (referring to "the public's First Amendment interest in receiving a balanced presentation on diverse matters of public concern.").

[126] *Red Lion*, 395 U.S. at 400-01.

[127] POST*, supra* note 75, at 78. *See also* Cass R. Sunstein, *Does "Red Lion" Still Roar?* 60 ADMIN. L. REV. 767 (2008) (advocating for a revival and reinvention of *Red Lion*'s principles for a cable news, social media era).

[128] 274 U.S. 357 (1927).

[129] *Id.* at 375 (Brandeis, J., concurring). *Whitney* is quoted at length in *New York. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), which celebrates the role of unfettered speech in collective self-government, *see id*. at 270-71, and which is itself quoted at length in *Buckley* in support of the idea that effective democratic self-rule requires the greatest quantity and diversity of views, *see Buckley,* 424 U.S. at 14-15, 48, 49.

[130] *Whitney*, 274 at 375 (Brandeis, J., concurring) ("Those who won our independence believed

Even in cases abolishing spending limits on individualist grounds, one can find evocations of political speech as a collective good. *Buckley* itself is exemplary on this score. There, the Court recognized that "Congress was legislating for the 'general welfare'"—in particular, to ensure an electoral process that had integrity and was inclusive.[131] Further, the Court identified the promotion of collective self-government as a fundamental rationale for the First Amendment: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."[132]

These passages from *Buckley* show that what is most centrally contested in campaign finance jurisprudence is not *whether* robust, unfettered political speech is essential to the polity as a whole, but instead *how* this collective good intersects with the interests of individual speakers—and which of these two sets of objectives should prevail when they conflict.

Much of the Court's free speech jurisprudence results from this conflict between the collective good and individual rights of free speech. The conflict can be seen, for example, in cases that address the rights of a speaker versus those of listeners.[133] It appears also in the tension between collective self-governance and individual self-authorship conceptions of the First Amendment.[134]

Another illustration of the conflict between the individualist and collectivist conceptions of free speech appears in the divided opinions in *McCutcheon v. Federal Election Commission*.[135] There, Justice Roberts, writing for the majority, championed the now-familiar individualist position that opposes equalization. The Court, he said, has "made clear that Congress may not regulate contributions simply to . . . restrict the political participation of some in order to enhance the relative influence of others."[136] Justice Breyer, dissenting, refused to frame the issue as a contest between the speech rights of different individual citizens. Instead, he used the term "collective speech" for the first time in the Court's jurisprudence,[137] and

… that the greatest menace to freedom is an inert people; that *public discussion is a political duty*; and that this should be a fundamental principle of the American government.") (emphasis added).

[131] *Buckley*, 424 U.S. at 90–91.

[132] *Id.* at 14-15.

[133] *See, e.g., Red Lion*, 395 U.S. at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount"); Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why* Buckley v. Valeo *Is Wrong*, 47 U. RICH. L. REV. 881, 886 (2013) ("The importance of free speech arguably lies primarily with the listener, not the speaker.").

[134] *See* Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2372 (2000). *See also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (grounding free speech protections in a right to individual self-fulfillment); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that "the constitutional guarantee of free speech ultimately serves only one true value, which I have labeled 'individual self-realization'"); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (grounding free expression in individual autonomy).

[135] 572 U.S. 185, 237 (2014)

[136] *Id.* at 191

[137] *Id.* at 237 (Breyer, J., dissenting). *See also* Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 628-641 (2016).

argued that "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*."[138] As such, he emphasized, any conflict between individual and collective rights "takes place within, not outside, the First Amendment's boundaries."[139] By his lights, evaluating speech restrictions requires balancing the individual right to convey one's message with other considerations and protections, including the collective right to absorb as many different messages as possible.

We do not seek to resolve the general tension between individual and collective speech rights in this Article. For our purposes, it is sufficient to demonstrate that this jurisprudence provides considerable support for the notion that political speech is a collective good, and one that the Court as well as Congress should protect. Having recognized as much, we can now see why the constitutional commodification of money as political speech is so deeply problematic.

D. *Commodification of the Collective Good of Political Speech*

Buckley's approach has been distilled into the slogan that "money is speech."[140] The slogan captures the bivalent dynamics of constitutional commodification. First, speech is reduced to a commodity, and so can be purchased in whatever quantities the speaker desires and can afford. Second, money, identified with speech, deserves speech's constitutional protections against government restriction.

1. The Market for Political Speech

Buckley may enshrine the idea that money spent on speech is equivalent to speech, but the assimilation of the free market and free speech does not originate with *Buckley*. As others have noted, the whole idea of a "marketplace of ideas" recruits commercial rhetoric to structure our conception of what free speech means and why we should value it.[141] Justice Oliver Wendell Holmes in *Abrams v. United States*[142] famously declared: "The ultimate good desired is better reached by free trade in ideas—the best test of truth is the power of the thought to get itself accepted

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[138] 572 U.S. at 237 (Breyer, J., dissenting).

[139] *Id*. at 239.

[140] *See, e.g.*, Kenneth J. Levit, *Campaign Finance Reform and the Return of* Buckley v. Valeo, 103 YALE L.J. 469, 503 (1993) (describing the Court's campaign finance jurisprudence as embodying the "theory that all money equals speech."); Maneesh Sharma, *Money As Property: The Effects of Doctrinal Misallocation on Campaign Finance Reform*, 41 U. MICH. J.L. REFORM 715 (2008) ("The Court's doctrine is often summed up in a familiar catchphrase: 'money equals speech.'"). *See also* supra note 2 and accompanying text. *But cf.* Wright, *supra* note 2, at 1005 ("[N]othing in the First Amendment commits us to the dogma that money is speech."); Gregory Klass, *The Very Idea of A First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1138 (2005) ("I have argued that when money is spent for speech, it does not, for First Amendment purposes, magically become equivalent to speech.").

[141] *See, e.g.*, Post, supra note 135, at 2356.

[142] 250 U.S. 616 (1919).

in the competition of the market."[143]

The market metaphor is given powerful voice in the *Buckley* opinion when the Court advances a revealing analogy: "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[144] However, the analogy presupposes a consumerist, atomistic orientation to market goods.[145] *Qua* market good, one can purchase as many cars as one wants, fill one's gas tank as often as one wishes, and drive as much and as far as one would like. All of these are private, individual decisions, not ordinarily subject to direct government regulation. Political speech is unlike an individual's decision to drive a car precisely because it is a good in which we all share. When the Court treats speech like any other good, it engages in *commodification by constitutional implication*.[146]

The Court's analogy is nonetheless especially apt for our purposes, since it draws out a conceptual connection between the "money is speech" and "waste is commerce" dynamics. Just as too much unequal speech undermines the collective good of political self-government, so can too much driving assault the collective goods of clean air and a healthy atmosphere.[147] In both cases, we must contend with the aggregate effects of individual acts on collective goods.

2. The Constitutionalization of Money

The problem with the Court's free speech jurisprudence is not simply that it treats political speech just like any commodity but also that it constitutionalizes money itself, immunizing it from any restrictions that the government could otherwise constitutionally impose.[148] This is the real force of the slogan that "money *is* speech," and it is a powerful instance of the second dynamic in constitutional commodification, namely the *constitutionalization of a commodity*.[149]

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[143] *Id.* at 630 (Holmes, J., dissenting). Holmes dissented from the Court's holding that the Sedition Act of 1918 was compatible with the First Amendment. His famous statement has been quoted in sixteen subsequent Supreme Court cases. *See, e.g.*, FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 257 (1986); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988); United States v. Alvarez, 567 U.S. 709, 728 (2012).

[144] *Buckley*, 424 U.S. at 19 n. 18

[145] *See supra* text accompanying notes 34-35. *Cf.* Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 230 (1989) ("In *Buckley,* the Court supported an individual view of politics.").

[146] *See supra* text accompanying notes 18-19.

[147] *See also infra* Part III.

[148] *Cf.* Timothy K. Kuhner, *Citizens United As Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395, 424 (2011) (describing how the Court in *Citizens United* "performed constitutional alchemy in order to turn money into speech—that is, to turn economic currency into political currency").

Note that we are *not* saying that money is "property" rather than "speech," and therefore any regulation of spending or contributions for political reasons is permitted. *See* POST, *supra* note 75, at 45-46 (criticizing this argument). We agree that some level of spending and contributions of money should be constitutionally protected. Our objection is that the "money is speech" formulation forecloses the possibility of any limits at all.

[149] *See supra* text accompanying notes 15-17.

Notwithstanding the Court's declarations, money is not really speech any more than time or fame is speech, though all three can facilitate the dissemination of one's message.[150] At best, money deserves constitutional protection only derivatively, because of its role in allowing one's speech to reach its target. The amount of protection money deserves cannot then be greater than the amount of protection political speech itself deserves. Yet this is the outcome of the constitutionalization of money. The money-is-speech equation paradoxically and perhaps unintentionally makes spending restrictions unconstitutional not in furtherance of political speech but instead at its expense. This is because constitutionally protecting money as speech in an absolute manner empowers some who are rich to drown out many who are not.[151] If it is political speech that we care about ultimately, then it follows that the spending of money in politics should be regulated within reasonable limits. More pointedly, we cannot treat both speech and money as equivalent, and subject to the same amount of constitutional protection, because political speech, when conceived of as a collective good, requires spending and contribution restrictions.

One might object that our analysis unduly diminishes the rights of individuals, but we do not deny individuals' rights as speakers or listeners. We simply also recognize another right based in a more general good—namely, a collective right to hear as diverse a range of views as possible and a related right of the public not to be inundated with political speech distorted by inordinately large amounts of money. We agree that individual speech rights entail First Amendment protection for some reasonable amount of spending, but not unlimited spending, especially in a world of increasingly radical divergence between the very rich and everyone else.[152] Nothing in the Court's prior jurisprudence establishes a basis for an absolute, unlimited right of spending on speech as a matter of logic or principle. The Court should therefore halt its rampant constitutionalization of money and allow for reasonable legal protections of the foundations of our collective good of democratic government.

III. WASTE IS COMMERCE

[150] *See, e.g.*, Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("I make one simple point. Money is property; it is not speech."). *Cf.* Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011) (using the example of money's role in facilitating speech to develop an account of when a constitutional right entails, or does not entail, a right to spend money in furtherance of that right).

Note that we are *not* saying that money is "property" rather than "speech," and therefore any regulation of spending or contributions for political reasons should be permitted. *See* POST, *supra* note 75, at 45-46 (criticizing this argument). We agree that some level of spending and contribution of money should be constitutionally protected. Our objection is that the "money is speech" formulation forecloses the possibility of any limits at all.

[151] *See supra* notes 111-15 and accompanying text.

[152] Economic inequality in the United States has spiked to record levels. *See, e.g.*, Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, By Race, Ethnicity and Income*, Pew Research Center, Nov. 1, 2017, http://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/ ("Wealth gaps between upper-income families and lower- and middle-income families are at the highest levels recorded.").

In this Part, we consider a series of cases decided under the negative or "dormant" Commerce Clause, which have held, beginning with *Philadelphia v. New Jersey*,[153] that "waste is commerce."[154] We argue that the Supreme Court erred in these cases when it overrode the traditional state law prerogative of governing land use to protect human health and the natural environment. In essence, the Court used the Constitution to commodify the business of waste disposal, holding that it counted as "commerce" in the same sense that markets for milk, meat, or corporate securities are "commerce." A long and tortuous line of cases followed *Philadelphia v. New Jersey*, eventually resulting in an accommodation to the continuing complications raised by this intrusion by the Court into the traditional bailiwick of the states.

After tracing the threads of constitutional commodification in these cases, we conclude that this legal story serves as another cautionary tale of the trouble that constitutional commodification can cause for non-commercial values, in this case the collective good of the environment that should be protected from degradation. In particular, we argue, with the benefit of historical perspective, that former Chief Justice William Rehnquist was right to warn about the Court's overreach into the traditional regulation of land use in decisions that privileged commercial contracts made *about the land*. His arguments sound in language congenial to our understanding of collective goods and constitutional commodification.

A. Philadelphia *to* United Haulers*: Commodifying the Environment*

The story of the constitutional commodification of waste begins, like the infamous voyage of the Khian Sea, in Philadelphia.[155] In *Philadelphia v. New Jersey*,

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[153] 437 U.S. 617 (1978).

[154] *Id.* at 621. *See also* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't Natural Resources, 504 U.S. 353, 359 (1992) ("Solid waste, even if it has no value, is an article of commerce.").

The Commerce Clause confers plenary power on Congress to pass legislation "[t]o regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. When Congress acts in a *positive* manner by enacting statutes, its constitutional authority under the Commerce Clause has been interpreted to be very broad. When Congress does not act, however, the Court has long held the Commerce Clause to impose a *negative* constraint to prevent state governments from discriminating against interstate commerce, even in the absence of Congressional action: hence the term "dormant" Commerce Clause. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 807-33, 1029-1150 (3d ed. 2000).

[155] The Khian Sea set sail from Philadelphia in August 1986 with 13,500 tons of hazardous incinerator ash. The ash was rejected by the Bahamas, and the ship then travelled around the Caribbean for about a year. In November 1987, the Khian Sea got a new captain in Honduras, and sailed to Haiti, where about half of the ash was unloaded before military officers intervened. The ship then returned to Delaware, received new orders, and dumped ash into the Atlantic Ocean until its equipment broke down. After docking in Yugoslavia in July 1988, the ship again dumped ash in the Indian Ocean and the Pacific Ocean before reaching Singapore empty. *See* Neatorama.com, *World's Most Unwanted Garbage: Cargo of the Khian Sea*. Aug. 15, 2007, https://www.neatorama.com/2007/08/15/worlds-most-unwanted-garbage-cargo-of-the-khian-sea/. The president and vice-president of the company were convicted of perjury. U.S. v. Reilly, 33 F.3d 1396 (3d Cir. 1994). A number of company officials had earlier been held in contempt for violating an temporary restraining order. Joseph Paolino & Sons v. Amalgamated Shipping Corp., 1989 WL 79743 (E.D. Pa. July 17, 1989). A silver lining of this notorious voyage was that it galvanized international efforts to begin to regulate the global disposal of hazardous waste. *See, e.g.*, Sejal Choksi, *The Basel Convention on the Control of Transboundary*

the Court first applied the negative Commerce Clause to restrict state authority to regulate waste in interstate commerce.[156] The Court held unconstitutional a New Jersey statute that prohibited importing most "solid and liquid waste which originated or was collected outside the territorial limits of the state" into New Jersey for disposal.[157] The New Jersey legislature said it was motivated by environmental protection: to preserve its land.[158] It claimed an environmental purpose to assure public health and safety, which is an area recognized traditionally as within a state's authority in the absence of conflicting federal regulation.[159] The New Jersey Supreme Court agreed, concluding the statute was "designed to protect, not the State's economy, but its environment."[160]

However, the U.S. Supreme Court felt no need even to inquire into the New Jersey state legislature's motive or purpose.[161] Justice Stewart's majority opinion argued that "the evil of protectionism can reside in legislative means as well as legislative ends."[162] The Court held the legislation discriminatory on its face. It fell subject to a "virtually *per se* rule of invalidity" applied to cases of "simple economic protectionism."[163] Finding solid waste to be "an object" of "interstate trade,"[164] the Court struck down the state's attempt to "isolate itself in the stream of interstate commerce from a problem shared by all."[165] The Court forced New Jersey to accept Philadelphia's waste into its landfills.

Having committed itself to this course in *Philadelphia*, the path dependence of *stare decisis* led the Court to extend its holding in various directions in future cases, including: overturning state government attempts to restrict *hazardous waste*,[166] striking down *local government* attempts to restrict out-of-state waste,[167] voiding

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Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation, 28 Ecology L.Q. 509, 515 (2001).

[156] 437 U.S. 617 (1978).

[157] 1973 N.J. Laws, ch. 363; N.J. Stat. Ann. § 13:1I-10 (West Supp. 1978) (quoted in Philadelphia v. New Jersey, 437 U.S. at 618).

[158] *See* 1973 N.J. Laws, ch. 363; N.J. Stat. Ann. § 13:1I-10 (West Supp. 1978) (quoted in Philadelphia v. New Jersey, 437 U.S. at 625).

[159] The traditional state prerogative to protect public health and safety formed the basis of Justice Rehnquist's dissenting opinion. *See infra* text accompanying note [209].

[160] Philadelphia v. New Jersey, 437 U.S. 617, 625 (1978) (describing New Jersey Supreme Court opinion).

[161] *Id.* at 626 ("This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case.").

[162] *Id.*

[163] *Id.* at 624. It is quite possible that the New Jersey legislature had "mixed motives," including (1) environmental protection of its land and (2) economic protection of its local industries who needed landfill space. *See* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018). However, it was duplicitous for the Court to reject both the New Jersey legislature's and its highest court's findings of at least a "primary motive" of environmental protection. *Cf. id.* at 1134-36 (examining areas of law using "primary motive" as a standard). Essentially, the Court assumed an illicit motive of economic protectionism without bothering to find any evidence for it. *See id.* at 1164 ("The law often avoids consideration of motives, and this impulse is even stronger when motives are mixed.").

[164] 437 U.S. at 622.

[165] *Id.* at 629.

[166] Chemical Waste Management Inc. v. Hunt, 504 U.S. 334 (1992).

[167] Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't Natural Resources, 504 U.S. 353 (1992).

differential taxes and charges for out-of-state waste disposal,[168] and upsetting *a flow-control statute* for waste disposal covering a local area when private business firms were involved.[169] In all of these cases, the states struggled, in the absence of preemptive congressional action, to address environmental waste problems within the constraints of the Court's constitutional commodification.

Finally, almost thirty years after *Philadelphia v. New Jersey*, in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,[170] the Court upheld a local government flow-control scheme that involved only "facilities owned and operated by a state-created public benefit corporation" rather than a private business firm.[171] At last, a work-around was found to the Court's interventions.[172]

Uncertainties remain, however. Interstate disposal of hazardous waste from fracking operations has become an issue, and a question has been raised about whether Ohio, for example, may restrict or prohibit transportation of waste from Pennsylvania.[173] In a back-to-the-future moment, New Jersey's governor in 2014 vetoed a bipartisan bill banning disposal of out-of-state fracking waste, including from high-fracking Pennsylvania![174] Fresh water scarcity, which is likely to be exacerbated by climate change, will provoke questions about whether states may protect their water resources from commercialization and export.[175] And the Court appears divided on whether states may restrict commerce in live bait to protect native fish and fisheries, a conflict which may extend to other resource and species preservation measures.[176]

The Court's treatment of waste in the *Philadelphia* line of cases presents an

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[168] Oregon Waste Systems, Inc. v. Dep't Environmental Quality, 511 U.S. 93 (1994).

[169] C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994).

[170] 550 U.S. 330 (2007).

[171] *Id.* at 334.

[172] This work-around remains a little rickety. *See infra* note 200.

[173] *See* Eric Michel, *Note*, *Discrimination in the Marcellus Shale: The Dormant Commerce Clause and Hydraulic Fracturing Waste Disposal*, 88 CHI.-KENT L. REV. 213 (2012) (arguing that a proposed bill in Ohio provided for a two-tiered charge for in-state and out-of-state fracking waste would be unconstitutional).

[174] *Gov. Christie's Veto of Fracking Waste Ban Is Toxic for N.J.*, TIMES OF TRENTON (editorial), Aug 12, 2014, https://www.nj.com/opinion/index.ssf/2014/08/editorial_gov_christies_veto_of_fracking_waste_ban_is_toxic_for_nj.html.

[175] *See* Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV. 131 (2011) (arguing against treating water as an article of commerce and suggesting various alternative frameworks); Jesse Reiblich & Christine A. Klein, *Climate Change and Water Transfers*, 41 PEPP. L. REV. 439 (2014). In one case, the Court struck down a state law restricting the interstate use of water resources on dormant Commerce Clause grounds. Sporhase v. Nebraska, 458 U.S. 941 (1982). Justice Rehnquist dissented, writing that in his view "a State may so regulate a natural resource as to preclude that resource from attaining the status of an 'article of commerce' for the purposes of the negative impact of the Commerce Clause." *Id.* at 963 (Rehnquist, J., dissenting). *But see also* Tarrant Regional Water Dist. v. Herrmann, 569 U.S. 614, 639-40 (2013) (upholding a state compact that prohibited export of water against a dormant Commerce Clause challenge). Future cases will likely turn in part on whether courts consider "water as a market commodity" or "water as a natural resource." Klein, *supra*, at 12-18.

[176] *Compare* Hughes v. Oklahoma, 441 U.S. 322 (1979) (striking down a statute forbidding the export of minnows) *with* Maine v. Taylor, 477 U.S. 131 (1986) (upholding a statute prohibiting imported baitfish in order to protect natural resources in wildlife).

example of constitutional commodification. Relying on the negative Commerce Clause,[177] the Court conceived of waste as a commodity, and treated trafficking in it as subject to the commercial market norms we have identified: *consumerism*, insofar as the Court refused to acknowledge that waste, or its disposal, might implicate anything of non-instrumental value; and *atomism*, insofar as the Court focused only on the transaction between the party that wanted to dispose of its waste and the party that would provide the disposal, without regard for the way many such transactions in the aggregate could implicate others' interests.[178] Further, the Court implicitly embraced unregulated commercial markets as the proper way to treat waste. Justice Stevens' majority opinion in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*[179] made plain the Court's insistence that the market is the only place for waste: "Solid waste, even if it has no value, is an article of commerce."[180] The Court ignored the collective good of a clean and safe natural environment.

To see that the Court was not inexorably led to commodify waste, consider three other ways to conceive of the problem of waste disposal: first, as analogous to quarantine laws, which had traditionally been taken to be exceptions to the negative Commerce Clause; second, and relatedly, as an environmental problem with waste figuring as a source of pollution; and, third, as implicating land use, and so a problem of land preservation. Chief Justice Rehnquist, who dissented in each of the Court's forays into this area during his time on the Court, advanced arguments that gave voice to each of these objections.[181] On any of these three alternative arguments, the

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[177] *See supra* note 155. For an early leading case (again in Philadelphia) establishing the "dormant" or negative power of the Commerce Clause, see *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 291 (1851). The roots of negative Commerce Clause jurisprudence trace to Justice Marshall's decision in *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824). *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE 15-19, 23-25 (1937). Ironically in this context, the metaphor of the "dormant" Commerce Clause first appeared in an opinion by Marshall that upheld the constitutionality of a state statute that allowed the damming of a navigable stream. Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

At present, the so-called "dormant" Commerce Clause is hardly passive and certainly not sleeping, so it is more accurate to refer instead to the "negative" Commerce Clause. This usage recognizes that reference to the "dormant" is a "bastardization" of Justice Marshall's original use of the word. Julian N. Eule, *Laying the Dormant Commerce Clause To Rest*, 91 YALE L.J. 425, 425 n.1 (1982). It also makes clear that "what remains dormant is Congress, and not the commerce clause" and follows the suggestion that "the clause's limitation on state regulations can certainly be termed implicit, silent, or negative, but dormancy does not accurately define the situation." *Id. See also* Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93, 95, 98-99, 108 (1994) (referring to the "negative Commerce Clause").

[178] *See supra* Part I.B.1.

[179] 504 U.S. 353 (1992).

[180] *Id.* at 359.

[181] In historical order, see *Philadelphia v. New Jersey*, 437 U.S. 617, 630-32 (1978) (Rehnquist, J., dissenting) (arguing that "health and safety" considerations supported New Jersey's right to regulate solid waste disposal and likening New Jersey's protective legislation to quarantine laws); *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353, 368, 373 (1992) (Rehnquist, J., dissenting) (arguing that the waste regulation was "at least arguably directed to legitimate local concerns, rather than improper economic protectionism," and finding "no reason in the Commerce Clause . . . that requires cheap-land States to become the waste repositories for their

relationship between waste disposal and collective interests is made plain: public health, the preservation of the natural environment, and common land—all of these are collective goods.[182]

Our review of the campaign finance cases has shown that even if political speech was not degraded in any single economic transaction, spending on political speech as a whole implicated the collective good of democratic self-government, and so warranted treatment different from what the commercial market offers.[183] A similar insight follows when one considers waste disposal in the aggregate. Waste is not a good whose value is corroded when it is subject to commercial exchange. If anything, waste has negative value—it is better conceived of as a "bad" rather than a "good," or a byproduct of commerce rather than commerce itself.[184] Waste itself

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brethren, thereby suffering the many risks that such sites present"); *Chemical Waste Management Inc. v. Hunt*, 504 U.S. 334, 349 (1992) (Rehnquist, J., dissenting) ("States may take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators. . . . Taxes are a recognized and effective means for discouraging the consumption of scarce commodities—in this case the safe environment that attends appropriate disposal of hazardous wastes."); *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 108, 110, 112 (1994) (Rehnquist, C.J., dissenting) ("The State of Oregon responsibly attempted to address its solid waste disposal problem through enactment of a comprehensive regulatory scheme for the management, disposal, reduction, and recycling of solid waste. For this Oregon should be applauded. . . . [The Court stubbornly refuses to acknowledge that a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in cases such as these. . . . [S[olid waste . . . it is not a commodity sold in the marketplace; rather it is disposed of at a cost to the State.").

[182] The Court's previous quarantine cases are particularly noteworthy because they had upheld a state government's authority to restrict interstate trade or transportation to protect public health. A number of these cases involved state restrictions on diseased or uninspected cattle or sheep. *See, e.g.*, Mintz v. Baldwin, 289 U.S. 346 (1933); Asbell v. Kansas, 209 U.S. 251 (1908); Rasmussen v. Idaho, 181 U.S. 198 (1910). State authority in this area is now preempted by federal statutes giving the Department of Agriculture regulatory authority to control in livestock. *See, e.g.*, Texarkana Livestock Comm'n v. USDA, 613 F. Supp. 271 (E.D. Texas 1985) (resolving dispute regarding cattle disease regulation). Similarly, states had authority to regulate interstate commerce in fruit for the same reason, namely, prevention of disease. *See, e.g.,* Sligh v. Kirkwood, 237 U.S. 52 (1915). Federal regulation has also preempted this area of quarantine regulation. *See, e.g.*, Oregon Washington R.R. v. Washington, 270 U.S. 87 (1926) (federal preemption of state regulation to prevent migration of weevil-infected hay).

The Court could easily have followed the same course with respect to waste disposal. It could have upheld state authority to regulate interstate commerce in waste which, like diseased livestock and fruit, can have consequences for public health. *See also* Blair P. Bremberg & David C. Shor, *The Quarantine Exception to the Dormant Commerce Power Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases*, 21 N.M. L. REV. 63 (1991) (arguing that states in some cases failed to present sufficient factual evidence of risks to public health to justify regulation). *Cf. also* Gwendolyn J. Gordon, *Environmental Personhood,* 43 COLUM. J. ENVTL. L. 1, 61 (2018) (reviewing various state regulations protecting land).

[183] *See supra* Part II.

[184] There are exceptions, of course, when considering how to use "waste" as new "inputs" as commodities for new manufacturing or use, such as in contemporary schemes to promote a "circular economy" in which "waste" is instead reprocessed, reused, or recycled into products or services rather than disposed of or otherwise discarded. *See, e.g.*, *The Circular Economy: Regulatory and Commercial Law Implications*, 46 ENVTL. L. REP. NEWS & ANALYSIS 11009 (2016) (panel discussion); Felix Preston, A Global Redesign? Shaping the Circular Economy (Chatham House briefing paper, 2012), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy%2C%C20Environ

undergoes no degradation where one party pays to have it transferred to another. It is already designated as "waste"! Waste disposal in the aggregate, however, threatens degradation of the natural environment and in many cases human health as well. Just as the collective good of self-government militates in favor of restrictions on the amount of political speech one can pay to disseminate, so the collective good of environmental protection militates in favor of restrictions on the amount of waste landfill operators may accept or other regulations designed to reduce the production of waste or to channel its disposal, recycling, and reuse.[185]

There is a second way in which the Court's commodification of waste is like its commodification of political speech. Recall in the campaign finance cases that the Court insisted, *without any empirical support*, that the First Amendment's aim of having the most diverse speech reach the greatest number of people necessarily ruled out restrictions on independent spending.[186] In the waste cases decided under the negative Commerce Clause, the Court similarly presumes that striking down discriminatory state regulation of waste is necessary to ensure a national market for waste disposal, which it seems further to assume is likely to result in the least-cost solution to waste disposal problems.[187]

Here too, the Court relies on an empirical premise that may prove false. The economic analysis of waste is not simple, and the Court's assumptions are most likely wrong.[188] In the long run, treating waste as a commodity to be freely traded

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ment%C20and%20Development/bp0312_preston.pdf. Note that this regulatory approach aims specifically at encouraging the design of manufacturing, distribution, service, supply, and other economic relationships as *not treating waste as a commodity to be disposed of or discarded* but rather as *new resources that circulate as standard economic commodities* that have positive or at least neutral value. The European Union has enacted the first systemic approach to move toward a circular economy vision. *See generally* European Commission, Report on the Implementation of a Circular Economy Action Plan, COM (2017) 33 final (Jan. 26, 2017), http://ec.europa.eu/environment/circular-economy/implementation_report.pdf.

[185] *Cf.* Philadelphia v. New Jersey, 437 U.S. 617, 629-33 (1978) (Rehnquist, J., dissenting) (arguing that under the Court's logic, New Jersey would have to let solid waste flood in from other states, as long as there was a private landfill willing to accept it, and suggesting that this outcome impermissibly trod on the state's prerogative to protect the "health and safety" of its citizens).

[186] *See supra* notes 94-98 and accompanying text.

[187] *See* Philadelphia v. New Jersey, 437 U.S. at 623-24 (focusing on the national economy as the relevant "unit" of legal analysis).

[188] *See, e.g.,* Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481 (1995) (contesting the idea that a "national free market in solid waste disposal" provides the most efficient economic solution, and proposing other solutions such as state compacts); Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487 (2003) (providing an economic analysis casting doubt on the assumption that a national market in waste is more efficient than other solutions that may be advanced by state and local government). *But see* William J. Cantrell, *Cleaning Up the Mess:* United Haulers, *the Dormant Commerce Clause, and Transaction Costs Economics*, 34 COLUM. J. ENVTL. L. 149, 150 (2009) (arguing for "judicial enforcement of the dormant Commerce Clause as a viable judicial option for economically efficient business regulation").

Economic approaches are also not unidimensional with respect to policy preferences. *See* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1194 (1999) (describing federal preemption and

and transported for least-cost disposal or reprocessing may not provide the most efficient outcome. Instead, *increasing* the cost of waste disposal may enhance efforts to decrease the total amount of waste—encouraging efficient design of production processes, package redesign, and recycling programs.[189] Moreover, different types of waste—hazardous waste, for example, as opposed to nonhazardous solid waste—may involve different economic considerations, which in turn may call for different regulatory approaches.

Our argument here is *not* that we oppose creative market-trading techniques that use *legislative* commodification as a policy tool. The advent of "environmental trading markets" has provided significant innovations in dealing with many environmental challenges, including: controlling acid rain, reducing overfishing, preserving endangered species, and addressing global climate change.[190] We instead argue that Supreme Court is not the appropriate branch of government to make these kinds of determinations. Environmental regulation is complex, relying on many different variables, and the Court is simply not in the best institutional position to decide how it should be done.[191]

Given the possibility and even the likelihood that other regulations would better deal with the problem of environmental waste, the Court's laissez-faire approach is unwarranted. The Court's lack of empirical support for its policy preference belies an implicit zeal for commercial markets.[192] In declaring waste an object of commerce, the Court effectively commodifies parts of the natural environment. It licenses an atomistic and consumerist approach to waste disposal notwithstanding the fact that a commercial market in waste may threaten to undermine the collective good of environmental protection.[193] Nothing in the Constitution or previous

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negative Commerce Clause cases as divided between judges who favor Coasian free-market solutions and judges who favor Pigovian regulation of externalities).

[189] *See supra* note 185. *Cf.* David M. Driesen & Amy Sinden, *The Missing Instrument: Dirty Input Limits*, 33 HARV. ENVTL. L. REV. 65 (2009) (arguing for charges on "dirty inputs" at the front-end of manufacturing or distribution processes as another alternative).

[190] *See* James Salzman & J. B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000) (describing these methods and finding that they often require different "currencies" other than money to accomplish effectively). *See also* Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 152 (2019) (describing an historical "transition away from 'command-and-control' regulation, a somewhat pejorative term for prescriptive rules, to market-leveraging approaches that employ price- or quantity-based mechanisms to force polluters to internalize the costs of their environmental externalities and thus reduce pollution more efficiently"); Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN. L. 1, 13 tbl.1 (2015) (offering a taxonomy of environmental regulation tools, including emissions trading markets and market-leveraging strategies, for both public law and private governance).

[191] *See* Paul R. Kleindorfer & Eric W. Orts, *Informational Regulation of Environmental Risks*, 18 RISK ANALYSIS 155 (1998) (recommending that legislative policy-making should begin with the "problem context" and then investigate of number of different regulatory strategies to find the best and most politically viable solution).

[192] A zeal for economics does not always translate into good economics. Justices of the Supreme Court do not seem particularly well qualified either personally or institutionally to make economic policy, and this is another reason that questions of environmental commodification should be left to legislators who may, unlike courts, consult qualified economists as part of the policy-making process.

[193] *Cf.* M. Neil Browne, et al., *The Struggle for the Self in Environmental Law: The Conversation*

precedents required the Court in *Philadelphia v. New Jersey* to commodify waste. Another case decided about a decade later expressed a better view. In *Maine v. Taylor*,[194] the Court said: "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values."[195]

B. *The Constitutionalization of Waste*

Like the Court's treatment of money and political speech, its jurisprudential treatment of waste disposal exemplifies the other side of the coin of constitutional commodification as well. As we have seen, the counterpart of *commodification by constitutional implication* is the *constitutionalization of a commodity*, where the Court confers upon a commodity the kind of protection from regulation that traditional constitutional values receive.[196] In its waste disposal cases, the Court overturns regulations in part because it treats waste itself as worthy of constitutional protection.

Of course, one might contend that any time the Court invalidates a regulation on negative Commerce Clause grounds it is constitutionalizing commodities—protecting them from regulation through the Constitution. What is different and problematic in the *Philadelphia* line of cases is that waste is not obviously, and not even plausibly, a true commodity, and whatever commodity may be at stake is constitutionalized at the unjustified expense of a collective good.

Consider first that to characterize waste as a commodity is to conceive of it as a good that is bought and sold. But waste disposal does not really involve the buying and selling of waste. The landfill operator does not pay for the use or ownership of the waste itself, but is instead paid to take and dispose of the waste. Justice Rehnquist argued as much,[197] and he was right. To say "waste is a good" simply doesn't make sense. The Court accomplished the commodification of human detritus, but to no clear end or purpose.

Perhaps, one might argue, the relevant commodity is not waste, but the service of disposing of it. Indeed, the Court moved in just this direction in *C & A Carbone, Inc. v. Clarkstown*.[198] Recognizing that the conclusory characterization of "waste" as "an article of commerce" had begun to wear thin, Justice Kennedy's majority opinion explained that "what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the

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Between Economists and Environmentalists, 18 UCLA J. ENVTL. L. & POLICY 335, 370 (2001) (arguing against atomism "because so many arguments on behalf of environmental regulation presume that an appeal to community is an appeal to the connective tissue that links one human to another, one generation to another, and one species to another. The resulting holism is referencing an entity that transcends society as just a collection of individual egos.")

[194] 477 U.S. 131 (1986).

[195] *Id.* at 151-52 (upholding state statute to protect its own wildlife).

[196] *See supra* text accompanying notes 15-19.

[197] *E.g.,* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res., 504 U.S. 353, 369 n.1 (1992) (Rehnquist, J., dissenting).

[198] C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994).

article of commerce is not so much the waste itself, but rather the service of processing and disposing of it."[199]

Thinking of waste disposal as a "service" certainly seems more accurately descriptive than thinking of waste as a "good," but the most apt characterization is that neither waste nor its disposal is a commodity at all. One may instead view the waste problem from the perspective of its site of disposal. From this perspective, waste is usually disposed in landfills or incinerated. To the extent that landfills and incinerators threaten to harm the environment (e.g., through hazardous leakage or rain), waste is from this perspective a form of *pollution*. Landfill space is scarce, dumping pollutes the land, incineration pollutes the air, and both methods of disposal can put water supplies at risk. It therefore seems perfectly reasonable to conceive of laws regulating the quantities, processing, or cost of waste disposal as aiming at environmental protection. Traditionally, state regulation of the environment had been respected as within the state's traditional powers and authority in the absence of congressional preemption. In its negative Commerce Clause waste cases, the Court mistakenly—and in an activist mode—departed from this tradition.

In retrospect, Justice Worrall Mountain of the New Jersey Supreme Court had the better argument. He argued that "commodities or substances injurious to the public health are not 'articles of commerce' within the meaning of the constitutional phrase. Their lack of market value coupled with their immediate threat to human health dictates that such substances not be afforded the protection of the Commerce Clause."[200] He emphasized New Jersey's interest in "the preservation of the environment and the protection of ecological values."[201] In support, he quoted an old but still relevant case in which Justice Oliver Wendell Holmes insisted on his version of the collective good of the natural environment: "The state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[202]

The U.S. Supreme Court went wrong in these cases because it characterized waste as a commodity, or waste disposal as a service, and then applied the machinery

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[199] *Id.* at 390-91. To consider the cases as "services" of waste disposal rather than transactions in waste as "goods" weakens the negative Commerce Clause analysis because the focus shifts to the "disposal" within a state rather than the transportation of what is to be "disposed of" from outside of the state. This is essentially the "interpretative out" that the Court developed for itself in *United Haulers*: exempting states from negative Commerce Clause peril when they provide a public service in waste disposal. *See* United Haulers Ass'n v. Oneida–Herkimer Solid Waste Management Authority, 550 U.S. 330, 334 (2007*)* ("The only salient difference [between *United Haulers* and *Carbone*] is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant.") Note that this solution is antithetical to the idea that the private provision of services may often prove more efficient than government-provided facilities and services. The constitutional work-around therefore appears to have had the unintended consequence of requiring a government solution to the problem rather than allowing for regulatory flexibility to include private operators.

[200] Hackensack Meadowlands Dev. Comm'n v. Mun. Sanitary Landfill Auth., 348 A.2d 505, 513 (N.J. 1975), *vacated and remanded sub nom.* Philadelphia v. New Jersey, 430 U.S. 141 (1977).

[201] 348 A.2d at 516.

[202] *Id.* at 518-19 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

of the negative Commerce Clause to strike down state regulation.[203] If the Court had characterized waste as *pollution* rather than a commercial commodity, it would have been much more likely to come to the right result. By instead constitutionalizing waste as a commodity, the Court extended greater protection to waste than to the environment that the waste threatens. In doing so, the Court undermined the ability of state legislatures to protect the collective good of the natural environment.[204]

Again to be clear, we do not mean to say that legislative approaches that employ market-based regulatory methods to address environmental problems are suspect.[205] It is perfectly legitimate and acceptable, in our view, for state legislatures or Congress (or even private actors) to create new markets for waste disposal, especially where doing so serves environmental ends such as waste minimization or elimination.[206] The problem is that the Court in its "waste is commerce" cases overstepped the bounds of its institutional competence and eroded the authority of state legislatures. The Court should tread more carefully in the likely event that these kind of cases arise in the future, such as in efforts by states to protect themselves from such environmental challenges as fracking waste, depredation of water resources, and the transformation of energy production and distribution.[207]

CONCLUSION: PROTECTING COLLECTIVE GOODS FROM THE COURT

We began by positing that *collective goods* exist, and they include institutions such as our democratic government and the environmental endowments of land, air, water, and atmosphere that support our lives and those of future generations. These collective goods are worth protecting.

We posited further that the long-term social and economic dynamic known as *commodification* can threaten collective goods. Democratic self-government is inconsistent with its commodification. To the extent that our government is or becomes "bought and paid for" by its wealthiest citizens, it transforms into an

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[203] Note also that the exception allowed so far by the Court in *United Haulers* appears to be a relatively narrow one. The Court emphasized that the case turned on the fact that the flow-control management system relied on a public-owned facility. 550 U.S. at 334, 339-45. Presumably, private waste disposal businesses will continue to have causes of action against discriminatory treatment in other contexts. *But see* 550 U.S. at 349 (Thomas, J., concurring) (arguing that he would "discard the Court's negative [or dormant] Commerce Clause jurisprudence" entirely).

[204] A former prosecutor pointed out an interesting connection between our two case studies in a criminal case that involved the conviction of a state representative who was involved in organizing illegal campaign contributions to a U.S. Senator in order to stop federal waste regulation that would have allowed states to restrict interstate disposals. See United States v. Sarafini, 7 F.Supp.2d 529 (M.D. Pa 1998), *aff'd*, 167 F.3d 812 (3d. Cir. 1999). This case illustrates that constitutional commodification may have feedback loops with commodification in one area (campaign finance) encouraging commodification in another (environmental protection), and vice versa.

[205] *See supra* note 191 and accompanying text.

[206] *See* Light & Orts, *supra* 191 (reviewing market-based regulatory methods applicable to both governments and private firms).

[207] *See supra notes* 174-76 and accompanying text (fracking and water issues); Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129 (2015) (energy law and policy).

oligarchy or plutocracy rather than a collective project of self-government.[208] Democratic government is a collective good in the sense that mutual participation of all citizens on at least a relatively equal basis defines it.[209]

Many environmental collective goods also survive only if they are not reduced to commodities. In addition to our opening example of national parks, consider the natural gifts of potable water and breathable, healthy air. Consider the wealth of biodiversity that human processes of economic commodification now threaten to destroy. Consider the atmosphere—the thermostat of our planet that has now become unstable due to the massive scale of commodified economic activities of production, distribution, and consumption.[210]

In this Article, we have focused on the tensions that can arise between collective goods and expanding commercial commodification. If there is hope in preserving collective goods such as democracy and a healthy global environment, it lies ultimately in the processes of government. Only in government—and not unrestrained commercial markets—can the existential perils to the collective goods of humanity get properly managed. We must place our faith and efforts, then, in government and in law. Again, this does not mean that economic markets cannot be used and channeled—and new regulatory markets created—to address challenges of collective goods. Markets to preserve collective goods, though, must serve these ends, and not the undirected aims of unmoored commercial markets.

Thus our target for criticism here has not been government in general, but only one of its branches—the Supreme Court—and only a discrete but important set of cases that it decides. The Court, we have argued, does not tend to take a wide view of these larger problems of collective goods. Its docket is driven by petitions from interested parties, many of them business firms or others seeking immediate economic advantage. In this posture, the Court should defer, when possible, to Congressional and state legislation. It should seek to empower rather than to hobble the modern democratic processes of government. One primary lesson we draw from the jurisprudence of "money is speech" and "waste is commerce" is to plead with the Court to restrain itself. [211] When asked to overturn a legislative effort to protect

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[208] In the lofty words of Abraham Lincoln, we seek "a government of the people, by the people, [and] for the people." Gettysburg Address (Nov. 19, 1863), https://www.britannica.com/event/Gettysburg-Address.

[209] *See, e.g.,* ROBERT A. DAHL, ON DEMOCRACY 37-40 (2d ed. 2005) (Ian Shapiro ed.) (emphasizing the importance of equal and effective participation in democracy).

[210] *See* JAMES GUSTAVE SPETH, THE BRIDGE AT THE EDGE OF THE WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY 17-45 (2008) (surveying the eight main global environmental dangers). *See also* WILLIAM NORDHAUS, THE CLIMATE CASINO: RISK, UNCERTAINTY, AND ECONOMICS FOR A WARMING WORLD (2015); DAVID W. ORR, DOWN TO THE WIRE: CONFRONTING CLIMATE COLLAPSE (2009).

[211] *See* Michael J. Gerhardt, *Constitutional Humility*, 76 U. CINN. L. REV. 23 (2007); Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee, Chief Justice of the United States) (adducing the importance of deciding cases with humility and on the narrowest possible grounds). *See also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004); Marc

a collective good, the Court should attend to whether its reasoning would unduly elevate a commodity or degrade the collective good. In other words, the Court should resist announcing solutions that rely on methods of constitutional commodification.

A minimal response to our plea for judicial modesty would ask the Court assiduously to consider the views of third-party advocacy groups concerned about the protection of collective goods (e.g., Common Cause, the Nature Conservancy, the Sierra Club, and other nonprofit organizations). Governments at the federal, state, and local level also have reason to take collective goods seriously. These groups can often alert the Court, as interveners or *amici*, to facts and legal arguments that expose threats or harms to collective goods beyond the immediate focus of competing litigants.

More substantively, the Court might consider retreating from its contemporary activist use of judicial review in collective goods cases. It could, for example, revive principles that defer to the elected, representative branches of government, such as in the political question doctrine[212] and the "clear mistake" standard of review.[213]

Surely, there will be many more cases implicating collective goods, and not only in the areas of constitutionalized democracy and the natural environment. For example, we believe that our account can offer illuminating critiques of *National Federation of Independent Business v. Sebelius*, which challenged the Affordable Care Act's individual mandate,[214] as well as the Court's school funding decisions.[215] In each of these areas, the Court focuses on individual interests while overlooking the collective goods at stake in public health and education, respectively. We believe that our account can also illuminate troubling dynamics in the Court's protection of commercial speech, union dues, trademarks for offensive speech, and gun ownership.[216] Our theory of collective goods and constitutional commodification

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Spindelman, *Toward A Progressive Perspective on Justice Ginsburg's Constitution*, 70 OHIO ST. L.J. 1115, 1126 (2009).

[212] *See, e.g.,* Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597, 599 (1976) ("[A] political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality."); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 101 (1988) (arguing against "judicial monopoly" of constitutional questions).

[213] RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 160 (2018) (under "the rule of clear mistake" the Court "would presume that legislators had found the legislation that they enacted to be constitutionally permissible and would hold such legislation unconstitutional only if the legislature had made a 'clear mistake' in constitutional reasoning"); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[214] 567 U.S. 519 (2012). Having found that the individual mandate violated the Commerce Clause, the Court nonetheless upheld it as a "tax" under Congress's taxing and spending authority. *Id.* at 574.

[215] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding Cleveland voucher program against an Establishment Clause challenge even though an estimated 80 percent of the participating schools were religious). Vouchers subject public education to market treatment. *See, e.g.*, Michael J. Trebilcock, Ron Daniels & Malcolm Thorburn, *Government by Voucher*, 80 B.U. L. REV. 205, 214 (2000) (describing the commodification concern with school vouchers).

[216] We leave elaboration of these applications for another day, but here are some brief suggestions.

Commercial speech might be limited to freedom to provide information for the collective good of efficient business and consumer markets. *Cf.* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 11 (2000) ("[C]ommercial speech should receive constitutional protection

stands to offer a unique and probing lens into many developing areas of law where commerce and the Constitution coincide.

It remains to be determined how courts, or the law more generally, should respond when collective goods are at stake. Here we can venture opinions only in a preliminary and tentative way, setting forth possibilities worthy of further thought and development.

One approach to protecting collective goods would rely on new legislation at all levels of government. In this connection, we celebrate and support experiments in what might be called *legislative commodification*. Unlike constitutional commodification, legislative approaches are *democratically adopted* and not imposed by an unelected Court. And indeed we are already seeing proposals of this kind in the areas of our two main case studies. Bills to provide public funding or individual matching funds to moderate the influence of money in political elections seem promising.[217] Creative market-based or market-leveraging approaches aimed at environmental protection are promising too.[218]

Legislative solutions are not likely to be sufficient, though, for legislators may face traps of potential capture,[219] majoritarian tyranny,[220] and loops of political control arising from the very campaign finance problems that we have identified.[221] A form of higher-lawmaking should therefore buttress quotidian democratic approaches.

The last few decades have seen exciting work identifying mechanisms for

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in order to safeguard 'the essential role that the free flow of information plays in a democratic society.'") (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996) (Stevens, J., plurality opinion)).

Requiring union dues does not seem to implicate the First Amendment, *contra Janus v. AFSCME,* 138 S. Ct. 2448 (2018), given that the union speaks for the collective good of employees whether or not they pay dues.

The Court might overturn or limit its decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017), where it extended trademark protection to ethnic slurs because that decision could lead to government approval of hateful or racist trademarks for groups such as the Ku Klux Klan or neo-Nazis that aim to undermine the collective goods of mutual tolerance and a commitment to democratic government.

Last but not least, a collective good of public safety and "domestic tranquility" could be invoked to cabin the expansion of an excessively individualized view of gun ownership rights under the Second Amendment. *See* Danielle Allen, *What Is Domestic Tranquility? It Is Not Being Gunned Down In Your House Of Worship*, WASH. POST, Oct. 28, 2018, at ("Achieving domestic tranquility is a constitutional issue. It is a moral issue. It is a matter of what, without discrimination in regard to our social identities, we all owe one another.") *But cf.* Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813 (2014) (arguing that we might make progress on the gun control debate if we were to retreat from casting it as a conflict between individual rights and others' interests). .

[217] *See, e.g.,* ACKERMAN & AYRES, *supra* note 95; LESSIG, *supra* note 82, at 264-75.

[218] *See, e.g.,* Salzman & Ruhl, *supra* note 191.

[219] *See, e.g.*, JANE MAYER, DARK MONEY (2017).

[220] *See, e.g.*, James Madison, Federalist 10 (expressing concern for "the violence of majority faction").

[221] *See, e.g.*, Sanford Levinson, *Electoral Regulation: Some Comments*, 18 HOFSTRA L. REV. 411, 411 (1989) (identifying as "almost certainly the most pressing first amendment issue of our time—the ability of the state apparatus to control the structure of elections whose main ostensible purpose is, of course, to select those who will become officials of the state apparatus")

higher-lawmaking.[222] While many of these seek to circumvent the constitutional amendment process, we are inclined to think that democratic government and the natural environment warrant protection through no less entrenching a device than formal amendments. Indeed, others have already proposed amendments protecting public rights in the environment,[223] enshrining equal political participation,[224] or specifically restraining the role of money in politics.[225] We do not assess the merits of these proposed amendments here, but recognize that they can, if carefully crafted, help to protect collective goods. In the past, other constitutional amendments have augmented other collective goods—such as those extending the franchise to ex-slaves, women, and younger people.[226] Although these amendments undoubtedly served the interests of the individuals who won citizenship and the right to vote, they also expanded the definition of the political "collective" of "We the People," thereby enhancing the diversity of political speech and improving the democratic quality of the collective good of self-government.[227] Other amendments to protect or augment other collective goods could be adopted as well.

In sum, our theory of collective goods and constitutional commodification makes plain the ways in which the Court has recently become overly enamored of commercial markets, using the Constitution both to extend their scope, and protect the means of exchange from regulation. More specifically, the Court has used the Constitution to commodify non-commodities, subjecting them to market norms that degrade them in the aggregate, or it has constitutionalized commodities, extending

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[222] Bruce Ackerman has reinvigorated thought about the possibility for higher lawmaking in his sprawling three- (soon to be four-) volume work illustrating successful movements to amend the Constitution through means other than those specified in Article V. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014). *See also* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 710 (2001); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); ROBIN L. WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 473 (2007); Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 814-20 (2003).

[223] *See, e.g.*, RACHEL CARSON, SILENT SPRING 12-13 (1962); John A. Chiappinelli, *The Right to A Clean and Safe Environment: A Case for A Constitutional Amendment Recognizing Public Rights in Common Resources*, 40 BUFF. L. REV. 567 (1992).

[224] *See, e.g.*, Madison365 Staff, *Reps. Pocan and Ellison Introduce Right to Vote Constitutional Amendment*, Madison365, Feb. 17, 2017, http://madison365.com/reps-pocan-ellison-introduce-right-vote-constitutional-amendment/.

[225] *See, e.g.*, Sen. Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235, 249-52 (2010). *Cf.* H.R.J. Res. 29, 113th Cong. (2013) (proposing a constitutional amendment that would deny for-profit corporations the right to spend their own money on political speech supporting or opposing candidates for office); see also Move to Amend's Proposed 28th Amendment to the Constitution, Move to Amend, https:// movetoamend.org/wethepeopleamendment. *But see* Senator Russ Feingold, *Upholding an Oath to the Constitution: A Legislator's Responsibilities*, 2006 WIS. L. REV. 1, 6 (2006) (describing his opposition to such an amendment); Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 28 (2014) (same).

[226] U.S. CONST. amends. XIV, XV, XIX, XXVI.

[227] *Id.* preamble.

to these commodities constitutional protection of a kind usually reserved for our most cherished constitutional rights. Unchecked, constitutional commodification risks undermining many important collective goods in which we all share.

Jurists, scholars, and commentators concerned with these developments have often sought to argue against them on the basis of the individual rights and interests that they implicate. This strategy, however, pits one set of individual interests against another (e.g., the right of the individual to speak as much as she would like on political matters versus the right of the individual to be heard). Or it sets one group of individual interests against the interests of a single state, where the former are taken to be presumptively weightier than the latter (e.g., the right of a private landfill owner to acquire and dispose of an unlimited amount of waste versus the right of a state to regulate the kind and quantity of waste it will allow to be disposed). These legal contests are far more lopsided than the adversarial posture may lead us to believe. On one side, there is an individual litigant who complains of a violated right. On the other stands the interests of all of us who share in the collective good that the litigation threatens. As stewards of these collective goods, we need to identify where and how they are threatened, and we need to find methods to protect them from erosion through constitutional commodification.