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Collective Goods and the Court: A Theory of Constitutional Commodification

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COLLECTIVE GOODS AND THE COURT: A THEORY OF CONSTITUTIONAL COMMODIFICATION

ERIC W. ORTS & AMY J. SEPINWALL*

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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 entirely 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 through its constitutional interpretations that glorify commodities and exalt individual rights at the expense of

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collective goods. Examining two lines of cases holding that “money is speech” and “waste is commerce,” this Article contributes a theoretical understanding of the nature of collective goods and their commodification through constitutional interpretation. It also makes recommendations for how the Court and our larger society should address these kinds of issues in the future.

TABLE OF CONTENTS

INTRODUCTION.....	639
I. A THEORY OF THE COMMODIFICATION OF COLLECTIVE GOODS	644
A. <i>Commodification in Historical Perspective</i>	644
B. <i>Commodification and Collective Goods</i>	646
1. <i>Market Individualism and Commodification</i>	647
2. <i>Commodification of Collective Goods</i>	649
C. <i>Constitutional Commodification in the Supreme Court</i>	653
II. MONEY IS SPEECH	654
A. <i>From Buckley to McCutcheon and Beyond</i>	655
B. <i>Individualist Approaches to Campaign Finance</i>	660
1. <i>Laissez-Faire Free Speech</i>	661
2. <i>Egalitarian Free Speech</i>	662
C. <i>Political Speech as a Collective Good</i>	665
D. <i>Commodification of the Collective Good of Political Speech</i>	668
1. <i>The Market for Political Speech</i>	669
2. <i>The Constitutionalization of Money</i>	670
III. WASTE IS COMMERCE	672
A. <i>From Philadelphia to United Haulers: Commodifying the Environment</i>	673
B. <i>The Constitutionalization of Waste</i>	681
CONCLUSION: PROTECTING COLLECTIVE GOODS FROM THE COURT	685

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

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 *W. POL. Q.* 351 (1977) (reviewing various economic conceptions including those of Mancur Olson and Paul Samuelson); *cf.* LESLIE GREEN, *THE AUTHORITY OF THE STATE* 207–09 (1988) (“shared goods”); JEREMY WALDRON, *Can Communal Goods Be Human Rights?*, in *LIBERAL RIGHTS* 339, 339–69 (1993) (“communal goods”); Andrei Marmor, *Do We Have a Right to Common Goods?*, 14 *CAN. J.L. & JURIS.* 213 (2001) (“common goods”); Joseph Raz, *Rights and Politics*, 71 *IND. L.J.* 27, 35–36 (1995) (“shared goods”); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 *REV. ECON. & STAT.* 387, 387–89 (1954) (“collective consumption goods”).

democracy to a regime of purchased loyalties and official actions procured only by bribery would corrupt this kind of government.

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 accomplishes these transmutations either by treating “contested commodities,”⁴ such as elements of the natural environment, as marketable, or by treating existing commodities, like money,⁵ as worthy of the same protection that it extends to non-market constitutional values, like speech. In other words, this kind of 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*. We also suggest remedies to this problem.

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 But we focus on two aspects of commodification that have gone unnoticed.⁷

2. *Buckley v. Valeo*, 424 U.S. 1, 262 (1976) (White, J., concurring in part and dissenting in part) (per curiam) (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, 1005 (1976) (“The Court told us [in *Buckley v. Valeo*], in effect, that money is speech.”); *infra* Part II.

3. *City of 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”); *infra* Part III.

4. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 1–15 (1996) (introducing and exploring the concept of “contested commodities”).

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 *AM. ECON. REV.* 304, 305 (1947); *see also* GEOFFREY INGHAM, *THE NATURE OF MONEY* 3–10, 15–37 (2004) (conceiving money as a “universal commodity” or a “neutral symbol” of all other commodities).

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* 3–15 (2010); *see also* Martha M. Ertman & Joan C. Williams, *Preface* to *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 1, 1–7 (Martha M. Ertman & Joan C. Williams eds., 2005).

7. *See infra* Part I.B.

First, much of the commodification literature contemplates the effects of marketization on *individuals* and the resources and experiences they need to live flourishing lives. For example, theorists worry that prostitution reifies female subordination⁸ and degrades sex among intimates.⁹ Child labor, human slavery, and the purchase and sale of vital organs such as kidneys provide other illustrations of the pernicious consequences of commodification on individuals.¹⁰ We share these worries, but we start here 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, we maintain, 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, and so no private person can or should exercise exclusive dominion over them. The commodification of collective goods necessarily overlooks, and may even betray, the interests of those who are not a party to the commercialized transactions.

A second reason that the commodification of collective goods warrants attention is that 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.¹¹ Protection of collective goods, however, may not always be considered adequately in two-party adjudications. Notably, the term “collective good” is nowhere to be found in Supreme Court jurisprudence,¹² and courts have generally been inhospitable to

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

9. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 154–55 (1993).

10. See e.g., SATZ, *supra* note 6, at 155–205.

11. Cf. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 127 (1976) (arguing with respect to the equal protection clause that “it is especially difficult to fit the vindication of group rights into the mold of the law suit”).

12. 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. City of New London*, 545 U.S. 469, 485 n.14 (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.

We do not mean to say that *the idea* of collective goods does not appear in the reasoning of some cases, as we discuss at various places in this Article. Our argument is that the Court should develop a better appreciation of collective goods in order to avoid commodifying them inadvertently and without the care and caution needed.

understanding constitutional protections as collective rights.¹³

Given the mismatch between collective goods and two-party adjudication,¹⁴ one might have expected the Court to act cautiously in many cases implicating collective goods, recognizing that Congress or state legislatures should address their disposition.¹⁵ For example, in our paradigmatic cases, the Court might have declined to expand the scope of constitutional protection for money when used for political speech, or declined to restrict the authority of the states to protect land when used as waste dumps.¹⁶ If anything, though, the Court has often taken the lead in cases widening the scope of commercial markets. It has commodified objects or activities whose value may be better captured non-monetarily, and it has elevated paradigmatic commodities such as money to constitutional status, and thereby insulated them from regulation motivated and informed by non-economic collective values.¹⁷

More formally, as we show here, the Court engages in what we call 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*,¹⁸ and we elaborate it primarily through the line of cases, beginning with *Buckley v. Valeo*,¹⁹ that equate money and political speech.²⁰

13. 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”); see also *infra* notes 122–128 and accompanying text. *But see* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (discussing the sense in which citizens have a “collective right” in freedom of speech). 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* x–xi (1991).

14. See U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defs. 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).

15. Another alternative, which often occurs at least in the Supreme Court, 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.

This consideration of collective goods suggests also that courts should defer to executive or independent administrative agencies when they act to protect them. Without making the argument at length here, we suggest that social decisions, generally speaking, to commodify what has previously been treated as a collective good should usually fall to democratically elected legislatures rather than the judicial branch.

16. See *infra* Parts II & III.

17. See *infra* Parts II & III.

18. For background on treating money as a commodity, see *supra* note 5.

19. 424 U.S. 1 (1976) (per curiam).

20. *Id.*; see also *infra* Part II.

Second, the Court sometimes treats collective goods as commodities whose value may be better captured non-monetarily. For example, beginning with *City of Philadelphia v. New Jersey*,²¹ 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.²² 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*. When the Court treats a collective good like any other item in commerce, it immunizes economic transactions involving this newly constitutionally protected commerce from certain kinds of regulation.

Although we believe in the significant social value of commercial markets, we raise a warning about constitutional commodification because it threatens essential 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 offers two theoretical innovations. First, it extends commodification theory in order to elucidate when and why the law’s treatment of collective goods risks problematic commodification. Second, our examination of constitutional commodification represents a theoretical contribution in its own right. Identifying the interpretive mechanisms through which the Court shifts market boundaries reveals why these developments are troubling both as a matter of substantive policy and institutional prerogative.

Our Article proceeds as follows. Part I briefly outlines 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 case studies that exemplify constitutional commodification. Part II reviews the line of cases that chart the Court’s recent march to an increasingly commodified conception of political speech and an ever greater insistence that any 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 Clause²³ that have restricted states from adopting

21. 437 U.S. 617 (1978).

22. See *infra* Part III.

23. U.S. CONST. art. I, § 8, cl. 3.

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 the traditional prerogatives and constitutional jurisdiction of state governments.

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

I. A THEORY OF THE COMMODIFICATION OF COLLECTIVE GOODS

In this Part, we consider historical and philosophical accounts of commodification to establish that they cannot track the unique harms arising from commodifying collective goods. We supplement these accounts and then examine how these theoretical discussions map onto the landscape of constitutional law.

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.”²⁴ 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 subjected more often to a political economy of “status” (e.g., systems of lords and serfs) rather than purchase and sale through commercial “contracts.”²⁵

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

24. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 71–80 (Beacon Press 2d ed. 2001) (1944); *see also* MARK BLYTH, *GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY* 3–16 (2002) (revisiting and updating Polanyi’s historical analysis).

25. *See* HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 165 (Beacon Paperback 1963) (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).

employment laws).²⁶ 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.²⁷ The general expansion of global markets and the potential for “backlash” against this expansion can also be understood in terms of a Polanyian “double movement” of market expansion and responsive regulation.²⁸

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.”²⁹ These regulatory approaches create markets designed to have positive outcomes, namely the reduction of various kinds of pollution, such as sulfur dioxide which causes acid rain, in a manner that minimizes the costs.³⁰ 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

26. POLANYI, *supra* note 24, at 79–80; *see also* BLYTH, *supra* note 24, at 1–7, 274–75 (extending Polanyi’s account of the “double movement” to contemporary political issues).

27. *See, e.g.*, Martin Kenney & John Zysman, *The Rise of the Platform Economy*, ISSUES SCI. & TECH., Spring 2016, at 61; *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, Essay, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL’Y REV. 309 (2016); Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501 (2016).

28. *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. *See* Ryan Calo & Alex Rosenblat, Essay, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017); Nicolas Colin & Bruno Palier, *The Next Safety Net: Social Policy for a Digital Age*, FOREIGN AFF., July/Aug. 2015, at 29. 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).

29. *See, e.g.*, Partha Dasgupta, *The Environment as a Commodity*, in ECONOMIC POLICY TOWARDS THE ENVIRONMENT 25, 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, 571 (2001) (providing an overview and assessment of various regulatory methods of “establishing markets in pollution rights”). The most recent innovation is a carbon fee and dividend approach, a version of which has been introduced in Congress. *See* *Senators Coons and Feinstein Introduce Climate Action Rebate Act of 2019*, EDF (July 25, 2019), <https://www.edf.org/media/senators-coons-and-feinstein-introduce-climate-action-rebate-act-2019> [<https://perma.cc/Y767-S7U7>].

30. 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); *see also infra* note 220 and accompanying text; *cf.* Christopher H. Schroeder, *Prophets, Priests, and Pragmatists*, 87 MINN. L. REV. 1065, 1090 (2003) (describing the acid rain trading program as a “success story,” but one that should not be overdrawn). *But see* Jody 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).

bad behavior. Pope Francis and others have adopted this critical attitude.³¹ 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.³² For example, economic desperation can make some people susceptible to exploitation by others, and that exploitation can prompt others to commodify themselves—e.g., by selling vital organs.³³ Second, distributing some resources, such as emergency healthcare, only according to one's ability to pay can lead to intolerable inequality.³⁴ Third, transacting in contested commodities can adversely affect our conception or valuation of individuals who bear a relationship to those commodities, such as in selling sex as a service, by creating a “domino effect.”³⁵

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

31. 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 those proposed for climate change regulation).

32. See SATZ, *supra* note 6, at 93–97 (identifying the harm of commodification in terms of exploitation or coercion).

33. See, e.g., Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Altruism Exchanges and the Kidney Shortage*, 77 *LAW & CONTEMP. PROBS.*, no. 3, 2014, at 289, 292 (noting that kidney transplant policy favors kidney donations since concerns about exploitation and commodification do not arise where the donor has altruistic motivations).

34. See MICHAEL WALZER, *SPHERES OF JUSTICE* 25–26 (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.”).

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

it perpetuates a conception of *all* people as objects of use for sex, women especially.³⁶ These are troubling consequences, but they all concern the impact of prostitution on individuals.

The problem of commodifying collective goods cannot be captured in these conceptual frameworks. 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 commercial 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.³⁷

First, commercial markets are normatively 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

36. Deborah Satz and Elizabeth Anderson resolutely argue that prostitution disproportionately and uniquely harms women. See ANDERSON, *supra* note 9; Satz, *supra* note 8, at 76–78, 85. Others note the rising trend of women buying men for sex too, and the objectification of all people that might result. See, e.g., Carol M. Rose, *Afterword: Whither Commodification?*, in RETHINKING COMMODIFICATION, *supra* note 6, at 402, 406 (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 rather gleefully”). But see Ann Lucas, *The Currency of Sex: Prostitution, Law, and Commodification*, in RETHINKING COMMODIFICATION, *supra* note 6, at 248, 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). Commodification of sex may therefore give rise to significant general concerns for 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.”

37. 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).

fit.³⁸ To treat something as an object of consumption is to conceive of its value mostly in instrumental terms.³⁹ Take, for example, our attitude toward breakfast cereals. Their value lies in the nutritional benefits and gustatory enjoyment they provide to us as individuals.

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.⁴⁰ 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.⁴¹

Atomism and consumerism both sustain and follow from what has been called the *coarseness* of commercial markets.⁴² We do not typically turn to these markets for social solidarity or spiritual uplift; still less do we conceive

38. See LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* (2003) (providing a historical account of the rise of consumer interests in the United States).

39. 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 102–20 (describing a relationship to commodities with intrinsic value as “incomplete commodification”).

40. See, e.g., ANDERSON, *supra* note 9, at 146.

41. See, e.g., Anna di Robilant & Talha Syed, *The Fundamental Building Blocks of Social Relations Regarding Resources: Hohfeld in Europe and Beyond*, in *THE LEGACY OF WESLEY HOHFELD: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES* (Shyam Balganes, Ted Sichelman & Henry Smith eds., forthcoming 2019); see generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917) (offering a systematic analysis of the normative relations individuals bear to one another, including those that arise with respect to particular goods); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913) (same).

42. See, e.g., ALBERT O. HIRSCHMAN, *RIVAL VIEWS OF MARKET SOCIETY* 105–39 (1986) (contrasting the idea of “doux commerce,” which posits that increases in market activity promote a peaceful society and better manners, with the “self-destruction thesis,” which argues that the pursuit of self-interest depletes the moral foundations of society by discouraging cooperation); Lewis Friedland et al., *The Politics of Consumption/The Consumption of Politics*, 611 *ANNALS AM. ACAD. POL. & SOC. SCI.* 6, 9 (2007) (aligning coarseness with an individual orientation); Julia D. Mahoney, *The Market for Human Tissue*, 86 *VA. L. REV.* 163, 205 (2000) (“The market has been lauded as a promoter of peace and progress and derided as a coarsening influence, one that encourages its participants to value financial returns at the expense of community and spirit.”); cf. 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) (“In every phase of Western tradition, there is a conception of virtue . . . to which the spread of exchange relations is seen as presenting a threat.”).

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.⁴³ 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.⁴⁴ Fireworks displays in municipal parks, for example, 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 a forest used for hiking, qualify as public goods for the same reason.⁴⁵

43. Cf. Shirley Woodward, *Debt to Society: A Communitarian Approach to Criminal Antiprofit Laws*, 85 GEO. L.J. 455, 486 (1997) (“The market is an amoral venue that provides rewards and incentives independently of the moral worth of the activity involved.”).

44. See, e.g., Paul A. 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, 89 (Michael Szenberg et al. eds., 2006) (crediting Samuelson for the insight); see also Tyler Cowen, *Introduction to PUBLIC GOODS AND MARKET FAILURES: A CRITICAL EXAMINATION* 1, 3 (Tyler Cowen ed., 1992) (using similar terminology); Tyler Cowen, *Public Goods*, LIBR. ECON. & HIST., <http://www.ecolib.org/library/Enc/PublicGoods.html> [<https://perma.cc/2KAD-EMPF>] (“[N]onexcludability 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.”).

45. See WILLIAM D. NORDHAUS, *MANAGING THE GLOBAL COMMONS: THE ECONOMICS OF CLIMATE CHANGE* 3 (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 SCI. 1243, 1244 (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).

Much of the economics literature is agnostic about the intrinsic value of public goods.⁴⁶ Thus the Grand Canyon⁴⁷ and bald eagles⁴⁸ might be taken to be public goods, but so too might municipal waste collection⁴⁹ and national defense.⁵⁰ 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.⁵¹ It is for this reason that the disposition of public goods falls to the government,⁵² and partly for this reason that nation-states exist.⁵³ Or so the standard economic story goes.⁵⁴

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).⁵⁵ 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

46. See, e.g., Gary North, *The Fallacy of "Intrinsic Value,"* FOUND. FOR ECON. EDUC. (June 1, 1969), <https://fee.org/articles/the-fallacy-of-intrinsic-value/> [<https://perma.cc/QMB8-YSY7>] (quoting what the author takes to be the words of 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.").

47. See, e.g., ROBERT SERRANO & ALLAN M. FELDMAN, *A SHORT COURSE IN INTERMEDIATE MICROECONOMICS WITH CALCULUS* 353 (2d ed. 2018).

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

49. See, e.g., George Klosko, *The Natural Basis of Political Obligation*, in *NATURAL LAW AND MODERN MORAL PHILOSOPHY* 93, 103 (Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul eds., 2001).

50. 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*.").

51. This is, of course, a restatement of "the tragedy of the commons." See *supra* note 45.

52. See, e.g., Joseph Heath, *Three Normative Models of the Welfare State*, PUB. REASON, Dec. 2011, at 13, 26–28.

53. See PAUL D. MILLER, *ARMED STATE BUILDING: CONFRONTING STATE FAILURE, 1898–2012*, at 44 (2013) ("The performance of functions and provision of public goods is how a state enacts its claim to legitimacy . . .").

54. See, e.g., MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 1–2 (1965). *But see* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71 (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.").

55. See, e.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324, 348 (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 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 Cowen ed., 1988).

by its public nature.⁵⁶ 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 on⁵⁷—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, namely the view that the proper unit of analysis is always the individual.⁵⁸

More specifically, the economics literature tends to focus on the experience of the individual qua end-user of the public good instead of the 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.⁵⁹ A more encompassing view of goods like baseball games 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).⁶⁰ 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 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.⁶¹

56. 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. ARCHIVE (Feb. 26, 2018), <https://plato.stanford.edu/archives/spr2018/entries/common-good/> [https://perma.cc/AU5U-N3G2].

57. Cf. Denise Réaume, *Individuals, Groups, and Rights to Public Goods*, 38 U. TORONTO L.J. 1, 11 (1988).

58. See, e.g., LARS UDEHN, *METHODOLOGICAL INDIVIDUALISM: BACKGROUND, HISTORY AND MEANING* (2001) (collecting and discussing a variety of theories of individualism); Kenneth J. Arrow, *Methodological Individualism and Social Knowledge*, 84 AM. ECON. REV. (PAPERS & PROC.) 1, 1 (1994); Geoff Hodgson, *Behind Methodological Individualism*, 10 CAMBRIDGE J. ECON. 211 (1986).

59. See *supra* Part I.B.1.

60. Cf. Arrow, *supra* note 58, at 8 (concluding that “social variables, not attached to particular individuals, are essential in studying the economy or any other social system”).

61. Note that the nature of a public good may also require restriction of the number of individuals that use it. For example, the value of wilderness or a natural setting sufficient to support a rich biodiversity of plants and animals may depend on restricting access to only a certain number of people at one time (such as through permits for excursions into a national park) in order to preserve the public good for the use and enjoyment of present and future generations. We thank Shontee Pant for suggesting this conceptual extension.

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 contribution 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.⁶² Other environmental goods are best enjoyed in the company of just a few others, or even alone.⁶³ 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.⁶⁴ Even a less exuberant view of democratic government recognizes it as a public project, in the sense that our government belongs to us collectively and acts for us in a collectively organized manner.⁶⁵

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.⁶⁶ By contrast, and very broadly

62. This is captured, for example, in Georges Seurat's masterpiece, *A Sunday on La Grande Jatte—1884*, ART INST. OF CHI., <https://www.artic.edu/artworks/27992/a-sunday-on-la-grande-jatte-1884> [<https://perma.cc/WWE6-EFAC>].

63. See, e.g., HENRY DAVID THOREAU, *WALDEN; OR, LIFE IN THE WOODS* (1854).

64. See, e.g., HANNAH ARENDT, *What Is Freedom?*, in *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 143, 154–55 (Viking Press 2d ed. 1968) (arguing that political participation is constitutive of the good life).

65. Lawrence 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); cf. Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 175–76 (2007) (asserting that “democracy is not about individual self-government, but about collective self-determination”); Owen M. Fiss, Essay, *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 “enrich[ing] public debate”).

66. 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

speaking, collective goods require collective governance by the citizens to whom those goods belong. We jointly preserve, protect, produce, maintain, regulate, oversee, and support these collective goods. We adopt an attitude of stewardship toward them.

Further, it is by virtue of their common ownership that these goods deserve more thoughtful and respectful treatment than commercial markets can provide. The market's coarseness encourages moral indifference to the transactions there.⁶⁷ We cannot afford, however, 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.⁶⁸ National parks and national symbols receive the same hallowed treatment.⁶⁹ 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.⁷⁰ Ever since,

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) ("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.").

67. See *supra* text accompanying notes 38–43.

68. Endangered Species Act, 16 U.S.C. § 1538 (2018). "The American bald eagle," as one of us recently opined in response to an attempt to reduce protection of endangered species, "is not for sale. The Endangered Species Act forbids a cost-benefit analysis of how much economic gain justifies the eradication of a species." Eric W. Orts, Letter to the Editor, N.Y. TIMES, Aug. 14, 2019, at A22.

69. See, e.g., U.S. Trademark Act of 1946 (Lanham Act) § 2(b), 15 U.S.C. § 1052(b) (2018) (barring the registration of marks that consist of or comprise the "the flag or coat of arms or other insignia of the United States . . . or any simulation thereof"); see also Barry Werbin, *Protection of Government Symbols in the United States*, INTA BULL. (Feb. 15, 2008), <https://www.inta.org/INTABulletin/Pages/ProtectionofGovernmentSymbolsintheUnitedStates.aspx> [<https://perma.cc/5BQH-6SZS>] (describing a cease and desist letter that the George W. Bush administration sent to *The Onion* because the newspaper allegedly violated the "statutory prohibition on use of the seal for commercial purposes").

70. See POLANYI, *supra* note 24, 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 in the [previously] common [land], tearing down the houses which, by the hitherto unbreakable force of custom, the poor had long regarded as theirs . . ." *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.

questions have arisen concerning what human activities and which parts of the natural environment should become subject to expanding markets, and which should not. These questions have sparked the “double movement” in the legal treatment of various commodifications as described by Karl Polanyi, and spawned a growing academic literature on commodification.⁷¹

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.⁷²

In our view, the Court has not been sufficiently attentive to the special nature of collective goods. Instead, it has at times—especially recently⁷³—operated with an apparent fervor favoring market freedom and expansion over other considerations. In so doing, it has subjected the value of some of our highest constitutional goods to the potential coarseness and amorality of commercial markets.⁷⁴ Our main concern is therefore institutional, not ideological.⁷⁵ In our view, collective goods are usually ill-suited to judicial disposition. We turn now to consider two case studies involving the problematic judicial treatment of collective goods, and to draw larger lessons from them.

II. MONEY IS SPEECH

The Court’s campaign finance jurisprudence can be characterized as a stalwart march to ever more permissive rules about spending money on political speech.⁷⁶ This increasing permissiveness relies on a sometimes

71. See *supra* notes 26–28 and accompanying text; *supra* Part I.B.

72. See *supra* text accompanying notes 4–22.

73. See *infra* Parts II & III; see also *infra* notes 210–214 (discussing cases) and 264 (identifying, and gesturing toward ways in which our account could fix, some incidents of constitutional commodification).

74. See *supra* notes 38–43 and accompanying text. Our position does not represent an anti-market or anti-economist view. We argue only that there are appropriate moral and political boundaries to economic markets. Again to echo two leading philosophers, “some things should not be for sale” because they constitute “what money can’t buy.” SANDEL, *supra* note 6; SATZ, *supra* note 6.

75. For the view that ideology informs suspicion of judicial review, see, for example, Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time* (July 19, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423135 (arguing that enthusiasm for judicial review depends both upon whether a majority of justices on the Supreme Court represent one’s political ideology and also where in the historical cycle of ideological dominance one finds oneself). Our skepticism, however, transcends the ideological composition of the Court. As a conceptual matter, we argue that collective goods should not be commodified by courts regardless of the political ideologies of those who would sit in judgment. It is true that legislative majorities may also take steps to commodify collective goods inappropriately or wrongly, but in our view this is generally a more democratically legitimate approach than the expansion of commodification by unelected judges.

76. See *infra* Part II.A.

implicit, sometimes explicit equivalence between money and speech.⁷⁷ Countless scholars have aimed to identify why the equivalence is wrong—morally, conceptually, and as a matter of constitutional law.⁷⁸ 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 of unlimited spending on political speech. From this perspective, we urge the Court to halt its march toward a complete constitutional commodification of political speech, and perhaps begin to reverse it.⁷⁹

We begin by reviewing the cases equating money and political speech. Our focus is on money in electoral politics, but we acknowledge that money's undue influence pervades politics elsewhere (e.g., lobbying), where free speech protections on spending money are at least as strong.⁸⁰ We then argue that the supposed equation of “money” and “speech” 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. *From Buckley to McCutcheon and Beyond*

*Buckley v. Valeo*⁸¹ was the first case where the Court ruled on the constitutionality of the Federal Elections Campaign Act (FECA) of 1971,⁸² which was at the time “by far the most comprehensive[] reform legislation passed by Congress” on federal elections.⁸³ Initially, the FECA received support from across the political spectrum, with even Mitch McConnell—

77. See *infra* Part II.D.

78. See *infra* Part II.B.2.

79. We appreciate that *stare decisis* may prevent complete reversal, at least in the near future, depending how strongly this value is weighed against the value of a correct constitutional decision in principle.

80. See, e.g., *United States v. Harriss*, 347 U.S. 612, 625–28 (1954) (recognizing First Amendment concerns regarding lobbying, but upholding legislative disclosure requirements to provide notice of potential influence because “[o]therwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal”).

Tabatha Abu El-Haj contends that the representation crisis results not so much from money as from the superior organizing and mobilizing forces of the wealthy relative to the poor. She urges progressive reformers to shift their focus away from campaign finance reform—which the wealthy are likely to circumvent anyway—and toward enhancing the civic organization of those with fewer material resources. Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127, 1129–30 (2016). Our emphasis on money in politics is somewhat at odds with her approach, but we find her efforts to mobilize individuals into collective speakers congenial to our view of political speech as a collective good.

81. 424 U.S. 1 (1976) (per curiam).

82. Pub. L. No. 92-225, 86 Stat. 3 (1972), amended by Pub L. No. 93-443, 88 Stat. 1263 (1974).

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

who, as a Senator, went on to challenge spending restrictions on political speech⁸⁴—referring to money in politics as a “cancer.”⁸⁵ 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).⁸⁶

In *Buckley*, the Court upheld the caps on campaign contributions, but it found unconstitutional the restrictions on independent expenditures for political speech.⁸⁷ 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 candidate’s campaign, and mounted without the candidate’s input or support.⁸⁸ 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 advertisements or airtime), but as *restrictions on speech* as such.⁸⁹ As a result, all of the restrictions were subject to strict scrutiny.⁹⁰ 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.⁹¹ *McCutcheon v. FEC*⁹² 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.⁹³

84. See *McConnell v. FEC*, 540 U.S. 93 (2003), *partially overruled by* *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010).

85. Mitch McConnell, Opinion, *Election Ordinance Is, in Part, Reaction to Past Excesses*, LOUISVILLE COURIER-J., Dec. 10, 1973, at A23. For a less partisan source of support, see HERBERT E. ALEXANDER, *FINANCING THE 1972 ELECTION* (1976). Alexander was taken to be the “leading commentator in the field of political reform” at the time. David Ifshin, *An Analysis of the Impact of the Federal Election Campaign Act on the 1976 Democratic Presidential Primary*, 18 SANTA CLARA L. REV. 1, 3 (1978).

86. These are the dollar amounts established in 1974. The statute provides for periodic increases to the caps to control for inflation and the passage of time. See *Buckley*, 424 U.S. at 88 (citing statute).

87. *Id.* at 51. As Robert Post has noted, the Court’s distinction between “contributions” and “expenditures” was “arbitrary” and is now “unraveling” into “chaos” because of a lack of a theoretical foundation. 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.

88. 11 C.F.R. § 100.16(a) (2019).

89. 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 (quoting *O’Brien*, 391 U.S. at 382).

90. *Buckley*, 424 U.S. at 14.

91. *Id.* at 28–29.

92. 572 U.S. 185 (2014).

93. *McCutcheon*, 572 U.S. at 227 (plurality opinion).

In contrast with its approach to campaign contributions, the *Buckley* Court was hostile to limits on independent expenditures because a majority of Justices believed they pose a far less significant threat of corruption.⁹⁴ And the Court was unwilling to consider that the restrictions might be justified on other grounds—namely to prevent wealthy citizens from exerting a disproportionate influence on electoral outcomes.⁹⁵ In this connection, the Court announced its now famous edict that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁹⁶

Consider more closely, however, the Court’s argument supporting this claim. The first premise states that the First Amendment was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”⁹⁷ 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.”⁹⁸ Therefore, the Court reasons, spending restrictions are incompatible with the First Amendment.⁹⁹

94. *Buckley*, 424 U.S. at 45.

95. *Id.* at 49–50. Charles Fried aptly summarizes the Court’s mistaken logic here: “only the five Pollyannas on the Supreme Court . . . 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, Letter to the Editor, N.Y. TIMES, Apr. 3, 2014, <https://www.nytimes.com/2014/04/04/opinion/the-courts-ruling-on-political-spending.html?src=rechp> [<https://perma.cc/3M9Z-XAYU>].

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.*, LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 89–213 (2011) (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, June 4, 2015, <https://www.nybooks.com/articles/2015/06/04/how-money-runs-our-politics/> [<https://perma.cc/6YFP-ZYJS>] (“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.”); THOMAS E. MANN & E. J. DIONNE, JR., CTR. FOR EFFECTIVE PUB. MGMT. AT BOOKINGS INST., THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS: WHY PRAISING THE 19TH-CENTURY POLITICAL MACHINE WON’T SOLVE THE 21ST CENTURY’S PROBLEMS 26–27 (2015), https://www.brookings.edu/wp-content/uploads/2016/07/new_political_realists_mann_dionne.pdf [<https://perma.cc/8LQJ-45X2>] (“The obstacles facing wealthy players have almost vanished. Super PACs and politically active nonprofits provide virtually unlimited opportunities for the wealthy to spend and for candidates to grovel before them. . . . Each election cycle brings bold new initiatives to evade what meager legal limits remain.”).

96. *Buckley*, 424 U.S. at 48–49.

97. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

98. *Id.* at 19 (emphasis added).

99. *Id.* at 51.

The Court is surely right to say that the First Amendment aims to guarantee the greatest audience for the greatest range of views.¹⁰⁰ The problem arises in the second premise of the Court's argument, where it contends that quantity and diversity of views go hand-in-hand.¹⁰¹ Even as an intuitive matter, the claim that more spending on speech means that more people will hear more viewpoints is flawed.

To see this, imagine that, under a regime with spending restrictions, Crosby and Stills, 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 or Young to offer their views, completely distinct from the Crosby-Stills set of views.¹⁰² All other citizens would then have a better chance of hearing each of Crosby, Stills, Nash, and Young in a regime with spending restrictions because the airwaves will be less clogged and the newspapers or websites less crammed with only Crosby's and Stills' ads and speech.¹⁰³

Although this argument is admittedly theoretical rather than empirical, it is also commonsensical. Spending restrictions may well yield *more* speech on *more* topics reaching *more* people.¹⁰⁴ Indeed, this is just the line of thought on which the Canadian Supreme Court based its support for rigorous restrictions on campaign contributions and expenditures.¹⁰⁵ Other

100. *Id.* at 48–49.

101. *Id.* at 19; *see also* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 413 (2000) (Thomas, J., dissenting) (noting that “the Court in *Buckley* explained that expenditure limits ‘represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech’” (quoting *Buckley*, 424 U.S. at 19)).

102. It is also likely that, under the original regime, where Crosby and Stills 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.

103. *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”); CROSBY, STILLS, NASH & YOUNG, *Find the Cost of Freedom*, on SO FAR (Atlantic Recording Corp. 1974) (“Find the cost of freedom/buried in the ground.”).

104. Theorists often offer the negative version of this claim, arguing that, without spending restrictions, fewer viewpoints will reach a wide audience. *See, e.g.,* Fiss, *supra* note 65, at 1412 (“[T]he 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*, 114 HARV. L. REV. 179, 304 (2000) (“If money talks, then America's campaign finance system leaves the poor and the working class voiceless.”).

105. *Harper v. Canada* (A.G.), [2004] 1 S.C.R. 827, 872 (Can.) (“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 drowned out. . . . This unequal dissemination of points of view undermines the voter's ability to be

countries also either impose limitations on spending or constrain political spending in other ways, such as restricting political campaign speech to defined windows before elections, or mandating shared access to political advertising on television and other media outlets.¹⁰⁶

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.”¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ In short, the Court was simply

adequately informed of all views.” (citations omitted)); *see also* *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569, 599 (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 87, at 48 (describing the “full-throated expression” of “[t]he principle of equality” in Canadian campaign finance law).

106. For an overview of comparative regimes, see, for example, Paul Waldman, *How Our Campaign Finance System Compares to Other Countries*, AM. PROSPECT (Apr. 4, 2014), <https://prospect.org/article/how-our-campaign-finance-system-compares-other-countries> [<https://perma.cc/4S5N-GLDQ>]; *see also* Vladyslav Dembitskiy, Note, *Where Else Is the Appearance of Corruption Protected by the Constitution? A Comparative Analysis of Campaign Finance Laws After Citizens United and McCutcheon*, 43 HASTINGS CONST. L.Q. 885, 909 (2016) (finding that U.S.-style treatment of “campaign finance as speech, not just manner of speech . . . is very different from how European courts treat money in politics”).

107. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

108. *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 *their own* money on speech. We might instead give each citizen a political speech allowance or taxpayer-funded vouchers. *See* BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 12–24 (2002) (describing government-funded “Patriot dollars” system); LESSIG, *supra* note 95, at 264–75 (describing various decentralized methods to align substantially the “funders” and “the People”). Our theory of political speech as a collective good provides a justification for these public-financed regimes.

109. 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.” *Buckley*, 424 U.S. at 49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)). This argument is subject to the same critique: whether speech restrictions hinder or benefit “unfettered interchange” is an empirical matter that the Court does not explore.

110. *See, e.g.*, Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*,

incorrect to say that the objective “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources’” requires unlimited spending.¹¹¹

Still, far from retreating from that stance, the Court has in the last decade doubled down on its conception of independent expenditures as warranting the same protection as speech. In 2010, *Citizens United v. FEC*¹¹² extended the right to spend unlimited amounts of money on political ads to corporations, which had until then been prohibited from spending their own funds on some kinds of political speech.¹¹³ Also in 2010, *SpeechNOW.org v. FEC*¹¹⁴ extended this right to raise and spend unlimited amounts of money independent of coordination with campaigns to so-called Super PACs (political action committees).¹¹⁵ Spending by Super PACs has increased exponentially since then in both non-presidential election years (\$62 million in 2010 to \$822 million in 2018) and presidential election years (\$609 million in 2012 to \$1.067 billion in 2016).¹¹⁶ Super PACs have thus become the poster child of the Court’s “money is speech” philosophy.

B. Individualist Approaches to Campaign Finance

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

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.” (footnote omitted)); 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.”); *cf.* Prithviraj Datta, *The Flawed Reasoning of the Citizens United Opinions 14* (2017) (unpublished manuscript) (on file with authors) (“There . . . exists little in the way of empirical evidence to support the contention that campaign spending is intended as, or has the effect of, persuading citizens by prompting reasoned evaluation on the part of those targeted by the messages that it funds.”).

111. *Buckley*, 424 U.S. at 48–49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

112. 558 U.S. 310 (2010).

113. *Id.* at 319.

114. 599 F.3d 686 (D.C. Cir. 2010).

115. *Id.* at 696; *see also* RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT AND THE DISTORTION OF AMERICAN ELECTIONS* 33 (2016) (describing the Super PAC as “a political action committee that can accept unlimited contributions to fund independent ads supporting or opposing federal candidates”).

116. *Outside Spending by Super PACs*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> [https://perma.cc/M38L-G4R2] (giving annual totals in charts). Corporate funding levels are more difficult to track because of limitations on disclosure, which currently allow “dark money,” or indirect corporate contributions to Super PACS. *See, e.g., How Companies Spend*, CTR. FOR POL. ACCOUNTABILITY, <https://politicalaccountability.net/political-spending-information/how-do-companies-spend> [https://perma.cc/C2V3-GEVM].

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.¹¹⁷

The Court's position across these cases might be termed *laissez-faire*.¹¹⁸ Its egalitarian critics, however, are no less beholden to individualist commitments.¹¹⁹

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 laws 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,”¹²⁰ and it has repeatedly rejected leveling measures in subsequent cases.¹²¹ In eschewing measures that would equalize access to audiences for political speakers, the Court's approach has been decidedly individualistic.¹²²

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*,¹²³ or measures that would have Peter subsidize Paul's speech, again

117. In recent work, David Landau and Rosalind Dixon have developed the notion of “abusive judicial review,” which occurs where courts “*intentionally* undermine[] the minimum core of electoral democracy.” David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. (forthcoming 2020) (manuscript at 10) (emphasis added), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3366602. We doubt that the *Buckley* Court deliberately sought to undermine our democracy. Indeed, we speculate that it is precisely the Court's sense that it had faithfully interpreted the Constitution that accounts for the decision's durability.

118. See, e.g., David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236 (1991). Elsewhere, this approach to campaign finance has been termed “libertarian.” See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 600, 616, 657.

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

120. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

121. See, e.g., *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014) (plurality opinion); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011); *Davis v. FEC*, 554 U.S. 724, 742 (2008).

122. 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.* (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”).

123. 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.”).

for Paul's sake.¹²⁴ 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 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—and perhaps Mary and other citizens—would have a right to insist on reasonable regulations to limit Peter's speech.¹²⁵ The Court can champion Peter's rights at Paul's expense only because it implicitly eschews an egalitarian campaign finance regime.¹²⁶

2. Egalitarian Free Speech

For egalitarians, one's wealth should not determine the effectiveness of one's voice.¹²⁷ Egalitarians therefore criticize *Buckley* and its progeny,¹²⁸ and they advocate measures, including restrictions on political spending, that would equalize the strength of individual voices.¹²⁹

In contrast to the contention in *Buckley* that the greatest quantity and diversity of speech emerges where there are no spending restrictions, the

124. See *Ariz. Fee Enter. Club*, 564 U.S. at 737 ("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.").

125. *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569, 598–99 (Can.); cf. PETER, PAUL & MARY, *Too Much of Nothing*, on LATE AGAIN (Warner Bros.-Seven Arts 1968) (covering Bob Dylan) ("Too much of nothin' can make a man feel ill at ease/One man's temper might rise, while the other man's temper might freeze./In the days of long confessions, we can not mock a soul/When there's too much of nothin', no one has control.").

126. Cf. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809–10 (1978) (White, J., dissenting) ("[N]ot to impose limits upon the political activities of corporations would have placed [the government] 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.").

127. See, e.g., John Rawls, *The Basic Liberties and Their Priority*, in 3 THE TANNER LECTURES ON HUMAN VALUES 1, 43 (Sterling M. McMurrin ed., 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).

128. See, e.g., Sunstein, *supra* note 127, 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").

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

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.¹³⁰ We know that candidates align with their donors and spenders,¹³¹ and wealthy individuals can and do spend more per capita on political speech than others.¹³² In this way, a regime without spending restrictions confers an advantage on the wealthy.¹³³

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, for example, can also augment a person’s voice and influence, and each of them, like wealth, is unequally distributed across the electorate.¹³⁴ For example, college students can spend many more hours on social media than can parents who work full-time. Celebrities like

130. *E.g.*, Datta, *supra* note 110, at 10–11.

131. *See* Stephanopoulos, *supra* note 110, at 1494.

132. For example, in the 2018 elections, only 0.47 percent of Americans gave \$200 or more each, but together these spenders accounted for over 71 percent of all money contributed to federal candidates, PACs, parties, and outside groups. *Donor Demographics*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/donordemographics.php> [<https://perma.cc/E7Q4-NLHG>].

133. *See* 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-increasingly-its-the-rich-and-the-rest/> [<https://perma.cc/2BMK-HHBB>]; *cf.* Abu El-Haj, *supra* note 80, at 1128 (“The political influence of moneyed elites even extends to issues where a clear majority of citizens disagree with their policy preferences.”).

Sanford 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 119, 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 also cheapen and degrade political speech. *See also infra* Part II.D.

134. As Peter Schuck observes, “[m]oney is only one of many sources of influence over politicians.” PETER H. SCHUCK, *ONE NATION UNDECIDED: CLEAR THINKING ABOUT FIVE HARD ISSUES THAT DIVIDE US* 227 (2017) (emphasis omitted). Others include

better organizational skills; friendship; past contacts or ties; the size, intensity, and thus influence of interest groups; tactical expertise; valuable information; media access and free (known as ‘earned’) TV time; personal charisma or eloquence; name recognition; dynastic power; persuasive arguments; propitious timing; a compelling life story; and still others—especially incumbency.

Id. Many of these factors may also, of course, correlate with relative wealth.

will.i.am can reach many more people with their messages than can the average Joe.¹³⁵

This poses a problem for the egalitarian because there looks to be no principled basis for treating money differently from time or 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 would likely involve intolerable limits on individual liberty¹³⁶—or resign themselves to having no restrictions on individuals’ wielding their time, prominence, oratory powers, good looks, and other advantages, as well as their 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 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.¹³⁷ This is precisely the interest that *Buckley* took to lie at the First Amendment’s foundation when the Court proclaimed that it was intended “to secure ‘the widest possible

135. Will.i.am famously stumped for Barack Obama, including creating a YouTube video that was viewed by over 26 million people. WeCan08, *Yes We Can – Barack Obama Music Video*, YOUTUBE (Feb. 2, 2008), <https://www.youtube.com/watch?v=jjXyqcx-mYY>; see also *Davis v. FEC*, 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 119, at 948–50; 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).

136. See Levinson, *supra* note 119, at 950 (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 such a regime, writing that the processes for participation must “offer a *meaningful* opportunity to shape the content of public opinion.” POST, *supra* note 87, at 50 (emphasis added). 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.

137. Or, to put the point in a way that a disaffected or reclusive citizen might, it is in the interest of each of us to have the *option* to hear from all citizens, even if some of us might choose to tune all of them out.

dissemination of information from diverse and antagonistic sources.”¹³⁸ We have this collective interest because we are joined together as citizens in the collective project of self-governance. As Robert Post argues, “a primary purpose of First Amendment rights is to make possible the value of self-government.”¹³⁹ 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 to arrive together at the best solution or approach, or at least the most democratic compromise.¹⁴⁰ The Court has failed to see this because it mistakenly abandoned a jurisprudential understanding of political speech as a collective good.¹⁴¹

C. Political Speech as a Collective Good

Not long ago, the Court had recognized the value of political speech as a collective good. It did so not only in cases that were avowedly “collectivist,”¹⁴² but also in cases that otherwise resolutely conceived of free speech as an individual right.¹⁴³

138. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

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

140. 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, JR., *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 generally COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS (Hélène Landemore & Jon Elster eds., 2014); HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* (2013).

141. 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, *Commentary, 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 13, 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 government 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.

142. See POST, *supra* note 65, 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).

143. See Blum, *supra* note 13, 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*

The high-water mark of the Court's collectivist orientation to free speech is *Red Lion Broadcasting Co. v. FCC*,¹⁴⁴ where the Court identified as controlling "the First Amendment goal of producing an informed public capable of conducting its own affairs."¹⁴⁵ It framed the public's interest as a "collective right."¹⁴⁶ On these grounds, the Court upheld a requirement of equal access to the airwaves for politicians on both sides of a controversial public issue.¹⁴⁷ *Red Lion* thus "interpreted the First Amendment rights of the public in light of the constitutional imperative of informed public decision making."¹⁴⁸

In another formative case, *Whitney v. California*,¹⁴⁹ Justice Louis Brandeis advanced an even more powerful vision of political speech as a collective good.¹⁵⁰ 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.¹⁵¹

Even in cases abolishing spending limits on individualist grounds, one can find evocations of political speech as a collective good. *Buckley* itself is

Audience as First Amendment Ideal, 2010 U. ILL. L. REV. 799, 839 ("[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.").

144. 395 U.S. 367 (1969).

145. *Id.* at 392; see also *Garrison v. Louisiana*, 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. Auto. Workers*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting) (emphasis added) ("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—vitaly important— . . . that the people have access to the views of every group in the community."); Marjorie Heins & Eric M. Freedman, *Foreword: Reclaiming the First Amendment: Constitutional Theories of Media Reform*, 35 HOFSTRA L. REV. 917, 922 (2007) (heralding *Red Lion* for providing "an expansive view of the First Amendment that recognized society's interest in a broad diversity of ideas as a value at least as important as—and in the broadcast context, more important than—an individual's or corporation's interest in communicating its point of view").

146. *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 of Cal.*, 468 U.S. 364, 380 (1984) (referring to "the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern").

147. *Red Lion*, 395 U.S. at 400–01.

148. POST, *supra* note 87, at 78; see also Cass R. Sunstein, *Does Red Lion Still Roar?*, 60 ADMIN. L. REV. 767, 777–78 (2008) (advocating for a revival and reinvention of *Red Lion*'s principles for a cable news, social media era).

149. 274 U.S. 357 (1927).

150. *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, *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. *Buckley v. Valeo*, 424 U.S. 1, 14–15, 48, 49 (1976) (per curiam).

151. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) ("Those who won our independence believed . . . 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)).

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.¹⁵² 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.”¹⁵³

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.¹⁵⁴ It appears also in the tension between collective self-governance and individual self-authorship conceptions of the First Amendment.¹⁵⁵

Another illustration of the conflict between the individualist and collectivist conceptions of free speech appears in the divided opinions in *McCutcheon v. FEC*.¹⁵⁶ There, Justice Roberts, championing the deregulatory stance that prevailed, adopted 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.”¹⁵⁷ Justice Breyer, dissenting, refused to frame the issue as a contest between the speech rights of different individual citizens. Instead, he used the term

152. *Buckley*, 424 U.S. at 90–91.

153. *Id.* at 14–15.

154. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“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.”).

155. *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. 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 H. 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, 211–13 (1972) (grounding free expression in individual autonomy).

156. 572 U.S. 185, 191, 237 (2014).

157. *Id.* at 191.

“collective speech” for the first time in the Court’s jurisprudence,¹⁵⁸ and 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*.”¹⁵⁹ As such, he emphasized, any conflict between individual and collective rights “takes place within, not outside, the First Amendment’s boundaries.”¹⁶⁰ 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 that the Court as well as Congress should protect this conception.¹⁶¹ 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.”¹⁶² 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, is given speech’s constitutional protections against government restriction.¹⁶³

158. *Id.* at 237 (Breyer, J., dissenting); see also Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 628–41 (2016).

159. *McCutcheon*, 572 U.S. at 237 (Breyer, J., dissenting).

160. *Id.* at 239.

161. It is consistent, on our view, to conceive of political speech as both a collective good and an individual right, each reinforcing the other. See also *infra* text accompanying notes 176–177.

162. See, e.g., Kenneth J. Levit, Note, *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, 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.* 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.”); Wright, *supra* note 2, at 1005 (“[N]othing in the First Amendment commits us to the dogma that money is speech.”).

163. On the double-faceted nature of constitutional commodification, see *supra* text accompanying notes 18–22.

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.¹⁶⁴ Justice Oliver Wendell Holmes in *Abrams v. United States*¹⁶⁵ famously declared: “[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market”¹⁶⁶

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.”¹⁶⁷ However, the analogy presupposes a consumerist, atomistic orientation to market goods.¹⁶⁸ 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*.¹⁶⁹

The Court’s analogy is nonetheless 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.¹⁷⁰ In both cases, we must contend with the aggregate effects of individual acts on collective goods.

164. See, e.g., Post, *supra* note 155, at 2356.

165. 250 U.S. 616 (1919).

166. *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., *United States v. Alvarez*, 567 U.S. 709, 728 (2012); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988); *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986).

167. *Buckley v. Valeo*, 424 U.S. 1, 19 n.18 (1976) (per curiam).

168. See *supra* text accompanying notes 37–43; cf. MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 117–27 (2019) (criticizing “the myth of the marketplace” as too biased and restricted); Gottlieb, *supra* note 110, at 230 (“In *Buckley*, the Court supported an individual view of politics.”).

169. See *supra* text accompanying notes 21–22.

170. See also *infra* Part III.

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.¹⁷¹ This is the real force of the slogan that "money is speech," illustrating the second dynamic in constitutional commodification, namely the *constitutionalization of a commodity*.¹⁷²

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.¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵

171. 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").

172. See *supra* text accompanying notes 18–20.

173. See, e.g., *Nixon v. Shrink Mo. 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 87, 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.

174. See *supra* notes 130–135 and accompanying text.

175. Cf. Tabatha Abu El-Haj, *"Live Free or Die"—Liberty and the First Amendment*, 78 OHIO ST. L.J. 917, 919 (2017) ("[T]he free speech rights of individuals cannot be so extensive as to undermine the end for which they were established, what we now call democratic politics.").

One might object that our analysis unduly diminishes the rights of individuals, but we do not deny individuals' rights as either 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 inordinately and unequally by large amounts of money.¹⁷⁶ 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.¹⁷⁷

Nothing in the Court's prior jurisprudence establishes a basis for an absolute, unlimited right of spending on political 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.¹⁷⁸

176. See, e.g., BENJAMIN I. PAGE, JASON SEAWRIGHT & MATTHEW J. LACOMBE, *BILLIONAIRES AND STEALTH POLITICS* 54–76 (2018) (documenting various strategies the very wealthy use to influence politics in the United States often in their own economic self-interest).

177. Economic inequality in the United States continues to spike to record levels. See, e.g., Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 519 (2016) (finding that the “top 0.1% wealth share has risen from 7% in 1978 to 22% in 2012” in the United States, and the “bottom 90% wealth share first increased up to the mid-1980s and then steadily declined”); Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RES. CTR. (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/> [<https://perma.cc/TBX9-F4A9>] (“Wealth gaps between upper-income families and lower- and middle-income families are at the highest levels recorded.”).

178. To say that we are open to a “reasonableness” limitation on the regulation of political campaign finance raises the question, of course, of what restrictions on spending on political speech would go too far. For some recommendations for reform, see our Conclusion *infra*. Suffice it to say here that one can imagine various kinds of fairness rules regarding television and social media advertising, as well as some general limits on spending on behalf of particular candidates, including even oneself.

The current regime in the United States appears increasingly to favor self-funded billionaires running for office. See, e.g., Chase Peterson-Withorn, *Trump Isn't America's Only Billionaire Politician—Meet the Others*, FORBES (Jan. 20, 2017, 5:50 PM), <https://www.forbes.com/sites/chasewithorn/2017/01/20/trump-isnt-americas-only-billionaire-politician-meet-the-others/#378ca4e52a65> [<https://perma.cc/L3E7-TTWA>]. As of this writing, Tom Steyer and perhaps Andrew Yang are billionaire candidates for President in the Democratic primaries, and quite a few are multi-millionaires. Grace Panetta, *Billionaire Tom Steyer Is Running for President — Here's Everything We Know About the Net Worth and Personal Finances of Each 2020 Democratic Presidential Candidate*, BUS. INSIDER (July 9, 2019, 12:54 PM), <https://www.businessinsider.com/estimated-net-worth-wealth-2020-democratic-presidential-candidates-2019-4> [<https://perma.cc/5KXQ-U3TY>]. Michael Bloomberg has announced similar intentions. Alexander Burns & Katie Glueck, *Testing Waters, Bloomberg Ripples Uneasy Pool*, N.Y. TIMES, Nov. 9, 2019, at A1. But there is no intrinsic reason, we believe, to allow billionaire Presidents to become the rule rather than the exception.

One-person-one-vote suggests an analogous principle of relative equality in the political influence that citizens should have in terms of expressions of their political views and support of candidates.

III. WASTE IS COMMERCE

In this Part, we consider a series of cases decided under the negative or “dormant” Commerce Clause, which have held, beginning with *City of Philadelphia v. New Jersey*,¹⁷⁹ that “waste . . . is ‘commerce.’”¹⁸⁰ We argue that the Supreme Court has erred in these cases when it overrode the traditional state law prerogative of governing land use to protect human health and the natural environment.¹⁸¹ 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.” As we show, a long and tortuous line of cases followed *Philadelphia*, eventually resulting in a provisional resolution of the complications raised by this intrusion of federal judicial power 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 this kind of commodification can cause for non-commercial values, in this case the collective good of the natural environment, which 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

179. 437 U.S. 617 (1978).

180. *Id.* at 621; *see also* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res., 504 U.S. 353, 359 (1992) (“Solid waste, even if it has no value, is an article of commerce.”). The cases following *City of Philadelphia* are identified and discussed *infra* Part III.A.

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 synonymous term “dormant” Commerce Clause. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 807–33, 1029–150 (3d ed. 2000).

181. *See, e.g.*, John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 366 (2002) (affirming a “national understanding that the power to control the private use of land is a state prerogative”); Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1399 (2012) (“Despite the expansion of the federal government over the past century, local governments have retained primary authority to regulate the use of land.”).

The narrative of what has become “environmental law” can be told as a progressive assertion of federal authority over property and land use jurisdiction traditionally exercised by the states. States and local authorities responded initially to problems of pollution and waste disposal, but the complexity and scale of these problems, as well as the scientific requirements for effectively managing them, led to federal interventions. *See* LAZARUS, *supra* note 31, at 1–23. This intervention commonly takes the form of federal statutes and regulations enacted under their authority. *Id.* at 47–54, 67–75, 106–16, 169–207. In contrast, in the negative Commerce Clause cases discussed here, the Supreme Court is reaching out to overturn state statutes in the absence of any federal statute or regulation.

made *about the land*.¹⁸² His arguments sound in language and principles congenial to our understanding of both collective goods and constitutional commodification.

A. From 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.¹⁸³ In *City of Philadelphia v. New Jersey*, the Court first applied the negative Commerce Clause to restrict state authority to regulate waste in interstate commerce.¹⁸⁴ The Court held unconstitutional a New Jersey statute that prohibited importing most “solid or liquid waste which originated or was collected outside the territorial limits of the State” into New Jersey for disposal.¹⁸⁵ The New Jersey legislature said it was motivated by environmental protection: to preserve its land.¹⁸⁶ 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.¹⁸⁷ The New Jersey Supreme Court agreed, concluding the statute was “designed to protect, not the State’s economy, but its environment.”¹⁸⁸

However, the U.S. Supreme Court felt no need even to inquire into the New Jersey state legislature’s motive or purpose.¹⁸⁹ Justice Stewart’s majority opinion argued that “the evil of protectionism can reside in

182. See *infra* note 210 and accompanying text.

183. 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 and Pacific Oceans before arriving empty in Singapore. See *World’s Most Unwanted Garbage: Cargo of the Khian Sea*, NEATORAMA (Aug. 15, 2007, 10:52 AM), <https://www.neatorama.com/2007/08/15/worlds-most-unwanted-garbage-cargo-of-the-khian-sea/> [<https://perma.cc/WVD2-FAY9>]. The president and vice-president of the company were convicted of perjury. *United States v. Reilly*, 33 F.3d 1396 (3d Cir. 1994). A number of company officials had earlier been held in contempt for violating a temporary restraining order. *Joseph Paolino & Sons, Inc. v. Amalgamated Shipping Corp.*, No. 87-1777, 1989 WL 79743 (E.D. Pa. July 17, 1989). A silver lining of this notorious voyage was that it galvanized international efforts to begin regulating the global disposal of hazardous waste. See, e.g., Sejal Choksi, *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation*, 28 *ECOLOGY L.Q.* 509, 515 (2001).

184. 437 U.S. 617 (1978).

185. *Id.* at 625 (quoting 1973 N.J. Laws, ch. 363, § 2 (codified as amended at N.J. STAT. ANN. § 13:11-10 (West Supp. 1978))).

186. *Id.* (quoting 1973 N.J. Laws, ch. 363, § 1).

187. The traditional state prerogative to protect public health and safety formed the basis of Justice Rehnquist’s dissenting opinion. See *infra* note 214 and accompanying text; see also *supra* note 181.

188. *Philadelphia*, 437 U.S. at 625 (describing New Jersey Supreme Court opinion).

189. *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.”).

legislative means as well as legislative ends.”¹⁹⁰ 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.”¹⁹¹ Finding solid waste to be an “object” of “interstate trade,”¹⁹² the Court struck down the state’s attempt to “isolate itself in the stream of interstate commerce from a problem shared by all.”¹⁹³ The Court forced New Jersey to accept Philadelphia’s waste into its landfills.

Having committed to this course in *Philadelphia*, the Court followed the path dependence of *stare decisis* to extend its holding in various directions in future cases, including:

- overturning attempts by state governments to restrict *hazardous waste*,¹⁹⁴
- striking down attempts by *local governments* to restrict out-of-state waste,¹⁹⁵
- voiding *differential taxes and charges* for out-of-state waste disposal,¹⁹⁶ and
- upsetting a *flow-control statute* for waste disposal covering a local area when private business firms were involved.¹⁹⁷

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*, in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,¹⁹⁸ the Court upheld a local government flow-control scheme that involved only “facilities owned and operated by a state-created public benefit corporation”

190. *Id.*

191. *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 and municipalities 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.”).

192. *Philadelphia*, 437 U.S. at 622.

193. *Id.* at 629.

194. *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992).

195. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353 (1992).

196. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93 (1994).

197. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994).

198. 550 U.S. 330 (2007).

rather than a private business firm.¹⁹⁹ At last, a constitutional work-around had been found to the Court's interventions.

This work-around is rickety, however, and uncertainties remain in other environmental contexts. Interstate disposal of hazardous waste from fracking operations has become an issue, and a question has arisen about whether Ohio, for example, may restrict or prohibit transportation of fracking waste from Pennsylvania.²⁰⁰ 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.²⁰¹ It has also been suggested that fracking bans enacted by states such as Maryland, New York, and Vermont might be challenged under the negative Commerce Clause, given an alleged interference in allowing landowners to participate in the interstate commerce of oil and gas production.²⁰²

Fresh water scarcity, which is likely to be exacerbated by climate disruption, will provoke questions about whether states may protect their water resources from commercialization and export.²⁰³ A challenge based on the *Philadelphia* line of cases may argue that "water" is, like "waste," an "article of commerce."²⁰⁴ The Court appears divided as well on whether

199. *Id.* at 334.

200. See Eric Michel, Note, *Discrimination in the Marcellus Shale: The Dormant Commerce Clause and Hydraulic Fracturing Waste Disposal*, 88 CHI.-KENT L. REV. 213, 235–43 (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).

201. Times of Trenton Editorial Bd., *Editorial: Gov. Christie's Veto of Fracking Waste Ban Is Toxic for N.J.*, TIMES TRENTON (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 [<https://perma.cc/MN5E-KJD2>].

202. See Alfred R. Light, *Fracturing Moratoria Under the Dormant Commerce Clause: The Need to Shape Rather than Resist the Shale Gale*, 44 ENVTL. L. REP. 10035, 10035–36, 10040–42 (2014); Jon Hurdle, *With Governor's Signature, Maryland Becomes Third State to Ban Fracking*, NPR: STATEIMPACT PA. (Apr. 4, 2017, 9:35 PM), <https://stateimpact.npr.org/pennsylvania/2017/04/04/with-governors-signature-maryland-becomes-third-state-to-ban-fracking/> [<https://perma.cc/WT8X-5KAZ>].

This challenge to state fracking bans strikes us as unlikely, but it's true that if oil and gas are characterized as a nascent "commercial good" or "item of commerce" in a manner similar to the mistaken treatment of waste and garbage in the *Philadelphia* line of cases, then there is some possibility of success.

For an argument that a number of practical and political reasons support at least a "narrow" scope of federal regulation of fracking involving its potential air and water pollution, see David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 460–68, 506–08 (2013).

203. See, e.g., Sebastien Malo, *US Faces Fresh Water Shortages Due to Climate Change, Research Says*, WORLD ECON. F. (Mar. 4, 2019), <https://www.weforum.org/agenda/2019/03/us-faces-fresh-water-shortages-due-to-climate-change-research-says> [<https://perma.cc/W5ZT-SXVT>] (reviewing scientific studies that predict severe water shortages likely to be caused by climate shifts in the United States, particularly in western and midwestern states).

204. E.g., *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992) ("Solid waste, even if it has no value, is an article of commerce."); see Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV.

states may restrict commerce in live bait to protect native fish and fisheries, a conflict which may extend to other biological resources and species preservation measures.²⁰⁵

The Court's treatment of waste in the *Philadelphia* line of cases presents an example of constitutional commodification. Relying on the negative Commerce Clause,²⁰⁶ 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.²⁰⁷ Further, the Court implicitly embraced unregulated commercial markets as the proper way to treat waste. Justice Stevens's majority opinion in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*²⁰⁸ made plain the Court's

131 (2011) (arguing against treating water as an article of commerce and suggesting various alternative frameworks).

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, 960 (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* Tarrant Reg'l 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 to be a commercial commodity or a natural resource. Klein, *supra* note 204, at 147.

205. Compare *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979) (striking down a statute forbidding the export of minnows), with *Maine v. Taylor*, 477 U.S. 131, 151–52 (1986) (upholding a statute prohibiting baitfish importation in order to protect natural resources in wildlife).

206. See *supra* note 180. For an early leading case (again in Philadelphia) establishing the "dormant" or negative power of the Commerce Clause, see *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). The roots of negative Commerce Clause jurisprudence trace to Chief Justice Marshall's decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); see FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* 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 allowing the damming of a navigable stream. *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). A litigant had described the stream as "one of those sluggish reptile streams, that do not run but creep, and which, wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes." *Id.* at 249.

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 Chief 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 "[t]he clause's limitation on state regulation can certainly be termed implicit, silent, or negative, but dormancy does not accurately describe the situation." *Id.*; see also *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 95, 98–99, 108 (1994) (referring to the "negative Commerce Clause").

207. See *supra* Part I.B.1.

208. 504 U.S. 353 (1992).

insistence that the market is the only place for waste: “Solid waste, even if it has no value, is an article of commerce.”²⁰⁹ The Court in these cases has 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 as such a problem of land preservation rather than commerce. Chief Justice Rehnquist, who dissented in each of the Court’s forays into this area during his time on the Court, advanced arguments giving voice to each of these objections.²¹⁰ On any of these three alternative arguments, the relationship between waste disposal and collective interests is made plain: public health, the preservation of the natural environment against pollution, and the conservation of land. All of these are collective goods.²¹¹

209. *Id.* at 359.

210. In historical order, see *City of 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*, 504 U.S. at 368, 373 (Rehnquist, C.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 brethren, thereby suffering the many risks that such sites present”); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 349 (1992) (Rehnquist, C.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 of Oregon*, 511 U.S. at 108, 110, 112 (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. . . . [T]he 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 . . . is not a commodity sold in the marketplace; rather it is disposed of at a cost to the State.” (citations omitted)).

211. 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 (1901). State authority in this area is now preempted by federal statutes giving the Department of Agriculture regulatory authority to control trade in livestock. *See, e.g.*, *Texarkana Livestock Comm’n v. USDA*, 613 F. Supp. 271 (E.D. Tex. 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.*, *Or.-Wash. R.R. & Navigation Co. 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

In our review of the campaign finance cases above, we showed 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.²¹² 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.²¹³ Waste itself undergoes no degradation where one party pays to have it transferred to another. It has already been 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 argues in favor of restrictions on the amount of waste landfill

upheld state authority to regulate interstate commerce in waste which, like diseased livestock and fruit, can have consequences for public health. *Cf.* Blair P. Bremberg & David C. Short, *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, 70–77, 82 (1990) (arguing that states in some cases failed to present sufficient factual evidence of risks to public health to justify regulation).

212. *See supra* Part II.

213. There are exceptions when using “waste” as new “inputs” for manufacturing or other alternative 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. For an overview including applications in different business sectors, see CATHERINE WEETMAN, *A CIRCULAR ECONOMY HANDBOOK FOR BUSINESS AND SUPPLY CHAINS: REPAIR, REMAKE, REDESIGN, RETHINK* (2017); *see also The Circular Economy: Regulatory and Commercial Law Implications*, 46 ENVTL. L. REP. 11009 (2016) (panel discussion); FELIX PRESTON, CHATHAM HOUSE, *A GLOBAL REDESIGN? SHAPING THE CIRCULAR ECONOMY* (2012), https://pdfs.semanticscholar.org/25a2/445d773e16a377379f69dc34065aa8604a88.pdf?_ga=2.52224425.1248396345.1565974621-1395453234.1565974621 [<https://perma.cc/VAH7-G7VJ>]; FELIX PRESTON & JOHANNA LEHNE, CHATHAM HOUSE, *A WIDER CIRCLE? THE CIRCULAR ECONOMY IN DEVELOPING COUNTRIES* (2017), <https://www.chathamhouse.org/sites/default/files/publications/research/2017-12-05-circular-economy-preston-lehne-final.pdf> [<https://perma.cc/B7JD-DHEL>]. For an early conceptual analysis along similar lines, see WILLIAM McDONOUGH & MICHAEL BRAUNGART, *CRADLE TO CRADLE: REMAKING THE WAY WE MAKE THINGS* (2002). For an extension advocating design in order to improve natural environmental background conditions, see WILLIAM McDONOUGH & MICHAEL BRAUNGART, *THE UPCYCLE: BEYOND SUSTAINABILITY—DESIGNING FOR ABUNDANCE* (2013).

Note also that a regulatory approach for a circular economy 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 for moving toward a circular economy vision. *See generally 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 [<https://perma.cc/6N2G-K9WU>]; *see also* Rafael Leal-Arcas, *Sustainability, Common Concern, and Public Goods*, 49 GEO. WASH. INT’L L. REV. 801, 874–75 (2017) (noting that the “concept of a circular economy is also an opportunity for innovation” as well as a partial solution to collective good problems such as global climate disruption).

operators may accept or other regulations designed to reduce the production of waste or to channel its disposal, recycling, and reuse.²¹⁴

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.²¹⁵ 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.²¹⁶

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.²¹⁷ In the long run, treating waste as a commodity to be freely traded 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, packaging redesign, and recycling programs.²¹⁸ Moreover, different types of waste—hazardous waste, for example, as opposed to nonhazardous solid waste—may involve

214. *Cf. Philadelphia*, 437 U.S. at 629–33 (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).

215. *See supra* Part II.A.

216. *See Philadelphia*, 437 U.S. at 623–24 (focusing on the national economy as the relevant "unit" of legal analysis).

217. *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 governments). *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 CALIF. L. REV. 1125, 1194–95 (1999) (describing federal preemption and negative Commerce Clause cases as divided between judges who favor Coasian free-market solutions and judges who favor Pigovian regulation of externalities).

218. *See supra* note 217; *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).

different economic and social considerations, which may in turn call for different regulatory approaches.²¹⁹

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.²²⁰ We instead argue that the 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.²²¹

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 that subsumes other considerations.²²² In declaring waste to be an object of

219. For example, environmental justice regarding racial and other social factors is particularly salient when the distribution of risks to health and safety are involved, such as is often the case with the location of hazardous waste disposal sites. *See, e.g.,* Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributive Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 801–06 (1993); *see also* Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 775 (1998) (providing a case study of “predominantly poor, African-American residents of Chester, Pennsylvania who attempted to stop the clustering of waste facilities in their community”).

220. *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 a 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 different tools of environmental regulation, including emissions trading markets and market-leveraging strategies, for both public law and private governance).

221. *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 a number of different regulatory strategies to find the best and most politically viable solution).

222. A zeal for economic markets 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. *Cf.* Saul Levmore, *Judges and Economics: Normative, Positive, and Experimental Perspectives*, 21 HARV. J.L. & PUB. POL’Y 129, 129–30 (1997) (“One struggles to express anything but mixed feelings about the normative use of law and economics in judicial decisionmaking. When judges are wise, when they correctly perceive the behavioral effects of their decisions, or when they can see how their opinions

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.²²³

Nothing in the Constitution or previous precedents required the Court to commodify waste in *Philadelphia* and its successors. Another case decided about a decade later expressed a better view because it deferred to the wisdom of the state legislature when acting to preserve the environment.²²⁴ In *Maine v. Taylor*,²²⁵ 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.”²²⁶ The collective good of preservation of the natural environment is one of those values.²²⁷

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*, whereby the Court confers upon a commodity the kind of protection from regulation that traditional constitutional values receive.²²⁸ 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

might control other decisionmakers, they are tempted to set the world right. . . . The arguments against the normative application of law and economics scarcely need rehashing here. Much of economics is built on questionable assumptions. Its very design is influenced by the positive character of most social science. It accepts a good deal as exogenously given, when law has the power to change much of the status quo. And the list goes on and on.”).

223. Cf. M. Neil Browne et al., *The Struggle for the Self in Environmental Law: The Conversation Between Economists and Environmentalists*, 18 UCLA J. ENVTL. L. & POL’Y 335, 337 n.8 (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.”).

224. See F. Italia Patti, *Judicial Deference and Political Power in Fourteenth Amendment and Dormant Commerce Clause Cases*, 56 SAN DIEGO L. REV. 221, 222–23, 246 (2019) (arguing that the Court should defer more readily to state legislatures in negative Commerce Clause cases than some others because a political remedy is usually available via federal legislation).

225. 477 U.S. 131 (1986).

226. *Id.* at 151–52 (upholding state statute to protect its own wildlife).

227. *Id.*

228. See *supra* text accompanying notes 18–22.

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.²²⁹

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,²³⁰ and he was right. To say “waste is a good” doesn’t make sense. The Court accomplished the commodification of human detritus, but to no clear end or purpose.

Conceivably, 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. Town of Clarkstown*.²³¹ Perhaps recognizing that the conclusory characterization of “waste” as “an article of commerce” had already begun to wear thin,²³² 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.”²³³ “In other words,” he continued, “the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.”²³⁴

229. See *supra* text accompanying note 213 (suggesting waste is more appropriately described as a “bad” with a negative cost rather than a good with a positive value). Again, note that the Court’s manner of proceeding in commodifying waste and reviewing regulation of it under the negative Commerce Clause is quite different from legislative approaches that use commodification as a legislative tool to address a particular environmental problem. In legislative commodification, a market-based solution, such as a pollution credit trading regime, is established within a policy framework by which different regulatory features are selected as useful, effective, and efficient. See *supra* note 220 and accompanying text. The problem in constitutional commodification is that the Court is making an implicit policy decision about how to treat the environmental problem of waste without either an empirical foundation or a broad consideration of alternative approaches.

230. E.g., *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353, 369 n.1 (1992) (Rehnquist, C.J., dissenting).

231. 511 U.S. 383 (1994).

232. See *supra* notes 204, 210 and accompanying text.

233. *Carbone*, 511 U.S. at 390–91.

234. *Id.* at 391. 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 Mgmt. Auth.*, 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

Thinking of waste disposal as a “service” certainly seems more accurately descriptive than thinking of waste as a “good,” but the best 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 toxic 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.²³⁵ 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.²³⁶ In its negative Commerce Clause waste cases, the Court mistakenly—and in an activist mode—departed from this tradition.²³⁷

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.”²³⁸ “Their lack of market value,” he continued, “coupled with their immediate threat to human health dictates that such substances not be afforded the protection of the Commerce Clause.”²³⁹ He emphasized New Jersey’s interest in “the preservation of the environment and the protection of ecological values.”²⁴⁰ In support, he quoted an old but still relevant case in which Justice Oliver Wendell Holmes

therefore has the unintended consequence of requiring a government solution to the problem rather than allowing for regulatory flexibility to include private operators.

235. For examples of these toxic tradeoffs in the context of power plants in Pennsylvania and elsewhere, see Charles Duhigg, *Cleansing the Air at the Expense of Waterways*, N.Y. TIMES, Oct. 13, 2009, at A1.

236. See, e.g., Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1172 (1995) (“Despite the growth of federal environmental law, Congress has gone to great lengths to preserve an important role for the states in environmental policy-making. State law retains considerable importance in the environmental protection arena. Congress generally has been careful not to preempt state law except in narrow circumstances.”); see also *supra* note 181 and accompanying text.

237. For an argument that, since 1976, just a few years before its decision in *City of Philadelphia v. New Jersey*, the Court has become more activist with respect to pro-development decisions in environmental cases and has relied increasingly on policy arguments based on economic efficiency rather than other values, see Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court’s Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989).

238. Hackensack Meadowlands Dev. Comm’n v. Mun. Sanitary Landfill Auth., 348 A.2d 505, 513 (N.J. 1975), *vacated and remanded sub nom.* City of Philadelphia v. New Jersey, 430 U.S. 141 (1977) (per curiam).

239. *Id.*

240. *Id.* at 516.

insisted on his version of the collective good of the natural environment: “[T]he 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.”²⁴¹

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 of the negative Commerce Clause to strike down state regulation.²⁴² If the Court had characterized waste as *pollution* rather than a commercial commodity, it would have been 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.²⁴³

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. 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 when doing so serves environmental ends such as waste minimization or elimination. We support the legislative commodification of waste so long as it is protective of the collective good of the natural environment.²⁴⁴

The problem is that the Court in its “waste is commerce” cases has 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 kinds of cases will arise in the future, such as in efforts by states to protect themselves from such environmental challenges

241. *Id.* at 518–19 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

242. 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. *United Haulers Ass’n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334, 339–45 (2007). Presumably, private waste disposal businesses will continue to have causes of action against discriminatory treatment in other contexts. *But see id.* at 349 (Thomas, J., concurring) (arguing that he would “discard the Court’s negative [or dormant] Commerce Clause jurisprudence” entirely).

243. A former prosecutor in Pennsylvania pointed out an interesting connection between our two case studies as demonstrated in a criminal case against 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. Serafini*, 7 F. Supp. 2d 529 (M.D. Pa. 1998), *aff’d*, 167 F.3d 812 (3d Cir. 1999). This case illustrates that constitutional commodification in one area (campaign finance) may have feedback loops that encourage commodification in another (environmental protection), and vice versa.

244. *See supra* note 229 and accompanying text.

as fracking waste, depredation of water resources, and the transformation of energy production and distribution.²⁴⁵

CONCLUSION: PROTECTING COLLECTIVE GOODS FROM THE COURT

We began by positing that collective goods exist, and they include institutions such as our democratic government as well as the environmental endowments of land, air, water, and atmosphere that support our lives and those of future generations. These collective goods are worth protecting.²⁴⁶

We posited further that the long-term social and economic dynamic known as commodification can threaten collective goods.²⁴⁷ Democratic government is a collective good in the sense that mutual participation of all citizens on at least a relatively equal basis defines it.²⁴⁸ To the extent that our government is or becomes bought and paid for by its wealthiest citizens,

245. See *supra* notes 200–205 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).

Renewable energy portfolio standards are one kind of effective climate regulation strategy that may prove vulnerable to a negative Commerce Clause challenge. See Felix Mormann, *Constitutional Challenges and Regulatory Opportunities for State Climate Policy Innovation*, 41 HARV. ENVTL. L. REV. 189, 193–94, 200–09 (2017). If “energy” in broad terms is considered “in commerce,” then state regulation that discriminates with respect to the environmental characteristics of the source (e.g., solar or wind instead of coal or oil) may be vulnerable to a constitutional commodification argument. In partial response to this constitutional threat, several scholars have argued for reform of negative Commerce Clause jurisprudence. See, e.g., Michael Barsa & David A. Dana, *A Climate Change Lens on the Dormant Commerce Clause, Lifecycle GHG Taxes, and In-State RPSS Requirements*, 5 SAN DIEGO J. CLIMATE & ENERGY L. 69 (2014); Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243 (1999); Danny Englese, Note, *Tilting at Windmills: Finding an Alternative Dormant Commerce Clause Framework to Preserve Renewable Portfolio Standard Generator Location Requirements*, 47 ARIZ. ST. L.J. 983 (2015); Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295 (2013). For earlier arguments for the Court to restrict the scope of review under the negative Commerce Clause, see Eule, *supra* note 206; Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 576 (1997).

A different kind of challenge involves contests among the states for access to water, especially in rivers, lakes, and groundwater. The Supreme Court has decided three cases of disputes between states over water, and it currently has on its docket an interesting claim in *Mississippi v. Tennessee*, in which the state of Mississippi claims to “own” all of the groundwater located within state lines as against use or capture by another state. *Mississippi v. Tennessee*, 136 S. Ct. 499 (2015) (referring case to a special master); see Christine A. Klein, *Owning Groundwater: The Example of Mississippi v. Tennessee*, 35 VA. ENVTL. L.J. 474, 479–81 (2017). The Court prefers that states negotiate agreements about water use that are then approved by Congress, but the difficulty and the stakes involved in these disputes are likely to increase given predictions of future water scarcity. *Id.* at 477; see also *supra* note 203 and accompanying text.

246. See *supra* Introduction & Part I.B.

247. See *supra* Part I.A.

248. See, e.g., ROBERT A. DAHL, ON DEMOCRACY 37–40 (Ian Shapiro ed., 2d ed. 2015) (emphasizing the importance of equal and effective participation in democracy); see also HASEN, *supra* note 115, at 188 (arguing that “the one-person, one-vote rule should carry over to money-in-politics decisions,” leading to the imposition of “reasonable limits on money in elections”).

it becomes a plutocracy rather than a collective project of self-government.²⁴⁹ In this way, democratic self-government is inconsistent with its commodification.²⁵⁰

Many environmental collective goods also survive only if they are not reduced to commodities. In addition to our opening example of national parks,²⁵¹ we examined the problem of the creation and disposal of waste.²⁵² Consider also 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.²⁵³ Consider the atmosphere—the thermostat of our planet that has now been seriously disrupted due to the massive scale of commodified economic activities of production, distribution, and consumption of goods and services.²⁵⁴ Land, water, air, and atmosphere are all collective goods worth protecting.

In this Article, we have focused on the tensions that can arise between collective goods and expanding commercial commodification. To preserve collective goods such as democracy and a healthy environment we must look to the processes of government as well as markets. Only with government—and not entirely unrestrained commercial markets—can we properly manage the existential perils to the collective goods of humanity.

More specifically, we must place our faith and efforts in national, state, and local legislatures²⁵⁵—and in law. Again, this does not mean that economic markets cannot be usefully channeled, or new regulatory markets created, to address the challenges of collective goods. Markets to preserve

249. In Lincoln's lofty words, we seek a "government of the people, by the people, for the people." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in ROY P. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734, 734 (1946); see also HASEN, *supra* note 115, at 5, 9 (emphasizing "the fundamental unfairness of a political system moving toward plutocracy" and recommending reforms "as a means of promoting and preserving political equality").

250. See *supra* Part II.

251. See *supra* text accompanying note 1; cf. JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980) (reflecting on the varied purposes and values involved in national parks, including the preservation of wilderness and a sense of awe).

252. See *supra* Part III.

253. According to a recent assessment by the United Nations, synthesizing thousands of scientific reports, one million species of plants and animals face extinction in the next few decades owing to expanding human activities. Jeff Tollefson, *Humans Are Driving One Million Species To Extinction*, NATURE (May 6, 2019), <https://www.nature.com/articles/d41586-019-01448-4> [<https://perma.cc/W634-ZDMA>]; see also ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY (2014) (summarizing evidence that we are living through the sixth era of mass extinctions of species on Earth in geological time).

254. 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 eight main global environmental dangers). On the threat to our climate in particular, see generally BILL MCKIBBEN, FALTER: HAS THE HUMAN GAME BEGUN TO PLAY ITSELF OUT? (2019); 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); DAVID WALLACE-WELLS, THE UNINHABITABLE EARTH: LIFE AFTER WARMING (2019).

255. See *supra* text accompanying notes 15, 221, and 236.

collective goods, though, must serve these ends, and not the unmoored, often self-interested aims of individuals transacting in commercial markets.²⁵⁶

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, has tended to take a narrow 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.²⁵⁷ In this posture, the Court should defer, when possible, to congressional, state, and local legislation.²⁵⁸ 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.²⁵⁹ When asked to overturn a legislative effort to protect a collective good, the Court should attend to whether its reasoning would unduly elevate a commodity or degrade a collective good. In other words, the Court should resist solutions that rely on methods of constitutional commodification.²⁶⁰

A minimal response to our plea for judicial modesty would be for the Court to be assiduous in considering the views of third-party advocacy

256. See *supra* note 220 and accompanying text. This is not to say that business and nonprofit organizations do not have a significant role to play in solving collective goods problems, but we believe that government plays an essential role in guiding society toward finding and following solutions to collective goods problems. No evidence supports the arguments associated with Ayn Rand and her extreme libertarian followers such as the Koch brothers that wholly unrestricted business and individualist interests can preserve collective goods such as democratic government and an environmentally livable planet. See MCKIBBEN, *supra* note 254, at 90–130 (critiquing “[t]he cult of Ayn Rand” that has captured many of “the rich and powerful” in our society).

257. See *supra* note 14 and accompanying text. According to one comprehensive study, the current Court has been relatively favorable toward business interests. The study found that “a plunge in warmth toward business during the 1960s (the heyday of the Warren Court)” has been “quickly reversed,” and “the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were.” Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013).

258. See *supra* Parts II & III. We imagine that it is possible for a future Court to embrace an active defense of collective goods, but because of the adversarial context of judicial decisions and the institutional difficulty for judges to consider empirical evidence bearing on collective goods and their preservation, this kind of judicial shift seems unlikely.

259. See Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. 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) (emphasizing 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 Spindelman, *Toward a Progressive Perspective on Justice Ginsburg's Constitution*, 70 OHIO ST. L.J. 1115, 1126 (2009).

260. See *supra* Part I.C.

groups concerned about the protection of collective goods (e.g., Common Cause, Fair Fight, the Nature Conservancy, the Sierra Club, and other nonprofit organizations). Governments acting through their executives at the federal, state, and local levels also have reason to take collective goods seriously. In addition to taking on the role of litigants themselves, governments can often alert the Court, as intervenors or *amici curiae*, to facts and legal arguments that expose threats or harm to collective goods beyond the immediate focus of competing litigants.

More substantively, the Court should consider retreating from its activist use of judicial review in collective goods cases. It could, for example, revive and reinvigorate principles that defer to the elected, representative branches of government, such as the political question doctrine²⁶¹ and the “clear mistake” standard of review.²⁶²

Many more cases implicating collective goods, and not only in the areas of constitutional democracy and the natural environment, will come to the Court going forward. For example, we believe that our account can offer an illuminating perspective on *National Federation of Independent Business v. Sebelius* and subsequent efforts to challenge the Affordable Care Act’s individual mandate.²⁶³ The collective good of national health is an essential interest that threatens to be overlooked in these recurring cases.

We believe that our account can also illuminate troubling dynamics in other disparate areas of law, including the Court’s protection of commercial speech, union dues, trademarks for offensive speech, and gun ownership.²⁶⁴

261. 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).

262. RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 160 (2018) (noting that 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 B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (original version of the rule).

263. 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. As of this writing, a new case challenging the constitutionality of the Affordable Care Act is being heard by the Fifth Circuit Court of Appeals. See Li Zhou, *The Latest Legal Challenge to the Affordable Care Act, Explained*, VOX, <https://www.vox.com/policy-and-politics/2019/7/9/20686224/affordable-care-act-constitutional-lawsuit-fifth-circuit-court-texas-district-court> [<https://perma.cc/9D7E-MDAJ>] (last updated July 10, 2019).

264. We leave elaboration of these applications for another day, but here are several brief suggestions.

(1) Commercial speech might be reasonably 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 in order to safeguard ‘the essential role that the free flow of information plays

Our theory of collective goods and constitutional commodification thus offers a unique and probing lens into many developing areas of law where commerce and the Constitution coincide and sometimes conflict.

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

One approach to protecting collective goods would rely on new legislation at all levels of government. In some cases, legislative prohibitions or bans might be appropriate, such as the prohibition imposed on the killing, taking, or trading of endangered species,²⁶⁵ or the federal ban on the bribery of public officials.²⁶⁶ In this connection also, we celebrate and support experiments in what we have called *legislative commodification*.²⁶⁷ Unlike constitutional commodification, legislative approaches are democratically adopted rather than imposed by an unelected Court. Indeed we already see 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.²⁶⁸ Creative market-based or market-leveraging approaches aimed at environmental protection may also prove attractive.²⁶⁹

in a democratic society.” (quoting 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996) (Stevens, J., plurality opinion))).

(2) Requiring union dues does not seem to implicate the First Amendment, *contra Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018), given that the union speaks for the collective good of employees whether or not they pay dues. See Amy J. Sepinwall, *Free Speech and Off-Label Rights*, 54 GA. L. REV. (forthcoming 2020).

(3) The Court might overturn or limit its decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017), which 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.

(4) A collective good of public safety and “domestic tranquility” could be invoked to cabin the expansion of an excessively and dangerously individualized view of gun ownership rights under the Second Amendment. See Danielle Allen, Opinion, *What Is Domestic Tranquility? It Is Not Being Gunned Down in Your House of Worship*, WASH. POST (Oct. 28, 2018, 11:22 AM), https://beta.washingtonpost.com/opinions/what-is-domestic-tranquility-it-is-not-being-gunned-down-in-your-house-of-worship/2018/10/28/599749fe-dab6-11e8-b3f0-62607289efee_story.html [https://perma.cc/TU8Q-8APL] (“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.”).

265. See *supra* note 68 and accompanying text.

266. See, e.g., Ofer Raban, *Constitutionalizing Corruption: Citizens United, Its Conceptions of Political Corruption, and the Implications for Judicial Elections Campaigns*, 46 U.S.F. L. REV. 359, 368–72 (2011) (describing scope of federal bribery statute).

267. See *supra* text accompanying note 220.

268. See, e.g., ACKERMAN & AYRES, *supra* note 108; LESSIG, *supra* note 95, at 264–75.

269. See *supra* note 229 and accompanying text.

Legislative solutions are not likely to be sufficient, though, for legislators may face traps of potential capture,²⁷⁰ majoritarian tyranny,²⁷¹ and loops of political control arising from the very campaign finance problems that we have identified.²⁷² Also as seen in our two principal case studies, both federal and state legislative solutions can run into constitutional trouble.²⁷³ A form of higher lawmaking should therefore buttress quotidian democratic approaches. By higher lawmaking we mean the evolution of the larger constitutional system toward the recognition and protection of collective goods such as democracy and the natural environment.²⁷⁴

In the last several decades, scholars have produced exciting work identifying new mechanisms for higher lawmaking.²⁷⁵ By design, these efforts sacrifice the deep entrenchment that a formal constitutional amendment secures.²⁷⁶ Yet we believe that the natural environment and democratic government deserve the utmost protection. We therefore recommend formal constitutional amendments to protect these collective goods.

270. See, e.g., JANE MAYER, *DARK MONEY* (2016).

271. See, e.g., THE FEDERALIST NO. 10, at 23 (James Madison) (Richard Beeman ed., 2012) (expressing concern for “the violence of [majority] faction”).

272. 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”).

273. See *supra* Parts II and III.

274. For articulations of the political and legal idea of “higher lawmaking,” see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104 (2014).

275. 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 the amending clause of 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 MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 710 (2001); 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); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 473 (2007).

276. See, e.g., Tushnet, *supra* note 275, at 818–20 (discussing weak-form judicial review); cf. Bruce Ackerman, *Essay, The Emergency Constitution*, 113 YALE L.J. 1029, 1078–91 (2004) (defending the use of a statute that allowed a branch of government to overstep its traditional powers in a time of emergency so long as that branch was subject to checks, including a sunset provision).

Nor are we alone. Others have proposed amendments to protect public rights in the environment,²⁷⁷ to encourage equal political participation,²⁷⁸ and to restrain the role of money in politics.²⁷⁹ We commend these efforts, but none of them specifically concerns itself with collective goods. In future work, we anticipate offering our own set of amendments and perhaps other proposals to address the particular ills that our two case studies have illuminated.

More broadly speaking, 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 inappropriately and to protect expanded exchange from regulation. The Court has used the Constitution to commodify non-commodities, subjecting them to market norms that degrade them in the aggregate. It has constitutionalized commodities, extending constitutional protection to them in a manner usually reserved for our most cherished constitutional rights.²⁸⁰ 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 individual right to speak as much as one would like on political matters versus the individual right to be heard).²⁸¹ Or it sets one group of individual interests against the interests of a 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

277. 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).

278. See, e.g., *Reps. Pocan and Ellison Introduce Right to Vote Constitutional Amendment*, MADISON365 (Feb. 17, 2017), <http://madison365.com/rep-pocan-ellison-introduce-right-vote-constitutional-amendment/> [<https://perma.cc/3F9L-5SLX>]. Proposals to provide every citizen with a voucher to spend on political speech might be seen as efforts to help equalize political participation. See, e.g., ACKERMAN & AYRES, *supra* note 108; HASEN, *supra* note 115, at 9–10, 84–103.

279. See, e.g., JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 79 (2014); 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> [<https://perma.cc/GS62-Y9U6>]. But see Russ Feingold, *Upholding an Oath to the Constitution: A Legislator's Responsibilities*, 2006 *WIS. L. REV.* 1, 6 (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).

280. See *supra* text accompanying notes 18–22 (distinguishing constitutionalization of a commodity and commodification by constitutional implication as two sides of the same coin).

281. See *supra* Part II.A and C.

unlimited amount of waste versus the right of a state to regulate the kind and quantity of waste it allows to be transported and disposed).²⁸²

These legal contests are far more lopsided than their 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 should identify where and how they are threatened, and we should find and establish methods to protect them from erosion through further constitutional commodification.

282. *See supra* Part III.