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Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment

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BEYOND THE BOSSES' CONSTITUTION:
THE FIRST AMENDMENT AND CLASS ENTRENCHMENT

Jedediah Purdy*

The Supreme Court's "weaponized" First Amendment has been its strongest antiregulatory tool in recent decades, slashing campaign-finance regulation, public-sector union financing, and pharmaceutical regulation, and threatening a broader remit. Along with others, I have previously criticized these developments as a "new Lochnerism." In this Essay, part of a Columbia Law Review Symposium, I press beyond these criticisms to diagnose the ideological outlook of these opinions and to propose an alternative. The leading decisions of the antiregulatory First Amendment often associate free speech with a vision of market efficiency; but, I argue, closer to their heart is antistatist fear of entrenchment by elected officials, interest groups, and bureaucrats. These opinions limit the power of government to implement distributional judgments in key areas of policy and, by thus tying the government's hands, constrain opportunities for entrenchment. This antidistributive deployment of market-protecting policy is the signature of neoliberal jurisprudence.

But this jurisprudence has deep problems in an order of capitalist democracy such as ours. Whenever the state cannot implement distributional judgments, markets will do so instead. Market distributions are, empirically speaking, highly unequal, and these inequalities produce their own kind of entrenchment—class entrenchment for the wealthy. A jurisprudence that aims at government neutrality by tying the distributional hands of the state cannot achieve neutrality but instead implicitly sides with market inequality over distinctively democratic forms of equality. Once we see that any constitutional vision involves some relationship between the "democratic" and the "capitalist" parts of capitalist democracy, it becomes possible not just to criticize the Court's siding with market winners but also to ask what kinds of equality-pursuing policies the Constitution must permit to reset that balance in favor of democracy.

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INTRODUCTION

Although the Supreme Court’s “weaponiz[ed]” First Amendment¹ often comes dressed in rhetoric associating political and civic life with an idealized market, it is aimed less at advancing a perfect market than at impeding very imperfect politics. It aims centrally at averting partisan and bureaucratic entrenchment—at preventing political elites from picking future winners from among candidates, parties, and policies.² The problem is that, even if it accomplishes this (a question this Essay does not attempt to answer), it does so at the cost of supporting class entrenchment: the concentration of political power in a relatively small and privileged echelon of Americans.³ It does so by constitutionally protecting the translation of unequal wealth into unequal political power. This Essay aims to illuminate the premises about the political economy of capitalist democracy that make these doctrinal outcomes plausible and even seemingly obvious, and to advance an alternative approach.

The Court has put an antidistributional principle at the center of today’s First Amendment doctrine: “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”⁴ This per curiam anathema on official distributional judgments in regulating speech—in this instance, the spending of personal wealth in electoral

1. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

2. See *infra* Part I.

3. See *infra* section II.A.

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

advocacy⁵—has echoed down from the 1976 ruling in *Buckley v. Valeo* to vindicate corporate campaign spending in *Citizens United v. FEC*⁶ and invalidate conditional public financing in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,⁷ among other consequences.⁸ Prohibiting certain kinds of political choices about distribution, especially of political influence itself, has become a key doctrinal tool for defining government neutrality under the First Amendment.⁹ Its effect, however, is not to avoid distributional decisions but to hand them off implicitly to markets.

An effective response must make the case for active democratic engagement with the terms of political power itself, centrally including the political power that arises from economic power. It must say what kind of interaction a democratic republic should build between economic and political power, and for what reasons. It must offer, that is, a political economy of power. This Essay thus moves from reconstructing the worldview that supports certain doctrines to addressing the question of what arrangement of market power and political power First Amendment doctrine should aim to cultivate.

Part I of this Essay elaborates the argument sketched above regarding the structure and sources of the Court's campaign-finance cases. Part II develops an alternative picture of the most important distortion of democracy in recent decades: the class entrenchment of the wealthy in political influence. Turning to the question of what political economy of power is desirable in a democratic republic, this Essay proposes that a democratic republic must be able to achieve political will formation around a creditable idea of the common good. This goal requires a modicum of civic equality, which in turn requires that the polity be able to set the terms of its own will formation—that is, to legislate on the formation and distribution of political influence, the very topic the current Court puts out of bounds. The Essay goes on to suggest that this doctrinal pursuit of civic equality should take notice—as the Court's current jurisprudence furtively does—of the political-economic order it aims to make possible, here one of stronger democracy and greater equality and security. One might call it a social-democratic jurisprudence. In contrast, the Court's recent First Amendment jurisprudence, with its conceptual annulment and practical embrace of class entrenchment, has produced a bosses' Constitution. Part III develops this approach further through the First Amendment cases addressing public-sector union fees.

5. See *id.* at 7.

6. See 558 U.S. 310, 349–50, 365 (2010) (citing *Buckley*, 424 U.S. at 48–49).

7. See 564 U.S. 721, 727–28, 741 (2011) (citing *Buckley*, 424 U.S. at 48–49).

8. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–42, 1450 (2014) (citing *Buckley*, 424 U.S. at 48–49) (invalidating a statutory limit on aggregate campaign contributions).

9. See *infra* Part I.

I. THE COURT'S POLITICAL ECONOMY OF SPEECH

A. *Speech, Democracy, and Entrenchment*

The Court's reasoning in the political-spending cases adopts a metaphor of public, political speech as occurring in an efficient market, "the 'open marketplace' of ideas protected by the First Amendment," in which "ideas 'may compete' . . . 'without government interference.'"¹⁰ In this marketplace, electoral "expenditure is political speech presented to the electorate," an offering that "presupposes that the people have the ultimate influence over elected officials."¹¹ The purpose of the advertising is "advising voters on which persons or entities are hostile to their interests."¹² Within this image, political speech (including spending) is thus "an essential mechanism of democracy, for it is the means to hold officials accountable to the people" by presenting voters with competing accounts of their situation and interests.¹³ So understood, speech is the cornerstone of "a republic where the people are sovereign."¹⁴

These passages bolster decisions holding that limits on campaign spending may not be constitutionally justified as measures to reduce "distortion" of political power or "corruption" in the form of undue political influence.¹⁵ The Court's praise of advertising's service to democracy is a buttress for the view that government must not be allowed to make distributional judgments concerning political speech and influence because "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election . . . , and it is a dangerous business for Congress to use the election laws to influence the voters' choices."¹⁶ It is avoiding this *summum malum* that powers the praise of political advertising and market-style voter choices as a democratic *summum bonum*. The Court treats elections and political debate *as if* they were perfect markets because this premise secures them against the vices of political rent seeking.

The Court's jurisprudence, accordingly, is not invested in the thoroughgoing coherence or adequacy of the market metaphor. As Professor David Grewal and I have emphasized elsewhere, modern arguments favoring private economic power over democratic countermeasures tend to have shifting, overlapping aspects: affirmative idealization of the efficiency of

10. *Citizens United*, 558 U.S. at 354 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

11. *Id.* at 360.

12. *Id.* at 354.

13. *Id.* at 339.

14. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

15. See *Citizens United*, 558 U.S. at 349–61 (rejecting the antidistortion and anti-corruption rationales for regulating corporate political speech).

16. *Id.* at 350 (internal quotation marks omitted) (quoting *Davis v. FEC*, 554 U.S. 724, 742 (2008)).

market arrangements; moralized identification of the rights and transactions of the marketplace as uniquely compatible with liberty, equality, and dignity; a tragic register insisting that the predictable deficiencies of politics generally, or certain democratic institutions in particular, prevent them from doing better than markets can, even if we might wish otherwise; and a preargumentative “common-sense” dimension that implicitly dismisses certain alternatives as “off the table” before the serious argument has begun.¹⁷ It is typical to move among these different registers almost unselfconsciously because they hang together as an ideological worldview. Indeed, besides their praise of markets and denigration of politics, the political-spending opinions invoke the “worth” and “voice” of speakers, as if corporations were marginalized populations in search of dignity, and liberally invoke the language of nondiscrimination, almost reflexively borrowing the moral language of First Amendment liberties.¹⁸ So the *Citizens United* Court announced of the corporate-spending ban, “The censorship we now confront is vast in its reach . . . [and] ‘muffle[s] the voices that best represent the most significant segments of the economy.’”¹⁹ In these opinions, however, avoiding the pathologies of politics is the keystone.

The implicit standpoint of the campaign-finance cases, then, is the following: The constitutional evil to be avoided is manipulation by the political class of the rules for later elections, which would “deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration” and will receive majoritarian endorsement.²⁰ Seen in this way, limiting campaign spending is a usurping attempt to predetermine the course of democratic self-rule, just like prohibiting antiwar pamphleteering or banning Karl Marx’s writings.²¹ The Court’s way of averting this hazard involves it in a certain view of democratic will formation. In this latter view, voting decisions are fairly characterized on the paradigm of the fully informed economic agent of neoclassical modeling, who gratefully accepts the helpful data that advertising provides.²² This upbeat idea that the wealthy, whether through the

17. David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 *Law & Contemp. Probs.*, no. 4, 2014, at 1, 6–7.

18. See *Citizens United*, 558 U.S. at 340–41 (“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.”).

19. *Id.* at 354 (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part)).

20. *Id.* at 341.

21. See generally Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 256–57 (arguing that the First Amendment should protect, among other things, philosophy and public discussions of public issues because of their importance to self-government).

22. See generally Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 *Q.J. Econ.* 99, 99 (1955) (“Traditional economic theory postulates an ‘economic man,’ who, in

corporate form or otherwise, are simply submitting arguments for assessment by their fellow citizens, is not an empirical claim about political persuasion and judgment. It is a half-theoretical, half-rhetorical premise. Current First Amendment doctrine tends toward this premise in good part to avoid a square confrontation with the problems that arise from its rejection of explicit distributional judgments concerning political influence.

B. *A Theoretical and Historical Origin Point for the Court's View*

The judicial outlook sketched above emerged before the rise of the “conservative legal movement” that today furnishes many of its spokespersons on the bench.²³ Its early articulation arose from a shared sense of the distinctive problems of capitalist democracy and the role of a constitutional order in mitigating them. The social and intellectual world of its early spokespersons was the end of the post–World War II “great exception,” the last years of a period of widely shared growth, the flattest distributions of wealth and income the country has seen, and a strong role for organized labor in the Keynesian management of the national economy.²⁴

From the point of view of the worried center-right, the postwar era presented a threat: Too much political control of the economy, bolstered by unions and by the left, would stifle personal liberty and initiative, leading to some combination of stagnation and tyranny.²⁵ The influence of this perspective on elite legal culture was evident in Justice Powell’s 1971 memorandum to Eugene Sydnor of the Chamber of Commerce, written shortly before his nomination to the Supreme Court, in which Powell called for a full-court press by business in politics, universities, media, and the courts for “the preservation of the system [of free enterprise] itself.”²⁶ Justice Powell’s memo crystallized a development in twentieth-century conservative jurisprudence that has come to full flower

the course of being ‘economic’ is also ‘rational.’ This man is assumed to have knowledge of the relevant aspects of his environment which, if not absolutely complete, is at least impressively clear and voluminous.”).

23. See generally Steven M. Teles, *The Rise of the Conservative Legal Movement* (2008) (charting the development, since the 1970s, of the “conservative legal movement” into a “sophisticated and deeply organized network”).

24. See Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*, at xiii–xiv (Patrick Camiller & David Fernbach trans., 2d ed. 2017) [hereinafter Streeck, *Buying Time*]; David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 *Theoretical Inquiries L.* 61, 61–67 (2017) [hereinafter Grewal & Purdy, *Inequality*] (describing the economic growth and optimism that prevailed in the three decades following World War II).

25. See Kim Phillips-Fein, *Invisible Hands: The Businessmen’s Crusade Against the New Deal* 150–212 (2010) (describing business interests’ mobilization of ideas against the regulatory state in the late 1960s and 1970s).

26. Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce 30 (Aug. 23, 1971) [hereinafter Powell Memorandum] (on file with the *Columbia Law Review*).

in the twenty-first: an across-the-board resistance to the politics of distribution, in which political spending plays a central role.

The fear of state-led distribution has been a frequently renewed resource in U.S. politics since James Madison's warnings against redistributive "factions" in Federalist No. 10.²⁷ It defined the right wing of the classically liberal Republican Party in the first Gilded Age, and the Liberty League and other opponents of the New Deal recast it for their purposes.²⁸ When the conservative *Reader's Digest* published a polemical summary of libertarian economist Friedrich Hayek's already polemical *The Road to Serfdom*, an antistatist beachhead was announced at the apex of America's (always incomplete and racially stratified) closest approach to social democracy.²⁹ Hayek and his fellow Chicago economist Milton Friedman (whom Powell admiringly quoted in his 1971 memo³⁰) brought to the defense of markets theoretical sophistication and, especially in Hayek's case, the ambition to synoptic social theory.³¹ By the early 1970s, these thinkers, like Powell, were developing the neoliberal response to a cross-national wave of labor militancy, social-movement discontent, and inflationary pressures (the last widely seen as connected with organized labor's expectation of regular wage hikes, even as productivity slowed),³² which among thinkers of the second Frankfurt School came to be known as the West's "legitimation crisis."³³ Hayek and his allies helped the reflective wing of American business to formulate an imperative to restore

27. See The Federalist No. 10, at 53 (James Madison) (Ian Shapiro ed., 2009) (warning against redistribution and debt relief as the signal threats of an unchecked local democracy).

28. See President Grover Cleveland, Second Inaugural Address (Mar. 4, 1893) ("[Economic paternalism] perverts the patriotic sentiments of our countrymen and tempts them to pitiful calculation of . . . sordid gain . . . It undermines the self-reliance of our people and substitutes in its place dependence upon governmental favoritism."); Phillips-Fein, *supra* note 25, at 3–25 (detailing the mobilization of free-market ideas against the New Deal).

29. See Angus Burgin, *The Great Persuasion: Reinventing Free Markets Since the Depression* 87–122 (2012) (detailing the popularization and reception of Hayek's thought and its role in conservative retrenchment against the New Deal); see also Grewal & Purdy, *Inequality*, *supra* note 24, at 66 (noting exceptions to the post-World War II "trend of economic inclusion," such as African Americans).

30. See Powell Memorandum, *supra* note 26, at 5–6.

31. See, e.g., Friedrich A. Hayek, *The Mirage of Social Justice* 107–32 (Phoenix ed. 1978) (theorizing the nature and benefits of the market order).

32. See Wolfgang Streeck, *The Crises of Democratic Capitalism* [hereinafter *Streeck, Crises*], in *How Will Capitalism End?* 73, 77–78 (2016) [hereinafter *Streeck, How Will Capitalism End?*] (recounting the rise of labor militancy and inflation beginning in the late 1960s).

33. See Streeck, *Buying Time*, *supra* note 24, at 1–46 (recounting the "legitimation crisis" debates of the 1970s and criticizing their failure to anticipate the resilience of capitalism).

competitive pressure throughout the economy and, conversely, to roll back uses of the state that baffled or annulled market competition.³⁴

Hayek followed political economist Joseph Schumpeter and other skeptics of robust democracy in holding that such ideas as “society” and “the political community” were sentimental mystifications, and distributional politics a semiorganized form of looting.³⁵ Hayek contended, moreover, that abandoning market coordination implied moving toward the only systemic alternative: outright political command of economic life.³⁶ He thus worked out in theory the position that Powell adopted in his memo:

The threat to the enterprise system . . . also is a threat to individual freedom.

. . . .

. . . [T]he only alternatives to free enterprise are varying degrees of bureaucratic regulation of individual freedom—ranging from that under moderate socialism to the iron heel of the leftist or rightist dictatorship.

. . . .

. . . [F]reedom as a concept is indivisible. As the experience of the socialist and totalitarian states demonstrates, the contraction and denial of economic freedom is followed inevitably by governmental restrictions on other cherished rights.³⁷

Hayek argued that, if democracy were to be viable despite these deficiencies, the scope of politically open questions must be closely restricted—specifically to exclude questions of distribution.³⁸

The Court’s worry about political entrenchment thus has a particular historical paradigm: the defense of market ordering, with its accompanying liberties, against the self-perpetuating rule of a bureaucratic state acting on behalf of well-organized or ideologically sympathetic interest groups. Hayek and Friedman joined public-choice theorists such as Gordon Tullock and James Buchanan in warning against this political

34. See, e.g., Burgin, *supra* note 29, at 186–213 (describing Friedman’s advocacy for laissez faire principles in the 1970s).

35. See Friedrich Hayek, ‘Social’ or Distributive Justice, *in* *The Essence of Hayek* 62, 67 (Chiaki Nishiyama & Kurt R. Leube eds., 1984) (“I believe that ‘social justice’ will ultimately be recognized as a will-o’-the-wisp which has lured men to abandon many of the values which in the past have inspired the development of civilization . . .”).

36. See *id.* at 91–93 (arguing that the only alternative to market allocation in the social division of labor is, in effect, the conscription of some people in defense of the privileges of others).

37. Powell Memorandum, *supra* note 26, at 32–33.

38. See Friedrich Hayek, *Whither Democracy?*, *in* *The Essence of Hayek*, *supra* note 35, at 352, 357–58 (arguing for the construction of a government that systematically avoids distributional decisions because the “different treatment which is necessary in order to place people who are individually very different into the same material position seems . . . not only incompatible with personal freedom, but highly immoral”).

entrenchment as the distinctive hazard of democratic capitalism.³⁹ The key to staving off this danger, it was influentially argued on the neoliberal right, was to cordon off questions of distribution from active political contestation.

It was in this setting that the Court announced per curiam that the refusal of distributional judgments was the essential commitment of the Constitution's protection of freedom of speech.⁴⁰ When one tries picturing the goal of averting political redistribution as a jurisprudential keystone, other doctrinal developments form an arch around it. The affirmative action cases head off distributional judgments and political entrenchment along racial lines, as in the opinions of Justices O'Connor and Scalia in *Croson*⁴¹ and Justice Roberts's opinion in *Parents Involved*.⁴² The Court's treatment of public-sector unions in *Janus v. AFSCME* (discussed in Part III) suggests a pair of touchstone worries: that the support of public-sector unions might provide a means of political entrenchment, and that the political empowerment of such unions might enable them to foist ruinous distributional demands on local and state governments.⁴³ The Spending Clause opinions in *National Federation of Independent Business v. Sebelius*, especially the joint dissent of four conservative Justices, aim at heading off Congress's imposing a redistributive form of social provision on the states via the power of general taxation.⁴⁴ In short, the antidistributional nerve of *Buckley* and the subsequent campaign-finance cases connects that reasoning both to the rising neoliberal political economy of the 1970s and to a substantial body of post-Warren Court jurisprudence, from the Nixon appointees' halt of Warren Court and Great Society egalitarianism to the Rehnquist and Roberts Courts' rollback

39. See generally James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962) (arguing for a positive theory of politics and government based on the analysis of decision dynamics among self-interested actors), reprinted in 2 *The Selected Works of Gordon Tullock* (Charles K. Rowley ed., 2004).

40. See *supra* note 4 and accompanying text.

41. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–97 (1989) (plurality opinion) (O'Connor, J.) (noting the danger of “simple racial politics” and the fact of Richmond's majority-black city government as reasons for applying strict scrutiny to affirmative action programs); *id.* at 520 (Scalia, J., concurring in the judgment) (rejecting the notion that governments may use racial classifications to ameliorate the effects of past discrimination).

42. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725–32 (2007) (expressing “concern that racial balancing has ‘no logical stopping point’” and, if permitted, will embed racial proportionality permanently in American life (quoting *Croson*, 448 U.S. at 498)).

43. See *infra* notes 98–107 and accompanying text.

44. See 567 U.S. 519, 690–91, 706–07 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (arguing that federalism principles should prohibit Congress from requiring states to choose between adopting a federally funded social-provision policy, on the one hand, and funding their own while simultaneously funding other states' federally subsidized programs through federal taxes, on the other).

of the same. Constitutional resistance to redistribution is at the heart of this jurisprudence.

This Part has diagnosed a set of premises about markets and democracy in the Court's First Amendment doctrine and located an origin point for these in the political, economic, and legal debates of the early 1970s. The next Part provides a larger context for explaining and assessing the Court's First Amendment doctrine, as well as criteria for marking out a different, more egalitarian and democratic path forward. I argue that a capitalist democracy like that of the United States must manage two competing sets of imperatives: those of marginal productivity aimed at profit and those of social provision and self-rule. While the Justices who have shaped the current doctrine have seen chiefly the danger that politics poses to markets, the greater danger is the threat that capitalism's dynamics pose to social provision and self-rule. Preserving democracy requires actively fostering the conditions for its success. The kind of redistributive policy that the *Buckley* Court made anathema is, in fact, indispensable.

II. AN ALTERNATIVE: THE TENSIONS OF CAPITALIST DEMOCRACY

Capitalist democracy welds together two quite different principles for generating answers to the basic problems of social coordination: Who plays what roles in cooperation, who gets what resources in distribution, and who has what authority in the political decisions that set the rules of further cooperation and distribution?⁴⁵ Capitalist ordering, based on the private ownership of productive resources (including labor power) and their market-mediated allocation in pursuit of the highest marginal return, tends persistently to produce inequality in wealth and income.⁴⁶ It also produces class stratification, as different social groups play different roles, from investor and rentier to professional and laborer.⁴⁷

45. This is a fairly conventional account of the questions any system of social cooperation must answer. See, e.g., Barrington Moore, Jr., *Injustice: The Social Bases of Obedience and Revolt* 9 (1978) (dividing the problem of social coordination into problems of authority, division of labor, and allocation of goods and services).

46. See Wolfgang Streeck, *Crises*, supra note 32, at 74–75 (characterizing the “capitalist” half of capitalist democracy as governed by a “principle[] . . . of resource allocation . . . operating according to marginal productivity, or what is revealed as merit by a ‘free play of market forces’”); David Singh Grewal, *The Laws of Capitalism*, 128 *Harv. L. Rev.* 626, 629–44 (2014) (reviewing Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer trans., 2014)) (summarizing Piketty’s findings of persistent, cross-national, multicentury trends toward increasing inequality of both income and wealth).

47. See Grewal, supra note 46, at 632 (summarizing Piketty’s diagnosis of class stratification under a system of “patrimonial capitalism” in which inherited wealth creates a sizable rentier class). This class-stratified division of labor is not unique to capitalist societies and in fact has characterized all industrial societies, including the authoritarian socialist regimes of the Soviet bloc. See, e.g., Kazimierz M. Słomczyński & Irina Tomescu-Dubrow, *Class Structure and Social Stratification in Poland from the 1970s to the 2010s*, in *Dynamics of Class and Stratification in Poland* 39, 39–65 (Irina Tomescu-Dubrow et al.

Democratic ordering, by contrast, presents a principle of majority decisionmaking by members of a community of political equals.⁴⁸ To give a democratic response to the basic problems of social coordination is to say that the terms of cooperation and distribution must ultimately take their legitimacy from the collective decision of a community of equals, such as a principle of “social need or entitlement, as certified by the collective choices of democratic politics.”⁴⁹ A democratic polity might have good reason to embrace market allocation for any number of purposes, but the use of markets would have its justification in a collective choice among equals; democracy would have to come first. The relation between the two principles of capitalist democracy is particularly fraught in the allocation of political authority to set the rules of cooperation and distribution.⁵⁰ Wealth and class stratification tend constantly to undermine the equality of citizens (which is always artificial and legally constituted), giving certain classes (the wealthy, professionals, investors) the capacity to set political agendas and control important decisions.⁵¹ This overriding of the democratic principle by its capitalist competitor is the

eds., 2018) (providing a sociological overview of these dynamics under Soviet-bloc socialism and subsequent capitalism). The tensions in relation to American-style capitalist democracy, however, are especially acute.

48. See Streeck, *Crises*, supra note 32, at 75 (characterizing the “democratic” half of capitalist democracy as governed by a principle “based on social need or entitlement, as certified by the collective choices of democratic politics”). This is not merely a conceptual stipulation. As David Grewal and I have recently argued, democratic authorization of political power constitutes not just the ethical core of American constitutionalism’s conception of legality but also the very foundation and structure of the Constitution’s authority. See David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 *Yale L.J.* 664, 681–90 (2018) [hereinafter Grewal & Purdy, *Original Theory*] (reviewing Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (2016)). While a sociological description such as Streeck’s captures essential difficulties in capitalist democracy, these difficulties arise and present the questions I am exploring here specifically because of the constitutional commitment to democratic self-rule.

49. Streeck, *Crises*, supra note 32, at 75. While I find Streeck’s characterization an invaluable shorthand, I don’t mean to follow him, or the Polanyian tradition in which he writes, in sometimes seeming to essentialize the national community in ways that can invite perceived affinities with dangerous forms of nationalism. See Grewal & Purdy, *Original Theory*, supra note 48, at 666–73 (explaining that the polity of democratic constitutionalism is an artificial, legally constituted entity—though no less real for that, a point that should be not at all mysterious to lawyers); Adam Tooze, *A General Logic of Crisis*, *London Rev. Books* (Jan. 5, 2017) (reviewing Streeck, *How Will Capitalism End?*, supra note 46), <http://www.lrb.co.uk/v39/n01/adam-tooze/a-general-logic-of-crisis> [<http://perma.cc/3ACT-QFV5>] (arguing that Streeck strays toward this essentialization).

50. Cf. Streeck, *Crises*, supra note 32, at 76 (“[T]heories of political economy . . . recognize market allocation as just one type of political-economic regime, governed by the interests of those . . . in a strong market position. An alternative regime, political allocation, is preferred by those with little economic weight but potentially extensive political power.”).

51. See Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America 1* (2012) (“The American government does respond to the public’s preferences, but that responsiveness is strongly tilted toward the most affluent citizens.”).

perennial tendency of capitalist democracy. American democracy demonstrates the tendency well.

A. *Distributional Contests and Class Entrenchment*

American democracy is profoundly divided along class lines. Professor Martin Gilens concluded, summing up his own research and that of others, that “under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn’t adopt.”⁵² The policy preferences of wealthy Americans diverge systematically from those of the general public: Significantly smaller shares of the wealthy support substantial redistribution (17% versus 52%), national health insurance (32% versus 61%), affordable college (28% versus 78%), and a living wage (40% versus 78%).⁵³ Elected representatives themselves are predominantly professional or wealthy. Less than two percent of members of the U.S. Congress entered politics from blue-collar jobs.⁵⁴ It is estimated that at least half of congresspersons are millionaires and that the median net worth of a member of Congress is over \$1 million.⁵⁵ The disproportionate representation of the wealthy reinforces their disparate influence: “[L]awmakers

52. *Id.*; see also Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 242–44 (2d ed. 2016) (finding that the political views of the poor had almost no influence on Senate roll call votes during the 112th Congress); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *Persp. on Pol.* 564, 572 (2014) (finding that nonwealthy and unorganized voters wield almost no political influence). But see Yosef Bhatti & Robert S. Erikson, *How Poorly Are the Poor Represented in the U.S. Senate?*, in *Who Gets Represented?* 223, 223–24 (Peter K. Enns & Christopher Wlezien eds., 2011) (“[W]e do not challenge Bartels’s finding of unequal representation as necessarily incorrect. We do, however, offer what we believe to be compelling reasons to interpret the evidence with considerable caution.”). See generally Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 *U. Pa. J. Const. L.* 419, 421 (2015) (summarizing data on inequality and arguing that the U.S. government is appropriately understood as captured by the wealthy). With regard to the debate just noted, my claims about class entrenchment do not depend on Gilens and Page’s conclusion that the wealthy nearly always prevail in policy contests. I claim only that political power is profoundly unequal.

53. See Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 *Persp. on Pol.* 51, 57–64 (2013). This finding cannot really be considered authoritative, as it is based on interviews with eighty-three wealthy individuals in the Chicago area, but data on this issue are scarce. See *id.* at 53 (describing the methodology behind these findings).

54. See Nicholas Carnes, *White-Collar Government: The Hidden Role of Class in Economic Policy Making* 7–20 (2013) (summarizing findings that over the past century no more than two percent of members of Congress have been members of the working class and that from 1999 to 2008 only six percent of members of Congress had spent any time at all in blue-collar jobs).

55. See Russ Choma, *One Member of Congress = 18 American Households: Lawmakers’ Personal Finances Far from Average*, *OpenSecrets.org* (Jan. 12, 2015), <https://www.opensecrets.org/news/2015/01/one-member-of-congress-18-american-households-lawmakers-personal-finances-far-from-average/> [<http://perma.cc/FK96-ABRN>].

from different classes tend to think, vote, and advocate differently on economic issues,"⁵⁶ with working-class representatives more likely to support progressive economic legislation and to attend to the priorities of less wealthy constituents.⁵⁷

The influence that wealth exercises over political judgment is not mostly transactional—not a matter of bribes—but structural and social. It is structural in the sense that costly campaigns require constant infusions of money, and political representatives and their staffers know where to secure it.⁵⁸ It is structural, too, in that a high-dollar influence industry creates an increasing overlap in personnel between politics and lobbying, as politicians who have relied on money directed from the influence industry during their elected careers move over to influence brokering upon leaving office.⁵⁹ The social character of unequal influence is a product of these structural characteristics. Those who hold power know, listen to, care about, and identify with those who—like them—have money.⁶⁰

This is a form of class entrenchment. Reflecting on it suggests that class entrenchment arises readily under capitalist democracy and may even be fairly described as the default form of politics under that regime. The reasons for this are not obscure. The American political situation just described is an instance of a general tendency. Capitalist economies tend, historically and today, toward high and growing levels of economic inequality.⁶¹ An economy that distributes gains unequally tends to produce successful constituencies that want to sustain their success.⁶² They have the means to do so by virtue of being economically advantaged.⁶³ The policies they support maintain or amplify the inequality-producing dynamics that generated their advantages in the first place.⁶⁴ The pattern

56. Carnes, *supra* note 54, at 3.

57. See *id.* at 71–82 (summarizing the distinctive priorities of working-class representatives).

58. See Zephyr Teachout, *Corruption in America* 246–57 (2014) (setting out the various ways in which the need for money directs the efforts and attention of politicians).

59. See *id.* at 246–47 (explaining that in 1970 only three percent of congressional representatives entered lobbying upon leaving office, whereas today that figure is over fifty percent).

60. See Bartels, *supra* note 52, at 301–05 (describing the narrow and class-stratified world of social contact and influence that shaped Treasury Secretary Timothy Geithner's response to the 2008 financial crisis in the course of the Obama Administration's 2009 policymaking efforts); Teachout, *supra* note 58, at 249–53 (describing the gift economy of the wealthy and influential).

61. See Grewal, *supra* note 46, at 629–42 (summarizing findings to this effect).

62. See Page, Bartels & Seawright, *supra* note 53, at 67 (discussing how many political preferences of wealthy Americans can be explained by their interest in protecting personal wealth).

63. See Gilens & Page, *supra* note 52, at 572 (“[E]conomic elites are estimated to have a quite substantial, highly significant, independent impact on policy.”).

64. See Carnes, *supra* note 54, at 111–20 (“Even when high-stakes economic legislation is on the line, lawmakers from different classes think and vote differently. . . . [I]n a class-balanced Congress, businesses probably would have enjoyed fewer tax breaks and

of class advantage will, of course, differ from polity to polity, depending in part on the ways in which economic power may be converted to political influence, and vice versa. For instance, campaign donation limits that are impossible to reach for most voters but within the reach of professionals and executives will empower a nexus of those classes and political brokers clustered around parties or their proxies, while unlimited independent expenditures will empower very wealthy political entrepreneurs such as Sheldon Adelson and Thomas Steyer.⁶⁵ The goal of the campaign finance legislation reviewed and weakened in *Buckley v. Valeo* was to empower a mix of parties and dedicated volunteers—the archetypical protagonists of “civil society”—to the relative disadvantage of large donors and spenders.⁶⁶

In seeking to avert incumbent and partisan entrenchment, the Court has developed a First Amendment jurisprudence that shields and fosters class entrenchment. It has also made class entrenchment constitutionally invisible by characterizing political spending as serving equal citizenship rather than undercutting it, defining the structural characteristics of class entrenchment as insufficiently problematic to justify campaign-finance regulation, and declaring constitutionally out of bounds the redistribution of political influence toward greater equality.⁶⁷ Such redistribution is *the* signal means for a polity to assert democracy against the default drift toward class entrenchment.⁶⁸ Appreciating the structural character of class entrenchment and the role of political spending in it helps to underscore that actively pursuing political equality is the only alternative to that default drift. The Court’s First Amendment jurisprudence simultaneously knocks out this buttress of democracy and obscures why a polity would need it in the first place.

This is what makes the Court’s characterization of capitalist democracy ideological. Its characterization of capitalist democracy generally, its praise of market-modeled elections, and its wariness of partisan and incumbent entrenchment might, taken alone, be characterized as an imaginary, or a worldview, or simply a set of heuristics: a way of organizing

would have had to shoulder more of the economic fallout from unforeseeable events [between 1999 and 2008].”).

65. See generally Robert G. Kaiser, *So Much Damn Money: The Triumph of Lobbying and the Erosion of American Government* 3–24 (2009) (detailing the extent of spending in politics); Top Individual Contributors: All Federal Contributions, OpenSecrets.org, <https://www.opensecrets.org/overview/topindivs.php> [<http://perma.cc/K8VJ-BKUQ>] (last visited Aug. 14, 2018) (listing Adelson and Steyer among the top individual contributors in the 2018 election cycle).

66. See *Buckley v. Valeo*, 424 U.S. 1, 6–7 (1976) (per curiam) (characterizing the statute under review, the Federal Election Campaign Act of 1971 (FECA)); Richard Briffault, *The Federal Election Campaign Act and the 1980 Election*, 84 *Colum. L. Rev.* 2083, 2083 (1984) (reviewing Herbert E. Alexander, *Financing the 1980 Election* (1983) and Elizabeth Drew, *Politics and Money* (1983)) (“The central thrust of FECA was to move the campaign finance process in a more egalitarian and public direction.”).

67. See *supra* section I.A.

68. See *infra* section II.B.3.

institutions and events into certain patterns of salience, highlighting certain priorities and dangers and discounting others.⁶⁹ All social practices, including forms of reasoning such as legal argument and academic inquiry, occur within imaginative frames of this kind.⁷⁰ When I say that the court's characterization is ideology, I mean something more. These judicial characterizations *obscure* central features of social and political reality and, indeed, render them legally unintelligible in ways that facilitate class entrenchment while denying the basic tension within capitalist democracy. To say that jurisprudence is ideological is to say that it mischaracterizes social and political reality by denying one or more of its constitutive conflicts and, at the same time, takes sides in those conflicts.⁷¹

B. *Principles for a Democratic First Amendment*

So, what should an egalitarian First Amendment jurisprudence do? This section addresses this question through a characterization of self-rule under capitalist democracy.

1. *Neutrality, Right and Wrong.* — The first step is to recognize that class entrenchment is a perennial tendency of capitalist democracy and arises from the tensions between the regime's two competing principles of social coordination.⁷² Appreciating this makes clear that, in one sense, the jurisprudential goal of enforcing state neutrality via the First Amendment is a chimera.

69. See generally Jedediah Purdy, *After Nature* 6–7 (2015) (“Imagination means how we see and how we learn to see, how we suppose the world works, how we suppose that it matters, and what we feel we have at stake in it. It is an implicit, everyday metaphysics . . . [in which] some facts stand out . . . while others recede . . .”); Charles Taylor, *A Secular Age* 171–76 (2007) (setting out a philosophical account of the role of a “social imaginary” in organizing experience).

70. See, e.g., 2 Charles Taylor, *Philosophical Papers: Philosophy and the Human Sciences* 21–28 (1985) (challenging the “epistemological orientation which would rule interpretation out of the sciences of man”).

71. See Karl Marx, *The German Ideology: Part I*, in *The Marx-Engels Reader* 146, 148–55 (Robert C. Tucker ed., 2d ed. 1978) (suggesting that in ideology “men and their circumstances appear upside-down as in a *camera obscura*”); see also Jorge Larrain, *The Concept of Ideology* 60–61 (1979) (“[I]deology is reaffirmed as a consciousness which conceals contradictions in the interest of the dominant class. The inverted character of ideological consciousness corresponds to the real inversion of social relations . . .”). Marx's definition of ideology as obscuring social reality is very stark, and any strict application of it requires a firm idea of what exactly counts as “social reality.” I do not, in general, share the young Marx's confidence that patterned and discernible material relations are the genuine stuff of social life and liberal interpretations the mere ideological dressing. See Karl Marx, *A Contribution to the Critique of Political Economy* 20–21 (Maurice Dobb ed., S.W. Ryazanskaya trans., Int'l Publishers 1970) (1859) (“The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness.”). Having said that, however, the basic tensions of capitalist democracy are so foundational, and their obscuring so significant, that a starker characterization of the situation seems justified. See *infra* note 72 and accompanying text.

72. See generally Streeck, *Crises*, *supra* note 32, at 74–75 (outlining the capitalist and democratic principles that perpetually compete in capitalist democracies).

Any doctrinal elaboration of the First Amendment will both presuppose and advance a specific dynamic between the twinned principles of capitalist democracy. Among other effects, any version of the First Amendment will tend to facilitate or impede certain forms of class entrenchment.

This is not to say that neutrality is impossible or undesirable in doctrine or that decisions must be outcome oriented according to the Justices' feelings about specific cases.⁷³ If neutrality means avoiding this caricature of unprincipled decisionmaking, then neutrality is both desirable and achievable. But such neutrality has multiple possible forms. It might be consistent with neutrality to permit *no* private expenditure on political campaigns, relying on public financing and the strength of volunteer efforts and other shows of popular support. Alternatively, neutrality might require the doctrines of *Buckley* and *Citizens United*.⁷⁴ It might be, too, that the best version of neutrality would start from a constitutional presumption that campaign-finance regulation is legitimate, subject to some constraint of reasonableness.⁷⁵ Any of these doctrines would be neutral both (1) in the formal sense that they do not require free-roaming, case-by-case judicial decisions about the distribution of political power and (2) in the substantive sense that they implement a version of the idea that the state is obliged not to make invidious distinctions among citizens.⁷⁶ None, however, would be neutral in the sense of implying no attitude toward the competing tendencies of capitalist democracy: economic inequality and political equality. An egalitarian First Amendment jurisprudence should seek a version of neutrality that aims at supporting political equality against economic inequality.

2. *Democratic Will Formation.* — A First Amendment jurisprudence concerned to foster, or at least not inhibit, the vitality of democratic equality must be oriented toward collective will formation that allows the majority to rule. The self-legislation of the majority, binding for all, is the normative core of modern constitutional democracy.⁷⁷ Constitutional

73. But cf. *City of Mobile v. Bolden*, 446 U.S. 55, 75 & n.22 (1980) (arguing against a claim for the judicial redistribution of voting power by denying the possibility of identifying a legitimate distributional principle).

74. See *supra* notes 4–6 and accompanying text.

75. This is basically the position that Justice Stevens recommends adopting by constitutional amendment, a recourse he advises only because of the Court's spending-protective precedents in this area. See John Paul Stevens, *Six Amendments: How and Why We Should Change the Constitution* 57–80 (2014).

76. See Ronald Dworkin, *Law's Empire* 199–201 (1986) (explaining the essential role in legal legitimacy of equal concern and respect for the interests and perspectives of those governed—that is, the second sense of neutrality); Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509, 539 (1988) (explaining that the virtue of the first sense of neutrality lies in “disabling certain classes of decisionmakers from making certain kinds of decisions”).

77. See Grewal & Purdy, *Original Theory*, *supra* note 48, at 683 (explaining that conceptual and institutional innovations enabled a “new practice of *popular authorship* of fundamental law by the political community” in eighteenth-century constitutional thought); see also Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 *Tex. L.*

interpretation should take place with an eye to sustaining the conditions of popular sovereignty, preventing the drift of government into deep or irremediable elite usurpation.⁷⁸

Collective will formation requires that the political process be able to resolve disputes by authoritative decisions connected with a conception of the common good.⁷⁹ While the content of any “common good” is notoriously indeterminate and, indeed, would contradict self-rule were it neatly fixed in advance, politics must be able to *produce* an account of the common good that will be generally recognized as legitimate even as it is contested through further politics. The political production of a common good becomes impossible if citizens pervasively mistrust the results of the political process—for instance, if they doubt the objectivity of voting, they regard the system as irremediably rigged by such means as gerrymandering and influence peddling, or they come to regard their political opponents as so essentially hostile to their values and interests as to be disqualified from sharing in any common good.⁸⁰ For a *democratic* republic to produce such an account of the common good, there must be no pervasive exclusion from political participation, and the distribution of political influence must not be so marked by inequality that the majority of people who must live under the law cannot regard themselves in any serious sense as having authorized it.⁸¹ A democratic republic

Rev. 1427, 1431–37 (2016) (defining republican government by reference to principles including self-rule, the common good, and civic equality). My assertion above the line obviously implicates a deep and long-running body of debate in political thought, which I do not pretend to survey. My goal here is to set out a normative orientation with strong roots in both the U.S. constitutional tradition and the general theory of capitalist democracy.

78. See, e.g., Balkin, *supra* note 77, at 1435–37 (identifying republicanism with anti-corruption and antientrenchment principles).

79. Cf. *id.* at 1433 (explaining that republicanism relies on a notion of the common good).

80. See Steven Levitsky & Daniel Ziblatt, *How Democracies Die* 102–44 (2018) (exploring the potential of polarization to undermine liberal democracy by eroding mutual toleration and institutional forbearance).

81. See, e.g., Balkin, *supra* note 77, at 1433–34, 1437–39 (arguing that republicanism emphasizes both civic equality and a good constitutional structure, including in the realm of political economy); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 *B.U. L. Rev.* 669, 687–96 (2014) (“Extreme concentrations of economic and political power undermine equal citizenship and equal opportunity. In this way, oligarchy is incompatible with, and a threat to, the American constitutional scheme.”); Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 *Tex. L. Rev.* 1301, 1319–27 (2016) (arguing that the Founders believed that “relative economic equality was necessary for republican government”). By this standard, the United States failed in important ways to be a democratic republic rather than a *Herrenvolk* republic before the Voting Rights Act of 1965, and its democratic status is thrown into doubt today by racial inequality in wealth, education, and criminal justice; by mass incarceration, especially when accompanied by disenfranchisement; and by the presence of a large population of unauthorized migrants who live under the laws of the United States but play hardly any part in their production or authorization. See Office for Civil Rights, U.S. Dep’t of Educ., *2013–2014 Civil Rights Data Collection: A First Look* 3–8 (2016), <https://www2.ed.gov/about/>

requires for its legitimacy the consent of living generations, not simply the inheritance of past political acts. Any government that prevents the current political community from renewing or revising its own basic commitments usurps popular sovereignty.⁸²

Constitutional interpretation can play only a relatively modest part in any program to achieve these conditions, and this goes a fortiori for the interpretation of any one part of the Constitution, such as the First Amendment.⁸³ That being said, the First Amendment has come to be closely connected with the structure of political contests, and there are significant stakes in its interpretation. At present, First Amendment doctrine presents a substantial barrier to popular sovereignty-renewing measures. An alternative approach should lead First Amendment jurisprudence to permit, even facilitate, the renewal of popular sovereignty, partly by linking the desiderata of democratic will formation to an account of the political economy of capitalist democracy that is both more realistic about market ordering and more committed to the prerogatives of a democratic polity.

3. *Necessary Redistribution.* — Democracy requires the deliberate and ongoing adjustment of economic power—distributional judgment.⁸⁴ The posture of distribution-blind neutrality that the Court has adopted in the First Amendment cases discussed here implicitly approves ways of contesting democratic will formation that tend to undercut democracy by

offices/list/ocr/docs/2013-14-first-look.pdf [https://perma.cc/TP8P-ETAR] (identifying racial inequalities in U.S. public education in contexts such as school discipline, access to high-level math and science courses, and chronic absenteeism); Jenny Gathright, *Forget Wealth and Neighborhood. The Racial Income Gap Persists*, Nat'l Pub. Radio: Code Switch (Mar. 19, 2018), <https://www.npr.org/sections/codeswitch/2018/03/19/594993620/forget-wealth-and-neighborhood-the-racial-income-gap-persists> (on file with the *Columbia Law Review*) (“[I]n 99 percent of neighborhoods in the United States, black boys earn less in adulthood than white boys who come from similar socioeconomic backgrounds[,] . . . undermin[ing] the widely-held belief that class, not race, is the most fundamental predictor of economic outcomes for children in the U.S.”); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, Prison Policy Initiative (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [https://perma.cc/6L9Q-ZT27] (“Nationally, according to the U.S. Census, Blacks are incarcerated five times more than Whites are, and Hispanics are nearly twice as likely to be incarcerated as Whites[.]”).

82. See Grewal & Purdy, *Original Theory*, supra note 48, at 681–91 (outlining the origins and logic of this principle).

83. Cf. Leslie Kendrick, *Another First Amendment*, 118 *Colum. L. Rev.* 2095, 2112 (2018) (“The goal of seeking a more egalitarian First Amendment is, first and foremost, to achieve a more egalitarian society. I doubt whether this tail can wag that dog.”).

84. See, e.g., John Rawls, *A Theory of Justice* 97 (1971) (“[A]s far as possible the basic structure [of society] should be appraised from the position of equal citizenship.”); id. at 277–80 (noting the need for ongoing redistribution to maintain “the fair value of the equal liberties,” that is, to make formal liberty a meaningful basis for a more robust equality among citizens); Michael Walzer, *Spheres of Justice* 291–303 (1983) (“At a certain point in the development of an enterprise, then, it must pass out of entrepreneurial control; it must be organized or reorganized in some political way, according to the prevailing (democratic) conception of how power ought to be distributed.”).

systemically amplifying the influence of the wealthy and super wealthy and (as discussed in the next Part) weakening workers' and others' capacity to organize themselves for collective action.⁸⁵

An egalitarian First Amendment jurisprudence would be marked by a willingness to accept certain risks on behalf of democratic self-rule. Part of the reason a democratic polity rules itself is so that it can address constitutional questions in an ongoing fashion: how its self-rule shall happen, what forms of economic power shall register in political life, and what some of the terms of cooperation shall be among social members.⁸⁶ A polity can decide, for instance, to favor time-intensive and face-to-face activity over costly and heavily mediated forms of argument. In fact, that is just the sort of decision democratic republics should be able to make over their own future practices.

Lawmaking inevitably and appropriately structures the political process to build up the constituencies and institutions that will channel energy and mobilization into future will formation. Democratic institutions iteratively reproduce and revise themselves.⁸⁷ If they are judicially impeded from revisiting the terms of self-rule, then other forces will establish those terms through drift, the accretion of economic power, and the strategic self-organizing of advantaged industries and classes.⁸⁸ The configuration of economic power in relation to political power does not stand still over time, and *someone* (really, many persons and institutions) will give it a shape. If a political community cannot do this work, the work will still happen by other means and on other terms. An egalitarian First Amendment need not empower judicial prescription of basic distributional questions, but it requires judicial recognition of the democratic prerogative to answer those questions.

4. *Process and Substance: Democracy and Social Democracy.* — Constitutional jurisprudence is connected with the substance of the economic order that it authorizes. New Deal jurisprudence authorized a regime of partial corporatism, extensive unionization, social provision through an interweaving of state and private (often employer-based) obligations, and economic planning.⁸⁹ It was not only a jurisprudence about the scope

85. See *infra* notes 98–107 and accompanying text.

86. See *supra* note 45 and accompanying text.

87. See Seyla Benhabib, *Democratic Iterations: The Local, the National, and the Global*, in *Another Cosmopolitanism* 41, 41–44 (Robert Post ed., 2006) (illustrating how “democratic iterations” mediate the will formation of democratic majorities). These institutions need not be representative or permanent, like legislatures, but may also include such institutional majoritarian practices as elections and constitutional referenda.

88. See *supra* notes 58–64 and accompanying text.

89. See William E. Forbath, *The New Deal Constitution in Exile*, 51 *Duke L.J.* 165, 166 (2001) (“The constitutional vision New Dealers championed . . . held that all Americans had rights to decent work and livelihoods, social provision, and a measure of economic democracy, including rights on the part of wage-earning Americans to organize and bargain collectively with employers.”). See generally Gérard Duménil & Dominique Lévy, *The Crisis of Neoliberalism* 281–93 (2011) (describing the main tenets of the New Deal as

and forms of self-rule in an industrial economy, as official functionalist narrations tended to have it.⁹⁰ It was also a jurisprudence of permission for (a modest and flawed) social democracy.⁹¹ Conversely, as sketched earlier, the current jurisprudence of distributional neutrality shares its origins with discourses, polemics, and programs that were aimed at blocking and rolling back the statist egalitarianism of the New Deal and the Great Society, which its critics recast as a form of corrupting interest-group entrenchment.⁹²

There are many reasons for a polity to deploy markets as its basic economic mode, from efficiency to personal autonomy.⁹³ But it is quite another thing for the same polity to constrain itself constitutionally to give the resulting economic arrangements a major role in its future political will formation.⁹⁴ When market ordering is constitutionalized in this fashion, it tends to move from being part of a menu of governing strategies that a political community might adopt and pursue to being itself a key determinant of which options even appear on the menu, let alone get chosen.⁹⁵ Constitutionally forbidding ongoing engagement with the structure of economic and political power takes away much of democracy's reason for being.

The stakes of self-rule for citizens (and noncitizen social members) in capitalist democracy include taming or eliminating arbitrary and overweening exercises and concentrations of power and building up the conditions of dignified, unfrightened existence and activity in a community of relative equals. At any time, these goals take specific institutional forms—unions, election laws, universal health care, the creation of public

the federal regulation of labor relations, the implementation of large public-works programs, and the protection of workers' rights to unionize and collectively bargain).

90. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942) (finding that the Commerce Clause authorized regulation of wheat production on the basis of its aggregate effect on interstate commerce).

91. See Forbath, *supra* note 89, at 166. I do not mean to deny either the many flaws of what we call “the New Deal” or its complexity and variety. See, e.g., Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* 156–94 (2013) (outlining how the reach and radicalism of New Deal reforms were limited by compromises with Jim Crow segregation).

92. See *supra* section I.B.

93. See, e.g., Milton Friedman, *Capitalism and Freedom* 8 (2d ed. 1982) (“Economic arrangements play a dual role in the promotion of a free society. On the one hand, freedom in economic arrangements is itself a component of freedom broadly understood In the second place, economic freedom is also an indispensable means toward the achievement of political freedom.”); *id.* at 167 (“[T]he essential function of payment in accordance with product in a market society is to enable resources to be allocated efficiently without compulsion . . .”).

94. For a summary of the ways in which these values may interact in various market arrangements, see Jedediah Purdy, *The Meaning of Property* 123–27 (2010) (drawing on and applying Professor Amartya Sen's account of the kinds of values that markets may serve).

95. See *supra* notes 58–64 and accompanying text.

utilities, guarantees against harassment and exploitation—and constitutional adjudication turns, accordingly, to whether such measures are required, favored, permitted, or forbidden. Today the issue seems to many of us to be a choice between oligarchy and a democratic-republican renewal.⁹⁶ To rework the link between economic and political concentrations of power, that renewal may have to move from the market-inflected state skepticism of the 1970s and 1980s to a posture that understands the mutual constituting of political and economic citizenship in terms that are more social democratic and more committed to the organized power of working people and mobilized citizens in contradistinction to wealth and capital than any that has counted for much in recent decades. We should consider what it might be like, not just to grit our teeth and acknowledge this conclusion as a lesson foisted on jurisprudence by recent political science and macroeconomics, but to embrace it as part of the horizon of a possible better world.

This Part has framed First Amendment jurisprudence within the context of capitalist democracy, arguing for the necessity of the redistributive policy that *Buckley* anathematized and for a conception of neutrality that aims explicitly at maintaining a certain relation between economic and political ordering, rather than allowing one to emerge by default. The full implications of this view, of course, are beyond the scope of a single Essay. The next Part offers one application: a diagnosis of the Court's recent treatment of public-sector union fees as a threat to free expression and an alternative view that understands such fees as essential parts of building the class power that is necessary in a capitalist democracy if it is to remain democratic. It shows, moreover, that this idea is not alien to American jurisprudence. Indeed, Justice Frankfurter believed something along these lines.⁹⁷

III. UNION FEES AND THE SHAPE OF ECONOMIC POWER: FURTHER DEFINING THE ALTERNATIVES

In June 2018, the Court ruled in *Janus v. AFSCME* that the First Amendment forbids public-sector unions from charging nonmember public employees in their bargaining units “agency fees” for employment-related services and advocacy.⁹⁸ The Court framed the issue as one of individual liberty from state compulsion. Justice Alito invoked Justice Jackson's great phrase, “[N]o official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or

96. See, e.g., Fishkin & Forbath, *supra* note 81, at 670–73 (positing democratic political economy as a counterweight and alternative to oligarchy); Sitaraman, *supra* note 81, at 1304 (same).

97. See *infra* notes 116–120 and accompanying text.

98. See *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459–60 (2018).

force citizens to confess by word or act their faith therein.”⁹⁹ Justice Alito warned, “Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning.”¹⁰⁰

As in the political-spending cases discussed in Part I, the Court invoked the dangers of entrenchment and self-dealing, noting that the case arose from a political context in which Illinois had nearly \$160 billion in unfunded pension and retiree healthcare liabilities and sought in bargaining to drive down employee costs.¹⁰¹ The defendant union instead “advocated wage and tax increases, cutting spending ‘to Wall Street financial institutions,’” and other left-of-center measures.¹⁰² Justice Alito’s opinion presented these events as evidence that “[w]hat unions have to say . . . in the context of collective bargaining is of great public importance” and amounts to political speech that agency fees subsidize.¹⁰³ It further noted that collective bargaining can involve “controversial subjects such as climate change, the Confederacy, [and] sexual orientation and gender identity.”¹⁰⁴ Justice Alito’s questioning in oral argument signaled alignment with the Hayek–Friedman–Powell line of concern about the proliferation of redistributionist policies that might stem from the entrenchment of political influence. He worried aloud that an empowered public-sector union might “push a city to the brink and perhaps over the brink into bankruptcy.”¹⁰⁵

Oral argument also indicated that at least one of the Justices who joined Justice Alito’s opinion understood the agency-fee requirement in *Janus* as a violation of the anti-redistribution principle of *Buckley*. Justice Kennedy pushed the union’s lawyer toward the concession that the fee amounted to an impermissible redistribution of political speech and thus posed a danger of entrenchment. Justice Kennedy pressed AFSCME’s lawyers to acknowledge that, “if you do not prevail in this case, the unions will have less political influence.”¹⁰⁶ When David Frederick conceded the point, Justice Kennedy replied, “Isn’t that the end of this case?”¹⁰⁷ That is to say, if the requirement to pay agency fees shapes the political playing field by directing resources to union advocacy, it must violate the First Amendment.

Janus, then, has the same logic as the political-spending cases. At its core is the plaintiff who wishes to determine how his money is disbursed

99. *Id.* at 2463 (emphasis omitted) (internal quotation marks omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

100. *Id.*

101. See *id.* at 2474–75 (recounting the budget problems in Illinois).

102. *Id.* at 2475 (quoting *Am. Fed’n of State, Cty., & Mun. Emps., Council 31, 33 Pub. Emp. Rep. for Ill.* ¶ 67 (Ill. Labor Relations Bd. 2016), 2016 WL 7645201).

103. *Id.*

104. *Id.* at 2476 (footnotes omitted).

105. Transcript of Oral Argument at 63, *Janus*, 138 S. Ct. 2448 (No. 16-1466), 2018 WL 1383160.

106. *Id.* at 54.

107. *Id.*

and who connects his money with constitutionally protected speech by showing its relevance to political debate. The individual-rights core of the opinion is buttressed by the structural worry that the challenged regime distributes the power of political influence in a way that entrenches certain established interests, here public-sector unions. The worry about distribution and entrenchment of political influence is linked, in turn, with a specific political outcome that is to be avoided: an empowered set of public employees with an agenda of egalitarian redistribution. Public-sector unions are cast here in the same role as the self-entrenching officials and bureaucrats who figured as the *bête noire* of the *Buckley*-era turn to an anti-redistributionist First Amendment doctrine.

A. *The Court's View of Workers' Interests, and an Alternative*

The assumption that the associational interest to be protected in unions' membership and political activity is a negative and individual one—an opt-out¹⁰⁸—excludes a different way of understanding the relationship of organized labor to democratic will formation. The interest in refusing unwanted associations is a privacy interest, one that has great power in many legal domains, from the common law guarantee against physical invasion to the personal rights of substantive due process.¹⁰⁹ But is the institutional structure of bargaining power and political advocacy that connects large employers with large bodies of workers best understood as a domain of private and voluntary relations, or as a domain of shared arrangements in which participation is in some important respects ineluctable once one is in the workplace? If the economy is a concert of individuals, orchestrated by personal choice, then privacy rights are consonant with it.¹¹⁰ But on a different view, class structure is part of this economy. Who occupies what role is, of course, decided by the interplay of personal choice and social structure.¹¹¹ But that there will be employers and employees, investors, and day laborers, is—for now—fate.¹¹²

108. See *Janus*, 138 S. Ct. at 2463 (“The right to eschew association for expressive purposes is likewise protected.”).

109. Cf. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277–78 (1990) (describing the common law protection against unwanted contact as a basis for a right to refuse unwanted medical care and locating that same right in the privacy interest protected by the Fourteenth Amendment).

110. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593, 2598–99 (2015) (holding that the right to marry whom you choose is an essential element of the constitutional privacy interest in self-definition and self-expression); *Lawrence v. Texas*, 539 U.S. 558, 562, 567 (2003) (holding that the same constitutional privacy interests protect the free choice of sexual partners).

111. See generally Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* 1–40 (1984) (outlining a social theory attentive to both structure and the ways these structures are continually recreated by agents).

112. See, e.g., G.A. Cohen, *The Structure of Proletarian Unfreedom*, 12 *Phil. & Pub. Aff.* 3, 11–12 (1983) (arguing that individual mobility does not alter the “collective unfreedom”

It is because of shared fate that processes of collective will formation become essential. To begin with an analogy to the workplace, politics is not an optional undertaking. It is a response to the fact that for certain purposes people are trapped together—in shared economic regimes, shared regimes of legitimate violence¹¹³—and there must be some process for determining the rules of those regimes. Democracy is, of course, optional, at both the individual and the systemic levels. But its efforts at collective will formation are an alternative not to the absence of politics but to a different political dispensation. The right way to see unions, on this view, is as akin to political subcommunities. A vote on unionization is more like a constitutional referendum than it is like the election of representatives, and once a union exists it is a forum of collective will formation within its workplace, appropriately binding on all who are, so to speak, within that jurisdiction.¹¹⁴ Organized labor presents a political-economic counterweight to wealth, an essential institution of rough civic equality.¹¹⁵ Absent clear suppression of a core interest in political speech, the First Amendment should not be interpreted as protecting personal rights that undercut this democratic institution.

B. *Two Ways of Seeing the Inseparability of Politics and Economics*

It is ironic that toward the end of his career in 1961, Justice Frankfurter took the same conceptual view of union activity that Justice Alito does today—that it is impossible to separate bread-and-butter economic representation from political advocacy—while drawing the opposite conclusion from that insight. For Alito, the inseparability of union representation from political advocacy means that even mandatory funding of representation is problematic under the First Amendment, because there is no getting politics out of it.¹¹⁶ Frankfurter's course of reasoning was the opposite. While Alito proceeds nominally from a conception of what is political speech (and so the concern of the First Amendment) and finds that it sweeps in all union advocacy, Frankfurter

of class society, which guarantees that a substantial share of people will always occupy a subordinate class position).

113. See, e.g., Jonah Birch, *Ending Their Wars*, *Jacobin* (May 28, 2018), <https://www.jacobinmag.com/2018/05/war-socialists-debs-vietnam-internationalism> [<https://perma.cc/Z3M8-D35F>] (“In the organization of state violence on an unprecedented scale, we see capitalism’s tendency to subordinate human need to the logic of profit and power.”).

114. See Gabriel Winant, *Where Did It All Go Wrong?*, *Nation* (Feb. 7, 2018), <https://www.thenation.com/article/organized-labors-lost-generations> [<https://perma.cc/WTW2-JCNF>] (giving this characterization of union elections).

115. See, e.g., James Feigenbaum et al., *Opinion, Right-to-Work Laws Have Devastated Unions—and Democrats*, *N.Y. Times* (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/opinion/connor-lamb-unions-pennsylvania.html> (on file with the *Columbia Law Review*) (summarizing research showing a sharp drop in electoral support for Democrats where state laws weaken the labor movement).

116. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2480–81 (2018).

proceeded from the assumption that unions played a legitimate and important role in American self-rule and reasoned that the activity in which they have historically engaged should enjoy a presumption of constitutionality.¹¹⁷ For Frankfurter, casting constitutional doubt on the standard legislative mechanisms for funding union advocacy “would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life.”¹¹⁸ Frankfurter took for granted the fundamentally collective character of unions, with its consequence that they cannot do their work if they are unable to generate mandatory forms of collective action. He analogized the speech situation of the union dues payer to that of the federal taxpayer and offered as a premise that a union could not be said to violate its members’ speech interests when it called a strike.¹¹⁹ What, after all, would a union be if it were not a locus of collective action? It would be like a state that could not make law.¹²⁰

Frankfurter’s view serves as a coda to this discussion, and also a bridge to an alternative, democratic political economy in First Amendment doctrine. In this view, a democratic polity has an interest in structuring economic power and its translation into political power in ways that counteract the structural advantages of wealth and coordination that otherwise strengthen owners and employers. Institutions that balance the power of wealth by enabling working people to combine for effective advocacy—in collective bargaining and in the broader contests of politics—should be assumed to be compatible with First Amendment interests unless there is a very strong showing to the contrary. But such a showing must not rest on findings that a union imposes unity on the voices of its members, once the union has been authorized to represent them, nor on the worry that unions might make distributional demands on the state. That would be condemning them for doing their job in the constitutional order.

117. See *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 812–13 (1961) (Frankfurter, J., dissenting) (describing historically the accepted role of unions in pursuing workplace goals through political activity).

118. *Id.* at 812.

119. See *id.* at 806, 810.

120. Here and in this Essay’s framing, there is a certain elision of the distinction between public-sector and private-sector unions, although that distinction is essential to the technical premise of *Janus*. My reasons are that (1) from the standpoint I am advocating, the two domains have essential commonalities because both are areas of workers’ collective power, and the rationale that Justice Frankfurter applied to private-sector unions also applies to public-sector ones; and (2) in the *Janus* oral argument, Justices Ginsburg and Breyer both speculated that a ruling against the union might also tend to undermine private-sector unions, with Justice Ginsburg even suggesting that *Shelley v. Kraemer*, 334 U.S. 1 (1948), might prohibit judicial enforcement of union agreements. See Transcript of Oral Argument, *supra* note 105, at 28–29.

CONCLUSION

Progressive engagement with First Amendment doctrine should start by recognizing that any plausible version of civic equality and self-rule requires political engagement with the terms of self-rule. If appropriately constituted majorities cannot decide how majorities shall rule, then other forces will. This point has particular bite in a regime of capitalist democracy, in which historical and contemporary empirics strongly suggest that unequal economic power tends to grow over time and to embed itself in political power. Some legally ordered relationship between political power and economic power is not just inevitable; its substance is of the first importance, because only it can sustain countervailing principles of equal citizenship, common good, and self-rule. In the face of a candidly neoliberal jurisprudence that advances the political domination of the wealthy, it is all the more important to recover and develop a constitutionalism of social democracy.