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## A Constitutional Amendment to Revive the Sovereignty of the American People

Brian Boyle

### I. Introduction

In the course of our American story, times of crisis have prompted fundamental law-making.<sup>1</sup> The Declaration of Independence, the Constitution and Bill of Rights, and the Reconstruction Amendments all were America's answers to existential questions.<sup>2</sup>

Why does crisis call forth fundamental law-making in America? Because such law-making becomes possible — becomes vital — as the People come more fully to their senses. When conditions grow intolerable, the People wake up and see that if the project of self-government is to survive, something deep must change.<sup>3</sup>

America is once again living through a time of profound crisis that threatens the continued viability of our nation:

Today, the question of rise or fall is more pertinent than ever. In this age of globalization, centralized power, economic inequality, deep demographic shifts, political

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<sup>1</sup> The term “fundamental law” is used here to refer to “law that, first and foremost, creates a set of dynamic relations between the people and their government.” See Victoria Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 889 (2004). In the United States, fundamental law is codified most recognizably in the written U.S. Constitution. But see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 288-290 (1991) (describing an alternate mode of codification in which the courts reshape constitutional doctrine to accommodate transformative statutory achievements by the political branches) [hereinafter ACKERMAN, *FOUNDATIONS*].

<sup>2</sup> See Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 n.4 (1983) (“When the text proves unable to assimilate the meanings of new narratives that are nonetheless of constitutive significance, people do create new texts — they amend the Constitution.”).

<sup>3</sup> See ACKERMAN, *FOUNDATIONS*, *supra* note 1, at 196 (“[W]renching social crisis has been instrumental in leading masses of Americans to support efforts to move beyond normal politics and articulate new principles of constitutional identity.”).

polarization, pandemics and climate change, and radical disruption in the media and information environments, we face these converging trends in a constitutional democracy that feels to many increasingly unresponsive, nonadaptive, and even antiquated.<sup>4</sup>

Perhaps above all, we are also bearing witness to the ongoing manifestations of America's original sin. Is there any reconciling the fact that a nation committed to the proposition that all people are created equal and capable of self-government could nonetheless embed a system of racial inferiority into our Constitution at its founding?

Each passing week brings new (often tragic) evidence that our political institutions are failing to generate just solutions to the problems that arise in diverse and interdependent human communities. If there is a path out of the darkness, it will likely cut through our Constitution. In a nation committed to the promise of self-government, our fundamental charter is the medium through which we address our deepest challenges.

To a large extent, our interlocking sociocultural crises can be understood as the spoiled fruits of a deeply malfunctioning political system, and a major (if not *the* major) root cause is that, in a structural sense, We the People have been outsiders looking in at our own Constitution. Thus far in American history, "We the People" have existed only in the Preamble to the Constitution; as a textual matter, "We" currently sit outside the structure of government that the Constitution creates.

This Issue Brief focuses on a proposed amendment to the Constitution that seeks to change that. If the movement for this amendment succeeds, for the first time "We the People" will be included among the Constitution's operative provisions.<sup>5</sup> The ultimate goal of the amendment is to create new dynamics in the lived relations between We the People and our government by reviving the People's collective power as sovereign lawmakers.

The proposed amendment is the product of a variety of thinkers and influences, including the large body of research showing that policymaking has been largely captured by elites whose preferences diverge from the rest of the people.<sup>6</sup> For most Americans, the disproportionate power of money in our democracy verges on being a self-evident truth.<sup>7</sup> The ability of citizens

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<sup>4</sup> AM. ACAD. OF ARTS AND SCI., *OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 1* (2020) [hereinafter AAAS, *OUR COMMON PURPOSE*].

<sup>5</sup> The text of the proposed amendment appears at page 4.

<sup>6</sup> See, e.g., BENJAMIN I. PAGE & MARTIN GILENS, *DEMOCRACY IN AMERICA* (2020); ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE* 253 (2019); LAWRENCE LESSIG, *REPUBLIC, LOST* (2015); JEFFREY D. CLEMENTS, *CORPORATIONS ARE NOT PEOPLE* (2014); Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSP. ON POL.* 51 (2013); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 *CORNELL L. REV.* 1445 (2016).

<sup>7</sup> See, e.g., PEW RES. CTR., *THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY 4* (2018) ("Americans think that those who donate a lot of money to elected officials have more political influence

meaningfully to participate in self-government on equal terms – which is the fundamental promise the Constitution makes – is fundamentally threatened by a system that so readily translates wealth into political power.<sup>8</sup> The proposed amendment addresses the reality that money currently has excessive and corrosive power in our representative democracy. It is meant to reconfigure the dynamics that have generated elite domination of our democracy, which in turn has generated public cynicism and distrust that produces interlocking political failures best described as “popular illegitimacy.”<sup>9</sup>

This Issue Brief presents the text of the proposed amendment, followed by a section-by-section overview explaining how the amendment’s diction and overall design are intended to promote several substantive purposes. The overarching aim of the amendment is to reorient the processes of American government so that We the People are central. This strategy – centralizing We the People by bringing us *into* the Constitution – embraces the premise of popular sovereignty: that the legitimacy and durability of a system of government depends on the existence of ongoing and meaningful consent by the governed.

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than others. An overwhelming majority (77%) supports limits on the amount of money individuals and organizations can spend on political campaigns and issues.”).

<sup>8</sup> E.g., Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. OF LEGIS. AND PUB. POL’Y 101, 103 (2017) (noting “[b]ipartisan anger regarding our political system’s bias toward wealthy elites”).

<sup>9</sup> See, e.g., David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 701 (2018) (“The tendency of representatives toward various forms of economic capture, elite consensus, and partisan polarization has hardly disappeared. . . . In light of powerful and persistent evidence that the priorities of the majority (whose sovereignty notionally authorizes government) diverge from the decisions that elected representatives take, there is no basis for abandoning the distinction between popular sovereignty and representative government, nor for giving up the ultimate priority of popular authority over governmental decision.”); AAAS, OUR COMMON PURPOSE, *supra* note 4, at 14 (noting “erosion of the legitimacy of our institutions”); William J. Eskridge, Jr., *Pluralism and Distrust*, 114 YALE L. J. 1279, 1293 (2005) (“Groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them or their perception that the process is stacked against them, or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion.”).

## II. The Proposed Amendment and How It Will Revive Popular Sovereignty

### A. Text of the Proposed Amendment

*Section 1.* We the People have compelling sovereign interests in representative self-government, federalism, the integrity of the electoral process, and the political equality of natural persons.

*Section 2.* Nothing in this Constitution shall be construed to forbid Congress or the States, within their respective jurisdictions, from reasonably regulating and limiting contributions and spending in campaigns, elections, or ballot measures.

*Section 3.* Congress and the States shall have the power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and artificial entities, including by prohibiting artificial entities from raising and spending money in campaigns, elections, or ballot measures.

### B. Section One: Compelling Sovereign Interests of “We the People”

Section One is the philosophical core of the proposed amendment. It embraces popular sovereignty as the fundamental source of governmental legitimacy in the United States.<sup>10</sup> As James Madison put it, “the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived[.]”<sup>11</sup>

#### 1. The Meaning of Popular Sovereignty

Professor Sanford Levinson and others have wondered “whether ‘popular sovereignty’ is anything more than a ‘glittering generality,’ useful, perhaps, as a trope in political mobilization but otherwise of little, if any, utility as a genuine analytical concept.”<sup>12</sup> The proposed amendment takes the view that popular sovereignty is both useful as an analytical concept and critical to America’s survival.

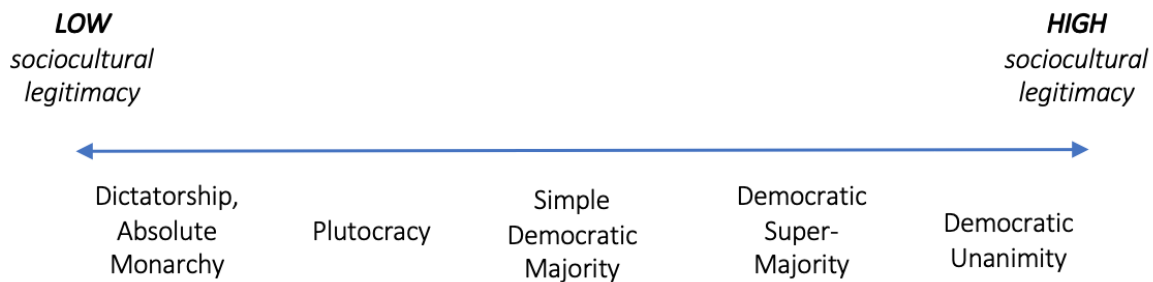
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<sup>10</sup> *Cf. Arizona St. Leg. v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 813 (2015) (“[T]he animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government.”).

<sup>11</sup> THE FEDERALIST NO. 49, 310 (James Madison) (2003 ed.).

<sup>12</sup> Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2646 (2014). By defending a conception of “popular sovereignty,” this Issue Brief does not endorse the ways in which that term has been invoked for divisive and violent purposes in our nation’s history. *See, e.g.,* Michael Gorup, *The Strange Fruit of the Tree of Liberty: Lynch Law and Popular Sovereignty in the United States*, 18 PERSP. ON POL. 819 (2020).

As a descriptive matter, popular sovereignty posits that the subjective sociocultural legitimacy<sup>13</sup> of a norm can generally be gauged by the proportion of the population that would freely consent to the norm. In other words, the level of popular support for a norm is usually a decent indicator of whether that norm can actually function and persist in a given sociocultural context.<sup>14</sup> In organized societies, some norms become law, and the theory of popular sovereignty presumes that the subjective sociocultural legitimacy of a law will also generally depend on the level of popular support it commands.<sup>15</sup> As illustrated below, popular sovereignty presumes that a law promulgated by a dictator is, in general, likely to have lower sociocultural legitimacy than a law put forth by a democratic supermajority<sup>16</sup>:



<sup>13</sup> A distinction is made here between “subjective sociocultural legitimacy” and “legal legitimacy” to acknowledge that there is nearly always some gap between the norms that prevail in people’s hearts and minds (*i.e.*, actual public sentiments) and the norms that happen to be instantiated in law at a given time. *See generally* Cover, *supra* note 2, at 4 (distinguishing between a society’s “normative universe” and its “formal institutions of the law”). *See also* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740, 2744 (2014) (“[W]e believe that it is often by the thick action of concerted social movement through which ‘we the people’ – meaning, in our view, the people who reflect a genuine community of consent – discover and legitimize the principles on which our democracy presumably rests.”).

<sup>14</sup> *E.g.*, Andr s Saj , *Emotions in Constitutional Design*, 8 INT’L J. CONST. L. 354, 362-363 (2010) (discussing how emotions shape “public sentiments,” which may eventually become “constitutional sentiments”).

<sup>15</sup> *Cf.* Harold J. Laski, *Theory of Popular Sovereignty*, 17 MICH. L. REV. 201, 210 (1919) (“[C]ertainly the psychological strength of a government which can claim effectively to have a majority behind it is enormous.”).

<sup>16</sup> Of course, it is possible for a dictator to promulgate a law that strongly aligns with the prevailing norms and preferences of the governed population and thus has high sociocultural legitimacy. But the theory of popular sovereignty supposes that, all things considered, it is *more likely* that a law will align with the prevailing norms and preferences of the population if the law is the product of an open and fair majoritarian process.

As a normative matter, popular sovereignty honors the inherent dignity of individuals and embraces the possibility of group action for the common good.<sup>17</sup> It is an instrumental good by which a human collective exercises the ability to create its own rules for social cooperation.<sup>18</sup>

The starting point of the response which human beings seem invariably to make to the basic conditions of human existence is to recognize the fact of their interdependence with other human beings and the community of interest which grows out of it. So recognizing, *people form themselves into groups for the protection and advancement of their common interests*, or they accept membership in groups formed by others.<sup>19</sup>

Before applying the concept of popular sovereignty to a nation, let's first imagine a small community (a few dozen people) seeking to govern itself. Suppose a group of that size came together to draw up a fundamental charter for the community. They might delegate the actual drafting to a smaller group that takes input from the whole, and then presents the finished product (the proposed charter) to a plebiscite in which each community member would have an equal vote.

Now suppose that the proposed charter is unanimously approved. At that moment, according to the theory of popular sovereignty, we have good reason to assume that the charter's sociocultural legitimacy is very high: the entire community was meaningfully involved in writing the charter, and the entire community unanimously chose to live under its terms. In a concrete way, the people themselves *authored* the charter and *consented* to it.<sup>20</sup> By successfully creating and approving its own fundamental charter, this small community has engaged in an act of popular sovereignty that mirrors the theory at the heart of the Constitution:

[T]he conception of popular sovereignty underlying a democratic constitution necessarily combines two ideas, one familiar, the other less so. The first is *popular authorship*: that the people can be said in a genuine, non-obscurantist way to be the original source of authority for their own fundamental law. The second is *present consent*: that what gives fundamental law its authority is the consent of the people now living under it, who constitute the present sovereign, rather than the fact that it was originally adopted through an earlier sovereign act. Taking these together, popular sovereignty must be ongoing and self-renewing, or else fail as a practice of self-rule.<sup>21</sup>

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<sup>17</sup> See, e.g., DECLARATION OF INDEPENDENCE ("We hold these truths to be self-evident, that all men are created equal . . ."); REINHOLD NIEBUHR, MAJOR WORKS ON RELIGION AND POLITICS 383 (2015) ("The individual and the community are related to each other on many levels. The highest reaches of individual consciousness and awareness are rooted in social experience and find their ultimate meaning in relation to the community.").

<sup>18</sup> See Laski, *supra* note 15, at 202.

<sup>19</sup> HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS 2 (1994).

<sup>20</sup> The elements of "popular authorship" and "present consent" are explained in Grewal & Purdy, *supra* note 9, at 683-683.

<sup>21</sup> Grewal & Purdy, *supra* note 9, at 681-682.



Under our Constitution, popular sovereignty is not exercised in the simplified way illustrated by the small-community example. Among other reasons, direct law-making by all the American people is simply infeasible in a nation with our population and geographical range.<sup>22</sup> Instead, our Constitution takes the notion of popular sovereignty and channels it in two basic directions. On the one hand, our ability to amend the Constitution through Article V is meant to be an opportunity for We the People to speak in one sovereign voice about matters of our fundamental law. And because of its super-majoritarian requirements, the output of an Article V process might be thought to come reasonably close to representing the sovereign will of the American people.<sup>23</sup>

On the other hand, recognizing that the American people rarely will speak with the substantially unified voice necessary to meet Article V's requirements, our Constitution secondarily channels popular sovereignty into the processes of everyday government that are carried out in our name by the federal legislative, executive, and judicial branches. In this secondary mode, popular sovereignty is necessarily diluted through the various devices that construct our political system. And so the decisions made by "the government" are, structurally speaking, at a level removed from the sovereign decisions made by "the people" via Article V.<sup>24</sup>

## 2. "Compelling Sovereign Interests"

The overarching objective of the amendment is to increase legitimacy in our political system by strengthening the connection between the popular sovereign (*i.e.*, "We the People") and our workaday government. It therefore recognizes *four structural devices* – (1) representative self-government, (2) federalism, (3) the integrity of the electoral process, and (4) the political equality of natural persons – as being *compelling sovereign interests*. They are termed compelling sovereign interests, rather than the more familiar compelling governmental interests, to highlight the important analytical distinction between "the sovereign" and "the government."

So, while the language in Section One might initially look merely prefatory or aspirational, it would be a mistake to think that Section One doesn't do any real work.

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<sup>22</sup> Cf. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1509 (1987) (discussing the structural device of representation and noting that "the sheer size of the United States makes it impossible to increase the number of representatives sufficiently, without turning the Congress into what Madison called 'the confusion of a multitude'").

<sup>23</sup> *But see* Grewal & Purdy, *supra* note 9, at 682 (arguing that, as a practical matter, "univocal acts of sovereignty are all but impossible under Article V").

It is also important to be aware that Article V's proposal-by-Convention method of amending the Constitution (which has never been used) now theoretically could enable a *popular minority* of the U.S. population to amend our fundamental charter. See Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. MICH. J. L. REFORM 409, 410 (1987).

<sup>24</sup> This idea – distinguishing between the sovereign will of the American people and the acts carried out by our government – is elegantly elaborated by Professor Ackerman under a framework he labels "dualist democracy." See generally ACKERMAN, FOUNDATIONS, *supra* note 1, at 1-32.

By design, Section One employs theory-laden terminology. Phrases like “representative self-government” and “the integrity of the electoral process” are qualitatively different from the Constitution’s more concrete provisions,<sup>25</sup> because they convey meaning only through reference to a theory (or theories). The best way to understand the presence of the theory-laden terminology in Section One is “as a mandate for the development of a theory that will give content to the terms used.”<sup>26</sup> The proposed amendment’s text invites us (“We the People”) to work out for ourselves the meanings of representative self-government, federalism, the integrity of the electoral process, and the political equality of natural persons. And it makes the same invitation to our posterity. When it comes to these terms, there are no fixed, original meanings, but rather an ongoing call to create and renew their meanings.

But though the terms in Section One lack fixed meanings, that does not imply that they are borderless canvasses with no guiding content. As Professor Frederick Schauer has noted, “Constitutional language can constrain the development of theory, or set the boundaries of theory-construction, without otherwise directing its development. Constitutional language can tell us when we have gone too far without telling us anything else.”<sup>27</sup> For example, we can know whether we are in the neighborhood of something like political equality without establishing a comprehensive-for-all-time account of political equality.

The terms in Section One are “incompletely specified” and abstract on purpose. And while each of us surely has particular principles or ideas that we’d associate with the four structural devices listed in Section One, they will likely always remain “essentially contested” in the sense articulated by Robert Cover:

[T]he meaning of such a text is always “essentially contested,” in the degree to which this meaning is related to the diverse and divergent narrative traditions within the nation. . . . And even were we to share some single authoritative account of the framing of the text – even if we had a national history declared by law to be authoritative – we could not share the same account relating each of us as an individual to that history.<sup>28</sup>

Given the inescapability of contestation, Section One of the amendment accepts the reality that American judges necessarily grapple with, and reason from, “deep premises of political

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<sup>25</sup> For example, the requirement that “No Person shall be a Representative who shall not have attained to the Age of twenty five Years” has a meaning that is clear without reference to a theory.

<sup>26</sup> Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 825 (1982).

<sup>27</sup> Schauer, *supra* note 26, at 828. This notion — that judges and other constitutional actors can discern whether we’ve gone off the page without knowing everything that’s on it — was at the heart of the disagreement between Chief Justice Roberts and Justice Kagan in *Rucho*. Justice Kagan believed the Court could identify out-of-bounds instances of gerrymandering without committing itself to a comprehensive fixed theory: “The majority’s ‘how much is too much’ critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2521 (2019) (Kagan, J., dissenting).

<sup>28</sup> Cover, *supra* note 2, at 17-18.



morality.”<sup>29</sup> By encoding four compelling sovereign interests into the Constitution itself, Section One is meant to be constitutionally innovative in two basic ways. First, by codifying popular sovereignty as a deep premise of American political morality, it is meant to give rise to new substantive strains of sovereignty-related jurisprudence; second, within those strains of jurisprudence, it calls for governmental processes – *including modes of judicial review* – that will be sovereignty-reinforcing and sovereignty-enhancing.<sup>30</sup>

By now it should be clear that Section One cannot purport to produce obvious answers to the thorniest questions that will surely arise under our Constitution. Instead, it aims to create a mindset: a constitutional self-consciousness in which “the People” are central, and in which that centrality is reinforced and enhanced through the four structural devices, which are now discussed in more detail.

### a. Representative self-government

Representation is the first compelling sovereign interest because it is the primary structural device by which the American people can have meaningful, ongoing involvement in self-government. Although representation is not equivalent to a popular sovereign acting for itself,<sup>31</sup> it should be structured and practiced in a manner that is sovereignty-reinforcing.

Key concepts related to the structural device of representation include:

- connection to the people and responsiveness to public opinion<sup>32</sup>
- accountability to the people<sup>33</sup>
- freedom of speech and expression to form public opinion<sup>34</sup>

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<sup>29</sup> William N. Eskridge, *Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS UNIV. L. J. 865, 893 (2013).

<sup>30</sup> Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980) (arguing for “a participation-oriented, representation-reinforcing approach to judicial review”).

<sup>31</sup> See ACKERMAN, *FOUNDATIONS*, *supra* note 1, at 236 (“[O]ur normally elected representatives are only ‘stand-ins’ for the People and should not be generally allowed to suppose that they speak for *the People themselves* . . .”).

<sup>32</sup> E.g., ROBERT POST, *CITIZENS DIVIDED* 60 (2014) (“[E]lections must be structured to select for persons who possess the communion of interests and sympathy of sentiments to remain responsive to public opinion.”) (internal quotation marks omitted).

<sup>33</sup> E.g., Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 43 (2004) (“All theories of representative democracy require, at a minimum, that those who exercise power be regularly accountable through elections to those they represent; accountability is a necessary, even if not sufficient, condition of democracy.”).

<sup>34</sup> E.g., POST, *supra* note 32, at 3-43 (discussing how representation and public opinion are necessary and symbiotic components of self-government). See also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (“[T]he 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*.”) (emphasis in original).

- existence of anti-fraud and anti-corruption measures<sup>35</sup>

## b. Federalism

Federalism is the second compelling sovereign interest because it is the primary structural device by which varying sociocultural norms can be embodied in law in differing ways throughout the country.<sup>36</sup> It also acknowledges the potential virtues of decentralization in a large democracy where reasonable pluralism is a fact of life.<sup>37</sup> In a vast representative democracy, the legitimacy of law (and of legally structured power) will inevitably depend on the existence of shared sociocultural norms among the people. While norms can emerge and operate within any level of government (federal, state, or local), it seems plain that the actual practice and experience of norms, for the vast majority of Americans, occurs in a local field.<sup>38</sup>

Key concepts related to this structural device include:

- different levels of government have differing proximity and responsiveness to the people<sup>39</sup>
- localism may be more inclusive and generate more participation<sup>40</sup>
- decentralization and localism may enhance legitimacy<sup>41</sup>

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<sup>35</sup> E.g., LESSIG, *supra* note 6, at 235-264 (presenting two conceptions of corruption: “corruption by individuals” and “institutional corruption”).

<sup>36</sup> E.g., Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 MINN. L. REV. 1, 26-27 (2016) (“[F]ederalism might entail a kind of epistemic humility” that “allows people with profoundly different moral views to stay peacefully united in one country”).

<sup>37</sup> E.g., JOHN RAWLS, JUSTICE AS FAIRNESS 3 (2001) (noting “[t]he fact of profound and irreconcilable differences in citizens’ reasonable comprehensive religious and philosophical conceptions of the world, and in their views of the moral and aesthetic values to be sought in human life.”) See also William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236 (1998); Sterling P. Lamprecht, *Some Political Implications of Ethical Pluralism*, 17 J. OF PHIL. 225 (1921).

<sup>38</sup> This is not to ignore or minimize the ways in which social media have altered traditional modes of norm adoption and norm spread. See, e.g., Rebecca Sawyer & Guo-Ming Chen, *The Impact of Social Media on Intercultural Adaptation*, 11 INTERCULTURAL COMM. STUDIES 151 (2012).

<sup>39</sup> E.g., Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”); Nourse, *supra* note 1, at 875 (“A decisionmaker representing more people is less likely, relative to one who represents fewer people, to be sensitive to citizen preference.”).

<sup>40</sup> *Id.* See also E. E. Steiner, *A Progressive Creed: The Experimental Federalism of Justice Brandeis*, 2 YALE L. & POL’Y REV. 1, 5-6 (1983) (“For Brandeis, federalism was important because it was only at the state and local levels of government that most Americans could participate in creative political activity.”).

<sup>41</sup> E.g., Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1507-1511 (1987) (describing how the device of federalism serves “the spirit and form of popular government” by generating various degrees of state and local autonomy); Steiner, *supra* note 40, at 16 (federalism promotes “political decentralization and the importance of vital local cultures”).

- norms are forged and experienced at smaller scale<sup>42</sup>

### c. The integrity of the electoral process

Electoral integrity is the third compelling sovereign interest because it is the primary structural device that builds and maintains trust in the device of representative self-government.

Key concepts related to this structural device include:

- registration and voting are accessible and fair for all eligible participants<sup>43</sup>
- elections are plausibly competitive<sup>44</sup>
- voting and tabulation processes are trustworthy<sup>45</sup>
- the informational environment is robust and healthy<sup>46</sup>

### d. The political equality of natural persons

Political equality is the fourth compelling sovereign interest because it is the primary structural device that places individuals on equal footing as members of the body politic.<sup>47</sup> Political equality states a goal to be continuously pursued; it is a perpetual premise, not a conclusion, of American justice. Substantively, political equality expresses the equal dignity of each person.<sup>48</sup> Procedurally, it orients our government toward processes in which individual interests are given due weight, where “due” is understood as asymptotically approaching “equal.”

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<sup>42</sup> E.g., Heather K. Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695, 1722-1723 (2017) (“[S]tates are no longer enclaves that facilitate retreats from national norms. Instead, they are the sites where those norms are forged. And while local and state structures were once condemned solely as tools for blocking racial change, they also provide crucial structures for seeking change. None of these truths has been fully absorbed by constitutional theory.”).

<sup>43</sup> E.g., ELY, *supra* note 30, at 116-125 (describing “a strengthening constitutional commitment to the proposition that all qualified citizens are to play a role in the making of public decisions”).

<sup>44</sup> E.g., PAGE & GILENS, *supra* note 6, at 220-227 (discussing various reforms to increase competition in elections); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999) (promoting “appropriately competitive interorganizational conditions” as a way of realizing “central democratic values, such as responsiveness of policy to citizen values and effective citizen voice and participation”).

<sup>45</sup> E.g., *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”).

<sup>46</sup> E.g., Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 549-550 (2018) (“The protection of a healthy speech environment in our times demands a rethinking of what it means to protect the channels of political speech in the internet age.”); AAAS, *OUR COMMON PURPOSE*, *supra* note 4, at 1.

<sup>47</sup> E.g., *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”).

<sup>48</sup> E.g., RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 272-273 (1977) (“Government must not only treat people with concern and respect, but with equal concern and respect.”).

The proposed amendment specifies that political equality applies to natural persons, not artificial entities. For example, under this provision, artificial intelligences would not have a constitutional interest in political equality because they are not actual members of the popular sovereign (“We the People”).<sup>49</sup> Likewise, other artificial and/or legal entities would not be accorded the same constitutional interest in political equality. According to this amendment, political equality is an interest held first and foremost by human beings.

Key concepts related to this structural device include:

- one person, one vote<sup>50</sup>
- meaningful expressive and participatory opportunities<sup>51</sup>
- value pluralism exists, *i.e.*, Americans are not all of one mind<sup>52</sup>
- popular sovereignty is a capacity of humans, not artificial entities<sup>53</sup>

### C. Section Two: Ending the Era of *Buckley v. Valeo*

In contrast to Section One’s abstract contours, Section Two<sup>54</sup> has a particular doctrinal aim: to end the era of campaign finance jurisprudence that began forty-five years ago with *Buckley v. Valeo*.<sup>55</sup> In *Buckley*, the Supreme Court invalidated several campaign finance regulations that were designed, in part, to limit the political spending of the nation’s wealthiest members so that everyday citizens could participate more meaningfully. The Court, viewing political spending as tantamount to speech, announced a principle that has shaped campaign finance jurisprudence ever since: “[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[.]”<sup>56</sup> Although it should be clear that Section One by itself renders *Buckley*’s analysis obsolete, it is also important to send a clear signal to the Supreme Court that it needs to

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<sup>49</sup> For a fascinating exploration of free speech theory and artificial intelligence, see Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169 (2016).

<sup>50</sup> *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>51</sup> *E.g.*, Jeffrey D. Clements, “*But It Will Happen*”: A Constitutional Amendment to Secure Political Equality in Election Spending and Representation, 13 HARV. L. & POL’Y REV. 373 (2019); Franita Tolson, *Protecting Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 180 (2015) (arguing that Article I and the Reconstruction Amendments “embrace a norm of broad participation that requires states to justify regulations that overly burden the right to vote”).

<sup>52</sup> *E.g.*, ELY, *supra* note 30, at 80 (arguing that our Constitution reflects “a strategy of pluralism, one of structuring the government, and to a limited extent society generally, so that a variety of voices would be guaranteed their say and no majority coalition could dominate.”).

<sup>53</sup> *E.g.*, POST, *supra* note 32, at 68 (“The value of democratic legitimation applies to persons, not to things.”).

<sup>54</sup> “Nothing in this Constitution shall be construed to forbid Congress or the States, within their respective jurisdictions, from reasonably regulating and limiting contributions and spending in campaigns, elections, or ballot measures.”

<sup>55</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>56</sup> *Id.* at 48-49.

revisit its campaign finance decisions in light of the four constitutionally-enshrined compelling sovereign interests.<sup>57</sup>

In *Buckley*, the Court applied a categorical frame of analysis and crammed campaign finance regulations into ill-fitting First Amendment doctrinal boxes.<sup>58</sup> Section Two of the proposed amendment would replace the *Buckley* categorical framework with a mode of analysis based on reasonableness/proportionality, and which considers how our compelling sovereign interests are (or are not) served.

Professor Jamal Greene has written forcefully about the pathological nature of the current categorical frame:

We disagree – reasonably – about the rights that we have, and so a categorical frame burdens the categories with more pressure than they can bear. . . . Proportionality analysis is more congenial to the way the lawyers and statesmen of the Founding generation understood rights than the presumptive absolutism that characterizes the modern [categorical] frame.<sup>59</sup>

Section Two’s use of the word “reasonably” is meant to pull us out of a world defined by rigid tiers of scrutiny and lead us into a world of interest balancing and proportionality.<sup>60</sup>

Additionally, the use of the word “in” creates a nexus requirement: to satisfy this requirement, campaign finance regulations will have to be sufficiently related to campaigns, elections, or ballot measures.

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<sup>57</sup> Taken as a whole, the proposed amendment would change the nature of the “constitutional problematic” that we face in the money-in-politics domain. Cf. ACKERMAN, FOUNDATIONS, *supra* note 1, at 82 (describing a change in “constitutional problematic” as a “shift[ in] the balance of constitutional discourse”).

<sup>58</sup> For an excellent overview of the deeply problematic jurisprudence that *Buckley* spawned, see Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. OF LEGIS. AND PUB. POL’Y 101 (2017). See also FIRST REPORT BY THE COMMONWEALTH OF MASSACHUSETTS CITIZENS COMMISSION CONCERNING A CONSTITUTIONAL AMENDMENT FOR GOVERNMENT OF THE PEOPLE 14-17 (2019) (surveying the Supreme Court’s post-*Buckley* doctrine).

<sup>59</sup> Jamal Greene, *The Supreme Court, 2017 Term – Foreword: Right As Trumps?*, 132 HARV. L. REV. 28, 35 (2017).

<sup>60</sup> See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402-403 (2000) (Breyer, J., concurring) (“[W]here a law significantly implicates competing constitutionally protected interests in complex ways[,] the Court has closely scrutinized the statute’s impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others[.]”); Cf. Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1340, 1341 (2020) (favoring a mode of analysis “that is more sensitive to the multiple interests implicated in free speech disputes than contemporary First Amendment jurisprudence” and urging the Court “to engage in balancing of some kind”).



The American people are dissatisfied with our current campaign finance laws.<sup>61</sup> But *Buckley* and the line of cases that follow it have made it extremely difficult to experiment legislatively in this area.<sup>62</sup> Upon ratification, Section Two of the proposed amendment would require a fresh constitutional look<sup>63</sup> at *Buckley* and cases such as:

- *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), holding that corporations have a First Amendment right to spend money to publicize opposition to a ballot initiative.
- *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), holding that corporations have a First Amendment right to make unlimited independent expenditures in elections.
- *Speechnow.org v. FEC*, 599 F.3d 686, (D.C. Cir. 2010), giving rise to “super PACS” by holding that individuals have a First Amendment right to make unlimited contributions to independent political action committees.
- *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), invalidating Arizona’s public financing scheme in which candidates received supplemental funds based on an opponent’s spending.
- *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012) (per curiam), announcing that the holding of *Citizens United* also applies to state campaign finance laws.
- *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014), holding that aggregate limits applicable to individuals’ political contributions are unconstitutional.

#### D. Section Three: Empowering Congress and the States

Finally, Section Three<sup>64</sup> gives Congress and the States a general power to implement and enforce the amendment. It also specifically empowers Congress and the States to distinguish between natural persons and artificial entities when they pursue various sovereignty-affirming measures,<sup>65</sup> both in the campaign finance domain and in other sovereignty-implicating

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<sup>61</sup> See, e.g., Megan Brenan, *American’s Most Satisfied With Nation’s Military, Security*, GALLUP (Jan. 28, 2019)(out of a list of 22 policy areas, “the public is least satisfied with the nation’s campaign finance laws”).

<sup>62</sup> Cf. Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 78 (2017) (“The Supreme Court’s constitutional mistakes are extremely difficult to correct; one can hope only for a change of heart, a change of personnel, or a change by constitutional amendment.”).

<sup>63</sup> A fresh look under the proposed amendment would not be simple – but that is feature, not a bug. Cf. Lakier, *supra* note 60, at 1341 (noting that there “is no good alternative” to a “more complicated doctrinal analysis”).

<sup>64</sup> “Congress and the States shall have the power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and artificial entities, including by prohibiting artificial entities from raising and spending money in campaigns, elections, or ballot measures.”

<sup>65</sup> This distinction is already implied in the text and design of Section One, which embraces *the people’s* sovereign interests, including our human interest in political equality.



domains.<sup>66</sup> Further, it clarifies that the power to distinguish between natural persons and artificial entities includes the power to potentially *prohibit* artificial entities from raising and spending money in campaigns, elections, or ballot measures. Of course, that prohibitory power is still subject to the principles in the first two Sections, including Section Two's reasonableness and nexus requirements.

### III. Conclusion

The proposed amendment will not become part of our constitutional legacy without a supportive and mobilized American people. The people will need to contact their state and federal representatives. The people will need to use their voices to influence public opinion in favor of the amendment. And the people will need to believe in their own power and responsibility to create the nation's fundamental law.

If Americans are able to successfully engage in the mode of politics necessary to ratify the amendment, we will have managed to carry out a peaceful and enduring restructuring of the relationship between us and our government — a relationship whose true center of gravity will be We the People.

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<sup>66</sup> Besides campaign finance, other domains that implicate our compelling sovereign interests include elections and voting, political parties, apportionment and districting, and lobbying (to name a few). *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (2016).

## About the Author

Brian Boyle is Counsel at American Promise, where his work focuses on amending the United States Constitution to stop the corrupting influence of money in our political system. Before joining American Promise, Boyle practiced law in a variety of settings, including the Massachusetts Attorney General's Office, the Massachusetts Appeals Court, a major international law firm, and non-profit organizations. He is a graduate of Cornell Law School and Harvard College.

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