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VOICE V. VOTE: THE SUPREME COURT'S PARADOX OF POLITICAL PARTICIPATION IN AMERICAN LIBERALISM

A dissertation submitted in partial satisfaction of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

POLITICS

by

Eric Stephen Snickars

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Voice v. Vote: The Supreme Court's Paradox of Political Participation in American Liberalism

Eric Stephen Snickars

What is the relationship between the voice of political expression and the vote that expresses this voice at the ballot box? How did a political philosophy develop under U.S. Supreme Court jurisprudence that put voice and vote values into conflict, ultimately favoring the corporate voice over that of the individual vote? I argue that the voice-vote dilemma is a case of the larger tension between liberty and equality in U.S. liberalism, as expressed by disagreements on the Supreme Court. Although the relationship between liberty and equality in U.S. liberalism throughout history has been multifaceted, the Court's decision in Citizens United v. FEC reflects a swing towards the dominance of libertarian values over egalitarian values on the Court, a built-in bias towards a uniquely exceptional notion of liberty that overwhelms egalitarian values to such an extent that meaningful campaign finance reform has stood little chance of success.
Chapter One

Liberalism, the Supreme Court, and the Paradox of Political Participation in U.S. Election Law

Financing elections creates problems inherent to liberalism and democracy. Campaigns require resources not merely to succeed, but to operate in the first place. These resources come from supporters of candidates and policies and, when a donor provides resources in the form of money, conventional political wisdom dictates they would like something in return; therefore, potential conflicts of interest may arise between elected officials and their donor-benefactors. Take this scenario out of the theoretical, and we can add that we know that more spending means more access to lawmakers.\(^1\) Thus, this conflict – between those with and those without resources – creates an inherent problem of volume and weight: the voices of the moneyed donors are louder than those with fewer resources. Because less moneyed interests are "heard" less, their individual votes – *one person one vote*, according to the United States Supreme Court\(^2\) – lose power as popular sovereignty transmutes into legislative decision-making. Individual, less moneyed voices and votes become drowned out by corporate voices, voices that in turn influence the legislative vote, shaping policy. The U.S. Supreme Court approved this system – as a *constitutional* matter – in *Citizens United v. FEC*.\(^3\)

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\(^3\) 558 U.S. 310 (2010).
This dissertation uses the history of election law reform and policy, legal and liberal theory, and comparative constitutionalism to explain the tension between vote and voice values in U.S. liberalism. What is the relationship between the vote and the voice in American liberal democracy and politics? How did U.S. notions of liberalism arrive at the collision between vote and voice values that the U.S. Supreme Court’s recent policies represent? Outside of changes in membership that shifted the balance of power on the Court, I argue that the tension between the vote and the voice is best understood as a consequence of (1) the ideological tension between liberty and equality in American liberalism as ultimately constructed in Supreme Court decisions and (2) the culture of legalism that privileges an exceptional form of liberty over other liberal values of equality, fairness, dignity, and justice. Therefore, the Court's ruling in *Citizens United* does not merely reflect a neo-liberal shift on the Court, but elevates the power of the voice – the *corporate* voice – over that of the individual vote.

**Statement of the Problem**

The Court's decision in 2010's *Citizens United v. FEC* drastically changed the law of campaign finance. In *Citizens United*, the Court struck a federal law that had banned corporate spending during election cycles. As a result of this decision, corporations gained the power to spend unlimited amounts of money supporting and opposing candidates. Additionally, this decision changed a long-standing constitutional rule that corporations could only participate in elections in limited ways. This rule had stood for 34 years, and had even survived a constitutional challenge
seven years earlier. *Citizens United* therefore serves as a bookend, ending a U.S.
campaign finance policy that had firmly and clearly limited corporate participation in
elections, and opening a new chapter that furthers the principle that "money is
speech."\(^4\)

This decision is part of a new order in election law, one guided more by a Court
valuing libertarian over egalitarian principles. Within few years of each other, the
early 21st-century Court weakened the Voting Rights Act,\(^5\) upheld voter
identification laws,\(^6\) and removed caps on individual campaign contributions.\(^7\) These
new rules replaced an election law jurisprudence that had already indicated hostility
towards reform since the inception of federal campaign finance rules. Although the
Court had shown support for the right to vote though its malapportionment and voting
rights decisions in the 1960s, a much different Court later used the First Amendment
to strike much of Congress's first comprehensive campaign finance law under the
reasoning that they stifled the *voices* of individuals.\(^8\) Between this 1976 libertarian
decision and the 1960s egalitarian decisions, the Court had placed the individual vote
against the individual voice.

Although the Court's entrance into campaign finance law in 1976 greatly
modified Congress's bipartisan agreement, there remained one clear understanding
with regard to the participation of corporations in elections – a natural person had a

\(^4\) More specifically, the use of money during political campaigns is the "functional equivalent" of


\(^6\) *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

\(^7\) *McCutcheon v. FEC*, 572 U.S. ___ (2014).

higher level of constitutional protection than did these non-natural persons. In other words, the government could clearly limit corporate participation in stricter ways that they could with natural persons. In *Citizens United*, the Court shattered this reasoning, holding that the form of the speaker – corporate or natural – should not matter. This led to the famous sound bite that "corporations are people."

To understand how the Court pit the voice against the vote, we must first understand how the Court arrived at its *Citizens United* moment: I argue that (1) the Court's 50+ year history of election law decision-making briefly elevated the power of the vote, before raising the power of the voice above it in two stages, stages represented by *Buckley v. Valeo* and *Citizens United v. FEC*; (2) the Court's debates on campaign finance reflect the 100+ year history of national legislative attempts; (3) the Court's moves on campaign finance reform reflect its decisions regarding civil rights and liberties overall. To explain how the Court arrived at the point where it was willing to elevate the corporate voice over that of the individual vote in *Citizens United*, I explain that: (1) the culture of legalism that governs U.S. legal institutions indoctrinates law students into classical liberalism via its adversary system and its legal ethics; (2) the relationship between voice and vote reflects the complex relationship between liberty and equality in U.S. liberalism, a relationship whereby liberty has a built-in bias over equality, partially as a result of legalism. Finally, I argue that any rehabilitation of campaign finance by the U.S. Supreme Court would be best served by considering the campaign finance decisions of the Canadian
Supreme Court, even though its egalitarian constitution gives judges a structural advantage over that of the U.S. libertarian constitution.

There are two additional pieces that explain *Citizens United*. That changes in Court membership allowed *Citizens United* to occur is uncontested. Likewise, it goes without saying that future changes in Court membership could change the constitutional law of campaign finance reform. Less obvious, however, is the inequality issue as it pertains to the ongoing battle over reform. Large resources have been expended in the Courts against campaign finance rules; in other words, money is being spent on lawsuits to ensure that more money can be spent in elections. This inequality issue is ripe for another project, but is not part of this one.

**Background**

Before the 1960s, the Court rarely intervened in election law matters. When the first case challenging legislative malapportionment came before the Court in the late 1940s, it dismissed the case as being beyond its jurisdiction, not wanting to "enter [into] this political thicket." However, as the legislative malapportionment problem continued to grow, the Court under Chief Justice Earl Warren reversed its position. During the early 1960s, the Court did not merely claim jurisdiction over apportionment cases, but it used its power to rewrite legislative maps all over the U.S. under its new "one person one vote" standard. Under this principle that every

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person's vote should count as equally as another's, the Court had – as a matter of constitutional law – elevated the power, or value, of the vote.

The Court's elevation of the value of the vote in should be considered alongside its approval of the 1965 Voting Rights Act,\textsuperscript{11} which had been challenged as not being empowered by the Fifteenth Amendment's proclamation that no person could be denied the right to vote on the basis of race. The Court's approval of the Voting Rights Act cemented the legal right to vote for all African Americans, as Congress had specifically targeted discriminatory jurisdictions for federal oversight. Between the malapportionment and voting rights cases, by the time Warren's tenure ended in 1969, all voters (1) had an enforceable right to go to the polls and (2) to have their votes counted as equally ("as practically possible") as anybody else.

But the Court’s post-1960s notions of the value of the vote shifted with its membership changes, beginning in the early 1970s, and continuing into the 21st century. The Court's transformation – as it has evolved since the 1970s – is best described as moving from the importance of the value of the vote to the integrity of the vote and, by extension, the integrity of the democratic process of participation. As the Court's membership changed, its majorities became more critical of measures designed to bring more political equality to voting rights, especially more aggressive measures designed to ensure minority representation by creating districts whose majorities were ethnic and racial minorities. In the 1990s, the Court limited the use of

these "majority-minority" districts via the reasoning that the appearance of racial gerrymandering in a free society undermines the integrity of the system.¹² Later, when the Court ended a recount in the 2000 presidential election and ordered a previous, uncertain vote count to stand, it did so via the reasoning that voting rights were violated because votes were counted via different – often drastically so – standards; in other words, the lack of an equal chance to count one's vote undermined the integrity of the process.¹³ And, in 2008, when the Court under Chief Justice John Roberts upheld state voter identification requirements that were required for voting at the polls, it did so under the reasoning that Indiana was empowered to enact reasonable voting restrictions based on a “real” threat of voter fraud.¹⁴ Again, the concern was the protection of the integrity of the system. This distinction between the 1960s’ value vs. the 21st century's integrity of the vote is important: valuing the vote privileges inclusion and participation, whereas the integrity policy privileges exclusion and promotes non-participation.¹⁵

¹² “It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.” From Justice O'Connor's 5-4 majority in Shaw v. Reno, 113 S.Ct. 2816, 509 U.S. 630 (1993).
¹⁵ I am thinking specifically of Judith Shklar's revisionist theory of representation. Reacting to the narrative that pits American suffrage as a hard-fought quest for inclusion that the nation eventually grants, Shklar argues that efforts towards full suffrage are better seen as a continual attempt at exclusion of the disenfranchised by those already graced with full citizenship. Judith N. Shklar, American Citizenship : The Quest for Inclusion, The Tanner Lectures on Human Values (Cambridge, Mass.: Harvard University Press, 1991).
But the 1970s provided the Court with the chance to reach into the realm of the other side of election law – campaign finance reform. In 1974, Congress attempted to rein in campaign spending with its first comprehensive schema that included a new regulatory body to enforce its new rules. Challenged immediately upon its passage, the Court effectively adjusted this Federal Election Campaign Act (FECA) in 1976's *Buckley v. Valeo* by striking some of its key provisions, namely those that the Court determined had limited political expression, or "speech" and "association" for individuals. 16 By framing reform under First Amendment limits, the Court attempted to protect another key element of liberal democracy – the voice of political participation.

The Court's 1976 decision may have disappointed reformers by striking much of the FECA, but there was relative agreement on two central aspects: (1) an individual donor could be subject to more regulations when giving directly to a candidate as opposed to spending money independently of that candidate's campaign; (2) when regulating spending, corporations (and unions) were subject to more stringent rules than were natural persons. It was clear was that the First Amendment did not offer corporations the same level of protections it does for natural persons. However, unlike the mostly unenforced campaign finance legislation that had preceded it, the FECA did not ban corporate participation in elections; in fact, the FECA legally enabled it by creating what would later be known as Political Action Committees (PACs), regulated by the newly created Federal Election Commission (FEC). So, as a

result of FECA's passage, corporations could legally participate in elections for the first time since 1907. They could not, however, use their money in as many ways as could individuals.

After the FECA and *Buckley*, federal courts spent the next quarter century dealing with the intricacies of interpreting the new rules, while the FEC promulgated its own regulations that attempted to clarify rules. The 1980s ushered in a conservative revolution, culminating with the presidency of Ronald Reagan, who was able to appoint three new justices – Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy – thus cementing a legacy on the Court still felt in 2015. Although the Court has held deep philosophical divisions amongst its membership on election law cases since it began hearing them in the 1960s, by 2000, the Court’s libertarian-egalitarian differences had developed almost consistently into a 5-4 split. Forced to intervene by the litigation of supporters of presidential candidates George W. Bush and Al Gore, the Court ended the 2000 presidential election – and effectively decided it – via a 5-4 decision.\(^{17}\) Three years later, the Court upheld Congress’s hard-fought 2002 campaign finance reform legislation – the Bipartisan Campaign Reform Act (BCRA) – by this same margin.\(^{18}\) In its BCRA decision, however, if they were not already aware, campaign finance reformers were then put on notice that their efforts were protected by a margin of *one* vote.\(^{19}\) When Justices Roberts and Alito replaced Justices O’Connor and Rehnquist, this feared reversal was sealed, as Justice

\(^{19}\) Ibid.
O'Connor had provided the fifth pro-reform vote on the Court, and Alito opposed reform. (Both Justices Rehnquist and Roberts oppose reform.) Thus, when one of the provisions approved by the Court in 2003 came before them once again in 2010's *Citizens United* – a provision that limited the participation of corporations and unions during elections – it was doomed based on the previously announced preferences of their replacements, Justices Roberts and Alito. By striking rules that limited corporate spending, this shift on the Court dramatically changed the contours of American election law, elevating the power of the corporate voice to such value that its “political speech” is to be protected via the highest level of judicial scrutiny. The narrow majority cemented this principle in *Citizens United*.

When the Court reversed its 2003 decision and struck campaign finance reform legislation that limited the independent spending of corporate money in elections, it broke two major bargains in election law: (1) a bargain amongst reformers and moneyed interests that would allow corporations to legally participate in elections, but with more limited means than could individuals; (2) a bargain within election law between the Warren Court's 1960s value of the *vote*, and the *Buckley* Court's 1970s volume of the *voice*. In this regime, political speech was protected, but it was not protected to the point where – according to the Court – elected officials could be influenced as a result of huge spending. When the Court empowered corporations with more ways to spend money in elections, it allowed the means for the elevation of the *volume* of some voices over those of others.

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Allowing unlimited campaign spending to disseminate messages increases the inequality of voices amongst other speakers. Given 21st-century realities regarding campaign spending and such spending's influence on voters as well as on access to legislators, this elevation of the power of the corporate voice has the potential to influence policy outcomes. Independent spending influences the individual vote, and the access garnered by such spending influences the legislative vote. How much is the vote worth when certain voices are able to spend much more money on campaigns, resulting in both (1) voters whose viewpoints have been tarnished by volume, and (2) moneyed interests who have more access to legislators, perhaps influencing the passage and details of legislation?

Thus, taken holistically, the Court's policies have created a paradox of political participation in the U.S. Early 21st century jurisprudence demands that all districts are to be divided as equally as reasonably possible – one person one vote. However, all votes in an election are to have an equal chance at being counted.  

21 Constitutional equality allows – and perhaps even demands – majority-minority legislative districts, yet also prohibits them if the districts are so bizarrely shaped that racial gerrymandering can be the only explanation. 22 The integrity of the vote allows for the exclusion of votes via voter ID. 23 Advertising dollars influence minds and viewpoints, and an inequality of volume of voice can influence the individual vote. Additionally,

21 The "equal chance" doctrine was first explained by Sunstein, "The Equal Chance to Have One's Vote Count." Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525 (2000). Also, note that, when this "equal chance" rule was announced, the Equal Protection Clause was being used to protect this right by ensuring that many votes not get counted.


campaign spending leads to more access to legislators, and more access means more influence.\textsuperscript{24} Taken together within this canon of political participation, the Court’s \textit{Citizens United} decision increased the power of the voice over the vote – direct vote buying and bribery may be illegal, but spending unlimited money to impact election results is not. Money thus can affect for whom and for what the electorate votes. Perhaps more importantly, elected officials determine policy, and thus election spending impacts policy. Because donors expect access if not results from their supporters, the \textit{Citizens United} decision could likely impact the development of legislation as well as legislative floor votes.\textsuperscript{25} The right to \textit{speak} thus has a direct relationship with the right to \textit{vote}. The rise of the Court’s campaign finance policy in the U.S. has increasingly pit the voice against the vote, to the point that we might ask, "How much exactly does a vote cost in media dollars?"

\textbf{Contribution and Relevant Work}

How did the Court get to the point where it was willing to elevate the power of the corporate voice, yet diminish the power of the individual vote? In order to answer this question, we must first look to the ways that the Supreme Court decides cases in the first place. Attempts to explain the jurisprudence of the U.S. Supreme Court generally fall into two categories: the \textit{political} and the \textit{legal}. Political scientists and the mass public generally accept that Court justices are guided by their preferences.\textsuperscript{26}

\textsuperscript{24} Clawson, Neustadt, and Weller, \textit{Dollars and Votes: How Business Campaign Contributions Subvert Democracy}.
\textsuperscript{25} Ibid.
\textsuperscript{26} Jeffrey A Segal and Harold J Spaeth, \textit{The Supreme Court and the Attitudinal Model Revisited} (Cambridge University Press, 2002).
while legal scholars often still emphasize doctrinal explanations for decisions.\textsuperscript{27} As legal and social science scholarship produced more interdisciplinary work towards the end of the 20th century, the idea that legal doctrine was the primary driver of decisions began to diminish, and "formalism" – as an explanation for decisions – lost adherents to a comparatively young school known as legal realism.\textsuperscript{28} Still, given that formalism is also the method by which attorneys and judges argue the law, it still has relevance regardless of the method(s) used by legal scholars to explain decisions.

Although attorneys use formalist doctrine in practice, and many legal scholars still rely on it to explain decisions, most social scientists reject the idea that doctrine has a pivotal role in guiding the Court's jurisprudence.\textsuperscript{29} Rather, social scientists use preference-based methods to explain decisions: policy preferences, ideology, and intra-Court bargaining explains decisions. Under this view, the only truly pivotal changes in Court jurisprudence occur when Justices are replaced, or change their minds. While I won't deny the importance of these preference models, they don't tell the full story explaining Court decision-making. The legal reasoning behind cases is all but ignored using social science methods, as only the case result is necessary to understand how the Court decides cases. As such work is and has been covered thoroughly through various literatures, this dissertation will not cover these

\textsuperscript{27} Richard H. Pildes, "Institutional Formalism and Realism in Constitutional Law," \textit{Supreme Court Review} 1 (2014).
\textsuperscript{28} James L. Gibson and Gregory A. Caldeira, "Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?," \textit{Law & Society Review} 45, no. 1 (2011); Pildes, "Institutional Formalism and Realism in Constitutional Law."
\textsuperscript{29} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model Revisited}. 
explanations. If my work is related to these mainstream social science methods, it is to add another structural dimension for them to consider.

Using the tension between the voice and the vote, this dissertation fills the gap between the political and the legal. Formalism and legal doctrine matter, just not in the ways that social scientists and legal scholars have traditionally considered. Social scientists are correct to point out that formalism does not explain decisions; it structures them. The election law jurisprudence of the U.S. Supreme Court provides a stark example of the ways in which Justices – both libertarian and egalitarian – are bound by a built-in bias of the American legal system, a bias that is libertarian in nature. We see this bias in *Citizens United v. FEC*, where even the egalitarian Justices are subverted by their own concerns regarding freedom of expression.

My work has significance for several literatures. First, this dissertation contributes to the historical institutionalism school in American political development (APD), a subfield that aims to explain the development of political institutions over time, a marriage of narrative political science and history. My work contributes to APD's focus on the historical development of ideas, interests, and institutions. Over time, the principles or ideas behind American liberalism have been reflected and refracted throughout the legal community, ultimately providing hidden structural

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barriers that guide Supreme Court decision-making.\textsuperscript{31} Specifically, the ideas of liberty and equality stand behind civil rights and liberties cases as the wizard behind the curtain, providing unconsidered barriers towards attaining the egalitarian policies of other Western nations.

Additionally, the narrative of 20th century campaign finance reform and voting rights that led to \textit{Citizens United} provides a story of institution building, as much of the judicial resistance to reform is at least partially a result of being trained in U.S. law schools, institutions that train attorneys to operate in a libertarian justice system.\textsuperscript{32} Combined with the manifestation of a more aggressive Supreme Court and its monumental changes in doctrine between the 1960s and 1970s – indeed, over the second half of the 20th century – the Court changed as it developed as institution, while the legal system remained stagnant, as legal culture changes very slowly.

This change and continuity between the Court and the legal system is relevant not merely to APD, but to other literatures specifically explaining U.S. constitutionalism. This includes work on the U.S. Founding moment and the creation of the constitution and its resulting political institutions,\textsuperscript{33} the division of U.S. constitutionalism into regimes over time,\textsuperscript{34} the creation of U.S. constitutional law

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\textsuperscript{31} The theoretical framework referenced is the subject of Chapter Two.
\textsuperscript{32} Again, Chapter Two provides the relevant theoretical framework.
\textsuperscript{33} David Brian Robertson, \textit{The Constitution and America's Destiny} (New York: Cambridge University Press, 2005); “The Return to History and the New Institutionalism in American Political Science.”;
Daniel Wirls and Stephen Wirls, \textit{The Invention of the United States Senate} (Taylor & Francis, 2004).
\textsuperscript{34} Bruce A. Ackerman, \textit{We the People} (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991).
outside of the Supreme Court and judiciary,\textsuperscript{35} the expansion and contraction over time of the right to vote,\textsuperscript{36} new institutionalist interpretations of the Supreme Court,\textsuperscript{37} and attempts to scale back the rights revolutions of the 1950s and 1960s.\textsuperscript{38}

In addition to APD and works of constitutionalism, my work responds to a debate within Law and Society (L&S), a literature that analyzes the role and effectiveness of law in social justice movements. Similar to APD and social science, L&S reject formalism as a primary explanation for Supreme Court decisions.\textsuperscript{39} And, like my response to social science, formalism matters, just not in the ways traditionally conceived. American lawyers are trained to argue cases in terms of doctrine, and even judges who are legal realists write their decisions in terms of formal legal doctrine.\textsuperscript{40} My challenge is that legal education and culture binds legal minds, causing a built-in bias towards a form of liberty that constitutes another case of American exceptionalism. Building on Judith Shklar's and Stuart Scheingold's

\begin{footnotesize}
\begin{enumerate}
\item Sarah Staszak, "Institutions, Rulemaking, and the Politics of Judicial Retrenchment," \textit{Studies in American Political Development} 24, no. 02 (2010).
\item For a discussion on formalism, realism, and the new institutionalism as it relates to the Supreme Court, see Pildes, "Institutional Formalism and Realism in Constitutional Law."
\end{enumerate}
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"legalism," I demonstrate how legal culture, doctrinal development, and political institutions trap judges, even those with egalitarian leanings.

Historically, the overwhelming majority of work on campaign finance reform itself is centered around (1) attempts to explain how legislation passed or how other legislation has failed; (2) the effectiveness of the legislation vis-à-vis its legislative intent; (3) the influence of money on voters and on access to legislators; (4) legal debates on the constitutionality of campaign finance rules vis-à-vis the First Amendment. Such work has been productive in identifying deficiencies in campaign finance policy, but has failed to adequately consider the theoretical conundrum between the voice as enabler of economic liberty, and the vote as enabler

of political equality. This lack of coverage is somewhat understandable given the 21st
century Roberts Court's exacerbation of the problem.

Despite social science's and L&S's rejection of formalism, most work
concerning Citizens United itself is doctrinal, published in law reviews. The change in
the law is mostly accepted in terms of ideology and preferences – namely, political
science's attitudinal model — pro-reform forces lost a vote, while anti-reform forces
 gained a vote. In law reviews, a combination of formalism dominates, attitudinal
preferences are presumed, and the Court members' decisions – if not their reasoning –
are generally accepted as genuinely representing their views. Some work has
considered both the potential as well as real impact on elections. Work has covered
the increase in the power of corporations in elections, explanations of new
constitutional doctrine and its potential consequences,

46 Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited; Gibson and Caldeira,
"Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?";
47 Rodolpho Sandoval and William Avila, "A Critical Analysis of a Corporation's First Amendment
Constitutional Right of Freedom of Speech and the Expansion of Their Political Influence: The Case of
48 Wayne Batchis, "Citizens United and the Paradox of "Corporate Speech": From Freedom of
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Review 50, no. 1 (2011); Jamie Raskin, "The Citizens United Era: How the Supreme Court Continues
to Put Business First," (Washington, D.C.2010); Paul S. Ryan, "Two Faulty Assumptions of Citizens
United and How to Limit the Damage," University of Toledo Law Review 44, no. 3 (2013); Sandoval
and Avila, "A Critical Analysis of a Corporation's First Amendment Constitutional Right of Freedom
of Speech and the Expansion of Their Political Influence: The Case of Citizens United V. Federal
Elections Commission."
49 Howard Darmstadter, "Making Sense of Citizens United," National Affairs 11 (2012); Floyd Abrams
and Burt Neuborne, "Debating Citizens United," Nation 292, no. 5 (2011); Floyd Abrams, Alan B.
Albany Law Review 76, no. 1 (2013); "Comments: Citizens United V. Fec: Corporate Political Speech",
Harvard Law Review 124, no. 1 (2010); Jason S. Campbell, "Down the Rabbit Hole with Citizens
United: Are Bans on Corporate Direct Campaign Contributions Still Constitutional?," Loyola of Los
decision in terms of spending,\textsuperscript{50} why the case was wrongly decided,\textsuperscript{51} shareholder protection,\textsuperscript{52} the ability of non-profits to participate after \textit{Citizens United},\textsuperscript{53} defenses of the decision,\textsuperscript{54} considerations and critiques of the Court's use of precedent,\textsuperscript{55} speculations on the future of campaign finance,\textsuperscript{56} the public's response to the case,\textsuperscript{57}


the neo-liberal aspects of the case, and prescriptions for solutions that could effectively avoid or overturn *Citizens United*.

Unlike most mainstream news sources, many law review writers support the notion that the First Amendment protects political speech to the point that many campaign rules should be struck. Additionally, even supporters of reform concede that the First Amendment is implicated in campaign finance, even if they believe that reforms pass the necessary constitutional tests. Other law review work has speculated on where the Court might go with campaign finance in the future, conceding the "end

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60 The immediate popular response to *Citizens United* was overwhelmingly negative; for example, a Washington Post—ABC News survey polled 8 out of 10 respondents as opposing the decision (*Washington Post*, 17 February 2010). Left-liberal sources were particularly incensed, using poll results to claim that “everyone” hates the ruling (*Huffington Post*, 17 February 2010), and that lobbyists could now threaten non-compliant legislators with “unlimited sums” advocating against re-election (*New York Times*, 21 January 2010). As public opinion has grown to accept the notion of attitudinal preferences, (Gibson and Caldeira, "Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?"). the 5-4 portion of the decision was often seen as the victory of five conservative or Republican-leaning justices against four liberal or Democrat-leaning justices. But while traditional left-leaning publications both contributed to and reflected the disdain for this decision, libertarians and conservatives generally applauded it as a victory for the First Amendment (*National Review*, 21 January 2010; 25 January 2010; 27 January 2010). The ACLU had, in fact, filed an amicus brief in support of Citizens United.

of an era," i.e., that a new regime or paradigm is emerging. Much has been written on what the law should be.

Addressing the domain of legal and political theory, the dilemma of conflicting liberal values is nothing new to constitutional theorists, who often frame such problems in terms of the complex, untidy, relationship between liberty and equality. Doctrinally, courts, attorneys, and many scholars have conveyed this conflict via a First Amendment-centric analysis. As the First Amendment generally doctrinally protects liberty rather than equality, such an analysis – even when supporting campaign finance rules – requires that the government’s interest in equality be at least substantial, and often compelling. From a doctrinal standpoint, this puts the equality interest at a severe syllogistic disadvantage, as the default position is to oppose speech regulations, forcing the burden of persuasion to the government. Even if the Court can be persuaded that political equality is a compelling governmental interest, the reform program must still be “narrowly tailored,” using means that are the “least drastic.”

Although legal scholarship has addressed tension between campaign finance and the First Amendment as a liberty and equality problem, it is often written

65 Sullivan, "Two Concepts of Free Speech."
without an adequate ideological foundation, especially when covered in law review articles; the definitions of "liberty" and "equality" can be taken for granted, rather than specifically defined. In political science, although political and legal theorists have treaded the relationship between liberty and equality in American liberalism and democracy, such an application of liberal principles has not yet been adequately applied to campaign finance reform. This dissertation will bring these subjects together, with an eye on the long historical development of liberalism itself, demonstrating that the Court's shift in policy best understood as the rise of neoliberalism within the ranks of the Court, a return to the notion that government's primary role is to protect property.

Moreover, campaign finance rules offer an inherent liberal conundrum – not one exclusive to the U.S. classical liberal tradition – that pits the values of political equality against the values of political liberty. The scholarship on campaign finance is distinctively normative, and there is generally little question where the authors stand on the topic: those who oppose campaign finance reform frame the debate almost completely in First Amendment terms, whereas reformers are more likely to frame

67 See Appendix A for a glossary of definitions.
69 See, for example, the decisions of Justices Roberts, Kennedy, Thomas, and Scalia in Citizens United. See also the work of John Samples who, through his own research, changed from a proponent to an opponent of campaign finance. It is important to note that opponents consider other arguments, but the bases of their positions reside under of Freedom of Expression. See Samples, The Fallacy of Campaign Finance Reform.
the debate in terms of principles of equality and democratic participation. Pro-reform scholarship critiques the rising amounts of election spending, whereas opponents cite the lack of enforcement and “whack-a-mole” responses by political operatives since 1976's *Buckley* decision. Several frame the issue in terms of the tension between free expression and political equality, yet no analytical framework has yet been presented that explains how the tension between the voice and the vote reflects the ultimate conflict between the liberal principles of liberty and equality, a conflict easily theoretically possible within the paradigm of classical liberalism, yet seemingly exclusive amongst advanced liberal democracies. After *Citizens United*, activists touted prescriptions, the most common of which was the advocacy of a constitutional amendment that would "overturn" the ruling on corporate speech. Law reviews provided much more sober analyses, accepting the decision and looking

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72 Smith, *Unfree Speech: The Folly of Campaign Finance Reform*.


74 Most opponents of *Citizens United* simply advocate for a constitutional amendment to overturn it; few details are generally offered as to the text of any proposed amendment. For examples of specific proposals, see Appendix B: Tribe, "The Once-and-for-All Solution to Our Campaign Finance Problems: How Citizens Can Unite to Undo Citizens United.," Cavanaugh, "Text of the Citizens United Constitutional Amendment."
to the future to imagine how future campaign finance cases will be decided,\textsuperscript{75} as well as how the new rules would shape elections. Although reformers and their opponents stand in stark disagreement with each other, almost all agree that the \textit{Buckley} system has been dysfunctional, not working to either libertarian or egalitarian satisfaction.

While the topics of political participation, voting rights, and freedom of expression are well covered in law and politics, holistic work regarding election law and theory has become more robust and fully developed after \textit{Bush v. Gore} placed these subjects on the radar. Attempts to cover merely the legal tensions inherent in American participatory democracy result in enormous casebooks\textsuperscript{76} and hornbooks and, in any case, are dominated by law review scholars. While this volume of work is advantageous for the doctrinal researcher looking for legal answers and prescriptions, it generally lacks considerations of the theoretical underpinnings that drive legal decision-making outside of formal law. I aim here not just to tell a richer story, but also to help us to better understand the built-in biases that contribute to keeping libertarian constitutionalism alive, not merely in election law, but in U.S. liberalism itself. Thus, my work offers election law a paradigm by which to consider the area not merely through the lens of U.S. history, but through that of liberalism itself.

\textbf{Argument and Chapter Design}

\textsuperscript{75} See, e.g., Kang, "After Citizens United." See also Hasen, "Citizens United and the Illusion of Coherence."

In order to fully answer the question of how American democracy arrived at its *Citizens United* moment, the relationship between the volume of the voice and the value of the vote in U.S. history must be explained.

In Chapter Two, *Liberty vs. Equality on the U.S. Supreme Court: The Conundrum of Election Law Jurisprudence*, I argue that the Court's anti-reform decision in *Citizens United v. FEC* is partially a consequence of (1) the theoretical conflict already present between liberty and equality in the classical liberal tradition; (2) the exceptional concept of liberty ever present in U.S. philosophy and politics; (3) the prevalence of legalism in U.S. society, an ideology that privileges libertarian values. The theoretical conflict emerges in four basic paradigms, all of which are demonstrated in Supreme Court decisions: neo-liberty; egalitarian liberty; positive equality; liberty vs. equality. However, with some brief historical exceptions, the history of the Court's constitutionalism exhibits a libertarian bias, partially because of the ideology of legalism to which all U.S. lawyers and judges are subjected. Therefore, the tension between liberty and equality in U.S. political and constitutional development is not an even contest. In the case of election law, this tension contributes greatly to the voice-vote dilemma.

Chapter Three, *From Good Governance to Corporate Expression: The Road to Citizens United v. FEC*, covers the development of election law in the U.S., focusing particularly on 20th century campaign finance reform efforts. This chapter will begin to answer the question of how the Court got to a point in history where a majority was willing to elevate corporate voice power to such a high level. Primarily a history of
federal election law, this chapter considers the legislative records on campaign
finance legislation, legislative text, and Court decisions. This is the story of how the
Court constitutionalized election law and, in doing so, ultimately placed core liberal
democratic values at odds: the voice and the vote. Moreover, this chapter tells the
story of the creation of the first regulatory campaign finance regime in the U.S. – the
passage of the FECA, and the Court's dramatic adjustment of this legislation. This
chapter makes a larger point about how legislative values – here, the volume of the
voice and that of "anticorruption" or political equality – are uniquely reflected and
refracted within an electorally insulated Court. The Court's governing rationales
against campaign finance reform – developed during the early 20th century via
legislation – developed an unenforceable patchwork of rules until the creation of the
Federal Election Commission (FEC). Once the Court entered the thicket of campaign
finance reform, it internally debated these rationales, which yielded a split: libertarian
justices opposed reform, while egalitarian justices tended to support most provisions.
All of the Court, however, privileged the First Amendment, yielding a limited means
of debate that, with the exception of Justice Thurgood Marshall's decision in *Austin v.
Michigan Chamber of Commerce* in 1990, does not yield a sufficient holistic theory
of political representation on the Court.

Chapter Four, *The Corporate Voice vs. the Individual Vote: Citizens United v.
FEC*, will describe how the Court broke a bargain between campaign finance reform
and the First Amendment that corporate speech could be treated differently than that
of natural persons, a bargain that had limited direct corporate participation in U.S.
elections to Political Action Committees (PACs). In *Citizens United*, the Court broke a bargain within all of election law, a bargain that balanced vote-voice values by limiting corporate participation while simultaneously protecting voting rights. *Citizens United* demonstrated the entire Court's lack of commitment to the integrity of the democratic process, as all members ultimately rejected the primary political equality rationale – anticorruption.

Chapter Five, *Canada's Egalitarian Election Law and the Liberal Conundrum of Campaign Finance*, considers the inherent existent philosophical tension between voice and vote values in liberalism, and asks why these tensions have hit fever pitch in the U.S., but not in other liberal democratic nations. The U.S. is not the only advanced democracy that has elections to fund, nor is it the only nation that constitutionally protects political expression. Yet other advanced Western democracies do not have a comparable voice-vote tension to that of the U.S. At best, legislatures have responded to corruption concerns with similarly structured regulations on campaign spending, and supreme tribunals have upheld such regulations. Ultimately, this chapter demonstrates that two models of constitutionals exist in Western liberal democracy: the U.S. model and the human rights model. The human rights model contributes to a structure that allows more opportunities for egalitarian justice from their high courts, as their constitutions balance the liberal values of liberty, equality, fairness, dignity, and justice. Comparatively, the U.S. Constitution focuses almost exclusively on the principles of liberty and equality, with a premium on liberty. Canada's Supreme Court provides the egalitarian's model
example of an election law policy, although the country's campaign finance apparatus is far from perfect.

As stated earlier, there are two additional explanations explaining the change from the first regime to *Citizens United* that will not be covered: (1) changes in preferences with changes in Justices; (2) inequalities of resources and the mobilization of resources. The first, most would say, is a given. The second requires research – *much* research – but it is not the topic of this dissertation.

**Conclusion**

The Court’s change in campaign finance policy is best explained not merely as a shift in power, but as the consequence of long-standing disagreements between political expression and political equality in American liberalism, and the legal institutions that shape their thinking. The Court’s inter-institutional role in campaign finance policy has led to a circumstantial constitutionalism of election law, one guided not merely by the partisan politics that result in Court membership, but by the tension between liberty and equality on the Court itself. The relevant circumstances are not merely Court membership shifts, but include important historical policy and legal decisions – in this case, the call and response of making reform happen as well as the chase to close loopholes.

This work – while considering relationships between institutions – is ultimately about the Court’s policy-making role, and the principles that contribute to the structure of its policy-making. I’ve chosen the realm of election law – specifically that of campaign finance – because it involves the conundrum of trying to deploy *fair*
rules regarding the democratic process. This is unique realm of judicial policy-making, where we can see the consequences of two pillars of American democracy – checks and balances as well as separation of powers; the Court is ruling not just on the Constitution, but on the rules of popular sovereignty, rules that will have an impact on popular sovereignty. Furthermore, it is engaging in modern-day acts of constitutionalism. The Court is making constitutional law, longstanding policies that have not merely doctrinal consequences, but have real life electoral consequences as well.

Making a liberal democracy work requires more than simply wielding a libertarian vision based on First Amendment jurisprudence, as well as more than using an egalitarian vision based on Fourteenth Amendment jurisprudence; it requires compromise and bargains. While legislators can bargain amongst themselves for quid-pro-quo legislative benefits, the Court’s inside bargaining has a much more philosophical tinge to it with regard to election rules; Court members have the shield of lifetime tenure, and need not fear the next election like their legislative and executive counterparts. In the law of democracy, the Court considers competing American liberal values – the power of the voice, as well as the power of the vote. My work will explain the voice-vote tension as the ultimate example of the tension between liberty and equality in American liberalism and on the Court itself.
Chapter Two

Liberty vs. Equality on the U.S. Supreme Court:
The Conundrum of Election Law Jurisprudence

Throughout the history of U.S. courts, the extraordinary growth of both powers and rights put them in positions where they were increasingly asked to mediate inevitable collisions between competing constitutional values. Before the Civil War, this meant relying on liberty from government action; the presumption was that all men were created equal. If the federal government was to violate one's individual liberties, then such action was textually unconstitutional. However, after the Civil War, courts had to contend with new constitutional commands based on equality. Rejecting this notion that equality was presumed, the Framers of the Thirteenth, Fourteenth, and Fifteenth Amendments added a form of mandated equality, one that Congress, the President, and the Supreme Court could – at least by law – enforce. This second generation of the relationship between liberty and equality led to complexities that the Supreme Court was often called upon to mitigate.

In short, the principles of liberty and equality find their roots in the liberal tradition; however, the developmental path of these terms has changed with time, circumstance, and, most importantly, constitutionalism. The Thirteenth, Fourteenth, and Fifteenth Amendments created a new constitution, one that could rely on enforced equality as much as it could liberty from government intervention. However, regardless of what lawmakers may assert, the Court is the ultimate interpreter of the
Constitution, the sole broker and creator of constitutional law. Through its decisions, we can see the voice-vote conflict as partially a consequence of the complex relationship between liberty and equality.

In this chapter, I argue that the Court's elevation of the corporate voice over the individual vote – as represented by the anti-reform decision in *Citizens United v. FEC* – is partially a consequence of (1) the theoretical conflict already present between liberty and equality in the classical liberal tradition; (2) the exceptional concept of liberty ever present in U.S. philosophy and politics; (3) the prevalence of legalism in U.S. society, an ideology that privileges libertarian values. The theoretical conflict emerges in four basic paradigms – neo-liberty, egalitarian liberty, positive equality, and liberty vs. equality – all of which are demonstrated in Supreme Court decisions. However, with some brief exceptions, the history of the Court's constitutionalism exhibits a libertarian bias, partially because of the ideology of legalism to which all U.S. lawyers and judges are subjected. Therefore, the tension between liberty and equality in U.S. political and constitutional development is not an even contest. In the case of election law, this tension contributes greatly to the voice-vote dilemma.

I. Relevant Attempts to Explain Liberty and Equality on the Court

The tension between liberty and equality in American liberalism has been well covered by philosophers and theorists, but legal scholars generally fail to articulate

77 Chief Justice John Marshall issued this proclamation in 1803, although this notion is not universally accepted outside of formal legal circles. See *Marbury v. Madison*, 5 U.S. 137 (1803).

78 The two additional factors that will not be covered are: (1) ideological and preference approaches; (2) an allocation of resources that allows the "haves" to come out ahead.

79 This chapter will introduce the paradigm and its origins. Chapters Three and Four will apply the paradigm.
what they mean by these contested terms. The definitions of liberty and equality are often taken for granted, despite their long histories that began with the classical liberalism that took so many of its cues from the Enlightenment. Liberty and equality have different meanings depending on the time period, context, and ideology to which they are attached. And, with regard to constitutionalism and the Supreme Court, no adequate typology has yet arisen to explain the relationship between these terms; this additionally means that no typology has not yet been created for liberty and equality in election law specifically, nor for the tension between the vote and the voice. However, two significant attempts from legal scholarship focus on the First Amendment and the Equal Protection Clause, and how liberty and equality can be "constituted" within the confines of both areas of constitutional jurisprudence. Kathleen Sullivan argues that egalitarian judges tend to adopt Equal Protection paradigms when interpreting the First Amendment, while libertarians tend to perform the reverse. Additionally, Julie Nice argues the Court can constitute liberty and equality via six different paradigms.

Sullivan argues that two competing viewpoints permeate current Court membership with regard to liberty and equality in First Amendment jurisprudence: free speech as serving the interests of liberty, and free speech as serving the interests of equality. Relying on classic 20th century First Amendment cases where the Court reimagined and developed new notions of equality, she applies her typology to both the majority and dissenting opinions in Citizens United v. FEC. In short, she presents

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80 Sullivan, "Two Concepts of Free Speech."
the Court majority's anti-reform decisions as an endorsement of free-speech-as-
liberty; the dissenters' more egalitarian decision evokes free-speech-as-equality. 81

For Sullivan, free speech as equality places the notion of equality “first” in n
priority before speech in a sort of hierarchy of judicial protection. “[Under] this view,
political equality is prior to speech: when freedom of speech enhances political
equality, speech prevails; when speech is regulated to enhance political equality . . .
regulation prevails.” 82 This view privileges both (1) antidiscrimination and (2)
affirmative action with regard to free speech. 83 In other words, messages less likely to
be heard – “disadvantaged” – should be given a higher level of protection under the
First Amendment. Seeing speech in this way might seem to resonate more with
Fourteenth Amendment jurisprudence, as Sullivan argues that judges who treat
speech in this way “implicitly evoke . . . equal protection law.” 84

Conversely, when free speech serves the interests of liberty, the First
Amendment should be used for “checking government overreaching into the private
order.” 85 As when free speech serves the interests of equality, discrimination amongst
viewpoints is highly disfavored. However, in addition to viewpoint-discrimination,
the free-speech-as-liberty view disfavors efforts to equalize the speaking power of
various voices. “On this view, the audience of citizen listeners is best situated to
evaluate political speech without government intervention aimed at reshaping the

81 Chapter Four covers Citizens United in detail.
82 Sullivan, “Two Concepts of Free Speech,” 148; Ronald Dworkin, Sovereign Virtue: The Theory and
83 Sullivan, “Two Concepts of Free Speech.”
84 Ibid., 155.
85 Ibid.
dialogue or achieving some preferred distributional end state in which the
government deems speaking power sufficiently justified.”

Nice engages liberty and equality on the Court as well, but presents her work
more as an ongoing inductive attempt to generalize larger Court patterns; her
conclusions are therefore more holistic than are Sullivan's. While Sullivan’s paradigm
was mostly limited to the First Amendment in terms of both her analysis and
implications, Nice more directly addresses tensions between First and Fourteenth
Amendment jurisprudence, getting closer to the complex theoretical relationship
between liberty and equality. Responding to Christian Legal Society v. Martinez – a
First Amendment Court case from 2010 brought under speech, free exercise, and
expressive association grounds – she declares that the Court’s jurisprudence provides
six types of relationships between liberty and equality: (1) liberty and equality
constitute separate and distinct legal infringements, which do not collide; (2) one of
the two can be “subsumed within the other”; (3) one comes first in time or in priority
and hence generates the other; (4) the two can be “stacked” or combined with each
other; (5) they are mutually constitutive; (6) they conflict with each other. Nice's
paradigms provide a doctrinal framework that addresses the procedural aspects of the
relationship. In other words, she is describing how judges syllogistically approach
rules driven by liberty and equality.

86 Ibid.
The primary weaknesses of both Sullivan's and Nice's arguments are that they take the definitions of liberty and equality for granted, rather than considering the contestation that comes with over 225 years of development in U.S. liberalism. Regarding their implicit definitions of liberty and equality, they have essentially substituted "First Amendment" for liberty, and "Fourteenth Amendment" for equality. While this is not entirely problematic – most agree that the First Amendment protects liberty, and that the Fourteenth protects equality – a more adequate foundation is necessary to frame these principles before explaining the constitutionalisms reflecting them.

In order to fully understand the relationship between liberty and equality on the Court, we need to first understand the contestation that marks their philosophical backgrounds; a simpler way of saying this is that we must define our terms before proceeding. Then, we can properly see how the Court has developed and used these principles in light of the classical liberal tradition, the U.S. liberal tradition, U.S. constitutional law, and the Court's law of democracy. The fact that liberty can mean freedom from government or, more broadly, freedom from the infringement of others, is a crucial semantic difference; just as crucial is whether equality is presumed or required. Any use of these terms without clear definitions creates confusion for readers. For a list of applicable definitions, see Appendix A.
procedures. A brief explanation of the long historical development of the principles provides the template for both (1) my typology between liberty and equality and (2) the ideology of legalism.

II. Liberalism: From Classical to Exceptional

Similar to liberty and equality, discussing liberalism in the U.S. is confusing unless we know what exactly the term is supposed to convey in a given context. These meanings are not mutually exclusive, and become more specific throughout time, from the Founding to the 21st century. For political theorists, liberalism refers to the long tradition of both economic and civil liberty as developed by the West; a more precise wording is "the (long) liberal tradition," or "classical liberalism," and its roots predate the Founding. The U.S. has continued to develop this form of liberalism, which is often referenced as "the liberal tradition in America"\textsuperscript{89}; in the early 21st century it may be more accurately referenced as neo-liberalism. This U.S. liberal tradition was ultimately divided into two opposing ideologies that will not be discussed in this work, but are important to address to complete this picture: liberalism and conservatism. In formal U.S. politics, this meaning of liberalism means left-of-center on a continuum, with "conservative" representing the political right. Later in this chapter, I will demonstrate how the liberal tradition segues into legalism and its interpretive tool, formalism.

\textsuperscript{89} Louis Hartz, \textit{The Liberal Tradition in America; an Interpretation of American Political Thought since the Revolution}, 1st ed. (New York: Harcourt, 1955).
Whether discussing classical liberalism, U.S. neo-liberalism, or U.S. liberalism and conservatism, each can be considered an ideology. Ideologies provide simplified worldviews for individuals,\textsuperscript{90} even if the applications of these core ideas are anything but simple. For example, Marxism might be reduced to the notion that power relations between economic classes does not provide the freedom claimed by classical liberals; therefore, the only solution is for the state to take control. Classical liberalism might be reduced to the notion that individuals can only be free if the government acts minimally, allowing the private sector (or, "the people") the bulk of the power. Both of these ideologies provide drastically different views of the world, views that are based in presumptions regarding human nature. Similarly, U.S. liberals and conservatives have different worldviews, as does the world of libertarian and egalitarian judges.

\textit{The Classical Liberal Tradition and its Presumptions}

In classical liberalism, as developed by both Enlightenment and U.S. revolutionary thinkers, the first primary presumption of human nature relevant here is that \textit{humans are naturally rational, self-interested individuals}.\textsuperscript{91} Two of liberalism's forefathers – Thomas Hobbes and John Locke – differed on what this meant: Locke

\begin{flushright}
\textsuperscript{91} The notion of \textit{homo economicus} can be traced back to Adam Smith, \textit{An Inquiry into the Nature and Causes of the Wealth of Nations} (Dublin:, Whitestone, 1776). Arguably, today's accompanying "rational choice" theory might be traced back to Hobbes.
\end{flushright}
argued that God created humans as naturally cooperative under the natural law,\(^9\) whereas Hobbes argued that life was "solitary, poor, nasty, brutish, and short."\(^9\) Hobbes' notion of self-interest led to a social contract that was created out of fear – it was born primarily to provide security from other naturally self-interested brutes. For Locke, rational self-interest resulted in the creation of government for the protection of property;\(^9\) for Hobbes, the protection of individual life from the state of nature was at least as compelling. The early 21st-century political binary between libertarians and egalitarians reflects these "originalist" notions of self-interest: libertarians tend to see the world as Hobbesian, whereas egalitarians tend to see the world more along the lines of Locke.

The second primary presumption is that humans are born relatively equal.\(^9\) This was a response to Western feudalism and monarchy, and therefore a theoretical precursor for self-governance. This equality was a presumption, not a mandate; unlike the constitutionalism of the 20th century, the government had no responsibility to enforce equality. Under this equality presumption, men were born with the free will to determine their own economic destinies. This presumption is reflected in all three U.S. Founding documents: the Declaration of Independence declared that "all men are created equal" before the government; the Articles of Confederation emphasized the

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\(^9\) Locke, *Two Treatises of Government and a Letter Concerning Toleration*.

sovereignty of individual states vs. the national government, reflecting the libertarian philosophy of the Declaration; the original Constitution of 1789 specifically outlined national powers, emphasizing that the national government has no power beyond that in the document; additionally, the Ninth and Tenth Amendments specifically leave non-delegated powers to the states and to the people. The Declaration's proclamation of this "negative" presumptive equality among men emanates throughout these documents.

The third primary presumption of the liberal tradition is that property is an extension of one's person, and institutions are necessary to protect property. Liberal institutions are necessary to safeguard the private property that is a natural extension of one's individual nature, however, such institutions exist solely to enforce the rules of the game, similar to the beliefs of 21st-century U.S. political conservatives and libertarians. This liberal presumption is the logical consequence of being created equal. And, because all are created equal, the notion of liberty from government intervention protects this idea of equality. This relationship between liberty, equality, and property dominated the political philosophy of the U.S. Framers, in the sense that government's role was to be highly limited; if anything, the government was going to promote the development of private property.

American Liberalism

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Locke's and Hobbes' disagreements on human "nature" permeate the early history of liberalism, and James Madison contributed a twist with major theoretical repercussions for democratic representation. Recall that Hobbes considered the natural human condition to be "solitary, poor, nasty, brutish, and short." Such humanity had to enter into government for security – for protection against each other. Locke, on the other hand, argued that humanity was nurturing and cooperative by nature, a belief supported by his notion of rationality. Locke's belief in God allowed for human reason, which wasn't merely selfish, but required individuals (1) to not harm others and (2) to follow the natural law, also referred to as the laws of nature. Madison presumed that humans were "reasonable, timid, and cautious" until they meet up with other humans to form factions. Of course, "factions would not exist [but for] the diversity of human interests that forces people into competition for dominance." 

Thus, for Madison, humanity's tyrannical nature resulted from a competition towards dominance, and a tendency to cluster; therefore, one potential cure for democratic tyranny was to create an institutionally fragmented political system with no political parties. Such fragmentation could minimize the dangers posed by popular sovereignty, promoting economic elites as the class best suited for governance. Like many of his time, Madison trusted elite representatives as having

98 Locke, *Two Treatises of Government and a Letter Concerning Toleration*.
100 Madison's disdain for what might be termed political parties soon yielded to realpolitik, as, with Jefferson, he became the father of the First Party System.
the freedom to legislate for the "common good" rather than for their own selfish interests. In this sense, Madison's concern with the possibility of factions foreshadows the possible corruption of representatives away from the good.  

Madison's Constitution of 1789 thus reflected a kind of liberalism rooted in fears of elite tyrants as well as mobs. The Framers structured the document via four pillars: (1) separation of powers; (2) checks and balances; (3) federalism; (4) civil liberties. This Constitution specifically created an interdependent government of enumerated powers. One particularly unique and hotly debated area was the creation of an independent judiciary, which "anti-federalists" feared would become the most powerful and most unaccountable branch of government. Anti-federalists took this position primarily because they read Article III's power of equity as granting the Court the possibility of unlimited power, as the power of equity allows courts to bypass statutory jurisdiction and access the corpus of British common law, as well as to make decisions simply on the basis of a judge's sense of morality. Alternatively, Founder and Federalist Alexander Hamilton famously dismissed the independent judiciary as the least dangerous branch, "having no influence over either the sword [wielded by the executive branch] or the purse [controlled by Congress]."

101 Madison's Federalist No. 10 is often used to frame discussions on political parties and interest groups, as well as campaign finance reform: see, e.g., Victoria A. Farrar-Myers and Diana Dwyre, Limits and Loopholes : The Quest for Money, Free Speech, and Fair Elections (Washington, D.C.: CQ Press, 2008).
103 See Robert Yates writing as "Brutus," Anti-federalist No. 11.
104 Hamilton, Madison, and Jay, The Federalist, No. 78.
debate over how far the power of judicial review extends remains a point of stark disagreement between libertarians and egalitarians, as well as between national political parties. By the 1960s, libertarians and egalitarians had together pushed for judicial activism in terms of applying the Bill of Rights to the states, greatly increasing the power of the federal courts. By the time egalitarians convinced the Court to hear malapportionment cases and, later, when libertarians convinced the Court to hear campaign finance cases, the judiciary had become so powerful that it had become fully capable of entering into election law.

Consistent with the growth of the federal government over the course of U.S. history, the Court has undeniably seized power since its inception in the late 18th century. This began with Chief Justice John Marshall’s proclamation that the Court has the power to review the constitutionality of every action of Congress and the Executive and, if it so deems in its wisdom, declare such action unconstitutional. Over time, this self-declared power of judicial review proved pivotal to the development of the U.S. liberal tradition, as the Court's doctrinal commands provided the basis for both civil liberty and civil rights claims in the 20th century. Looking to Court decisions themselves, the Justices – especially in concurring and dissenting opinions – reasoned via the principles behind the Constitution: liberty, equality, justice, and fairness. And because the originalism and textualism of the early Constitution and Bill of Rights produced a much different liberalism than does the

\[105\] Marbury v. Madison, 5 U.S. 137 (1803).
originalism and textualism of the second, post-Civil War constitutional regime, liberty and equality could have a uniquely multi-faceted and contested relationship. The legal system itself would ultimately both reflect and reproduce this uniquely developed form of liberalism.

The originalist presumptions led to a U.S. Constitution of – by 21st-century standards – almost unbelievably limited textual power, created through the theory of a social contract, rather than via the divine right of kings. Individual liberty was dichotomized against the tyranny of government as well as the insecurity of protecting one's private property. The historical narrative of the Founding itself, in a sense, supports this ideological dependence on individual liberty. After all, Western European settlers gradually moved into the Americas throughout the 1500s, 1600s, and 1700s. As the native peoples appeared "lawless" and "savage" to the Europeans, the rugged individualistic narrative that resulted should not be surprising. Formal colonization was linked to law, but survival itself was not, and both the land as well as the law of the Americas needed to be made. The making of American law reflected and reinforced the classical liberal values of the Founding.

*Liberalism, U.S. Constitutionalism, and the Making of American Law*

And law indeed was made, first in the form of municipal townships – the first American corporations – one of the pre-Founding expressions of the Lockean social contract. Most American territories were “lawless” during the 17th and 18th centuries.

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106 The notion of constitutional "regimes" is from Ackerman, *We the People.*
— “beyond the reach of formal law and indifferent to it.”\textsuperscript{107} As such, law had to manifest over the course of the 19\textsuperscript{th} century, with a libertarian federalist (rather than unitary) Constitution providing no guidance for how territories should be governed despite incentives – from the federal government – for individuals and railroad barons to move westward. Imagine the force of law reaching out westward across the U.S., incorporating more and more jurisdiction over territory and subject matter. Early settlers in fact did seem to be living in a relative state of nature, and needed to create legal, binding, social contracts – jurisdictions – to tame and colonize the land. In referencing this time period, a discussion of the line between public and private makes little sense; through the municipal township, they were one and the same. Yet the legal jurisdiction of the municipal township could only reach so far as the social contract would allow, and as northeastern cities developed with a firmer hand of law, the vast expanses of the west's fairly jurisdiction-free space would contribute to the libertarian tradition in the U.S.\textsuperscript{108}

As such, the Constitution that resulted from the American Founding is best described as a Constitution of \textit{fear}. By constructing a written document with specifically enumerated powers and specific yet incomplete protections of rights, the Founders addressed both the fear of tyranny represented by monarchies as well as the fear of majority rule that the Articles of Confederation had brought about. Although


\textsuperscript{108} One need only consider the 2014 standoff in Nevada between ranchers and the federal government. Ranchers claimed that they had the right to allow their cattle to graze on public land without having to pay for permits. They claimed that they would defend their "rights" via the gun if had to.
the Founders had constructed the Articles mainly in response to the fear of tyrannical, monarchal power, one of the perceived weaknesses of the Articles was that its lack of strong institutions allowed the danger of the worst incarnation of democracy: mob rule.\(^{109}\) This fear had reached its symbolic heights via Shay's Rebellion, forever remembered for its demonstration of the lack of working governmental institutions. The new Constitution of 1791 – although providing comparatively weak federal power as compared with 21st-century interpretations – would address these problems partially via a stronger national government, but with a reinforcement of dedication to the preservation of individual rights via its clearly bounded governmental powers, including a Bill of Rights which clearly respected federalism's guarantee of states' rights. The Bill of Rights also enumerated certain specific rights that the federal government could not take away,\(^{110}\) while simultaneously emphasizing that, just because such rights were mentioned, other unnamed (presumably natural) rights could not be taken away from the people by the national government.\(^{111}\) Additionally, undelegated powers were left for state regulation; outside of state regulation, such rights would remain with the people.\(^{112}\) Thus, the increase in national power over states still respected a libertarian social contract overall; this tradition, although not exclusive to the time,\(^{113}\) has persisted throughout the U.S. conservative and libertarian

\(^{109}\) Hamilton, Madison, and Jay, *The Federalist.*  
\(^{110}\) *Constitution of the United States*, Amendments One through Eight.  
\(^{111}\) Ibid., the Ninth Amendment.  
\(^{112}\) Ibid., the Tenth Amendment.  
\(^{113}\) Although the "Lockean" constitution is perhaps the easiest way for students to understand the Constitution – and was indeed the dominant view during the Founding – it was not exclusive to the time. Other thinkers espoused the notion that, simply because a power was not enumerated in the
traditions, and has reinvigorated itself through neo-liberalism's late 20th century manifestation.

_The Introduction of (Positive) Constitutional Equality into U.S. Liberalism_

If the Bill of Rights – and the First Amendment specifically – are seen as providing the ultimate protections of liberty from government action, then the best way of understanding the development of U.S. liberty is through the constitutional law of the Supreme Court. Likewise, if the ultimate guarantee of equality is seen as emanating from the Thirteenth, Fourteenth, and Fifteenth Amendments – particularly through the Equal Protection and Due Process clauses – the development of the equality principle is best seen through the eyes of the U.S. Supreme Court. The liberty and equality principles and their corresponding legal interpretations provide a wide berth of decisions, particularly as they developed through the 20th century.

However, before the 20th century, the Court had barely developed either liberal principle, first rejecting the notion that liberty's Bill of Rights could apply to states, and later rejecting what was supposed to be equality's primary Fourteenth Amendment weapon: the privileges and immunities clause. One might understand the 1791 Constitution as an almost purely libertarian document by 21st century standards, from the Founding through the passage of the Civil War Amendments; remember that, in the Constitution of 1791, equality was presumed. The Thirteenth, Fourteenth, and

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Constitution, it did not follow that government could not have such power. See Mark A. Graber, _Dred Scott and the Problem of Constitutional Evil_, Cambridge Studies on the American Constitution (Cambridge ; New York: Cambridge University Press, 2006). Remember that the notion and production of a written Constitution was a new one for the time. However, even a cursory look at _The Federalist_ demonstrates that the Constitution was primarily _sold_ on the notion of a Lockean social contract of limited government.
Fifteenth Amendments were the first of the amendments to empower positive
governmental action, rather than limit it.114 While negative constitutional liberty
requires limitations on government power, positive constitutional equality requires
the use of government power to effectuate it. Congress had the power, "via
appropriate legislation," to end slavery, enforce equal protection of the laws, and
enforce the right to vote.

But the resultant political equality that would seem to be required by
constitutional equality did not last past Reconstruction. After federal troops vacated
the South and it implemented Jim Crow, black civil and voting rights were eliminated,
and were not to return until Congress, the President, and federal courts acted during
the mid-1960s. These three institutions – of course – were complicit with equality's
relative disappearance from American law, as political parties gave way to coalitional
politics, moving the interests of Southern Blacks to the sidelines. The Court gutted
equality's primary promise – the privileges and immunities clause – before the end of
the 19th century.115 And, as the 20th century began, the Fourteenth Amendment
ceased any protection of equality, as the Court instead applied it to the notion of
negative liberty – liberty of contract.116 This lasted until political equality's modern
day coming of age – the New Deal.

The New Deal years precipitated the long-term development of equality
principles on the Court, culminating in the rights revolution of the Warren Court

114 The enforcement provisions can be seen as an addendum to Congress's powers under Article I §8.
115 See The Slaughterhouse Cases, 83 U.S. 36 (1873). See also The Civil Rights Cases, 109 U.S. 3
(1883).
during the 1960s, a revolution that added the liberal value of fairness firmly into constitutional law. But the Court's egalitarian decisions here would not come without consequence. The Court's entrance into election law (indeed, its general encouragement of civil liberties and rights matters) encouraged new industries of litigants, litigants whose eventual expertise would contribute to the making of American law. Moreover, the mainstream libertarian and conservative backlashes that resulted from 1960s social justice decisions at large created mobilizations that can still be felt in the early 21st century. The neo-libertarian ideals and rules used to garner results changed the trajectory of U.S. constitutional law, moving it back towards its classical liberal roots.

In U.S. constitutional law, the Court did not effectively develop civil rights and civil liberties law until the 20th century. This is, of course, not entirely its fault, given the "demand-activated" role played by the Court in the law-making process; the Court, as a passive actor, can only decide on cases brought before them. Doctrinally, even an expansion of constitutional liberty would not be opportune until the passage of the equality amendments, namely the Fourteenth Amendment's Due Process clause. At first, the Court used this expansion of constitutional equality – ideationally – to effectuate economic liberty, interpreting the Due Process as protecting "freedom of contract" between employers and employees, a libertarian position. Later, the Court used this same "substantive" due process provision to expand civil liberty – through

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the Bill of Rights – to the other side of American federalism, the states. This notion of
egalitarian liberty would ultimately apply almost all of the liberties of the Bill of
Rights against all levels of government, not just the federal government.

However, the Court's warmth towards egalitarianism would grow much larger
with the addition of Chief Justice Earl Warren in 1953. The Warren Court's
monumental expansion of an egalitarian form of liberty simultaneously created an
expansion in the power of the federal law and courts over areas formerly under state
jurisdiction. This all occurred simultaneous to both (1) the largest U.S. period of
sustained economic expansion in its history; (2) the continued development of the
U.S. welfare state via sustained Keynesian economic policies. The federal
government (i.e., the state) grew in power and scope, the welfare state grew, and
egalitarian liberty expanded, as did the power of the Supreme Court.

This egalitarian scenario – which reached its peak in the 1970s – might have
represented some of the Anti-federalists' greatest fears, at least theoretically. Robert
Yates ("Brutus") feared the Court's power of equity, a power the Court used to
effectuate its desegregation orders in Brown II. Moreover, the notion that the
Constitution required the application of unnamed "fundamental rights" against states
via the Fourteenth Amendment would have offended late 18th-century anti-
Federalists, who largely opposed the 1789 Constitution on the grounds that it

119 This massive expansion of the power of courts was feared during the Founding by Anti-Federalists,
and noted in Brutus's Anti-Federalist.
120 When a Court makes an "equitable" decision, it forces a remedy upon the losing party that demands
a specific performance of certain actions. It exists outside of statutory law, able to reference the
common law, although such references are not required.
inexcusably expanded federal power at the expense of states and localities. Remember that the federalism aspect of the Constitution provided a crucial area of consensus for the Framers, whose interests required a relative balance of state and federal power at the time. Whether or not proponents or opponents of the 1789 Constitution would support or oppose 20th-century expansions of constitutional powers is unknowable and besides the point; but we can use this original conflict to better understand not merely the growth of American law and federal court power, but the growth and transformation of the core liberal concepts of liberty and equality. And, as we better understand such transformations, we'll see how these core concepts structure and ultimately limit the making of good law – especially campaign finance law – in the U.S.

III. A Typology for Liberty and Equality on the Court

Looking to the Constitution's protections of liberty and equality, the Equal Protection and Due Process clauses protect equality, while the Bill of Rights protects liberty, with the First Amendment specifically protecting speech and assembly. Textually, speech and assembly are phrased as negative rights – they prevent the government from acting – while textually, equal protection and due process are phrased both negatively and positively: the states cannot deny equal protection and due process, but Congress can enact legislation to ensure that states cannot deny these rights. Considering the possibilities of judicial enforcement based solely on the text, a federal court can legitimately (1) prevent Congress from denying liberty; (2) prevent a state from denying equality; (3) defend Congress's power to enforce equality on the
states. Therefore, a textual analysis provides two paradigms that explain the relationship between liberty and equality: (1) negative liberty, where Congress cannot act; (2) positive equality, where Congress can act. Under this basic rubric, liberty and equality can theoretically collide; however, the voice and the vote cannot. This is because most of the protections associated with voting rights in the 21st century were created by acts of judicial – not textual – constitutionalism. In the text itself, Congress's only powers with regard to elections are to (1) enforce the rules that forbid states to deny the vote on the basis of race, sex, failure to pay a poll tax, and age, if over 18; (2) change the "times, places, and manner" of holding elections, a power concurrent with states. The 20th century law of the Supreme Court enabled another constitutional relationship between liberty and equality, one that would ultimately contribute to the tension between the individual vote and the corporate voice.

During the 20th century, the Court increased the scope of both liberty and equality by nationalizing the Bill of Rights, resulting in a massive increase in its jurisdictional power. By applying the Bill of Rights to all levels of government – not merely Congress, but the states and localities – the Court enforced the idea that all people should have equal liberties under the Constitution. However, by "equalizing" liberty across the nation, negative liberty was essentially given a wider swath of jurisdiction; the Court could now strike state rules as well as federal. This notion of equal liberty legally prevented the states from denying speech and assembly under the same rules that it prevented Congress from doing so. If theoretically applied to any
national campaign financing rules, the most extreme possibility would be to protect all spending as speech, striking any regulatory legislation.

However, the Court under Chief Justice Earl Warren did not merely continue to "increase liberty," but enabled equality with more constitutional power that ever seen in the U.S. First, in *Brown v. Board of Education II*, the Court extended Congress's Fourteenth Amendment power of positive equality to the federal courts. Using its power of equity, the Court put schools offending the "separate but equal" doctrine under the jurisdiction of the federal courts, which could then use their powers of equity to design policies that would effectuate school desegregation. Given that equitable remedies are only limited by the imaginations of the judges making the decisions – especially in the case of federal judges, who all have lifetime tenure – the Court provided equality with the maximum power possible. After this, not only could Congress create legislation in the name of equality, but the Court could demand it too.

A decade later, the Court – still with Warren at the helm – used the Equal Protection clause to demand that all congressional and state legislative districts except for the national Senate be apportioned as equally as practically possible, one person, one vote. Again, the Court used its equitable powers to force state legislatures to redistrict fairly, under federal court supervision. At this point, the *positive* power of equality attached itself to the right to vote's new equipopulation rule. Around the same time, the Court approved of Congress's use of equality's Fifteenth Amendment – preventing any denial of the right to vote on the basis of race – to enforce the Voting Rights Act. With the Act, Congress placed discriminatory districts under the
jurisdiction of the DC Federal District Court and the Justice Department; if such districts wanted to change their election rules, they had to get approval from either body first. Between the actions of Congress and the Court, equality emerged as the protector of the right to vote. Now, not only could liberty collide with equality, but also the moneyed voice could collide with the people's vote. Therefore, from the text of the Constitution and from some basic moves made by the Court, four paradigms emerge that can theoretically describe the relationship between liberty and equality on the U.S. Supreme Court: neo-liberty, egalitarian liberty, positive equality, and liberty vs. equality.\(^{122}\) The first three constitute ideal types\(^{123}\) and – for neo-liberty and egalitarian liberty – liberty and equality facilitate each other. Liberty vs. equality represents the conflict, and provides the background and justifications that have resulted in the voice-vote problem.

The first ideal type – neo-liberty – presumes equality in the originalist sense: all are created equal before God and the government. Here, negative liberty is maximized; because all are born equal, individuals need only exercise their liberty in order to construct the best, most just society. Additionally, all governmental powers must specifically be delegated in the social contract(s), which include(s) both the constitutions at the federal and state levels. Anything not specifically enumerated in one of the social contracts is invalid, as it was not part of the original agreement. Thus, 

\(^{122}\)Definitions follow, but are also found in Appendices A and C. A visual continuum appears at the end of this section.

as a "pure" type, this paradigm would leave only Congress submissive to the Bill of Rights, not the states and localities.

Additionally, the ideal neo-libertarian society would – as libertarian economist Milton Friedman has argued – value local power over centralized power.\textsuperscript{124} If civil society can solve a problem, this is the best way to proceed. If not, then the local government should be favored over the state, and the state favored over the national, the idea being that, if you don't like your city or state, you can move; however, Friedman contends that, because the U.S. is the best nation on earth, citizens would not want to leave because we disagree with policy. Realistically, however, a 21st century neo-libertarian accepts the nationalization of the Bill of Rights as legitimate constitutional canon, although the rest of the syllogism remains the same. It is still an exceptional form of liberty; this maximum notion of liberty can be seen as an example of American exceptionalism.

Neo-liberty is represented on the Court by judges who oppose campaign finance reform, judges who support the unequivocal power of the voice. A neo-libertarian judge will argue that government cannot encroach on these civil liberties, and will engage in judicial activism to strike any legislation to the contrary; this is essentially how judges eliminate campaign finance measures. Neo-liberty represents the strong return to classical liberalism, a return at least partially owed to the libertarian

Federalist Society, a group that began in the 1970s under the guidance of then Professor Antonin Scalia at the University of Chicago.\textsuperscript{125}

The second ideal type – egalitarian liberty – mandates that all persons in the nation have equal liberty from government interference in their lives. This position defines liberty differently from the first, as government is not the only actor that can take it away – one's fellow citizens can, as with the voice-vote dilemma. Egalitarian liberty is therefore an attempt to balance liberty and equality on the Court. In doing so, neo-liberty's power is diminished; in other works, in mandating equal liberty, the exceptionalist aspect of American liberty is balanced by egalitarian concerns. When coming before the Court, rules based in egalitarian liberty will often "balance interests" between the government and the individual. This is the paradigm most often used by Court supporters of campaign finance reform – it represents the Court's reasoning in such cases – and is also the second component of the Court's voice v. vote dilemma.

At the time they occurred, the Supreme Court's incorporation cases provided U.S. Constitutional jurisprudence's most striking example of this egalitarian liberty paradigm. One by one, almost all of the Bill of Rights became binding on states throughout the 20th century.\textsuperscript{126} In other words, the Court changed the nature of


\textsuperscript{126} This journey began with 1925's \textit{Gitlow v. NY}, 268 U.S. 652 (1925), when the Court incorporated speech and press. The Court began to "selectively" apply the Bill of Rights one by one, and essentially finished with 1969's \textit{Benton v. MD}, 395 U.S. 784 (1969), which incorporated double jeopardy. The
federalism by mandating that the Bill of Rights would apply to everyone in the
country, everywhere, regardless of state or local jurisdiction. And the Court did this
by ultimately insisting that the Due Process Clause of the Fourteenth Amendment
required the enforcement of "fundamental rights." Equality may no longer have
meant that all were created equal, but it would mean that all would have the same
fundamental rights, i.e., egalitarian liberty. This nationalization of the Bill of Rights
was eventually accepted by almost all neo-libertarians as a means of effectuating
liberty against government intrusion, although the Court was clearly making a move
that was equally egalitarian.

The third ideal type, positive equality, places liberty and equality into separate
spheres of existence where they do not collide. Here, equality is clearly valued more
than is neo-liberty. The government's insistence on equality occurs primarily through
court orders and acts of Congress, although states and local governments often pass
egalitarian measures as well. In constitutional terms, this means that, if a state denies
equal protection to a person, then Congress and/or a federal court can use its power to
nullify the state's policy. Generally, rules to enhance equality provide more power to
particular – generally disenfranchised or less powerful – groups in society. Positive
equality requires government action to effectively protect such groups.

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127 The application of such rights would vary for non-citizens.
128 This is first seen in the Court's rejection of double jeopardy as a fundamental right in Palko v. Connecticut, 302 U.S. 319 (1937).
Legislatively, the Civil and Voting Rights Acts are both examples of the positive equality paradigm, as is the 1960s Warren Court's jurisprudence on elections. Here, the Supreme Court became the protector of equality, an advocate for an egalitarian constitution. When the Court ordered federal supervision in order to enforce equal protection and voting rights, this was positive equality in action. A better-known example is when the Court ordered schools to desegregate with "all deliberate speed" under the jurisdiction of the federal courts in Brown v. Board of Education II. Positive equality is the preferred position for egalitarian political theorists studying election law as well as campaign finance reform advocates. Here, even under a strict First Amendment analysis, political equality is elevated to the same level of importance as political expression. This is the ideal position for a supporter of reform.

The previous types allow for liberty and equality to work in relative harmony in liberalism, even when one is privileged over another. However, these principles collide when the ideal types are placed directly against each other by relatively equally powerful interests. In this fourth paradigm – liberty vs. equality – neo-liberty is placed against positive equality, as both exist in separate spheres, and cannot be effectively balanced. As this is a conflict, liberty vs. equality does not constitute an ideal type; in fact, it might be said to be the worst type of relationship between liberty and equality. This paradigm asserts that the notion of neo-liberty stands directly opposed to positive equality, resulting in a clear philosophical collision: what the government *can't* do vs. what the government *must* do. This is the maximum possible
conflict created by the adoption of the equality's Fourteenth Amendment. With such
measures at odds, liberty vs. equality theoretically allows the very real conflict
between the voice and the vote in election law. This conflict provides the 21st century
structure of the Court's rules regarding democratic representation, as voting rights are
protected by the equality amendments, and campaign finance reform is limited by the
First Amendment. Because the Court has determined that the First Amendment is
triggered when political speech is limited, the "constitutionalization" of campaign
finance reform forces the government to provide an interest of some level to
overcome this hurdle – for the early campaign finance cases, the interest needed to be
"substantial"; 129 by the time Citizens United and McCutcheon v. FEC, it needed to be
"compelling." 130

The consequential collision between voice and vote values here did not happen
directly before the Court; it evolved holistically as the Court's corpus of election law
developed. If the government is limited and/or prohibited from regulating campaign
spending on the basis of expression, this impacts the power of the individual vote, as
more money equals more volume by the Court's own admission, as well as from
psychological evidence. Moreover, because this can change election results, the
values between being able to disseminate messages directly collide with the notion of
popular sovereignty, as money – at the least – buys access to legislators. And, when

the Court elevates the corporate voice to the power of the individual voice, we have the corporate voice trouncing the individual if not the legislative vote.

Together, these four paradigms together demonstrate that the voice-vote problem is rooted in an inherently liberal problem, the relationship between liberty and equality. Because the vote is a form of voice – rather than the voice of political expression, the vote is the voice at the ballot box – it doesn't take much imagination or development to portray advertising as expression that influences the voting voices. As will be discussed in Chapters Three and Four, the Court's reasoning has evolved from an positive equality-based position in the 1960s, to a neo-liberty position on both the voice and the vote, beginning in the 1970s, and solidifying and extending it by the Roberts Court in the early 21st century. However, because vote values were entrenched in equality during the Warren years, the neo-libertarians have quite a bit of case law to overturn. Because these conditions are present, the early 21st-century Court not only continues the voice-vote dilemma begun in *Buckley v. Valeo*, but in *Citizens United*, extended and solidified the neo-libertarian position originally put forth by *Buckley's* per curium opinion.
IV. Legalism: A Reflection of Liberalism on the Court and the Legal Mind

Coined by Judith Shklar, legalism is the ideology behind the methods learned by lawyers and judges in U.S. law schools. It is most easily described as a reflection of the tenets of classical liberalism in the U.S. court system. Law students are socialized into a legal system where parties must bring cases, each side generally pays its own way, each side's lawyers work independently of each other, and truth itself is a byproduct of a judgment that generally declares victory for one side. Here, judges are supposed to merely "call balls and strikes." As each side brings its case, a judge supposedly merely mediates the behavior of the other participants: the admissibility of evidence, the validity of a jury's decision, and reining in any "unacceptable" behavior by any participants. This kind of court is a mirror of classical liberalism, one that mandates judgments based on independent actions; in other words, courts – similar to the role of government in classical liberal democracy overall – merely exist to "enforce the rules of the game." Because lawyers and judges adhere to a worldview dominated by legalism and its corresponding court structure, this ideology – reflecting classical liberalism through its largely laissez faire judging style – in turn influences society with these legal values. This system becomes a trap that

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131 Shklar, Legalism.
134 See Herbert L. Packer, "Two Models of the Criminal Process," University of Pennsylvania Law Review (1964). Additionally, this is world into which law students are indoctrinated. However, those who end up arguing before courts find out very quickly that most judges are far more active than the ideal libertarian (e.g., Federalist Society that advocates anti-federalist ideals) would like to see.
contributes to the construction of a built-in bias towards an exceptionally narrow definition of liberty – freedom from government intervention. In other words, virtually the entirety of the U.S. legal profession faces an unconscious bias towards classical liberalism as it is applied methodically in courts. from the way lawyers are taught to think, to the almost purely adversarial nature of U.S. courts themselves.

Legalism relies on the formalistic approach to the interpretation of law. Via this view, judges should look to the law and apply it to the facts of a given case with restraint – this limits judges to interpretations based on (1) the literal letter of the law ("literalism"), (2) the intent of the government ("intent"), and/or (3) past cases ("precedent" or "stare decisis"). This formalistic approach to law has ethical consequences, because strict legalism requires "fidelity to law." As Neil MacCormick wrote, citing Lon Fuller, "[T]his crucially involves subjecting human conduct to the 'governance of rules,' and these rules count for the ethical purposes in issue only if they combine clarity with generality, constancy over time with coherency in time." As legalism is a direct consequence and reflection – in U.S. courts – of classical liberalism itself, it makes sense that its ethics are premised on submitting ourselves to the "rule of law." In practice, formalism follows basic a priori principles of formal logic that are designed to be "impartial" and therefore "just." Formalism is thus an inherently deductive endeavor whereby law is

137 A judicial "liberal" relies on rules, whether created by statute, regulations, or courts.
theoretically interpreted blindly towards the facts of the case, yet is still supposedly
devoid of the context of that case.

Shklar termed legalism "a civilized political ideology" requiring a "tendency to
abstract legal concepts from their social setting and thereby to exaggerate the scope of
their relevance." She criticized legalism as a "belief that morality consists of
following rules and that moral relationships are a matter of duties and rights assigned
by rules." In other words, the impact of legalism goes far beyond the U.S.
adversarial court system. This obsession with rules, Shklar argued, provides a
structure for everyday life, going far beyond the confines of any court. Although she
stopped short of advancing the proposition to all parts of American life, she described
legalism's influence on society as a matter of degree, advancing the application of the
term to a continuum; in other words, via a sliding scale, a society can be more or
less legalistic. However, she emphasized that the primary problem with legalism is
the faith of those who believe that legal action is "an adequate response to every
social need." For her, this provides both a theoretical dilemma as well as a practical
problem. Legal theorists must grapple with this structural problem, while lawyers
almost have no choice but to reinforce it.

138 Shklar, "In Defense of Legalism," 51.
139 Ibid.
140 See ibid., 51-52.
141 For political scientists, this continuum is similar to the way Charles Tilly describes democracy, i.e.,
a society democratizes or de-democratizes. See Charles Tilly, Democracy (Cambridge, England ; New
142 Shklar, "In Defense of Legalism," 52.
143 Stuart Scheingold explains that the process of attaining a formalist legal education – combined with
a legal culture that reinforces this methodology – leads to the "myth of rights," the notion that law will
Stuart Scheingold advanced the concept of legalism further by more forcefully presenting it as a formal ideology, although he implied that it rises to the level of *mythology*, as the legal community takes its precepts as a sort of religious gospel; he called this phenomenon "the myth of rights." Scheingold argued that the classical liberal legal ideology of U.S. law schools structures the way that lawyers think about and solve problems; this is the dimension he adds to legalism. More importantly, he argued that U.S. legal training – focusing on legal formalism – effectively structured out creative lawyering, thus rendering potential activist attorneys ineffective. He explained this dedication to formalism as a consequence of buying into the "myth of rights," the notion that the advocacy of rights alone could significantly impact social and political change. Successful activist attorneys like Ralph Nader, Scheingold argued, used the law amongst other tools to effectuate social and political change; Scheingold referred to this hybrid methodology as properly utilizing the "politics" of rights. To him, at least in the early 1970s, social justice attorneys tended to be trapped in a rights-based mentality.

According to Scheingold, law schools train aspiring lawyers to “internalize” the myth of rights from the onset of their legal training in law school, thus making the belief in law itself as the primary or sole driver of political outcomes. Consequently, many activist lawyers’ long-term strategic visions are narrowed because the mindset


144 Ibid., 158-62.
145 Ibid.
146 Ibid., 151.
147 Expanded upon in Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*
for social and political change is shaped by the ideals of the myth of rights itself, and
the remedies that can be provided by the litigation process. Strategies conceived
from a politics of rights mindset discard the myth that litigation and its corresponding
legal remedies should provide the primary vehicle for best effectuating social
change.

Combining Scheingold's notion of the myth of rights as ideology, Shklar's
observance of legalism as something that influences everyday life, the influence of
tenets of classical liberalism on court procedures, and the dependence on formalism
within legalism, we can see a libertarian bias in the thinking of our lawyers and
judges. They practice in what are essentially procedurally libertarian courts, are they
are taught to argue within a very limited formalist range. When considered with the
history of the Court's development of liberty, equality, and the voice-vote tension in
Chapters Three and Four, it will become evident that the competition between liberty
and equality is not an even contest in U.S. constitutional law.

V. The "Haves" Come Out Ahead

An inequality of resources cannot be ignored, especially when corporate
interests are at stake. As a general rule, lawyers and their corporate clients –

148 This is essentially the point of Part III of Politics, “The Strategists of Rights,” encompassing
chapters 10 and 11, pp. 151-199. It is arguably the point of the book.
149 To be precise, Scheingold doesn’t invoke the terms “social change,” “social justice,” or even
“inequality.” But he does frequently, especially early on, invoke the liberal tradition as espoused by
Louis Hartz’s The Liberal Tradition in America. Given that Hartz provides the sole theoretical
background for liberal individualism in Scheingold's book, and the fact that Scheingold’s real-life
cases stem from the work of Ralph Nader, the NAACP, and ACLU, I feel safe claiming that
Scheingold is hoping for his “politics of rights” framework to be used by activist attorneys fighting
inequality.
oftentimes representing powerful interests – are “repeat players” who can game the system to their advantage; by continually engaging with the same rules, lawyers, and judges, repeat players have substantial advantages over less experienced litigants, "one-shotters" who lack the experience, attorney resources, sophistication, and – most importantly – the money of the repeat players.\footnote{Galanter, "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change."; Lisa B. Bingham, "Employment Arbitration: The Repeat Player Effect," \textit{Employee Rights and Employment Policy Journal} 1, no. 1 (1997).} Marc Galanter’s work explaining how the "haves come out ahead" applies to Supreme Court politics, especially considering the rise of constitutional law departments in major law firms over the past 20 years, departments which have been bolstered by the support of past government attorneys who have chosen to take their experience to the private sector. Additionally, combined with Scheingold's politics of rights strategies, campaign finance rules have almost undoubtedly changed as a result the participation of repeat players. Such litigators include anti-reform advocate, James Bopp, Jr., who spent years crafting a political strategy to effectuate a legal outcomes, raising money, spreading awareness, writing law review articles, and bringing cases. He ultimately filed the initial lawsuit for Citizens United.

Much more can be said regarding the unequal distribution of resources between the "haves" and those who have less; however, such work could constitute a book on its own. Just as I agree that attitudes and policy preferences shape Court decisions, I believe that the legal battle on reform is shaped by the amount of resources deployed by each side. Thus, the chasm between louder and quieter voices is itself shaped by

inequality. Thus, decisions like *Citizens United* could lead to a stronger business class, who will then in turn flex the new muscles to continue to weaken reform, as well as pass legislation in their interests. This could also lead to more anti-reform litigation, anti-reform candidates, and then anti-reform policies. And, from an ideological standpoint, it could move the U.S. to the right politically, reinstating a classical liberal tradition that values private property above all else, and rejects social welfare spending.

**Conclusion**

Although the Framers deserve credit for the initial structure of American liberalism, the Court is arguably the ultimate developer of liberty and equality in America's liberal tradition, given its power to interpret the meaning of constitutional provisions based on these principles. The Court's power is considerable, not having to answer to any other court, as its authority is limited only by the realities of political power. What this means is that, by law, the Court can produce any result it wants in any given case. Moreover, there is no legal requirement that they write actual decisions; they can simply rule "affirmed" or "dismissed" without comment, which they sometimes do.

But judges overwhelmingly consist of former lawyers, members of the bar who have been trained in U.S. law schools, which teach students to "think like lawyers." Of course, the learning of any discipline necessarily narrows one's inquiry to that

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151 For a thorough analysis of the Court's relationship with public opinion, see Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, 1st ed. (New York: Farrar, Straus and Giroux, 2009). See also Ackerman, *We the People*.
discipline's methodology when attempting to tackle an issue in that discipline. In other words, lawyers from accredited law schools all learn to think the same way. And, as with any discipline, it giveth and taketh away – attorneys and social scientists thus see law very differently from each other, each through their own disciplinary blinders. Outside of the legal profession, this blindness has been defined as "legalism," an ideology indoctrinated into students during law school, structuring the profession itself.¹⁵²

U.S. law schools continue the indoctrination into the classical liberal tradition begun in early life, taking it one step further for lawyers and judges through the doctrine of legalism. These are ideas and principles that bind the mind towards legal doctrine and formalism. Consequently, the liberty vs. equality competition does not constitute an even contest. Libertarian values – neo-liberty – benefit from a built-in bias based on both U.S. legal structure and the adversarial legal mind produced by law schools. As I will demonstrate in Chapter Three, this internal liberal conundrum set the stage for the internal liberal struggle within election law, especially with regard to campaign finance reform. Egalitarian legislation, while supported by the Warren Court, gave way to a more libertarian Burger Court in the 1970s. Yet, both the Court's egalitarians and libertarians worried about the effects on "political speech" that campaign finance reform allegedly creates. As Chapter Three will demonstrate, Congressional reform legislation based on egalitarian values has faced off against Courts – Burger's, Rehnquist's, and Roberts' – with clear neo-libertarian values

regarding campaign finance under the First Amendment. But, given the nature of both
the U.S. legal system as well as legal education, egalitarian measures almost had to
yield on some level to the First Amendment. U.S. legal culture seems married to a
libertarian First Amendment, while it merely has affairs with equality. The Warren
Court's affairs with equality gave the vote a much-needed boost, one that took neo-
libertarians almost two generations to whittle away.
Chapter Three

From Good Governance to Corporate Political Expression:
The Road to *Citizens United v. FEC*

On August 9, 1974, an embattled President Nixon resigned the Office of the Presidency of the United States after losing his legal battle to keep his oval office recordings secret under the doctrine of Presidential privilege. From the standpoint of the American people, this seemed a final blow to the general post-war political optimism. But the 1960s itself was – politically – a paradoxical decade, both for egalitarians as well as for the American people. On the one hand, President Kennedy's can-do attitude, the African American Civil Rights Movement, the Civil and Voting Rights Acts, and the appointment of the first African American to the U.S. Supreme Court all provided the hope that the United States might achieve the fair society promised to everybody, an equal opportunity for *all* to succeed. Yet the values of positive equality and egalitarian liberty introduced in Chapter Two were overshadowed by the cynicism of the end of the decade, a cynicism that climaxed in the early 1970s with President Nixon's resignation. After all, despite the egalitarian gains of the 1960s, President Kennedy, his brother Robert, Martin Luther King, and Malcolm X had all been assassinated. And, while President Johnson had ushered in his "Great Society" legislation, it was accompanied by a war in Vietnam that would ultimately destroy his presidency. Moreover, despite legal and political victories

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154 And, ironically, a significant number of drafted soldiers included the African Americans targeted for Great Society programs.
for African Americans, the 1967 riots in Newark, New Jersey as well as Detroit, Michigan resulted in the deployment of thousands of National Guard troops and other federal law enforcement personnel to end these protests.

Thus, by the 1970s, an age of cynicism about government simmered in the United States. However, as this age of cynicism towards government officials gathered steam, support for reforms continued into the 1970s, yielding significant changes to political institutions. For example, Republican President Nixon supported Title VII lawsuits for the sex discrimination rules created in the 1960s, and he supported and oversaw the creation of the Environmental Protection Agency. On the other hand, his Watergate scandal and corresponding resignation simply added to Americans' distrust of government officials, setting the stage for an overhaul of the area of elections untouched by the 1960s rights revolution: campaign finance.

And so, Congress's first comprehensive campaign finance law was birthed from mass political cynicism as well as from an age agreeable to government regulation. After all, the 1960s rights revolution provided victories for civil rights as much as for civil liberties – for egalitarian government action as well as for libertarian protection from the government. And the most egalitarian victories at the Supreme Court level required government action – the ongoing desegregation of public schools, the reapportionment and redistricting of legislative districts throughout the U.S., and the enforcement of voting rights in the South. As discussed in Chapter Two, Chief Justice Earl Warren's Supreme Court provided a glimpse of political and social equality
never before seen in U.S. Supreme Court jurisprudence, and the legacy of his Court still provides a beacon of hope to left-leaning liberals in the 21st century.

Recall that Chapter Two advanced the argument that the liberal tradition – and its judicial reflection legalism – together provide a piece of the larger answer, one that can explain the Court's decision in Citizens United outside of attitudinalism and the policy preferences of the Justices. Additionally, from an analysis of the liberal tradition and U.S. constitutionalism, four paradigms emerged that explain how the Court can deal with the principles of – and tensions between – liberty and equality: neo-liberty, which presumes the existence of equality and defines liberty as freedom from government action; egalitarian liberty, where the government makes efforts to equalize individual liberty across all demographics; positive equality, where the government much more forcefully enforces equality, commonly through court orders; liberty vs. equality, the inevitable collision that occurs when neo-libertarians and positive egalitarians attempt to create policy together. The Court has constitutionalized election law, with First Amendment liberty being the obstacle to campaign finance reform, and Fourteenth and Fifteenth Amendment equality enforcing (and later, limiting) redistricting and voting rights. This collision between liberty and equality pits the voice against the vote in U.S. constitutional law.

This chapter tells the story of how the Court's constitutionalization of election law initially pit the individual voice against the individual vote. First, I will demonstrate that two of the main principles behind campaign finance reform debated throughout the campaign finance cases – anticorruption and shareholder protection –
find their origins in the over 100-year history of congressional legislation. We can see this by reviewing the initial legislative attempts at reform, from 1907 to 1971. Second, after elevating the importance of the individual vote via the legal standard of one person, one vote in the 1960s, the Court subsequently – and rather quickly – elevated the individual voice principle when it accorded it First Amendment protection to campaign "speech" in the 1970s. This is apparent after a comparison of the Court's 1960s election law decisions with its partial acceptance and partial rejection of the Federal Election Campaign Act of 1974 (FECA) in Buckley v. Valeo. Third, I will explain the Court's continued resistance to campaign finance reform by analyzing the Rehnquist Court's reaction to Bipartisan Campaign Reform Act of 2002 in McConnell v. FEC, as well as the Roberts' Court's election law decisions before Citizens United. I will apply my four-part typology to Court opinions as I discuss them. Ultimately, this chapter will demonstrate that the long history of campaign finance reform is a series of failures from the beginning of its history.

I. Congress and Early Campaign Finance Reform – 1907-1974

Reformers have attempted to create rules regarding fundraising for elections since the Progressive Era. However, Congress did not provide a comprehensive election finance regulatory system until 1974's Federal Election Campaign Act (FECA). The FECA not only mandated contribution and spending limits, but it created a regulatory agency – the Federal Election Commission (FEC) – to oversee the new rules, create regulations, and receive and provide disclosure information on donors to the public. However, although the FECA – along with the subsequent
Supreme Court decision *Buckley v. Valeo* – created the United States' first functioning campaign finance regime, it was far from Congress's first attempt to do so. In fact, the journey from the first reform act to *Buckley* took almost 70 years.

*Shareholder Protection and Fighting Corruption – The Tillman Act*

The history of national campaign finance reform legislation can be traced back to the rise of the national political party system during the mid-19th century. Bribery and patronage flourished via local political machines, the most famous of which being Tammany Hall in New York City. Both states and the federal government had failed to find ways to combat patronage, especially given that this "spoils" system was heavily embedded in U.S. politics. To combat political patronage and bribery at the federal level, Congress passed the Pendleton Act in 1883, forcing government employees to go through a hiring process overseen by a newly formed Civil Service Commission, rather than simply being hired at-will. Moreover, the Act provided criminal penalties for all parties participating in an act of patronage or bribery for government jobs. However, it was not until 1907 that Congress decided to act directly against the bribery that occurred under the auspices of campaign spending.

1907's Tillman Act was the first national piece of legislation aimed directly at limiting money spent in national elections. Tillman passed in the wake of Theodore Roosevelt’s “good governance” campaign, as well as after several elections where the

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155 For a detailed account, see Urofsky, *Money and Free Speech: Campaign Finance Reform and the Courts*.
156 Patronage was so embedded that it may have played a role in the assassination of President James Garfield, shot by a man who believed he was owed a job due to his election support.
157 22 Stat. 403 (1883).
158 See §§ 11-15.
spending of bank and corporate money was considered to have a *corrupting* influence, either in the form of expecting direct quid-pro-quo exchanges that essentially equate to bribery, or in the form of at least expecting more access to lawmakers.\footnote{Alexander, \textit{Money in Politics}.} Notably, public opinion had begun to demand election reform after the highly corrupt McKinley-Bryan Presidential contest in 1896. Given the record amount of contributions accepted by McKinley – an estimated $16 million – Roosevelt's ultimate support for reform might be see as ironic in hindsight, given his own participation as McKinley's running mate in 1900, or was perhaps the result of an experience he found despicable.\footnote{Adjusted for inflation, the McKinley-Bryant campaign still holds the record for the most expensive Presidential campaign in U.S. history as a percentage of GDP. See Matthew O'Brien, "The Most Expensive Election Ever: . . . 1896?," \textit{The Atlantic} (2012), http://www.theatlantic.com/business/archive/2012/11/the-most-expensive-election-ever-1896/264649/. See also Enik Rising, "More Spending on Presidential Elections and the Peculiar Case of 1896," \textit{Enik Rising Blogspot} (2012), http://enikrising.blogspot.com/2012/03/more-spending-on-presidential-elections.html. However, in terms of inflation alone, the 2012 Obams-McCain campaign is the most expensive. See Dave Gilson, "The Crazy Cost of Becoming President, from Lincoln to Obama," \textit{Mother Jones} (2012), http://www.motherjones.com/mojo/2012/02/historic-price-cost-presidential-elections.} Despite his participation in the second McKinley campaign, Roosevelt emerged as a champion for Progressive and Populist reforms.

The Tillman Act was therefore framed as an anticorruption measure aimed at national banks and corporations. Roosevelt himself orchestrated the effort for campaign finance reform, beginning with a speech he made in 1902 criticizing the problems of corporate power and moneyed interests. Notably, Roosevelt's initial call to action was holistic rather than specific; in other words, he addressed the rise of corporate power in society at large, and not the corrupting influence of money in elections:
One of the features of the tremendous industrial development of the last generation has been the very great increase in private, and especially in corporate, fortunes. We may like this or not, just as we choose, but it is a fact nevertheless; and as far as we can see it is an inevitable result of the working of the various causes . . .

Moreover, Roosevelt emphasized that there could be no perfect solution for the resulting "evils" of industrialism, and that remedies could be private or public. At the very least the appearance of corruption – especially from corporations and national banks – was unacceptable if political equality was to be valued; the banks should not have more influence than the electorate.

Later, when Roosevelt ran for election in 1904, he faced allegations from his opponent, Alton Parker, that he was receiving gifts that essentially amounted to bribes. Moreover, large companies donated large amounts of money to Roosevelt and the Republican Party. As the public became aware of this, a politically astute Roosevelt pushed for passage of legislation that would rein in the moneyed interests that were allegedly buying Congress and the Presidency. The Tillman Act was therefore passed – at least in part – to reduce influence from national banks, corporations, and wealthy individuals.

Although consisting of one short paragraph, the textual sweep of 1907’s Tillman Act was broad, providing for criminal penalties against any national bank “or any corporation organized by authority of any act of Congress” making a “money

161 Theodore Roosevelt, "Roosevelt Advocates Federal Regulation," in History Commons (1902).
contribution in connection with any election to political office.” Furthermore, the Act explicitly prohibited corporations from making contributions to campaigns where Presidential or Vice Presidential electors, U.S. House members, and/or Senators are to be elected, meaning that the Act effectively covered state elections that were directly related to federal elections. Recall that, at the time, state legislatures still elected U.S. senators. Additionally, states did and still choose electors. Textually and legally, if the Tillman Act were enforced in the 21st century without First Amendment concerns, it would have more limits on corporate participation than either the FECA or the BCRA.

Regarding criminal penalties, both the corporation itself as well as its officers and directors were criminally liable under the Act, as the original statute allowed up to $5000 in fines against an offending corporation and a range of $250-$1000 for each conspiring officer and director. If convicted, an officer or director could pay a minimum of $250 in fines, or face one year in jail, or both. All of this is mandated in the legislation itself; however, Congress created no regulatory body to create and enforce rules. Courts were empowered with the discretion to sentence officers and directors to up to one year in jail and/or any combination of fines and jail time that he or she deemed appropriate. On parchment, Theodore Roosevelt and Congress seemed to have created a viable way to minimize the roles of national banks and other corporations in U.S. elections, as big business's lawyers had not yet constructed the

164 1907's Tillman Act predates the age of legislative delegation, so federal criminal liabilities needed to be made explicit in the legislation itself; otherwise, federal judges would have no guidelines for sentencing.
First Amendment argument against campaign regulation. In reality, however, because
there was no regulatory agency specifically tasked with enforcement, the Tillman Act
barely existed off of parchment.

The anticorruption rationale comports with the previous generation's Congresses,
given Pendleton's largely successful efforts to end the patronage system a generation
earlier; moreover, it was consistent with Progressives' own anticorruption positions.
Thus, the anticorruption interest, later necessary to override the individual's First
Amendment interest in political speech, has its origins in the years leading to Tillman.
This is what legal scholars – as well as President Barack Obama – meant when
claiming that the Court reversed over 100 years of campaign finance law in Citizens
United; the Court rejected the argument that independent expenditures lead to quid-
pro-quo corruption in Citizens United.

However, there was another perhaps more compelling rationale for legislators,
one that at least helped to have garnered the Congressional coalitions necessary to
pass the Act: the "shareholder protection" rationale.165 In the years leading to Tillman,
broadboards of directors of large companies had been making campaign contributions to
candidates from their general treasury funds, much to the chagrin of individual
shareholders. Boards of directors did so because they wanted to pass legislation that
would benefit the directors to the detriment of the general shareholders of the
company. The Act therefore addressed the notion that shareholders were being

165 Adam Winkler, "Other People's Money: Corporations, Agency Costs, and Campaign Finance Law,"
disadvantaged by Board members, who were using *other people’s money* to corrupt the political process.\(^{166}\)

The Public Disclosure of Campaign Spending

For many reform advocates, disclosure is the “cornerstone” of campaign finance reform.\(^{167}\) The 1910 Act – popularly known as the Publicity Act, but sometimes referred to as the first Federal Corrupt Practices Act (FCPA) – is the first attempt to mandate the disclosure of federal campaign spending. The Act was much longer and more comprehensive than Tillman, which had been merely one paragraph. Although limited to *House general elections*, it not only mandated the disclosure of all campaign contributions over $10, but it also mandated the disclosure of each *activity* costing at least $10.\(^{168}\) And it mandated disclosure of all such expenditures and receipts to the Clerk of the House of Representative within 30 days of an election.\(^{169}\)

From a legislative standpoint, the Publicity Act looks on paper to be a victory for reformers, setting up an institutional framework for disclosure, backed by real criminal penalties: $1000 and/or one year imprisonment. Yet, again, there was no regulatory agency tasked with enforcement, and there is little evidence of any real effort by the Justice Department to find violations. However, in terms of the history of campaign finance, FCPA added a piece of election law that that would go unchallenged even by most reform opponents, even if – at the time – it amounted to

\(^{166}\) Ibid.

\(^{167}\) Alexander, *Financing Politics: Money, Elections, and Political Reform*.


\(^{169}\) Ibid.
no more than an accounting law backed by modest criminal sanctions. FCPA made disclosure a legal – if not a factual – reality.\textsuperscript{170}

Congress amended the FCPA in 1911, extending coverage to Senate elections as well as to primaries in both houses.\textsuperscript{171} Applying to all candidates for election in the House and Senate during both primaries and general elections, it required the disclosure of all monetary and non-monetary contributions. Each candidate was to deliver disclosure documents to the House Clerk or Secretary of the Senate 10-15 days before an election. Most notably, the 1911 law contained the first national spending \textit{cap} for candidates: $5000 total expenditures for House candidates, and a $10,000 limit on expenditures for Senate candidates; these were \textit{combined} limits for both the primary and general election.\textsuperscript{172} The Supreme Court struck these limits in \textit{Newberry v. U.S.}\textsuperscript{173} under the reasoning that Congress's powers did not extend to the regulation of primaries or private political party activities; the rules had been rarely enforced, but Congress tried again in 1925.

\textit{Federal Corrupt Practices Act of 1925}

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\textsuperscript{170} This matters because disclosure is the only rationale remaining that is almost universally accepted as passing constitutional muster. However, there is a robust debate regarding whether or not the relative \textit{anonymity} of donors should be protected by the First Amendment. Bruce E. Cain, "Is Dependence Corruption the Solution to America’s Campaign Finance Problems?," \textit{SSRN} (May 19, 2013). This remains a primary reason why SuperPACs have to register with the FEC. \textit{Speechnow.org v. FEC}, 599 F.3d 686; 389 U.S. App. D.C. 424 (2010).
\textsuperscript{171} Keep in mind that citizens did not directly elect the Senate until the passage of the 17th Amendment in 1913.
\textsuperscript{172} Publicity Act Amendment of 1911, Pub. L. No. 32, 37 Stat. 25 (1911).
\end{flushleft}
This third piece of legislation under the FCPA effectively updated and replaced all previous federal campaign finance law; it reiterated the Tillman Act,\(^\text{174}\) and it provided far more detailed disclosure requirements than the previous Acts. It notably contained a provision explicitly banning the quid-pro-quo exchange of jobs and political appointments for campaign support,\(^\text{175}\) rhetorically strengthening Pendleton.

FCPA began by defining the new terms that had arisen alongside the day’s party mechanics, reflecting reformers' continuing attempts to reduce the causes of corruption: the Act covered elections, candidates, political committees, contributions, expenditures, and persons.\(^\text{176}\) One kind of “person” specifically covered was a Corporation.\(^\text{177}\) Additionally, the 1925 Act provided for overall campaign expenditure limits for candidates – $10,000 for a House campaign, $25,000 for Senate – while allowing states the power to set lower limits.\(^\text{178}\) The Act reiterated the illegality of bribery and patronage,\(^\text{179}\) as well as Tillman’s prohibition on corporate and bank contributions,\(^\text{180}\) but raised the discretionary penalties to $5000 per corporation, and $1000 for each consenting officer and director, and/or up to one-year imprisonment. The Act allowed state campaign finance rules consistent with the Act to remain.\(^\text{181}\)

\(^{175}\) Ibid.
\(^{176}\) §302.
\(^{177}\) §302(f): “The term ‘person’ includes an individual, partnership, committee, association, corporation, and any other organization or group of persons.”
\(^{178}\) §309.
\(^{179}\) §310 and §311.
\(^{180}\) §313.
\(^{181}\) §316.
Yet again, however, these national requirements constituted mere parchment rules as – once again – few resources were used to enforce them.

*From Corporate Corruption to Union Corruption*

Congress did not pass the next piece of reform legislation until 1939, 15 years after the last FCPA. Since then, a major stock market crash in 1929 had ushered in the Great Depression, which ultimately led to one of the most major aggregate policy shifts in U.S. history – the New Deal. President Franken Delano Roosevelt (FDR) and his Democratic Party fought hard to provide a social safety net – a welfare state – for Americans, especially for those clearly in need of monetary relief. Passing several pieces of legislation during the 1930s, the Roosevelt administration and Democrats faced off against the U.S. Supreme Court several times. This pro-business Court repeatedly struck down any federal or state legislation that violated the "freedom of contract" between employer and employee, a right that the Court protected via the Fourteenth Amendment's Due Process Clause. By 1937, the Court had backed off, allowing FDR's programs as well as state programs to proceed.

However, the empowerment of the working class did not come without consequences. As the power of labor unions rose, entrepreneurs became increasingly concerned at the costs labor protections incurred. Together, the Hatch Acts were a response to the increasing power of workers relative to the business class, as unions learned to organize more effectively. However, the creation of the Soviet Union in 1922 had led to public fears of communist infiltration, and progressives' as well as labor unions' ideological connections to Marxism provided the necessary rhetorical
ammunition for political attacks; furthermore, the unrest in Western Europe had turned into what would later be known as World War II. This rise of the Communists to power allowed for unions to be attacked more easily. Moreover, connections to criminal activity left unions open to allegations of corruption which – with a campaign contribution – could lead to the corruption of elected officials.

Therefore, the Hatch Acts marked a change in anticorruption concerns from those of national bank and corporate interests to those of the rising power of unions. The 1939 Act’s text indicated a fear of violence, and addressed the anti-communist concerns of the time as well, banning the employment of "any political party or organization [advocating] the overthrow of our constitutional government." It specifically outlawed voter intimidation, “official” interference with elections, quid-pro-quo exchanges of support for jobs/benefits, racial discrimination in voting, and political blacklists. Violations could be punished by up to $1000 fine and/or up to one year of imprisonment.

Both the 1939 and 1940 Acts were billed as legislation “[t]o prevent pernicious political activities.” In particular, they were aimed at preventing public sector employees from participating in elections, thus hearkening back to the anticorruption

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182 Hatch Act of 1939, Pub. L. No. 76-252, §1
183 Ibid., §9(A).
184 Ibid., §1.
185 Ibid., §2.
186 Ibid., §3.
187 Ibid., §4.
188 Ibid., §6.
189 Ibid., §8.
goals of the 1883 creation of the civil service system. Although those earlier reformers had been successful in eliminating the patronage of the Gilded Age, proponents of the Hatch Act argued that the vestiges of patronage had simply become embedded in the civil service system itself. The Hatch Act's answer was to ban all federal employees from advocating for the election of candidates, as well as prevent them from making campaign contributions; this way, the appearance of corruption could be avoided. These provisions withstood the Court's First Amendment scrutiny in 1947. In denying the First Amendment claim, Justice Reed's majority opinion articulated a theory of representation that balanced the needs between expression and popular sovereignty:

Of course, it is accepted constitutional doctrine that these fundamental human rights [accorded by the First, Fifth, Ninth, and Tenth Amendments] are not absolutes . . . The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people . . . [T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.

1940’s Hatch Act contained the first federal legislation mandating an annual aggregate contribution limit – $5000. Moreover, it contained an outright ban on any expenditures, "goods, commodities, advertising, or

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192 330 U.S. 95-96.
193 Hatch Act (1940), §13(a).
articles of any kind . . . where the proceeds . . . shall directly or indirectly inure to the benefit of or for any” federal candidate.\textsuperscript{194} Despite its addition to the canon of campaign finance rules, unlike previous legislation, the 1940 Hatch Act (unlike 1939’s) explicitly did \textit{not} amend FCPA.\textsuperscript{195}

Continuing the trend towards adding unions to the legislative campaign finance schema, Smith-Connally (also known as the War Labor Disputes Act) attempted to regulate labor strikes during World War II.\textsuperscript{196} The Act added unions to the original Tillman framework, amending FCPA’s reiteration and clarification that corporations and banks may not make contributions “in connection with” any federal election.\textsuperscript{197} The 1943 statute placed the fines at $5000 for each corporate and union violation, with a $1000 fine and/or the possibility of up to one-year’s imprisonment for each officer connected.\textsuperscript{198} Like previous legislation, Smith-Connally provided no practical enforcement mechanism.

Continuing a legislative trend to rein in labor organizations, 1947’s Taft-Hartley contained a provision aimed at clarifying the ban on unions by specifically including the “labor organization” as an entity covered by the ban.\textsuperscript{199} Smith-Connally’s criminal penalties remained intact, but now applied to “[e]very corporation or labor organization which makes a contribution or \textit{expenditure} . . .”\textsuperscript{200} The newly amended

\begin{footnotesize}
\textsuperscript{194} Ibid., §13(2)(c).
\textsuperscript{195} Ibid., §13(2)(e).
\textsuperscript{196} War Labor Disputes Act of 1943 (Smith-Connally), Pub. L. No. 78-89 (1943)
\textsuperscript{197} Ibid., §9.
\textsuperscript{198} Ibid.
\textsuperscript{200} Ibid. Emphasis added.
\end{footnotesize}
statute defined a labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”

Between Tillman, FCPA, Smith-Connally, and now Taft-Hartley, on parchment, corporations and labor unions had been legally banned from participation in U.S. elections on anticorruption grounds.

After Taft-Hartley, Congress was mostly quite on this subject until 1947. The courts, however, began to hear a handful of prosecutions. Before then, there is only one reported federal court case, a case which initially attacked the Tillman Act’s constitutionality. The federal district court denied the defendants' claims that (1) Article I’s Time, Place, and Manner clause did not empower the Tillman Act and (2) First Amendment speech and press were violated. The defendants ultimately pled guilty to charges that it violated Tillman’s prohibition on corporate contributions.

Congress introduced a degree of public financing for presidential elections in 1966, although intense opposition resulted in a refusal to fund it the following year. Congress resurrected this policy for its 1971 Revenue Act and first FECA in 1972,

201 Ibid.
203 Ibid; U.S. v. U.S. Brewers Assn, 239 F. 163 (W.D. Pa. 1916). As Richard Epstein notes, however, only U.S. Supreme Court cases are required to be reported; both district and appellate courts have discretion.
204 Epstein, Corporations, Contributions, and Political Campaigns; Federal Regulation in Perspective, 16.
resulting in the check-off box that now appears on I.R.S. income tax forms. This policy allows taxpayers to voluntarily donate a small portion of their tax payment to fund the Presidential Campaign Fund.²⁰⁶

II. Into the Thicket of Election Law – The Relationship Between the Vote and Voice Begins

As discussed in Chapter Two, during the 1960s, the Supreme Court under Chief Justice Earl Warren greatly expanded civil rights and liberties. When the Warren Court applied civil rights to U.S. election law – beginning with legislative reapportionment – it essentially "constitutionalized" election law, opening the door to lawsuits via the Court's new theory that Equal Protection mandates the notion that every vote should count equally – one person, one vote. Although the proclamation was "new law," the Court justified its decision partially via the historical development of equality in U.S. constitutionalism and jurisprudence; the development culminated with the ascension of positive equality under the Warren Court.²⁰⁷

The Reapportionment Revolution

The constitutionalization of U.S. election law has been a contested policy notion since the Court began its foray "into the thicket" of malapportionment in the 1960s.²⁰⁸

²⁰⁶ While this program is still in active, it may be defunct as both parties find ways to bring in much more money to campaigns. In 2008, John McCain was the last candidate to use public financing for his presidential campaign.
²⁰⁷ See Chapter Two.
²⁰⁸ The number of law review articles and books on reapportionment is too numerous to list. However, immediate responses included Carl A. Auerbach, "The Reapportionment Cases: One Person, One Vote-One Vote, One Value," The Supreme Court Review 1964, no. ArticleType: research-article / Full publication date: 1964 / Copyright © 1964 The University of Chicago Press (1964). Robert B. McKay and Twentieth Century Fund., Reapportionment: the Law and Politics of Equal Representation (New York,: Twentieth Century Fund, 1965).
Assuming that all congressional districts were to be equally proportioned, there was a clear necessity for judicial intervention during the first half of the 20th century; however, when the issue first appeared before the Court, it narrowly found the issue to be nonjusticiable – a political question whereby the federal courts should not intervene.\footnote{Colegrove v. Green, 328 U.S. 549 (1946).} Dissenting, Hugo Black provided the genesis of the one person, one vote principle in U.S. constitutional law: "While the Constitution contains no express provision requiring that congressional election districts established by the States must contain approximately equal populations, the constitutionally guaranteed right to vote, and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast."\footnote{Black, dissenting, 328 U.S. 549, 570 (1946).} Consistent with much of U.S. constitutional development, Black's dissent would eventually be cited with authority when the Court reversed its policy.

The Court's reversal on malapportionment 16 years later was a drastic one, supported by an overwhelming majority. \textit{Baker v. Carr}'s 6-2 decision not only contradicted the \textit{Colegrove} proclamation that redistricting was nonjusticiable, but provided precise advice on how redistricting activists could win a subsequent case on the merits. With regard to state redistricting claims, both Justices William Douglas and Tom Clark advised future litigants to use the Equal Protection Clause.\footnote{Baker v. Carr, 369 U.S. 186 (1962).}

Although the Court relied on Article I § 2 to reapportion the House of

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\begin{itemize}
  \item \footnote{Colegrove v. Green, 328 U.S. 549 (1946).}
  \item \footnote{Black, dissenting, 328 U.S. 549, 570 (1946).}
  \item \footnote{Baker v. Carr, 369 U.S. 186 (1962).}
\end{itemize}
Representatives, it used the Equal Protection Clause to fully effectuate its reapportionment revolution, mandating all state legislatures to reapportion as equally as practically possible, one person, one vote. Earl Warren's Court supported this standard by an overwhelming 7-2 margin. When the Court was finished with its "reapportionment revolution," all legislative bodies other than the U.S. Senate were constitutionally required to submit to this new, sweeping equipopulation rule that was to enforce the new constitutionalization of redistricting.

The Voting Rights Act

The Court spent substantial energy through a series of cases during the early 1960s expanding political equality through its one person, one vote principle. At the same time, Congress too moved towards political equality, passing the Voting Rights Act of 1965. This Act represented the guarantee of the Fifteenth Amendment's right to vote regardless of race, a guarantee that had been effectively stripped from Southern blacks by the late 1880s. Congress even went so far as to demand "pre-clearance" from the Justice Department for changes in voting administration in districts where (1) under 50% of the eligible voting population was registered to vote and (2) the district used a "test or device" restricting registration or actual voting.

In 1964, coverage included the entire states of Alabama, Alaska, Georgia, Louisiana,

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214 The ruling itself was affirmed by an 8-1 margin. Clark concurred with the result, but opposed the One Person, One Vote mandate as it applied to both houses of state legislatures: "[I]n my view, if one house of the State Legislature meets the population standard, representation in the other house might include some departure from it so as to take into account, on a rational basis, other factors in order to afford some representation to the various elements of the State." (Reynolds, 377 U.S. 533, 588)
Mississippi, South Carolina, and Virginia. The Act additionally covered specific districts ("political subdivisions") in Arizona, Hawaii, Idaho, and North Carolina. Congress specifically delegated to the D.C. District Court authority to hear disputes between the Justice Department and districts, disputes which could include challenges to Justice Department determinations, as well as attempts to "bail out" of pre-clearance requirements after demonstrating current lack of discriminatory practice.

South Carolina immediately challenged the constitutionality of the Voting Rights Act, claiming that it went beyond the scope Fifteenth Amendment's guarantee that the right to vote shall not be infringed on the basis of race. The Court approved the Voting Rights Act by an 8-1 margin, with Justice Black as the lone dissenter, arguing that §5's preclearance requirement was unconstitutional under Article III – Article III limited federal court jurisdiction to cases and controversies, and for a D.C. federal court to "pre-clear" legislation was akin to delivering an advisory opinion, which the federal courts do not do, according to Black. Moreover, he argued, §5 violated principles of federalism. However, surviving the challenge, the Court Congress, the D.C. Court, and the Justice Department together created an effective regime to carry out the pre-clearance requirements of the Voting Rights Act.

The Burger and Rehnquist Courts and the Libertarian Response to Equal Protection

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217 However, Black's dissenting position would carry the day 67 years later, when the Roberts Court ruled the coverage formula of §4 unconstitutional, thus incapacitating §5. The 5-4 majority argued that conditions have changed enough so that the Fifteenth Amendment no longer justifies a coverage formula from 1964. Shelby County v. Holder, 570 U.S. ___ (2013).
As the 1970s began, first-term Republican President Richard Nixon got the chance to immediately shape the Court, resulting in a more libertarian vision for constitutional equality. Nixon appointed four justices between 1969 and 1972: Chief Justice Earl Warren, Hugo Black, Abe Fortas, and John Harlan II retired, being replaced by Chief Justice Warren Burger, Harry Blackmun, and William Rehnquist.218

When campaign finance reform finally became a legal reality through both the 1972 and 1974 FECA's, the Court moved against egalitarian constitutionalism by using the preeminent champion of civil liberty – First Amendment Freedom of Expression. Over time, the Court under Chief's Warren Burger and William Rehnquist used the First Amendment as well as the libertarian Equal Protection Clause to pit the individual voice against the individual vote by (1) severely limiting the scope of campaign finance reform; (2) using Equal Protection as a weapon to limit the power of the Voting Rights Act under the Fifteenth Amendment. This trend has continued under the Roberts Court of the early 21st century.

How did the libertarian Courts justify these moves? First, the malapportionment cases provided ammunition for new redistricting cases, which were now subject to egalitarian constitutional principles. However, because the Equal Protection Clause can be used both as a negative as well as a positive right, the egalitarian invocation of the Clause in voting rights cases allowed libertarians to invoke the same rule, only

218 As I stated in Chapter One, I agree with preference-based notions that changes in Court membership are pivotal to changes in the law.
from their perspective. And, once Equal Protection (and Article I §2) was invoked by libertarians for their purposes, it collided with the Fifteenth Amendment-empowered Voting Rights Act. The tools previously used to create the equipopulation principle were ultimately used to strike the majority-minority districts that both the Republican and Democratic parties approved of. The positive power to effectuate equality was easily turned into a weapon that could strike government action as well as demand it. The libertarian Equal Protection Clause ultimately proved to be the victor, as majority-minority districts – empowered by the Fifteenth Amendment – were ultimately subject to Fourteenth Amendment limitations: the Court decided that there were limits on egalitarian measures, even as they used an egalitarian tool to do so. For egalitarians, this use of Equal Protection evoked memories of the Due Process protection of "liberty of contract"; however, this switch in use – from prohibiting discrimination, to demanding integration, to forbidding districts that can only be explained in racial terms – once again demonstrates how creativity allows main constitutional principles to consistently be interpreted in drastically different – libertarian and/or egalitarian – terms.

The Federal Election Campaign Acts

In the realm of election law, the Congresses of the 1970s picked up the 1960s Court's move towards political equality with four pieces of campaign finance reform legislation. The 1971 Federal Election Campaign Act (FECA 1972, known as the

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219 Congress followed FECA 1972 with amendments in 1974, 1976, and 1979. Being the most comprehensive, 1974 FECA is of most concern, as it introduced the regulatory regime.
time as the "Campaign Communications Reform Act"), was Congress's first campaign finance legislation since 1947's Taft-Hartley. Passed in 1972, FECA 1972 changed campaign finance in four ways: (1) it ended 1925 FCPA's overall campaign expenditure limits in favor of limits on media spending; (2) increased disclosure requirements for both contributions and expenditures; (3) provided criminal penalties for noncompliance; (4) limited the amount of money that a person could contribute to his or her own campaign for federal office. Moreover, it mandated specific structures for political committees, namely for the purpose of producing accurate disclosure.

Containing new media requirements, new criminal penalties, comprehensive limits on contributions and expenditures, another direct ban on patronage, as well as detailed financial and disclosure requirements, FECA 1972 was the most comprehensive campaign reform package passed to date. However, like all campaign finance reform attempts before, there was no viable enforcement mechanism.

The ineffectiveness of the 1972 FECA as well as a cynical political climate – no doubt exacerbated by President Nixon's Watergate scandal – spurred Congress to amend the FECA in 1974. But this time, Congress added an enforcement mechanism – the Federal Election Commission (FEC). The FEC was tasked with managing national campaign finance rules, taking over disclosure responsibilities from the House, and sharing enforcement with the Justice Department. It would also manage the Presidential Election Campaign Fund Check-off – the voluntary contribution

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program that appears on U.S. Internal Revenue Service tax forms – passed in FECA 1972. As an independent regulatory agency, it would have a total of eight members: the Secretary of the Senate and Clerk of the House, six other members, all of whom must be confirmed by a majority of both Houses; however, two would require approval of the President pro tempore of the Senate, two by the Speaker of the House, and two by the U.S. President.\textsuperscript{222} This Act was the first comprehensive campaign finance reform act in U.S. history.

Most importantly for the voice-vote dilemma, however, 1974's FECA legalized and encouraged what would be commonly known as Political Action Committees (PACs), organized means of participation whereby supporters of candidates could come together to spend money on campaigns. FECA rules mandated regular reporting to the FEC of all donors who contributed to the PACs, as well as the contributions and expenditures made by PACs during elections. This legalization of PACs was a pivotal moment in the development of campaign finance reform, allowing the voice to take a different form, one that would allow those long banned from elections to now participate – corporations and unions.

One of the original purposes of reform was to keep corporations – and later, unions – out of elections. However, under the new FECA, corporations and unions could create PACs that could contribute directly to candidates. Reflecting the shareholder protection rationale of the Tillman Act, this had been part of the bargain that allowed the FECA to not only pass Congress, but to overcome President Ford's

\textsuperscript{222} Ibid.
veto of the legislation. From a reformer's point of view, though, the FECA could be seen as yet another failure of attempted reform. However, when the Supreme Court entered this newly created regime, reformers suffered yet another loss.

III. The First Campaign Finance Regime: From *Buckley* to the Eve of *Citizens United*

Reform opponents brought the FECA before the Supreme Court in 1976's *Buckley v. Valeo*. This decision formally constitutionalized campaign finance law, via both the neo-liberty and egalitarian liberty paradigms. Via one per curium Opinion, and five combined concurrences and dissents, the Court used First Amendment political speech principles to strike (1) the aggregate independent expenditure ceiling for those spending money outside of campaigns; (2) limits on the amounts a candidate could spend during an election; (3) the limitation on a candidate's use of his or her own money. Because these were *direct* restrictions on candidates' political speech, the Court argued, the First Amendment could not tolerate them. The Court upheld FECA's limits on contributions to individual candidates, recognizing a “sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption”; this is now referred to as the anticorruption rationale. In other words, the government has an interest in preventing corruption or the appearance thereof, and if the interest is *sufficiently important*, it should overcome First Amendment hurdles. However, the Court explicitly rejected any notion that equality of voice – the antidistortion rationale – was ever a First Amendment concern. Even FECA's

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disclosure and recordkeeping provisions were challenged on the basis that holders of unpopular political views could be harmed or otherwise harassed.224

Although the history of legislative reform as well as the structure of FECA already distinguished between contributions to candidates and outside expenditures, *Buckley* is pivotal because the Court *constitutionalized* these concepts, as well as the previous rationales for campaign finance reform. Not only were contributions and expenditures considered to be very different forms of spending, but they would require different standards of constitutional review, as the First Amendment interest is not the same, nor is the government's interest in passing the legislation. Expenditure limits provide substantial limits on an individual's spending that the Free Speech cannot tolerate, but the government itself has a substantial interest in protecting the integrity of electoral processes, as well as fighting corruption and the appearance thereof.

*The Arguments and Competing Ideologies in Buckley v. Valeo*

When considered alongside the Warren Court's equality decisions of the 1960s, the Court's *per curium decision*225 in *Buckley* placed the individual voice and individual vote into conflict, reflecting the collisions between liberty and equality described by Chapter Two's four-part liberty-equality paradigm: neo-liberty, which

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224 The Court upheld the disclosure rules, noting that specific exceptions could be made under the circumstances. Notably, the Court struck the means of appointing the FEC via Article II's Appointments Clause, arguing that the Constitution only allows for the U.S. President to appoint all "Officers of the United States." The FECA was later amended to allow today's process, which requires the appointment by the U.S. President and confirmation by the Senate, and cannot consist of more than three members of any single political party.

225 Notably, Justice Stevens – who would later become the closest voice to political equality on the Court – abstained in *Buckley.*
presumes the existence of equality and defines liberty as freedom from government action; egalitarian liberty, where the government makes efforts to equalize individual liberty across all demographics; positive equality, where the government much more forcefully enforces equality, commonly through court orders; liberty vs. equality, the inevitable collision that occurs when neo-libertarians and positive egalitarians attempt to create policy together. 

Unlike the Warren Court's 1960s election law decisions, the FECA was not challenged on equality grounds; it was challenged as violating political liberty under the First Amendment. Generally, when a rule is challenged under the First Amendment, if freedom of expression is at issue, then it must be demonstrated that the government's interest is sufficient enough to outweigh the constitutional intrusion. If the Court determines that the government does not have a sufficient enough interest, then the rule is unconstitutional. Because this was the first large-scale piece of campaign finance legislation to come before the Court, the government needed to construct arguments upon which the Court had never ruled. The arguments advanced by the government as sufficient "interests" reflected the previous 70 years' worth of attempts to pass campaign finance reform legislation.

In defending the FECA's limits on contributions, the government argued that three interests outweighed First Amendment concerns: (1) the government's interest in preventing corruption and the appearance of corruption, later known as the "anticorruption" rationale; (2) the government's interest in equalizing the voice of different individuals; and (3) the government's interest in preventing individuals from having an unfair advantage in the political process. These arguments were based on the government's interest in protecting the integrity of the democratic process and ensuring that all voices are heard equally.

See Chapter Two for more detail.
between wealthy interests and the rest of society, later known as the "antidistortion" rationale; (3) the interest in controlling the costs of elections in order to help create a system whereby less wealthy candidates have more opportunities to participate than they otherwise would have, which can be construed as a broad political equality position.

The government's arguments represent the egalitarian liberty model. The intent of the contribution limits was to equalize the voice – more money to candidates implied a quid-pro-quo agreement whereby wealthy donors could "buy" more access to candidates.\footnote{Even after the FECA, it has been demonstrated that wealthy donors have increased access to legislators. Clawson, Neustadt, and Weller, Dollars and Votes: How Business Campaign Contributions Subvert Democracy.} Moreover, more money for political messages allows wealthier interests to speak "louder" than interests with less money to spend. Additionally, by limiting campaign spending, less wealthy candidates have a better chance of being heard, giving voters more choices. In other words, the goal is to provide the liberty of participation to all.

Opponents of reform relied on the both the First Amendment's freedom of expression and association principles, as well as the Equal Protection component of the Fifth Amendment's Due Process Clause.\footnote{The Equal Protection component of the Fifth Amendment provides the same limitations on the federal government as provided by the Equal Protection Clause of the Fourteenth Amendment. See Frontiero v. Richardson, 411 U.S. 677 (1973), where the Court ruled that the Fifth Amendment prohibits the government from demanding that female military members can not be compelled to demonstrate that their husbands are dependents for benefits, while males did not have to demonstrate that their wives were dependent. See also Bolling v. Sharpe, 347 U.S. 497 (1954) where the Court applied the Brown v. Board of Education, 347 U.S. 493 (1954), 349 U.S. 294 (1955), decisions to desegregate Washington D.C.'s public schools via the Fifth Amendment.} Under the First Amendment, they primarily presented an overbreadth argument, meaning that the legislation is so broad...
that it impacts both protected as well as unprotected expression. In other words, the government had gone too far, and was violating individual liberty – a neo-libertarian argument. More specifically, the reform opponents argued that (1) "most large contributors do not seek improper influence over a candidate's position or an officeholder's action"; (2) the contribution limit "is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder"; (3) "the monetary thresholds in the record-keeping and reporting provisions lack a substantial nexus with the claimed governmental interests, for the amounts involved are too low even to attract the attention of the candidate, much less have a corrupting influence."

Additionally, reform opponents provided a neo-libertarian argument via the Fifth Amendment's Equal Protection component of the Due Process Clause, claiming that both the public financing of Presidential campaigns and political conventions constituted "invidious discrimination" against independent candidates, while protecting incumbents. They argued that the public finance rules – clearly aimed at the two major parties – could discourage and minimize the participation of independent candidates, as well as invidiously advantaging the position of incumbents. Here, the "negative" Equal Protection clause would be applied, meaning that the government must stop acting in a manner that causes discrimination – according to opponents, these FECA provisions discriminated against those with more money, a position directly opposed to the egalitarian position that moneyed voices should not be able to drown out less-moneyed voices.
The Court itself – via its per curium opinion – pit liberty against equality for the first time in its election law jurisprudence, creating the conflict between the individual voice and the individual vote. Separate opinions exacerbated this conflict, making a holistic determination of the Court's position highly difficult, if not impossible, to construct.\footnote{229} Representing the neo-liberty position, Justice Rehnquist concurred that \textit{some} disclosure provisions passed First Amendment muster; however, he opposed the rest of the FECA. Notably, he criticized the Court's reliance on Freedom of Association rather than on Freedom of Speech,\footnote{230} which he wrote contributed to the Court's faulty reasoning behind the dichotomy between expenditures and contributions. Moreover, he predicted that the Court's new rules would be unworkable, given the split between contributions and expenditures, a dichotomy that he claimed made little sense.\footnote{231}

Conversely, Justice White's decision represents the genesis of the positive equality model in campaign finance.\footnote{232} He supported almost all of the provisions of

\footnote{229 Much has been written on the Court' lack of cohesion regarding any theory of political participation after \textit{Buckley}. See especially Justice Thomas's dissent in \textit{Holder v. Hall}, 512 U.S. 574 (1994), where he argued that the Court has no business creating and endorsing "political theory" with regard to the Voting Rights Act's §2 provision enabling vote dilution. In \textit{Buckley}, Justice Burger provides the most cogent philosophy of political participation.}

\footnote{230 My own reading of \textit{Buckley} somewhat contradicts this, as the Court – at least rhetorically – looks to have based its decision on both Freedom of Expression as well as Freedom of Association.}

\footnote{231 Justice Blackmun joined most of the Court's decision, but challenged the notion that the Court could make a "principled constitutional distinction" between contributions and expenditure limits. (184) By 2015, both the Court's libertarians and egalitarians have expressed concerns over the workability of the \textit{Buckley} standard, but for different reasons. Libertarians are hostile towards most campaign finance rules, and therefore they argue that the First Amendment prohibits such rules. Egalitarians tend to support campaign finance rules, and therefore they want \textit{Buckley} overruled for the purpose of allowing rules under the First Amendment.}

\footnote{232 As discussed earlier, the political equality model has been used to desegregate schools (\textit{Brown I} and \textit{Brown II}), reapportion districts (\textit{Baker, Reynolds, Wesberry, and Gray}), and enforce voting rights (\textit{Katzenbach}).}
the FECA, and thus dissented against the contributions-expenditures dichotomy. Although conceding that a First Amendment analysis was proper, he nonetheless argued that FECA provisions existed outside of Expression and Association, and hence outside the purview of the First Amendment:

[N]either the limitations on contributions nor those on expenditures directly or indirectly purport to control the content of political speech by candidates or by their supporters or detractors. What the Act regulates is giving and spending money, acts that have First Amendment significance not because they are themselves communicative with respect to the qualifications of the candidate, but because money may be used to defray the expenses of speaking or otherwise communicating about the merits or demerits of federal candidates for election. The act of giving money to political candidates, however, may have illegal or other undesirable consequences: it may be used to secure the express or tacit understanding that the giver will enjoy political favor if the candidate is elected. Both Congress and this Court's cases have recognized this as a mortal danger against which effective preventive and curative steps must be taken.

Justice Marshall, who went on to be the Court's leading egalitarian with regard to campaign finance reform, would also have upheld most of the FECA provisions. In particular, he wrote to critique the Court's striking of the provision that limited the spending of candidates' own money in elections:

[T]he wealthy candidate's immediate access to a substantial personal fortune may give him an initial advantage that his

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233 He agreed with the Court that the appointment method of FEC members violated the Appointments Clause of Art. II §2. In the original FECA, the eight members were to be chosen in the following way: (1) Secretary of the Senate and Clerk of the House were to be non-voting, ex officio members; (2) two appointed by the President pro tempore of the Senate, with the advice of both the majority and minority leaders; (3) two appointed by the Speaker of the House, with the advice of both majority and minority leaders; (4) two appointed by the President of the U.S. White concludes that none of these appointments are consistent with Art. II §2.
less wealthy opponent can never overcome. And even if the advantage can be overcome, the perception that personal wealth wins elections may not only discourage potential candidates without significant personal wealth from entering the political arena, but also undermine public confidence in the integrity of the electoral process.

Here, Justice Marshall alludes not merely to anticorruption, but to *antidistortion*, foreshadowing his vehement defense of campaign finance reform in a highly controversial case 14 years later.  

While *Buckley* might seem like a mixed decision to many, for most campaign reform advocates, it represented the death knell for meaningful campaign finance reform. At the very least, it signaled the Court's elevation of the neo-liberty interest in election law to at least the level of the equality interest from the previous decade. At most, when comparing the interest in voice to the interest in participation – certainly in the media age – *Buckley* may represent a privileging of First Amendment liberty over equality. The answer is difficult to ascertain, given that this first campaign finance regime arose during the final rise of old media, as advertising became more prevalent and saturated, and communications were continuing to speed up. This increase in media volume and communications is relevant to political operatives' responses to the FECA, which would not be legislatively addressed until 2002's Bipartisan Campaign Reform Act (BCRA).

*Unintended Consequences?*

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234 I will discuss *Austin v. Michigan Chamber of Commerce* (1990) later in this chapter.
Although reformers seemingly achieved legislative victory with the FECA and its newly created FEC, the creation of a national campaign finance regime had unintended consequences. First, the FEC quickly grew to be known as a dysfunctional agency, fraught with deadlock, never rising to its full administrative capacity, and often not fully staffed with members. Second, consistent with the drive to win elections, political operatives — whose primary job is to win elections — adjusted to the new rules, and found creative ways to avoid them, in one case arguably with the help of Buckley. They did so via two primary means: (1) the use of "soft money," unregulated sums of money that could go to parties in unlimited amounts; (2) the use of "issue ads" (issue advocacy advertisements) which were spent by groups independent of a particular campaign, but on that campaign's behalf. The FEC secured mandatory disclosure of soft money contributions by 1991, but had no way to manage the issue ads, as the Court had struck the relevant independent expenditure limit in Buckley.

One foreseeable consequence of the constitutionalization of campaign finance was that it would impact state campaign finance rules, as First Amendment proclamations apply equally at the federal, state, and local levels. But this application, when brought before the Court, would yield an additional potential government interest that could outweigh the First Amendment: the antidistortion rationale. The Court decided that Michigan could ban issue ads without offending the First Amendment, because the rule is "sufficiently narrowly targeted" towards its goal and

"precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views."\textsuperscript{236} Moreover, Justice Marshall, writing for the Court, found that the potential for distortion could justify reform measures:

> Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies [this section's] applicability to all corporations.\textsuperscript{237}

Justice Marshall's antidistortion rationale would not be forgotten by attorneys and reformers, although it would quickly be discarded by his colleagues on the Court.

\textit{Congress Reacts to the Circumvention of the FECA by Campaign Operatives}

The Bipartisan Campaign Reform Act of 2002 (BCRA) represented a monumental achievement for a Congress split almost 50-50 between Democrats and Republicans\textsuperscript{238} and with a Republican President presiding.\textsuperscript{239} The Act followed the failure of two previous measures in the 1990s, both of which attempted to rein in both the "soft money" and "issue ads" used by strategists and parties to circumvent the

\textsuperscript{236} Ibid.
\textsuperscript{237} Ibid.
\textsuperscript{238} The Senate was equally divided between Democrats and Republicans. The House of Representatives ranged from a 12-14 member Republican advantage during the course of the 107th Congress. Also, the Act is often referred to as "McCain-Feingold" after the Senate sponsors, even though the bill that was ultimately passed was the Shays-Meehan bill from the House.
\textsuperscript{239} We might find noteworthy the split on Republicans on this issue. John McCain has been a career-long supporter of reform, while Mitch McConnell has consistently opposed it. President Nixon signed the first FECA in 1972, President Ford signed FECA amendments in 1974 and 1976. President George W. Bush signed 2002's BCRA. President Carter signed the 1976 FECA amendments; he is the only Democratic President to sign campaign finance reform measures during this first campaign finance regime.
FECA rules as modified by the Court.\textsuperscript{240} Most notably, the approved legislation (1) clarified the meanings of electioneering communications, independent, and coordinated expenditures; (2) mandated that expenditures coordinating with a campaign be counted as direct contributions; (3) mandated the disclosure of most independent expenditures used in campaigns; (4) mandated that corporations and unions could not use general treasury funds for any electioneering during the close of election cycles.\textsuperscript{241}

Almost immediately after its passage, Senator Mitch McConnell (R-KY) and other opponents – including the National Rifle Association – sued the federal government, alleging the Act's unconstitutionality under the First Amendment. This action was expected, given that (1) the Court had already constitutionalized campaign finance reform in 1976, and continued to issue rulings between that time and the BCRA; (2) similar to FECA, such a challenge was predictable if one looks to the legislative record, where several legal experts testified about the possibility of First Amendment hurdles. In short, knowing that a legal challenge was inevitable, lawmakers considered the \textit{Buckley} rules when crafting the BCRA, knowing that the Court needed to approve the "regime" change. This attention to constitutional law, however, did not stop the Court from rendering a highly divided decision in 2003's \textit{McConnell v. FEC}.

\textsuperscript{240} Pub.L. 107-155 (2002).
\textsuperscript{241} These "blackout" periods constituted the 30 days before a primary, and 60 days before a general election.
The Court in *McConnell* delivered *eight* separate opinions, with the majority rejecting almost all of the challengers' claims.\(^{242}\) Most importantly, both the bans on soft money and ban on issue ads passed constitutional muster, *but only by a 5-4 majority*. In fact, three Justices wrote three separate Opinions of the Court. Each of these Opinions was supported 5-4, with two dissents, and three *other* separate opinions. Constitutional disagreements regarding various aspects of campaign finance abounded on the Court. But with just one vote holding the difference between the issue ad ban, advocates on both sides of the campaign finance debate were eagerly awaiting the next change in membership.

*From McConnell v. FEC to the Eve of Citizens United*

The constitutional positioning for campaign finance changed drastically between 1976 and 2003: while *Buckley* was almost universally branded as the case that effectively killed reform, it had transformed into a pro-reform case by 2003. While *Buckley*'s 7-2 majority originally represented a resistance towards reform – Justices either wanted to strike the independent expenditure rules, or strike *all* of the rules – support of the original contribution-expenditure dichotomy transformed into a *pro*-reform stance, even if even the Court's egalitarians became just as concerned about the efficacy of the dichotomy as the libertarians.

With regard to disagreements amongst the Justices, *McConnell* is the most nuanced and splintered of all of the Court's campaign finance decisions. The case generated three Opinions of the Court: (1) O'Connor and Stevens wrote to uphold

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Titles I (soft money) and II (issue ads); (2) Rehnquist wrote to address Titles III and IV, most claims of which were considered to be nonjusticiable; (3) Breyer wrote to uphold Title V's new disclosure provisions. Scalia, Thomas, Kennedy, Rehnquist, and Stevens also wrote separately to illustrate the differences between their own reasonings vs. that of the majority opinions. Looking to all of these opinions, a philosophical tension exists between the egalitarian liberty majority and the neoliberty minority. Notably absent is any member advocating for positive equality.

In defending and upholding the two major areas of the BCRA – Title I's ban on soft money and Title II's ban on issue advertisements – Justices Stevens and O'Connor relied upon an egalitarian liberty position. In their joint opinion, they only once cited to Justice Marshall's antidistortion rationale, relying almost completely on the anticorruption and anticircumvention rationales introduced in Buckley and developed since then. The opinion operates almost solely as a defense against an all-powerful and benevolent First Amendment, never addressing the interests of the system at large. And the only defense used here is that quid pro quo corruption as well as the perception of corruption provides a sufficiently important government interest in regulating soft money and issue ads.

The primary disagreement between the O'Connor-Stevens majority and Kennedy's lead dissent on Titles I and II was the definition of "anticorruption." O'Connor and Stevens argued that both quid pro quo corruption as well as the

243 This is contrary to the claim made by Justice Kennedy that Stevens and O'Connor relied upon Austin's antidistortion rationale.
appearance of corruption constitutes a sufficiently important interest to overcome First Amendment concerns; however, Kennedy argued that an actual quid pro quo interest was necessary to demonstrate that a narrowly-tailored *compelling* governmental interest could overcome First Amendment scrutiny.

*McConnell* clarified this tension between O'Connor-Stevens' "closely-drawn scrutiny" vs. Kennedy's strict scrutiny, which demonstrates the tension between the egalitarian liberty wing of the Court vs. the neo-liberty wing. For example, O'Connor and Stevens argued that the ban on soft money "does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders. Their discussion of corruption consistently argues the notion that big money clearly leads to at least the appearance of corruption, if not to outright corruption itself:

> [1] In 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology.

Moreover, they argue that there is sufficient evidence via testimony that soft money contributions are given to achieve more *access* to lawmakers. This provides those with money more liberty to make their voices heard. Note that, even though the legislation can be construed as one of positive equality rather than egalitarian liberty, the decision itself falls well short of an endorsement of positive equality.

The dissents of Justices Rehnquist (rather than his Opinion), Thomas, Scalia, and Kennedy represent the neo-liberty position. Scalia in particular sums it up:
It should be obvious . . . that a law limiting the amount a person can spend to broadcast his political views is a direct restriction on speech. That is no different from a law limiting the amount a newspaper can pay its editorial staff or the amount a charity can pay its leafletters. It is equally clear that a limit on the amount a candidate can raise from any one individual for the purpose of speaking is also a direct limitation on speech. That is no different from a law limiting the amount a publisher can accept from any one shareholder or lender, or the amount a newspaper can charge any one advertiser or customer.

**Conclusion**

The history of national campaign finance legislation yielded three tools that would later be used by egalitarians to argue against First Amendment intrusions – the anticorruption, antidistortion, and shareholder protection rationales. The argument against corruption and its appearance has dominated the reform debate since the turn of the 19th century, with the equality of voice being by far a secondary concern. Although the shareholder protection argument may very well be the motivating factor for the passage of 1907's Tillman Act, it was not part of later Congressional rationales for reform.

During the first half of the 20th century, Congress passed and reiterated several reform measures, all of which were fairly comprehensive in terms of textual coverage; however, most of it was never enforced. Similarly, on the other side of election law, rules on the reapportionment of legislative districts were not enforced either. Solving the reapportionment problem during the 1960s, Chief Justice Earl Warren's Supreme Court used its power of equity to demand that districts be as equally proportioned as practically possible. Additionally, Congress simultaneously
used its egalitarian powers under the Fifteenth Amendment to demand voting rights for African Americans, a demand that was approved by Warren's Court and enforced by federal courts. The egalitarian liberty behind one person one vote – that every person should have an equal voice at the ballot box – morphed into positive equality by virtue of enforcement: the Court forced districts to change. Additionally, the Voting Rights Act's requirement that discriminatory jurisdictions would have to clear any new voting rules with the federal government constitutes the strongest example of positive equality in federal election law.

But equality's great victories in the 1960s would roll back during the 1970s, after Chief Justice Warren's retirement. It didn't happen right away, as the egalitarian notion of anticorruption provided Congress with the primary rationale for the FECA. When the FECA was challenged, government lawyers used all of the rationales as they had developed over time, with the Buckley majority accepting only the anticorruption rationale, outright rejecting both antidistortion and shareholder protection. The Court's reasoning provided a split decision, with different standards for direct campaign contributions and independent spending. At this point, the power of individual voices to spend more money than others was fully constitutionalized as a First Amendment right. Given that the Court had elevated the power of the vote roughly a decade earlier, its elevation of the moneyed voice placed the individual voice and the individual vote into direct tension. The vote is the voice of citizens at the ballot box; therefore, when moneyed voices are able to "drown out" the voices of those with lesser financial means, vast amounts of money can change the debate on
any given issue and/or candidate, effectively impacting the vote. While Congress had passed an egalitarian piece of legislation, the Court limited the rules by constitutionally manifesting an opposing libertarian value in Freedom of Expression, one that absolutely outweighed any notion of creating an equality of volume.

Yet egalitarian voices had not completely disappeared from the Court in the 1970s, so equality's arguments in favor of reform stayed dormant until ready to be deployed. As discussed in Chapter Two, once an argument enters the legal ether, it exists eternally, allowing Justice Thurgood Marshall to decide 1990's *Austin* partially on the basis of the antidistortion rationale, effectively resurrecting it from its certain death in *Buckley*. But by the time of 2003's *McConnell*, support for antidistortion had waned, especially with the absence of Justice Marshall, with the anticorruption rationale remaining as strong as it had ever been. By *Citizens United*, the Court had accepted the anticorruption rationale, debated but mostly rejected antidistortion, and outright rejected shareholder protection. With Justice Roberts' warning in 2007's *WRTL v. FEC*, the future of reform – of political equality in election law overall – indeed looked bleak.

In Chapter Four, I will explain how *Citizens United* shattered the previous election law bargain between the voice and the vote established in *Buckley*, making significant reform even more difficult for legislators. Justice Roberts' majority strengthened the tensions between voice and vote values, greatly increasing the power of big business to enact policies by drowning out less moneyed voices. By the end of *Citizens United*, the conflict has grown from the individual voice vs. the individual
vote, adding the *corporate* voice vs. the individual vote to the dilemma. Additionally, reform supporters on the Court dropped the ball by distancing themselves from the antidistortion rationale, which they seemingly did out of respect for *legalism*, helping to demonstrate its bias against legal equality.
Chapter Four  
The Corporate Voice vs. the Individual Vote: *Citizens United v. FEC*  

*Introduction*  
On January 21, 2010, campaign finance reform opponents achieved a monumental victory over reformers. Throughout the 20th century, one of the major pillars of reform had always been the idea that corporations should not have disproportionate power over elections and policy. The first national campaign finance reform legislation – 1907's Tillman Act – targeted corporations and national banks, at least partially for this purpose. It took almost 70 years for corporations to attain a legal way of participation, a means granted by the Federal Election Campaign act of 1974 (FECA) via the creation of segregated "political action committee" (PAC) funds. Although political operatives were later able to quickly maneuver campaign spending into "soft money" donations and issue advertisements, the legal separation between independent spending and direct contributions – as well as between corporate and natural persons – remained intact, part of the larger bargain that allowed the FECA to pass in the first place.  

However, after Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA) to rein in the FECA loopholes exploited by campaign operatives, the contours of this bargain from *Buckley v. Valeo*244 began to change. Challenging the BCRA immediately after its passage, Senator McConnell and his allies argued – amongst other things – that PAC participation did not allow corporations enough

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244 424 U.S. 1 (1976).
options to express their positions. They argued that the First Amendment demanded that corporations should be able to participate outside of this PAC system, but they lost.\textsuperscript{245} Seven years later, in \textit{Citizens United v. FEC},\textsuperscript{246} McConnell and his forces would be able to declare victory on this issue.

In \textit{Citizens United}, the U.S. Supreme Court struck this "blackout" provision that had allowed corporations and unions to participate in elections almost solely via their PAC funds. The rules after \textit{Citizens United} allow corporations to participate outside of this system, spending as much money as they like on elections, limited only by the rule that such spending be "independent" of the candidates they support. If one of the goals of the Tillman Act was not just to limit – but to \textit{ban} – corporate participation in elections, then the FECA began this demise by creating the new PAC system, and the \textit{Citizens United} Court completed it by allowing participation outside of this system. This is new rule is what President Obama meant at the 2010 State of the Union when he said that the Court had “reversed a century of law to open the floodgates – including foreign corporations – to spend without limit in our elections.”

Ultimately, this chapter will make three primary points regarding the place of \textit{Citizens United} in U.S. constitutional history: first, the Court's majority decision changes a major bargain made within the first campaign finance regime, one that – although dissatisfying to reformers and enacted with a neo-libertarian bias –

\textsuperscript{245} McConnell \textit{v. FEC}, 540 U.S. 93 (2003).
\textsuperscript{246} 558 U.S. 310 (2010).
somewhat balanced libertarian and egalitarian interests.\textsuperscript{247} In \textit{Citizens United}, the majority shattered the rationale behind legislative distinctions between corporate persons and individuals, distinctions that had been a hallmark of campaign finance reform rules since long before the FECA and \textit{Buckley}. The distinction was important to the passage of the BCRA in 2002, enacted after amassing one of the largest legislative histories in U.S. history.\textsuperscript{248} Following the rules of the old regime, the Court continued to narrowly approve this distinction in 2003's \textit{McConnell v. FEC}.\textsuperscript{249}

Second, \textit{Citizens United} changed an overall election law bargain, one that somewhat balanced voice and vote overall, and certainly balanced power in the sense that corporate persons should not wield the same level of First Amendment protections held by natural persons. We see this change in three stages: first, when the Court elevated the individual vote principle in both the malapportionment as well as the voting rights cases, as discussed in Chapter Three; second, when the Court elevated the individual voice to a level of constitutional protection that could overcome legislation enacted for the purpose of leveling the playing field, as discussed last chapter; third, when the Court empowered the corporate voice theoretically to a level matching the individual voice in \textit{Citizens United},\textsuperscript{250} as will be discussed this chapter. This award of explicit high-level First Amendment protections to corporate persons shatters the final element of the voice-vote balance, giving not

\textsuperscript{248} See ibid.
\textsuperscript{249} 540 U.S. 93 (2003).
\textsuperscript{250} The first two stages are discussed in Chapter Two.
merely unprecedented power to voice protection itself (through its denial of the quid pro quo rationale to any independent expenditure as a matter of law), but providing unprecedented First Amendment power to corporate participants.

Third, *Citizens United* represents a Court that has moved away from core liberal values by favoring one over the rest – neo-liberty does not merely best equality, but overwhelms liberalism's other core values of fairness, dignity, and justice. In fact, the Roberts Court in *Citizens United* placed so much value on this exceptionalist neo-liberty that it was willing to reach out beyond the actual controversy and strike a ban on corporate spending that had rather consistent – if mostly unenforced – legislative support during the 20th century. Moreover, Justice Stevens – theoretically equality's advocate in his dissent – inadequately addressed political equality in his decision, essentially abandoning it in favor of the anticorruption rationale.

**I. The Eve of Citizens United v. FEC**

Although in *McConnell*, the soft money, issue advertisement, and corporate blackout provisions of the BCRA were upheld, reformers at the time were well aware that that President George W. Bush could nominate a justice to the Supreme Court who could strike one or more of these provisions. By late 2004, Chief Justice Rehnquist's health was declining, and he was diagnosed with thyroid cancer. Additionally, Justice O'Connor's husband had been diagnosed with Alzheimer's

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251 "Dignity" has been discussed with regard to voting and civil rights, although it was never dispositive in those cases. Justice Kennedy has used the concept of "dignity" in support of same-sex marriage. *Obergefell v. Hodges*, 576 U.S. ___ (2015); *U.S. v. Windsor*, 570 U.S. ___ (2013); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

252 Remember that President Bush signed the BCRA in 2002.
disease. In September of 2006, Justice Rehnquist died and, shortly thereafter, O'Connor announced her own retirement so she could spend time with her ailing husband. Therefore, during the 2005-2006 recess, President George W. Bush had the opportunity to appoint two new justices to the Supreme Court, including a new Chief. Bush chose Samuel Alito and John Roberts to fill the vacancies, awarding the Chief Justice position to Roberts. Both judges had been known as stanch conservatives compared to O'Connor's relatively moderate jurisprudence, and Rehnquist's traditional conservatism. Given the highly splintered 5-4 decision in *McConnell* – as well as the well-known anti-reform positions of Scalia, Thomas, and Kennedy – this change in membership set the stage for the Court to roll back reform.

As Justices Roberts and Alito led the charge against the regulation of independent expenditures (issue ads), the ongoing debate on the efficacy of the *Buckley* framework gathered momentum on both sides of the Court, with the libertarian wing wanting to move towards deregulation, and the egalitarian wing wanting to allow more regulation, specifically in the area of independent expenditures. 2006's *Randall v. Sorrell* illustrates this problem, as the Court moved against public campaign finance.

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In *Randall*, the Court considered the constitutionality of Vermont's aggressive reform measures enacted in 1997. Vermont had passed an Act ("Act 64") that practically barred independent expenditures from state elections, and mandated contribution limits between $200 and $400 dollars for all state candidates, political parties, and independent organizations for state candidates in an election cycle. By a vote of 6-3, the Court struck the expenditure rules as well as the contribution limits. In addition to the libertarian wing – Roberts, Alito, Scalia, Thomas, and Kennedy – Justice Breyer joined the majority, writing the Court's Opinion. Under the *Buckley* framework, argued Breyer, the contribution limits were not "narrowly tailored" under the "closely-drawn scrutiny" test enough to survive First Amendment scrutiny:

Vermont's rules, Breyer argued, prevented challengers from "mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." Continuing, Breyer argued that the rules burden the First Amendment by "threatening to inhibit effective advocacy by those who seek election, particularly challengers." *Randall* effectively demonstrates that even supporters of reform like Justice Breyer have a contribution floor below which the First Amendment will not allow. Breyer effectively demonstrates the egalitarian liberty position in campaign finance, expressing a preference for First Amendment rights not seen via the positive equality viewpoint.

Writing for himself in dissent, Justice Stevens attacked *Buckley* itself for violating the proposition that both contributions and expenditures could be regulated, as he argued had been the law since the Tillman Act. And, even if with *Buckley*'s
contributions-expenditures dichotomy, Stevens argued, Justice Breyer misinterpreted the law under *Buckley* – Stevens pointed out that the Court had never before considered a spending cap to be violative of the First Amendment.

It didn't take long for the Roberts Court to move towards the corporate blackout, although it eliminated it in two moves: 2007's *FEC v. WRTL* and 2010's *Citizens United*. From a purely legalistic standpoint, although the blackout provision had survived a facial constitutional challenge in *McConnell*, this did not mean that the provision could survive all *as-applied* challenges; in other words, the means of corporate speech/spending might be such that – in a particular context – the rule must give way to First Amendment interests. With this in mind, in 2004, Wisconsin Right to Life (WRTL) filed for an injunction to prevent the FEC from applying the blackout provision to advertisements critical of senators who were filibustering conservative, anti-abortion judicial nominees. WRTL wanted to pay for the ads with its general treasury funds – placing it outside of the PAC system – and run the ads within the primary's blackout period. Ultimately, the Court determined that the blackout provision could not be constitutionally applied to WRTL's advertisements without violating the First Amendment. WRTL was such a small non-profit that a PAC requirement could prove unduly burdensome, thus inhibiting political expression.\(^\text{256}\)

\(^\text{256}\) *FEC v. WRTL*, 551 U.S. 449 (2007). This decision extended what is known as the "MCFL exception" from 1986's *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). In *MCFL*, the Court ruled that a non-profit need not create a PAC so long as it does not accept union or corporate funds, due to the fact that small non-profits could be unduly burdened by the FECA's disclosure, accounting, and reporting requirements. For a discussion, see Corrado, *The New Campaign Finance Sourcebook*. 
For the first time since the passage of the BCRA, the Court used the First Amendment to protect a corporation's use of general treasury funds from the blackout period.\textsuperscript{257} But this wasn't the first time in the Court's history where it had granted such protection. In 1986's \textit{FEC v. MCFL}, the Court created an exception for non-profit corporations where the overwhelming majority of contributions came from independent donors.\textsuperscript{258} Known as the "MCFL exception," the Court exempted non-profits from the PAC rules so long as they received no corporate or union money. In \textit{WRTL}, the Court based part of its reasoning on this decision. For the corpus of constitutional election law, \textit{WRTL} signaled to campaign finance reform opponents that the new Court under Chief Justice Roberts held more hostility towards reform than had the previous Court.\textsuperscript{259} As had become the pattern for campaign finance cases, the Court issued a highly splintered ruling, permitting a judgment – rather than a majority decision – from Roberts. Led by Justice Souter, the four egalitarians – including Ginsberg, Stevens, and Breyer – dissented. With O'Connor's departure, the battle lines had changed by one vote in the three years since \textit{McConnell}, allowing the new majority to move the Court towards further resistance to electoral reform.

\textsuperscript{257} The Court had previously protected a for-profit corporation from FECA's same ban on campaign spending when the ban had \textit{specifically targeted the plaintiff corporation}. See First National Bank of Boston \textit{v. Bellotti}, 435 U.S. 765 (1978).
\textsuperscript{258} \textit{FEC v. Massachusetts Citizens for Life}, 479 U.S. 238 (1986).
\textsuperscript{259} It is important to note here that the change in membership is not the \textit{only} reason that \textit{WRTL} found it prudent to litigate. There were lingering questions regarding what exactly constituted an "electioneering communication" under §203 – pure issue ads were not, ads using the "magic words" were. In \textit{WRTL}, the Court found that the advertisements in question fulfilled the criteria of pure issue ads, according them a higher level of First Amendment protection. Regardless, the change in membership certainly emboldened reform opponents.
Roberts' majority opinion stopped short of facially striking down the same provision that held the Court's attention in *McConnell* – whether or not the First Amendment prohibits the government from banning corporations from using general treasury funds to advertise in elections – but determined instead that the First Amendment protected WRTL from BCRA's application. But Roberts' language in *WRTL* was clear to attorneys – he would be willing to strike this and similar legislation in the future:

*McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban – the issue we do have to decide – we give the benefit of the doubt to speech, not censorship. The First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech" demand at least that.  

The Court continued its typical 5-4 split between libertarians and egalitarians in 2009's *Davis v. FEC*. In *Davis*, the Court struck BCRA's "Millionaire's Amendment," which allowed contributors to provide *triple* the individual limit of funds against a self-financed opponent.  

This piece of legislation had provided a major victory for reformers, who support public financing for elections. This tripling of the amount was designed to both discourage self-financed campaigns as well as to level the playing field when a self-financed candidate entered the race. Justice Alito's majority

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261 For details on how the Amendment was triggered, see the FEC website: [http://www.fec.gov/press/bknd/MillionairesAmendment.html](http://www.fec.gov/press/bknd/MillionairesAmendment.html)

262 In formal legal language, the correct term is "trebling."
opinion emphasized *Buckley*'s rule that the equalization of speech is *not* an interest sufficient to overcome First Amendment hurdles, a recurring argument from the Court's reform opponents:

In *Buckley*, we held that '[t]he interest in equalizing the financial resources of candidates of candidates' did not provide a 'justification for restricting' candidates' overall campaign expenditures, particularly where equalization 'might serve . . . to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign. 263

Advocating for equality, Justice Stevens' emphasized the reform argument repeated by the Court's egalitarians since *McConnell*, "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 264

However, for Justice Kennedy – a vehement opponent of campaign finance reform 265 – the appearance of the corruption of the *judiciary* allowed the West Virginia bar to apply its codes without violating the Constitution. In *Caperton v. Massey*, 266 a 5-4 majority ruled that the Fourteenth Amendment's Due Process Clause required a West Virginia state Supreme Court justice to recuse himself from a case after a donor had contributed over $3 million towards his election. At trial, Caperton had been awarded $50 million from Massey Coal Co., who subsequently appealed to the state Supreme Court. In the meantime, the state Supreme Court's judicial elections were being held. Massey Coal's CEO spent money supporting challenger Brett

263 *Davis* quoting *Buckley*, 424 U.S., at 56-57.
265 See *McConnell*.
Benjamin, exceeding all other spending in the election, including the amount spent by Benjamin's own committee. After Benjamin's victory, the case came before the state Supreme Court. Caperton moved to disqualify the now Justice Benjamin from the case, arguing that he should have recused himself because he had a "pecuniary interest" in the case; Benjamin denied such an interest and dismissed the motion. The state Court then reversed the $50 million dollar verdict, a verdict that Caperton then brought before the U.S. Supreme Court. The Court ruled that, under these circumstances, the Fourteenth Amendment's Due Process Clause required recusal. In Caperton, Kennedy joined with the egalitarians, while the other libertarians dissented. However, although reformers had won this particular battle against corruption, Kennedy's adherence to an egalitarian notion of fairness here would not change his First Amendment position from McConnell. Compared to the campaign finance law being created by the Roberts Court, Caperton was merely a blip on the historical radar.

II. Citizens United v. FEC

In order to demonstrate the three primary points of this chapter – the breach of the campaign finance bargain, the breach of the bargain between the voice and the vote, and the Court's neo-libertarian bias – an in-depth discussion of Citizens United v. FEC is required. Citizens United provides nothing less than a revolution in Constitutional law, in the field of election law, and in the way the Court theorizes democratic participation. First, the decision elevated corporations and unions to the same status as natural persons when ascertaining the constitutionality of independent
expenditures under the First Amendment, and the Court made clear that it would apply strict scrutiny to such rules. Second, following the logic of the first, the ruling eliminated the corporate and union blackout period that had been in place since the 1974 FECA, had been reiterated in 2002's BCRA, and had been upheld by the Court in *McConnell*. Third, the Court diminished the scope of the anticorruption rationale by invalidating claims based on quid-pro-quo arrangements for independent expenditures. Fourth, the Court invalidated what was left of the antidistortion – or *political equality* – rationale. Fifth, it reiterated its almost-universal support for the public disclosure of all independent expenditures. Finally, in doing all of these things, the Court demonstrated the neo-libertarian structural bias inherent in the legalism discussed in Chapter Two. Combined with American liberalism's early 21st-century rightward trend, the Court continued to value freedom from government intervention over the other liberal values of dignity, equality, fairness, and justice.

The background events leading to *Citizens United* should be understood before explaining the results and significance of the case itself. In January 2008, Citizens United, a non-profit corporation, produced a film entitled *Hillary: The Movie* (“*Hillary*”). Citizens United intended to air the film as a criticism of Democratic presidential candidate Senator Hillary Clinton, in an effort to derail her attempts to attain the Democratic nomination for President of the United States. Specifically, Citizens United wanted to (1) advertise pay-per-view showings of *Hillary* and (2) show *Hillary* on pay-per-view. However, Citizens United's attorneys were aware of

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267 Citizens United was a 501(c)3 tax-exempt non-profit corporation.
the BCRA "blackout" provision that the Court had narrowly approved in *McConnell* – a ban on “electioneering communications” by corporations and unions during election cycles.\(^{268}\) Anticipating FEC punishment, Citizens United preemptively requested an injunction against FEC enforcement of this blackout period.\(^{269}\) The federal District Court denied the injunction, awarding summary judgment\(^{270}\) to the FEC, a decision appealed by Citizens United. Technically, the case that ended up before the Supreme Court is therefore a decision that is based on the denial of this original injunction, a punch line few understand outside of the legal community.\(^{271}\)

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\(^{268}\) These periods are generally referred to as the BCRA “blackout” periods, enumerated in § 434. The BCRA legislation is enforced by FEC regulations, in this case 11 CFR § 100.29.

\(^{269}\) More specifically, the rule applied to express advocacy for or against an individual candidate, in an individual candidate election, within 30 days of a primary election, and 60 days before a general election. These "blackout" periods are enumerated in § 434. The BCRA legislation is enforced by FEC regulations, in this case 11 CFR § 100.29.

\(^{270}\) Black's Law Dictionary defines summary judgment as "a judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. • The court considers the contents of the pleadings, the motions, and additional evidence adduced by the parties to determine whether there is a genuine issue of material fact rather than one of law. This procedural device allows the speedy disposition of a controversy without the need for trial." See Fed. R. Civ. P. 56.

\(^{271}\) For practicing attorneys and legal scholars, this series of events makes perfect sense from a justiciability standpoint; however, those who do not regularly study law and politics might be shocked to hear that none of the feared events ever came to pass. Given the Court’s ultimate decision, however, this “imaginary” aspect of the case is relevant to both groups. *Hillary* was never shown in the manner intended by the initial suit, and therefore, from a formalist viewpoint, the Court’s decision in *Citizens United* could be seen as saying, “District Court reversed and injunction granted. Citizens United can now advertise and show its film 30 days before a Democratic primary election without fear of reprisal from the FEC.” Given that Citizens United wanted to show the film in 2008, and the decision was rendered in 2010, the case has no value for the previous election campaign, although the decision clearly has enormous precedential value. Although attorneys understand that there is little debate regarding whether or not this case constituted a “live” controversy under Article III,\(^{271}\) they might still be concerned about the decision in light of the fact that the Court used a non-event to reach out and *facially* strike § 203, despite the fact that Citizens United had dropped its facial challenge. What was no longer at issue in the dispute ultimately was resurrected by the majority – raised on its own accord – providing appellant Citizens United with more than it requested. Justice Stevens spent considerable time critiquing the majority’s reasoning on this basis, as the majority decision is arguably based on one big hypothetical.
The procedural history of the case before the Court merits a mention as well. As a matter of constitutional history, *Citizens United v. FEC* was *McConnell* revisited, with a new Court; such changes in membership in and of themselves can change the law. This new Court in 2009 featured the additions of Roberts and Alito as replacements for Rehnquist and O'Connor; given O'Connor's support for reform, and Roberts' and Alito's opposition, the balance of the Court shifted.\(^{272}\) The Court heard *two* oral arguments, one in 2009, and the other in 2010.\(^ {273}\) The first addressed the issues in the parties' pleadings themselves – whether or not the blackout period could apply to *Citizens United* itself. The second addressed the prima facie constitutionality of the blackout provision.\(^ {274}\) The fact that the prima facie argument was even considered caused a sharp rift on the Court, as three majority justices scrambled to defend it,\(^ {275}\) while Stevens thoroughly lectured them on proper civil procedure,\(^ {276}\) which requires courts to decide cases between parties, rather than raise constitutional issues of its own volition.

The case – through all of its opinions – issued what can be considered a new ultimatum on the campaign finance rationales that had developed over the past century. With regard to the substantive law in question, the Court's majority – through

\(^ {272}\) In terms of results, Sotomayor's replacement of Justice Souter was inconsequential. However, if the hearsay about Souter's – reported by Jeffrey Toubin – supposed dissent is true, egalitarians may have had more ammunition for future cases. As will be discussed later in this chapter, Justice Stevens' dissent was lacking for this purpose.

\(^ {273}\) The Court heard the first oral argument on March 24, 2009, and the second on September 9, 2009.

\(^ {274}\) *Citizens United v. FEC*, No. 08-205, Respondent's Oral Argument, pg. 66, lines 7-9, when Solicitor General Kagan confesses that a pamphlet would be considered "classic electioneering," and therefore subject to the blackout period.

\(^ {275}\) See Kennedy's Opinion of the Court. See also concurring opinions of Roberts and Scalia.

\(^ {276}\) See Stevens' dissenting opinion, Part I.
Kennedy's opinion and the concurrences of Roberts and Scalia – and Stevens' dissent disagreed on the following issues in the constitutional law of campaign finance: (1) whether or not a legal, non-natural entity is a “person” under the Fourteenth Amendment’s Due Process Clause for the purposes of rules on independent election spending, thus according corporations and labor unions First Amendment protections for such spending; (2) whether or not the government's interest in corruption and the appearance of corruption outweighs the First Amendment protection accorded to political expression (the anticorruption rationale); (3) whether or not the government has enough of an interest – in preventing louder, more moneyed voices from drowning softer, less moneyed voices – to outweigh First Amendment protections (the antidistortion rationale); (4) whether or not the government has an interest in the protection of shareholders from compelled election spending by corporate boards, and if so, whether or not this interest outweighs First Amendment protections (the shareholder protection rationale); (5) whether or not the mandated disclosure of independent election spending can survive First Amendment protections.277

Justices Kennedy, Roberts, Scalia, Thomas, and Stevens all wrote opinions for *Citizens United*. Justice Kennedy wrote the Opinion of the Court, with Justices Roberts, Scalia, Thomas, and Alito joining with regard to corporate personhood and the blackout period. Justice Kennedy wrote for all of the Court except for Thomas when upholding the mandatory disclosure provisions at issue, while Thomas provided

277 For a discussion of the development of these rules over the course of the 20th century, see Chapter Three.
the sole voice against the disclosure of campaign spending on the Court. Roberts and Scalia wrote concurring opinions, while Justice Stevens wrote the dissent; Ginsberg, Breyer, and Sotomayor joined with Stevens. Through all of these decisions, the Justices produced robust debates about all of the legal issues before the Court, and the following narrative will summarize these disagreements.

1. Elevation of Corporate Status to Equivalent of Natural Persons for Spending

The most publicly controversial element of *Citizens United* was its supposed proclamation that "corporations are people." While this phrase may work as effective propaganda for reformers, it hardly encapsulates the Court's decision on this issue. First, as all law school graduates know, corporations are *unquestionably* people.

Granted, they are legal persons rather than natural persons, but they have always been persons as a matter of law. That is one of the major reasons for incorporation – to protect the owners from personal civil liability through a "veil" that can rarely be pierced. In other words, corporate personhood provides protection to the natural persons who own the corporation by guaranteeing that, under almost all circumstances, a claimant can only sue the corporation, and not the owners. Thus, the proclamation that "corporations are people" is simply a repetition of the obvious. Moreover, corporations have had substantial constitutional protections since the early 1800s. The first corporations in America were municipal, i.e., towns. The first "private" corporations in the U.S. all had to be specifically chartered by state legislatures, and could only be formed if serving the public interest. The conception of "private corporation" as we understand it today did not develop until the late 19th century. Friedman, *A History of American Law*.

278 This is based on an economic efficiency argument, i.e., we don't want corporations afraid to do business for fear of personal liability. This liability protection theoretically allows companies to take higher risks, which is theoretically good for economic growth.
20th century, beginning with the notion of "freedom of contract." Additionally, corporate First Amendment protections rose alongside those of individuals during the Rights Revolution of the 1960s. That being said, whether or not corporations should have protections coextensive with individuals on the issue of campaign finance is a separate constitutional issue, one distinguished from other First Amendment issues.

Thus, writing for the Court's majority, Kennedy began his formal analysis of corporate speech by noting that the First Amendment had historically applied to corporations; he cited a litany of late 20th-century speech and press cases where the litigants were corporations, the most well known of which were *New York Times v. Sullivan* (different defamation standards for public officials and private persons in the interests of a free press) and *NYT v. U.S.* (U.S. didn’t meet the high burden for its prior restraint of Pentagon Papers). Kennedy noted that none of these cases turned on the litigants’ corporate status; it was the right – the speech – that was at stake, and not the speaker.

Moving directly to campaign finance, Kennedy presented 1978's *First National Bank of Boston v. Bellotti*\(^{281}\) as the lead case with regard to corporate speakers. In *Bellotti*, the Court had ruled in favor of a corporation, based on the notion that the government had banned its expression based on its corporate identity. In *Bellotti*, banks and corporations wanted to spend general treasury funds to oppose a Massachusetts ballot measure.\(^{282}\) Massachusetts law, however, banned businesses from spending money "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."\(^{283}\) By a 5–4 vote, the Court struck this law under the First Amendment on the grounds that speech on public matters – especially on government affairs – cannot be stifled by the government; *who* is speaking – whether a corporate or natural person – is irrelevant to this analysis. Therefore, using *Bellotti*, Kennedy emphasized that the blackout was unconstitutional because the First Amendment does not allow the government to prohibit speech due to the speaker’s identity.\(^{284}\) This was the operative language leading to the "corporations are people" sound bite.

Thus, Kennedy's decision substantially rested upon the notion that the First Amendment avoids – as he argued – "identity-based" distinctions. In other words, the First Amendment protects the speech itself; the protection of speakers is secondary.

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\(^{282}\) Remember, as discussed in Chapter Three, that 1907's Tillman Act explicitly banned contributions from national banks and corporations. This ban had been passed by many state legislatures as well.
\(^{284}\) 558 U.S. 310 (2010), Kennedy 30.
Responding to Kennedy in his dissent, Justice Stevens responded that this argument was easily overcome. After all, the Court had made decisions that were partially based upon a number of identity-based distinctions:

[In a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, the do not necessarily raise constitutional problems. 285]

Scalia’s concurrence – joined by Alito, and Thomas in part – attempted to bolster Kennedy’s opinion by providing a rather lengthy account of the history and importance of corporate development in the U.S., even citing law-and-society historian Lawrence Friedman to argue that any “Framer resentment” towards corporations was limited to the monopoly privileges they would tend to receive from states. 286 Scalia’s overall point with regard to corporate personhood was that, because corporations were so instrumental in U.S. development – and because there were so many of them – the Framers could not have intended to deny them speech rights without being explicit about it. In response to Stevens’ contention that there was no evidence that the Framers intended to protect corporations via the First Amendment,

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285 Ibid., Stevens 29.
286 Ibid., Scalia 3. Before and during the Founding, incorporation could only be achieved by (1) attaining permission from the state legislature and (2) demonstrating to the legislature that corporate activities were in the public interest. Additionally, here, Scalia writes that, although the Founders may have not liked corporations during the Founding, they would certainly approve of them today.
Scalia asked what evidence exists that corporations were not intended such protection. 287

2. Quid Pro Quo Corruption and its Appearance

To sum up the Court's position on corporate speech, Kennedy reiterated that the First Amendment protects political expression, and that the Citizens United organization was attempting to express itself. The blackout on corporate expenditures was thus a ban on speech that the government must have a compelling interest in order to justify. 288 However, even when the government has such a compelling interest, it may not take action that discriminates or favors certain viewpoints, content, or speakers. 289 Kennedy distinguished “a narrow class of speech restrictions” on the basis that they “were based on an interest in allowing governmental entities to perform their functions.” 290 Otherwise, “[t]he First Amendment protects speech and speaker, and the ideas that flow from each.” 291 In this case, the government did not provide a compelling justification for singling out corporations as speakers; hence, the blackout facially violated the First Amendment.

To construct the Court's argument, Kennedy reiterated the legal history of campaign finance, focusing on the rules the Court set in Buckley v. Valeo. In Buckley, the Court upheld the FECA’s ban on contributions to individual candidates, recognizing that a “sufficiently important” governmental interest in "the prevention of
corruption and the appearance of corruption” was enough to support limits on contributions; this later became known to reformers as the anticorruption rationale. However, because the risk of quid pro quo corruption does not extend to independent expenditures, Kennedy argued, the government did not have such an interest with regard to the BCRA’s blackout. Kennedy noted that the Court did not rule on corporate and union expenditures in Buckley.

Justice Kennedy emphasized that Buckley’s holding used the “quid pro quo” corruption requirement specifically, i.e., “in order to ensure against the reality or appearance of corruption.” This "anticorruption," according to Kennedy, was the Court's sole rationale behind allowing restrictions on campaign contributions. Kennedy noted that the Buckley Court “did not extend this rationale to independent expenditures.” He further emphasized that Buckley’s establishment of a sufficiently important governmental interest in controlling direct contributions should only apply to quid pro quo corruption.

Moreover, relying upon the extensive record from McConnell v. FEC – over 100,000 pages – Kennedy argued that the appellate judge’s statement that there were no “direct examples of votes being exchanged . . . for expenditures” proves that there is no quid pro quo interest in corruption vis-à-vis independent expenditures. Thus, Kennedy emphasized as a matter of law that independent expenditures do not give

292 Kennedy 41.
293 Kennedy 41.
294 Kennedy 43.
rise to quid-pro-quo corruption or the appearance thereof. Consequently, evidence of quid pro quo corruption could not be used to the overcome First Amendment concerns.\textsuperscript{296}

Responding to Kennedy, Stevens' critique of the majority's dispensation and narrowing of the anticorruption rationale provided his strongest argument in favor of upholding the corporate blackout. He took Kennedy to task over his argument that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to quid pro quo corruption,"\textsuperscript{297} arguing that McConnell explicitly rejected this premise. Moreover, Stevens argued that Kennedy's "crabbed view of corruption . . . does not accord with the record Congress developed in passing the BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs – and which amply supported Congress' determination to target a limited set of especially destructive practices."\textsuperscript{298} And finally:

Corruption operates along a spectrum, and the majority's apparent belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf.\textsuperscript{299}

3. \textit{Stare Decisis and the Inadequacy of Political Equality (Antidistortion)}

\textsuperscript{296} This hardly means, however, that quid-pro-corruption cannot be stopped. The federal government has bribery statutes designed for such prosecutions.
\textsuperscript{297} McConnell 43.
\textsuperscript{298} Stevens 56-57.
\textsuperscript{299} Ibid.
Termed the "antidistortion" rationale, the government arguably has an interest in prevented moneyed voices from having more "volume" than less moneyed opponents. Such volume could effectively drown out opposing voices, hindering democratic debate. Because this rationale advocates for a relative equality of voice, election law scholar Richard Hasen has additionally termed it the "political equality" rationale. From this standpoint, the Court rejected political equality as an interest strong enough to outweigh the importance of corporate spending in elections. But here, the Court's majority focused on how such a rationale fit into precedent. The majority's biggest problem regarding the antidistortion precedents was *Austin v. Michigan Chamber of Commerce*.\(^{300}\) Kennedy's *Citizens United* opinion argued that stare decisis negates the antidistortion rationale, and that the single use of it in *Austin* is not enough to discount other decisions – like *Buckley* – that specifically said it was not an adequate argument to justify First Amendment intrusions; only the anticorruption rationale had such power.

While the Court in *Citizens United* could fairly easily discard McConnell's approval of the corporate blackout as simply a Court majority that had just barely gotten it wrong by one vote, *Austin's* use of the antidistortion rationale was more formally problematic. In *Austin*, speaking for the Court, Justice Thurgood Marshall upheld a Michigan state law that was virtually identical to the blackout provision struck in *Citizens United*. The rule in question prohibited corporations (except for media) from making independent expenditures from general treasury

funds for candidate elections; corporations must use a segregated fund if they wanted to participate in elections. Justice Marshall explicitly stated that the government has an interest in political equality; in other words, the government has a compelling interest in the equalization of the voice to justify First Amendment intrusions, and the blackout rule was narrowly tailored to address this interest. Additionally, the Court ruled that the attempt to equalize the voice did not violate the Fourteenth Amendment's Equal Protection clause.

So, if *McConnell* had upheld the identical BCRA rule before *Citizens United*, and *Austin* had upheld an almost identical rule in 1990, how could Kennedy get around these two cases and still maintain the appearance of consistency? Overruling cases is a last result for courts, as judges tend to treat the law as "real," meaning that, if judges get it wrong, it is their fault for inaccurately seeing what the law really is.\(^3\) But Kennedy did not attempt to present *Austin* or *McConnell* as consistent; he wrote that they were wrongly decided.\(^4\) Therefore, in *Citizens United*, Kennedy's majority discarded *Austin* as an "outlier" from the rest of the *Buckley* regime, a change in the law inconsistent with the campaign finance cases that came both before and after *Austin*. Citing his own dissent in *Austin*, Kennedy wrote that the Court there upheld a "direct restriction on the independent expenditures of funds for political speech for

\(^{301}\) Recall my discussion in Chapter Two on Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*. The myth of rights was born of the idea that law was something mystical and "real" in the first place.

\(^{302}\) The Court solely reversed the portion of *Austin" inconsistent"* with *Citizens United* – the constitutional validity of the antidistortion rationale.
He accused the Austin majority of creating the “antidistortion interest” in order to get around the precedents of Buckley, which had explicitly rejected this interest, and First National Bank of Boston v. Bellotti, where the Court had explicitly protected corporate political expression via the First Amendment. So, with regard to antidistortion, Kennedy defined the Court’s precedential dilemma here as determining the outcome of a conflict between a pre- vs. post-Austin line of reasoning. “No case before Austin had held that Congress could prohibit independent expenditures based on the speaker’s corporate identity.”

Stevens, on the other hand, attempted to bring Austin into line with stare decisis. He did so by arguing that antidistortion was best seen alongside anticorruption and shareholder protection, providing mutually constitutive and interrelated rationales. Seen in this light, Austin was not an outlier at all, but part of a larger corpus on the constitutional law of campaign finance. Although veiled, Stevens appreciated the competing interests between voices, as well as the relationships between money, elections, and their resulting policies. When discussing anticorruption, he connected the high volume of moneyed voices with (1) influence on voters via advertising; (2) influence on elected officials and parties, who know exactly who is spending money on their behalf; (3) the increase in access to elected officials who are aware of those spending money on their behalf; (4) the potential for quid pro quos between donors and elected officials, due to increases in access; (5) the corporate motive to spend

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303 Kennedy 31 quoting 494 U.S., at 695, emphasis added.
304 Kennedy 31.
305 Kennedy 32.
306 Kennedy 32.
money in the aforementioned ways, as doing so could be in the interests of the business. According to Stevens, this corporate motive could bring even more big money into the system, drowning out less-moneyed voices, influencing voters, politicians, and policy.

4. Shareholder Protection

As reviewed in Chapter Three, the shareholder protection rationale helped to pass 1907's Tillman Act. The idea was that a corporation's state charter constitutes the requisite "state action" necessary to raise a First Amendment claim. This is partially a historical argument, as the first public corporations were municipal corporations, i.e., cities, and the first private corporations required specific grants of charters from the state legislators; private corporations had to demonstrate to the satisfaction of lawmakers that the company would operate in the public interest. Courts have consistently rejected this "state action" argument for shareholder protection, yet it still remains debated – as well as advocated for – in law review articles.

If there was state action, then the shareholders could argue that any use of funds for political purposes was a violation of the First Amendment principle of freedom not to speak,\textsuperscript{307} which is exactly what the First National Bank of Boston did unsuccessfully in \textit{Bellotti}. This argument has been consistently rejected as well, as shareholders can respond by (1) selling their shares or (2) calling a shareholder vote to determine democratically (at least by the number of shares) on whether or not to

\textsuperscript{307} The lead case on "freedom not to speak" is \textit{Boy Scouts of America v. Dale}, 530 U.S. 240 (2000), where the Court ruled that, under the First Amendment, the Boy Scouts cannot be compelled to obey an anti-discrimination statute that barred businesses from discriminating on – amongst other things – the basis of the sexual orientation of its members.
pursue the policy.\textsuperscript{308} The majority in \textit{Citizens United} quickly dispensed with the shareholder protection rationale.

\textbf{5. The (Almost) Universal Support for Disclosure Mandates}

The one area of relative agreement on the Court throughout its history from \textit{Buckley} onward is that of disclosure. Only Justice Thomas opposed the disclosure provision of the BCRA, arguing that public disclosure can chill the speech of speakers who are communicating unpopular ideas. For Thomas, liberty is so primary that it protects the \textit{anonymous} right to free speech. To be fair, Thomas’s primary concern regards the safety of persons who take unpopular positions.\textsuperscript{309} Additionally, he expressed concern about potential blackmail as a result of such forced disclosures.\textsuperscript{310} Such fear of expression – he argued – has a “chilling effect” on free speech, as those who wish to express themselves may decline to do so due to fear of retaliation, either by activist groups or even by incumbent representatives themselves.\textsuperscript{311}

\textbf{III. Liberty and Equality in \textit{Citizens United}}

As discussed in Chapter Three, the switch from Justices Rehnquist and O'Connor to Justices Alito and Roberts moved the Court towards a jurisprudence opposing campaign finance reform. Rehnquist had generally opposed reform measures, voting with the libertarian majority in \textit{McConnell} that struck the BCRA
provision banning minors from making contributions (§318), and with the dissenters in opposing its ban on soft money (Title I) and its corporate/union blackout provision (Title II). O'Connor swung both ways as the pivotal vote in upholding the soft money ban and blackout provision while joining with the libertarians in striking the minors' ban. O'Connor co-authored McConnell's majority opinion on the soft money and blackout rules with Stevens, but joined Rehnquist's majority opinion on the minors' provision. After the membership change, in Citizens United, Roberts joined Kennedy's majority as well as wrote his own concurrence. Alito joined Kennedy's majority as well as Roberts' and Scalia's concurrences. Using these decisions, we can see neo-liberty's influence on both libertarians and egalitarians. Of the four paradigms describing the constitutional relationship between liberty and equality, positive equality – which would place campaign finance outside of the First Amendment completely via the doctrine that money is not speech – is all but ignored; neo-liberty, egalitarian liberty, and ultimately, liberty vs. equality, are all represented. Kennedy, Scalia, Roberts, and Thomas clearly demonstrate their neo-libertarian principles; this is no surprise. However, Justice Stevens does not stray far – if at all – from egalitarian liberty in his decision; his decision almost seems apologetic, given the way he handled the antidistortion interest, which Stevens "orphaned," according to Richard Hasen. However, we can also see Stevens' lack of gusto for positive equality as being partially the result of the pervasive influence of legalism.

The Neo-Libertarian Bias of the Majority

312 Hasen, "Citizens United and the Orphaned Antidistortion Rationale."
As a whole, Kennedy – representing Scalia, Roberts, Alito, and Thomas in addition to himself – imposed a radical vision of the First Amendment upon campaign finance, one that stands firmly within the libertarian tradition. Together, the majority supported political expression to such an extent that they were willing to shatter the Buckley regime, which allowed corporations and unions to participate in elections through their political action committees [PACs]. This old regime had approved the FECA's PAC system, allowing for the first legal means of corporate election participation since the Tillman Act. The old regime even protected shareholder interests by requiring corporate boards to set up these segregated funds if they wanted to participate, despite the Court's refusal to use the shareholder protection rationale as any legal justification for corporate rules. The fact that corporations could "speak" only in this limited fashion for the purpose of protecting the democratic process did not provide sufficient political liberty for the majority.

How could such a policy come from the highest court in the United States? Corporations already had a means of participation, one that had not even been legal until 1974's FECA. Yet, after Citizens United, corporations would have unprecedented legal power in elections, able to use PACs, their own general treasury funds, as well as create "SuperPACs" while donors use 501(c)(4) non-profit tax exempt "companies" to hide their identities. Although they still must use the FECA PACs in order to make direct contributions to candidates, big business's options with regard to independent spending have increased drastically. Outside of outright partisanship, how might this move be understood?
Libertarians fear government tyranny in an exceptional way, although this fear does not extend to the private sector. In their view, tyranny begets more tyranny; if any quarter is given, then tyranny will snowball into totalitarianism. This fear is central to neo-libertarians, who often rely on slippery slope arguments to strike what they frame as "government intervention." Although this slippery slope – or "parade of horrible possibilities" – argument is a logical fallacy, it is often accepted in the legal community, used by those of any ideology when it serves their purposes. However, it has a special significance for an ideology based in a fear of tyranny. In fact, neo-libertarians often use language claiming that policy has already reached the bottom of the slope; however, where they ultimately land is speculative at best. For example, in *Citizens United*, Justice Kennedy's majority opinion went so far as to compare the blackout period to "censorship" and "thought control":

> When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she cannot hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.\(^{313}\)

Writing separately while joining Kennedy's decision, Roberts – who Alito joined – also framed the debate in terms of “censorship”\(^{314}\) and the slippery slope. He based his primary argument on a hypothetical: “The Government . . . asks us to embrace a theory of the First Amendment that *would* allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually

\(^{313}\) Kennedy 40.

\(^{314}\) Roberts 1.
any other medium that corporations and unions might find useful in expressing their views on matters of public concern.”

Roberts’ parade of horrible possibilities continued:

Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations – as the major ones always have been. First Amendment rights could be [emphasis added] confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.

Although solely speculative, the libertarian fear provided substantial ammunition for the majority position. It is worth mentioning that the fear of what might be possible fits well with the neo-libertarian ideology, where the answer to societal problems is essentially "anything but tax increases and government action."

_Prior Restraints and Political Expression_

Continuing its constitutionalism of fear, the Court majority analogized the corporate blackout with one of the most offensive means of denying First Amendment protected speech: the "prior restraint." 

A prior restraint occurs when the government prohibits speech before it has been communicated or expressed; the government can only constitutionally punish speech after it has been expressed. The

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315 Ibid.
316 Roberts 1-2.
317 According to Black's Law Dictionary, a prior restraint is "a governmental restriction on speech or publication before its actual expression." See _New York Times v. U.S._ (1971) – commonly known as the Pentagon Papers case – where the Court ruled that the government could not preemptively ban the _Times and Washington Post_ from publishing articles based on classified documents. In ruling for the newspapers, the Court stated that "[a]ny system of prior restraints [carries] a heavy burden against its constitutionality." _New York Times v. United States_, 403 U.S. 713 (1971).
most famous prior restraint case was *New York Times v. United States*,\(^{318}\) where the Court ruled that the government could not prohibit journalists from publishing the Pentagon Papers *before* they were actually published; liability or punishment can only occur after the offensive act has been committed. Using this line of thought, Kennedy framed the FEC’s and D.C. District Court's jurisdiction over the blackout as a prior restraint issue. He argued that FEC enforcement of the blackout period was the functional equivalency of a prior restraint given that, although speakers “are not compelled by law to seek an advisory opinion from the FEC before speech takes place . . . a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak,”\(^{319}\) which is exactly what Citizens United did. Because of the potential for criminal liability, as well as the rule's general deference to the decisions of administrative agencies, Kennedy reasoned that the blackout period placed a *chilling effect* on freedom of expression,\(^{320}\) another classic use of the First Amendment used to strike government action:

If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the [long] test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.\(^{321}\)

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\(^{318}\) 403 U.S. 713 (1971).
\(^{319}\) Kennedy 18.
\(^{320}\) Kennedy 18-19.
\(^{321}\) Kennedy 19.
Note that, once again, this potential for oppressed liberty reflects the neo-libertarian constitution of fear.

Additionally, Kennedy’s majority opinion in *Citizens United* framed the blackout rule in terms of not merely criminal, but *economic*, punishment. The blackout provision is objectionable because its criminal penalties subject defendants to the loss of personal liberty as well as loss of *property* in the form of fines. This is especially important when considering the majority as a modern-day example of neo-liberty – *originalist* liberty – in action, inextricably tying freedom to personal liberty and property. Without economic liberty vis-à-vis property rights, there cannot be personal liberty under this rubric; both kinds of rights are required for the requisite freedom from government interference in individual lives. Additionally, Kennedy emphasized that the First Amendment protects the “marketplace” of ideas. This connection between economic and political liberty is crucial to not merely the structure the decision; it provides an example of the trappings of legalism, the ideology imposed upon U.S. law students, lawyers, and judges that traps them in a rights-based mentality, practiced in an adversarial court system that reflects libertarian values. When interpreting the Constitution under the rubric of original

323 This is derived Justice Oliver Wendall Holmes’s famous dissent in *Abrams v. U.S.* (1919, 250 U.S. 616) when he used the market competition metaphor to emphasize the importance of government noninterference in political debate.
324 For a discussion on legalism and the court system as a reflection of liberalism, see Chapter Two. “Legalism” was coined by Judith Shklar Shklar, *Legalism*. It was further developed in Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*. 

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intent, the Justices are forced to contend with the Framers' presumption of equality, and the intent to limit government power in the name of liberty; legal syllogism and culture practically guarantees an analysis to proceed in this manner, whether or not it is truly genuine, or merely payment of lip service to achieve a certain result. Egalitarians can and do find ways around this, but the fact that it a structural obstacle in the first place denotes the limits of the legal mindset.

Moving beyond Kennedy's opinion, Justices Scalia and Thomas provided the most radical neo-libertarian visions on the Court. Unequivocally favoring notions of neo-liberty over egalitarianism, Justice Scalia exclaimed that all speech is desirable, as it can only help – rather than hinder – political discourse.\textsuperscript{325} The liberty of the First Amendment is the end result here for Scalia; the interest it serves is speech itself. However, ideationally, Justice Thomas's dissent provides the most extreme example of a neo-liberty-centric jurisprudence, as the lone dissenter with regard to the disclosure, disclaimer, and reporting requirements. For Thomas, liberty is so primary that it protects the \textit{anonymous} right to free speech. Thomas's primary concern regards the safety of persons who take unpopular positions.\textsuperscript{326} Additionally, he is concerned about potential blackmail as a result of such forced disclosures.\textsuperscript{327} Such fear of expression has a “chilling effect” on free speech, as those who wish to express themselves may decline to do so due to fear of retaliation, either by activist groups or

\textsuperscript{325} Ibid., 9.
\textsuperscript{326} Ibid., \textit{Thomas dissenting} at 3.
\textsuperscript{327} Ibid., 4.
even by incumbent representatives themselves.\textsuperscript{328} To be fair, in election law circles, there is a debate regarding the extent to which the First Amendment should impact disclosure rules, especially when trying to attain bipartisan compromises.\textsuperscript{329}

However, to Thomas’s credit, unlike his fellow libertarians, he did not make his arguments via hypotheticals or the parade of horribles as did his colleagues; he referenced real-life events, primarily the retaliation by California Proposition 8 opponents against its supporters. Proposition 8 opponents had used public disclosure sources to identify the supporting donors targeted for retaliation, which included the damaging and defacement of property.\textsuperscript{330} Although it might be distressing to some that Thomas’s concern seemed to regard the rights of “gay bashers,” he evoked classic concerns with regard to liberty and democratic processes, namely the notion that all political speech should be protected, especially that which is abhorrent.\textsuperscript{331} Like his libertarian colleagues, Thomas privileges the voice above other election values, even if the result is to outweigh the vote. However, as the sole opponent of

\textsuperscript{328} Ibid., 4-5.
\textsuperscript{329} See Cain, "Is Dependence Corruption the Solution to America’s Campaign Finance Problems?." In this piece, Cain addresses the concerns of libertarians that full disclosure will chill the expression of unpopular ideas. Asserting that partisan disagreements demand compromise on disclosure, Cain advocated a theory of "partial disclosure," whereby reformers would concede donor anonymity in exchange for donating limited amounts, that would be recorded via "census-like" categories. He introduced this theory in Bruce E Cain, "Shade from the Glare: The Case for Semi-Disclosure," \textit{Cato Unbound} (2010).
\textsuperscript{330} Ibid, at 3.
\textsuperscript{331} Unfortunately, Thomas does not decry the bigotry of the Proposition 8 supporters, and his lack of utterance here might be seen as showing sympathy towards anti-gay-rights forces. Generally, when protecting unpopular speech, judges emphasize that, although the expression itself is despicable, we must protect horrible ideas in order to ensure that "good" speech is protected as well. The Court made this clear when protecting the rights of the Ku Klux Klan to march on a public street in the principle case on inciting violence, \textit{Brandenburg v. OH}, 395 U.S. 444 (1969).
disclosure, Thomas represented the most radical libertarian vision on the Roberts Court in *Citizens United*.

*Justice Stevens and the Neo-libertarian Influence on the Egalitarian Wing*

Justice Stevens delivered the more egalitarian decision, but he stopped short of relying on the positive equality rationale driving Justice Marshall's decision in *Austin*. His decision, although based in egalitarian liberty jurisprudence, demonstrated the neo-libertarian bias – the *legalism* – inherent in legal procedure. Like a good U.S. attorney or judge, Stevens tried to argue his side by relying on two of the three accepted means of constitutional interpretation: original intent and stare decisis. In doing so, Stevens mostly abandoned the antidistortion rationale, attempting to fold it into the anticorruption rationale in a confusing section of his dissent.

Stevens responded to the majority primarily by critiquing Kennedy's diminution of the anticorruption rationale. Here, relying on precedent, Stevens argued that every previous campaign finance decision by the Court has, in some way, relied on the anticorruption rationale to uphold reforms. From *Buckley* to *Bellotti* to *Austin* to *McConnell*, Stevens argued, the Court relied on the *possibility* of quid-pro-quo corruption. Even *Caperton* – a Fourteenth Amendment case – cited the importance of anticorruption. Stevens argued:

> [In *Caperton*, w]e accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of quid pro quo corruption.\footnote{Stevens 68.}

\footnote{The third method is use of the text.}
However, in attempting to protect the blackout period from the First Amendment, he – seemingly, quite intentionally – conflated or folded the antidistortion rationale into the anticorruption rationale:

The majority fails to appreciate that *Austin's* antidistortion rationale is itself an anticorruption rationale . . . tied to the special concerns raised by corporations. Understood properly, "antidistortion" is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an "equalizing" ideal in disguise.\(^{334}\)

Continuing to downplay the importance of the antidistortion rationale, Stevens contested Roberts' and Kennedy's notions that there was even such a thing as an independent antidistortion rationale:

It is fair to say that *Austin* can bear an egalitarian reading, and I have no reason to doubt this characterization of Justice Marshall's beliefs . . . [T]he *Austin* Court expressly declined to rely on a speech-equalization rationale, and we have never understood *Austin* to stand for such a rationale. Whatever his personal views, Justice Marshall simply did not write the opinion that the Chief Justice suggests he did . . ."\(^{335}\)

For reformers, it was bad enough that the government dropped the antidistortion rationale during oral argument; even worse, however, was Justice Stevens' reimagining of *Austin* as an exclusively anticorruption decision. A supposed reformer essentially abandoned the idea that the government has a specific interest in allowing

\(^{334}\) Stevens 74.

\(^{335}\) Stevens 74-75, fn 69. This quote weakens Stevens decision greatly, because it is unquestionably wrong, which is easily discovered by reading Marshall's opinion in *Austin*. 148
less-moneyed voices to have enough of a voice to compete with moneyed voices, instead characterizing louder voices as a thread to the potential of quid pro quo corruption. This constitutes a loss of a constitutional weapon that could – with an egalitarian Court – be used in the future to promote finance rules. Now, if a later Court wants to use the antidistortion rationale, it will have to jump over more rhetorical hurdles in order to remain consistent with precedent. While this certainly can be done, any clear denial of stare decisis will cause a firestorm in legal – especially neo-libertarian – circles.

Yet a careful reading of Stevens' dissent suggests that, if determined to make his case through original intent and stare decisis, he had little choice but to abandon antidistortion. Once Stevens based his argument on original intent and stare decisis, he backed himself into a rhetorical corner; in other words, by using the tools of legalism, he ended up – possibly unintentionally – severely weakening his own position. How could he reconcile the fact that only Austin had truly relied upon the antidistortion (as well as the shareholder protection) rationale? Keep in mind that arguing the consistency of cases that are clearly inconsistent with past precedent is what attorneys and judges are trained to do. Stevens maneuvered through this by essentially merging the antidistortion rationale into the anticorruption rationale, arguing that the distortion of voices in the democratic process led to corruption and the appearance of corruption, contributing to a loss of faith in the democratic process. Although this is a rational analysis, if antidistortion – the representation of political equality in campaign finance – is valued here, Stevens buried it deep.
To be fair, the much larger formalist problem in reviving the antidistortion rationale would be to do it in a way that does not overrule the overruling of past cases. In order to maintain the illusion of the cohesiveness of constitutional law, lawyers and judges will have to come up with a new argument that achieves the same result, perhaps by empowering campaign finance legislation under the Equal Protection clause in order to bring back a political equality interest, thereby potentially avoiding a contest between the First and Fourteenth Amendments.

Alternatively, Richard Hasen has attacked Justice Stevens' portrayal of antidistortion as muddled and conflated with the anticorruption argument. Adding to the problem, according to Hasen, was that then Solicitor General Elena Kagan had already abandoned the "political equality" rationale during oral argument. During an exchange with Chief Justice Roberts, Kagan clearly conceded that the government was not arguing that the "equalization of a speech market" provided the interest necessary to overcome the First Amendment.336 Hasen noted that the majority here "pounced on the government's failure to defend the antidistortion interest,"337 as this exchange led to significant time spent on the proper role of a judge in dealing with attorney arguments – namely, to what extent can a judge use an attorney argument that has since been stipulated by both parties as no longer part of the controversy.338

336 Hasen, "Citizens United and the Orphaned Antidistortion Rationale."
337 Ibid., 996.
338 I have not mentioned this as part of the Citizens United narrative, because it is not related to the larger questions of voice, vote, and liberalism. Nonetheless, the argument between Roberts and Scalia on the one hand, and Stevens on the other, provides an example of the differences on the different roles of judges in the judicial process.
Richard Hasen more directly critiqued Stevens treatment of antidistortion as "imposing real social costs." He cited Justice Ginsberg's general claims on the role of dissents: (1) turn a dissent into a majority opinion later; (2) allow a dissent to influence a future majority opinion; (3) appeal to changed attitudes in the future; (4) attract public attention and, consequently, encourage legislative change. Hasen focused on the fourth, arguing that a stronger dissent would have encouraged more public debate on the issue of campaign finance, influencing change. He argued that "legal advocates with an eye on the courts are forced to discuss their legislative proposals and legal arguments for campaign finance regulations solely in other terms, such as anticorruption." However, antidistortion has rarely been written about in the first place. A Westlaw search on "antidistortion" and "antidistortion" yielded 212 law review articles, 136 of which were written after Citizens United. Almost most of these articles were not directly about antidistortion or political equality, it seems that, if anything, Stevens' decision increased discussion on the topic. To be fair, many of these articles cited Hasen, so perhaps he intervened at the right time to avoid his own prophecy.

By framing his decision as he did, Stevens served the neo-libertarian Court in ways he may not have intended. He essentially buried the antidistortion – the political equality – rationale, while relying almost entirely on his criticism of Kennedy's (mis)application of the anticorruption rationale. And, ultimately, he used more space

340 Ibid.
341 Ibid., 1002.
342 This is based on a Westlaw search from 4-15-15.
to advocate for the shareholder protection rationale than he did political equality. Even as campaign finance reform was being destroyed, the Court's leading egalitarian could not free himself from neo-liberty's logic. Given that he submitted to the notion that the spending of money triggers a First Amendment analysis, Stevens' views stop short of the positive equality model, despite his clear support for reform. He remained mired in the legalism of his profession, appearing bound by stare decisis and the original intent of the constitution. Although clearly at least a decision via the egalitarian liberty paradigm, by not being bold enough to jettison the spending of money from a First Amendment analysis as conduct, not speech. In this sense, libertarianism won over egalitarianism, while the liberal tradition clearly values both.

As Justice Stevens failed to effectively advocate for political equality, the best example of egalitarianism remains Justice Thurgood Marshall's majority opinion in *Austin*, discussed in Chapter Three – namely, the antidistortion rationale that the *Citizens United* majority eliminated from the corpus of constitutional law.

If Justice Marshall's decision accurately represented the reasoning of the Court's majority, *Austin* provides the strongest case for egalitarianism in the history of the Court's campaign finance jurisprudence. For Marshall, the First Amendment allows rules under voice equalization principles, and the Equal Protection clause does not prevent such rules from taking effect. Additionally, by the end of his decision, Marshall had presented a theory of representation fully compatible and consistent with the Warren Court's election law jurisprudence. However, again, all of this no longer has the force of constitutional law.
V. The Broken Campaign Finance Bargain

In addition to providing a neo-libertarian bias towards campaign finance reform, the Court in *Citizens United* broke a delicate bargain between reformers and opponents. This bargain split the difference in *Buckley v. Valeo*’s per curium Opinion, allowing the government more latitude when regulating direct contributions; spending that is independent of the candidate's own campaign organization receives more constitutional protection under this bargain.

Additionally, the bargain maintained the philosophy begun with the Tillman Act, a philosophy reiterated throughout 20th century reform measures: non-natural persons – corporations – can be treated differently from natural persons when regulating campaign finance. As a rule, this distinction had been a part of statutory law since 1907. The original Tillman Act rules can be construed as banning corporations and banks from any campaign spending, although the Act certainly at least banned direct contributions. However, persistent attempts at corporate participation – along with the power of unions through an early version of the political action committee – ultimately contributed to one of the most central bargains of the FECA: corporations *could* participate, so long as they created an organization separate from the business itself, and did not use general treasury funds from the business. Despite the successful attempts by campaign operatives to circumvent FECA rules – attempts that led reformers to attempt to pass new reform legislation in the 1990s – the PAC regime remained central to campaign donations. Congress reaffirmed this system in the BCRA, and the Court in *McConnell* approved it by one vote.
This was a regime that – despite its problems – operated with some clear bright lines as to what was and wasn't allowable under campaign finance law. As political operatives came up with more ways to circumvent the regime, decisions by the FEC and the Court would clarify the rules. However, the persistent use of the First Amendment by litigators continued to allow a space for opponents to whittle away at reform. The proclamation in *Buckley* that the use of money is the functional equivalent of political expression keeps this door open. Still, corporations could unquestionably be subject to more stringent rules than could individuals. The logic behind *Citizens United* shattered this paradigm, placing federal and state rules into doubt, encouraging more anti-reform litigation, and leaving campaign finance attorneys with more doubts about "what the law is" than ever. Five years after *Citizens United*, a new bargain still had not manifested.

**VI. The Broken Election Law Bargain**

Between the voting rights and campaign finance cases, *Citizens United* additionally broke a bargain in election law overall, allowing the corporate voice significant power over the individual vote. As discussed in Chapter Three, the Warren Court of the 1960s constitutionalized the redistricting process, mandating that each vote must count as equally as practicably possible under the mantra, "one person, one vote." Additionally, the Court approved the Voting Rights Act as a valid use of the Fifteenth Amendment proclamation that the right to vote cannot be denied on the basis of race. By doing so, the Court gave its approval to national policies that forced discriminatory districts to get approval from the Justice Department or the DC
District Court in order to make any changes in voting administration. Following the principle that equality not only allows, but *requires* government to take action in order to enforce it, Justice Warren's egalitarian Court elevated not just equality itself, but the power of a vote that could no longer be constitutionally diluted.

However, the power of the individual vote soon was matched by the power of the individual voice. After passing the comprehensive FECA, the Court struck provisions it claimed violated First Amendment Expression and Association. Individuals who wanted to spend money on elections independently of candidate committees were protected by these principles. However, the Court allowed limits on direct contributions to candidates, citing an interest in preventing corruption or the appearance thereof. Although not presented this way, this "split decision" of sorts is a compromise regarding campaign spending itself, limiting one means of expression while allowing another.

Yet the *Buckley* Court – although not directly addressing the issue – was clear that corporations could be held to more stringent regulations than could individuals spending independently of committees. The Court did so implicitly by addressing the abilities of corporations to participate in elections through the FECA's newly created and approved Political Action Committees [PACs]. This was the first time since 1907's Tillman Act that corporations could legally make contributions directly to candidates. This type of participation itself was a bargain between non-participation and full participation in elections – corporations could participate in a certain manner, a manner that easily provided disclosure and, therefore, accountability to election
spending. At this point in time, the individual voice and the individual vote exist on a somewhat equal footing, an indirect bargain between two liberal values that will not likely face off against each other in a court of law, but clearly come together under a unified law of democracy.

Yet, beginning with *FEC v. WRTL* in 2007, the new Roberts Court began to roll back the rules protecting campaign finance. In *WRTL*, the Court did not allow the FEC to apply the BCRA blackout period to WRTL, citing concerns with expression and association. While the Court did not facially strike the provision, it provided a warning to practitioners and reformers that the rules were about to change. To the Court's credit, it was crystal clear that it was ready to facially strike the blackout period, providing Citizens United with the necessary arguments to win.

Therefore, when *Citizens United* struck the blackout rule, it threw the entire regime into disarray, effectively ending it. The clear distinction between corporations and natural persons became blurred, as the Court's reasoning could be construed as mandating that there is no legal distinction at all between the two. Taken to the extreme, for-profit corporations could theoretically avoid the PAC system itself, allowing them to draw on general treasury funds rather than – or in addition to – PAC money. Having both sets of funds at their disposal, big business could conceivably wield a level of electoral power not seen since the corruption of the late 19th and early 20th centuries. This elevation of power gives big business a much louder voice than it had during the *Buckley* regime, as we know that money allows access to
legislators. This allows big business power over the legislative vote as well. Additionally, we know that advertising influences minds and, therefore, voting decisions; louder voices impact the individual vote. *Citizens United* allowed the corporate voice to trounce the individual vote once again, but this time, it was under the auspices of U.S. constitutional law.

This tension became even worse after *Citizens United*. Perhaps unintentional consequences of the Court's decision, one new organization emerged, and another bound itself to this kind of organization: SuperPACs and charitable organizations. Independent expenditure-only committees – commonly known as "SuperPACs" – emerged to allow donors to contribute to organizations solely designed to spend independent money, and not to make any direct contributions to campaigns. Additionally, in order to hide the identity of donors, political operatives began to use charitable organizations to make contributions to SuperPACs. The SuperPAC was the logical response to the new rule that corporations could spend unlimited amounts of general treasury funds on elections spending; it is "independent expenditure-only" because direct contributions can still be regulated. However, because the Court in *Citizens United* left the disclosure mandates untouched, SuperPACs are still required to report their donors and spending to the FEC. However, campaign operatives came up with a way to avoid such disclosure: the use of "501(c)(4)" charitable

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organizations. The BCRA mandates that PACs disclose their donors, and the FEC applied these rules to SuperPACs. However, if a corporation is the donor to the SuperPAC, then only that corporation's name need be disclosed. Therefore, in order to remain anonymous to the FEC, a donor can create a charitable organization to make donations to SuperPACs, organizations with any fictitious business name they like. If Herbert Alexander was correct that disclosure is the cornerstone of campaign finance reform, then the building might be on the cusp of collapse.

**Conclusion**

If there was ever a tide towards campaign finance reform, the Court effectively ended it in *Citizens United*. And if 1907's Tillman Act is considered as the inception of legislative campaign finance reform, then *Citizens United* must surely represent its demise; after all, with the exception of disclosure, the Court majority systematically rejected every legislative rationale for campaign finance reform put forth since Tillman – anticorruption, antidistortion, and shareholder protection were all explicitly rejected as rationales for the blackout rule by the Court majority. *Citizens United* was, quite simply, the most important and pivotal campaign finance case to ever come before the Court; it offers a bookend for *Buckley v. Valeo*, and its significance as an event cannot be understated.

Whether or not one accepts my argument that *Citizens United* exacerbated voice-vote tensions initially manifested in *Buckley v. Valeo*, *Citizens United*.

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344 "501(c)(4)" is a reference to the provision in the tax code allowing charitable organizations to have tax-free status.

constituted a change in the basic paradigm of constitutional election law. As a consequence of *Citizens United*, any strict dichotomy between individuals and non-natural entities was shattered; legislators could no longer simply rely on the notion that rules regulating corporate election participation would be held to a different First Amendment standard than would rules regulating individual persons. This had been a premise of campaign finance reform since the Court first approved much of the reasoning behind the FECA, and once again when it narrowly approved the BCRA.

Additionally, *Citizens United* demonstrates that U.S. campaign finance reform is a case of the irony of Congressional and Court intervention in solving a policy dilemma. Both the FECA and *Buckley* enabled corporations to participate in politics legally through a new, regulated PAC system. If *Citizens United* potentially provides corporations the same First Amendment protections accorded individuals, then the entire system designed to *limit* the power of big business has now been used – through the power of the Court and its decision to constitutionalize the issue – to *increase* corporate power relative to individual power.

Ultimately, none of the decisions rendered in *Citizens United* articulate a palatable theory of democratic representation for advocates of political equality. Hiding behind Freedom of Expression – which includes expressive association – the majority of the *Citizens United* Court put forth the position that corporate actors should have the same speech rights as do living, breathing human beings. And, to diminish egalitarian principles further, the dissenters seemed unable to articulate the notion that political equality is primary to a government and society to run fairly.
Exceptionalist neo-liberty won the day on the Court, narrowing the legal options available to reformers. If it was previously not the case, effective 2010, neo-liberty far outweighed political equality on the U.S. Supreme Court.

Additionally, *Citizens United* enabled a change of the basic structure of campaign finance reform in the U.S., effectively ending the first campaign finance regime as reflected by *Buckley* and the FECA. 346 By changing the First Amendment's application to corporations in elections, the Court enabled a new regulatory structure by which (1) independent expenditure-only committees ("SuperPACs") could legally raise and spend as much money as they are able for the purpose of uncoordinated campaign spending; (2) disclosure laws could be avoided by first creating a "shadow" 501(c)(4) corporation and then only disclosing the name of the corporation – rather than the names of the shareholders – when donating to the desired SuperPAC. The Court, of course, was not solely responsible for these changes, which required the preparation of campaign finance attorneys. The FEC approved the creation of independent expenditure-only committees as a means to keep election activity under their regulatory framework, namely to maintain disclosure requirements. 347 However, as of early 2015, the FEC has as yet been unable to mandate disclosure of the 501(c)(4) donors, thus thwarting the long-standing and almost universally-accepted

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346 See Chapter Two.
347 *Speechnow v. FEC*, No. 08-5223, D.C. Cir. (2010).
disclosure requirement. Again, if disclosure is truly the cornerstone of campaign
finance reform, reformers must be prepared for this next battleground.

But, in order to attain the reform that egalitarians want, they must overcome the
exceptional view of liberty that neo-libertarians advocate, a form of liberty reified by
the legalism promoted in law schools, impacting egalitarians as well. This exceptional
vision of liberty stands above American liberalism's other pillars of equality and
fairness, ultimately allowing the Court to treat political equality as barely a blip –
through the Warren Court of the 1960s – in the Court's 20th century election law
jurisprudence. In fact, Kennedy spent more time attempting to discount the
antidistortion rationale than Stevens did arguing for it. However, the fact that the four
dissenters – speaking through Stevens' one voice – all but abandoned the primary
ideological driver for reform speaks volumes about the Court, legal establishment,
and American liberalism's built-in bias towards freedom from governmental
intervention.

There is hope, however, for reformers: political equality can legitimately be
resurrected at almost any time, as it now exists in the legal ether. Stevens could have
strengthened this rationale, but chose not to do so, weakening the chances of it
happening – as a rhetorical matter, the Court would have to overturn an already-
overturned Austin. More likely, the groundwork would be laid first, i.e., a dissent that
reaches for antidistortion. Thus, any judicial hopes for defending reform measures
will most likely exist – if ever – many years beyond Citizens United. If egalitarian

348 Alexander, Financing Politics : Money, Elections, and Political Reform, 164.
Voters truly want societal reform, they will have to behave as their libertarian counterparts, and use their skills to raise as much money as they can to speak as loudly as possible.
Chapter Five

Canada's Egalitarian Election Law and the Liberal Conundrum of Campaign Finance

Liberty and equality are hallmarks of liberal nations, all of which – at least legally and rhetorically, if not in reality – explicitly provide for freedom of political expression and equality of voting power. Yet none of these nations has a high court that has placed voice and vote values into conflict in the manner of the U.S. Supreme Court, using constitutional law to give corporations and wealthy individuals more power over policy. This difference can be partially attributed to the basic nature of a nation's constitution, and the values that reflect the supreme laws in it. So, although we may not be able to speculate on the road not taken in the U.S., we can see – through other nations – that the financing of elections need not generate a real-life conflict between liberal constitutional values. The theoretical internal conflict that can produce the voice-vote and liberty-equality problems is reliant on constitutional interpretations that greatly limit the powers of government in favor of individual rights.

As I've demonstrated in Chapters Two through Four, the power of the voice over the vote in the U.S. is a consequence of clashing values within the liberal tradition, the conflict between exceptional libertarian values and egalitarianism, as well as the larger culture of legalism that has been institutionalized in the U.S. legal system. For reform advocates, there is little sense in talking of the road not taken with campaign finance in front of the U.S. Supreme Court, as neo-liberty has dominated
over egalitarian liberty and positive equality since 1976's *Buckley v. Valeo*.

Throughout the course of the Court's campaign finance jurisprudence Justice Thurgood Marshall was the only member to advocate for positive equality,\(^{349}\) and even Justice Stevens could barely move past egalitarian liberty.\(^{350}\) And in the larger world of election law, only the 1960s Warren Court has provided a glimpse of egalitarian jurisprudence. This clash between liberty and equality in the U.S. has clearly not been an even contest.

But what if it *had* been an even contest? What would such jurisprudence look like? Are there structures – legal, political, cultural – that are necessary and/or advantageous in achieving an egalitarian jurisprudence of election law? What would "the road not taken" look like if the U.S. Supreme Court valued equality as much as liberty, the individual vote as much as the corporate voice? Of the world's liberal democracies, Canada's Supreme Court is the only high court to provide a positive equality example of an egalitarian campaign finance jurisprudence close to Thurgood Marshall's.

This chapter will first explain the advantages and limits that various constitutional structures provide for reform measures, namely in the area of campaign finance. The structures can be broken down into two models: the libertarian social contract model and the egalitarian human rights model. Depending on whether or not the nation has a libertarian or egalitarian high court, a four-part typology can be


Second, I will apply the interpretation of campaign finance measures in nations that fit the models, focusing on Japan and Canada, and contrasting them with the U.S. Court. Both nations face the liberal dilemma of freedom of expression vs. the right to vote, yet these high courts have yielded different results; however, what's most striking here are the similarities in arguments presented by court majorities and minorities.

A full consideration of how comparable western nations have handled voice-vote dilemmas could fill at least one book; as such, this chapter is designed as one part comparative, and one part introduction to the comparative constitutionalisms of election law across the world. I will not compare U.S. legalism to training in other nations' law schools, although such research would shed further light on their legal cultures and institutions. What is important here is to see how other liberal judges can handle comparable liberal problems.

I. Models of Liberal Constitutionalism

Black’s Law Dictionary defines a constitution as "[t]he fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and liberties." Constitutions can be flexible – allowing changes through normal legislative or democratic procedures – or rigid – where only "special amending procedures" can change it. They can be written – as with the U.S.

351 For a visual depiction, see Figure A at the end of this chapter, as well as Appendix D.
352 Black's Law Dictionary is accepted and citable in all U.S. and state courts.
tradition – or unwritten, like the British Magna Carta tradition.\textsuperscript{354} Regardless of the tradition, constitutions generally invoke notions of "higher law," embodying rules that are so important they are seen as fundamental, or at least more fundamental than rules that have resulted from "normal" legislative politics.\textsuperscript{355}

With regard to the relationship between governmental powers and the rights of the people, two basic models provide the paradigms for modern constitutionalism in advanced Western democracies: the libertarian social contract model and the egalitarian human rights model. Fundamentally, these models consider constitutionalism on two basic levels: founding constitutionalism and judicially-interpreted constitutionalism. This creates four basic theoretical possibilities: (1) a libertarian constitution leads to a libertarian-dominant\textsuperscript{356} high court; (2) an egalitarian constitution leads to an egalitarian-dominant high court; (3) a libertarian constitution leads to an egalitarian-dominant high court; (4) an egalitarian constitution leads to a libertarian-dominant high court (see Figure A). All four paradigms are represented in this chapter.

The libertarian model focuses on the notion that government is a fully realized social contract, with government having solely the powers granted to it, while all other powers and freedoms are left to states and the people to determine. It finds its inspiration in the social contract theories of John Locke, Thomas Hobbes, and Jean-

\textsuperscript{354} Ibid.
\textsuperscript{355} I'm borrowing the notion of "higher law" vs. "normal politics" from Bruce Ackerman's description of constitutional moments. Ackerman, \textit{We the People}.
\textsuperscript{356} I use the term "dominant" because there are almost always disagreements amongst judges on high courts. Similar to the U.S., high court judges disagree as to how to apply liberal values to decisions.
Jacque Rousseau, where the existence of government is "legitimized" by the idea that citizens have freely entered into a contract with other individuals to forfeit certain "natural" rights for security as well as for protection of property. The libertarian constitution will specifically enumerate the powers of government, out of fear that government can become large and tyrannical. It presumes that all are "created equal," and therefore the primary concern is to protect individual liberty against government tyranny. When a high court interprets its constitution in this manner, it is following the neo-liberty paradigm of jurisprudence.

As can be seen by reading the text of the Charter of Fundamental Rights of the European Union or the Canadian Charter of Rights and Freedoms, the human rights model expands its concerns beyond liberty to "rights" and "freedoms," terms that can cover both negative and positive rights and liberties. Most democracies comparable to the U.S. – most notably, those with a separation of powers, an independent judiciary, and judicial review – have produced founding documents that follow the human rights model, despite U.S. influence on democratic constitutionalism worldwide. Western European governments tend to be structured around the U.K.'s parliamentary model, with the addition of an independent judiciary. Moreover, while the U.S. Constitution puts a premium on liberty, these younger constitutions follow the human rights model, balancing libertarian with egalitarian principles.

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357 See Chapter Two.
358 The roots of the neo-liberty paradigm are discussed in Chapter Two.
The work on different models of human rights constitutions available has addressed questions of democratic theory and efficacy in Western Europe359 as well as in third world or "less developed" systems.360 Such work considers the powers of the government and rights of the people in these contexts. However, here, I'm trying to make a larger point about the relationship between liberal values, and the drastically different versions of liberalism produced at least partially as a result of these documents. Although rhetorical, legal texts bind judges, simultaneously creating opportunities while constraining others. Ultimately, this leads to less flexibility in systems that might be deemed social contract systems, as opposed to other human rights systems.

There are other aspects worth considering here. Additionally, constitutions themselves vary in their "originalism." Under the social contract model, the founding documents themselves should be considered "original," and all interpretation should come from this original document and/or subsequent high court decision. Founding documents include not merely the texts of the constitutions themselves, but any "founder's" documents that might provide their intent in drafting the various provisions. The U.S. and Japan notably follow such a model. The U.S. Supreme Court renders decisions based on what was written its original Constitution, from

1789 onward, as well as the Federalist papers, which provide clues to original intent; Japan's high court renders decisions based on what was written from its 1946 Constitution and subsequent changes onward. As the U.S. Constitution provides the libertarian model, and Japan's constitution is egalitarian, we can see the social contract at play – at least in terms of judicial review – in either a libertarian or egalitarian constitution.

Some constitutions are not entirely written, and can contain doctrine not explicitly written in anything that constitutes a founding document. We might refer to this as the Magna Carta model, a model that impacts two comparable western nations, the United Kingdom and Canada. Under this model, constitutions are more visibly "living," as such constitutions do not represent a single written document, but a series of developments over time. Such constitutions can consist of multiple written documents, including additions and amendments, as well as civil law traditions. The British and Canadian systems best represent this model: both systems can trace their constitutions back to the Magna Carta of 1215. However, Britain's constitution is unwritten, and Canada's 1989 Charter of Rights and Freedoms has been held to represent a continuing – rather than a founding – development in Canadian constitutional law. The Magna Carta model theoretically allows more room for interpretation by judges, who can use hundreds of years of case law to support their

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361 The Articles of Confederation are not relied upon, as the Constitution of 1789 effectively rendered the Articles moot.
decisions. Similar to the social contract model, this constitution has both libertarian as well as egalitarian options.

In comparing constitutions of comparable nations, three elements immediately stand out: (1) the U.S. Constitution is much shorter than those of other nations; (2) other liberal nations focus on dignity, equality, fairness, freedom, and justice, while the U.S. focuses almost exclusively on liberty and equality; (3) other liberal nations spell out more powers, and delegate specific powers to subdivisions (e.g., states), adding aspirational rights like the right to work or the right to paid vacation. In addition to having to balance competing liberal interests, independent judiciaries of comparable nations are thus provided with more constitutional rules to interpret and apply. The inherent liberal problem regarding campaign finance reform can thus be solved to an extent due to the fact that there are simply more competing constitutional arguments available for interpretation. Unlike the U.S., these courts do not consider cases almost solely under the rubric of freedom of expression; they choose to balance freedom of expression against other forms of the right to be heard, rights that are enumerated in their constitutions. Egalitarian liberals thus have a far stronger opportunity structure in every other liberal nation, assuming that the constitutional

362 These are the chapters of the *Charter of Fundamental Rights and Freedoms of the European Union*.
363 This was discussed in Chapter Two.
364 The right to work under the human rights model means that the government has a duty to ensure full employment. This contrasts with the U.S. "right to work" states, whereby unions are forbidden from the closed shop practice, meaning that workers cannot be compelled to join a union as a condition of employment.
365 Brazil's Constitution has a right to a paid vacation, Title II, Chapter II, Social Rights, Article 7, XVII. Additionally, Italy's Constitution provides a right to work, which exists regardless of actual employment statistics. See Constitution of Italy, Fundamental Principles, Art. IV.
text is taken seriously. Assuming that the high courts can hear such cases, the egalitarian model thus allows constitutions to have more jurisdiction over private individuals, rather than simply over government.

It is important to consider the fact that all of these countries contain competing libertarian and egalitarian values, as well as disagreements amongst court members, academics, and society at large. However, constitutional structure contributes to arguments that ultimately produce each society's dominant values. As I argued in Chapter Two, constitutional structure combined with its resulting libertarian values produced a U.S. bar that – with the exception of the National Lawyers Guild and public interest attorneys – values individual liberty above other values.

The Libertarian Constitution – U.S. Exceptionalism

The U.S. Constitution of 1791 – when the Bill of Rights was ratified – provides the ideal model for a libertarian constitution. The powers of government are provided in the original document from 1789, the constitution's limits being that the federal government theoretically had no more power than what was specifically delineated in the document.\(^{366}\) The Bill of Rights provided more specific restraints on government power – what the government could not do – restraints that would later be referred to as "negative" rights. Perhaps most importantly, the Ninth and Tenth Amendments

\(^{366}\) However, there were Founding debates regarding the scope of governmental power, and whether or not the national government would have merely enumerated powers or powers beyond this. However, as a matter of constitutional syllogism, the U.S. Court has consistently pointed to specific constitutional powers and rights, thus accepting the social contract model despite any Founding debates to the contrary.
proclaimed in essence that all unnamed rights were left to the states as well as "the people," thus fulfilling this libertarian version of the Lockean social contract.

The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments introduced the aspirational notion of equality, empowering the federal government with the positive power to end slavery, enforce Equal Protection and Due Process, as well as to enforce the right to vote for African Americans. Yet the U.S. Supreme Court initially used the negative language of the Fourteenth Amendment to enforce libertarian values, namely the notion that Due Process meant "freedom of contract." However, although equality textually garners as much constitutional support as the Bill of Rights' liberty provisions, the Court would spend most of its years defending libertarian positions, ultimately leading to libertarian vs. egalitarian viewpoints in election law.

*The Egalitarian Constitution – Aspirations Towards Human Rights*

Although the U.S. revolution is often compared to the French Revolution in terms of achieving liberty from tyranny, France's Declaration of the Rights of Man provides a slight contrast with the U.S.'s libertarian Bill of Rights. France's Declaration – like the U.S. – reflects the perceived governmental corruption of the time, and thus contains provisions that provide for limitations on governmental action against the individual: the rights to property, political participation, and the practice

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367 See Chapter Three for a discussion.
368 See *Lochner v. New York* 198 U.S. 45 (1905). This rule was used to strike protective legislation for workers and women, and to strike New Deal programs. The *Lochner* rule was invalidated in *West Coast Hotel v. Parrish* 300 U.S. 379 (1937).
369 Chapters Two, Three, and Four discuss the libertarian biases of U.S. courts in more detail.
of religion. However, it notably limits freedom of expression – speech and press – as those exercising these freedoms "shall be responsible for such abuses of this freedom as shall be defined by law."\(^{370}\) It also limits freedom of speech and religion by allowing prosecutions for when individuals "disturb the public order established by law."

What this demonstrates is that France placed egalitarian balancing measures into its Declaration – it immediately balanced the interests of individual rights against that of society at large, a job that in the U.S. has been left to the Supreme Court through acts of interpretation. Even France's "sacred right"\(^{371}\) to property is can be deprived for a "public necessity." Article 7 protects individuals from being "accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law," yet it also mandates that individuals comply with the law when properly accused. In 1789, France's General Assembly produced a founding document that took its liberalism in a different direction than that of the U.S., providing the basic ammunition for an egalitarian constitution.

Although France's Declaration falls short of modern-day Western European liberalism's egalitarian values of equality, dignity, fairness, freedom, and justice, it is often cited as the first document to explore the realm of human rights. However, the post-World War II landscape provided the conditions necessary for the egalitarian human rights constitution, beginning with the 1945 UN Charter. The Preamble

\(^{370}\) France, The Declaration of the Rights of Man and of the Citizen, Article 11, 1798.

\(^{371}\) Ibid., Art. 17.
explicitly sets out the purpose of the UN: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" as well as to "to promote social progress and better standards of life in larger freedom." Once these ideas take the form of rules in international law, they clash with the notion of state sovereignty. Moreover, when a nation's constitution is based on libertarian principles, absent any treaty, such outside rules exist outside of the nation's social contract. A conflict between international rules and state sovereignty is analogous to the U.S.'s internal competition between principles of liberty and equality.

2000's European Union's Charter of Fundamental Rights notably expanded upon the aforementioned UN values, reflecting 55 years of human rights development. It provides the language necessary for the early 21st-century egalitarian model:

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.372

While still protecting the rights of the individual, the text alone notes a balance between dignity, equality, freedom, security, and justice. Note that dignity is not a directly stated libertarian constitutional value, yet it is emphasized in human rights

documents.\textsuperscript{373} In the EU Charter, dignity is the first provision of the first Chapter:
"Human dignity is inviolable. It must be respected and protected."\textsuperscript{374} The following Article provides for the "right to life"\textsuperscript{375} and prohibits the use of the death penalty.\textsuperscript{376} The differences in the priorities between libertarian and egalitarian constitutions are evident here.

Regarding constitutions themselves, the U.S. and Australia provide examples of the libertarian model; the European Union, UN Charter, Canada, and Japan provide examples of the human rights model. Developing nations overwhelmingly choose the human rights model, as have both Mexico and Brazil. These models find their legal legitimacy in drastically different places, even if both models represent liberal values.

\textbf{II. Judicial Interpretation of the Voice vs. the Vote}

Advanced democratic societies go through many similar growing pains, attempting to balance institutional powers with liberalism's dedication to civil liberty. Similar to the U.S.'s move from the Articles of Confederation's unanimity requirements for constitutional amendments, the EU needed to amend its own unanimity requirements. As is well accepted, the \textit{form} of democratic institutions will impact the type of government and society that results, and in liberalism, this will mean considering the relative power of its founding principles – for the libertarian

\textsuperscript{373} In U.S. constitutional law, "dignity" has been discussed with regard to voting and civil rights, although it was never dispositive in those cases. Justice Kennedy has used the concept of "dignity" in support of same-sex marriage. \textit{Obergefell v. Hodges}, 576 U.S. \text{____} (2015); \textit{U.S. v. Windsor}, 570 U.S. \text{____} (2013); \textit{Planned Parenthood v. Casey}, 505 U.S. 833 (1992).

\textsuperscript{374} Ibid., Chapter 1, Article 1.

\textsuperscript{375} The EU's "right to life" refers to a ban on illegal killings, in contrast to the U.S. notion of the "right to life," which means that one opposes the legality of abortion.

\textsuperscript{376} Ibid., Chapter 1, Article 2.
constituition, liberty and equality; for the egalitarian constitution, dignity, equality, freedom, fairness, and justice.

*Japan – A Human Rights Constitution vs. A Libertarian Court*

Japan illustrates a nation with its own voice and vote problems, despite its fairly egalitarian constitution. Moreover, like the EU, its patterns of institution building are comparable to the problems of the U.S. development of constitutional democracy. However, Japanese constitutionalism – similar to the U.S. – emerged from a former civil law society, transforming into a constitutional democracy mandating the rule of law.\(^{377}\) The limitations on the monarchial power of the Emperor were made clear in the opening Articles, the separation of powers was made clear, and the power of judicial review is explicitly listed.\(^{378}\) However, Japan's high court follows, comparative to the U.S., a much more limited view of judicial review, and provides a model of judicial *restraint*. For example, although the Constitution mandates "equality," the Court has limited its scope to state action, similar to the U.S.\(^{379}\) Moreover, the Court regularly defers to the executive and the legislature,\(^{380}\) with some notable exceptions.

Japan's constitution – influenced by U.S. lawyers – provides a textual example of an egalitarian constitution. It immediately sets out and limits the Emperor's

\(^{377}\) Mark A. Srour, "Restrained Judicial Constitutionalism in Japan: A Reflection of Judicial Culture Rather Than Political Interests."

\(^{378}\) Constitution of Japan, Ch. VI, Art. 81, 1947.

\(^{379}\) Srour, "Restrained Judicial Constitutionalism in Japan: A Reflection of Judicial Culture Rather Than Political Interests."

\(^{380}\) Ibid.
powers,\textsuperscript{381} as well as renounces war,\textsuperscript{382} both understandable given that their constitution was written in 1946 under the guidance of Western – namely U.S. – powers from whom they had just lost a major war. But Chapter III presents a more egalitarian stance, guaranteeing "human rights" to all;\textsuperscript{383} the right to "life, liberty, and the pursuit of happiness";\textsuperscript{384} equality for all and a ban on discrimination based on "race, creed, sex, social status, or family origin";\textsuperscript{385} universal suffrage;\textsuperscript{386} freedom of "thought and conscience"\textsuperscript{387} as well as freedom of assembly, speech, religion, press, as well as freedom from censorship.\textsuperscript{388} Notably, academic freedom is guaranteed,\textsuperscript{389} as is the right to an equal education.\textsuperscript{390} Like many egalitarian constitutions, a right to work is guaranteed,\textsuperscript{391} as is the right to organize.\textsuperscript{392} Japan's constitution also contains similar protections of criminal procedure to the U.S.\textsuperscript{393} In Japan, an acquitted person can sue the state for damages without having to overcome governmental immunity.\textsuperscript{394}

Japan has very few campaign finance rules and – similar to Canada – elections are funded via parties rather than through individual candidates. Notably, Japan is the one other nation in the world whose high court has proclaimed that political donations

\textsuperscript{381} Constitution of Japan, Ch. I.
\textsuperscript{382} Ibid., Ch. II.
\textsuperscript{383} Ibid., Ch. III, Art. 11.
\textsuperscript{384} Ibid., Ch. III, Art. 13.
\textsuperscript{385} Ibid., Ch. III, Art. 14.
\textsuperscript{386} Ibid., Ch. III, Art. 15.
\textsuperscript{387} Ibid., Ch. III, Art. 16.
\textsuperscript{388} Ibid., Ch. III, Arts. 20-21.
\textsuperscript{389} Ibid., Ch. III, Art. 23.
\textsuperscript{390} Ibid., Ch. III, Art. 26.
\textsuperscript{391} Ibid., Ch. III, Art. 27.
\textsuperscript{392} Ibid., Ch. III, Art. 28.
\textsuperscript{393} Ibid., Ch. III, Arts. 31-40.
\textsuperscript{394} Ibid., Ch. III, Art. 40.
cannot be banned on the basis of donor identity, i.e., corporations are people for the purposes of campaign finance, which includes giving money directly to parties. In a case from 1970, Japan's high court stated that corporations have a constitutional right to participate via direct contributions because corporations are made up of people. Also similar to the U.S., the case was brought on the basis of the shareholder protection rationale, the same rationale that has been consistently rejected by the U.S. Court. The rationales for reform in Japan are essentially the same as in the U.S. – the prevention of corruption and its appearance, distortion of voice, and shareholder protection – although its legislature has repeatedly rejected reform attempts. However, as campaign finance reform has not been on Japan's political radar, one cannot say that it constitutes a political problem.

With some clear exceptions, Japan's high court provides a model of relative restraint, as it tends to defer to the executive and the legislature. Perhaps the most popular explanation for this is the notion that judges want promotions – controlled by the legislature – and therefore it stays out of legislative and executive affairs unless called upon to do so. However, the prevalence of judicial restraint in Japan does not preclude the importance of ideas in the judges' decision-making processes. For example, in election law, judges adhere to the equipopulation rule on the basis of the one person one vote theory. However, despite Japan's libertarian court, its high court

396 See Chapter Three for a discussion on shareholder protection.
398 Srour, "Restrained Judicial Constitutionalism in Japan: A Reflection of Judicial Culture Rather Than Political Interests."
has not been called upon to use its freedom of expression provision against its campaign rules, rules which would likely not pass First Amendment scrutiny in the U.S. For example, Japan's rules ban electoral communications via media. Due to Japan's reliance on civil society groups as well as a culture of relative disinterest in formal politics, campaign spending is relatively low.399

While the U.S. Supreme Court has a liberty problem – seen through its elevation of the voice over the vote – Japan's Supreme Court actively deals with its country's equality problem. Similar to the U.S., the constitutional right to an equal vote has been guaranteed by Japan's high court. Moreover, both high courts have derived a constitutional right to an equally-apportioned vote from their constitutions: The U.S. Supreme Court has found textual support for equipopulation in the U.S. House of Representatives via the Article I §2 apportionment clause, as modified by the Fourteenth Amendment; the Court found equipopulation for state legislatures through the Fourteenth Amendment's Equal Protection clause. Similarly, Japan's Court found the equally-weighted vote principle in a number of places: Article 14's proclamation that all people are "equal under the law"; Article 15's guarantee of universal suffrage as well as the power to choose and remove public officials; Article 43's proclamation that both houses of the legislature consist of elected members, "representative of all the people." Notably, Japan's Court often must decide the equipopulation rule

399 Scheiner, Democracy without Competition in Japan : Opposition Failure in a One-Party Dominant State.
alongside its Public Offices Elections Act, which specifically mandates equally proportioned districts.

While Japan's Supreme Court has been quite busy deciding one person one vote cases, the Court has faced very few campaign finance conflicts. And, given the way that Japan's Court decides apportionment cases, we might wonder how a campaign financing case would be resolved. With regard to elections, Japan has an outright ban on contributions before election periods; all money must be raised during the official election campaign. Although disclosure is required from parties who accept donations from corporations, unions, and individuals, the candidates who receive party money need not disclose what they've received. This is one way that businesses have been able to influence politics, as the system is based upon donations to parties, who then distribute the money to individual candidates. Similar to hiding one's identity via a U.S. 501(c)4, a business or individual wanting to donate to a candidate contributes to their party of choice, who then distributes the money to the desired candidate. But Japan has nothing resembling the U.S. Federal Election Commission, lacking a regime able to regulate campaign spending. It is unclear how spending rules would change Japan's political system, which is dominated by civil society organizations

400 See Kawahara v. Dogama (1997) where the Court declared that any ratio beyond 1:4 violates the equipopulation rule. For refusal to invalidate elections despite ratios between 1:2 and 1:6, see Nonoyama v. Dogama (2008), as well as 1994 (Gyo-Tsu) No. 162; 1999 (Gyo-Tsu) No.35, 2003(Gyo-Tsu)No. 24, 2008 (Gyo-Tsu) No. 209, 2010 (Gyo-Tsu) No. 207.
401 See Scheiner, Democracy without Competition in Japan: Opposition Failure in a One-Party Dominant State.
402 Recall that a 501(c)4 is a nonprofit corporation dedicated to the public good. This has become one way that donors can get their money to independent expenditure only commissions (IECs, commonly known as "SuperPACs") anonymously, and the FEC merely requires disclosure of the party giving money to the IEC.
that have been responsible for getting out the vote.\textsuperscript{403} As one party dominates Japanese politics, there seems little incentive to create new election rules; they have a far more pressing equality problem.

Despite the equipopulation and corporate spending decisions by the Japanese high court, the clientelistic relationships based on personal support organizations ultimately govern Japan's elections.\textsuperscript{404} These personal support organizations -- \textit{koenki} -- are hierarchical like U.S. political parties and caucuses; however, these organizations work more like private clubs, where the official at the "top" hosts parties for the \textit{koenki}.\textsuperscript{405} Ethan Schneider compares membership in these organizations to membership in a private club,\textsuperscript{406} where these core supporters "vote and get out the vote" for their candidate.\textsuperscript{407} National politics is thus based on organization and support at the local level.\textsuperscript{408}

One reason why Japan's elected officials are beholden to Personal Support Organizations is because of Japan's fairly stringent campaign financing rules, rules that would likely never pass constitutional muster in the U.S. Japan's legislature limits access to T.V., radio, and print media which, according to Ray Christensen, makes difficult efforts to campaign on "broad based, mass appeals."\textsuperscript{409} This is why

\begin{thebibliography}{9}
\bibitem{403} Scheiner, \textit{Democracy without Competition in Japan: Opposition Failure in a One-Party Dominant State}.
\bibitem{404} Ibid.
\bibitem{405} Ibid.
\bibitem{406} Ibid., 71.
\bibitem{407} Ibid., 138.
\bibitem{408} Ibid., 224.
\end{thebibliography}
candidates must rely on the "organized vote," "mobilizable bases of support at the local level." Because institutions control election spending, Japan provides an example of a society where campaign money itself doesn't seem to matter so much in terms of real political power, given the predominance of Personal Support Organizations. The clientelistic relationship between voters and elected officials has received the brunt of the criticism in Japan, and the legislature debated reforms in the 1990s, but could not eliminate this system.

Yet Japan's high court has explicitly upheld the right of corporations to participate via direct contributions to candidates (although, to be fair, they do not distinguish between the U.S. invention of "contributions" and "expenditures"). However, the Court did not do so under any freedom of expression provision; rather, the Court rejected the shareholder protection rationale, arguing that corporations have a constitutional right to participate because they're made up of people. Taken collectively, the Court's decisions favor a "pluralist democracy," as the Court will generally defer to the other branches. Japan thus presents a nation whose institutions and electoral practices have alleviated the need for massive spending.

Canada – Egalitarian Constitution and an Egalitarian Court

Canada's Constitution is similar to the British Constitution in that it is not compiled into a single founding document, and it can be traced back to the Magna

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411 Ibid., 224.
412 Ibid., 112.
Carta. Canada's written constitutions manifested 115 years apart: 1867 provided the British North American Act of 1867 (the "Constitution Act"), and 1982 provided its Charter of Rights and Freedoms. This latter Charter provides the impetus for a more egalitarian society, following – if not also partly defining – the Human Rights model. It doesn't merely regulate governmental power; it governs the private sector as well. Equality rights – equal protection, equal benefits, and no discrimination – apply to all in Canada, not merely to state action. As Frederick Schauer argues, given that there are two conceptions of democracy – libertarian and egalitarian – Canada and its high court favor egalitarian values.  

The U.S. and Canadian high courts both use freedom of expression principles to measure the constitutionality of campaign finance reform. However, the Canadian Court explicitly endorses the antidistortion rationale that has consistently (with the exception of Austin v. Michigan Chamber of Commerce\textsuperscript{415}) been rejected by the U.S. Court. For the Canadian Court, antidistortion or political equality – an "equal playing field"\textsuperscript{416} – is a perfectly legitimate rationale to overcome freedom of expression concerns. Wayne Batchis argued that this was a later development in Canadian Constitutional Law, as its language regarding expression "reads as if it were borrowed word-for-word from U.S. Supreme Court precedent."\textsuperscript{417} For example, in Canada's

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{415}] 494 U.S. 652 (1990).
\item[\textsuperscript{417}] Wayne Batchis, "Reconciling Campaign Finance Reform with the First Amendment: Looking Both inside and Outside America's Borders," QLR 25 (2006).
\end{enumerate}
\end{footnotesize}
principle campaign finance case, *Attorney General of Canada v. Harper*, the Court noted that political speech "is the single most important and protected type of expression . . . The right of the people to discuss and debate ideas forms the very foundation of democracy." However, the balancing of interests clearly distinguishes Canada's Court's constitutionalism from that of the U.S.

Election law scholars have often debated the influence of U.S. Court decisions on the Canadian high court. For example, Colin Feasby argues that the splintered U.S. *Buckley v. Valeo* decision in effect scared the Canadian high court. Unlike the U.S. Court, Canadian judges could see the conflict between *Buckley's* libertarian principles and its direct collision with the 1960s malapportionment decisions. And, although the Canadian Charter explicitly provides for freedom of expression, its Court ultimately reconciled this decree with the long-standing Canadian tradition of regulating its democracy. According to Feasby, "an egalitarian conception of democracy informed by the ideas of Rawls and other liberal theorists has been adopted by the Supreme Court of Canada under the guise of the elusive idea of 'fairness.'" The Canadian Court's model of campaign finance is thus the antithesis of the U.S. model.

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418 Ibid., quoting *Harper*.
419 Ibid., Colin Feasby, "Libman V. Quebec (Ag) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model" (1999), *McGill LJ* 44.
420 "Libman V. Quebec (Ag) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model" (1999), 7.
422 Feasby, "Libman V. Quebec (Ag) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model" (1999), 8.
As I've argued throughout this work, U.S. First Amendment blinders create an inherent bias towards freedom of expression, reducing political equality to a government interest, rather than an inherent constitutional principle; under such a system, advocates of equality must consider campaign finance under the larger rubric of the right to participate. Canada provides an alternative vision whereby the court majority does not present expression and voting as two as separate issues, but rather approaches election law via a holistic vision of the democratic process. For U.S. reformers, Canada presents the ideal model for campaign financing. However, as I argue in the final section of this chapter, historical and institutional factors likely prevent such a desirable system from coming to fruition in the U.S.

For reformers, the Canadian Supreme Court's constitutional interpretations regarding campaign finance provide an ideal type. Despite a comparable freedom of expression provision, the Canadian Supreme Court has upheld the nation's quite stringent campaign finance rules, partially on the basis of the antidistortion rationale rejected by the U.S. high court. However, Canada's constitutional structure as well as its own campaign finance rules and history differ greatly from the U.S. In 1989, a Canadian government commission on elections determined that promoting fairness in the process, promoting "equality of the vote," as well as protecting the democratic rights of the electorate were the primary concerns in reforming national election laws. But unlike the U.S., Canadian government is structured to allow such moves. In the Canadian Charter of Rights and Freedoms, the right to vote is expressed in

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positive terms: "Every citizen of Canada has the right to vote . . ." rather than the U.S. equality amendments' "No person . . . shall be denied the right to vote . . ." While the Canadian Court must balance "democratic rights" against the "fundamental . . . freedom of . . . expression," reformers in the U.S. must construct a sufficiently important or narrowly tailored compelling governmental interest in order to overcome the right of political "speech" and association. Simply put, the Canadian document is structured to allow reform, whereas the U.S. Constitution is tailor-made to strike government action at will.

This is not to say that the libertarian view is not represented in Canada. After all, the freedom of expression claim was enough to bring campaign finance rules to the Canadian Supreme Court twice, and the Court produced dissents in both cases on freedom of expression grounds. Moreover, the Court struck legislation that banned "third party advertising," spending which would be considered independent expenditures in the U.S. system. However, in Canada, reform legislation has been primarily based upon spending limits for candidates and political parties. Individuals are held to contribution limits, and corporate contributions have been banned since 1908. And like most liberal systems, disclosure of all spending is mandatory.

Similar to the U.S., the Canadian government provides for an independent judiciary with the power of judicial review. In two Supreme Court cases in particular,

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424 Canadian Charter, §3.
the Court majority directly used the notion of equality of voice to uphold legislation.\footnote{426} And, although both cases had their libertarian dissenters, the majority swiftly disposed of the idea that freedom of expression constituted a barrier to reform measures:

If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. To ensure a right of equal participation in democratic government, laws limited spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does no hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard . . .\footnote{427}

Expenditure limits posed no problem for Canada's high Court, as the majority hailed the egalitarian model:

The Court's conception of electoral fairness as reflected in the foregoing principles [from Libman] is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation[.]. Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power . . . These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn,

enables voters to be better informed; no one voice is overwhelmed by another.\textsuperscript{428}

How could two nations so similar have high courts with such opposing views on election financing? Canada has produced far more stringent campaign finance legislation than the U.S. has produced at the federal and state levels. Certainly, the political will has been there to pass such legislation; however, the Canadian Constitution simply provides more opportunities to legislate in favor of equality as well as to make election law at legislative will. The word "equality" itself appears in the Charter five times, guaranteeing equality "before and under the law" as well as "equal protection and equal benefit of the law without discrimination."\textsuperscript{429} Notably, the Charter mandates equality of language between English and French.\textsuperscript{430} These rights, like most of the rights provided in the Charter, are phrased in \textit{positive} terms, including the right to vote: "Every citizen of Canada has the right to vote . . ."\textsuperscript{431} This is in contrast to the U.S. Constitution, where all rights are phrased in negative terms. Thus, the Canadian Charter itself textually provides far more opportunities for the national government to act; indeed, it \textit{mandates} governmental action in many areas.

However, although Canada's Court provides the ideal position for reform, its system is not without election law problems. The aforementioned reimbursement program provided a case for the most telling campaign finance scandal in Canada's recent history. In 2006 and 2008, Canada's Conservative Party was accused of

\textsuperscript{429} Canadian Charter, §15(1).  
\textsuperscript{430} Ibid., §16.  
\textsuperscript{431} Ibid., §3.
producing fraudulent reimbursement documents, which allowed the Party to receive more money than they otherwise would have from the national government. The party then used that money to exceed the national spending cap, in clear violation of national law. The Party ultimately pled guilty to this "In and Out" scandal in 2011, but settled in March 2012.\(^\text{432}\) Notably, most of the evidence against the Conservative Party had been properly disclosed, and a *record checker* found the irregularities. Canada therefore not only has a comprehensive system that seems to control spending; it has a regulatory body that works effectively, and it has the will to enforce campaign finance laws.\(^\text{433}\)

On the other hand, however, one effective result of the improperly directed funds was to elect Conservative leader Stephen Harper Prime Minister in 2006; as of 2014, he remains Prime Minister. Thus, although Canada has a mechanism for dealing with finance problems, the effectiveness of the remedies available is questionable. The federal government settled the case with the Party, who merely had to reimburse the government for illegal funds received.\(^\text{434}\) This all occurred *after* the Conservative Party applied for an $800,000 reimbursement for the 2006 election, Elections Canada denied the application, and the Party sued for the funds. The trial

\(^{433}\) The flip side of this is that Stephen Harper, one of the politicians at the center of the scandal, was elevated to Prime Minister partially as a result of this money. As of 2013, he is still Prime Minister after being elected in 2006, the year of the scandal.
\(^{434}\) "Conservatives Drop Appeal of 'in-and-out' Ruling "; "In-and-out Election Financing: Tories Drop Supreme Court Case, Repay Taxpayers."
court agreed with the Party, but an appeals court reversed, stating that Elections Canada had the discretionary power to deny the application.435

Yet despite these major scandals, Canada's high court took a position in direct opposition to the U.S. Court's privileging of political expression, and has even seemed more willing to solve other issues regarding political equality. While the U.S. Supreme Court has proclaimed that political speech and association concerns prevent government action from providing for equality of voice, the Canadian Court has declared that the interests in equality of voice outweigh the interests in freedom of political expression.

*The Warren Court – A Libertarian Constitution Meets the Egalitarian Court*

As discussed in Chapter Three, the U.S. Supreme Court under Earl Warren provides an example of a libertarian constitution being interpreted by an egalitarian court. The Warren Court – active from 1953 to 1969 – is well known for bringing a "rights revolution" by elevating the Fourteenth Amendment's equality provisions to a level that, before, was beholden to liberty. Similar to Canada's Supreme Court of the 1990s and 2000s, the Warren Court routinely balanced libertarian and egalitarian values, leading to groundbreaking decisions in the realms of legislative malapportionment,436 racial discrimination,437 criminal procedure,438 political

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The Court greatly empowered the Equal Protection Clause, using it to not only fight racial discrimination, but to declare that all legislative bodies in the U.S. except the Senate must adhere to the equipopulation principle, one person, one vote. It practically completed the Court's incorporation exercise, applying — via the Fourteenth Amendment's Due Process Clause — to states the right of expressive association, the right to petition for a redress of grievances, the exclusionary rule, requirements surrounding search warrants, double jeopardy, the right to not be compelled to be a witness against oneself ("self-incrimination"), the right to a


speedy trial,⁴⁵⁰ the right to a trial by an impartial jury,⁴⁵¹ the right to confront adversarial witnesses,⁴⁵² the right to subpoena testimony,⁴⁵³ the right to effective counsel,⁴⁵⁴ as well as protection against cruel and unusual punishment.⁴⁵⁵ It almost seems as if the Court was trying to correct and amend the U.S. libertarian tradition, and – when faced with the possibility of enacting egalitarian policies, it took full advantage. The Warren Court provided the most egalitarian regime seen in U.S. history, and offered the strongest challenge to libertarian principles than any other U.S. Court.

And while the Warren Court did not have occasion to judge campaign financing, as discussed in Chapter Two, it essentially created an enforceable right to vote by both mandating the equipopulation principle as well as by protecting the Voting Rights Act from constitutional challenges. Additionally, as discussed at length in Chapters Three and Four, Justice Thurgood Marshall's election law jurisprudence provides the strongest positive equality position seen in campaign finance, on par with the Canadian high court.

Conclusion

The human rights model provides for dignity, equality, justice, fairness and freedom, all of which are the focus of the European Union's Charter of Fundamental

Rights. Relative to the libertarian U.S. Constitution, the image is reversed, as these other liberal governments have a constitutional responsibility to protect and enforce equality and dignity measures. Therefore, a balance between liberal principles is written into their Constitutions, providing their high courts with a rubric of balance. Consequently, these courts can be more honest about their judicial role to balance interests, and their responsibilities to balance competing constitutional interests cannot be rhetorically hidden on their high courts in the same way as they can with the U.S. For example, a statement that equality of voice cannot possibly compete with freedom of expression would likely not pass constitutional muster in egalitarian nations like Canada, although they could potentially do so in a nation like Japan.

The text of the European Charter of Rights and Freedoms best demonstrates the human rights model. Based on the development of Human Rights since World War II, the Charter is divided into provisions regarding dignity, freedoms, equality, solidarity, rights, and justice; the Preamble states that these are the values – the principles or ideas – that hold the Union together. Subscribing to this model, Canada's Charter provides for "democratic rights," "equality rights," and affirmative action. While U.S. Constitutionalism was exported in the post-World War II landscape to the West German and Japanese constitutions, the European and Canadian charters stand as far more representative of rules and ideas in advanced democracies. Moreover, developing nations, e.g., Brazil and Mexico, have overwhelmingly chosen this

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456 Canada's Charter of Rights and Freedoms, ratified in 1982, predates the EU Charter, which was ratified in 2000. However, both documents hail from the Human Rights model, which can textually be traced back to the United Nations Charter. However, the ideas can be traced back to the notion of the natural law.
aspirational – this *Human Rights* – model, which textually balances egalitarian and libertarian values more evenly than does the U.S. model.

But it is not always the case that a libertarian constitution produces dominant high court values. For example, Japan's egalitarian constitution has not stopped its high court from valuing individual rights in the form of supporting corporate participation in its elections.\(^4\) And, although its high court majority proclaims its dedication to election law's equipopulation principle – one person one vote – via its constitution's right to vote, it is reluctant to use its power to invalidate elections.\(^5\) The Japanese high court thus allows a "live and let live" attitude with regard to its elections, seeming to be content in allowing its civil society groups to control its remarkably unfair elections.\(^6\)

Notably, the U.S. Court's dichotomy between campaign contributions and expenditures – discussed in Chapter Two – is unique worldwide; Canada rhetorically distinguishes between contributions and expenditures, but does not apply separate "tests" to determine their constitutionality. In fact, other than the almost universally-accepted disclosure laws, most advanced Western nations focus on controlling *spending*, even while they mandate contribution limits. In contrast, the U.S. Supreme


\(^5\) See *Kawahara v. Dogama* (1997) where the Court declared that any ratio beyond 1:4 violates the equipopulation rule. For refusal to invalidate elections despite ratios between 1:2 and 1:6, see *Nonoyama v. Dogama* (2008), as well as 1994 (Gyo-Tsu) No. 162; 1999 (Gyo-Tsu) No.35, 2003(Gyo-Tsu)No. 24, 2008 (Gyo-Tsu) No. 209, 2010 (Gyo-Tsu) No. 207.

\(^6\) For a full discussion, see Scheiner, *Democracy without Competition in Japan : Opposition Failure in a One-Party Dominant State.*
Court has declared that the First Amendment protects donors against independent expenditure limits as well as against personal spending limits when a candidate is self-financed. Additionally, the Court struck the FECA’s aggregate contribution limits in 2014’s *McCutcheon v. FEC*.

Canada has the most comprehensive campaign finance regime of any Western nation, and its independent judiciary has supported these rules against its own constitutional freedom of expression provision twice. Canada has public financing options, contribution as well as overall spending limits, bans most corporations from participating in elections, and even provides reimbursements for campaign spending. And its high court rarely interferes with these legislative rules. However, it is worth mentioning that campaign finance reform certainly does not root out corruption completely, as Canada's scandals have demonstrated.

The difference in election law rules between the U.S. and other advanced liberal democracies can be explained via (1) their constitutional structure; (2) how their independent judiciaries have handled the liberty vs. equality dilemma; (3) how both aforementioned structures have developed over time, i.e., the constitutionalism of comparable nations. In short, despite maximizing the power of judicial review, the U.S. has the most minimalist Constitution of all comparable nations; this minimalism – listing only the powers of government as well as a specifically incomplete Bill of Rights – as well as legal culture, facilitates the exceptional libertarian ideals of so many attorneys and judges. Other nations' constitutions are much more lengthy as

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460 See *Libman* and *Harper*.
well as much more detailed.\textsuperscript{461} Moreover, other constitutions are far more concerned with equality and dignity, thus making their founding documents far more \textit{aspirational}.\textsuperscript{462} Aspirations require the enforcement of \textit{positive} rights – those rights requiring affirmative governmental action – whereas originalist U.S. constitutionalism is far more concerned with \textit{negative} rights – that which the government \textit{cannot} do.

Western Europe – as well as new democracies – have developed a more egalitarian system of liberalism, in part because they have relied on a broader set of constitutional values. In one sense, the U.S. system \textit{betrays} liberalism, an ideology with far more to it than liberty and equality. \textit{Dignity} – a human rights hallmark – does not appear in the U.S. Constitution, and is rarely referenced in constitutional decision-making. \textit{Equality} only became a U.S. constitutional value after the Civil War, and the Court essentially did not apply that value until it moved against racial discrimination.\textsuperscript{463} \textit{Fairness} and \textit{justice} were hallmarks of the Court under Earl Warren, but were derivative of Due Process and Equal Protection, and thus were judicially-created values. Liberty or \textit{freedom} is balanced amongst these values, thus making it rhetorically difficult to privilege one value over another.

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\begin{itemize}
\item \textsuperscript{461} The U.S. state of Alabama has the world's longest constitution, while India's is the second longest.
\item \textsuperscript{462} Aspirations require affirmative government action in order to succeed. For example, Brazil's constitution provides a right to an annual vacation, Italy's constitution provides a right to a job, and the U.S. Constitution provides equal protection of the laws. These positive rights must be enforced. Cf. negative rights which prevent the government from acting, e.g., the government can make no law abridging the freedom of speech. In order to enforce freedom of speech, the government must step back, i.e., \textit{stop} violating freedom of speech.
\item \textsuperscript{463} This move began with \textit{Shelley v. Kraemer}, 334 U.S. 1 (1948), and was solidified with \textit{Brown v. Board of Education I}, 347 U.S. 483 (1954).
\end{itemize}
\end{footnotesize}
These other systems help us to better understand the U.S. system, helping to explain how the U.S. Supreme Court majority could so easily reject the notion that political equality constitutes a societal interest, especially in the realm of elections. Other advanced democracies provide constitutions that allow different values to arise behind their respective historical trajectories of constitutional development. The high courts have more constitutional references – especially with regard to the right to vote – to allow more equitable arguments to arise.

**FIGURE A**
Typology for Libertarian and Egalitarian Constitutionalism

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<th>Libertarian Constitution ➔ Libertarian Interpretation</th>
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<tr>
<td>Example: Japan</td>
<td>Example: Canada</td>
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</table>
CONCLUSION

From the passage of the Tillman Act to Citizens United v. FEC (2010), the history of campaign finance reform is a history of successive failures. Corporations were legally banned from participating in elections in 1907, but this was not enforced. The Federal Corrupt Practices Act mandated the disclosure of campaign spending shortly thereafter, but this was not enforced either. By mid-century, unions had been banned alongside corporations, but none of these rules were enforced. And, when Congress finally passed comprehensive reform in 1974, the legislation allowed corporations to legally participate in elections by legitimizing political action committees and creating a support structure with the FEC. Then, in Buckley v. Valeo (1976), the Court decided that many of the new law's expenditure provisions violated the First Amendment, effectively wiping out at least half of the potential impact of the FECA.

After Buckley, the race to get around the new rules began, ultimately leading to the proliferation of soft money and use of issue advertisements that were directly attacked by the BCRA. 2002's BCRA constituted a long and hard fought victory that included at least two failed attempts in the 1990s to rein in the spending. Most of the BCRA was upheld in McConnell v. FEC (2003), offering reformers a temporary victory, but one of the Act's most powerful components was struck in Citizens United – the corporate and union blackout period.

So, 20th century campaign finance reform began by banning corporations from elections, but this was not enforced. When Congress passed a comprehensive law to
enforce reform, it simultaneously allowed corporations in to the system. Although a concession to corporations, this level of participation would soon not be enough for them and now, after Citizens United, they have more legal power to participate in elections since the passage of 1907's Tillman Act. They were banned from participation, later allowed to participate in a limited fashion, and now can participate in an unlimited fashion. Considered in light of the amount of money spent on 21st century politics, the regime created by the Roberts Court provides corporations with more electoral power than perhaps has ever been seen before in the U.S.

Despite the reform loss in Buckley, that first campaign finance regime managed a bargain, one that the Court shattered in Citizens United by eliminating one of its central components: corporations can be treated differently than individuals. After Citizens United, a new rulebook needed to be constructed, one that included "SuperPACs" – independent expenditure-only committees. Because such PACs would not be directly connected to candidates, donors could contribute unlimited amounts of money; the Court's only catch was that donors and donations would have to be submitted to the FEC. But political operatives quickly found a way around this as well, by using non-profit corporations – "501(c)4's" – to hide donor identities. As of 2015, neither Congress nor the FEC have moved to close this loophole.

These are not isolated moves by the Court. On another side of the law of democracy, the Roberts majority eliminated the most potent provision of the Voting Rights Act – the coverage formula that determined which jurisdictions would have to be pre-cleared by the Justice Department or DC District Court in order to make
changes in voting administration.\textsuperscript{464} Together with the Civil Rights Act, 1965's Voting Rights Act had been part of a larger package that attempted to bring equality to African Americans, mostly but not exclusively in the South. The Warren Court had approved the constitutionality of both Acts\textsuperscript{465} that – together with the malapportionment decisions – completed the contours of its egalitarian election law canon. However, in 2013's \textit{Shelby County v. Holder},\textsuperscript{466} Roberts – writing for the libertarian majority – declared the coverage formula for determining "preclearance" unconstitutional as a violation of "principles of [state] sovereignty."

More recently, the Roberts Court intervened again in 2014's \textit{McCutcheon v. FEC}.
\textsuperscript{467} In \textit{McCutcheon}, the Court invalidated the maximum contribution ceilings for election cycles. While this decision will likely not have much of an impact on elections – there aren't many donors who want to contribute directly to so many individual campaigns – it continues the Court's neo-libertarian stance on reform under the First Amendment. This time, Justice Breyer spoke for the dissenters, initially relying on original intent and stare decisis, but ultimately his reasoning was based upon hypothetical scenarios. Although a spirited attack on what Stevens had called the majority's "crabbled view of corruption" in \textit{Citizens United}, Justice Breyer's arguments similarly fell short of advocating for political equality in the ideal manner of Justice Thurgood Marshall or the Canadian Supreme Court. However, Breyer \textit{did}

\begin{flushleft}
\textsuperscript{464} \textit{Shelby County v. Holder}, 570 U.S. ___ (2013).
\textsuperscript{466} 570 U.S. ___ (2013).
\textsuperscript{467} 572 U.S. (2014).
\end{flushleft}
advocate for a rationale the lawyers created after the 1974 FECA: the "anti-circumvention" of campaign finance rules as an interest sufficient to overcome First Amendment concerns. Although consistently rejected by Court majorities, Breyer may have awakened a legal argument, as even dissents can become constitutional law in the future.

An Exceptional Form of Liberalism Reflected in the Law and Courts

Like any ideology, liberalism has its own internal contradictions. As ideologies develop and change, conflicts become more pronounced, and others are created. By the mid-20th century, the U.S. liberal tradition had developed into "liberal" and "conservative" wings and, depending on one's particular brand of liberalism, each can point out the contradictions in the others. Libertarians argue that they are "consistent," because equality is presumed, and therefore individuals can be free in a society that allows them to do what they wish with their pocketbooks and their bodies. Liberals support egalitarian liberty, consistently believing that the government has a role in promoting equality of opportunity, a chance for all to compete on a level playing field. Conservatives argue their own consistency through a vision of "original" constitutional intent, whereby in this narrative, the Founders were attempting to create a Christian nation based in free enterprise.

This dissertation has engaged with several competing, non-mutually exclusive ideologies: classical liberalism, U.S. left-liberalism, neo-liberty, egalitarianism, legalism, egalitarian liberty, and positive equality. Classical liberalism provides the basis for all of these "sub" ideologies – the liberalism and conservatism of U.S.
politics; the libertarianism, egalitarianism, and conservatism of the U.S. Supreme Court; the legalism of the legal community; the egalitarian liberty and positive equality subsets of the Court's election law jurisprudence. For a long time in political science, ideology played a major role in attempting to explain policy decisions. However, interests have played the dominant role in explanation in the early 21st century, and I'm not trying to discount this. However, ideology does matter, especially when it provides the basis of the legal culture – indeed, perhaps of the dominant culture – of an entire nation. This matters when the liberal tradition creates its legal reflection, legalism. Legalism – the ideology behind the law – provides the real "constitution" or higher law/principles of the legal community. Law itself is generated from principles, which reflect liberal values themselves. Liberalism's pillar principles of liberty and equality provide the basis and ammunition for many of the Court's constitutional policies.

But the history of the constitutional development of liberty has a historical edge over that of equality, given liberty's longer lifespan. In the context of the Bill of Rights, liberty constitutes freedom from government action. After the passage of the Fourteenth Amendment, equality seemed to mandate government action, although the Court quickly limited this power to the application of federal rights.\footnote{Slaughterhouse Cases, 83 U.S. 36 (1873).} By the end of the 19th century, the Court had even used equality's Due Process Clause to create the
substantive liberty of contract, a policy enforced by the Court for 30 years.\textsuperscript{469} However, during the 20th century, the Supreme Court nationalized the Bill of Rights, essentially applying the egalitarian liberty paradigm. Chief Justice Earl Warren's Court got even bolder, reflecting a positive equality mentality that placed the federal courts front and center in terms of overseeing its equitable measures. Yet, this egalitarian Court was not to last, as Republican presidents repeatedly were able to add members to the Court, resulting in more libertarian and conservative policies. During the 1980s, libertarians got to see their associates join the Court, with their descendants – John Roberts and Samuel Alito – joining them in the early 21st century. The libertarian Chicago school's Federalist Society's long legal strategy had paid off, but they had a built-in advantage to begin with.

However, under almost any circumstances, campaign finance reform is an uphill battle, even if conditions are as "ideal" as they were during the passages of the FECA and BCRA – where compromise garnered a piece of legislation – due to the structural libertarian bias of American liberalism, which is most clearly seen in legal culture and Court decisions. This built-in bias keeps the U.S. on a developmental path unique amongst its liberal democratic colleagues, given the centrality of law and courts in U.S. liberalism. It allows more room for neo-libertarians to maneuver. It is based on a constitution that is easily interpreted in a highly limited manner, regardless of the disagreements the Framers may have had on the scope of government power. In a

\textsuperscript{469} This began with the inception of "freedom of contract" in \textit{Allegeyer v. LA}, 165 U.S. 578 (1897), a concept reified in \textit{Lochner v. NY}, 198 U.S. 45 (1905), and finally rebuked in \textit{West Coast Hotel v. Parrish}, 300 U.S. 379 (1937).
sense, the deck stacked against fair elections by virtue of America's exceptionalist view of liberty, particularly its adoration for the First Amendment.

*Formalism Matters – The Gap Between the Political and the Legal*

One of the primary points has been that *formalism* matters, simply not in the way formalists have intended it to matter. As a part of a culture of legalism, formalism *structures* decisions; it does not make them. Formalism *limits* decisions; it rarely empowers them. Formalism relies on the institutionally accepted means of judicial interpretation: textualism, intent of the drafters, and an adherence to past decisions – *stare decisis*. The more of each of these things, the more rhetorical room that lawyers and judges have to play with. But it is the fact that they *feel* bound by formalism's limits that binds lawyers and judges to it.

Political scientists often argue that Court members make decisions based on preconceived judicial attitudes on the particular policy before the bench, based on their ideologies. This is not untrue; however, the ideology of *legalism* has socialized lawyers into believing that our legal system has a real existence outside of raw power – that rights truly exist – and that such rights are the means of protecting individuals from government action. If we accept the attitudinal and other preference-based models, then these biases are already built in to the analyses, hidden from view.

All liberal traditions privilege freedom of political expression and association. However, the U.S. has an exceptional preoccupation with the First Amendment, for speech, association, and religion. It has a virtual obsession with liberty from government action. Such principles and rights are in no way absolute, though, even if
they are often portrayed as such by mainstream, uneducated sources. However, *defamation* has never been considered protected speech. Nor have fighting words, the advocacy of violence, violations of national security, and obscenity. All of this is conduct outside of the First Amendment. If the prevention of such actions are so important that the First Amendment offers no protection, how can rules designed to protect democracy from being dominated by oligarchs receive such protection? Yet such a preoccupation with First Amendment values makes perfect sense if one is a subject of U.S. law schools, and is therefore socialized into a neo-libertarian mindset.

The history of campaign finance itself is a series of failures, with the brightest lights coming from the FECA, the BCRA, and the words of Justice Thurgood Marshall. The future of an ideal form of campaign finance is grim, with the Supreme Court's approval existing as the first barrier before reformers can even have a chance at winning. When we consider the hard fought congressional battles and bargains necessary to pass the FECAs\(^ {470} \) and the BCRA\(^ s \), the failed attempts at passing reform measures,\(^ {471} \) as well as a history of Court hostility since their first important campaign finance decision in 1976, a fair means of achieving reform seems impossible.

However, there are many factors that go into creating a campaign finance system – constitutional values, partisan politics, political compromise, public opinion, supportive courts – and, even a fair legal system won't guarantee a corrupt-free


\(^{471}\) Dwyre and Farrar-Myers, *Legislative Labyrinth : Congress and Campaign Finance Reform.*
system. Canada's Court has created an ideal egalitarian model, yet its government is far from free from corruption, being well known for its campaign financing scandals. In formal politics, structure is never enough; there has to be the will – the agency – to create and maintain the system. No one who follows elections would expect political operatives and advisors to stop finding ways and legal loopholes that serve their clients and interests.

In the 1960s, the power of the vote was supposed to have won. The Civil and Voting Rights Acts worked. Preclearance worked, and black voting rates drastically increased. The Warren Court equalized the power of the vote through its one person one vote principle. And the Court even approved the Voting Rights Act as a weapon to fight minority vote dilution. However, President Nixon's ability to reshape the Court with four appointees greatly changed its ideology and, almost overnight, egalitarians were on the defensive. And, when considered against the fact that even U.S. egalitarian lawyers and judges have a deep love and respect for freedom of expression, we can see that the deck is stacked.

Big business interests are now positioned to have more influence on legislation than they have had since the late 19th century. The inequality of resources between louder and softer voices will likely increase and, as moneyed interests acquire more resources, this inequality will likely increase further in a snowball effect. As the years pass after Citizens United, crucial research will have to be performed to measure the disparities between interests with different amounts of resources, as we try to measure how and to what extent the haves are coming out ahead. But, as of 2015, it is safe to
say that the volume of the corporate voice has trounced the power of the individual vote.

Reformers will most likely have to wait for changes in Supreme Court membership before proceeding with meaningful campaign finance rules. However, the power of legalism and the seemingly consistent victories of neo-liberty over equality mean that egalitarian Court membership might not be enough. If Justices Stevens, Ginsberg, Breyer, and Sotomayor can collectively fail to stand up for political equality, there is little hope for almost any version of the U.S. Supreme Court to adequately stand up for softer voices, as well as for the power of the individual vote.
APPENDIX A
Definitions of Terms

Voice:
The "voice" refers to attempts at political expression, i.e., the ability to convey messages. Voices must be "heard" in order to matter, i.e., it's about communicating positions to others in a "marketplace of ideas." Technically, the "vote" is another form of "voice," i.e., it is the voice at the ballot box. The voice has significant First Amendment protections.

Individual Voice:
The "voice," as applied to individuals, i.e., to natural persons.

Corporate Voice:
The "voice," as applied to corporations, i.e., to non-natural persons.

Individual Vote:
The means by which citizens express their political preferences at the ballot box. The individual vote in the United States is protected by the Fourteenth Amendment's Equal Protection Clause (as well as the Equal Protection component of the 5th Amendment's Due Process Clause) under the "one person one vote" equipopulation principle, which mandates that legislative districts must be apportioned "as equal as practically possible." The individual vote is distinguished from the legislative vote.

Legislative Vote:
The vote of legislators in their legislatures. The legislative vote determines which legislation is passed and potentially signed by the executive. The legislative vote is influenced by the individual vote, individual voice, and the corporate voice.

Volume (of the Voice):
The amount of money spent attempting to disseminate a particular message. Those with more resources are able to speak more "loudly" than can those with fewer resources.

Value (of the vote):
"Value" refers to the relationship between the corporate voice, individual vote, and the legislative vote. The corporate voice can influence the other two by (1) spending enough resources on advertising or other publicity in order to influence the minds of voters; (2) "buying" more access to legislators, thus potentially influencing the legislative vote. Here, the question becomes, "How much does a vote cost, i.e., what is the value of the vote?"

Integrity of the Vote:
A position taken by those who advocate for stricter voter identification laws, usually requiring at least one form of photo identification at the polls in order to vote. The claim is that a lack of properly strict requirements will at the least diminish confidence in the legitimacy of the process and at most can lead to voter fraud that can swing an election.

**Neo-liberty:**
One of four ideal types provided by the social contract model of constitutionalism. Neo-liberty *forbids* government action against fundamental rights, e.g., the Bill of Rights. It stands in opposition to positive equality, and reflects the principles of classical liberalism.

**Egalitarian liberty:**
One of four "ideal" types of social contract-based constitutionalism. It is a form of liberty where liberty and equality facilitate each other. The purist example is the incorporation of the Bill of Rights through the Fourteenth Amendment's Due Process Clause. While the Bill of Rights textually applied to states – not to the federal government – the Supreme Court used "substantive" due process to apply each civil liberty to states, thus legally guaranteeing equal liberty across the nation.

**Positive equality:**
One of four ideal types provided by the social contract model of constitutionalism. Positive equality is the most aggressive form of equality, as it *mandates* government action, and is usually enforced via courts. It stands in opposition to neo-liberty.

**Liberty vs. Equality:**
A condition created when two equally important liberal principles – operating in the same sphere of influence – collide. Voice vs. vote provides an extreme example, pitting the liberty of the voice against the equality of the vote.

**Liberalism:**
The long tradition of limited government, freedom from government intrusion, and the primacy of the individual over that of the group. In reference to the time of the U.S. Founding, it can be referenced as "classical" liberalism.

**U.S. Left-liberalism:**
Although the U.S. Founding can find its philosophical roots in classical liberalism, by the 20th century, this had developed into the commonly known left-right spectrum that places "liberalism" on the left, and "conservatism" on the right. To avoid confusion, I'll use "left-liberalism" when using the liberalism of the left-right spectrum. U.S. left-liberalism values individual civil liberties and civil rights, while U.S. conservatism values economic liberties and religious rights.

**Libertarian:**
A blanket term describing those who generally disfavor government action – presuming its potential tyranny – and therefore tend to favor private sector activity over that of the government. In its purest form ("ideal type"), it reflects classical liberalism. A libertarian position opposes campaign finance reform.

**Egalitarian:**
A blanket term describing attitudes and positions that are more receptive and often quite accepting to government action than are libertarians. Egalitarian positions generally require government action in order to effectuate their policies. Egalitarians are more receptive – and often vehemently support – campaign finance reform.

**U.S. Conservatism:**
On the left-right spectrum of U.S. politics, conservative exists on the right. It values a libertarian position with regard to economic matters. Additionally, it privileges "traditional" moral values, e.g., Christianity, prayer in schools, anti-abortion.
APPENDIX B
Proposed Constitutional Amendments to Overturn *Citizens United v. FEC*

Lawrence Tribe:

Nothing in this Constitution shall be construed to forbid Congress or the states from imposing content-neutral limitations on private campaign contributions or independent political campaign expenditures. Nor shall this Constitution prevent Congress or the states from enacting systems of public campaign financing, including those designed to restrict the influence of private wealth by offsetting campaign spending or independent expenditures with increased public funding.

S.J.Res.19 - A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections, 111th Congress (2013-2014), as reported by Tim Cavanaugh:

Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.

Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.

Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.

Other Drafts Proposed in the House of Representatives:

Proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections:

Section 1. To advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, Congress shall have power to regulate the raising and spending of money and in-kind equivalents with respect to Federal elections, including through setting limits on--

\[472\] Tribe, "The Once-and-for-All Solution to Our Campaign Finance Problems: How Citizens Can Unite to Undo Citizens United."

\[473\] Cavanaugh, "Text of the Citizens United Constitutional Amendment."
Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.

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Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.
APPENDIX C
Typology of Liberty and Equality: Four Paradigms

Neo-liberty: presumes the existence of equality and defines liberty as freedom from government action.

Egalitarian Liberty: where the government makes efforts to equalize individual liberty across all demographics.

Positive equality: where the government much more forcefully enforces equality, commonly through court orders.

Liberty vs. Equality: the inevitable collision that occurs when neo-libertarians and positive egalitarians attempt to create policy together.
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<tr>
<td>Example: The Roberts Court, 2005-present</td>
<td>Example: The Warren Court, 1953-69</td>
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<td>Justice Thurgood Marshall, 1967-91</td>
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<td>Egalitarian Constitution ➔ Libertarian Interpretation</td>
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<tr>
<td>Example: Japan</td>
<td>Example: Canada</td>
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APPENDIX E
CHAPTER FIVE SOURCES

Constitutional Sources


Cases

Canada:


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