Campaign Finance, *Citizens United*, and the Case for Procedural Equality

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Chapter I: A Nation Divided

For those of us engaged in political life, the words *Citizens United* are sure to evoke strong reactions. Whether they are sentiments of bewilderment at the classification of corporations as persons or deep-seeded beliefs concerning the nature of liberty, the reaction is almost always one of forceful political conviction. Having radically altered the political landscape, this landmark case still resonates in the consciousness of our nation.

We can observe our nation’s struggles with this ruling and its aftermath in a case granted certiorari by the Supreme Court in February 2012. Concerning Montana’s Corrupt Practices Act and the state’s attempt to mitigate the influence of corporate money in elections, the Court issued a stay on the state court’s ruling, which upheld the legislation, as it was in direct conflict with *Citizens United*. A statement by Justice Ginsberg, with which Justice Breyer joined, accompanied the stay, declaring that the political developments following the landmark decision have “[made] it exceedingly difficult to maintain that independent expenditures by corporations ‘do not give rise to corruption of the appearance of corruption.’”¹ While Justice Ginsberg did join the stay as “lower courts are bound to follow [the] Court’s decisions,” she argued for granting certiorari as it provides the “opportunity to consider whether, in light of the huge sums currently deployed to buy candidates’ allegiance, *Citizens United* should continue to hold sway.”²

This paper is devoted to providing a case for why such a drastic reversal of precedent is necessary. For those unfamiliar with the decision, *Citizens United*, by a majority of 5-4, struck

² Ibid.
down limitations on the use of general treasury funds by corporations or unions for the purpose of financing electioneering communications, or those ads pertaining to a clearly identified candidate within 30 days of a primary or 60 days of an election. Justifying the decision through an appeal to the First Amendment, the Court found that the regulations at issue violated the constitutionally-enshrined right to free speech. Declaring the legislation invalid, the Court further rejected a government interest in preventing corruption or the appearance thereof as insufficient to save the statute from First Amendment challenges and categorically rejected a state interest in promoting political equality through the regulation of political speech. In the coming paper, I examine these arguments and present a case for why they are mistaken.

Advancing the thesis that a respect for procedural equality is necessary to the proper treatment of citizens and the institutional health of our republic, I argue that considerations of political equality merit more attention than they have been granted in recent conversations concerning the electoral process and are in fact a constitutive feature of the political liberties our Constitution seeks to protect.

Unfortunately, while *Citizens United* has reignited debate over critical public concepts, such as liberty, democracy, and political equality, it has also exposed political fault lines within our nation concerning the very nature of these commitments. While this fundamental disagreement is much broader than that concerning the constitutional requirements placed on the electoral process, it does find some of its clearest manifestations in the debate over campaign finance; thus, despite its seemingly divisive tendencies, the national dialogue on campaign finance and democratic commitments may provide us with the opportunity to reflect on and come to better understand the origin of our differences so as to find a common ground from which to begin the conversation.
While my argument tends toward the case for procedural equality, or that for the roughly equal worth of political liberties, I understand that the complex constitutional issues raised by regulations on the electoral process cannot be adequately treated by a singular focus on political equality so defined. Commitments to liberty, the tradition of correcting damaging speech by increasing volumes thereof, and considerations of corruption should also inform these issues. While I ultimately find that these considerations incline our decision in a similar direction, I devote considerable attention to reconciling apparent tensions between this multiplicity of constitutional values.

I proceed first by providing an overview of the state of campaign finance in the aftermath of *Citizens United* so as to clarify what Justice Ginsberg could mean by the claim that money used to influence the political allegiances of candidates gives rise to corruption or the appearance thereof. Highlighting the rise of super PACs and the increasing role they’ve given to large contributions, public distrust of money in the democratic process, and contemporary inequalities, I argue that our representative democracy as an institution is not functioning properly and the people know it. By providing my reader with a concrete understanding of the issues at the core of this legal debate, I hope to make available an empirical record against which to test the more abstract claims with which I later engage.

Following this exposition, I then move into a critical discussion of the cases which have been integral in shaping the constitutional status of attempts at reform. Though the majority in *Citizens United* rejected a government interest in preventing the reality or appearance of corruption as the speech in question was supposed to be made independent from coordination with candidates, I argue this is at best naïve, if not fundamentally mistaken, given the problems which have arisen in the wake of *Citizens United*. Given the inadequacy of this argument, I hope
to highlight how the majority’s position and the constitutionality of campaign finance reform really turn on deeper issues of free speech and procedural equality in their relation to democratic governance.

To clarify how basic philosophic questions regarding the nature of self-government implicate and inform these debates, I then move into a theoretical exposition of what commitments to liberty, equality, and democracy actually entail. While the Court’s rejection of regulations on political speech may appear *prima facie* to be a neutral act, I argue a refusal to recognize the validity of arguments deriving from procedural equality or fair political procedures leaves the Court effectively endorsing a bleak picture of democracy which is unharmonious with our constitutional tradition. While I recognize that philosophic inquiry is limited in its ability to completely reconcile conflicting political convictions, I do hope to propose a method which may succeed in exposing a basis of consensus as to our views of democracy and of the political liberties by abstracting to more fundamental notions of the citizen and fair participation in society. To succeed in providing a systematic treatment of these issues, I will rely heavily on John Rawls’s theory of justice as fairness to make the case that procedural equality and the fair worth of political liberties resolve the seeming conflict between liberty, democratic health, and the equal treatment of citizens.

Lastly, I move on to possible policy solutions which foster a commitment to fair political procedures and which help reconcile regulations on political speech with our Constitutional tradition. Though I mention a few which could plausibly restructure our democratic institutions such that they allow for roughly equal access, I am sceptical of their ability to pass Congress. While I am by no means advocating passive cynicism, in fact I am hopeful that our nation will mobilize against the threats posed to our democratic institutions, I do hope to stress the extent of
the damage that the Court’s decision in *Citizens United* has had on our electoral processes and to suggest that they may be the only ones who can recognize and restore the constitutional legitimacy of regulations aimed at insuring procedural equality. Given the Court’s power to review the holding in *Citizens United*, I now turn to the case for why they should.
Chapter II: The Contemporary State of Campaign Finance

Within the coming chapter, I examine the evolving role of money in politics in the wake of *Citizens United*. Within this exposition, I dedicate considerable space to challenging the notion that independent expenditures are really “independent” from campaigns given the rise of super PACs. Further, touching upon competing understandings of corruption and the decline of public trust in our governing institutions, I argue that the developments regarding how campaigns are financed implicate the Court’s position on the propriety of regulations.

To begin, I propose we examine the evolution of the campaign of President Barack Obama as a case study of the pressures which the current system of campaign finance exerts on a candidate. Beginning with a pledge to opt into the public financing system for federal elections, President Obama has now progressed to a place in which he has effectively endorsed the support of super PACs.\(^3\) While this decision may come as a surprise given that Obama was the candidate who wanted to “fundamentally change the way Washington works,” it is not as shocking when placed within the framework of viable political strategies.\(^4\) Rather, I argue that, given broader developments, the choices made by the Obama campaign reflect the ways in which the current system effectively circumscribes the available strategic alternatives available to candidates; the problem is systemic, not a rogue, unprincipled politician.

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\(^3\) While it is a common misconception that these entities were directly born from the decision in *Citizens United*, they actually resulted from a case decided in its wake: *Speechnow.org v. Federal Election Commission*. I discuss their impact on the electoral process in the coming paragraphs.

In 2008, opting into the public financing system for presidential candidates would have resulted in the allocation of $84.1 million to Obama’s campaign and would have prevented him from accepting private contributions or from spending in excess of the allotted amount. Though this is in no way a trivial allowance, Obama’s grassroots organization had provided the campaign with the potential to exceed this amount through sheer volumes of small donations. While Obama’s campaign did possess a strategic advantage in refusing public finance independent of any other concerns, candidate Obama further cited inadequacies in the regulatory system as the underlying motive driving his decision. Though his campaign had enjoyed success in fundraising, the Democratic National Committee had lagged behind its Republican counterpart; as neither committee was beholden to the same contribution or expenditure limits imposed on individual campaigns, Obama attributed this disparity in fundraising to the Republican National Committee’s more voluminous acceptance of “contributions from Washington lobbyists and special interest PACs.” To account for this disparity on the national stage, the Obama campaign decided against public funding.

Claiming that his decision actually minimized the influence of powerful parties and special interests, (90 percent of donations to his campaign didn’t exceed $100), his republican competitor, Senator McCain, rightfully responded that this retreat from a previous commitment to public finance raised issues of public trust. Though he may have meant to direct his criticism at the character of his opponent, I believe that this development more fundamentally implicates a citizen’s ability to trust in the system’s capacity to allow for candidates to remain competitive without becoming beholden to large donors. In fact, it is hard to imagine many tactics which

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6 Ibid.
7 Ibid.
allow for the candidate to both limit the influence of large contributions in order to remain responsive to her constituents and which enable her to be competitive in contested elections.

While this decision on the part of the Obama campaign in 2008 still allowed for an ability to be receptive to the needs of the public given the grassroots nature of its financing, developments following the Citizens United decision expose the ways in which campaign finance has evolved to further constrain the strategically sound alternatives with which candidates are presented. In February, 2012, President Obama announced his virtual support for the super PAC supporting his candidacy, Priorities USA, by allowing for top staffers, Kathleen Sebelius and Jim Messina, to speak at fundraising events. A decision which drew much scrutiny, an editorial published by The New York Times went so far as to accuse Obama of “telling the country that simply getting re-elected is bigger than standing on principle.”

Though President Obama certainly has compromised his commitment to battling the influence of special interests in Washington, which he has previously identified as a “threat to our democracy,” I must stress again that it seems unfair, or at least unrealistic, to blame the politician and not the system. It simply isn’t a viable political strategy to refuse to use tactics which are in accordance with the rules of the game and which, if not employed, threaten the success of the campaign as others are making the same choice. The problem is systemic, which, beyond giving rise to distrust of elected representatives, also creates a disjuncture between the strategic interests of the candidate and her ability to remain responsive to her constituents. Thus, while this decision is unfortunate, this development in the Obama campaign reflects an

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9 Ibid.
10 Ibid.
institutional and regulatory failing and not the misguided decision of a single politician. This should trouble us given that President Obama was the candidate who began his political career with a fervent commitment to fundamentally reforming the structure of influence in Washington and has subsequently sacrificed this commitment under the pressures of the current system.\(^\text{11}\)

Beyond the transformation of a man and his political agenda, the interchange between the Obama campaign and Priorities USA further exposes an untruth promulgated in *Citizens United*: independent expenditures really are “independent” and don’t give rise to actual or apparent corruption. Given the rising predominance of super PACs, affiliated with both parties and all major candidates, this proposition becomes increasingly hard to square with the reality of the 2012 campaign cycle. While *Citizens United* dealt with limitations on contributions and independent expenditures from unions and corporations alike, and expressly not PACs, *Speechnow.org v. Federal Election Commission*, decided in its wake, gave rise to this novel political entity. Classified as an organization solely devoted to financing independent expenditures, the Court ruled that its actions were entitled to full First Amendment protection: expenditures could not be subject to limitations, nor could contributions to super PACs from unions, corporations, or persons be limited.\(^\text{12}\) Drawing inspiration from the ruling in *Citizens United*, super PACs were found to be constitutional as their use of money to promulgate political

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\(^{11}\) While this development itself is problematic, it also exposes the limits on the possibility of political reform through the legislative or executive branches. As these politicians are forced to operate and campaign under the pressure of lobbyists and other powerful interests groups, it is hard to see how lasting change will be made by those who depend on their contributions for reelection. Lawrence Lessig also touches on this problem, which he defines in terms of incumbent interests. For more on this assessment, see his book *Republic, Lost*, p. 96-124.

messages was found to be *independent* of the campaigns and candidates which their ads serve to endorse or attack.\(^\text{13}\)

In fact, the supposed “theoretical independence” of expenditures from the candidates or campaigns they support or oppose was critical to the majority’s rejection of a state interest in preventing corruption or the appearance thereof. Again, let’s take the campaign of Barack Obama as a case study. Priorities USA, a self-labeled progressive super PAC, is “theoretically independent” from the Obama campaign; that is, the two organizations do not collaborate in the creation or finance of advertisements. Yet, recall that Obama recently sent two top staffers, Kathleen Sebelius and Jim Messina, to speak at fundraising events for the super PAC in what *The New York Times* deemed an attempt to “[signal] to wealthy Democratic donors that he wants them to start contributing to an outside group supporting his re-election.”\(^\text{14}\) Beyond expressing his virtual support for Priorities USA fundraising events, President Obama has also released Bill Burton, his former national press secretary, to serve as a senior strategist at this very super PAC.\(^\text{15}\) Given this exchange of personnel who are familiar with the inner-workings and strategies of the Obama campaign, it seems puerile to attempt to maintain that there isn’t a potential for or reality of collaborative efforts between the two organizations.

Similar patterns of coordination can be observed in the Romney campaign and the super PAC which supports him, Restore Our Future. While both seek strategic advice and research concerning voters from TargetPoint Consulting, this opportunity for collaboration between two

\(^{13}\) *Open Secrets* (Center for Responsive Politics), s.v. ”Super PACs,” http://www.opensecrets.org/pacs/superpacs.php.


“theoretically independent” organizations is only the tip of the iceberg. Located within the same building as TargetPoint Consulting is WWP Strategies, “whose cofounder is married to TargetPoint’s chief executive and works for the Romney campaign,” as well as the Black Rock Group, whose cofounder was a chief strategist for the 2008 Romney campaign and works for Restore Our Future and American Crossroads, another conservative super PAC headed by Karl Rove. Both are consulting firms to which the Romney campaign and Restore Our Future go for strategic advising.

This tangled web of relations between individuals, firms, super PACs, and the Romney campaign itself “offer a case study in the fluidity and ineffectual enforcement of rules intended to prevent candidates from coordinating their activities with outside groups.” Given the potential for collaboration, this network of affiliation presents serious challenges to the notion that super PACs and expenditures can or do operate independently of the campaigns they seek to support. Rather, given that these organizations are exempt from the contribution and expenditures limits to which the campaign themselves are beholden, it seems as if they act to effectively provide candidates with a loophole through which to bypass these regulations, “function[ing] almost as adjuncts of the campaigns.”

To make matters worse, Romney has in fact appeared at fundraising events for Restore Our Future and has been known to confuse in speech large donations to the organization as contributions to himself and his campaign. Referring to a $1 million donation to Restore Our

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17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.
Future by a resident of New Hampshire, Romney expressed his gratitude for the fact that the voter “gave to [him]” and “has given to [him] before.”

In a radio interview, Romney has further declared that, due to his connections with the people behind Restore Our Future, “[o]f course [he helps] raise money for it.”

This collaborative network becomes increasingly visible as one sifts through the spending records of both the super PAC and the Romney campaign. Restore Our Future has paid $350,000 to TargetPoint Consulting for its strategic advice and the Romney campaign itself has dished out $200,000 to the same firm; both have even paid for services on the same day.

Though I admit this coincidence in payment may not serve as evidence of collaboration at any one time, it is sufficient to make an observer rightfully suspicious given the potential for cooperation and Romney’s self-proclaimed awareness of the strategic advantage with which the PAC provides him.

While these insights to the inner-workings of the Romney campaign strongly suggest a violation of the independence which is necessary to the constitutional standing of super PACs, insiders in the firms and the campaign itself insist that their actions are legal; and they may in fact be correct. While the Federal Election Commission, which was created to ensure that electoral procedures lived up to democratic standards, has established complex regulations to prevent coordination on advertisements between independent groups and the campaigns they support, it has failed to establish precise guidelines for other cooperative activities which provide the opportunity for strategic coordination. As Paul Ryan of the Campaign Legal Center has

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22 Ibid., 28.
stated, this narrow focus on ads has rendered “'[t]he legal definition of coordination… completely divorced from reality.'”

The rules in existence which serve to regulate this “gray area” have been “largely ignored” by the FEC, a committee composed of three Democrats and three Republicans. Though the committee possesses the potential to expand and enforce regulations which encompass more than issue ads or electioneering communications, the group is ideologically divided and has often come to an impasse on particular cases. Fred Wertheimer of Democracy 21, a whistle-blowing organization, has gone so far as to say that “[t]he campaigns know the FEC isn’t going to enforce the law, and so they’ve decided to do whatever they want.”

Though this kind of coordinated activity would be inappropriate if confined to even the two campaigns mentioned, regulatory failings have allowed for this problematic behavior to be systematically pervade our electoral process. That is, the regulations which ought to prevent this kind of collaborative and unconstitutional activity are nonexistent, too narrow, or not enforced. Aggravating the problem of coordinated activity between supposedly independent organizations is the fact that super PACs have opened the door to big money contributions and their possibility to create political debts on the part of the candidate they benefit.

While my aim here is not to demonstrate that large contributions cause policy failing, I do hope to demonstrate possible problems they may pose to our democracy. The first comes in the form of what Lawrence Lessig has identified as “dependence corruption,” which differs in form from quid-pro-quo bribery, whose prevention has been recognized by the Court as a

26 Ibid.
compelling state interest.\textsuperscript{27} To help illustrate this difference, Lessig introduces a distinction between a gift economy and an exchange economy. While \textit{quid-pro-quo} corruption belongs to the latter category, gift economies also can give rise to corruption, though it is more subtle in form. Predicated on the natural tendency toward reciprocity, these marketplaces operate in terms of relationships which “import obligations.”\textsuperscript{28} Through the repeated provision of favors, obligations to one’s benefactors are developed by “the moral expectations that a system of gift exchange yields.”\textsuperscript{29} Thus, while the obligations the recipient acquires aren’t necessarily explicit or intended, these beneficiaries do develop a sense of interpersonal debt.\textsuperscript{30} This sort of relationship is seemingly fit to describe the “political debts” which could be acquired by a candidate through another party’s use of campaign contributions and “independent” expenditures. Lessig quotes Senator Paul Douglas to help in translating these developments into the political realm:

\begin{quote}
Today the corruption of public officials by private interests takes a more subtle form. The enticer does not generally pay money directly to the public representative. He tries instead by a series of favors to put the public official under such a feeling of personal obligation that the latter gradually loses his sense of mission to the public and comes to feel that his first loyalties are to his private benefactors and patrons. What happens is a gradual shifting of a man’s loyalties from the community to those who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties rather than the public good. Throughout this whole process, the official will claim—and may indeed believe—that there is no casual connection between the favors he has received and the decisions which he makes.\textsuperscript{31}
\end{quote}

Though this form of corruption may not be as glamorous nor appalling as that which we often envision taking place in smoky back rooms, it does create serious problems for our democracy as contributions become avenues of access to candidates, elected officials, and subsequently the

\textsuperscript{27} For a fuller discussion of the possible forms of corruption, see \textit{Republic, Lost}, 107-119, 226-248.
\textsuperscript{29} Ibid., 110.
\textsuperscript{30} Ibid., 114.
\textsuperscript{31} Ibid., 110.
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legislative agenda. This problem of access to the political arena, while itself undermining a commitment to political equality, can serve to effectively monopolize the national dialogue and legislative process.

This more subtle form of corruption stems from what Lessig has coined as an “improper dependence” on those financing one’s campaign. Given the Founder’s intention that Congress and the Presidency “be dependent upon the people alone,” a conflicting dependency upon those funding one’s bid for (re)election poses serious problems to the ability of our democratically elected branches of government to be responsive to the people.32 As I have previously stated, the problem is not corrupt individuals working within a “well-functioning institution,” but is rather one of a systematic nature which infects our institutions as “the pattern of influence operating upon individuals within the institution draws them away from the influence intended.”33

Given the pressures exerted on candidates by the need to raise unprecedented amounts of money to compete in this new political landscape, it is no wonder that pleasing one’s potential donors or those who could effectively endorse one’s candidacy through “independent expenditures” becomes an essential feature of a campaign’s political strategy. While this nearly inevitable conformance to the expressed interests of one’s potential benefactors may not qualify as *quid-pro-quo* corruption, “this shape-shifting is harmful to our republic, even though the thing the shifting tries to secure—more money for political speech—is pure.”34 Thus, while the corruption of our democratic institutions is not a matter of unprincipled politicians attempting to manipulate the system so as to serve their “pecuniary interest[s],” and rather comes down to

33 Ibid., 231.
34 Ibid., 232.
simple calculations of political strategy and interest, it is indeed damaging to our republic as the
elected branches of government are at risk of becoming increasingly less receptive to the will of
the people.\textsuperscript{35}

Unfortunately, “dependence corruption” has only been aggravated by the rise of super
PACs and the increasing role they have given to large contributions and independent
expenditures. Consider another presidential candidate competing in the Republican primary:
Newt Gingrich. The super PAC which supports him, Winning Our Future, has received over $10
million from a single family alone.\textsuperscript{36} Sheldon Adelson, a casino tycoon and staunch supporter of
Israel, has rallied his wife and children to the cause of “single-handedly [keeping] Gingrich’s
presidential bid alive.”\textsuperscript{37} Given these contributions, it is simply unrealistic to assert that Gingrich
is not aware and indeed appreciative of this very generous intervention meant to keep his
candidacy alive. This raises serious problems for his ability, if elected, to be responsive to the
needs of the people over the interests of the Adelson family if they were to conflict. Indeed, if
the success of a politician’s campaign was almost singularly dependent on financial revenues
from an individual and his immediate family, it’s almost the policy preferences of one’s
benefactors would receive excessive attention.

We see similar patterns in the financing of a super PAC affiliated with another
Republican candidate: Red, White and Blue and Rick Santorum respectively. Notorious for his
comments concerning women’s reproductive rights, Foster Friess has assumed the role within
the Santorum candidacy that Adelson plays for the Gingrich campaign. In December, 2011 and

\textsuperscript{35} Lawrence Lessig, Republic, Lost (New York: Hatchette Book Group, 2011), 232.
\textsuperscript{37} Ibid.
January, 2012 alone, Friess donated in excess of $1 million to Red, White and Blue.\textsuperscript{38} This is especially troubling as “Foster Friess [was] simultaneously serving as a part of Santorum’s campaign entourage and inner circle” while also playing an active role in Red, White and Blue’s financial and strategic planning.\textsuperscript{39} I leave it to my reader to consider whether it’s truly plausible that candidate Santorum would be able to operate free from a sense of obligation to Mr. Friess if elected president.

While these two campaigns and affiliated super PACs present troubling statistics regarding the dependence of candidates on singular sources of revenue, Restore Our Future presents disconcerting information regarding a plethora of large donations. In 2011 alone, Restore Our Future received 7 contributions of $1 million dollars each.\textsuperscript{40} Beyond this staggering amount of $1 million dollar donations, Restore Our Future has also received four contributions of $250,000 each from different individuals associated with the private equity firm for which Romney used to work, Bain Capital; this means that $2 million have been contributed to the super PAC from those with whom Romney used to share a workplace.\textsuperscript{41} Again, is it really plausible to assert that Romney’s sense of gratitude for and dependence on this kind of financial support will not translate into increased access to or attention from him if he is indeed elected president?

While this demonstrated financial dependence of candidates and campaigns presents serious problems to the ability of our democratic institutions and the elected representatives who

inhabit them to be responsive to the needs of the people, the possible distortion of the legislative process through dependence corruption is only one problem which manifests from the increasing role of vast sums of money in our electoral process. The second comes in the form of public perception of the reality or appearance of institutional corruption. In fact, 75 percent of Americans are of the opinion that “campaign contributions buy results in congress.”\footnote{Lawrence Lessig, Republic, Lost (New York: Hatchette Book Group, 2011), 133.} This is a strikingly large number, especially when considered in light of the fact that super PACs have since opened the door to unprecedented amounts of money.

This perception of corrupting influences in government has also coincided with a loss of confidence in our democratic institutions. In fact, “just 22% [of American voters] say they can trust the government in Washington almost always or most of the time.”\footnote{Ibid., 134, quoting “The People and Their Government: Distrust, Discontent, Anger and Partisan Rancor,” The Pew Research Center (April 18, 2010), 2.} Congress has fared even worse; when asked by Gallup in July, 2010 if they had confidence in Congress, only 11% of respondents, an all-time low, answered affirmatively.\footnote{Lydia Saad, “Congress Ranks Last in Confidence in Institutions,” Gallup, last modified July 22, 2012, http://www.gallup.com/poll/141512/congress-ranks-last-confidence-institutions.aspx.} This distrust in government is particularly problematic for a democratic society. Without confidence in the system, citizens are likely “to become resentful, cynical, and apathetic.”\footnote{John Rawls, Political Liberalism, expanded ed. (New York: Columbia University Press, 1999), 362-363.} This eventual deterioration of popular participation is extremely damaging to democracies as it destroys the very fabric from which our government is to be built.

Given the current incentive structure within which elected officials are operating, who could blame the people for losing faith in our democratic? Unfortunately, other social trends look set to aggravate this public distrust in government; given the growing income and wealth inequalities, the majority of Americans are simply unable to participate at these levels of
economic influence and could quite easily lead them to the conclusion that they are unable to influence the legislation which is to govern them. According to the Congressional Budget Office, the after-tax income of the top 1% of earners has nearly tripled since 1979 while those in the middle 60% of the income scale have seen their earnings increase at a rate just south of 40%. While this raises questions regarding the fairness of tax policy and whether this too is not a manifestation of the dependence corruption we just discussed, it also implicates the fairness of the electoral process itself. Given these vast disparities in material resources, it seems unfair and, frankly, undemocratic to continue to allow our system to operate in such a way that vast amounts of money are necessary for meaningful access to the political arena or to one’s elected representatives.

As if this yawning gap between the income of top earners and those in the middle or lower ends of the spectrum weren’t sufficient to generate public scepticism over whether our institutions are living up to democratic standards, this disparity in wealth and income has now apparently translated into the political realm. According to the Washington Post’s Peter Whorisky: “[b]etween 1984 and 2009, the median net worth of a member of the House more than doubled… from $280,000 to $725,000 in inflation-adjusted 2009 dollars, excluding home-equity.” In stark contrast, the net worth of the average American over that same period has become fallen from $20,600 in 1984 to $20,500 in 2009.

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49 Ibid.
Beyond the fact that this means that elected officials bring different economic perspectives and experience to the legislative bargaining table, it also implicates the ability of citizens to trust that our institutions allow for equal opportunity to assume public office. While the median net worth of members of Congress has always been higher than that of the average American, it wasn’t always “so unusual for a person with few assets besides a home to win and serve in Congress.”\textsuperscript{50} Unfortunately, this appearance that one’s ability to compete for and assume public office is increasingly contingent upon one’s net worth further threatens to further undermine public trust in our government.

Even though these developments occurred after the \textit{Citizens United} decision, they make it increasingly hard to accept that the state interest in preventing corruption was not sufficient to outweigh the liberty interests at stake. Given the seeming implausibility of the Court’s position that “influence over or access to elected officials does not mean that those officials are corrupt” nor that it would “cause the electorate to lose faith in this democracy,” I turn to the cases with have given rise to this state of affairs in an attempt to better understand what other considerations the Court may have seen as decisive.\textsuperscript{51} As it has become increasingly apparent that a state interest in preventing corruption or the appearance thereof is extremely compelling in the case of “independent” expenditures and contributions alike, I question whether a more fundamental conviction that the First Amendment right to free speech is incompatible with regulations drove the Court’s decision.


Chapter III: A Critical Review of Precedent

To properly account for what considerations the Court deemed decisive, I now turn to the cases *Buckley v. Valeo*, *First National Bank of Boston v. Bellotti*, *Austin v. Michigan Chamber of Commerce*, *McConnell v. FEC*, *Citizens United v. FEC*, and *McComish v. Bennett*. This treatment will aim to provide a brief exposition of the Court’s view of First Amendment commitments, with special treatment given to its understanding of the relationship between free speech and representative government. Emphasizing an early endorsement of the principle “more speech is better,” I will examine the ways in which the Court has understood this commitment to foster self-government. Further, I will call attention to the majority’s departure from this principled attachment to quantity of speech in recent decisions to highlight subsequent tensions in First Amendment precedent. I will argue that this inconsistency suggests that commitments which are more fundamental than mere volumes or quantity of speech is at issue; rather, I will contend that the fundamental disagreement between competing interpretations of the First Amendment turns on their understanding of and attempt to reconcile claims of liberty and political equality.

**Buckley v. Valeo**

Beginning with an analysis of the foundational case in contemporary campaign finance law, I now propose an overview of the case *Buckley v. Valeo* (1976), which sought to respond to First and Fifth Amendment challenges posed to four tenets of the Federal Election Campaign Act of 1971 (FECA). This legislation was representative of Congress’ attempt to curb the corrupting influence of money in politics through the introduction of regulations on contributions and
independent expenditures, disclosure and disclaimer requirements, and public finance options.\textsuperscript{52} Beyond providing historical context for subsequent attempts to regulation campaign finance, this case is particularly interesting as the majority’s commitment to the principle that “more speech is better,” a guiding standard in First Amendment jurisprudence, is illustrated in the theoretical distinction it drew between contributions and independent expenditures.

FECA’s contribution limits prevented individuals or groups from donating to federal candidates in excess of $1,000. Political actions committees (PACs) were held to a similar, yet more lenient, cap of $5,000 on contributions to a particular candidate during an election cycle. Further, annual limits on total individual contributions to any candidate or party were capped at $25,000. In addition, Congress had sought to manage independent expenditures, or that speech pertaining to an issue or candidate that is financed and organized independent of any campaign. Individuals were subject to limitations of $1,000 on independent expenditures relative to a particular candidate and personal expenditures by candidates themselves were also subject to regulations.\textsuperscript{53}

Appellants raised First Amendment challenges to both contribution and expenditure limitations, declaring that “limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political [communication] in the modern setting involve[s] the expenditure of money.”\textsuperscript{54} While the Court found a government interest sufficient to justify the limitations on contributions, it invalidated those placed on independent expenditures due to a perceived incompatibility with the

\textsuperscript{52} While the latter two regulatory mechanisms merit attention in their own right, I will focus presently on the limits placed on campaign contributions and independent expenditures as they are most relevant to ensuing developments in the line of precedent at issue.


\textsuperscript{54} Ibid., 11.
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First Amendment. The majority justified this distinction by an appeal to the necessity of high volumes of speech in a democratic system, which it argued the latter regulations threatened to reduce.

Beyond either’s relation to the principle that “more speech is better,” the Court also provided a detailed analysis of the nature of both campaign contributions and independent expenditures to better inform their possible subsumption under First Amendment protections. While the case *United States v. O’Brien* had distinguished pure speech from its symbolic or active elements, the contemporaneous dependence of political communication on the use of money could plausibly for the subsumption of financial mechanisms under First Amendment protection. Finding political communication to be entitled to full protection, the Court declared that it “has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required.”

The majority held that “both [independent expenditures and campaign contributions] implicated fundamental First Amendment interests” but only contribution limits were found to

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Though I understand the desire to protect the means necessary to the exercise of the right to free speech, I am hesitant to accept the Court’s claim that the use of money doesn’t itself constitute or introduce “an active element” to the speech it finances. Rather, I think the Court could have achieved the same result by recognition of this role as a necessary means to speech (as opposed to positing a possibly untenable classification of money as speech itself). The Court could have then granted it constitutional protection as a mechanism which promotes First Amendment commitments, in this case identified as increasing volumes of speech. To borrow Justice White’s word in dissent: “What the Act regulates is giving and spending money, acts that have First Amendment significance not because they are themselves communicative with respect to their qualifications of the candidate, but because money may have been used to defray the expenses of speaking or otherwise communicating about the merits or demerits of federal candidates for election” (*Buckley v. Valeo*, 424 U.S. 1 (1976), White dissenting at 259).
pass the exacting standard of review. Sustained by a vote of (5-4), the Court found that these regulations imposed “only a marginal restriction upon the contributor’s ability to engage in free communication.” The Court justified this position through a classification of contributions as “the symbolic expression of support evidenced by a contribution”; thus, the regulations to which they were subject were justified as “the quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated symbolic act of contributing.”

Further, the majority found this marginal restriction to be justified by a government interest in the “prevent[ion] of corruption and the appearance of corruption spawned by the real or imaginary coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.” The Court found this interest sufficient as the contributions limits were narrowly tailored to “[focus] precisely on the… aspect of political association where the actuality and potential for corruption have been identified.” This justification represents the Court’s recognition of the importance of public confidence in a democratic system as it granted “equal concern [to] the danger of actual quid pro quo arrangements [as to] 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.” Thus, as the Court found contribution limits to be compatible with a commitment to high volumes of speech and to serve a compelling interest in maintaining the integrity of and trust in representative government, the regulations passed constitutional scrutiny.

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57 Ibid., 20.
58 Ibid., 20-21.
59 Ibid., 25.
60 Ibid., 28.
61 Ibid., 27.
In stark contrast, the majority, by a vote of (7-2), declared FECA’s expenditure limits to be unconstitutional as it found them to impose “substantial, rather than merely theoretical, restraints on the quantity and diversity of political speech.” Even with a narrow understanding of the statute’s scope as applicable “only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office,” the Court found this limited applicability insufficient to save the legislation from First Amendment challenges.

The Court contemplated three governmental interests which could possibly serve as justification for the regulations, though none were found to outweigh the liberty interests as stake. As limitations on independent expenditures imposed a substantial burden on protected speech, they could not be justified in terms of their instrumental value to the regulatory scheme in general, or contribution limits in particular, but rather had to pass the exacting test of satisfying a compelling government interest. The Court ultimately held that “the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify §608 (e)(1)’s ceiling on independent expenditures” as:

“the absence of prearrangement and coordination of an expenditure with this candidate… not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments.”

Thus, as previously mentioned, the Court circumscribed a government interest in preventing of corruption to apply only to arranged exchanges of contributions for political favors.

\[63\] Ibid., 44.  
\[64\] Ibid., 47.
While this argument was perhaps plausible in 1976, the subsequent developments we discussed earlier have made this position less tenable now. In fact, by the Court’s own standards, the distinction between contributions and not-so-independent expenditures may collapse in practice due to either’s ability to give rise to “corruption and the appearance of corruption spawned by the real or imaginary coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.” While these developments were perhaps unknowable by the Court, the majority also failed to find sufficient justification for the limitations on expenditures in two other interests presented by the state. First, the majority rejected a governmental interest in mitigating the rising costs of elections as insufficient to justify the expenditure limits. Further, the Court refused to recognize a state interest in equalizing the relative resources of individuals as it found that:

“restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed ‘to secure’ ‘the widest possible dissemination of information from diverse and antagonistic sources’ and ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”

Dismissing comparisons to the precedent in cases establishing relative worth of votes, the Court asserted that “[these] principles… do not justify governmentally imposed restrictions on political expression [as democracy] depends on a well-informed electorate.”

In fact, this conception of quantity of speech as an important precondition for a diverse marketplace of ideas took on a central importance in the majority’s opinion. Moving to construe the First Amendment’s guarantee of free speech as a necessary means to a healthy democracy,
the Court asserted that “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs… of course includ[ing] discussion of candidates.”\textsuperscript{68} Thus, the case for high quantities of speech was made insofar as “it reflects our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.’”\textsuperscript{69} This commitment to a vivacious, open, and diverse marketplace of ideas in turn was declared to be integral “in a republic where the people are sovereign, [as] the ability of the citizenry to make informed choices among candidates for office is essential.”\textsuperscript{70}

Though I recognize that increasing volumes of speech could plausibly lead to a broader range of issues which are treated in the public discourse and to a greater depth at which they are discussed, I am troubled at the harsh nature in which the Court rejected considerations of political equality given that it is a constituent feature of democratic rule. Further, given that a lack of regulations on independent expenditures has led to an increasing domination of this marketplace of ideas by a few economically powerful parties, it seems as if the very regulations at issue may in fact promote the diversity and openness which the Court praises. Though enforcing standards of equality has typically been seen as an inappropriate attempt by the judiciary to pass judgment on which strengths merit reward in the political process, a complete disregard of procedural fairness may indeed have similar results by “endorsing” economic prowess in a laissez-faire marketplace.

In dissent, Justice White recognized similar concerns and challenged the notion that unlimited expenditures actually produced a public dialogue which serves democratic

\textsuperscript{70} Ibid., 14-15.
commitments, identifying rather the potential for corruption. Quoting Ex Parte Yarbrough, White argued for a legislative regulatory power in preventing “corruption,” the consequence of ‘the free use of money in elections, arising from the vast growth of recent wealth,’” as necessary “to protect the elections on which its existence depends.” 71 Justice White further classified expenditures as properly subject to regulation due to the improbability that they could actually be orchestrated in such a way as to be independent from candidates as the beneficiaries “could scarcely help knowing about and appreciating the expensive favor.” 72

Justice Marshall’s dissent further made a case for the propriety of regulations on expenditures, revising the government interest which was originally presented in the form of “equalizing the relative financial resources of the candidates.” 73 Marshall presented “the interest [as] more precisely the interest in promoting the reality and appearance of equal access to the political arena” and thus made the case for providing basic conditions of procedural fairness. 74

This particular way of articulating the government interest in equality is particularly poignant as it highlights institutional significance of fair political procedures in the broader constitutional project of establishing self-government. While the majority argued that the democratic value of political equality could not be realized by diminishing the voice of more economically or politically advantaged parties, the notion of “equal access to the political arena” informs this interest in such a way as to make it increasingly compatible with, and perhaps a constituent feature of, the meaningful exercise of political liberty.

72 Ibid., 261.
73 Ibid., 287.
74 Ibid., 287.
While the *Buckley* majority didn’t explicitly grapple with the demands of political equality so defined, it did move to establish the importance of free speech not only in terms of an individual’s right to express their political sentiments but also as instrumentally significant to an informed electorate and as a mechanism to buttress popular sovereignty. Given this view of the political arena as a “marketplace of ideas,” *Buckley* provides us with a starting point from which to view the Court’s understanding of a right to free speech and procedural equality, or “equal access to the political arena,” in their relation to democratic institutions. I move now to the development of these concepts and commitments in subsequent cases.

**Intermediate Cases**

The period following *Buckley v. Valeo* brought many questions regarding free speech and campaign finance before the Court. While all of these decisions merit consideration, I regrettably must confine my inquiry to a few which were of central importance to the later, controversial decisions *Citizens United* and *McComish*. Within these cases, I will aim to demonstrate the qualifications and limitations that the Court placed on its endorsement of corporate rights under the First Amendment, deriving from the possible tension between democratic processes and corporate participation therein, as well as the Court’s continuing commitment to the principle that “more speech is better.”

In the case *First National Bank of Boston v. Bellotti* (1978), decided in the wake of *Buckley*, the Court again posited a conception of the political arena in terms of the marketplace of ideas when it struck down a Massachusetts law which proscribed corporations “from making contributions or expenditures ‘for the purpose of… influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of [its] property,”
business, or assets.” The majority, by a vote of (5-4), found that the legislation violated the First Amendment as the Court recognized a corporate right to speak in terms of its instrumental worth to “public discussion and the dissemination of information and ideas.” Relying on the 1975 decision Virginia State Board of Pharmacy v. Virginia, the majority reiterated that “commercial speech is accorded some constitutional protection not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information.’”

Though the Court granted protection to corporate speech in express terms of public interest in information, remaining committed to the principle that more speech is better, it took special care to qualify its endorsement of First Amendment protections afforded to corporations. Recognizing a concern that corporate participation “would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of the government,” the Court found that if there were empirical evidence that corporate involvement “threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment Interests, these arguments would merit [their] consideration.” Distinguishing a corporation’s right to participate in conversations of “public interest” from that to participate in the electoral process, the majority declared that their protection of the former “implies no comparable right in the quite different context of participation in a political campaign for election to public office.”

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76 Ibid.
78 Ibid.
79 Ibid.
Court itself circumscribed the scope of the corporate right to speech to include only matters of public interest, explicitly distinguished from participation in a campaign.

In two other cases, Austin and McConnell, the Court further paid attention to the special considerations surrounding the democratic legitimacy of corporate participation in the electoral process. Austin v. Michigan Chamber of Commerce, decided in 1990, articulated the “anti-distortion rationale,” a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth” on the electoral process, when it upheld the Michigan Campaign Finance Act, which had prohibited corporations from spending general treasury funds in state elections. This government interest, premised on the maintenance of fair and equitable processes of participation, was found to serve as sufficient justification for the act as unregulated expenditures involving parties of substantially unequal resources can serve to functionally limit opportunities for meaningful participation. While the Citizens United majority overturned this case and, with it, the legal validity of a compelling government interest in preventing the distortion of the electoral process, I believe this position stems from a misunderstanding about the necessity of procedural fairness to democratic systems.

Over a decade later, a similar First Amendment challenge to a provision in the Bipartisan Campaign Reform Act of 2002, the latest attempt by congress to “to purge national politics of what [is] conceived to be the pernicious influence of ‘big money’ campaign contributions,” was granted review by the Court. In McConnell v. Federal Election Commission, decided in 2003, the Court upheld regulations on the contribution and use of “soft-money” to and by political parties as well as bans on the use of corporate money to finance independent expenditures within

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certain time periods surrounding elections. Soft-money, or direct contributions to political parties, were most often used to execute functions such as voter-registration and very seldom were used for expenditures. Thus, the Court found that the provision imposed “only a marginal restriction upon the contributor’s ability to engage in free communication” and posed little threat to the dissemination of ideas in the political marketplace.\textsuperscript{82} Further, given this minimal effect, the statute survived critical examination as the Court recognized governmental interests in the form of preventing “actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption” sufficient to justify these “marginal restrictions.”\textsuperscript{83} The McConnell majority in this way remained sensitive to the delicate task of maintaining the integrity of and confidence in representative government while fostering a commitment to the free flow of information and the principle that “more speech is better.” Unfortunately, the majorities in the next two decisions neglected the former considerations and reflected a growing tendency in First Amendment jurisprudence to view the right to free speech as incompatible with regulation.


While the preceding cases did begin to expose the Court’s understanding that free speech and political equality are in tension within the context of regulations on campaign finance, I turn now to \textit{Citizens United} and \textit{McComish} to further examine this belief as it took on an increasing significance in these two cases. Within my treatment of the majority opinions, I will continue my attempts to explicate the dimensions of the Court’s conception of the relationship between free speech and democracy and the role of procedure in uniting these two Constitutional values. This latter attempt to understand the procedural requirements perceived to properly foster this

\textsuperscript{83} Ibid., 24-32, quoting National Right to Work, 459 U.S., at 208.
relationship will serve as the starting point for a discussion of whether the Court’s refusal to recognize the validity of arguments deriving from political equality renders its conception of the marketplace of ideas incapable of properly accounting for commitments to free speech and self-government.

Similar to McConnell, Citizens United v. Federal Election Commission resulted from a First Amendment challenge to the BCRA. As a thorough exposition of this monumental opinion is unfortunately beyond the scope of my project, I will confine my inquiry to the majority’s understanding of previous precedent and will pay particular attention to its classification of the relationship between quantities of speech and the democratic process. Citizens United, a non-profit corporation, had sought to make its documentary Hillary, a critical review of the then presidential candidate Hillary Clinton, available on video on demand. Its debut was prevented as it arguably fell under a temporal prohibition on electioneering communications articulated in the Bipartisan Campaign Reform Act. Decided in 2010, a five justice majority struck down the relevant statute, §441b as amended by §203, which had prohibited corporations and unions from using general treasury funds to finance electioneering communications. Defined as any “publicly distributed… broadcast, cable or satellite communication’ that ‘refers to a clearly identified candidate for federal office’ made within 30 days of a primary or 60 days of a general election,” the Court found electioneering communications to be entitled to full First Amendment protection.84 To support this conclusion, the Court made a number of controversial moves, including, but not limited to, rejecting narrower grounds on which to rule. While I question the applicability of §441b to Hillary, I will grant this assumption so as to engage directly with the constitutional issues at hand.

*Citizens United*, despite the majority’s claims, marked a radical shift in precedent; while claiming fidelity to the doctrine of *stare decisis*, the Court still managed to overturn *Austin* in totality and strike down *McConnell* in part. Dismissing critical qualifications in *Bellotti*, a case on which much of its logic rested, the majority found *Austin*’s anti-distortion rationale to violate the corporate right conferred in this previous ruling. By focusing the entirety of their attention to a just a portion of reasoning in *Bellotti*, the Court was able to reach the conclusion that there is “no support…for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation” and granted corporations full First Amendment protection in the political arena.\(^8^5\) Dismissing Footnote 26 of *Bellotti* as “supported only by a law review student comment, which misinterpreted *Buckley*,” the Court’s own interpretation of relevant cases takes on serious internal tensions.\(^8^6\) Justice Stephens, in his dissent, went so far as to classify the majority’s treatment of *Bellotti* as “[putting them in] the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley*.\(^8^7\)

As previously mentioned, *Bellotti* provided express qualifications to the corporate right it conferred when it refrained from passing judgment on the “many other state and federal laws regulating corporate participation in partisan candidate elections… [and] prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing

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\(^{86}\) Ibid., 3.

candidates.”

The majority exercised this restraint due to its recognition of “[t]he overriding concern… [found in] the problem of corruption of elected representatives through the creation of political debts” and refused to question “the governmental interest in preventing this occurrence.”

To reiterate, the *Bellotti* majority endorsed a corporate right to speak in sole terms of public interest in information; as “the case before [them had] present[ed] no comparable problem” regarding dependence of representatives, the Court explicitly qualified their endorsement “of a corpora­tion’s right to speak on issues of general public interest,” declaring that it implies “no comparable right in the quite different context of participation in a political campaign for election to public office.”

For the Court to dismiss this governmental interest in maintaining the independence and integrity of elected representatives, which “has never been doubted,” as a mistaken interpretation of *Buckley* does incredible injustice to precedent, which, in Kennedy’s own words, “purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption.”

This mistaken understanding of the terms on which a corporate right to speech is conferred allowed the majority to overturn *Austin* and its “anti-distortion rationale” by claiming that it created a new governmental interest to bypass *Buckley* and *Bellotti*. This classification of *Austin* ignores the critical nuances of previous precedent which specifically articulated that a corporate right to speak is to be granted solely in terms of the public interest in the free-flow of information. Rather than bypass *Bellotti*, it seems quite like *Austin* had taken up *Bellotti*’s suggestion that “congress might well be able to demonstrate the existence of a danger of real or

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89 Ibid.
90 Ibid.
apparent corruption in independent expenditures by corporations to influence candidate elections” when it respected the Michigan statute.\(^{92}\) Thus, in overturning *Austin*’s anti-distortion rationale, the Court too readily dismissed the constitutional tradition of respecting Congress’s attempt to mitigate the threats posed to our democratic institutions by the financial dependence of elected representatives on those financing their campaigns. Further, by attributing a dependence on *Austin* to *McConnell*, the Court overturned the portion of latter opinion which had upheld the BCRA’s extension of the proscription of corporate independent expenditures to encompass issue ads or electioneering communications. Thus, by relying on the supposed, and perhaps fabricated, existence of tensions between previous cases and *Austin*, the majority overturned the anti-distortion rational and, with it, the legal validity of a government interest in maintain fair and equitable political procedures.

Having overturned the features of precedent which would have inclined their decision in another direction, the Court then declared §441b of the BCRA unconstitutional as it found it to be incompatible with First Amendment principles. Citing the indeterminacy surrounding the scope of legal entities encompassed by the ban at issue, the Court asserted that the prohibition on corporate independent expenditures would create a “chilling effect” on “protected speech pending the drawing of fine distinctions.”\(^{93}\) The Court concluded that the regulatory “regime” at issue thus constitutes “an unprecedented governmental intrusion into the realm of speech” and therefore must pass exacting scrutiny if it is to stand.\(^{94}\) Moving to opine that “influence over or access to elected officials does not mean that those officials are corrupt” nor that “the appearance

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\(^{94}\) Ibid., at 19.
of influence or access… [would] cause the electorate to lose faith in this democracy,” a claim at odds with the empirical record, the Court found the government interest in preventing corruption or the appearance thereof insufficient to justify the regulations at issue.\(^95\) Whether an awareness of this empirical record would have changed the Court’s decision is uncertain as it seems that the majority was more fundamentally arguing for an understanding of the First Amendment as conferring an absolute right to free speech, one which is not properly subject to regulation.

Continually justifying its decision in terms of democracy and the importance of an informed electorate, the Court advanced a conception of uninhibited speech as central to the public discussion on which democracy is founded. Given the implausibility of the Court’s claim regarding a lack of public suspicion of money in politics, this perceived necessity of an absence of regulations may in fact be the foundation of the Court’s position and could have perhaps outweighed the government interest in preventing corruption even had the empirical record been considered. Consider the majority’s equivocation on the nature of the corporate right to speech. While the Court first moved to declare regulations grounded in identity-based distinctions to be incompatible with the First Amendment as they “[deprive] the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice,” it is hard to see how this applies to corporations, especially given that their right to free speech is supposed to be understood in terms of public interest.\(^96\) To borrow Justice Stevens’ words in dissent: “Take away the ability to use general treasury funds for some of those ads, and no one’s autonomy, dignity, or political equality has been impinged upon in the least.”\(^97\)

\(^{96}\) Ibid., 24.  
Given the inadequacy of this classification of “corporate personhood,” the Court’s primary justification for a corporate right to participate in elections would seemingly need to be found in its “primary emphasis not on the corporation’s right to electioneer, but rather on the listener’s interest in hearing what every possible speaker may have to say.”\(^9^8\) Yet, adopting this position may lead to internal inconsistencies in the majority’s position as it is in tension with the Court’s unqualified rejection of regulations on the exercise of the right to speech; if corporate First Amendment rights are predicated on their instrumental worth to the public discourse, “surely the public’s perception of the value of corporate speech” and some measure of its effects on the worth of the speech of actual persons deserves recognition.\(^9^9\) This ambiguity regarding the nature of the right to free speech, especially when granted to corporations, suggests that there may be more fundamental issues at stake, namely an understanding of First Amendment as conferring an absolute right which is not properly subject to regulation.

The claim that the Court may have been relying on an absolute interpretation of the First Amendment becomes more plausible when one considers that the Court further rejected the political action committee (PAC) as a legitimate alternative outlet for corporate speech. Indeed, it is hard to see what other considerations support this position as the public interest in obtaining information is still served and the status of the rights of actual persons is virtually unaffected as the PAC option still provides an avenue of access to the political arena.\(^1^0^0\) Attempting to square this position with the demands of democracy, the Court moved to assert that the regulations

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\(^9^9\) Ibid., at 79.

\(^1^0^0\) I make this argument solely to expose the Court’s inconsistencies as I possess certain reservations of my own regarding the role of PACs in elections as we have seen them to be “adjuncts” of the campaigns they seek to support.
would “deprive the public of the right and privilege to determine for itself what speech and
speakers are worthy of consideration” and declared that:

“a ‘restriction on the amount of money a person or group can spend on political
communication during a campaign…necessarily reduces the quantity of expression by
restricting the number of issues discussed, the depth of their exploration, and the size of
the audience reached.’”

Ironically, this claim is oblivious to the fact that the people had decided, through their elected
representatives, that corporations didn’t merit full First Amendment protection. Further, the
majority failed to engage the argument that unregulated corporate participation in the electoral
process creates a system which is incapable of granting the proper respect to individual citizens
seeking to participate. Intuitively, it seems as if the individuals who are deprived of their ability
to “strive to establish worth, standing, and respect, for [their] voice” are those who can’t compete
financially with a corporation in a deregulated marketplace of ideas where access is predicated
on economic competition.

Despite the majority’s claims to further self-government through allowing for vivacious
public discourse, it doesn’t necessarily follow from the fact that corporations can afford to speak
endlessly on any number of issues that they’ll speak in a way which fully represents the broad
spectrum of public issues and viewpoints which constitute a diverse marketplace of ideas.
Unfortunately, the Court doesn’t treat the possibility that corporate participation could threaten
the very range of issues and depth at which they are discussed.

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101 Citizens United v. Federal Election Commission, No. 08-205, slip op. at 22-24 (January 11, 2011),
102 Ibid., 24.

While I personally believe PACs and their new variant super PACs are not a solution to the problem of corporate
participation, for the previously mentioned reasons of dependence corruption and procedural inequalities, it is hard
to understand how this option doesn’t cohere with the majority’s position.
In fact, it seems more likely that the economic advantage possessed by corporations could serve to effectively undermine “equal access to the political arena” if gone unchecked. While the majority is surprisingly silent on this matter, Justice Stevens addresses this concern in dissent, stating that:

“[t]he opinions of real people may [in effect] be marginalized. ‘The expenditure restrictions of [2 U.S.C.] §441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.’”

These considerations seemingly provide ample justification for the limitations on corporate spending in elections; for if citizens are prevented from effectively promulgating ideas in the marketplace of ideas, corporate participation could “distort public debate in ways that threaten rather than advance the interests of listeners.”

This problematic possibility and the Court’s misunderstanding of the nature of corporate rights makes it apparent that the majority uncritically moved forward with the assumption that an unregulated “marketplace of ideas” and an absolute right to free speech were best suited to foster an enlightened public discourse which is the foundation of democratic rule. I argue that this understanding of the majority’s position is reasonable as it continually emphasized the importance of diverse perspectives to democratic dialogue, citing the necessity that “all channels of communication be open to [citizens] during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.”

Repeatedly invoking our nation’s commitment to popular sovereignty, the Court further emphasized that “‘discussion of public issues and debate on the qualification of candidates [is]...
integral to the operation of [our] system of government.”106 Citing Federalist Paper 10, the
Court seemingly identified increasing volumes of speech as the proper remedy for the problem of
“factions,” that is “permitting them all to speak, and… entrusting the people to judge what is true
and what is false.”107

Given these commitments, the majority seemingly grounds its decision in the assumption
that higher volumes of speech serve the end of democracy by increasing the number of issues
discussed, the depth at which they are examined, and the diversity of perspectives represented.
As the majority fails to demonstrate in what ways granting corporations a right to participate in
elections accomplishes these goals, much less defends itself against the criticism that this
functionally limits the opportunities for diverse participants, it seems as if “[t]he majority [was]
oblvious to the simple truth that laws such as §203 do not merely pit the anticorruption interest
against the First Amendment, but also pit competing First Amendment values against each
other.”108

While I discuss in length how regulations can actually promote both First Amendment
values referred to here, I move now to McComish so as to better illustrate what position the
Court has committed itself to. In concluding our discussion of Citizens United, I wish finally to
reiterate the majority’s endorsement of the principle “more speech is better” so as to illuminate
the surprising turn of events.

Decided in the following term, McComish v. Bennett set to resolve the First Amendment
challenges to the Arizona Citizens Clean Election Act, a public financing system for candidates
in state elections passed by popular referendum. A five-justice majority, identical to that in

106 Citizens United v. Federal Election Commission, No. 08-205, slip op. at 23, (January 11, 2011), quoting Buckley
107 Ibid., at 39.
108 Citizens United v. Federal Election Commission, No. 08-205, Stevens, J., dissenting, slip op. at 84 (January 11,
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_Citizens United_, found the statute unconstitutional as it was perceived to burden and penalize the exercise of constitutionally protected free speech through the use of a matching-funds mechanism. This mechanism provided $.94 to publicly financed candidates for every dollar their privately-funded competitor spent over the initial grant of public money. Its intention was to enable candidates who accepted public-finance to remain competitive in a private market while refraining from unnecessarily releasing tax-payer dollars.  

Abandoning its commitment to the principle that “more speech is better,” the Court essentially declared that this increasing competition, derivative of others’ subsidized exercise of free speech, substantially burdened the ability of privately-financed candidates to exercise their First Amendment rights. The Court took particular issue with the statute’s “multiplier effect,” or the fact that “one dollar raised or spent by the privately financed candidate results in an almost one dollar increase in public funding to each of the publicly financed candidates.” The majority found this problematic as “spending [even] by independent groups on behalf of a privately funded candidate, or in opposition to a publicly funded candidate, results in matching funds” and found this “disparity in control” to be unconstitutional.

The Court professedly relied on the decision in _Davis v. Federal Election Commission_, which had found the Millionaire Amendment unconstitutional as “the opponent of the candidate who exceeded that limit [on personal expenditures] was permitted to collect individual contributions up to… three times the normal contribution limit.” Ignoring the fact that this previously identified burden had resulted from an “asymmetrical regulatory scheme,” the Court

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110 Ibid., at 4.
111 Ibid., at 4.
112 Ibid., at 9.
moved to declare that “the burden imposed by the matching funds provision is [similarly] evident and inherent in the choice that confronts privately financed candidates.”113 Despite this dissimilarity, the Court further attempted to maintain the possibly untenable position that the matching-funds mechanism imposed an even more substantial burden than the Millionaire Amendment given the multiplier effect and “disparity in control.”114

Yet, due to the absence of an asymmetrical scheme, the conceptual grounding of the Court’s understanding of “burden” remains unclear. Given that “[a]ny system of public financing, including the lump-sum model upheld in Buckley, imposes a similar burden on privately funded candidates,” it seems odd that the majority would find that the burden at issue is a property of the matching funds mechanism alone.115 In fact, it seems as if the majority effectively endorsed the idea that “additional speech constitutes a ‘burden’”; “the very notion of which… is odd and unsettling.”116

Given these peculiarities, it seems as if Court, whether they were aware of it or not, moved to protect the relative worth of the original party’s speech which derived from a pre-existing, unequal distribution of financial reasons. This raises problems for the Court’s concept of what constitutes a “burden”; indeed, it seems quite strange that their concept of “burden” would protect the worth of a party’s speech from the threat of competition in an accessible political arena but can’t accord the same respect to the worth of speech of economically disadvantaged parties which is threatened in an unregulated marketplace of ideas.

114 Ibid., at 11.
116 Ibid., at 15.
In an attempt to square this conclusion with the Court’s previous commitment to “more speech is better” and thus to save it from this conceptual predicament, the majority attempted to equate this “burden” with a “restriction on the amount of money a person or group can spend on political communication during a campaign [which] necessarily reduces the quantity of expression.” Unfortunately, it is not immediately clear that there exists an identity between a choice to speak in a competitive marketplace and the absence of choice imposed by literal limitations on an individual’s speech. Furthermore, this attempt to establish a causal relationship between the Arizona Citizens Clean Elections Act and necessary reduction of quantities of speech not only is conceptually incoherent but is incompatible with the empirical record; in her dissent, Justice Kagan cites the fact that independent expenditures had risen by 253% since the passage of the act. Given the complications which arise in the majority’s conception of burden and restriction, it seems as if this just is a fundamentally mistaken classification; but, for the sake of argument, let’s grants that the matching funds mechanism does constitute a restriction on political speech and thus that it violates the First Amendment.

Is there a compelling government interest which can justify it? Unsurprisingly, the majority failed to find one of sufficient force. Contorting the proposed purpose of the bill by singularly relying on an online statement as demonstration of intent, a method contrary to established practice, the majority declared that “there is ample support for the argument that the matching funds provision seeks to level the playing field,” (as if equal access to the political arena were something bad). It buttressed this outlandish refusal to recognize the actual intent

of the bill, which actually aimed to prevent the corruption of elected representatives, by citing
the fact that the resulting system allowed for participating candidates to seek private
contributions in the case that the state was unable to provide the promised public-funds and
declared this to be evidence of a desire to “level the playing field.” While this is contrary to a
more obvious purpose is insuring the system would be efficacious, it provided the majority with
the fodder it needed to declare the matching funds mechanism unconstitutional. Relying on
*Buckley*, the Court rejected “a compelling state interest in ‘leveling the playing field’ [when it
imposes] undue burdens on political speech.” 120 Supplementing this concern for burdens
imposed on parties, which are in fact non-existent in this case when one discounts subsidized
competition in the marketplace of ideas, the Court asserted that “leveling electoral opportunities
means making and implementing judgments about which strengths should be permitted to
contribute to the outcome of an election.” 121 Oddly enough, the Court failed to recognize that a
choice to categorically reject attempts to regulate money as a mechanism for political speech in
effect has the same results but functionally endorses economic advantage as the strength which
merits advantage in the electoral process.

Unfortunately, while the Court eventually contemplated a state interest in preventing
corruption, it found it inapplicable in this case as the majority could not “imagine what marginal
corruption deterrence could be generated by the matching funds provision” and found that it
couldn’t be justified as an incentivizing device for public finance as this was insufficient to save
it from First Amendment scrutiny. 122 Again, the Court justified its decision in terms of the
significance of political speech to democratic governance, declaring “campaigning for office… a

120 McComish v. Bennett, No. 10-239 (June 27, 2011), slip. op. at 23, quoting *Citizens United*, 558 U. S., at ___
(slip op., at 34), http://www.law.cornell.edu/supct/html/10-238.ZO.html.
121 Ibid., at 24, quoting *Davis*, supra, at 742.
122 Ibid., at 26.
critically important form of speech.”  

123 The majority further purported to enlighten its audience on the purpose of “the First Amendment [which] embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.”  

124 This commitment, they explicated, “reflects our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”

Despite these claims to furthering enlightened self-government, the majority fails to establish a convincing case for why the statute at issue actually hinders this “unfettered interchange of ideas” or why a completely unregulated marketplace of ideas, as opposed to fair political procedures, actually promotes it. Contrary to the majority’s opinion, it seems as if the statute actually helps realize “the values underlying both the First Amendment and our entire Constitution by enhancing the ‘opportunity for free political discussion to the end that government may be responsive to the will of the people.”  

126 When viewed in this light, not only does the act help to preserve the independence of representatives and fair processes of government by providing public finance options, but it also opportunities for the exercise of individual liberty through allowing for roughly equal access to the political arena. Given these considerations, I remain absolutely unconvinced that considerations of fairness are irrelevant to and incompatible with the First Amendment, which is meant to foster enlightened self-government. As the Court has rejected these arguments, citing a tension between liberty and political equality, I now propose a comprehensive assessment of what these commitments entail.

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124 Id., at 25, quoting Buckley, supra, at 14.
and whether they are really incompatible within the context of political participation. To that discussion I now turn.
Chapter IV: The Case for Procedural Equality

This chapter is devoted to resolving the supposed tension between the right to free speech and equal access to the political arena by attempting to understand these commitments in their relation to the broader constitutional project of establishing self-government. As this introduces question of political theory, I begin with a brief discussion of models of jurisprudential interpretation to address concerns which derive from an attempt to inform constitutional questions by appeals to moral and political philosophy. Addressing concerns regarding the legitimacy of such judgments when made by the judiciary, I make the case that the Court simply cannot be neutral in the case of campaign finance regulations.

Stressing the need to engage these more fundamental questions regarding the nature of self-government, I then move to advance the thesis that fair political procedures are a constituent feature of democratic rule and the proper treatment of citizens. Further, I argue that these considerations of procedural fairness, if properly conceived, can account for a First Amendment interest in the right to uninhibited speech as well as an interesting in promoting equal access to the political arena by emphasizing what John Rawls coined the “fair value of political liberties.” Thus, rather than attempting to weight two competing constitutional values, I aim to propose a method by which we can systematically account for both the right to free speech and the democratic commitment to political equality.

Jurisprudential Theory

Given the rise of originalism and the challenges it poses to my eventual method of interpretation, I begin my discussion of jurisprudence here. Originalism generally takes two
forms. The first, which maintains that the constitution ought to be interpreted according to the founders’ intent, is fraught with problems given that the founders often disagreed over key provisions. Given these issues, I move now to a discussion of “textualism,” the other variant of originalism, as its account of judicial interpretation is more plausible.

Advocated by Justice Scalia, textualism holds that the only proper and legitimate standard of statutory or constitutional interpretation resides in “the objective indication of the words, rather than the intent of the legislature” or the founding generation.¹²⁷ When interpreting a constitutional provision, then, a judge ought to “begin with the text, and… give that text the meaning it bore when it was adopted by the people.”¹²⁸ This emphasis on the historical meanings of words derives from concerns regarding the legitimacy of judicial interpretation and poses the most interesting challenge to the relevance of the philosophic arguments I ultimately claim are decisive in these cases.

Textualism is a staunch critic of any model which seeks to look beyond the text for evaluative criteria. Scalia in particular directs his attacks at common law models of interpretation, or the view that “the Constitution is a living organism, [which] has to grow with the society that it governs or it will become brittle and snap”;¹²⁹ he finds it especially troubling that “it is the judges who determine [society’s] needs and ‘find’ the changing law.”¹³⁰ While Scalia admits that an extra-textual view of the constitution is “a pragmatic one,” he ultimately

finds it to be fatally flawed as he claims it is an illegitimate practice which lacks a standard of judgment.\textsuperscript{131} Declaring an extra-textual method of interpretation to be illegitimate, Scalia argues “[i]t shouldn’t be up to the judges” to determine what the Constitution means, “it should be up to the legislature.”\textsuperscript{132} Assuming a position of legal realism, Scalia asserts that “judges in fact ‘make’ the common law,” as opposed to “finding it,” and this procedure bares an “uncomfortable relationship” to democracy as the law and the essential rights it protects become creatures born by judicial creativity and are no longer a product of popular legislation.\textsuperscript{133} This apparent incompatibility between democracy and judicial interpretation derives from the fact that “judges have no authority to pursue those broader purposes or write those new laws.”\textsuperscript{134} Within the context of the current cases, then, proponents of this method would maintain, as Scalia did, that any evaluative standard not explicitly found in the Constitution, such as standards of procedural fairness, may not be legitimately consulted by judges seeking to understand the First Amendment’s protection of the right to free speech.

Further, Scalia argues, the view of the constitution as a document which develops to accommodate changes within society is “[incompatible with the whole anti-evolutionary purpose of a constitution, [as] there is no agreement, and no chance of agreement, upon what is to be the guiding principle of evolution.”\textsuperscript{135} This nonexistence of a fixed standard for interpretation in practice allows judges to rely on personal judgments of “what ought the result to be, and then


\textsuperscript{132}Antonin Scalia (Lecture, Woodrow Wilson International Center for Scholars, Washington, D.C., March 14, 2005), 5.


\textsuperscript{134}Ibid., 98.

\textsuperscript{135}Ibid., 118.
[to] proceed to the task of distinguishing… any prior Supreme Court cases that stand in the way.” Thus, Scalia argues, “[t]here is no such thing as a moderate interpretation of the text” and the very practice of judicial interpretation “render[s] the Constitution useless because it will mean what the majority wants it to mean.”

It is due to these considerations that Scalia argues “not [for a] rationalization of this process but [an] abandonment of it”; for what exactly is to constrain the judge who attempts to recognize extra-textual rights or principles of evaluation? “The philosophy of John Rawls?” While this notion is laughable to Justice Scalia, I argue that resolutions to the First Amendment issues before us presuppose answers to basic questions of political theory and self-government and further that Rawls’s philosophy actually provides us with the best guide by which to systematically address these questions as he grounds his normative theory in the fair representation of the person.

Ronald Dworkin, who works within the Rawlsian tradition and who argues that jurisprudential issues are essentially philosophic, admits that there are in fact issues of legitimacy within the “politically sensitive issue of constitutionalism.” These concerns exist, and rightfully so, given that the idea of the introduction of new evaluative principles by judges


amounts to “ex post facto legislation, [and] not the enforcement of an existing obligation.”\textsuperscript{141} Despite these concerns, Dworkin confronts us with a simple, yet illuminating, question: “Can the most fundamental principles of the constitution… themselves be considered a part of the law?”\textsuperscript{142}

Answering this question positively, Dworkin introduces a new model of interpretation, which relies upon the role of constitutional principle, to make judicial interpretation compatible with democracy. Rather than “usurping” power from democratic branches of government, Dworkin argues that judges employ a weak form of discretion when they appeal to extra-textual principles embedded in the constitutional tradition. Distinguished from a strong sense of discretion in which “some set of standards… [does] not in fact purport to impose any duty as to a particular decision” in a given case, Dworkin identifies the incorporation of principle in a judicial decision as a “duty defined by standards that reasonable men can interpret in different ways.”\textsuperscript{143} Judges in fact have “a duty to take measure of these principles,” though they may understand them differently, and their subordination to personal preferences amounts to “a mistake.”\textsuperscript{144} We can observe this sense of obligation to the principle “more speech is better” in the cases at hand; indeed, even when it didn’t seem to support the majority decision in \textit{McComish}, we saw the justices struggle to square their position with it.

While Dworkin maintains that these principles are binding on judges, he does classify them as contributory, as opposed to decisive; that is, “they incline a decision one way, though

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\item[\textsuperscript{141}] Ronald Dworkin, \textit{Taking Rights Seriously} (Cambridge: Harvard University Press, 1996), 44.
\item[\textsuperscript{142}] Ibid., viii.
\item[\textsuperscript{143}] Ibid., 69.
\item[\textsuperscript{144}] Ibid., 35.
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not conclusively, and they survive intact when they do not prevail.”\textsuperscript{145} This is due to the fact that principles “conflict and interact with one another” and “[provide] a reason arguing in favor of, but [do] not stipulate a particular solution.”\textsuperscript{146} As weighting competing principles can be controversial, Dworkin argues that judges must “make a case for a principle, and for its weight, by appealing to an amalgam of practice.”\textsuperscript{147}

Again, we can observe this attempt to grapple with constitutional principles embedded within our tradition in the previously discussed cases. Recall that in \textit{Buckley}, the majority rejected a government interest in “equalizing the relative resources of individuals” as unconstitutional “leveling.” Unsatisfied with this classification, Justice Marshall attempted to argue for this government interest by reframing it in terms of “equal access to the political arena,” a principle which advances our commitment to representative government. Given the Court’s recognition of a similar principle in cases which declared the relatively equal worth of votes to be constitutionally required, the Court’s categorical rejection of considerations of procedural fairness is increasingly alarming. Rather than advocating “unfettered freedom” as a principle which carries absolute weight, the Court should have earnestly engaged arguments advocating equal access to the political arena.

Viewed in this light, the right to free speech and the right to equal access to the political arena are not simply “objective indications” of the constitutional text, but are rather “creatures of both history and morality… [and] depend upon both the practice and justice of its political institutions.”\textsuperscript{148} When attempting to enforce these rights, as well as others, Dworkin recognizes

\textsuperscript{146}Ibid., 72.
\textsuperscript{147}Ibid., 35.
\textsuperscript{148}Ibid., 89.
that it is insufficient to declare it to be of an absolute nature; while “the institutional structure of rules and practice may not be sufficiently detailed” to determine a particular case, the right at issue still needs to be understood in the context of the history of the institutions which protect it. Dworkin admits that this is a difficult task as the conventions at issue are often abstract as “their full force” can often only “be captured in a concept that admits of different conceptions; that is, in a contested concept.” As a judge must then “decide which conception is a more satisfactory elaboration of the general idea,” she in turn must address basic questions of “political philosophy” if she is to “answer in sufficient detail the question of what political scheme the constitution establishes.”

We see this debate regarding which conceptions of the right to free speech and political equality are most suited to our democratic institutions sprinkled throughout the previous cases. While Scalia maintains this conflict can be resolved by a singular appeal to the Constitutional text, this is an inadequate approach if one is to take seriously the difficulty of the task. Dworkin’s model of interpretation, through its emphasis on the history and character of a society’s institutions, thus seems to better inform the disagreements over the constitutional of campaign finance regulations. Rather than attempting to simplify the task, this model can account for the fact that the right to free speech within the context of political participation raises basic questions about the nature of representative democracy. To answer these questions in a systematic and principled way, one must be willing to admit that “jurisprudential issues are at their core issues of moral principle, not legal fact or strategy.”

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150 Ibid., 103.
151 Ibid., 107.
152 Ibid., 7.
Michael Sandel, a preeminent constitutional scholar and political philosopher, argues for a similar approach to understanding constitutional questions. While jurisprudential neutrality, or the act of “bracket[ing] moral and religious values when deciding legal questions,” is often championed as the only legitimate method of interpretation, Sandel rightly argues that this practice is not possible in certain cases. According to Sandel, at times, “[t]here is simply no way to decide the legal issue without deciding an underlying moral question.”

Consider the cases at hand. The Court repeatedly emphasized the importance of the First Amendment right to free speech in fostering an enlightened electorate and in serving the ends of self-government and political autonomy. While these relations have no clear source in the constitutional text, the founders, scholars, and judges have emphasized and explicated the importance of public discussion to self-government, a conversation which itself constitutes a part of our constitutional tradition. This conversation demands engagement if we are to properly understand the legal issues before us as there simply is no way to address the right to political speech without taking an implicit or explicit stance on certain fundamental questions regarding the nature of self-government.

Alexander Meiklejohn, in his classic work *Free Speech and Its Relation to Self-Government*, declared that “the unabridged freedom of public discussion is the rock on which our government stands,” a position which mirrors the Court’s own commitments in the

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153 Jeffrey Abramson, “Justice Takes a Stand,” review of *Justice: What's the Right Thing to Do?*, Texas Law Review 89, no. 3 (February 2011): 653. While I endorse Sandel’s view that there simply isn’t a way to decide certain legal issues while remaining neutral on deeper philosophic questions, I am more unwilling to accept his view that judges should seek to constitutionalize many, if not most, political debates when presented with the opportunity. Though I ultimately find that the Court does have an inevitably active role to play in the particular cases at hand as they raise questions of public morality, I do think judicial restraint from passing judgments on private morality, when possible, is often desirable. For an interesting discussion on the merits of liberal neutrality, see Jeffrey Abramson, “Justice Takes a Stand,” 667-679. 154 Ibid., 154. For a discussion of further cases in which this claim in demonstrated, see Michael Sandel, *Justice: What’s the Right Thing to Do?*
previously discussed cases.\footnote{Alexander Meiklejohn, \textit{Free Speech and Its Relation to Self-Government} (New York: Harpers & Brothers, 1948), 91.} Given the fundamental role political speech plays in democracy, “public discussion… has a constitutional status which no pursuit of an individual purpose can ever claim.”\footnote{Ibid., 93.} The “crucial task” in determining which forms of speech are granted utmost First Amendment protection thus comes down to “separating public and private claims.”\footnote{Ibid., 99.}

This distinction between public and private rights under the First Amendment may help to clarify what conception of democracy and political participation the Court effectively endorsed when it declared the regulations in \textit{Citizens United} and \textit{McComish} to be unconstitutional. This understanding of democracy finds its expression in the writings of the great Justice Holmes. According to this mechanical view of the law, “[t]he activities of legislatures and courts [are] simply… a play of forces which are in conflict”; and further, moral or political theory has no role to play in informing constitutional commitments but rather “threatens to clog the legal machinery.”\footnote{Ibid., 73-76.} Individuals act from the “basic principles of human behavior,” “self-preference and force,” and society amounts to nothing more than “a multitude of individuals, each struggling for his own existence.”\footnote{Ibid., 71-78.}

Within this bleak picture, the value of speech “is instrumental in the sense that it is connected with the emergence of truth” as political truth comes down to an idea’s ability to survive in a competitive “marketplace of ideas.” Yet, as Cass Sunstein rightly points out, this view has two basic features which may not be entirely consistent: “skepticism” regarding an external criterion for truth and “competition in the marketplace.”\footnote{Cass R Sunstein, \textit{Democracy and the Problem of Free Speech} (New York: The Free Press, 1993), 25.} If the marketplace of ideas...
really is to define truth and is to simultaneously act as a bulwark for democracy, it seems that some conception of the “appropriate preconditions for such competition” needs to be stipulated in order to ensure the system functions properly.\textsuperscript{161}

A competing conception of democracy, which may help us in identifying conditions which allow for the relationship between free speech and self-government to properly obtain, was championed by another great member of the Court, Justice Brandeis. Often going by the title “deliberative democracy,” this conception of democracy finds its “roots… in classical republican thought, with its emphasis on political virtue, on public spiritedness, on public deliberation, and on the relationship between character and citizenship.”\textsuperscript{162} According to this understanding of self-government, “political truth is what emerges in a well-functioning democracy, one that allows open discussion under ideal or at least acceptable conditions.”\textsuperscript{163} Within this broader project, “free speech is thus emphatically a ‘means’” to realizing the end of self-government and doesn’t represent an absolute right of individuals which can’t be subject to regulation.\textsuperscript{164} This emphasis on evaluative criteria for “the marketplace of ideas” as a democratic institution seemingly leaves room for, and further necessitates, considerations of procedural fairness or of equal access to the political arena, which Justice Marshall so avidly argued for in his dissent in \textit{Buckley}. While Brandeis believed that these conditions could be achieved through an emphasis on “more speech, [and] not enforced silence,” a strong case exists


\textsuperscript{162} Ibid., 27.

\textsuperscript{163} Ibid., 26.

\textsuperscript{164} Ibid., 27.

It is worthwhile to note that one need not accept deliberative democracy in its totality to agree with the broader argument that certain conditions of fair competition are necessary to allow for the emergence of political truth.
for why this guiding principle, as conventionally understood, is no longer adequate for its purported ends within the political context.\textsuperscript{165}

Whereas the view of democracy championed by Justice Holmes often leads to the conclusion that government intervention in public discourse amounts to “superimposing regulation on a realm of purely voluntary interactions,” the second conception of democracy is compatible with the fact that “what seems to be government regulation of speech might, in some circumstances, promote free speech” and uninhibited public discussion.\textsuperscript{166} While it is a common refrain that any regulations on speech amount to a violation of the First Amendment, the “notion of ‘laissez-faire’ is no less a myth—a conceptual error—for speech than it is for property.”\textsuperscript{167} Given that laws regulate and protect property, which in turn serve as the \textit{legally permissible} mechanism by which speech is financed in a contemporary state, the introduction of new regulations “simply [substitute] one form… for another.”\textsuperscript{168}

In turn, government “neutrality” ultimately comes down to a respect for “existing distributions” of resources or primary goods and “ensures that some will be unable to speak or to be heard at all, and at the same time that others will be permitted to dominate the public discourse.”\textsuperscript{169} Given that “elections based on those distributions are actually a regulatory system” which is created and sustained through law and which “is not obviously neutral or just,” the probability that citizens will be systematically excluded from meaningfully accessing the

\textsuperscript{166} Ibid., 31-35.
\textsuperscript{167} Ibid., 41.
\textsuperscript{168} Ibid., 31.
\textsuperscript{169} Ibid., 50.
political arena becomes increasingly unacceptable. The Court simply cannot be neutral in questions concerning regulations on free speech within the context of political participation.

If the Court does not meaningful engage with these arguments, it in effect endorses “a regulatory decision to allow disparities in resources to be turned into disparities in political influence.” These are considerations that, given our commitment to democracy and fair representation, simply can’t be ignored. Unfortunately, it is exactly this task that the majorities in *Buckley*, *Citizens United*, and *McComish* fail to complete. By attempting to bracket these basic philosophic questions, the Court unfortunately runs the risk of advocating the picture of democracy as a political system essentially constituted by self-interested individuals attempting to manipulate the legislative process through economic force to serve their ends.

Though I emphatically reject that this bleak understanding of democracy captures the inspiring commitment to self-government our nation has made, I do recognize there is still a debate to be had over how we are to guarantee acceptable conditions of competition in the marketplace of ideas while still remaining loyal to the First Amendment. While the majority in *McComish* asserted that considerations of fairness have no place in the conversation over what regulations on speech are appropriate, I now turn to the argument for why evaluative measures of procedural equality are best able to capture the relationship between public discussion and self-government. To undertake this project in a principled fashion, it is here that I turn to the philosophy of John Rawls as he provides the most sophisticated understanding of how a commitment to liberty and equality can be reconciled and, in some circumstances, made congruent. While ultimately these “decisions about legal rights depend upon judgments of

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171 Ibid., 98.
political theory… and [political conviction] about which reasonable men disagree," I think the strongest case can be made for Rawls’s justice as fairness.\textsuperscript{172}

**Procedural Equality and the Fair Value of Political Liberties**

As we must be committed in *some* form to fair political procedures and equal access thereto if public discussion is to properly foster democratic rule, I turn now to Rawls as he provides the clearest and most nuanced understanding of how these goals can be achieved. Emphasizing the importance of fair political procedures and the fair representation of citizens, I argue that Rawls provides us with the best model by which to systematically account for a right to free speech within a workable theory of self-government. By introducing a distinction between formal liberty and its worth, Rawls demonstrates that liberty and equality are not always incompatible and further that, in the context of political participation, regulations designed to promote procedural equality are a constituent feature of a commitment to the political liberties.

For those unfamiliar with Rawls, his theory attempted to work within and modify the social contract tradition which spans back to Hobbes, Locke, Rousseau, and Kant. His particular contribution to this legacy comes in the form of implementing procedural mechanisms to insure fair conditions of bargaining; that is, the social contract is said to be adopted from “the original position” in which “the veil of ignorance” prevents the hypothetical individual from “know[ing] his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural asserts and abilities.”\textsuperscript{173} While some object to the ability of contract theory to bind actual societies, I find that these objections are not applicable to Rawls’s broader


theory which “is… obviously fair and sensible” as the normative framework it creates derives from and seeks to implement the fair representation of the citizen.\textsuperscript{174}

This result is achieved through an emphasis on procedure as the veil of ignorance circumscribes “the range in which self-interest may operate.”\textsuperscript{175} While this presupposes that certain knowledge is irrelevant from a moral standpoint, which may itself be controversial, the application of this belief within the original position seems not to be so as:

“The parties are made ignorant of their special resources and talents to prevent them from bargaining for principles that are inherently unfair because they favor some collection of resources and talents over others.”\textsuperscript{176}

Due to the equal standing from which individuals adopt the contract, the original position acts as a mechanism to ensure the fair and impartial representation of the citizen. In turn, the theory argues for political procedures which mirror commitments to a conception of procedural equality advanced by the Court in previous cases. In the famous line of precedent which established the principle “one person, one vote,” the Court moved to classify procedural equality in democratic processes as constitutionally required, stating that the “the Equal Protection Clause guarantees the opportunity for equal participation by all voters.”\textsuperscript{177} By mandating that legislative districts were to be apportioned so as to insure the relatively equal worth of votes, the Court seemingly recognized that an equal opportunity to influence the political process is a constitutive

\textsuperscript{174}Ronald Dworkin, \textit{Taking Rights Seriously} (Cambridge: Harvard University Press, 1996), 151. The most notable alternative to contract theory has been made by Randy Barnett, in which he argues for the need to recognize pre-political rights of an absolute nature to fill this vacuum. While I find his argument noteworthy given its increasing popularity, I ultimately find it incompatible with our democratic tradition for the reasons mentioned above in the discussion of the laissez-faire marketplace of ideas. For more on this assessment, see Randy Barnett, \textit{Restoring the Lost Constitution}, 11-88.


\textsuperscript{176}Ibid., 153.

feature of self-government, which aims at realizing political autonomy. We further see this commitment echoed in Justice Marshall’s dissent in *Buckley* when he declared that there was a constitutional interest in ensuring that all citizens had “equal access to the political arena.”

As justice as fairness models this ideal of procedural equality and equal treatment of citizens through its achievement of the fair representation of persons within the original position, it thus seems best able to provide us with a systematic understanding of how to best mirror these commitments in our own political procedures. Rather than taking constitutional rights to be absolute demands born of objective propositions, Rawls’s theory gives us the opportunity to better understand and incorporate the political liberties within a broader democratic structure by emphasizing the role of procedure. This prospect is especially promising as it illuminates how we are to understand which regulations on the marketplace of ideas enable it to fulfill its democratic function.

Admittedly, while the concept of procedural equality can be reasonably interpreted in different ways, justice as fairness also provides us with the opportunity to bridge these differences as it grounds the theory’s justification in two fundamental concepts embedded within the canon of western political thought. While “liberalism has its origin in” the understanding that “equal citizens have different and irreconcilable conceptions of the good,” Rawls attempts to “carry it one step further: that is, to root its assumptions in two underlying philosophical conceptions” of social cooperation and of the person.\(^\text{178}\) When we understand our basic governing institutions “as a form of cooperation” and take the original position to be a mechanism to “[model] the conception of the person,” Rawls succeeds in providing us a theory which reflects the deepest assumptions in our tradition and which builds from them to provide

normative criteria by which to evaluate our institutions.\textsuperscript{179} As he does this always an eye to procedural equality, as a way to mirror fair terms of cooperation and the fair representation of the person in political procedures, Rawls theory can help us understand what requirements we, as a democratic nation committed in some form to political equality, may want to place on our political procedures and “the marketplace of ideas.”

In this capacity, Rawls’ theory of justice as fairness is especially suited to fulfill a “practical role” of “focus[ing] on deeply disputed questions… to see whether, despite appearances, some underlying basis of philosophical and moral agreement can be uncovered” within constitutional and political disputes.\textsuperscript{180} This social role of political theories finds its fullest expression in the provision of evaluative standards to mediate conflicting claims “aris[ing] from divisive political conflict and the need to settle the problem of order.”\textsuperscript{181} Take for example “the conflict between the claims of liberty and the claims of equality in the tradition of democratic thought,” which are indeed the underlying issues at stake in the cases we just examined. “Debates over the last two centuries or so,” as well as contemporary debates over income inequalities and the role of money in politics, “make plain that there is no public agreement on how basic institutions are to be arranged so as to be most appropriate to the freedom and equality of democratic citizens.” At the root of the conflict, Rawls identifies “the different philosophical and moral doctrines that deal with how the competing claims of liberty and equality are to be understood.”\textsuperscript{182}

\textsuperscript{182} Ibid., 2.
It is precisely this void that Rawls seeks to fill through the introduction of “justice as fairness,” which can serve as a public “conception of political and social justice which is congenial to the most deep-seated convictions and traditions of a modern democratic state” and which I argue provides the best systematic solution to the issues raised in the line of precedent containing *Buckley* and *Citizens United*.\(^{183}\) Through grounding his argument in “bases of agreement implicit in the public culture of a democratic society,” Rawls’s theory provides us with the best opportunity to reconcile the competing understandings of liberty and equality we saw at stake in *Citizens United* and related cases.\(^{184}\) I turn now to how Rawls’s idea of the fair value of political liberties manages to encompass both these considerations and fit them into a workable democratic scheme.

While a detailed discussion of Rawls’s broader theory is ultimately beyond the scope of my project, I will provide a brief treatment of the general agreement which results from the original position to illuminate the breadth and depth at which he attempts to understand commitments to liberty and equality. Within the original position, the parties choose two basic principles to govern the distribution of primary goods, or those “things [which] are generally necessary as social conditions and all-purpose means to enable persons to pursue their determinate conceptions of the good and to develop and exercise their moral powers”:\(^{185}\)

1. “Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.”
2. “Social and economic inequalities are to satisfy two conditions. First, they must be attached to officers and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.”\(^{186}\)


\(^{184}\) Ibid., 300.

\(^{185}\) Ibid., 307.

\(^{186}\) Ibid., 291.
While the second principle does act to regulate individual advantage and worth of liberty generally, I will presently focus on the first principle of equal basic liberties as it is most relevant to the broader question we are trying to address.\textsuperscript{187}

Rawls understands the two principles to be “lexically ordered,” or, in plainer terms, the first principle takes precedence over the second. While liberty is taken to be the priority of any political system, Rawls limits the first principle to apply “not assigned to liberty as such” but rather seeks to secure the most basic and essential liberties within a constitutional regime so as to preserve their significance.\textsuperscript{188} These liberties amount to:

“freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law.”\textsuperscript{189}

As Rawls does consider these basic liberties to be of utmost significance, he recognizes that formal assurances of law aren’t sufficient to provide citizens with equal opportunities to exercise their liberties. Rawls indeed is aware of the fact that if citizens are not in possession of roughly equal means which are needed to meaningful use one’s liberties, there is a sense in which the scheme of equal basic liberties doesn’t provide for the equal treatment of citizens.

To respond to this potential criticism and to properly unite considerations of equality and liberty, Rawls introduces the distinction between basic liberties and their worth. Basic liberties

\textsuperscript{187} While I unfortunately cannot give a full treatment of Rawls’ second principle, it is important to note the impact it has had on judgments of the \textit{worth} of liberty generally. Through the difference principle, as well as the principle ensuring fair equality of opportunity, Rawls elevated in importance the understanding that conditions beyond mere legal environments and their formal assurances affect the worth of liberties. While there have been reasonable objections that primary goods are insufficient to judge the worth of liberties as measured by individual advantage, most notably by Amartya Sen, Martha Nussbaum, and G.A. Cohen, Rawls brought the notion of the worth of liberty to the forefront of Western political thought and ignited a trend of increasing understanding that liberty must be understood through inclusive considerations which go beyond formal legal assurances. While these considerations merit discussion in their own right, it is unnecessary to pursue this here as the relevant considerations are accounted for by the fair value of political liberties embedded in the first principle.


\textsuperscript{189} Ibid., 291.
are “specified by institutional rights and duties that entitle citizens to do various things, if they wish, and that forbid others to interfere.” While these liberties themselves are formally assured to all, the worth of these liberties, or their “usefulness to persons,” may vary among individuals as they are affected by obstacles in the form of “ignorance and poverty, and the lack of material means generally.” These obstacles can act to effectively “prevent people from exercising their rights and from taking advantages of these openings.”

While Rawls has provided for a fair distribution of material means through the second principle specifying fair equality of opportunity and the difference principle, he takes special care to expand upon the notion of “fair value of political liberties” so as to continue the project of constructing fair political procedures which properly represent the person. While Rawls rejects an attempt to realize the equal worth of all basic liberties as “irrational, superfluous, and tending towards social division,” he does find that adequate conceptions of political liberties include considerations of fair worth as they are integral to the fairness of political institutions as well as their ability to represent the interests of various parties. Thus, the fair value of political liberties seems to be “a natural focal point between merely formal liberty on the one side and some kind of wider guarantee” of substantive worth and provide us with a systematic understanding of how political procedures can simultaneously embody commitments to liberty and equality. Due to their essential role in fair political procedures, the political liberties, and the political liberties alone, are to be distributed to citizens in such a way that individuals are assured of their relatively equal worth.

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191 Ibid., 325.
192 Ibid., 326.
193 Ibid., 329.
194 Ibid., 328.
This procedural role has multiple dimensions. Though political liberties may be “thought to have a lesser place in most persons’ conceptions of the good,” they are also understood as “essential institutional means to secure the other basic liberties.”\(^{195}\) Further, the political liberties are seen as “essential in order to establish just legislation and also to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality.”\(^{196}\) As it is in these latter capacities that the fair value of political liberties, or the assurance of procedural equality within political processes, possesses the most potential to inform contemporary debates over regulations on campaign finance, I now propose we look at them in greater detail.

Premised on the “principle of equal participation,” the assurance of fair value of political liberties “requires that all citizens are to have an equal right to take part in, and to determine the outcome of” the legislation which is to govern them.\(^{197}\) This evaluative standard bears a striking resemblance to the principle we saw in operation in the voting rights cases as well as in Marshall’s dissent in *Buckley* and thus provides an interesting opportunity to reconcile the seeming conflict in claims between liberty and equality as Rawls encompasses the notion of procedural equality in his understanding of political liberty itself. While Rawls classifies free speech as a basic liberty of conscience, there is an important sense in which this right within the context of political participation assumes the character of the political liberties. Though it may seem *prima facie* desirable to allow for the “unimpeded access to public places and to the free use of social resources to express our political views,” “these extensions of our liberty, when granted to all, are so unworkable and socially divisive that they would actually greatly reduce the


effective scope of freedom of speech.” Thus, to enable for the mutual exercise of our political liberties, we seemingly need to “accept reasonable regulations relating to time and place, and the access to public facilities, always on a footing of equality.”198 What is “essential,” according to Rawls, “is the kind of speech in question and the role of this kind of speech in a democratic regime.”199 Due to the public role which political speech is to play in a democratic system of governance, which the Court has consistently recognized, I will understand speech within the context of the political process to be assured some level of fair value and to be the proper subject of regulation in efforts to preserve equal access to fair political procedures.

The propriety of regulation for the sake of political equality takes on increasing importance when one comes to understand “the political process as a public facility… [with] limited space” for participation and entry.200 The “limited space” in which political participation can take place and the possibility that people will be effectively excluded through unequal distribution of resources and networking suggests that “compensating steps must, then, be taken to preserve the fair value” of the political liberties.201 As “[t]hose with greater responsibility and wealth can control the course of legislation to their advantage” by dominating the political discourse, these assurances may amount to regulations on the use of money to finance speech.202 Indeed, while Rawls recognizes that the identification of the measures necessary to ensure the fair value of political liberties within a particular society is ultimately beyond the scope of philosophic inquiry, he does posit certain guidelines for institutionalizing the fair worth of the

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199 Ibid., 342.
200 Ibid., 328.
political liberties and identifies certain situations, such as problems posed by unequal material resources, which threaten their fair value.

Rawls seems particularly intent on bringing attention to the need “to keep political parties independent of large concentrations of private economic and social power in a private-property owning democracy” to prevent the aforementioned problems of exclusion from the political arena and subsequent distortion of legislation, a standard to which our contemporary system certainly doesn’t stand up. According to Rawls, “[i]f society does not bear the costs of such organization,” such as through the introduction of public finance through the allocation of “sufficient tax revenues,” “and party funds need to be solicited from the more advantaged social and economic interests, the pleadings of these groups are bound to receive excessive attention” and threaten to lead to the form of dependence corruption which we previously discussed in Chapter Two. In effect, not only is the health of our democratic institutions implicated, but our commitment to the political liberties diminishes “whenever those who have greater private means are permitted to use their advantages to control the course of public debate.” Counter to common intuition, assurances of equal worth of votes is an insufficient solution to this problem as “the political forum [becomes] so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom properly presented.”

These problems posed by the subsequent unequal worth of political liberties are especially problematic within governmental systems premised on popular participation and help us understand the implications of the growing public distrust in our democratic institutions.

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205 Ibid., 199.
While in “a well-governed state only a small fraction of persons may devote much of their time to politics… this fraction, whatever its size, [ought to] be drawn more or less equally from all sectors of society.”²⁰⁶ Yet, when participation in or access to the political process is premised on the use of money, lesser-advantaged parties are effectively barred from realizing the worth of their political liberties. Unfortunately, this process is likely to take on a self-reinforcing nature as it undermines public trust in the system and “the less favored members of society, having been effectively prevented by their lack of means from exercising their fair degree of influence, withdraw into apathy and resentment.”²⁰⁷ The political injustice inherent in a failing of procedure and the perception thereof thus poses distinct problems for attempts to establish political procedures capable of representing diverse segments of the population as “[p]olitical power rapidly accumulates and becomes unequal; and making use of the coercive apparatus of the state and its law, those who gain the advantage can often assure themselves of a favored position.”²⁰⁸

Unfortunately, the warnings signs described above are increasingly apparent in our own electoral system. Given the existence of gaping disparities in wealth alongside the role of super PACs and large donors in the current campaign season, it becomes increasingly clear that the opportunity to effectively participate in, much less access, the political process is essentially being denied to the majority of citizens. Entrance to the political arena is not equally open to all who wish to meaningfully participate given that such participation is predicated on the expenditure of large sums of money. Given these dire circumstances and our better

²⁰⁷ Ibid., 198.
²⁰⁸ Ibid., 199.
understanding of how they implicate core democratic values, let’s review the three big cases we just discussed: *Buckley*, *Citizens United*, and *McComish*.

**Buckley, Citizens United, and McComish Reconsidered**

I turn first to *McComish* as the two principles which have surfaced in the Court’s reasoning in these cases, the first that “more speech is better” and the second demanding “equal access to the political arena,” seemingly point to the same solution in this case. As the matching funds mechanism actually increased volumes of speech, both by conceptual and empirical standards, the argument from the principle “more speech is better” does not undermine, but rather supports, the constitutionality of the matching funds mechanism. Thus, while the majority moved to classify the mechanism at issue as placing a significant burden on competing candidates, and ultimately moved to equate this to a restriction on speech, it now becomes apparent that the Court’s arguments really turn on competing conceptions of the right to free speech and whether it is properly subject to regulation.

Viewed in light of the need to accommodate equal access to the political arena so as to insure the fair worth of the political liberties and to foster fair political procedures, it becomes hard to see how the mechanism at stake violates a commitment to the First Amendment; rather, it seems to foster First Amendment values by preventing concentrated wealth from both controlling the public discourse and from preventing lesser-advantaged citizens from competing for public office. To employ Meiklejohn’s distinction between private and public claims, the First Amendment shouldn’t grant protection to the preexisting advantage of parties which derives from an unequal distribution of resources. Rather, the regulatory scheme responds to a public claim under the First Amendment which seeks to establish a broad and diverse political discourse.
Further, as the matching funds mechanism provides the opportunity to individual candidates to operate independently of the improper influences imposed on them by the pressures of financing their campaign, it establishes basic preconditions in the marketplace of ideas which are necessary to the institutional health of our democracy. Moreover, as it provides equal access the political arena to citizens without restricting the speech of other parties, it becomes difficult to see problems with the matching funds mechanism. Indeed, the only thing the mechanism threatened was the competitive advantage certain parties possessed due to their disproportionate possession of the material means necessary to compete in a contemporary political landscape.

To be charitable, it is doubtful that the majority was actively concerned about the fair value of political liberties but was rather advancing a conception of liberty as best served by “laissez-faire marketplace of ideas.” Yet, given the incompatibility of such a system with the fair representation of the person and our democratic tradition, it becomes increasingly apparent that their understanding of “undue burden,” and their understanding of liberty itself, is severely misguided. It simply is unreasonable to assert that the liberty protected by the First Amendment cannot properly be regulated without engaging the argument of how a laissez-faire marketplace of ideas is to foster self-government. As we previously saw, we do need to stipulate suitable conditions for the marketplace of ideas if it really is to serve the ends of democracy.

Unfortunately, the only standard with which the majority in *McComish* provides us is one which stipulates that no regulation is permissible, a position which is incompatible with the character of democratic institutions. Thus, even if it could be plausibly argued that a burden was placed on privately-financed speakers, this burden was not undue. Given the role of free speech and equal opportunity for participation in establishing representative political procedures, the
specification of what constitutes an undue burden should be understood in light of the need to establish basic conditions of fairness and equal opportunity to participate in the political arena.

While *McComish* shouldn’t have led the Court to choose between the traditional principle that “more speech is better” and that promoting equal access to the political arena, *Buckley* and *Citizens United* are more interesting as the two principles are in conflict in these cases. Though the emphasis on volumes of speech was meant to foster self-government, we have seen how this relationship no longer obtains in contemporary contexts and was perhaps evident even when *Buckley* was decided. Described by Rawls as “profoundly dismaying,” it is now clear that *Buckley* rejected arguments deriving from a commitment to the fair value of political liberties or fair political procedures when it refused to recognize a government interest “in leveling the playing field.” While there certainly is an interest in allowing for uninhibited political discourse, “the fundamental error of the majority opinion was its failure to recognize that the government’s interest in prohibiting such expenditures by banks and corporations derives from the First Amendment.” This interest comes in the form of guaranteeing that the protected right to free speech, which is meant to foster enlightened self-government, stands in the proper relation to democratic institutions and is not exercised in such a way as to prevent equal access to political processes.

This failure “to recognize that the fair value of the political liberties is required for a just political procedure” left the Court effectively “endors[ing] the view that fair representation is representation according to the amount of influence effectively exerted.” According to Rawls:

> “On this view, democracy is a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and

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210 Ibid., 359-360.
willingness of each to use its financial resources and skills, admittedly very unequal, to make its desires felt.”

Unfortunately, the majority’s position in *Buckley* and *Citizens United* fails to engage these arguments. Though the decisions in no way neglect the importance of free speech within a democracy to an informed electorate, they do seem to overlook the fact that certain conditions of fairness or reasonable competition are necessary to achieve a democratic dialogue within circumstances of such great inequalities of resources. The majority in *Citizens United* was especially rash in granting the corporate right to free speech in terms of the corporation’s interest in political participation as this position completely disregards the democratic interest in promoting an accessible political arena.

In effect, while the view of democracy the Court has effectively endorsed may be in line with the exercise of absolute liberties by self-interested agents, it seemingly fails to capture the ideal of citizenship or democracy in which the American tradition takes such pride. Indeed, it’s hard to imagine how an all-out economic battle to speak the loudest within the marketplace of ideas captures our commitment to political truth, democratic rule, or the equal treatment of citizens. If we are to take our commitment to democracy seriously, considerations of procedural equality and fairness absolutely merit attention in the debate concerning regulations on the use of money in politics.

Thus, while the Court attempted to uphold our nation’s commitment to the First Amendment, they failed to recognize that equitable political procedures are necessary for the democratic exercise of free speech and collapsed into an absolute conception of liberty which is incapable of fostering self-government. To rely on Rawls’s distinction between regulations and

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restrictions, freedom of speech “is not infringed when [it is] merely regulated, as [it] must be, in order to be combined into one scheme as well as adapted to certain social conditions necessary for their enduring exercise.”\textsuperscript{212} Thus, as opposed to the Court’s interpretation of the First Amendment as guaranteeing absolute liberties, democracy and a commitment to political liberty itself seemingly point to the need for reasonable regulations: “there is a large difference between a ‘marketplace of ideas’—a deregulated economic market—and a system of democratic deliberation” and, further, “[d]eregulated economic markets are neither a sufficient nor a necessary condition for a system of free expression.”\textsuperscript{213}

As a system of free expression “is closely connected to the central constitutional goal of creating” a representative democracy, the case for reasonable regulations can now be made as essential not only for allowing for the ability of citizens to equally access political procedures but also for the proper functioning of democracy itself. As “the system of deliberative democracy is premised on and even defined by reference to the commitment to political equality,” its incompatibility with a laissez-faire marketplace of ideas become increasingly stark and the case for reasonable regulations becomes stronger. Whereas in marketplaces “votes are measured by dollars, which of course vary from rich to poor,” “a different norm of equality” serves as the governing standard within democratic systems; the principles “one person, one vote” and “equal access to the political arena” “[are] simply the most recent effort to concretize the traditional constitutional commitment to political equality.”\textsuperscript{214}

Therefore, while our commitment to freedom of speech is an essential feature of American constitutional identity, it is not the only consideration which should affect our

\textsuperscript{214} Ibid., 20.
judgment of issues surrounding regulations on campaign finance and cannot be properly understood without reference to the constitutional project of establishing self-government. Indeed, if we do not choose to grant greater attention to the legitimate arguments which stem from a commitment to political equality, our very identity as a democracy is implicated. While one could still argue that, in their absence, we still have a democracy of the form previously described by Holmes, I encourage my reader to earnestly reflect on whether this is the best we can do for our country and our fellow citizens.

Thus, while I in no way mean to deny the utmost significance of the right to free speech as it is itself so integral to the proper functioning of democratic institutions, a view of liberty as incompatible with regulation is incapable of capturing all the intricacies which compose our incredible project to become a self-governing nation. Rather, we must view the interest in uninhibited liberty of speech in light of our other constitutional commitments and attempt to bring them all into a cohesive framework capable of realizing democratic ideals. Indeed, despite what Justice Scalia may so flourishingly assert in his opinions, we have ample reason to be concerned with identifying political procedures which are best able to achieve fair representation and to provide equal opportunities to all citizens to meaningful participate. These too are constitutive features of a commitment to democracy and I am disheartened to find that they were not granted more weight in the decisions at issue. Given that a commitment to free speech and a commitment to political equality can be made compatible through an emphasis on procedural fairness, there is no reason not to engage these broader concerns.

If the Court was serious about its commitment to fair representation through equal influence of votes in Reynolds, it is hard to see how the same argument from procedural equality is not decisive in the cases Buckley and Citizens United. Unfortunately, these considerations
were largely disregarded by the Court when it overturned *Austin* and the BCRA in *Citizens United*, propelling us closer to a laissez-faire marketplace of ideas which is incapable of fostering the broader constitutional commitment to democracy. Given the opportunity to reconsider this decision, presented to us by the case out of Montana, I cannot emphasize enough how critical it is that the Court engage the theoretical and constitutional arguments deriving from procedural equality.
Chapter V: Possible Solutions

While the Court has the opportunity to engage considerations of procedural equality and arguments of dependence corruption, I am doubtful that it will be persuaded to relinquish its current view of the right to free speech as not properly subject to regulation. This is extraordinarily unfortunate as the likelihood of change through other avenues is unlikely given that elected officials have enjoyed campaign success within the current system. While I remain hopeful that a majority of the justices may come to understand the ways in which regulations of money in politics can actually promote First Amendment values, especially pending the presentation of the empirical record, I end my discussion of campaign finance and *Citizens United* with a brief exposition of extra-judicial solutions. With an eye to procedural equality and the ability of elected officials to remain properly dependent on the people, I now provide a brief treatment of possible models for reform.

The first measure for reform seeks to increase transparency by requiring campaigns and independent organizations alike to disclose their donors. The idea here is that money always has and always will continue to find a way into the system. Given this unfortunate reality, the full disclosure of financial records can help to reduce the threats posed by corruption or the appearance thereof by allowing for “conscious consumerism.” By providing the public with a list of contributors to campaigns, disclosure could in effect “mobilize [the public] to demand cleaner government,” or at least to refrain from electing those candidates tied to questionable financial revenues.\(^{215}\)

Unfortunately, as Lawrence Lessig points out, this sort of data simply isn’t indicative and is “more likely to confuse” than to inform a voter.\textsuperscript{216} For one thing, it says “too much.” That is, the existence of a contribution from an individual doesn’t prove that the recipient is indeed operating under some sense of obligation to the donor; this is problematic as the knowledge that a candidate received money from, let’s say, the financial industry, given the recent suspicion surrounding it, is likely to cause a voter to “jump from some stray fact to a conclusion it can’t support.”\textsuperscript{217} Disclosing donors also says “too little” as the real risk of corruption has more to do with the relationship between the candidate, her supporter, and potential involvement by lobbyists, something which can’t be precisely recorded.\textsuperscript{218}

Increasing transparency further raises problems for reform as it “normalizes” the financial dependence of candidates instead of attempting to end it. By shining a spotlight on the potential for or reality of dependence corruption, then, transparency also runs the risk of aggravating the public’s current distrust in the system.\textsuperscript{219} While this is not to say that disclosure does not have an extremely important role to play in campaign finance reform, (indeed it does), it is to say that this mechanism is not sufficient to restore the integrity of our governing institutions and the ability of the public to trust that they are operating independently of corrupting influences. Given the rise of “independent” expenditures and the threat that donations to super PACs supporting an opponent pose to a candidate, both of which cannot be captured by disclosing the donors to campaigns, broader reform is needed.\textsuperscript{220}

\textsuperscript{216} Lawrence Lessig, Republic, Lost (New York: Hatchette Book Group, 2011), 257.
\textsuperscript{217} Ibid., 257.
\textsuperscript{218} Ibid., 257.
\textsuperscript{219} Ibid., 258.
\textsuperscript{220} Ibid., 258-260.
When I first began this project, I personally believed that we simply needed to end or severely limit private financing of campaigns and independent groups alike and create an involuntary system of public funding for candidates competing for public office. I had just returned from studying abroad in France and was impressed by French electoral politics. Campaigns are short-lived, commercial advertising is prohibited within three months of an election, and the closest thing to political advertising is subsidized by the government during an allotted period for “official campaigning.” These tight regulations on campaign finance place greater emphasis on the debates and less on sensationalized media blitzes.

Unfortunately, while this system may work for France, I don’t think it is a viable model for reform at this point in American history as it threatens to undermine equal access to the political arena by diminishing the ability of minority view-points or candidates to gain traction in the system. Allowing for the bureaucratic control of campaign resources runs serious risks of allowing incumbents to refuse to recognize and thus to systemically exclude minority candidates and parties. This kind of central control of political speech could in effect create viewpoint based or content-based regulations, which are certainly incompatible with the First Amendment. That being said, there are alternatives models which can help achieve the goals of equal access to the political arena and the independence of elected representatives.

One possible model for reform, introduced by Bruce Ackerman and Ian Ayres, attempts to develop a complex system of anonymous donations. While private contributions are still allowed, they can only be made in “anonymous donation booths,” which would parcel the contributions for a particular candidate into random amounts before forwarding them on. Due to

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the anonymity, the motivation for a donor to give in large amounts in the hope of influencing a
candidate if elected is lessened as there is no way to assure the recipient that one did donate the
allotted amount. The system further reserves the right of the donor to revoke the contribution
once made, aggravating the uncertainty on the part of the candidate as to whether, and in what
amount, a particular individual actually donated. This model also introduces a system of
public finance which is controlled by the voters, with each citizen receiving 50 “patriot dollars”
which they can donate to any candidate of their choice. To ensure that private contributions did
not eclipse the worth of the public finance system, the former would be subject to regulations
and not allowed to exceed half the amount of the money donated through patriot dollars.

Thus, while the system does much to advance the fair value of the political liberties as
everyone has relatively equal means by which to participate, and the differences therein would
not result in vast disparities of influence on candidates, it is doubtful that their model for reform
would withstand review by the Court. Given the ruling in Speechnow.org, it is unlikely that a
majority of the justices would allow for such stringent limitations on the aggregated amount
individuals can contribute to candidates. Further, while this would seemingly do much to
prevent candidates from collecting political debts in the process of campaigning, Lessig is right
to point out that this may not restore America’s trust in our democratic institutions. Indeed,
while the system is “ingenious,” it may be “unrealistic” to expect the American public to fully
grasp the intricacies of the system in such a way as to eliminate their belief that large
contributions buy influence in Washington. Thus, while this system has the potential to break
the chain of influence operating on our elected representatives, this requires drastic changes to

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224 Lawrence Lessig, Republic, Lost (New York: Hatchette Book Group, 2011), 263
our current system and a lot of risk if brought before the Court; in fact, “[t]here is a smaller change we could make with a larger potential payoff.”

Fully explicated in *Republic, Lost*, Lessig proposes the most promising model for reform which aims to similarly make “the funders the people” and draws inspiration from programs already in place in Maine, Arizona, and Connecticut. In short, these systems seek to implement public-financing systems which candidates can opt into. Qualifying “by raising a large number of small contributions,” the state then supplements a candidate’s financial resources at levels which make the campaign competitive in the particular race. “[T]hese ‘clean-money,’ or ‘voter-owned,’ elections have had important success”; in fact, they have proven to make candidates more likely to spend time with voters, have enabled a “broader range of citizens” to run for office than “the candidates who run with private money alone,” and have “succeeded in increasing the competitiveness of state legislative elections.”

Despite their success, these public-financing systems have again raised concerns regarding bureaucratic control of fixed, and perhaps arbitrary, funding and have also led to some outcry among citizens who oppose the use of their taxes to fund the campaigns of candidates whom they oppose. To solve these problems, Lessig has proposed a new paradigm for reinstituting candidate’s dependence on their constituents. This system operates on the use of “democracy vouchers,” similar to the above-described patriot dollars, which are $50 tax credits returned to every citizen for use in the campaign season. While the “voter is free to allocate his or her democracy voucher as he or she wishes,” to a single candidate or multiple, the “only

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226 Ibid., 264
227 Ibid., 264
228 Ibid., 264-265.
229 Ibid., 265
requirement is that the candidate receiving the voucher must opt into the system." If the candidate does choose to receive this source of public funding, it comes with the further condition that this can be the only source of revenue for their campaign.

As the $50 democracy voucher may be perceived by the Court as too severe to serve as a limit on an individual’s ability to express their support for a candidate, Lessig does allow for further individual contributions up to $100 to any particular candidate an individual chooses to support. To account for additional complications, as there is the reality that not every voter will get around to allocating the voucher, Lessig has structured the system such that the funding goes either to the party to which the voter is registered, or, if the voter is an independent, to financing “the infrastructure of democracy,” or projects such as voter education.

The merits of this model for public finance are numerous. Indeed, Lessig’s system avoids the aforementioned problems of bureaucratic control of public funding and allows taxpayers to decide how their money is allocated. Furthermore, given the reality that a majority of the justices may not be persuaded of the propriety of regulations designed to foster procedural equality, the model is particularly promising as it possesses the potential to stand review by the Court. As it is a voluntary system which still allows for supplemental contributions, the Court would be hard pressed to construct an argument declaring this financial scheme “burdensome.” Aligning with the principle that “more speech is better,” Lessig’s system possesses the potential to produce “$6 billion in campaign funds per election cycle” if opted into by every registered voter. While we saw an equivocation in the Court’s commitment to this principle in

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230 Lawrence Lessig, Republic, Lost (New York: Hatchette Book Group, 2011), 266
231 Ibid., 266
232 Ibid., 266.
233 Ibid., 267-268.
McComish, it still constitutes an important part of our nation’s First Amendment tradition and I would be surprised to see the Court completely disregard it in future cases.

Most importantly, though, as citizens who opt into the system are delegated roughly equal resources for participation, the model makes great progress in guaranteeing equal access to the political arena and the fair value of political liberties. While I admit that the fair value of the political liberties is not achieved outright, given the reality that many economically advantaged parties won’t opt into the system, Lessig’s system provides the most holistic solution to the problem of inequitable political procedures while still possessing the ability to withstand the current political environment and review by the Court.

Thus, though this system would do much to alleviate public distrust in the system by providing opportunities for participation and could succeed in refocusing candidates’ attention on their constituents, I possess certain reservations regarding the feasibility of actually implanting the necessary reforms. While the system could pay for itself in savings from “corporate welfare,” or subsidies given to businesses by legislatures (often in exchange for campaign contributions), I am further sceptical as to whether the system could compete with the increased predominance of large independent expenditures given the rise of super PACs.

Unfortunately, the unlikelihood of implementing and maintaining this system of public finance becomes increasingly clear when one examines Lessig’s proposed strategies to put the plan in motion; even he admits it is doubtful such a bill could survive in Congress. To begin, any incumbent is going to be skeptical of radically altering the system in which they have enjoyed so much success. Given the influence of lobbyists and the plans of many legislators to assume these well-paid positions upon finishing their service to the nation, it is unlikely that
either body of individuals would be extremely enthusiastic about eliminating the profession which allows for such lucrative benefits.\textsuperscript{234} Due to these factors, I am doubtful that the branches of government who would be adversely affected by the reforms would be particularly enthusiastic in passing the bills into law.

Consider another strategy which Lessig proposes: recruiting a celebrity, or multiple, who has not previously been involved in politics to compete in multiple primaries simultaneously against incumbents until those incumbents pledge their support for public financing of campaigns. Only then would this celebrity-do-gooder renounce their candidacy. Or consider a similar strategy within the campaign for president. Recruit a nationally-beloved individual to run on the platform that, if elected, they will hold the government hostage until broad campaign finance reforms are passed which serve the end of restoring the dependence of elected officials on their constituents.\textsuperscript{235} While either of these options would certainly make headline news, I am doubtful that such an individual could be found, much less that they could single-handedly reform our government.

The last strategy which Lessig proposes is nothing short of a constitutional convention.\textsuperscript{236} Though this method would be extremely effective if achieved, I doubt the likelihood that any individual could rally enough public or political support for this idea given the increasing polarization which grips our government. Further, given the fact that our nation has not had a constitutional convention since ours was adopted and that the corrupting influences at issue are subtle and don’t invoke visceral reactions, I am doubtful that we will see the need for one now.

Thus, while I cannot give enough praise to Lessig for all of the incredible work he has done to

\textsuperscript{234} Lawrence Lessig, Republic, Lost (New York: Hatchette Book Group, 2011), 274-275. For more on the exchange of personnel between the legislative and lobbying professions, see Republic, Lost.
\textsuperscript{235} Ibid., 276-289.
\textsuperscript{236} Ibid., 293.
elucidate the nature of “dependence corruption” and to provide solutions which could end the institutional failings of our republic, the problem has now reached a point where a moment of drastic reflection by the Courts, elected representatives, and the people on our identity as a democratic nation is needed.

That is why I think it so direly important that the Court seize this opportunity to reconsider their position in *Citizens United* as they are the few with the power to recognize that regulations which are designed to promote fair political procedures can actually be made to promote First Amendment values. As we saw Congress pass multiple pieces of legislation aimed at reforming money in politics, this signal by the Court might provide the political momentum necessary to allow further attempts at reform. While it is too early to say what the Court will do, there may be a solution which could enable the people, if convinced of the reality of dependence corruption and the unequal worth of their political liberties, to exert sufficient influence on their representatives to initiate reform: new forms of communication.

Mark Zuckerberg’s sister, Randi, recently launched the political alternative to the social networking mega-giant Facebook: Votizen. Premised on the power of grass-roots organization, Votizen seeks to put voters with similar political convictions in contact with one another so that they can campaign together for the causes or candidates of their choice. It further seeks to connect representatives with their constituents through a system which verifies that individuals are indeed from the public official’s district before forwarding on the message. While I am sceptical of this social network’s ability to empower citizens to compete against advertising onslaughts by super PACs, it does provide an interesting ray of hope as it possesses great

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potential to strengthen relationships between representatives and constituents. Perhaps the internet, the great equalizing tool of the 21st century, can help restore democracy in America by providing an outlet for a social movement aimed at reforming the role of money in politics.

Thus, while media tools such as Votizen give the people increased access to their representatives and an avenue through which to exercise their First Amendment right to free speech, this cannot remedy the Court’s wrongful declaration that any regulations on political speech aimed at establishing procedural equality or fair political procedures are unconstitutional. While the problem is drastic, I do reserve hope that a majority of the Court can be persuaded of the necessity of reforming our electoral as allowing the current system to persist implicates our identity as a democratic nation. Therefore, I urge the Court to reconsider their understanding of free speech in its relation to self-government as they are the only ones who can recognize and restore the constitutional validity of a state interest in fair political procedures.
Bibliography


