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Sarah Gordon April 12, 2022

Citizens United v. FEC and the Triumph of Modern Conservatism

by

Sarah Gordon

Daniel LaChance
Adviser

Department of History

Daniel LaChance

Adviser

Patrick Allitt

Committee Member

Judd Owen

Committee Member

2022

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By

Sarah Gordon

Daniel LaChance

Adviser

An abstract of
a thesis submitted to the Faculty of Emory College of Arts and Sciences
of Emory University in partial fulfillment
of the requirements of the degree of
Bachelor of Arts with Honors

Department of History

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Abstract

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By Sarah Gordon

Free speech has consistently been a controversial topic in American political discourse. In 2010, however, the terms of that discourse changed entirely; the Supreme Court's decision in *Citizens United v. FEC* in January of that same year misconstrued and misinterpreted not only centuries of established judicial precedent but also the United States' fundamental political culture: one centered on protection against corruption, that finds its roots in the American founding and that persisted into the twentieth century. This thesis explores that political culture, traces its existence, and argues that the increasing conservatism of the Supreme Court's membership over the course of the late twentieth century transformed American perceptions of free speech.

Chapter One of this thesis traces a legal through-line of the most critical cases concerning political speech before the Supreme Court from the time of the Founding to the early twentieth century, in addition to the political philosophy undergirding the Framers' understanding of corruption, free speech, and political speech. Chapter Two centers *Buckley v. Valeo* (1976) as a key moment in the history of First Amendment jurisprudence. Chapter Three addresses the origins of modern conservatism and its legal variants. Chapter Four addresses *Citizens United* itself: the Court's rationale for its decision, the tell-tale signs of neoliberal legal thought in it, and the public responses the decision garnered. Ultimately, this thesis constructs a political through-line, however disjointed over the course of several centuries, in a case that is often depicted as "shocking" in legal, political, and historical realms of scholarship.

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Acknowledgements

I'd like to thank Dr. Daniel LaChance for his invaluable guidance and constructive criticism over the past two years. The fundamental ideas undergirding this thesis originated in his First Amendment class in the fall of 2019, and his support has been indispensable ever since.

I would also like to thank my family, who has always instilled in me a deep love for learning and the importance of education.

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“I'm against very wealthy people attempting to or influencing elections. But as long as it's doable, I'm going to do it.”

— Sheldon Adelson, U.S. Businessman

Introduction

On an inauspicious Sunday in January of 2010, a little-known lawsuit before the United States Supreme Court upended American politics entirely. That morning, the Court issued its 5-4 decision in *Citizens United v. Federal Election Commission*, which struck down virtually all limits on the independent funding of political broadcasts. The Court ruled that any individual or group, no matter its identity, had the right to spend unlimited amounts of money to fund political broadcasts—in other words, to convince voters to cast their votes for or against a certain candidate.[1] The decision was polarizing. While conservative activists applauded the Court's decision as a victory for "free speech," liberals declared that the Court had "thrust politics back to the robber-baron era of the 19th century"—to these actors, the Supreme Court had "str[uck] at the heart of democracy," and ignored its roots.[2]

In truth, the Court's decision in *Citizens United* misconstrued and misinterpreted not only centuries of established judicial precedent, but also the United States' fundamental political culture: one centered on protection against corruption, that finds its roots in the American founding and persisted into the latter half of the twentieth century.[3] This thesis explores that political culture, traces its existence throughout American history—particularly as it was revolutionized during the twentieth century—and will argue that the increasing conservatism of the Supreme Court's membership allowed American perceptions of free speech to change entirely: that, ultimately, politics is often what determines the Court's decision-making, rather than any substantive dedication to the law. Because of that reality, the notion that a marketplace

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[1] *Citizens United v. FEC*, 558 U.S. 20 (2010).
[2] "The Court's Blow to Democracy," *The New York Times*, January 22, 2010.
[3] Jack N. Rakove. *Original Meanings: Politics and Ideas in the Making of the Constitution*, (United States: Knopf Doubleday Publishing Group, 2010).

of ideas—a distinctly neoliberal term and concept—came to dominate the American understanding of free speech with the Court's decision in *Citizens United*.

Citizens United is remarkable for a variety of reasons. The United States remains one of the only democratic nations in the world that provides large corporations free reign regarding political participation. To some, the Court's ruling in *Citizens United* has the potential to erode the very fabric of American democracy. To others, including several justices on the Court, the decision serves as the triumph of the "true" individualistic American spirit as it was understood by the Framers of the constitution. This discrepancy must be explored if historians are to understand the decision in its entirety. To that end, the questions I plan to answer in this thesis are as follows: why did the Court shift its focus from the prevention of corruption and its understanding of speech as a civil liberty to the conflation of speech and money? How does *Citizens United* embody the triumph of this conception of liberty, and what are its implications? What political processes undergird these changes, and what is their significance? These questions demand a thorough investigation, if scholars and Americans more broadly are to understand the origins and full implications of corporate personhood.

The historiography of *Citizens United* is rather limited, and the most direct analysis of this recent decision appears in law review articles. While these pieces are relevant, they almost always refrain from making distinctly *historical* analyses of *Citizens United*. They also often refrain from providing much detail about the decision's broader historical context, much less its close and questionable relationship with the rise of modern conservatism.[4] No scholar has made a distinct connection between the rise of institutionalized modern conservatism—the form of

[4] Richard L. Hasen. "*Citizens United*" *and the Illusion of Coherence*. (*Michigan Law Review* 109, no. 4), 581-623; Zephyr Teachout. *Historical Roots of Citizens United vs. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights, The General Essay*, 5 Harvard Law and Policy Review. 163 (2011), 166.

conservatism that arose in the late 1970's and 1980's, defined by its emphasis on neoliberal deregulation, promotion of traditional family structures, a militaristic contingent, and spearheaded by Republican politicians like Ronald Reagan—the Court's sudden adoption of originalist modes of thought, and its subsequent precedent-defying decision in *Citizens United*. To that extent, I intend to situate *Citizens United* in the larger histories of conservatism and political speech—rather than as a historical anomaly—as a means of better understanding its historical impact. Because the historiography surrounding *Citizens United* is somewhat insubstantial, the historiography of modern American conservatism and neoliberalism, as well as scholarship on the longer history of the First Amendment and its interpretation, are fundamental to this thesis.

The historiography of modern conservatism and historical works that describe the close relationship between American legal institutions and conservative judicial advocacy organizations closely inform this analysis of *Citizens United*.[5] Moreover, more culturally focused histories also play a role in this work's understanding of American political outcomes and realities over the course of the twentieth century, as the roots of modern conservatism took hold. Rick Perlstein and Stephen Thorne's *Nixonland: The Rise of a President and the Fracturing of America*, as well as Julian Zeiler and Kevin Kruse's *Fault Lines: A History of the United States Since 1974* are critical in this respect, as both works recount the turbulent rise of American hyper-partisanship.[6] Histories of the Supreme Court and the First Amendment also inform this

[5] Steven M. Teles. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. (Princeton University Press, 2008)., Ann Southworth. *Lawyers of the Right: Professionalizing the Conservative Coalition*, (University of Chicago Press, 2009).
[6] Rick Perlstein and Stephen R Thorne. *Nixonland The Rise of a President and the Fracturing of America*, (Blackstone Publishing, 2017).

thesis and support its broader claims about the Court's historical roots, purpose, and jurisprudence.

Primarily, however, this thesis draws upon legal primary sources to fill in the analytical gaps concerning conservatism's rise as it relates to *Citizens United*. So called "watershed" legal decisions, like *Buckley v. Valeo* (1976) and others are centered as I trace the treatment of political speech in American jurisprudence, particularly throughout the twentieth century. Naturally, statutes serve a similar purpose in this thesis. Indeed, laws that expressly banned electioneering communications by corporations and nationally chartered banks were explicitly overturned by the Court's ruling in *Citizens United*; this demands a thorough investigation into these statues' language and what they meant both at the time of their ratification and throughout twentieth-century American history.[7] Additionally, this thesis integrates public responses to the rise of modern conservatism and its impact on *Citizens United* into its analysis.

This thesis proceeds in four chapters. The first traces a legal through-line of the most critical cases concerning political speech before the Supreme Court from the time of the founding to the early twenty-first century, in addition to the political philosophy undergirding the Framers' understanding of corruption, free speech, and political speech in general. The second chapter of this thesis centers *Buckley v. Valeo* (1976) as a key moment in the history of both campaign finance jurisprudence and free speech jurisprudence. It argues that the decision represents the first time the Court conflated ideas about money and politics—a convergence from which the institution would never fully return. The third chapter of this thesis addresses the origins of modern conservatism and its legal variants, as embodied by the rise of relevant political figures, most critically President Ronald Reagan and related institutions like the Federalist Society, and

[7] "Bipartisan Campaign Reform Act," H.R.2356 (2002), "Tillman Act," Public Law 502. U.S. Statutes at Large 34 Stat. 864.

connects the rise of these individuals and institutions to a new form of legal thought that would inform the Court's decision-making process throughout the late twentieth and early twenty-first centuries. The final chapter of this thesis addresses *Citizens United* itself: the political and legal battles leading up to it, the Court's rationale for its decision, the tell-tale signs of neoliberal legal thought in it, and the public responses the decision garnered.

All in all, this thesis constructs a political through-line, however disjointed over the course of several centuries, in a case that is often depicted as "shocking" in legal, political, and historical realms of scholarship. Through a close analysis of relevant primary source content and the integration of prior historiographical interventions by scholars of conservatism and free speech, this thesis will demonstrate just how engrained new conceptions of conservatism have become in modern American jurisprudence. While battles over Supreme Court appointments and the political nature of the Court have long been part and parcel of American political discourse, *Citizens United* represents a uniquely sharp break with established precedent—and the most profound consequence of modern conservatism's institutionalized rise to date.

Chapter 1 - *Corruption, Confusion, and Common Sense: A Short History of Free Speech in America*

To many present-day onlookers, the United States is characterized by its singular emphasis on individualism. What matters most is not the community but the self: protection of one's own interests, wellbeing and, most critically, one's wealth. Indeed, the ability to build and sustain wealth seems to be the guiding principle underlying much of American domestic and foreign policy. From declarations of "don't tread on me," to accusations of communist conspiracy at the mere thought of a single-payer healthcare system, the United States' modern political culture—or perhaps a particularly influential subsection of it—rejects any notion of collective responsibility. Government has no duty to protect individual citizens. And in tandem, its citizens should have no sense of responsibility to one another.

But that culture has not always existed. The idea that from its founding, the United States and its political bodies—including its judicial branch—prioritized individual rights above all else is a fallacy. In truth, the United States' political culture, and not to mention legal precedent, long prioritized protection against corruption over the unencumbered right to free speech. For the purposes of this thesis, corruption can be defined as the placing of economic or political self-interest ahead of the public good: typical actions associated with that sort of behavior include extortion, bribery, and the wielding of undue influence over supposedly impartial political proceedings. From the earliest days of the republic, many Americans and their leaders were concerned with the appearance of this sort of corruption. Gifts, for one, were treated as political threats, innately enabling incentive structures that occasionally amounted to full-fledged treason. Early provisions barring federal corruption can be seen in the Articles of Confederation, which explicitly addressed the issue all while ignoring essentially everything else critical to good

governance. Specifically, a provision of the Articles prohibited "any person holding any office of profit or trust under the United States" from "accept[ing] any present" under any circumstances.[8] This was remarkably stringent language for a famously weak document.[9] The Articles' drafters clearly believed that government figures had to be barred from the corrupting influence of foreign gift-givers.

Accordingly, at the Constitutional Convention, the Framers intentionally left intact the section of the Articles that prohibited the acceptance of gifts. Article I, Section 9 of the United States Constitution declares that "No person . . . shall, without Congress, accept any kind of present . . . from any foreign state."[10] Though somewhat less stringent than the version that appeared in the Articles of Confederation, the Constitution's prohibition against receiving gifts remains firm. The statute's language is remarkable; members of Congress and other officers of the public trust are forbidden from accepting not just sizable gifts, but "any kind of gift whatsoever."[11] As Zephyr Teachout argues, this sort of language suggests an early American culture that was "commit[ted] to transforming political culture" away from the acceptance of bribery.[12]

But the Founders' fascination with corruption and its prevention took root long before the Revolutionary era: it began with the political theory that inspired the American Revolution in the first place. The principal strand of philosophy the Framers drew upon to construct their views was Aristotelian republicanism, embodied most clearly in the work of the French political

[8] U.S. Congress. *United States Code: Articles of Confederation – 1952*. https://www.loc.gov/item/uscode1952-001000005/
[9] Jack Rakove. "The Legacy of the Articles of Confederation." *Publius* 12, no. 4 (1982): 45–66.
[10] U.S. Constitution, art. 1, sec 9.
[11] U.S. Constitution, art. 1, sec 9.
[12] Teachout. *Corruption in America*.

philosopher Baron de Montesquieu.[13] A secondary strand drew upon variant of Judeo-Christian political philosophy espoused most clearly by the English philosopher John Locke.[14] According to both Montesquieu and Locke, "the core metaphor of corruption was organic and derived from disease and internal collapse."[15] Often, the imagery associated with corruption in the republic vision was that of literal rot and disease, specifically in regards to public-facing virtue: "corruption was the cancer of self-love at the expense of love of country."[16] Historical context also informed the Framers' perception of liberty, power, and corruption. From the outset of the American colonial project, many colonists believed that what had "peopled America," or encouraged former Englishman to emigrate to the New World, was "a love of universal liberty."[17] Indeed, a common idea amongst colonial settlers was that they "had emigrated to create a new land civil and ecclesiastical governments pursue, freer than those they had left behind."[18] The Church of England had been corrupted, alongside the government propping it up. Many colonists, as John Winthrop put it, fled to achieve their pure, uncorrupted "city upon a hill," in which they could live free from the corruption of the Church of England.[19]

As such, the Constitutional Convention itself focused heavily on corruption. It should be noted, however, that the Framers were not *only* concerned with corruption and that their aims were not entirely pure. Indeed, many of the landed and gentry-identifying men at the founding's helm were equally as concerned with the preservation of chattel slavery on plantations across the South as they were with the prevention of corruption. Even still, corruption and the dissolution of

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[13] Teachout. *Corruption in America*, 39.
[14] Teachout. *Corruption in America*, 39.
[15] Teachout. *Corruption in America*, 39; Isaiah Berlin, Roger Hausheer, and Mark Lilla. "Montesquieu." In *Against the Current: Essays in the History of Ideas*, edited by Henry Hardy, 164–203. Princeton University Press, 2013.
[16] Teachout. *Corruption in America*, 39. Berlin, et al. *Against the Current: Essays in the History of Ideas*.
[17] Bernard Bailyn. *The ideological origins of the American Revolution*. (Cambridge, Mass: Belknap Press of Harvard University, 1967), 83.
[18] Bailyn, *The Ideological Origins of the American Revolution*, 83.
[19] Michael Parker. *John Winthrop: founding the city upon a hill*, (New York: Routledge, 2014).

virtue were addressed as soon as the Constitutional Convention began on May 29, 1787. Elbridge Gerry, a delegate to the Convention, wrote to General Warren—a military leader who had served in the Revolution—on the eve of the event as he pondered what was to come:

> It is out of my power in return for the information you have given me to inform you of our proceedings in convention, but I think they will be complete in a month or six weeks, perhaps sooner. Whenever they shall be matured I sincerely hope they will be such as you and I can approve, and then they will not be engrafted with principles of mutability, corruption or despotism, principles which some, you and I know, would not dislike to find in our national constitution.[20]

"Chaos and domination, outside power and internal insurrection," then, were "the context" in which the Convention was held.[21] Many of the Framers, no matter their individual affiliations, were concerned with it. At the Convention's outset, for instance, Hamilton wrote "Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."[22] Given the context of national disorganization caused by the Articles of Confederation, the Framers were forced to reckon with fundamental questions about the new nation's character: how could it best evolve and prolong itself? The answer to that question had a great deal to do with the prevention of corruption.

Though it is evident that the United States was at least in part founded "on anticorruption concerns," its regulation of two of the most central aspects of corruption—extortion and bribery—were comparatively weak in the years of the Early Republic.[23] This was, in part, no fault of the new government's own. The United States inherited English common law as its guide in essentially all legal affairs. But that body of law was unclear about how best to punish acts of bribery and extortion, if at all. In general, bribery was largely linked to judicial officers, rather

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[20] Elbridge Gerry to General Warren. August 3, 1787. Via *ConSource.*
[21] Teachout. *Corruption in America*, 57.
[22] Alexander Hamilton. Federalist No. 68: "The Mode of Electing the President." *New York Packet,* March 14, 1788.
[23] Teachout. *Corruption in America*, 105.

than members of public life writ large. Extortion, on the other hand, was rarely prosecuted in any meaningful way. It would have required legislators and public office holders to go after their own kind—something government officials were naturally unwilling to do. The corruption-minded American government, then, had little to work with in terms of the common law of bribery.[24]

As the institutional power of the states and federal government grew, however, laws concerning the prevention of corruption were expanded to legislative activity in states throughout the country—including laws that expressed concern about the combination of money and politics. Georgia began the trend with a statute that stipulated five years in prison for any individual who attempted to "influence the opinion, judgement, decree, or behavior of any member of the general Assembly, or any officer of this State, Judge, or Justice."[25] Illinois soon passed a similar law that included judges and members of its general assembly, punishing bribery with a $1,000 fine and a year in prison. Legislative bribery was often broadly defined, encompassing much than basic quid pro quo activities—indeed, officials were guilty if "they were found to be partial or to treat one side more favorably, and bribers were guilt for trying to influence anything, even judgement."[26] Eventually, bribery and extortion came to be fused, and statutes—such as Kentucky's 1851 statute barring members of the general assembly from "tak[ing] or agree[ing] to take, any bribe too do or omit to do any act in his official capacity"—became incredibly broad.[27] Reported cases of bribery and extortion grew alongside them. Similarly, the common-law understanding of bribery also expanded: most state courts recognized it, and Blackstone—the famous legal commentary— provided an apt definition used by Courts

[24] Teachout. *Corruption in America*, 106.
[25] Teachout. *Corruption in America*, 114.
[26] Teachout. *Corruption in America*, 115.
[27] Teachout. *Corruption in America*, 115.

and individual lawyers alike. Accordingly, the first federal U.S. bribery law was passed in 1853 in the wake of the Mexican War, during which fraudulent claims abounded.

The statutory obsession with corruption—and the prevention of conflating money and politics—continued in the judicial realm throughout the nineteenth century; in fact, several decisions rendered by state and federal courts privileged the prevention of political corruption. In the 1874 case *Trist v. Childs*, for instance, the Supreme Court refused to enforce a contract to lobby, because paid lobbying was so fundamentally corrupt that to use the law to enforce such a contract would be to undermine the legitimacy of the government in its entirety.[28] Ten years later, in *Ex Parte Yarbrough*, the majority argued that every state has "the right and duty to fight against the twin threats of violence and corruption . . . The right to combat these evils, the Court held, need not be constitutionally grounded to be constitutional—such rights are fundamental and presumed in the very structure of a republican state."[29] These decisions were not outliers. They reflected a broad consensus that one of the fundamental goals of the American system of government was to prevent corruption and the undue influence of wealth on the political process.

Even still, the late nineteenth century was marked by corruption in its own way. President Ulysses S. Grant and his administration were tainted by allegations of corruption, and the Gilded Age more broadly was characterized by widespread bribery and, in particular, the bribery of voters, whose votes were not secret. The early twentieth century Progressive Era was a reaction against that sort of corruption and stemmed from a related desire to make government more accountable to the people. Successful ballot initiatives and referenda coupled with the direct election of senators were all distinct attempts to rectify the corruption that, to many, proliferated

[28] *Trist v. Childs*, 88 U.S. 21 Wall. 441 441 (1874).
[29] Zephyr Teachout. *Historical Roots of Citizens United vs. FEC,* 166.

in American society. There was, then, undeniably a gap between the law and the lived experience of many American citizens in the late nineteenth century.

Even still, despite its espoused values, the Court did not maintain its obsession with corruption for very long. Cases concerning free speech that came before the Court in the early twentieth century demonstrate its members' unwillingness to deal directly with corruption, and instead a desire to expand civil liberties and their protection: in particular, the First Amendment's promise of free speech. Indeed, throughout the twentieth century, many justices moved toward an increasingly individualistic—and less corruption-concerned—perception of the First Amendment: one that guaranteed the essentially unencumbered right to speak one's mind. During this period, the Court's focus shifted entirely from problems of the intention and effect of speech to the rights of individuals to participate in the democratic process. What mattered was not the effect speech produced, but the ability of an individual to speak at all.

To that end, immediately following the Great Depression, and long after, the Court released decision after decision protecting individual liberty over other, and formerly more pressing, concerns: including the prevention of corruption and money in politics. For one, the movement toward the expansion of due process jurisprudence beyond liberty of contract began with cases involving challenges to the autonomy of private education and became more expansive from there.[30] Indeed, by 1925, in *Gitlow v. New York*, the Court definitively declared that "freedom of speech and of the press . . . are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by

[30] David E. Bernstein. *Rehabilitating Lochner: defending individual rights against progressive reform* (Chicago: London: University of Chicago Press, 2012), 93; *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Lochner v. New York*, 198 U.S. 45 (1905)*; Adkins v. Children's Hospital*, 261 U.S. 525 (1923)*; Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Gitlow v. People of New York*, 268 U.S. 652 (1925).

the states."[31] And in 1927, in *Fiske v. Kansas,* the Court unanimously invalidated a state conviction for criminal syndicalism—the advocacy of unlawful means to engender a change in government—as a violation of the right to freedom of speech. Critically, and also in 1927, Justice Louis Brandeis wrote a concurrence in *Whitney v. California* in which he argued that the Fourteenth Amendment's Due Process Clause, correctly interpreted, applies only to matters of procedure: he supported protecting freedom of speech only because precedent held that the clause protects substantive rights.[32] In "asserting that freedom of speech was in essence a matter of the social interest in democratic self-government rather than a libertarian matter of fundamental individual rights, Brandeis tied to cleanse freedom of speech from any association with liberty of contract," thereby creating an entirely new realm of rights that could be supported by progressive jurists, along with their more libertarian counterparts, without public backlash.[33] The Court moved even further from there: in *Stromberg v. California* (1931), it struck down a state criminal syndicalism law on federal First Amendment grounds, albeit cautiously.

In another landmark case about a remarkably different issue, the Court signaled its shift from the importance of property rights, as well as the prevention of corruption, to individual liberties. In *US vs. Carolene Products* (1938), the Court upheld New Deal economic regulations while carving out an exception for the court to protect civil liberties guaranteed by the Bill of Rights, particularly for minorities. Specifically, the Court upheld a federal ban on the shipment of filled milk by means of interstate commerce. However far removed this case might seem from issues of free speech, its impact was profound: Justice Harlan Fiske Stone, writing for the Court, made clear that the justices would "no longer subject economic legislation to heightened

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[32] David E. Bernstein. *Rehabilitating Lochner: defending individual rights against progressive reform* (Chicago: London: University of Chicago Press, 2012), 101.
[33] Bernstein. *Rehabilitating Lochner: defending individual rights against progressive reform*, 101.

scrutiny, but would instead now apply a rational basis test."[34] In other words, the Court concluded that other courts should defer to legislatures in economic regulation cases, but not in those pertaining to civil liberties.[35] Moreover, the Court determined in its infamous "footnote four" of the decision that "there may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth": laws concerning the political process that prevent their own repeal, or laws having to do with minorities, for instance, were to be approached narrowly by federal judges.[36] Footnote four revolutionized the role of the federal courts. While some justices rejected the new double standard of review for instances of potential infringement on individual liberties, the Court adopted its usage with increasing frequency throughout the 1960s. The Warren Court, with Chief Justice Earl Warren at the helm, took advantage of the new heightened standard of review.[37]

The Warren Court massively expanded the modern understanding of civil liberties and exacted harsh scrutiny against allegations of their abridgement. Indeed, during the Red Scare, the Court restricted the use of the Smith Act of 1940 in *Yates v. United States* (1957) and *Scales v. United States* (1961) to protect the right of individuals to "advocate, abet, advise, or teach" the violent destruction of the U.S. government. The Warren Court also expanded the rights of witnesses before congressional committees in *Watkins v. United States* (1957), in which the

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[34] David Schultz. "Carolene Products Footnote Four," The First Amendment Encyclopedia (Middle Tennessee State University) accessed at https://www.mtsu.edu/first-amendment/article/5/carolene-products-footnote-four; Lewis F. Powell. "'Carolene Products' Revisited." *Columbia Law Review* 82, no. 6 (1982): 1087–92.
[35] Schultz. "Carolene Products Footnote Four," The First Amendment Encyclopedia.
[36] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
[37] Richard J. Regan. "The Warren Court: (1953–69)." In *A Constitutional History of the U.S. Supreme Court* (Catholic University of America Press, 2015), 139–0.

majority maintained that the scope of Congress to conduct investigations was not unlimited, and certain inquiries into the private affairs of individuals were unconstitutional on the grounds that they violated the accused's civil liberties. The Court also tried to restrain the definition of obscenity in *Roth v. United States* (1957) and indicated its willingness to supervise state courts on the subject in *Jacobellis v. Ohio* (1964). It expanded protections for the right of association in *NAACP v. Button* (1963) and established the actual malice test for libel suits by public officials in *New York Times Co. v. Sullivan* (1964). All in all, the Warren Court greatly expanded the reach of civil liberties in the judicial sphere: the right of individuals, whether to speak, assemble, or be protected from government incursion into their private affairs, was paramount. The Court moved toward—though, critically, had not yet fully reached—an individualist approach to the First Amendment for the first time in the Court's history.

All in all, over the course of the twentieth century, the Court shifted its understanding of free speech. At the outset of the period, the Court largely chose to protect socially useful speech. Yet by the mid-twentieth century, its focus had changed: protecting access to democratic participation had become of the utmost importance to the justices, rather than other legal or political concerns. This shift would have been largely unthinkable in the years of the early Republic, when concerns about corruption, money in politics, and their prevention proliferated. Yet the understanding of access to democratic participation as a form of speech set the stage for what was to come throughout the twentieth century: the understanding that money itself—particularly in the form of political contributions—*was* a form of speech. The gradual expansion of the Court's understanding of protected speech in the early twentieth century allowed such a perception to take hold. That perception would ultimately come to inform the Court's decisions in both *Buckley v. Valeo* and *Citizens United v. FEC*.

Chapter 2 - *Buckley Bucks: Money Becomes Speech*

Over the course of the twentieth century, the federal government enacted more restrictions on the behavior of political campaigns than ever before. As the body of campaign finance law grew, so did legal challenges to its precepts and assumptions. The battle over campaign finance law over the course of the twentieth century culminated in *Buckley v. Valeo*: a 1976 case before the Supreme Court challenging the constitutionality of the Federal Election Campaign Act of 1971, the most substantive piece of campaign finance legislation passed by Congress up until that point. The Court's ruling in *Buckley*—in which the majority held that limits on election spending required by FECA were unconstitutional—signified a shift in the Court's jurisprudence from which it would not return. That shift was away from issues of corruption, extortion, and bribery, and toward the full-throated acceptance of money—in this case, political expenditures—as a form of speech: a distinctly neoliberal, or market-based, understanding of political speech and participation.

While the federal government had long been concerned with allegations of political corruption, bribery, and election tampering, significant legislation meant to prevent campaign fraud was not enacted until the early twentieth century during the Progressive Era, when campaigns for political and social reform abounded.[38] The modern understanding of campaign corruption arose as early as the 1904 presidential election, when allegations of it ran wild: Democrat Alton B. Parker accused incumbent Republican President Theodore Roosevelt of accepting large sums of money from corporations vying to influence administration policy.[39] Roosevelt denied the allegations and encouraged Congress to introduce federal legislation

[38] Elmer B. Stats. "Impact of the Federal Election Campaign Act of 1971." *The Annals of the American Academy of Political and Social Science* 425 (1976), 99.
[39] Michael J. Blitzer. "Tillman Act of 1907." https://www.mtsu.edu/first-amendment/article/1051/tillman-act-of-1907.

regulating political campaigns. Soon after, Senator Benjamin R. Tillman, a Democrat from South Carolina, introduced legislation banning campaign contributions by corporations and banks chartered by the federal government. The bill, which came to be known as the Tillman Act, was signed into law in 1907.[40] It represented an incursion by the federal government into campaigns' conduct—the likes of which the United States had never seen. It also anticipated later legislation that would become that subject of lawsuits and political debate.

Congress quickly realized there was more to be done, however; it soon enacted the Federal Corrupt Practices Acts of 1910 and 1925 (collectively known as FCPA), which required political parties and candidates for federal office to make their receipts and expenditures available to the public.[41] FCPA was the first federal law to mandate the disclosure of campaigns' finances and, as a result, hold them accountable publicly. Consequently, Congress passed the Hatch Act of 1939 which banned the use of federal funds in elections and prevented employees of the federal government from engendering political support by promising federal funding or employment.[42] Moreover, the later Taft-Hartley Act, passed by Congress in 1947, banned labor unions—which were rapidly becoming politically significant and wealth-generating institutions—from using their general treasury funds to make contributions to candidates for federal office.[43] As such, the potential for campaign corruption had long been of significant concern to Congress and other American political actors. Yet it was also true that the body of campaign finance law—however long or detailed it may have been—remained comparatively weak. This was largely due to poorly written law: there was no enforcement agency responsible

[40] Blitzer. "Tillman Act of 1907."
[41] The Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. 95-213, 91 Stat. 1494 (1977), 15 U.S.C. §§78dd-1, et seq.
[42] The Hatch Act of 1939, Pub. L. 76-252, 53 Stat. 1147 (1939), 5 U.S.C. §§ 7321-7326.
[43] The Taft-Hartley Act of 1947, Pub. L. 80-101, 61 Stat 136 (1941), 29 U.S.C. §§ 141-197.

for ensuring compliance with campaign finance law, regulations were easily evaded, and punishment for rule-breaking was rare.

Yet the rise of modern broadcast media and other technological developments quickly brought campaign corruption to the forefront of the public agenda; by 1971, it was obvious to many legislators that it had to be actively prevented. Indeed, throughout the early 1970's, there was, according to legal officials advocating for further legislation regulating campaign contributions, "a tremendous feeling in this country that you could not trust the Government, a lack of . . . confidence in our Government Officials, the notion that somehow people could be bought."[44] According to that same authority, between 1952 to 1972, after adjustments to reflect increases in the cost of living, the cost of congressional races increased more than three hundred percent. Indeed, between 1962 and 1972, the cost of Presidential races increased more than four hundred and fifty percent; by 1972, it was estimated that the total cost of elections in the United States exceeded $400 million.[45] These figures were astounding to many American citizens. Campaigning had once been the stuff of small-scale local events and familiar faces. Now, it was undertaken by millionaires, billionaires, and candidates who could afford to have their faces plastered on billboards and the nighttime news. Even more significantly, calls for reform also grew from politicians who wanted to spend less time fundraising, which was required if they were to keep up with the increasing costs of campaigns.[46] Congress knew it had to act.

It was in this political moment that the Federal Election Campaign Act (FECA)—a consolidated version of prior campaign finance laws—was passed on August 5, 1971. While

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[44] Transcript of Oral Argument. *Buckley v. Valeo* (1976). Ballotpedia, 31. Retrieved at https://cdn.ballotpedia.org/images/4/49/Buckley_v._Valeo_Oral_argument_transcript.pdf.
[45] Transcript of Oral Argument. *Buckley v. Valeo*, 31.
[46] Zephyr Teachout. *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United*, (Boston: Harvard University Press, 2014), 206.

FECA's start date, April 7, 1972, encouraged candidates and committees to collect contributions and spend funds prior to its enactment, it set in motion a series of unprecedented changes in the way American elections functioned.[47] The law's stated purpose was to "impose overall limitations on campaign expenditures and political contributions; to provide that each candidate for Federal office shall designate a principal campaign committee; [and] to provide for a single reporting responsibility with respect to receipts and expenditures by certain political committees," among other things.[48] To achieve these goals, FECA required full reporting of campaign contributions, amounts donated to campaigns, and expenditures: the sums of money spent by campaigns on various advertising materials.[49] These disclosure requirements were backed by criminal sanctions. Critically, FECA also limited spending on media advertisements.[50]

Furthermore, while the Tillman Act and the Taft-Hartley Act of 1947 banned direct contributions by corporations and labor unions to influence federal elections, FECA provided an alternative model for the limitation of corporate influence on elections. Specifically, it provided a framework for "separate segregated funds, popularly referred to as PACs (political action committees), established by corporations and unions," which could use treasury funds to establish, operate and solicit voluntary contributions.[51] These donations were then considered eligible for contribution to federal election campaigns.[52] FECA's changes to federal election law were largely unprecedented. Indeed, FECA represented Congress's first attempt to regulate campaigns and political conduct in a systematic, enforceable way.

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[47] Elmer B. Stats. "Impact of the Federal Election Campaign Act of 1971," 99.
[48] The Federal Election Campaign Act of 1971 (FECA), P.L. 92-225, 86 Stat. 3 (1971), 2 U.S.C. ch. 14 § 431 et seq.
[49] The Federal Election Campaign Act of 1971.
[50] The Federal Election Campaign Act of 1971.
[51] "The Federal Election Campaign Laws: A Short History," Appendix 4: Brief History, https://transition.fec.gov/info/appfour.htm.
[52] "The Federal Election Campaign Laws: A Short History."

The Watergate scandal, however, sent demands for campaign finance reform to new heights. On the morning of June 17, 1972, five burglars were arrested as they broke into the Democratic National Committee (DNC) headquarters at the Watergate office-apartment complex. Soon after, Federal Bureau of Investigation (FBI) traced the money involved in the burglary to a Miami bank account that, astonishingly, "President [Richard Nixon]'s campaign committee had used to launder thousands of dollars in secret and illegal contributions."[53] Nixon, the incumbent Republican president, was immediately tied to the burglary. The incident aroused immediate and significant public concern.[54] Nixon's prior facade of untouchability—created through foreign and domestic policy successes, as well as an iron-grip on media coverage of his administration—quickly crumbled.[55] The Senate soon established a special committee to investigate election practices during the 1972 campaign, all while John Dean—the White House Counsel—and Jeb Stuart Magruder, Nixon's deputy campaign director, began to cooperate with federal investigators. Ultimately, it was revealed that John Dean's political aides had attempted to cover up their involvement with the burglary. In July 1974, the Supreme Court ruled that Nixon was obligated to deliver underlying evidence to investigators.[56] Nixon's approval rating almost immediately shot down to 24%.[57] The writing was on the wall; Nixon resigned the presidency on August 9, 1974[58] Indeed, the Watergate scandal "created a constitutional crisis second only to the Civil War of more than a century earlier."[59] If the President himself was implicated

[53] Anthony J. Gaughan. "The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform." 77 Ohio State Law Journal 791, (2016), 794.
[54] Keith W. Olson and Max Holland. *Watergate: The Presidential Scandal That Shook America With a New Afterword by Max Holland*, (University Press of Kansas, 2016), 2.
[55] Olson and Holland. *Watergate: The Presidential Scandal That Shook America With a New Afterword by Max Holland*, 1.
[56] *United States v. Nixon*, 418 U.S. 683 (1974).
[57] Andrew Kohut. "From the Archives: How the Watergate Crisis Eroded Public Support for Richard Nixon," Pew Research Center (Pew Research Center, May 30, 2020), https://www.pewresearch.org/fact-tank/2019/09/25/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/.
[58] Olson and Holland. *Watergate: The Presidential Scandal That Shook America With a New Afterword by Max Holland*, 1.
[59] Ibid, 1.

in illicit schemes to influence election campaigns, who wasn't? The United States found itself at a political crossroads. And the public demanded an explanation. Indeed, in the immediate aftermath of Watergate, trust in government plummeted to 36% among Americans.[60] Comprehensive change had to be undertaken.

Watergate may have engendered societal division, but it created a large enough political consensus surrounding campaign abuses for comprehensive legislative action; in 1973 and 1974 Congress debated and approved amendments to FECA that would revolutionize federal election law. The amendments included limitations on contributions to candidates, an expenditure cap on both congressional and presidential elections, public financing of congressional and presidential campaigns, and the creation of the Federal Election Commission (FEC) to enforce the new law and its provisions, which were applicable to both individuals and corporations.[61] Specifically, the 1974 amendments to FECA established a per election limit of $1,000 on contributions to federal candidates, imposed a total biennial limit of $25,000 in total contributions by a single donor to all federal candidates and committees, limited total campaign expenditures by presidential and congressional candidates, restricted independent campaign expenditures to $1,000 per individual, and mandated public disclosure of campaign contributions.[62] These contribution and expenditure limits, as well as additional disclosure requirements, acted as new administrative hurdles campaigns and candidates would need to jump through if they were to be in compliance with federal law. Not only would candidates need to keep track of their finances: they would have to ensure their proper *limitation*, too.

[60] Kohut. "From the Archives: How the Watergate Crisis Eroded Public Support for Richard Nixon."
[61] Gaughan. "The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform," 800.
[62] The Federal Election Campaign Act of 1971.

Moreover, under FECA, the Federal Election Commission became the first independent agency to assume the authority to enforce federal election law. The FEC took on the relevant administrative functions once assigned to Congressional officers and the Governmental Accountability Office (GAO).[63] The FEC was granted the jurisdiction to monitor compliance with FECA, decide cases in civil enforcement matters, and had the unique ability to write its own regulations pertaining to federal campaign finance law—though these directives did not have the force of federal law.[64] The FEC was designated as the "national clearinghouse for information on the administration of elections," rather than the GAO or any congressional authority.[65] The amendments also provided that the President, the Speaker of the House, and the President pro tempore of the Senate would each appoint two of the six Commissioners that composed the FEC's board.[66] The Secretary of the Senate and the Clerk of the House were deemed non-voting Commissioners who could comprise a quorum. The first FEC Commissioners were sworn in on April 14, 1975.

Moreover, the 1974 amendments to FECA also provided for the public financing of Presidential elections and, revolutionarily, the establishment of Political Action Committees (PACs) operating on the behalf of unions and corporations. The amendments provided for partial federal funding for presidential primary candidates' election campaigns, however such funding was only provided if the candidate agreed to a spending limit and refrained from raising private money in their general election campaign. Furthermore, the 1974 amendments to FECA fully established the now-famous PAC model of campaign fundraising, allowing corporations and

[63] "The Federal Election Campaign Laws: A Short History."
[64] Ibid.
[65] Ibid.
[66] The Federal Election Campaign Act of 1971.

unions to establish and operate PACs with federal contracts.[67] As scholar JA Nelson puts it, FECA's "strategy of reform" emphasized both supply-side and demand-side ideas about economics and, by extension, politics.[68] Limitations on contributions and expenditures attempted to reduce the supply of campaign money by limiting the amount of money that could be present in the system at large. The amendments also attempted to limit demand: public financing provisions sought to decrease campaigns' need for outside funding overall.[69] However well-planned it may have been, it remained to be seen whether the system and its incentives would work.

Broadly speaking, Republicans and Democrats largely supported FECA's most basic provisions, along with its amendments. The most significant debate among legislators centered around the scope of public funding, rather than contribution or expenditure limits—though the latter would become the main thrust of the legal argument made against FECA by right-leaning political and legal authorities. Indeed, FECA's most vocal opponents hated the law because of its potential to become a corrupt tool, allowing "entrenched politicians . . . to protect their own power."[70] Such actors might do so through "limiting the amount spent so much that insurgents, who needed more than incumbents to get attention, would be unable to reach the public."[71] This sort of rhetoric represented the time that advocates against campaign finance restrictions combined political participation and money: thinking of both, which had previously been deemed distinct, as entirely equivalent.

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[67] "The Federal Election Campaign Laws: A Short History."
[68] Justin A. Nelson. "The Supply and Demand of Campaign Finance Reform." *Columbia Law Review* 100, no. 2 (2000). 537.
[69] Nelson. "The Supply and Demand of Campaign Finance Reform," 537.
[70] Teachout. *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United*, 206.
[71] Ibid, 207.

The public consensus on the political left was that the FECA amendments would be good for democracy, healthy for Congress, and ultimately would serve as the breath of fresh air needed for American society in the wake of Watergate and Nixon's resignation. The public largely agreed. A September 1973 Gallup Poll found that 65% of Americans supported public financing of federal campaigns and a complete ban on private campaign contributions.[72] Congress could do little to fight off the ever-increasing calls for reform. Indeed, on August 8, 1974—the day before Nixon resigned from the presidency—the House voted to approve the FECA amendments by a vote of 355 to 48.[73] The Senate passed the FECA amendments by a margin of forty-four votes.[74] On October 15, President Gerald Ford signed the amendments into law.

But the law's legislative success was quickly challenged. In January 1974—before the FECA amendments could actually be implemented—a large group of plaintiffs, including the anti-FECA activist Senator Buckley, former Senator Joseph McCarthy, Representative William A. Steiger, the Committee for a Constitutional Presidency, McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, and the New York Civil Liberties Union Inc., filed a lawsuit challenging FECA's constitutionality, in part on First Amendment grounds, in the United States District Court for the District of Columbia. This was an astonishingly diverse group of plaintiffs. Conservative senators, presidential campaigns, and non-governmental organizations teamed up with former Democratic senators and the ACLU of New York to fight FECA and its amendments. The plaintiffs were united in their belief that the amendments represented a violation of the First Amendment and actively encouraged the

[72] George Gallup. *The Gallup poll: public opinion, 1972-1977* (1978), 186.
[73] 120 Cong. Rec. (1974) 27513–14.
[74] Ibid, at 34392.

suppression of insurgent candidates for federal office. To that end, the plaintiffs sought an immediate "declaratory judgement respecting and injunction restraining the enforcement or operation of provisions of Subtitle H of the Internal Revenue Code of 1954 on grounds of repugnance to the Constitution of the United States": a far cry from prior understandings of outsized political contributions as being dangerous to the democratic process.[75]

The District of Columbia's *en banc* panel largely ruled in favor of the respondents in its August 1975 opinion; "a narrow majority of the judges upheld the most important provisions of the amendments, including the expenditure caps."[76] The majority held that "after subjecting the issues to 'exacting judicial scrutiny,' the Court . . . upholds the core provisions of the legislative scheme, holds one incidental provision unconstitutional, and declines to rule on other provisions for a lack of a ripe controversy."[77] On the subject of money in campaigning, the District Court concluded that "given the power of money and its various uses, and abuses, in the context of campaigns, there is a compelling interest in its regulation notwithstanding incidental limitations on freedom of speech and political association."[78] To that end, the court reasoned, "there is a 'compelling governmental interest,' both as to need and public perception of need, that justifies any incidental impact on First Amendment freedoms that result from the statutory limitations stemming from FECA's statutory limitations."[79] This appears to be perfectly in line with prior conceptions of the First Amendment, which adopted a limited understanding of speech and, in addition, the bad tendency test: a judicial standard regarding the curtailment of speech that proposed it could be limited if it had a "bad tendency." Money, the Court reasoned, perhaps was

[75] *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975).
[76] Gaughan. "The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform," 803; Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975).
[77] *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975).
[78] Ibid.
[79] Ibid.

speech, but had to be regulated ono the basis of its potential for corruption. Indeed, the DC Circuit took a hard line against the deregulation of the market for speech in the United States.[80]

But however friendly the D.C. Circuit's ruling may have been to the respondents, it "represented little more than a placeholder."[81] The plaintiffs appealed the case to the Supreme Court quickly, and the Court itself also "felt pressure to decide the case before the 1976 presidential election season."[82] To that end, oral arguments in *Buckley v. Valeo* were held on November 10, 1975. They lasted over four hours. Unlike present-day oral arguments, during which appellants and appellees are limited to just a few attorneys, seven advocates participated in the proceedings: Brice M. Clagett, Ralph K. Winter, and Joel M. Gora argued the cause for the appellants, while Lloyd N. Cutler, Archibald Cox, Ralph S. Spritzer, and Daniel M. Friedman did so for the appellees. Such a widespread division of labor necessitated a long and industrious hearing, with typical rapid-fire questioning from justices across the ideological spectrum.[83]

Interestingly, much of the conversation focused on whether FECA's provisions were "facially discriminatory": a legal concept often used to describe suspect classifications based on race, sexuality, religion, other social identifiers.[84] That the language of race-based classification was applied in this case is not insignificant. It represented a distinct effort on the part of appellants to demonstrate the apparent unfairness and inequality of the FECA amendments. In a brilliant appeal to the Justices'—and by extension, many Americans'—fascination with freedom and civil liberties, such as the right to speak ones' mind, the appellants explicitly integrated

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[80] Wendy Brown. "Speaking Wedding Cakes and Praying Pregnancy Centers: Religious Liberty and Free Speech in Neoliberal Jurisprudence." In *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West*, (New York; Chichester, West Sussex: Columbia University Press, 2019), 123.
[81] Gaughan. "The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform," 803.
[82] Ibid, 18.
[83] Oral Argument, *Buckley v. Valeo* (1976).
[84] Ibid, 5.

notions of facially discriminatory legislation with "Congress's [relative authority or lack of authority to limit speech] under the First Amendment made by law."[85] Indeed, Ralph K. Winter framed appellants' argument against the law as both a "Fifth Amendment attack in that [FECA was seen] as invidious discrimination, but . . . also a First Amendment [issue] . . . in that it clearly regulates content": a direct conflation of speech and money if there ever was one.[86] The appellees, on the other hand, continually alleged that Congress knew exactly what it was doing—and that, more importantly, it acted within the bounds of established law. Indeed, advocate Daniel M. Friedman opened appellees' section of oral argument by noting that

> "the Congress, the body that is particularly expert in knowing the problems, resulting from the use of money, the corrupting effect of money on Federal Elections and Congress has studied the problem, has recognized that when things do not work, changes are necessary and Congress has been willing to change in this area and to try the devise a scheme that will once and for all, we hope put an end to this problem."[87]

To the appellees, this was not a First Amendment nor Fifth Amendment matter. It was a matter concerning the very preservation and sanctity of American democracy. Increased campaign donations, however "free" the speech implicit within them may have been, signified a slippery slope down a road of endless opportunities corruption and bribery.

Buckley was ultimately decided in January 1976 when the Court handed down its remarkably complicated and 294-page *per curiam* opinion. No justice wrote for the majority, and the ruling itself represented an amalgamation of appellants' and appellees' arguments. To begin, the justices upheld FECA's limits on contributions to candidates as entirely constitutional. In their opinion, the justices explicitly acknowledged the potential for immense corruption in

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[85] Ibid, 6.
[86] Ibid, 7; Brown. "Speaking Wedding Cakes and Praying Pregnancy Centers: Religious Liberty and Free Speech in Neoliberal Jurisprudence," 125.
[87] Ibid, 29.

campaign contributions as, in the past, enormous contributions had been "given to secure a political quid pro quo from current and potential office holders."[88] The Justices, then, were not immune from the collective effects of the Watergate scandal and the doubt it sowed within some members of the American public. Indeed, "Although the Court did not mention Nixon by name, the Justices emphasized that 'the deeply disturbing examples surfacing after the 1972 election' demonstrated that the threat of corruption from campaign contributions 'is not an illusory one.'"[89] On that basis, the Court's majority deemed FECA's $1,000 contribution limit a "reasonable policy response" to increased potential for campaign corruption within the United States.[90] Ultimately, the Court determined that such a contribution limit would not

> ". . . undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties."[91]

The Court also upheld creation of the FEC, FECA's public financing provisions, and its various disclosure requirements.[92] Much of the law, then, was upheld. Even still, the Court took notice of the fact that contribution limits *could* be construed as a violation of individual freedom, and in particular, freedom of speech, laying the groundwork for future—and more expansive—interpretations of the First Amendment as it related to political contributions and political speech.

Critically, however, the Court ruled that FECA's caps on overall expenditures by candidates, parties, private individuals, and outside groups were unconstitutional. While seemingly an arbitrary distinction, given that the Court had already upheld FECA's contribution

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[88] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[89] Gaughan. "The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform," 793; Buckley v. Valeo (1976).
[90] Gaughan. "The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform," 793.
[91] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[92] Ibid.

and disclosure requirements, the Court held that the restrictions on *total spending* violated the First Amendment rights to freedom of speech and association, noting that "a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates."[93] Restrictions of this kind were seen by the majority as "limit[ing] political expression 'at the core of our electoral process and of the First Amendment freedoms.'"[94] Rather than adopting the view that the colloquial "playing field" should be leveled for all participants, the Court embraced the opposite understanding of that concept and espoused a neoliberal form of reasoning: one that emphasized unfettered access to the market for speech and deregulation of that market. The Court's logic departed from much of its precedent concerning political speech, which largely held that it could be limited for the sake of the public good. Regardless, the majority contended that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[95] To the Court, expenditure limits in particular limited "the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[96] As such, the *Buckley* decision "created a hybrid campaign finance model" based on these principles, balancing low limits on contributions to federal candidates and parties but no overall limits on total election *spending*.[97]

This hybrid model revealed something clear about the direction the Court would take in future campaign finance and First Amendment-related cases. It now viewed political participation in the form of money—and particularly campaign expenditures—as a type of

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[93] Ibid.
[94] Ibid.
[95] *Buckley v. Valeo,* 424 U.S. 1 (1976).
[96] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[97] Gaughan. "The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform."; *Buckley v. Valeo*, 424 U.S. 1 (1976).

protected speech. Rather than a judicial body meant to prevent corruption, the Court had made its purpose clear: to protected and uphold free speech rights as they existed in almost every form, including cash expenditures. This marked a shift from previous interpretations of campaign finance statutes and laid the ideological groundwork for the Court's ruling in *Citizens United*. Indeed, the majority laid out a broad, sweeping argument for the unconstitutionality of restrictions on political speech, noting 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."[98] Here, the majority implicitly adopts a neoliberal understanding of speech, arguing that unencumbered access to the free market of ideas, campaigning, and political speech was paramount: a far cry from its previous understandings of speech, which focused primarily the social desirability of speech and its ability to protect—or alternatively, damage—the public good.

However, the Court simultaneously recognized that campaign contributions had the potential to "undermine the integrity of our system of representative democracy," and that limits on independent expenditures "preclude . . . most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association."[99] These broad pronouncements signified far more than the Court's political stance. They signified its willingness to adopt the notion that money and politics could be melded at all. Indeed, these pronouncements would begin to inform an ever-growing body of law which held that political campaigns, monetary contributions, and free speech existed in the same realm of the Court's consciousness. This slight shift in ideology was, and continues to be,

[98] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[99] Ibid.

confusing for the general populous and legal scholars alike. But the Court had come to a definitive conclusion: political participation and contributions were their own form of speech and were somewhat unregulatable. This set the stage for the next era of Supreme Court jurisprudence, in which conservative forces would co-opt the conflation of money and speech for their own neoliberal and deregulatory ends.

Chapter 3 - *The Rightward Turn: Reagan and the New Court Packing*

The Court's turn toward money as a form of speech was a radical change in and of itself. *Buckley* was emblematic of that shift. But it was also just the beginning of a long trend in Supreme Court jurisprudence: one that conflated issues of speech and property at the most basic ideological level. That shift in ideology did not happen arbitrarily. The increasing institutionalization of modern conservatism—and neoliberalism—coupled with the appointment of conservative-leaning justices to the Supreme Court under President Ronald Reagan contributed to this shift. Ultimately, these developments paved the way for an ever-expansive conflation of property rights and speech rights in the Court's jurisprudence throughout the latter half of the twentieth century and the beginning of the twenty-first.

This shift in the Court's understanding of speech rights in the aftermath of *Buckley* can be seen in two separate cases concerning the use of public space over the course of six years: *PruneYard Shopping Center v. Robins* (1980) and *Pacific Gas v. Public Utilities Commission of California* (1986). In the former case, the Court argued that speech by outside individuals on private property did not constitute an infringement of its owners' property rights; in the second, it took the opposite position. Such different perspectives on a similar issue can only be remedied by analyzing the contemporaneous rise of the institutionalized conservative legal movement and increasing presence of Republican-appointed justices to the Supreme Court. As justices who at least facially subscribed to conservative principles joined the Court, its decisions frequently conflated money, property rights, and speech, paving the way for the complete deregulation of corporate speech in the twenty-first century.

In *Pruneyard Shopping Center v. Robins,* the Court specifically ruled that private property rights unrelated to a given property owners' voice can be infringed to promote the value

of free speech. The lawsuit centered around two high school students seeking support for their opposition to a United Nations resolution against Zionism, who set up a table in PruneYard, a shopping mall, to distribute literature and solicit signatures for a petition to that effect. A security guard affiliated with PruneYard instructed the students to leave because their actions violated the shopping center's regulations against "publicly expressive" activities.[100] The high school students sued on First Amendment grounds, arguing that PruneYard's policy violated their free speech rights. They claimed that the shopping mall presented itself as a public space and that, as a result, they had the right to speak on its space.

In a rather shocking departure from its own precedent, the Court unanimously held that the students' use of the mall's space did not represent a major impairment of its use, and that, by extension, the mall's owner was not forced to "associate with" the speech. In other words, the students' efforts were separate from that of the shopping mall. No confusion that necessitated a disclaimer on the owners' part existed. On that basis, the Court ruled that the shopping center was not limited to the use of appellants, and because no specific message was mandated by the government to display, the students' actions were entirely within the bounds of the law.[101] There was, in effect, no merit to appellants argument that they were denied their property without due process.[102] The appellants' claim that a private property owner possesses a First Amendment right not to be forced by the state to use his property as a forum for the speech of others was, in the Court's view, erroneous. Critically, the Court flipped in this case; it argued that property rights can be mildly infringed if such infringement does not take away political rights or derail the established "purpose" of private owner. This was a stark deviation from the Court's past

[100] *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).
[101] *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).
[102] Ibid.

jurisprudence, in which it often upheld property rights over much else. Critically, however, the Court did not rule that malls everywhere were fair game for this sort of outcome: it simply affirmed the right of the California Supreme Court to hold that under California constitutional law, PruneYard could not legally prevent the students from speaking on its property.

To begin, the Court noted that PruneYard was not a small proprietorship, but a large retail establishment: "a handful of additional orderly persons soliciting signatures and distributing handbills . . . under reasonable regulations . . . do not interfere with normal business operations . . . would not markedly dilute defendant's property rights."[103] Here, the Court debunks one of the fundamental assumptions underlying the appellants' claim. PruneYard's property rights had not been fundamentally infringed, because the appellees' behavior had not significantly interfered with the establishment's normal business operations. In essence, the value of PruneYard's property had not been diminished. The majority goes further, however, suggesting that the appellees' speech on PruneYard's property did not intrude on its First Amendment rights: " . . . the shopping center by choice of its owner is not limited to the personal use of appellants . . . [and] no specific message is dictated by the State to be displayed on appellants property."[104] The property in question was not PruneYard's alone, in the sense that it was a public space, shared and enjoyed by many. The logical implication of this assertion is that any statements made on such property are not inferred to belong solely to PruneYard; it is possible that a wide range of opinions, belonging to a wide range of individuals, can be represented. Moreover, the Court notes that PruneYard was not being forced or mandated by some entity to display an opinion with which it did not agree. Because it was not forced to

[103] Ibid.
[104] Ibid.

amplify a certain opinion on its property, PruneYard had no legitimate First Amendment nor Fifth Amendment claim.

Yet just six years later, in *Pacific Gas v. Public Utilities Commission of California*, the Court sided *with* a corporation that did not want to express speech it disagreed with. The lawsuit centered around the requirement that San Francisco-based public utility Pacific Gas and Electric Company carry a message supplied by a public interest group in rebuttal to the messages the utility supplied in its newsletter, which it placed in its billing envelope. The question confronting the Court was nuanced: when Pacific Gas and Electric mails bills and sends out a newsletter expressing its own opinion, should it be forced to also display the other side, as was mandated by the Public Utilities Commission of California? The Commission previously decided that the envelope containing the bill belonged to Pacific Gas and Electric, the bill belonged to the customer, and the space left over in the envelope was "shared" between the two. On that basis, the Commission mandated that the pamphlet included with the bill demonstrate opposing sides every other month. Pacific Gas argued that this infringed on its First Amendment rights.

The Court agreed. In this case, it argued, Pacific Gas was being asked to deliver an opinion with which it explicitly did not agree. Such a requirement, the Court reasoned, seemed Orwellian.[105] A preference for a certain kind of speech was entirely unacceptable. The Court argued that "the Commission's order [was] inconsistent with [First Amendment] principles. The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers."[106] Further, the majority contended that "The Commission's access order also impermissibly requires appellant to associate with speech with which it may disagree . . . That kind of forced response is antithetical to the free discussion that

[105] *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986).
[106] *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986).

the First Amendment seeks to foster."[107] While the State of California countered that the Commission's order was serving a compelling state interest in promoting fairness, the Court concluded that "the Commission's order impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects other speakers on the basis of their viewpoints. The order is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation."[108] Moreover, the court argued that the empty space in the envelopes belonged to Pacific Gas, noting that "According to appellees, it follows that appellant cannot have a constitutionally protected interest in restricting access to the envelopes. This argument misperceives both the relevant property rights and the nature of the State's First Amendment violation."[109] Because the property in question belonged to the company, it had to be subject to constitutional protections, including those pertaining to free speech.

The Court also argued that forcing the Pacific Gas to disseminate views that were not its own was an infringement on its right to free expression. While there is a right to speak freely, the Court argued, there is also a right to *not* speak: entities and individuals cannot be legally forced to state things contrary to their own beliefs. The connection to private property in this case was irrefutable: "Where . . . the danger is one that arises from a content-based grant of access to private property, it is a danger that the government may not impose absent a compelling interest."[110] The Commission granted access to the company's property and forced it to express a dissenting view. This constituted forced speech and, by extension, a violation of Pacific Gas's property rights.

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[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.

The connection between the First Amendment and property rights, then, as laid out by the justices in *Pacific Gas*, is that an individual cannot be made to use their property to express anything should they not wish to. In *Pruneyard*, individuals only had First Amendment rights on or in the property of others if their speech did not interfere with the property owner's expression: the opposite seemed to be the case in *Pacific Gas*. Property rights were essential to this conception of the First Amendment in a way that they had not been previously. Access to property itself had become a form of expression, further engraining neoliberal ideas about money and speech that had become fundamental to the Court's understanding of the First Amendment in *Buckley*. In *Pacific Gas*, the Court took the position that a corporation did not have to use its property to disseminate the speech of others: to the justices, equality of viewpoints was less important than the sanctity of property. Indeed, the Court had begun to conflate speech rights and property rights even more intensely than it had previously, implicitly contending that if a company's property rights were being infringed, then its speech rights were as well. This represented an even further extension of the Court's understanding between the relationship of money and politics and hinted that they were one and the same, setting the stage for the further integration of speech, money, and property in the realm of First Amendment jurisprudence.

Critically, however, *Pacific Gas* was not unanimous: justices Powell, Burger, Brennan, and O'Connor formed the majority, and Chief Justice Rehnquist—joined by Justices White and Stevens—wrote in dissent. No ideological consistency emerges from these alliances. Powell and Brennan were generally liberal: Burger was not. Interestingly, justices Powell, Burger, and Brennan appeared to have had a change of heart on issues of speech, or at least came to a newly developed and expansive understanding about its meaning over the six years between *Pruneyard* and *Pacific Gas*. Brennan, Powell, and Burger had been in the majority in *Buckley*, however:

ideas about speech and physical property—and the forced expression of certain political opinions—were increasingly shared by these justices as time went on. Critically, a new conservative justice had helped to form the majority in *Pacific Gas*: Justice Sandra Day O'Connor, appointed by President Ronald Reagan in 1981.

As such, the Court's changing understanding of speech rights and property rights can be, at least in part, explained by a change in the Court's membership—and, by extension, a changing of the guard in the American presidency. The election of Ronald Reagan—a distinctly conservative politician with distinct aims to restore neoliberal economic policies, expand the nation's military, promote a "traditional" view of American life and decrease access to the right to privacy—his conservative appointments to the Supreme Court, and the institutionalization of conservatism throughout the 1980s engrained the Court's perception of money as a form of speech, and property rights as inalienable: fundamental aspects of the Court's later decision in *Citizens United*, which often appears to be a break with the Court's established precedent.[111]

When Ronald Reagan ran for president in 1980, he did so as a so-called "movement conservative": a conservative activist who not only espoused a selective number of typically conservative viewpoints, but one who adopted an entire worldview based on conservative frameworks, whether economic or ideological.[112] Before 1980, the conservative insurgency since World War II had been "largely an alliance of dissenters," rather than anyone in the mainstream of American political discourse. Reagan's election "brought American conservatives into the promised land inside the Beltway. He conferred prestige on them," and legitimized their

[111] David Farber. "Ronald Reagan: The Conservative Hero." In *The Rise and Fall of Modern American Conservatism: A Short History*, 159–208. Princeton University Press, 2010.
[112] George H. Nash. "Ronald Reagan's Legacy and American Conservatism." In *The Enduring Reagan*, edited by Charles W. Dunn. (University Press of Kentucky, 2009), http://www.jstor.org/stable/j.ctt2jchbs.6, 57.

worldview.[113] Before the significance of the American conservative movement is dissected, it is critical to analyze who exactly composed this political contingent. Three main groups—several unlikely bedfellows, in the eyes of many scholars and political analysts—aligned to form the most basic components of the modern conservative movement: advocates of socially conservative values, advocates of increased militarization, and proponents of a neoliberal economic agenda that focused on deregulation and the promotion of free-market capitalism.

The ideas espoused by the neoliberal contingent were fundamental to the Court's increasingly prominent understanding of speech rights as a concept that existed within the so-called "marketplace" of ideas: an inherently neoliberal framework. While classical liberalism—a form of economic thinking based on the deregulation of the free market and *laisse faire* economy policymaking to advance the same—had long been present on the American political and philosophical scene, the term neoliberalism itself first appeared in early-twentieth-century efforts to recapture the spirit of classical liberalism. Its late-twentieth-century definition was first established in Latin America, where pro-market economists adopted the term *neoliberalismo* to describe their agenda, propelling into the development debate a term that became roughly synonymous with the "Washington Consensus," a debt-driven program of privatization and austerity.[114] At around the same time, the economic crisis that began in the early 1970s in the North Atlantic world undermined confidence in what has been called, in hindsight, the "post-war Keynesian welfare state."

Writ large, however, neoliberalism is a political ideology that privileges and "adopts a moralized view of economic life that protects individual autonomy in market transactions."[115] In

[113] Nash. "Ronald Reagan's Legacy and American Conservatism," 58.
[114] Jedediah Purdy. "Neoliberal Constitutionalism: Lochnerism for a New Economy." *Law and Contemporary Problems* 77, no. 4 (2014): 197.
[115] Purdy. "Neoliberal Constitutionalism: Lochnerism for a New Economy," 197.

other words, in the neoliberal view, economic liberty, and access to it, is the standard by which to judge the morality of a given society. The neoliberal philosophy purports to "take certain economic transactions as paradigms of constitutional liberty and equality," and privilege their protection.[116] These economic transactions now concentrate "on forms of autonomy that are more characteristic of twenty-first century capitalism than that of a century ago: selling data, making consumption decisions, and deciding how to spend money more generally to advance one's preferences."[117] As neoliberalism first arose, however, it centered itself around more general economic propositions, such as the freedom to participate in economic transactions, and "reshape[d] democracy in the image of capitalism": freedom was not defined by access to rights, but by the unencumbered ability to participate in economic life. This was equated with freedom. According to legal scholar Jedidiah Purdy, the neoliberal ethos is characterized by

> ". . . an image of the world in which politics and argument are practically the same as pursuing one's preferences through spending and seeking profit by advertising. This image assimilates to a single constitutional status two kinds of activity that have traditionally received very different levels of protection: classic political speech on the one hand and market activities such as spending, marketing, and data-mining on the other."[118]

President Reagan's views, and particularly the views of those aligned with him, largely focused on neoliberal economic policies, and championed deregulation. Indeed, upon Reagan's election his three primary domestic policy goals were to reduce income taxes, balance the federal budget, and increase defense spending.[119] Reagan made his political philosophy crystal clear in his first inaugural address: "government," he said, "is not the solution to our problem;

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[116] Ibid.
[117] Ibid.
[118] Purdy. "Neoliberal Constitutionalism: Lochnerism for a New Economy," 198.
[119] Stephen F. Knott. "Mr. Reagan Goes to Washington." In *The Enduring Reagan*, edited by Charles W. Dunn (University Press of Kentucky, 2009), 76.

government is the problem."[120] In a contemporaneous journal entry, he clarified that he did not want to undo the work of the New Deal, but rather that of President Lyndon Johnson's Great Society, including the Voting Rights Act, which he saw as a "bloated" overreach of the federal government's power and authority.[121] This conservative and fundamentally neoliberal ethos permeated much of the conservative moment of the late 1970s and 80s. Historians have largely accepted that this movement was engendered by a backlash against New Deal and Great Society liberalism that enabled conservative activists, who had slowly been coalescing since the early Cold War, to produce a conservative realignment in American politics: one through which the Republican party was able to successfully capture the South, win control of the White House and Congress, and prevent liberalism from rebounding after its perceived failures during the Carter administration.[122]

Indeed, in the wake of what was often deemed "liberal devastation," the so-called New Right emerged: a secular conservative movement defined by its emphasis on social and economic issues, such as limits on welfare expansion, government spending, and concerns regarding the ever-expanding bureaucracy.[123] The New Right was successfully able to capitalize on the failures of the Carter Administration and publicize its own message of deregulation, a return to "traditional" family values, and the restoration of faith in American industry and integrity both at home and abroad. Through the establishment of now infamous "direct-mailers," think-tanks such as the Cato Institute and Heritage Foundation, and a strong electoral strategy,

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[120] Reagan, Ronald. "1981 Inaugural Address." January 20, 1981. (Washington, D.C.), https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981.
[121] Michael Schaller. *Reckoning with Reagan: America and its president in the 1980's* (New York: Oxford University Press, 1994), 35.
[122] Meg Jacobs and Julian E. Zelizer. *Conservatives in power: the Reagan years, 1981-1989: a brief history with documents* (Boston: Bedford/St. Martin's, 2011), 370.
[123] Kevin Michael Kruse and Julian E. Zelizer. *Fault lines: a history of the United States since 1974* (New York: W.W. Norton & Company, 2019), 112.

New Right activists were able to effectively and efficiently disseminate explicitly the messages promoted by conservatism to not only their supporters, but the broader American population, as well.[124] Arguments of conservative and libertarian intellectuals were quickly popularized, and Reagan—with his emphasis on deregulation and massive tax cuts—made some members of the public believe that their ideas were the only way to restore economic growth in the wake of the Carter Administration's failures.[125] This new form of conservatism, aptly referred to by some as "Reaganism," had become standard in American discourse, paving the way for ideas about free market deregulation and "traditionalism" to abound.

Reagan's conservative, and distinctly neoliberal, political philosophy did not merely apply to domestic and foreign policy decisions: it also extended to his appointment of justices to the Supreme Court. In the spring of Reagan's first term, Justice Potter Stewart made the decision to resign from the Court, offering the Reagan administration the opportunity to appoint its first justice. President Reagan was prepared for this moment. Over the course of the 1980 presidential campaign, he had repeatedly promised to nominate a woman to the high court for the first time, largely due to trailing poll numbers amongst women because of his lack of support for the Equal Rights Amendment. When confronted with the opportunity to appoint a justice, Reagan's administration did so explicitly to, the words of one aide, "help [them] with the woman problem," which was only worsening amidst a failing foreign policy strategy in El Salvador.[126]

Reagan did not appoint just any female judge, however. He appointed Sandra Day O'Connor: the former Republican majority leader of the Arizona state senate, and trial court judge who described herself as a doting mother and "a good shot with a .22 caliber rifle."[127]

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[124] Kruse and Zelizer. *Fault Lines*, 113.
[125] Kruse and Zelizer. *Fault Lines*, 113.
[126] David Greenberg. "The New Politics of Supreme Court Appointments." *Daedalus* 134, no. 3 (2005), 10.
[127] Laurence Bodine. "Sandra Day O'Connor." *American Bar Association Journal* 69, no. 10 (1983): 1396.

O'Connor was, in the eyes of many, a "classic conservative." Her modest upbringing in rural Arizona and El Paso, Texas and rags-to-riches archetype—indeed, she went from a house with no running water for the first seven years of her life to Stanford Law School, where she graduated in the top ten percent of her class—made her a likeable appointee for Reagan and his administration, who had long privileged the notion of "pulling yourself up by your bootstraps."[128] O'Connor herself was a self-identified Republican, though she was largely considered a moderate by her colleagues in the Arizona state senate. She had expressed support, for instance, for a law that would de-criminalize abortion in the state of Arizona, making her a target for many far-right activists, such as Jerry Falwell, to oppose her nomination. President Reagan expressed concern about resistance to her nomination in his personal diaries, noting that "Called Judge O'Connor and told her she was my nominee for supreme court [sic]. Already the flak [sic] is starting and from my own supporters. Right to Life people say she is pro abortion [sic]. She declares abortion is personally repugnant to her. I think she'll make a good justice."[129]

Despite any reservations Reagan or his allies may have had about O'Connor's commitment to conservative causes, she was confirmed to the Court with a vote of 99-0. Though technically a moderate, the first few years of her tenure did not disappoint conservative activists and the Reagan administration. Within her first year on the Court, O'Connor earned a reputation for joining the well-established conservative alliance between Justices Warren Burger and William Rehnquist. Indeed, O'Connor aligned closely aligned with the conservative chief justice William Rehnquist, voting with him 87% of the time her first three years at the Court). From that time until 1998, O'Connor's alignment with Rehnquist ranged from 93.4% to 63.2%, hitting

[128] Kruse and Zelizer. *Fault Lines*.
[129] Ronald Reagan. "Diary Entry – Monday, July 6, 1981." *White House Diaries* (Reagan Foundation: Washington, D.C., 1981).

above 90% in three of those years. In nine of her first sixteen years on the Court, O'Connor voted with Rehnquist more than with any other justice: a surefire sign of ideological alignment with one of the Court's most conservative members.[130] By 1986, it was clear that she was a member of a three-member conservative bloc, voting alongside Rehnquist and the newly nominated Antonin Scalia, set to replace Chief Justice Burger. The appointment of O'Connor to the Court undeniably shifted its balance toward conservatism and a neoliberal worldview.

Contemporaneously, the conservative political movement attempted to entrench itself through explicitly legal means: both by means of reforming the legal education system and the founding of legal public interest groups that would go on to shape the terms of public debate. This process began through the integration of law and economics in law schools and undergraduate institutions throughout the country. Particularly at the University of Chicago Law School, several professors including Richard Posner and Richard Epstein, initiated "training ground[s] for many of the movement's early practitioners and entrepreneurs."[131] Henry Manne, another conservative legal scholar, institutionalized the practice of law and economics through programs at major undergraduate institutions across the country. John M. Olin, an American philanthropist startled by the increase in "radicalization" among students at major universities across the United States, established the aptly named Olin Fellowship at various institutions across the country. The fellowships allowed interested students to receive a multi-thousand-dollar stipend for conducting research related to "law and economics." The goal of the program was, in Olin's own telling, to fight the "increased development since F.D. Roosevelt's 1932

[130] Jan Crawford Greenburg. *Supreme Conflict: the Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin USA, 2008).
[131] Stephen Teles. *The rise of the conservative legal movement: the battle for control of the law* (Princeton, NJ: Princeton Univ. Press, 2008), 188.

presidency and following World War II of socialism in our country."[132] Whether Marxist or Keynesian, Olin did not care: he "very much fear[ed that] the 1980 decade w[ould] bring about very serious problems in our own country" on account of socialism's proliferation and the expansion of the bureaucratic state. The Olin Fellowship and programs like it, he reasoned, would work to counter that reality. Olin's foundation took an aggressive entrepreneurial turn, garnering upwards of $100 million in assets by the end of 1985. Centers for law and economics were started at the most elite law schools in the nation to develop a "strategic form of patronage," in which members could easily become faculty members and participate in the feedback loop of the conservative legal movement.[133] These organizations further sowed the seeds of neoliberal interpretations of the law at the most prestigious legal institutions in nation, and in the minds of those who would go on to become the leaders of the legal profession.

That legal movement and its infrastructure only grew—and did so at a rapid rate. Soon after the rise of the law and economics movement, the Federalist Society—the most influential conservative legal organization to date—was founded in 1982. The first activity undertaken by the Society was a symposium on federalism at Yale Law School in April 1982. Vague chapters of similar societies already existed at high-profile schools across the country. According to the organizers, their aim for the event was the belief that "law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology," and that correspondingly, a "conservative," and implicitly neoliberal, "critique or agenda" had to be formed in the field.[134] The symposium had rather modest aims but attracted a great deal of attention from national news outlets and among members of the conservative movement. By the end of that same summer, the

[132] Teles. *The rise of the conservative legal movement,* 188.
[133] Teles. *The rise of the conservative legal movement,* 188.
[134] Teles. *The rise of the conservative legal movement,* 137.

Society's funders had attracted massive donations from major donors across the United States.[135] Senior members of the conservative legal movement, such as Antonin Scalia, assisted with fundraising and assisted the founders in creating a substantive infrastructure by offering them an office at the American Enterprise Institute.[136] Kenneth Crib, a member of the Reagan administration, also assisted the founders, and recounted that they were "loyal to a philosophical principle that Reagan was trying to accomplish": namely, market deregulation.[137] The Regan administration soon hired the Society's "entire founding cadre," thereby sending "a very powerful message that the terms of advancement associated with political ambition were being set on their head: clear ideological positioning, not cautiousness, was now an affirmative qualification for appointed office."[138] That ideological positioning had a great deal to do with the neoliberal influence that would come to dominate the Court's thinking about issues of free speech and money in politics.

The Federalist Society's primary organizational success lay in its "self-imposed prohibition on 'position taking,'" apart from vague platitudes about the "preservation of freedom" and judges' responsibility to "interpret the law, not write it."[139] Society-aligned individuals in the public sphere have generally refused to name a particular philosophy that informs the Society's endeavors and advocacy. All the while, Society members have created a network so large and deep-rooted throughout the reaches of American government that its influence on judicial nomination processes, particularly in Republican administrations, is assumed. With the Federalist Society and its allies at the ready, the conservative and neoliberal

[135] Teles. *The rise of the conservative legal movement,* 137.
[136] Teles. *The rise of the conservative legal movement,* 140.
[137] Teles. *The rise of the conservative legal movement,* 141.
[138] Teles. *The rise of the conservative legal movement,* 141.
[139] Ibid.

legal movement was poised to redefine the Supreme Court's understanding of liberty once more: this time by appropriating the individualist ethos in the name of unencumbered economic liberty. Collectively, the rise, institutionalization, and entrenchment of modern conservatism and its neoliberal economic policy set the stage for the Court, and its increasingly conservative membership, to exploit *Buckley*'s ambiguities and to eventually conclude that all speech necessarily had to be "deregulated" to ensure the functioning morality of American society.

The Washington D.C. chapter of the Federalist Society was particularly adept in these efforts, and by the estimation of many closely involved with its initiatives, played a central role in the development of so-called "originalist" jurisprudence, where the concept—originated by Reagan appointee Ed Meese—was popularized among members of the society through its networks and debates. In general, the D.C. chapter was adept at "overcoming the intrinsic informational challenges of coordinating across the executive branch' and across political movements.[140] Indeed, between 1981 and 1986, the organization experienced serious growth: its budget grew from about $120,000 to just about $1 million over the same time span.[141] Contemporaneously, the amount of student and legal professional-based chapters across the country grew steadily as well.

The Federalist Society's impact cannot be understated. Though its primary aims were, and continue to be, more subtle—and less *overtly* political—than often portrayed in the media and in popular culture, its members effectively engaged in the recruitment of law students and practicing attorneys to participate in a conservative, and neoliberal, legal movement. It also effectively invested in the human capital of its members by frequently organizing debates and discussion forums, in which members and non-members alike can be exposed to conservative

[140] Ibid.
[141] Teles. *The rise of the conservative legal movement*.

legal ideas and concepts. The Society also created cultural capital by facilitating the development of conservative legal ideas and their "injection into the legal mainstream, reducing the stigma associated with those ideas."[142] Most critically, the Federalist Society also produced *social* capital in the form of networks and connections created between members, who went on—largely due to their already privileged place within the legal industry's hierarchy—to become influential members of the legal establishment across the United States, and particularly within government institutions.

The Federalist Society and its efforts were so significant in conservative circles, and within the broader sphere of American political debate, that Reagan's next appointee to the Supreme Court, Antonin Scalia, was one of its most devout members. Often described as an "animated proponent of originalism and strict constitutionalism," Scalia was a remarkable nominee for Supreme Court justice by the sheer force of his conservative beliefs—standing in stark contrast to those of the more moderate Justice Sandra Day O'Connor.[143] Day O'Connor, however friendly she may have been to conservative causes at the beginning of her tenure, proved herself somewhat weak on issues of importance to conservative activists, particularly regarding abortion.[144] Because of that disappointment, the Reagan administration knew that its next nomination was critical. Members of the administration hoped to ensure that candidates were "rated . . . against the ideal Supreme Court nominee, who would exhibit 'a refusal to create new constitutional rights for the individual,' a 'disposition toward less government rather than more,' an 'appreciation for the role of the free market in our society,' and a respect for traditional

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[142] Teles. *The rise of the conservative legal movement*, 98.
[143] James MacGregor Burns. *Packing the court: the rise of judicial power and the coming crisis of the Supreme Court* (New York: The Penguin Press, 2009), 213.
[144] See *Akron v. Akron Center for Reproductive Health*, wherein Justice Day O'Connor voted to narrow *Roe v. Wade*'s scope, rather than gut it entirely.

values.'"[145] Ed Meese himself railed for a nominee who would promote a "jurisprudence of Original Intention."[146] This was not a search for a moderate conservative of ages past: it was the recruitment of a distinctly Reaganite, neoliberal, and "originalist"—and therefore Federalist Society approved—ideologue.

Antonin Scalia was the Reaganites' ideal candidate. Described as an "archconservative Catholic" at the age of seventeen by a military school peer, a former law professor, assistant attorney general under Nixon, a scholar at the American Enterprise Institute, a Reagan appointee to the U.S. Court of Appeals for the District of Columbia, and a dedicated member of the Federalist Society, Scalia's jurisprudence and legal background were described as nothing less than "perfect."[147] He continually touted his originalism in the classroom, in law review articles, and on the bench. Though he often paid lip-service to "deference to the political branches" and "deferring to the legislature," Scalia had no qualms about undertaking activist opinion-writing and overturning precedents he believed were wrongly decided.[148] He was very public about his personal and jurisprudential disagreements with *Roe v. Wade*: a boon to the pro-life contingent that had begun to have serious voting power in the Republican party and in conservative political and legal circles more broadly. Despite his militant beliefs, Scalia was confirmed unanimously by the Senate.

Scalia's nomination paved the way for a far more neoliberal understanding of money, politics, and speech to take hold on the Court. Just a few months after his confirmation in December 1986, the Court handed down its majority opinion in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* in which it held that FECA was, in part, unconstitutional: a

[145] Burns. *Packing the court*, 213.
[146] Burns. *Packing the court*, 213.
[147] Burns. *Packing the court*, 214.
[148] Burns. *Packing the court*, 214.

further recognition that the speech rights—and property rights—of corporations could, and necessarily had to be, protected. Massachusetts Citizens for Life (MCFL) was incorporated under the laws of Massachusetts as a non-stock, non-membership corporation in 1973.[149] Prior to the 1978 primary elections, MCFL distributed a flyer to contributors, due-payers and to approximately 50,000 people MCFL considered sympathetic to its goals. This flyer encouraged readers to "vote pro-life," listed candidates for state and federal office in every voting district in the state, and identified each candidate as either supporting or opposing MCFL's views. The Federal Election Campaign Act (FECA) prohibited corporations from spending general corporate treasury funds on any federal election; MCFL spent a total of $9,812.76 from its general treasury on the flyers in question The FEC filed a complaint against MCFL, seeking a civil penalty and other relief. The lower court found that MCFL's flyers did not fit within the Act's definition of "expenditures," and that FECA would violate the First Amendment if applied in the case. The United States Court of Appeals for the First Circuit reversed on the first issue but confirmed the latter.[150]

The Supreme Court's majority agreed. In an opinion penned by Justice Brennan, the Court held unanimously that MCFL's flyers clearly represented an "expenditure" according to FECA's definition of the term, particularly because of the statute's specification that an expenditure includes the provision of anything of value made for the purpose of influencing a federal election. Yet in a 5-4 majority composed of Brennan, Marshall, Powell, O'Connor, and

[149] This sort of corporation does not have members and does not sell shares of its own stock. A political action committee, on the other hand, is an organization that raises or spends more than $1,000 in a calendar year in connection with supporting candidates or issues in a federal election. They are governed by federal election law, whereas corporations are not (though they are subject to their own unique rules and regulations). Registering as a non-membership, non-stock corporation is advantageous in many ways: in this case, it allowed MCFL to operate outside the bounds of federally regulated election campaigning all while supporting several distinct policy goals, particularly regarding abortion law.

[150] *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

Scalia, the Court ruled that FECA was unconstitutional as applied to MCFL's flyers. Brennan argued that FECA's requirements were a substantial restriction on MCFL's First Amendment rights, noting that the organization was forced to comply with several "burdensome" requirements only because it was a corporation: this, Brennan presumed, could potentially create a disincentive for engaging in political speech.[151]

Moreover, Brennan argued that the state's interest in restricting corporate spending in elections did not extend to MCFL because it was, for all intents and purposes, a political organization that functioned as a non-profit regardless of its corporate form. In dissent, Chief Justice Rehnquist argued that the relative threat from corporate participation in elections differed slightly based on the type of corporation involved, he also contended that these were differences "in degree," rather than in kind.[152] Rehnquist implied that he hoped to go further and strike down all bans on corporate spending on political messages. Even still, the Court, with the help of its two Reagan appointees, had taken a further step in the deregulation of corporate speech. It had explicitly adopted the principle that some types of corporations—perhaps those non-profit ones with a more conservative bent—could freely spend their money on federal elections in blatant violation of federal law and Supreme Court precedent.

The Court's conservative shift in the Reagan era was complete with the appointment and subsequent confirmation of Justice Anthony Kennedy in the wake of the failed nomination of conservative hard-liner Robert Bork. Reagan's initial hope for a replacement in the wake of Justice Powell's June 1987 retirement was a man "whose long career as a reactionary academic and judge had put him in the vanguard of the right wing's legal counterrevolution."[153] Indeed,

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[151] *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).
[152] "*Federal Election Commission v. Massachusetts Citizens for Life, Inc.*," Oyez, accessed March 2, 2022, https://www.oyez.org/cases/1986/85-701.
[153] Burns. *Packing the court*, 215.

Robert Bork's "voluminous paper trail exposed a nominee who would, in the name of originalism and restraint, sweep away the precedents of half a century."[154] Bork's nomination was unacceptable to Democrats. His nomination hearings went disastrously. Described by some as an attempt at "confirmation conversion," Bork often went on long tirades, lectures, and engaged in hypotheticals over the course of his hearing before the Senate judiciary committee. Accordingly, the Senate rejected his nomination, with 58 voting in favor and 42 voting against.

Reagan then nominated Douglas Ginsburg, another conservative jurist who passed the ideological litmus test set by the Republican party with flying colors but failed the Senate's "traditional values" test; he admitted to smoking marijuana while working as a law professor. Reagan's final nomination, largely undertaken out of necessity, was far more moderate by contemporaneous standards. Anthony Kennedy of the federal appeals court in California had been a strong contender for a seat on the Court for years, but "disturbing aspects of his jurisprudence—a sympathy for privacy and other 'new' rights, a lack of deference to the political branches—damaged his standing among true believers."[155] Yet it was just these qualities that would prove central to his swing vote on issues of consequence, particularly in the realm of campaign finance and First Amendment jurisprudence. He was a hardline conservative as it related to issues of free speech and subscribed to neoliberal ideas about the necessity of its deregulation.[156] Kennedy was confirmed unanimously after distancing himself from Bork during his confirmation hearings.

With Kennedy's place on the Court established, a decisive conservative majority won out: voting together eighty percent of the time in the Supreme Court's 1988 and 1989 terms,

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[154] Burns. *Packing the court*, 215.
[155] Burns. *Packing the court*, 216.
[156] Nadine Strossen. "Justice Anthony Kennedy's Free Speech Legacy [comments]" *Articles & Chapters* (2019), 1354.

Rehnquist, O'Connor, Scalia, Kennedy, and White challenged key liberal precedents in civil rights and civil liberties cases. The power of the conservative contingent only expanded with the appointments of David Souter in July 1990 and Clarence Thomas in 1991 by President George H.W. Bush. Though Souter appeared much moderate than Thomas upon first glance—largely due to the latter's "fierce, almost Borkian conservatism in [his] writings and speeches," both came down firmly on the side of conservatism often during their time on the bench.[157] By this time, every justice on the Court was a Republican appointee apart from Byron White. This era of Republican court-packing, then, represented a shift toward conservatism from which the Court would never fully return. Through the confluence of a growing conservative political and legal infrastructure and the sheer force of the Republican Party's political will, the conservative movement gained irrevocable control of the highest court of the land. Judicial debate would now be set on its terms.

[157] Burns. *Packing the court*, 216.

Chapter 4 - *The Triumph of the Conservative Will: Citizens United Emerges*

By the last decade of the twentieth century, the conservative majority on the Supreme Court was poised to rule decisively on the issues its members were most passionate about: abortion rights, the right to privacy, and, critically, issues of free speech. Indeed, the neoliberal conception of free speech itself was poised to prevail. But the justices had to wait for their moment to strike. Various members of the conservative majority were, at certain times, unwilling to deregulate corporate speech decisively and entirely. *Citizens United v. FEC* presented just that opportunity. The correct amalgamation of conservative justices, coupled with facts that lent themselves toward a deregulatory interpretation of campaign finance law, allowed the majority to rule in favor of corporate personhood, against campaign finance regulation, and in accordance with the neoliberal precepts espoused by proponents of conservatism.

Despite its apparent unification in other realms of law, the conservative cohort on the Supreme Court remained somewhat divided about issues concerning free speech and campaign finance law even as its composition changed slightly throughout the late twentieth century. * [158] In 1990, the Court decided *Austin v. Michigan Chamber of Commerce*: a case that both justices Kennedy and Scalia hoped to overturn as soon as tactically feasible. The case concerned the Michigan Campaign Finance Act, which prohibited corporations from using treasury money for independent expenditures to support or oppose candidates in state elections. The law provided, however, that if a corporation established an independent fund designated solely for political purposes, or a Political Action Committee (PAC), it could make such expenditures. This statute largely mirrored federal law on the same subject and was written with the assumption that "the unique legal and economic characteristics of corporations necessitate some regulation of their

[158] *See Appendix I for a complete and succinct chart of the Court's decisions relating to campaign finance between *Buckley* and *Citizens United*.

political expenditures to avoid corruption or the appearance of corruption."[159] The Michigan Chamber of Commerce, a non-profit corporation that received donations from business corporations, sought to support a candidate for Michigan's House of Representatives by using general funds to buy a newspaper advertisement. On a 6-3 vote, with all three Reagan appointees dissenting, the Court held that the Michigan law did not violate the First Amendment guarantees of free speech and association nor the Equal Protection Clause of the Fourteenth Amendment.[160]

Like *Buckley*, *Austin* centered around spending limits, but critically focused on limits concerning corporate campaign contributions. The Court held that the corporate PAC requirement and ban on spending general treasury funds satisfied strict scrutiny, or the intense form of review required in cases concerning civil liberties. Rather than bribery or extortion, however, the Court found that the Michigan law was "designed to prevent a 'different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[161] Though the majority reasoned its ruling was made on anti-corruption grounds, its decision was, implicitly, far more concerned with political inequality; it validated the Michigan statute on the grounds that it prevented corporations from having disproportionate influence in state elections. In this sense, *Austin* was a departure from *Buckley* and, to advocates of campaign finance restrictions, a rather positive development.

Scalia disagreed. In a fiery dissent, he began with a stark warning. "'Attention all citizens,'" he stated,

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[159] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).
[160] Richard Hasen. 2018. *The justice of contradictions: Antonin Scalia and the politics of disruption* (New Haven: Yale University Press, 2018), 116.
[161] Hasen. *The justice of contradictions,* 117.

> "'To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: ___.' In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe."[162]

Scalia's dissent in *Austin* took his usual conservative, neoliberal form. He argued that limiting how much any person or entity spends in an election constitutes a form of blatantly unconstitutional censorship. He further contended that legislatures often pass campaign finance laws, including restrictions on campaign spending, to protect incumbents—turning the majority's argument in equality and preserving democracy somewhat on its head: an incumbent "who welcomes full and fair debate," he argued, "is no more to be trusted than the entrenched monopolist who says he welcomes full and fair competition."[163]

Scalia also noted that the law only targeted corporations, not labor unions, because of the political support for the latter in Michigan. He further claimed that the statute's exemption for the press—it allowed press-affiliated and producing organizations to be exempt from the PAC requirement—was "much more likely to produce the New Corruption (too much of one point of view) than amassed corporate wealth that is generally busy making money elsewhere."[164] Scalia, then, viewed *Austin* as antithetical to his view of free speech: one that did not privilege equality of speakers, but rather unfettered *equality of access* to the market for speech. No matter an entity's identity, whether human or corporate, Scalia argued it had an equal right to participate in the political process by contributing to campaigns. Justice Kennedy, in a separate dissent with which justices Scalia and O'Connor concurred, largely agreed with Scalia's assessment, noting

[162] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).
[163] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).
[164] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

that "the majority opinion validates not one censorship of speech but two."[165] The conservative appointed minority, then, appeared ready to end campaign finance restrictions once and for all.

But their time had not yet come. In a series of decisions between 1990 and 2010, Scalia and Kennedy attempted to garner three additional votes to that effect, failing each time. In *Nixon v. Shrink Missouri PAC* (2000), for instance, a Missouri law imposing campaign contribution limits ranging from $250 to $1,000 to candidates for state office was challenged. The statute allowed for periodic adjustments, which increased the 1998 contribution limit to $1,075 for candidates for statewide office, including state auditor. In 1998, Zev David Fredman, a candidate for the Republican nomination for Missouri state auditor, and the Shrink Missouri Government PAC, a political action committee, filed suit. They alleged that the Missouri statute violated their First and Fourteenth Amendment rights. The PAC had contributed $1,075 to Fredman and argued that without the limitation it would have contributed more to Fredman's campaign. In a 6-3 opinion authored by Justice David H. Souter, the Court held that *Buckley* was the proper authority for comparable state-level campaign finance regulation. However, the majority also contended that the federal limits approved in *Buckley* did not entirely define potential permissible state limitations, and that the Missouri did not violate the First Amendment.[166] Souter wrote that "even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed . . . the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[167] Scalia, Thomas, and Kennedy unsurprisingly dissented and voiced support for overturning *Buckley* in its entirety.

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[165] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).
[166] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).
[167] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000)

Additionally, in *McConnell v. Federal Election Commission*, the Court appeared to move even further toward the full-throttle protection against undue corporate influence in elections. In *McConnell,* the Court ruled on the constitutionality of the Bipartisan Campaign Reform Act (BCRA), which was passed in 2002 at the urging of Senators Russell Feingold and John McCain. In its own words, the Court upheld "BCRA's two principal, complementary features: the control of soft money," or contributions to political parties that are not accounted as going to a particular candidate, thus avoiding various legal limitations, "and the regulation of electioneering communications."[168] But the opinion was incredibly complicated: indeed, "No single Justice wrote for the majority. Instead, different groups of Justices formed majorities to interpret various titles of the Bipartisan Campaign Reform Act of 2002."[169] While the Court upheld the majority of BCRA's provisions, its internal divisions regarding the legislation's various titles represent, at best, a unique division of labor, and at worst, a sense of intense confusion and disagreement about what its provisions truly meant. Justice Scalia, for instance, "concurred with respect to BCRA Titles III and IV, dissented with respect to BCRA Titles I and V, and concurred in the judgment in part and dissenting in part with respect to BCRA Title II"; Justices Thomas, Kennedy, Rehnquist, Stevens offered their own varied concurring and dissenting opinions, as well.[170] That essentially every Justice found a certain aspect of the ruling entirely incorrect suggests an inability to succinctly resolve the issue at hand, though *McConnell* is largely considered the "high point of Supreme Court deference toward governments that passed restrictive campaign finance laws to improve the democratic process."[171] The majority argued

[168] *McConnell V. Federal Election Commission*, (02-1674) 540 U.S. 93 (2003).
[169] Louis Fisher. *President Obama: Constitutional Aspirations and Executive Actions.* "Campaign Finance." (University Press of Kansas, 2018), 151.
[170] *McConnell V. Federal Election Commission*, (02-1674) 540 U.S. 93 (2003).
[171] Hasen. *The justice of contradictions,* 118.

that "large amounts of money flowing into politics raised dangers of corruption and undue influence, even if the money was spent independently . . . the majority believed that the Court should defer to the elected officials who crafted campaign finance laws . . . because legislators . . . had greater expertise than judges on the dangers of money in politics."[172]

The conservative wing of the Court soon found its footing, however. Justice Sandra Day O'Connor retired in 2006 and was replaced by Samuel Alito, whose views on campaign finance were and are similar to Justice Scalia's. As such, only four years after *McConnell*, the Court held a provision of BCRA unconstitutional: that provision banned "any broadcast, cable, or satellite communication that refers to a clearly identified Federal candidate" within sixty days of a general election and thirty days of a primary election.[173] In *Wisconsin Right to Life v. FEC*, Chief Justice Roberts—appointed in 2005 upon the retirement of the conservative William Rehnquist—wrote for the majority, deeming only the restriction of "general issue ads," which deal broadly with political questions, unconstitutional. BCRA forbade the use, within sixty days of a general election or thirty days of a primary, of corporate or union treasury money for campaign advertisements that mentioned a federal candidate. In this case, Wisconsin Right to Life paid for broadcast advertisements in 2004 that asked Wisconsin listeners to contact U.S. Senators Kohl and Feingold and to ask them to vote against anticipated filibusters of federal judicial nominees; Senator Feingold was up for re-election in 2004 and some of WRTL's advertisements would have run during Wisconsin's primary and general elections. In the majority opinion, Roberts wrote that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban . . . we give the benefit of the

[172] Hasen. *The justice of contradictions,* 118.
[173] *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

doubt to speech, not censorship."[174] Indeed, with this decision, the Court further muddled yet another ambiguous distinction: one between issue advocacy and express advocacy. Its ruling not only compounded existing confusion, but also laid the groundwork for the complete deregulation of corporate political speech.

Citizens United v. Federal Election Commission was decided to resolve these ambiguities and solidify the conservative wing's neoliberal understanding of the First Amendment. The Court's gradual movement toward the promotion of individual liberties won out over concerns of corruption, bribery, and commonly held understandings of speech as they existed prior to *Buckley* and in *Austin*. *Citizens United* centered around BCRA and focused specifically on Section 203 of the statute, which prohibited the use of general treasury funds for express advocacy and electioneering communications, or speech that references a given candidate Remarkably, the Court ruled that all limitations or bans on corporate speech were unconstitutional. Justice Anthony Kennedy, the author of the majority opinion, made this clear: "The law before us," he declared, "is an outright ban, backed by criminal sanctions."[175] The majority viewed BCRA's ban on corporate independent expenditures as a form of blatant censorship. No longer did the speaker's origin, intent, or effect matter. The Court's only concern was whether every individual— regardless of its corporate form—had the ability to speak and contribute to political discourse in the United States. Logically, the Court reasoned, if a corporation was prohibited from "speaking," its individual members' First Amendment rights were improperly infringed. For that reason, Justice Kennedy declared that the issues underlying *Citizens United*, such as whether the content released by the organization constituted an "electioneering communication" under settled law, could not be decided "without chilling

[174] *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)
[175] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

political speech, speech that is central to the purpose of the First Amendment."[176] Justice Kennedy, it seems, had adopted a neoliberal understanding of the First Amendment's purpose: unrestrained access to the ability to speak, regardless of both the implications of that speech and the relative acceptability—or corporate form—of the speaker.

Indeed, a neoliberal form of reasoning appears throughout the majority opinion and solidifies the Court's gradual shift toward the expansion of speech rights and away from the importance of limiting free speech for the sake of the public good. As soon as Justice Kennedy addresses the fundamental constitutional issues underlying Citizens United's claims, he makes clear that "as any additional rules are created for regulating political speech, any speech arguably within their reach is chilled."[177] Justice Kennedy's rhetoric implies, and perhaps even necessitates, that *any* regulation on speech has a "chilling effect" and reduces the quantity of speech. Notably, Justice Kennedy does not address whether some speech—perhaps speech that has a deleterious effect or a bad tendency—*should* be "chilled."

Justice Kennedy's reasoning quickly adopts an explicitly deregulatory aim. He goes on to note that "The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1771 advisory opinions since 1975."[178] That Justice Kennedy takes legal issue with the sheer number of regulations and restrictions placed upon speakers signifies his neoliberal stance on the issue. Indeed, the reduction of regulation is a key economic and political aim of the neoliberal arm of the conservative movement. Critically, Justice Kennedy then describes that while "this regulatory scheme may not be a prior restraint on speech in the strict sense of that term . . . the complexity of the regulations and the deference

[176] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[177] Ibid.
[178] Ibid.

courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability . . . must ask a governmental agency for prior permission to speak."[179] To Justice Kennedy and the majority, the mere presence of regulation functions as a form of indirect prior restraint. Such regulations are later described as "onerous" and "analogous to [arcane] licensing laws" that governed behavior in 16th and 17th century England.[180] Justice Kennedy, then, makes a normative judgement about the presence of regulation itself—a neoliberal outlook if there ever was one. He also is careful to note that *Austin* "interferes with the 'open marketplace' of ideas protected by the First Amendment."[181] Neoliberal logic, then, had become engrained in the Court's decision-making process and therefore its jurisprudence.

Accordingly, Justice Kennedy denied that the existence of political action committees remedied BCRA's incongruencies, writing that the relevant section of the law was "a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak."[182] He reasons that PACs have to comply with regulations in order to speak, and that the very notion that "PACs must exist before they can speak" has a similarly "chilling effect" on political speech.[183] Any administrative hurdle that must be overcome in order to speak represents an improper incursion on the First Amendment. Deregulation is the Court's solution to this apparently insurmountable issue; the majority similarly contends that corporations must necessarily have the right to *directly* contribute to political campaigns from their general treasury funds to have unfettered, and therefore proper, access to the market for speech. Forming a political action committee requires a great deal of effort—effort that, Justice Kennedy implied,

[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] Ibid.

might prevent some individuals from attempting to speak at all. The PAC requirement would not be considered "merely a time, place, or manner restriction on speech" if it were applied to individuals, Kennedy reasons: "Its purpose and effect are to silence entitles whose voices that Government deems to be suspect."[184] Justice Kennedy neglects to acknowledge that, for most of its history, the Court *did* silence entities whose perspectives it found suspect: the definition of the term "suspect" merely evolved over time.[185] But no matter. The majority had chosen its side. Deregulation, and a capitalist conception of the market for speech, had to triumph. "Political speech," Justice Kennedy wrote, "must prevail."[186]

Most troubling to the majority was the fact that "The Government has muffle[d] the voices that best represent the most significant segments of the economy." Rather than any other identifier—such as, perhaps, the potential harm of a speaker's propositions—Justice Kennedy deemed the economic success of a speaker the ultimate arbiter of "censorship's reach." BRCA's rules and regulations were anathema to the First Amendment not because they punished *all* speakers, but because they punished speakers who wielded significant economic influence in society. With this contention, the majority once again demonstrates its acceptance of neoliberal precepts. In the justices' view, the "marketplace of ideas" could only be maintained if its most influential participants—those with the most money—had the unlimited right to speak. Fairness, then, was defined by the majority on the basis of market allocation, rather than any normative standard.

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[184] Ibid.

[185] Justice Kennedy did carve out some narrow exceptions to this rule. He noted that the Court had previously upheld only "a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions." He cites a series of cases involving public education, the corrections system, the civil service, and the military as examples of proper forms of speech curtailment. Anything outside these bounds, he argued, were "inapposite."

[186] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Accordingly, "the Court . . . reject[ed] the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[187] The distinction between a "natural person" and a corporate entity is an important one: the Court granted that there is some fundamental difference between a human being with political beliefs and a corporate entity. But at the same time, it ignored this distinction and contended that the form of a participant in the market for speech had no bearing on the market's proper functioning—or its potential to allow for corruption. According to Justice Kennedy, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[188] Corporations, he contended, were merely "association[s of citizens] that have taken on the corporate form."[189] Further implications of the corporate form are not addressed. Any restriction on corporations right to speak, therefore, constituted a "troubling assertion of brooding governmental power [that cannot be reconciled] with the confidence and stability in civic discourse that the First Amendment must secure."[190]

No longer was the public good the most critical aspect of speech: unfettered market access, under the guise of "stable civic discourse," was. No matter a speaker's identity, "All . . . including individuals and the media, use money amassed from the economic marketplace to fund their speech."[191] The ultimate conflation of money and speech had taken hold amongst members of the majority. Under its logic, corporations and individuals were considered equal under the law because of their apparently inherent use of money in political participation. As such, the

[187] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid.

ambiguity surrounding questions of political speech was invalidated in one fell swoop. Corporations were to be afforded the same First Amendment protections as any other entities or individuals. The seemingly arbitrary distinctions of past decisions were done away with, ushering in a new era of First Amendment history: one in which the right to speak was protected above all else, and one in which neoliberal ideas about free market enterprise had infiltrated discourse—and law—concerning political speech.

The results of *Citizens United* were drastic. Outside spending in U.S. federal elections reached about $1.3 billion in 2012 and exceeded $1.4 billion in 2016. In 2012, one couple—Sheldon and Miriam Adelson—spent between $98 million and $150 million to try to elect Republican candidates. In the 2014 midterm elections, Tom Steyer spent $74 million trying to preserve the Democrats' Senate majority. And once again, in 2016, Steyer and Adelson topped the list of disclosed campaign donors, with Steyer providing Super PACs with over $66 million and Adelson over $42 million.[192] These figures are astounding and, in the view of campaign finance proponents, catastrophic for democracy itself.

Indeed, the Court's decision in *Citizens Unit*ed as well as its outcomes were, and are, troubling to many private and public actors who attempted to remedy the so-called injustices of the Citizens United decision through legislative action which largely failed. To begin, the *Citizens United* decision was decried on the editorial pages of many newspapers. Writing for the *New York Times*, one editorial author declared that "the Supreme Court has thrust politics back to the robber-baron era of the 19th century," all while "strik[ing] at the heart of democracy."[193] Kenneth Vogel of *Politico* claimed that the decision opened "wide new avenues for big-moneyed

[192] "2014 Top Donors to Outside Spending Groups," OpenSecrets.org (Open Secrets), https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&disp=D&type=V.
[193] Kenneth Vogel. "Court decision opens floodgates for corporate cash," *Politico*, January 21, 2010.

interests to pour money into politics."[194] The consensus among liberal-leaning journalists and everyday Americans was that the Court's ruling in *Citizens United* would serve to undermine the democratic process by allowing corporations to exercise undue influence on American elections. This view was shared by President Barack Obama, who, according to Vogel, declared that *Citizens United* was ". . . a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."[195]

These sentiments were acted upon almost immediately after the decision was rendered. In May of 2010, the House Administration Committee introduced the DISCLOSE Act, a bill that required organizations to "identify the top five contributors on screen" at the end of any ad it disseminated for a candidate or cause.[196] After much debate and six separate hearings, the bill passed the House of Representatives in June of 2010, 219 to 206: mainly along party lines. The first attempt to pass the bill through the Senate failed in July of 2010, and the second attempt to do so failed in September of 2010 after a failed cloture motion to proceed without amendments. In 2019, the DISCLOSE Act was reintroduced by House Democrats as part of the For the People Act: a broad swath of legislation encompassing campaign finance reform and other anti-corruption measures. The House of Representatives passed the bill on March 3, 2019, but the Senate did not take it up. As such, the main legislative effort to combat the anticipated results of the Citizens United decision was met with disdain from legislators. Notably, campaign finance reform has become a partisan issue. Democrats and liberal-identifying politicians have largely hoisted the banner of BCRA-like regulations since *Citizens United*, at which point such

[194] Vogel. ""Court decision opens floodgates for corporate cash."
[195] Vogel. ""Court decision opens floodgates for corporate cash."
[196] Fisher. *President Obama: Constitutional Aspirations and Executive Actions,* 158.

initiatives became fully partisan. Much of Democrats' support for campaign finance legislation is attributable to their proclivity for government regulation of the economy and politics more generally. Many members of the Republican party, on the other hand, endorse the neoliberal logic of deregulation espoused in *Citizens United* and other realms of modern conservative political theory.

The judiciary has also explicitly refused to undo its ruling. In 2012, the state of Montana passed a law prohibiting "a corporation from making 'an expenditure in connection with a candidate or political party.'"[197] The Montana Supreme Court upheld the legislation. The Supreme Court of the United States, however, issued a *per curiam* opinion reversing that decision.[198] All attempts to remedy the effects of *Citizens United*, whether they originated from the legislative or judicial branches, either tapered off or were outright rejected. As a result, the Court's judgement in *Citizens United* and its neoliberal reasoning remain ingrained in the nation's jurisprudence.

[197] Fisher. *President Obama: Constitutional Aspirations and Executive Actions,* 158.
[198] Fisher. *President Obama: Constitutional Aspirations and Executive Actions,* 158.

Conclusion

This thesis has demonstrated that the Supreme Court's decision in *Citizens United* is, in many ways, the direct result of political maneuvering. That reality stands in stark contrast to the way most Americans perceive the Court, or at least idealistic conceptions of its purpose in often-folkloric renditions of American history: as a bulwark against the whims of political influence, bribery, and partisan infighting. The justices, in most cases, truly do believe the merits of the cases they decide and do not operate blindly as partisan hacks, as some might believe. But their decisions are affected by their underlying beliefs, attitudes, and assumptions about the world. That much is clear. In that sense, *Citizens United* should come as no surprise, given our modern political discourse and the electoral popularization of the modern conservative ethos.

Yet, as this thesis has also attempted to prove, the Court stands in blatant violation of its own precedent in *Citizens United*. As early as the revolutionary era and the early decades of the new republic, American political society—and particularly its political elites like the Founding Fathers and Framers of the constitution—viewed the prevention of corruption as one of the new republic's primary political aims. Indeed, bribery and the combination of money and politics was seen as anathema to the public good and to the proper functioning of democratic society. Those jurists who deem themselves "originalists" or structural textualists, then, should have found themselves in a bind when they were confronted with the prospect of interwoven political speech, money, and bribery. Interestingly, in *Citizens United*, those same justices did not. They instead embraced a conflation of speech rights, property rights, and outsize sources of money in politics. This thesis has demonstrated that the Framers would have been appalled. Originalism, at its core, is less a legal doctrine than a form of political theology and conservative orthodoxy. Its

most central "legal" tenets just so happen to align with the outcomes hoped for and publicly espoused by conservative activists.

Until *Buckley*, the history of free speech had largely tended toward the expansion of the right to speak, but it had not yet encompassed, in any way, the contribution of money to political efforts. In a certain way, then, *Buckley* represented a new form of constitutional incorporation. Rather than a new amendment being incorporated to the states and their constitutions, an entirely new *form of political participation* was incorporated into conceptions of speech held by the highest court in the land. This shift was, in some ways, inevitable. An ever-expanding version of public and private speech was bound to include varied forms of political participation, including donations to political campaigns, expenditures on political campaigns, and the like. Though the majority opinion in *Buckley* seems like a deviation from the Court's prior conception of free speech—and in many nuanced ways, it was—it was a development that fit rather well in the historical progression of free speech in twentieth century America. Fundamentally, it fit.

Not so with *Citizens United*. This thesis argues that things changed alongside, and as part of, the conservative revolution of the 1970s and 1980s. In two cases about similar issues of free speech—most critically, whether a corporation or business organization had to permit the expression of ideas on its property with which it disagreed—the Court came down on opposite sides of the issue, first arguing that an entity could be forced to do so, and then arguing that a similar entity could not. What accounts for this nuanced shift is a change in the composition of the Court's membership, and the institutionalization of the conservative legal movement in the form of both non-profit organizations and broader educational initiatives: the combination of these movements, and in particular, the addition of Reagan appointee Sandra Day O'Connor, and later Antonin Scalia and Anthony Kennedy, to the Court, solidified its future. As these somewhat

conservative (relative to previous Supreme Court nominees) justices were nominated and confirmed, the Court increasingly moved toward an ever-expansive understanding of "free speech." That understanding was inclusive not just to some limited participation in political processes but unlimited participation in those activities. During the last fifteen years of the twentieth century and the first ten of the twenty-first, the Court's most conservative members waited for their moment to strike at the heart of campaign finance legislation in the United States in blatant violation of both precedent and longstanding norms.

With the appointment of Justice Samuel Alito and under the stewardship of Chief Justice John Roberts, they found their chance. In that sense, *Citizens United* represents the triumph of both the conservative will to personify the corporate form and neoliberal understandings of the First Amendment. The Court's majority legitimized corporate contributions to federal elections and made high spending in elections for federal office the norm. While this thesis does not claim any normative judgement about the relative appropriateness of large contributions and their associated donors, it does—based on sound and broad-based historical evidence—argue that *Citizens United* stands in blatant violation of the Framers supposed "original intent," and that it was decided at least somewhat based on political ideology. It also demonstrates that the conservative-leaning justices' ideological aim was one they had been attempting to meet for some time.

This is our reality at present. Legal decision-making at the highest level is influenced by the political composition of the Court, and proponents of political issues on both sides of the aisle wait for their respective moments to strike. Critical legal disputes are resolved not based on settled law, but rather on partisan affiliation. Judges are appointed for their accomplishments in name only. Their jurisprudence, and its relative alignment with one political party or another, is

what accounts for their confirmation and decision-making once they are confirmed (consistently along partisan lines) to the Court. It remains to be seen what outcomes this trend will bring. But from a historical perspective, it is imperative that scholars continue to analyze the development of the Court to an institution as blatantly polarized as the legislature. What accounts for that development? In what other areas of law might it be relevant? And how does the legacy of the Court's changing identity resonate today? This thesis has probed those questions from one perspective: that of free speech. It has done so with the intention of drawing out that concept's most important elements, and its eventual combination with ideas about money, political contributions, and the corporate form. All in all, it has demonstrated that understandings of the Court as an ideological institution—that is, with a consistent ideology or understanding of itself across centuries or decades—are inaccurate. The Court, as many Americans knew it, died with *Citizens United*. It is up to citizens on both sides of the aisle to revive it.

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Appendix

Type of Limit	*Buckley*	*FEC v. MCFL*	*Austin*	*Nixon v. Shrink Missouri Government PAC*	*McConnell*	*FEC v. WRTL*	*Citizens United*
Contributions to campaigns	Upheld limits to campaign contributions.	N/A	N/A	Upheld state-level restrictions on campaign contributions.	Upheld prohibition of soft money contributions to campaigns; upheld increased contribution limits for the wealthy.	N/A	Upheld the ban on *direct* contributions to candidates from corporations and unions.
Contributions to PACs	Upheld contribution limits for PACs; instituted a $5,000 ceiling on PAC contributions to campaigns.	N/A	Upheld PAC scheme at the state level; if a corporation established a PAC, it could make independent expenditures.	N/A	Upheld soft money contributions to PACs; upheld increased contribution limits for the wealthy (millionaires and above).	N/A	N/A
Independent expenditures and spending on advertisements	Limits to campaign expenditures held unconstitutional.	FECA's expenditure limits deemed unconstitutional as applied to non-stock, non-membership corporations.	Upheld Michigan statute barring corporations from using general treasury funds for independent expenditures.	N/A	Upheld prohibition of soft money. Upheld increased regulation of "electioneering communications."	BRCA's limitations on political advertising found unconstitutional.	Corporate funding of political broadcasts cannot be regulated; any regulations are unconstitutional.