

**ELECTIONS ACROSS THE POND:  
COMPARING CAMPAIGN FINANCE REGIMES  
IN THE UNITED STATES AND UNITED KINGDOM**

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Campaign finance reform sits at the junction of two central tenets of modern liberal democracy: political liberty and political equality. On the one hand, political liberty proves indispensable to the discovery<sup>1</sup> and dissemination<sup>2</sup> of political truths—a

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1. See JOHN STUART MILL, ON LIBERTY 33 (London, Parker & Son 2d ed. 1859); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 217–18 (1972).

requisite for genuine consent and participation by the citizenry.<sup>3</sup> On the other hand, political equality remains the standard by which the integrity of a democratic system is measured.<sup>4</sup> At first glance, these tenets do not necessarily collide in opposition: Both principles speak to individual autonomy, and both convey respect for human dignity. In a free-market economy, however, the asymmetrical distribution of wealth can result in unequal opportunities to influence the political process if liberty remains unrestrained.<sup>5</sup> This is particularly true with respect to political liberties that require an investment of capital before they can be exercised with any great effect.<sup>6</sup>

The right to political speech is a prime example. Although the ability to voice one's ideas is not dependent on wealth, the ability to reach a wide audience is. What is the point of designing a political cartoon unless you can purchase the paper on which to print it? Speech without resources is sterile. It is deprived of the very thing that gives speech its inherent value as an instrument of individual self-development and democratic participation.<sup>7</sup> Of course, this coupling of speech and capital alludes to the very snarl mentioned above. When wealth is unevenly distributed, as it inevitably is, some individuals will be in a better position than others to exercise their right to effective political speech. These individuals will be in a better position to set the contours of public debate and secure their success at the polls.<sup>8</sup> For any democracy that identifies political equality as something beyond a formal definition of one-man-one-vote, this lopsided arrangement has severe implications since access to political liberty appears to favor affluence but the democracy's legitimacy depends on uniform access to

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2. See ERIC BARENDT, FREEDOM OF SPEECH 8 (1985) (discussing arguments advanced by both Mill and Milton).

3. See *id.* at 20.

4. See generally GLOBAL COMM'N ON ELECTIONS, DEMOCRACY, & SEC., DEEPENING DEMOCRACY: A STRATEGY FOR IMPROVING THE INTEGRITY OF ELECTIONS WORLDWIDE 3 (2012), <http://www.global-commission.org/sites/global-commission.org/files/DeepeningDemocracyFinalReport.pdf>.

5. See, e.g., K. D. EWING, MONEY, POLITICS, AND LAW: A STUDY OF ELECTORAL CAMPAIGN FINANCE REFORM IN CANADA 13–16 (1992).

6. See *id.*

7. See *id.* at 17–19, 21–22; RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 14–15 (2006).

8. See generally JACOB ROWBOTTOM, DEMOCRACY DISTORTED: WEALTH, INFLUENCE AND DEMOCRATIC POLITICS (2010).

methods of influencing the government.<sup>9</sup> Thus, democratic governments often find themselves traversing a tightrope in the areas of political speech, gauging each step in an attempt to find the optimal balance of free speech and fair play.

A government's campaign finance laws represent the legislature's judgment regarding the proper balance between political liberty and political equality. Campaign finance laws represent an assessment of how a society's constitutional principles, organizational choices and political realities shape its democratic priorities. More importantly, these laws work to palliate the government's perceived loss of legitimacy by enabling the citizenry, through their elected representatives, to make a purposeful choice of which principle to indemnify. Any resulting political inequality or inhibitions on liberty are rationalized as a product of the society's democratic values, not a slight against them.

Legislatures, however, do not possess unlimited discretion in their choices. In addition to political checks, many democracies structure their constitutions in ways that inhibit majoritarian control over political speech lest that control give way to hegemony by the majority and exclude minorities from access to political power.<sup>10</sup> These constitutional constraints vary, but oftentimes reflect the level of trust present within each country's political ethos. Whatever their form, these efforts to stave off government incursions on political speech can disrupt the legitimizing effect of campaign finance laws, as they prevent the legislature from voicing the public's ideal recipe on proper democratic values.

Despite this concern, there is a current trend in modern democracies towards "constitutionalism,"<sup>11</sup> whereby shifts in the importance of fundamental rights and the muscle commanded by the judiciary have imposed new limitations on national legislatures.<sup>12</sup> This trend has introduced a new deliberative process in each affected state that looks toward historical consensus

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9. See EWING, *supra* note 5, at 13.

10. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl.1 (Ger.); S. AFR. CONST., 1996.

11. Constitutionalism can be defined as a commitment to institutional arrangements that limit government authority so that government is not "destructive to the values it was intended to promote." A. W. BRADLEY & K. D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 8 (12th ed. 1997) (quoting M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 1 (1967)).

12. See *generally* DAWN OLIVER, CONSTITUTIONAL REFORM IN THE UNITED KINGDOM 25-27 (2003).

instead of dynamic settlements as the basis for certain political rights. “Constitutionalism” essentially has changed what were once political decisions into legal ones, removing entire areas of regulation from the purview of national legislatures.<sup>13</sup> These effects are particularly evident in countries like the United Kingdom, New Zealand, Israel, and Canada, which currently have (or in Canada’s case, recently had) customary constitutions that associated the protection of individual rights with legislative supremacy.<sup>14</sup> In these countries, public bodies have not yet adapted to new institutional roles nor have they settled on the proper distribution of rights protection amongst their political branches. As a consequence, the extent to which their legislatures may regulate political speech and other political rights is somewhat in question.

With that in mind, this Article will compare campaign finance regulations in two distinct political systems to flesh out how “constitutionalism” affects public efforts at strengthening political integrity. Specifically, the Article looks at how the constitutional arrangements of the United States and the United Kingdom either facilitate or frustrate the ability of public bodies to enact the prevailing public opinions on whether the nation’s underlying principles favor unrestrained political liberty or a level of political equality beyond the simple contours of one-man-one-vote. More important, the Article will compare the presumption each nation makes regarding its legislature’s trustworthiness and how that presumption impacts the intensity of its constitution’s legal principles. Ultimately, this Article seeks to show that the legislature’s discretion in campaign finance reform does not necessarily reflect the existence of “constitutionalism,” but rather the level of trust shared between the various constitutional actors.

The Article is divided into two parts. Part I analyzes the history and current state of campaign finance reform in the United States. It then looks at Congress’s intent when drafting seminal legislation in this area. Part I then addresses the relevant textual guarantees in the U.S. Constitution, followed by the U.S. Supreme Court’s response to impositions on political speech and the Court’s impact on the nation’s final regulatory scheme. Part II summarizes the current state of campaign finance re-

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13. *See id.* at 25–26.

14. *See id.* at 21–25, 100.

form in the United Kingdom and Parliament's motivations in passing the legislation. It then examines how the residual character of political rights and the traditional observance of legislative supremacy have permitted Parliament greater flexibility in drafting these types of reforms. Part II closes with a discussion of recent challenges to Parliamentary sovereignty and any possible effects on Parliament's ability to legislate. Special emphasis is given to the customary nature of the British constitution, the constitution's reliance on political safeguards, and the comity shared amongst constitutional actors.

### I. CAMPAIGN FINANCE IN THE UNITED STATES

To understand how constitutionalism affects campaign finance reform, it is necessary to summarize the regime's current character. In the United States, that character can best be described as transitory and uncertain. Despite an unbroken succession of congressional legislation,<sup>15</sup> starting with the Tillman Act of 1907<sup>16</sup> and continuing most recently with the Bipartisan Campaign Reform Act of 2002,<sup>17</sup> campaign finance reform has never enjoyed unreserved constitutional acceptance in the United States. Even when campaign finance legislation engendered the support of a legislative and judicial majority, there remained a steady undercurrent of unease among some members of the government at how far Congress's authority to regulate elections extended. This authority was challenged in the courts as early as 1916<sup>18</sup> and was regularly brought into question during congressional debates.<sup>19</sup> More recently, the legislative schemes have encountered what increasingly seems to be hostile judicial attention.<sup>20</sup> Time and again, American courts

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15. See Dean McSweeney, *Parties, Corruption and Campaign Finance in America*, in PARTY FINANCE AND POLITICAL CORRUPTION 37, 39 (Robert Williams ed., 2000); Carolyn Caccese, Note, *The Bipartisan Campaign Reform Act: Constitutional Implications for the Future*, 18 ST. JOHN'S J. LEGAL COMMENT. 223, 223 (2003).

16. Pub. L. No. 59-36, 34 Stat. 864.

17. Pub. L. No. 107-155, 116 Stat. 81.

18. See *United States v. U.S. Brewers' Ass'n*, 239 F. 163 (W.D. Pa. 1916).

19. See 148 CONG. REC. 3600 (2002); 148 CONG. REC. 1365 (2002); 120 CONG. REC. 8210 (1974); 41 CONG. REC. 1452 (1907).

20. Compare *McConnell v. FEC*, 540 U.S. 93, 224 (2003) (substantially upholding principal features of the Bipartisan Campaign Reform Act of 2002), with *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 482 (2007) (striking down a provision of the same Act), and *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010).

have narrowed<sup>21</sup> and even struck down<sup>22</sup> pieces of legislation aimed at reducing the “corrosive and distorting effects”<sup>23</sup> of disproportionate wealth in U.S. elections. While the courts justify this interference as a legitimate and necessary use of their power of constitutional review,<sup>24</sup> critics are quick to respond that the judiciary’s interference oftentimes results in unintended loopholes and wide gaps in coverage, which provide ample room for entrepreneurs to exploit.<sup>25</sup> This judicial interference, and its subsequent repercussions, have caused American campaign finance laws to advance in graduated cycles, or as Professor Persily describes, “a series of stages”: legislative innovation, judicial modification, entrepreneurial circumvention, and, ultimately, additional rounds of legislation.<sup>26</sup> Thus, every inch of ground gained is the fruit of exertions not just on the House floor, but also on the bench, at the podium, and on the election circuit.

This disjointed evolution of U.S. campaign reform is a direct result of judicial intervention.<sup>27</sup> The American Constitution shares powers amongst the different branches of government, permitting each constitutional actor a limited degree of influence over the activities of its colleagues. Occasionally, these powers do not just delay legislation, but thwart it all together. This constitutional structure was a deliberate choice by the United States’s Founding generation. The American Founders distrusted public officials; in particular, they distrusted the temptations of power and the charms of political office.<sup>28</sup> As James Madison stated, “Enlightened statesmen will not always

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21. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam); *United States v. Constr. & Gen. Laborers Local Union*, 101 F. Supp. 869, 877 (W.D. Mo. 1951).

22. See, e.g., *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010); *Citizens United*, 130 S. Ct. at 917; *Davis v. FEC*, 554 U.S. 724, 744 (2008).

23. *Citizens United*, 130 S. Ct. at 883 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

24. See, e.g., *id.* at 911.

25. Nathaniel Persily, *The Law of American Party Finance*, in *PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE* 213, 216–17 (K. D. Ewing & Samuel Issacharoff eds., 2006).

26. *Id.*

27. See *A Century of U.S. Campaign Finance Law*, NAT’L PUB. RADIO, <http://www.npr.org/templates/story/story.php?storyId=121293380> (last visited Mar. 15, 2013).

28. Colleen Sheehan, *James Madison*, in *THE FOUNDERS’ ALMANAC* 118 (Matthew Spalding ed., 2002).

be at the helm.”<sup>29</sup> Consequently, the Founders ratified a Constitution that integrated a series of external and internal controls intended to frustrate the aggrandizement of political authority and its subsequent infringements on liberty. Chief among them is a system of checks and balances, whereby powers are intertwined in order to foster a competitive struggle between the institutions of national government.<sup>30</sup> Comity is not the intended overarching value—the protection of liberty is.<sup>31</sup> Hence, the Supreme Court has an institutional incentive to intervene in congressional legislation, and, as will be discussed below, that incentive is particularly strong with respect to election reform, where legislation has the potential to both perpetuate those in office and contravene the enumerated right to free speech.

That institutional incentive extends to state law as well. Although the U.S. Supreme Court often extends state legislatures (and the occasional state referendum) a level of deference and comity owed to a sovereign body, the reach of state law is limited by the Article VI Supremacy Clause<sup>32</sup> and the Fourteenth Amendment,<sup>33</sup> which incorporates the prohibition against government infringements on free speech into state law.<sup>34</sup> State governments, after all, possess the same potential to both perpetuate those in office and frustrate individual rights, and, as will be discussed below, that ability to contravene political liberty does not recede in the case of state referendums even if a public referendum largely eliminates the danger of incumbents deploying campaign finance laws against prospective challengers. Once again, comity gives way to liberty. The judiciary possesses the power of constitutional review over federal and state legislation and, in the case of campaign finance reform, exercises it with reliable frequency.

#### A. *The Permitted Framework*

It is not necessary for purposes of this Article to give an in-depth account of every labyrinthine rule to understand the structure underlying American campaign finance laws. Instead, it proves more advantageous to delineate the general

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29. THE FEDERALIST NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 1961).

30. See generally THE FEDERALIST NOS. 10, 47, *supra* note 29 (James Madison).

31. See generally THE FEDERALIST NOS. 47, 48, *supra* note 29 (James Madison).

32. U.S. CONST. art. VI, cl. 2.

33. U.S. CONST. amend. XIV.

34. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

framework utilized by the federal government in order to learn what mechanisms the government found productive and, more significantly, which of those mechanisms were available to it. The answer illuminates not only the legislature's judgment on how the nation's political and organizational realities should tailor constraints on political speech, but also how the legislature's finding is fettered by constitutional considerations, including the judgment of other constitutional actors.

There are four mechanisms to reform campaign finance: disclosure requirements, contribution limits, expenditure limits, and public funding.<sup>35</sup> American campaign finance laws depend heavily on the first two. This dependency is due in large part to the intervention of the Supreme Court and its determinations as to what amounts to a valid restriction on free speech. The Supreme Court, generally speaking, has been more lenient with respect to the supply side of campaign funding.<sup>36</sup> For instance, the Court has explicitly stated that "disclosure requirements impose no ceiling" on political activity.<sup>37</sup> The Court, therefore, has been deferential on which governmental interests outweigh implicated free speech rights.<sup>38</sup> Likewise, the Court has permitted contribution limits<sup>39</sup> provided that they are not so low or so strict that candidates cannot amass the resources necessary for effective advocacy.<sup>40</sup>

The Supreme Court has failed to extend this discretion to the demand side of campaign funding. It has prohibited expenditure limits and has severely handicapped public funding programs. To address each respectively, the Court has ruled that expenditure limits must further a "compelling interest" and must be "narrowly tailored" to achieve that interest.<sup>41</sup> For all practical purposes, this rule has been an insurmountable burden since the Court ruled that corruption and the appearance of corruption—the compelling interest that vindicated both disclosure requirements and contribution limits—did not jus-

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35. K. D. EWING, *THE COST OF DEMOCRACY: PARTY FUNDING IN MODERN BRITISH POLITICS* 43–54 (2007).

36. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

37. *Id.* at 64.

38. *See id.* at 71–74; *Citizens United v. FEC*, 130 S. Ct. 876, 901–02 (2010).

39. *McConnell v. FEC*, 540 U.S. 93, 117 (2003); *Buckley*, 424 U.S. at 35. *But see* *Speechnow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (striking down limits on contributions to an independent expenditure group).

40. *See* *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 21).

41. *See* *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).



tify caps on expenditures.<sup>42</sup> The Court has persistently refused to recognize other governmental interests sufficiently weighty to prevail over free speech rights.<sup>43</sup> As a consequence, political candidates and third-party organizations have the right to spend an unlimited amount of funds.

This reasoning has bled over into the Court's jurisprudence regarding public funding of candidates. The Court has ruled that public funding schemes are, by and large, constitutional.<sup>44</sup> The Court, however, has recognized several noteworthy limitations that diminish the effectiveness of these schemes. The legislature cannot prohibit a candidate from using private funds, nor can it prohibit non-candidates from using private funds for election-related spending.<sup>45</sup> The Court has also ruled that public funding schemes cannot penalize a privately funded candidate by either relaxing his opponent's contribution limits<sup>46</sup> or by issuing his opponent matching funds once he has surpassed a certain threshold.<sup>47</sup> Such legislation would make the breadth of one individual's free speech rights hinge on those of another. The Supreme Court has ruled that this type of analysis is foreign to the U.S. Constitution.<sup>48</sup> It is worth mentioning that the Court has not ruled against matching funds for private contributions; thus, federal and state governments remain free to offer liberal ratios for small private donations to incentivize grassroots fundraising. The effectiveness of such schemes, however, is undercut in part by the Court's refusal to cap personal expenditures, because matching contributions cannot necessarily replace the deep pockets of an independently wealthy candidate.<sup>49</sup> Hence, although the Court permits public funding schemes, it simultaneously abolishes many legislative incentives that make public funding attractive to candidates and enfeebles what few legislative incentives it permits.

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42. See *Buckley*, 424 U.S. at 47–48.

43. See, e.g., *Citizens United*, 130 S. Ct at 917.

44. See *Buckley*, 424 U.S. at 90.

45. See Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 567 (1999).

46. *Davis*, 554 U.S. at 742–44.

47. *Arizona Free Enter. Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011).

48. See *id.* at 2826–28; *Buckley*, 424 U.S. at 48–49.

49. Cf. ANGELA MIGALLY & SUSAN LISS, THE BRENNAN CENTER FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 22 (2010), [http://brennan.3cdn.net/8116be236784cc923f\\_iam6benvw.pdf](http://brennan.3cdn.net/8116be236784cc923f_iam6benvw.pdf).

These rulings have profound implications. On the one hand, the Court has permitted the legislature to encumber the amassing of large treasuries, but, on the other hand, it has refused to restrain personal spending or to allow the legislature to discourage private funding. The result is a lopsided regulatory regime that favors wealthy candidates.<sup>50</sup> Congress cannot properly ensure that voters have an equal opportunity to influence elections, and the restrictions that do exist may aggravate existing inequalities.<sup>51</sup> In other words, Congress seeks to stopper the overflow of election money but has discovered that it has but one hand with which to plug six holes.

### B. *Congress's Attempt to Foster Political Parity*

The above framework does not reflect the U.S. legislature's ideal model. Rather, the framework exists only because the Supreme Court sifted Congress's initial legislation through a First Amendment sieve. Congress enacted two pieces of seminal legislation that formed the foundation of modern campaign finance reform: the Federal Election Campaign Act of 1971 (FECA)<sup>52</sup> and the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>53</sup> Each Act attempted to reduce the political inequalities attributable to wealth, and each Act underwent drastic revisions by the Supreme Court.<sup>54</sup>

#### 1. *Congress's First Attempt*

The Federal Election Campaign Act (FECA) was enacted in 1971 after a surge in the cost of federal elections.<sup>55</sup> Soon after, the Watergate scandal broke, exposing a number of crooked dealings and convincing Congress of the existing law's futility in preventing abuse.<sup>56</sup> In response, Congress enacted a round of amendments to FECA, the combination of which instituted a

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50. See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 70–71 (2001).

51. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1735 (1999).

52. 2 U.S.C. §§ 431–455 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

53. Pub. L. No. 107-155, 116 Stat. 81 (2002).

54. See *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010); *Buckley v. Valeo*, 424 U.S. 1, 51 (1976).

55. See McSweeney, *supra* note 15, at 37, 39.

56. See *id.* at 40–41.

whole new regime of campaign regulations that endeavored to foster greater parity amongst political participants.<sup>57</sup> Congress incorporated all four mechanisms of campaign finance reform in the hopes that their selected combination would remove the need for big money in election campaigns.<sup>58</sup> This move aimed to control both the supply and demand sides of campaign funding.

FECA prohibited individuals from contributing more than \$1,000 to any single candidate per campaign.<sup>59</sup> This amount was significantly below the average cost of a federal campaign.<sup>60</sup> Congress, therefore, expected that the contribution caps would reduce the weight of each contribution, since the donation would reflect a mere sliver of a candidate's war chest, and the contributor's voice would be submerged by other donors.<sup>61</sup> In addition, the cap would have the added benefit of equalizing the relative ability of all citizens to affect the outcome of federal elections, limiting corruptive influences, and widening active participation in the electoral process.<sup>62</sup>

However, as the Act recognized, contribution limits alone cannot reduce the greater potential voice of well-financed individuals since those individuals remain free to promote directly the candidates and policies they favor.<sup>63</sup> Indeed, on their own, contribution limits may amplify inequalities.<sup>64</sup> Consequently, FECA sought to eliminate the causes of the demand for big money through two complementary devices. First, it heavily curtailed private expenditures by forbidding individuals from spending more than \$1000 a year "relative to a clearly identified candidate."<sup>65</sup> It also severely curtailed a candidate's use of his personal and family resources and placed limitations on the candidate's overall campaign expenditures.<sup>66</sup> Congress anticipated that these restrictions would reduce the burden of the en-

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57. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

58. *Id.*

59. *Id.*

60. McSweeney, *supra* note 15, at 42.

61. See Brief for the Attorney General and the Federal Election Commission at 23, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437), 1975 WL 171459 at \*14.

62. See *id.* at \*18-26.

63. See *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976).

64. See SMITH, *supra* note 50, at 70-72.

65. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1265.

66. *Id.* at 1266.

acted contribution limits as well as moderate disparities in wealth because the expenditure cap both deprived candidates of the need to fundraise large sums, as well as deprived personally funded candidates of the ability to rely on a blank check.<sup>67</sup>

Second, FECA offered candidates public funding equal to the expenditure cap, at least with regard to the presidential race. Congress established a Presidential Election Campaign Fund that entitled each major party candidate to \$20,000,000 provided that he or she did not incur expenses in excess of the entitlement and did not accept private contributions except where the Fund was unable to provide the full allotment.<sup>68</sup> The most noteworthy feature of the Fund was that it offered major party candidates the full amount allowed by the Act's expenditure limits.<sup>69</sup> As such, privately funded candidates did not hold a serious advantage over their publicly funded counterparts.

This is where the heart of the legislation resides. The Act limited the amount federal candidates could spend on each election.<sup>70</sup> It also made the accrual of campaign funds more burdensome, but offered, at least with respect to presidential elections, an alternative source of funding that came without the danger of expected favors. It arranged the board so that the only likely move was the acceptance of public funds. This provision would not only purge elections of the corrupting influence of big money, but also would raise indigent candidates to equal footing. It attempted to create a regulatory scheme that provided for political parity in at least one area of federal elections.

## 2. Congress's Second Attempt

Ultimately, FECA failed to usher in the expected reforms. This failure was partially due to the Supreme Court striking down the legislation's expenditure limits<sup>71</sup> and partially due to the unforeseen ingenuity of moneyed interests, who routed election funds into "soft money" contributions<sup>72</sup>—gifts made to political parties for activities not directly related to the election of specific

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67. Brief for the Attorney General and the Federal Election Commission at 23, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437), 1975 WL 171459 at \*14.

68. Federal Election Campaign Act Amendments of 1974, §§ 101, 408(c).

69. *Id.* § 404(a).

70. *Id.* § 101.

71. See *supra* note 37 and accompanying text.

72. Briffault, *supra* note 45, at 191, 192.

candidates—and Political Action Committees (PACs).<sup>73</sup> The legislative regime also suffered from Congress's underestimation of what contributions limits and what public grants would satisfy the monetary needs of modern campaigns.<sup>74</sup> Congress addressed many of these shortcomings with the Bipartisan Campaign Reform Act (BCRA).<sup>75</sup> The Act was not as ambitious as FECA, but it did direct significant attention toward closing the conduits of soft money.<sup>76</sup> For the most part, the soft money restrictions conformed to the Supreme Court's contribution-expenditure distinction. Although the ban applied to solicitations and expenditures of soft money, the Court accepted the government's characterization of the ban as a contribution limit because it did not cap total party spending.<sup>77</sup> The Court, therefore, upheld all of the Act's soft money restrictions.<sup>78</sup>

BCRA, however, contained more than just soft money bans. It also included two provisions that addressed unequal access to the political process. The first provision, commonly called the "Millionaire's Amendment," relaxed the contribution and coordinated-expenditure limits of congressional candidates whose self-financed opponents exceeded certain spending thresholds.<sup>79</sup> The second provision required labor unions and corporations to pay for "electioneering communications" from separately segregated funds.<sup>80</sup> To address each in turn, the Millionaire's Amendment sought to diminish the importance of personal wealth as a criterion for election to federal office.<sup>81</sup> It also sought to rectify a flaw in the existing regulatory scheme. Without limits on expenditures, the contribution restrictions had disproportionately burdened candidates facing independently wealthy opponents because it asymmetrically frustrated

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73. McSweeney, *supra* note 15, at 49.

74. See Craig M. Engle, John DiLorenzo, Jr., & Charles Spies, *Buckley Over Time: A New Problem with Old Contribution Limits*, 24 J. LEGIS. 207 (1998).

75. See 148 CONG. REC. 3555–655 (2002) (senators' concern over the Act's constitutionality); Statement on Signing the Bipartisan Campaign Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 517–18 (March 27, 2002).

76. See Statement on Signing, *supra* note 75, at 517.

77. *McConnell v. FEC*, 540 U.S. 93, 202–03 (2003).

78. Briffault, *supra* note 45, at 195.

79. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 319, 116 Stat. 81, 109–12.

80. *Id.* § 203.

81. Brief for the Appellee at 37–38, *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008) (No. 07-320).

their fundraising efforts.<sup>82</sup> The dual regulatory regimes, therefore, seemed like a reasonable compromise that minimized the advantage present in the system while still conforming to the Court's contribution-expenditure distinction. The requirement for separately segregated funds represented a similar compromise. Congress could not ban the political expenditures of corporations and labor unions outright;<sup>83</sup> it thus decided to place an obstruction between the organizations and the resources of their general treasuries. Corporations and labor unions could only use a segregated fund, which could only receive donations from stockholders, employees, and members of the organization. Congress could, therefore, inhibit "the corrosive and distorting effects of immense aggregations of wealth"<sup>84</sup> but still allow corporations and labor unions to participate in political activity. Both provisions were eventually overturned by the Supreme Court as violations of the First Amendment.<sup>85</sup>

### C. *The Enumerated Right to Free Speech*

The United States of America was founded as a nation of limited government.<sup>86</sup> As such, Congress must satisfy two constitutional requisites before it legislates. It must affix a statute to a specific grant of power, and it must avoid any constitutional proscriptions.<sup>87</sup> With respect to campaign finance reform, Congress easily satisfies the former. The Elections Clause of the Constitution specifically grants Congress the authority to regulate "the Times, Places and Manner" of holding elections for the Senate and House of Representatives.<sup>88</sup> Furthermore, the Supreme Court has interpreted Congress's power to include primary contests<sup>89</sup> and presidential elections.<sup>90</sup> These powers are well established, rarely questioned, and often used to justify campaign finance legislation.<sup>91</sup>

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82. 148 CONG. REC. 3603 (2002).

83. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

84. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

85. *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Davis*, 554 U.S. 724.

86. See U.S. CONST. amend. X.

87. See U.S. CONST. amend. X; U.S. CONST. art. VI, cl. 2.

88. See U.S. CONST. art. I, § 4.

89. See *United States v. Classic*, 313 U.S. 299, 317 (1941).

90. See *Burroughs v. United States*, 290 U.S. 534, 544–45 (1934).

91. See *Buckley v. Valeo*, 424 U.S. 1, 133 (1976).

Congress hits its main snag with respect to the second requirement. The First Amendment to the Constitution states, "Congress shall make no law . . . abridging the *freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>92</sup> The language is forceful. A cursory reading suggests that the Constitution proscribes all restraints on speech "without any 'ifs' or 'buts' or 'whereases,'"<sup>93</sup> irrespective of the government's countervailing interests. This position is strengthened by the fact that, unlike many other modern democracies, the Constitution does not include a provision that expressly subjects the right of free speech to additional democratic considerations.<sup>94</sup>

This was not unintentional. The American Founders presumed that human nature is selfish.<sup>95</sup> They believed that public officials are prone to corruption and that political branches are prone to aggrandizing power.<sup>96</sup> Thus, as aforementioned, the American Founders designed a system of government with both external and internal checks on government authority.<sup>97</sup> The Constitution and the Bill of Rights represent two of these external controls. The Constitution established a legislature powerless to act outside of specific enumerated powers, and the Bill of Rights sheltered fundamental rights away from the machinations of a temporary majority.<sup>98</sup> Moreover, the Bill of Rights sheltered the faculties in which American citizens could defend themselves against oppression.<sup>99</sup> The American Founders recognized the limits of their creation, and therefore entrenched numerous political liberties that were seen as indispensable "bulwarks" against tyranny.<sup>100</sup> Of these liberties, free speech ranked high. Political expression, in their minds,

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92. U.S. CONST. amend. I (emphasis added).

93. *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

94. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, § 2, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

95. *See* THE FEDERALIST NO. 51, *supra* note 29 (James Madison).

96. *See id.*

97. *See id.*

98. *See generally* LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* (1999).

99. *See* Sheehan, *supra* note 28, at 118–19.

100. John Trenchard & Thomas Gordon, *Of Freedom of Speech: That the same is inseparable from publick Liberty*, in CATO'S LETTERS No. 15 (1721).

checked government abuse by exposing misconduct.<sup>101</sup> The Founders, resultantly, were mistrustful of government-imposed restrictions on free speech since public officials always have an interest in silencing dissent. The language drafted, therefore, permitted little leeway.

Despite its stark language, the Supreme Court has never interpreted the First Amendment literally. The Court instead considers the fundamental principles that underlie the First Amendment and the context of each particular fact pattern to determine whether there are compelling reasons to supersede the political liberties enshrined within it.<sup>102</sup> The presumption leans heavily in favor of liberty. The Supreme Court has been highly sensitive to free speech rights and has therefore interpreted the restriction broadly. The Court has even struck down legislation regarding seemingly inconsequential forms of expression, such as virtual child pornography,<sup>103</sup> violent video games,<sup>104</sup> tobacco advertising,<sup>105</sup> sexually explicit cable programming,<sup>106</sup> and hate speech.<sup>107</sup> That protection only intensifies as the banned conduct approaches what are called “core” First Amendment rights.<sup>108</sup> Importantly, these core rights are identifiable through the Constitution’s text. The First Amendment does not mention free speech in isolation. The Amendment instead names free speech alongside the rights of assembly and petition.<sup>109</sup> This juxtaposition emphasizes the former’s role in safeguarding the interests of minorities and opposition groups.<sup>110</sup> It also emphasizes the former’s role in facilitating participation in governance. As a result, the Supreme Court has understood that the First Amendment shields political expression first and foremost and has demanded that the government offer a compelling justification before it permits any significant incursion.<sup>111</sup>

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101. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977).

102. BARENDT, *supra* note 2, at 33.

103. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

104. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

105. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

106. See *United States v. Playboy Entm’t Grp.*, 529 U.S. 803 (2000).

107. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

108. See *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

109. U.S. CONST. amend. I.

110. See BARENDT, *supra* note 2, at 31.

111. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346, 348 (1995).



Not everyone agrees that the First Amendment favors liberty over equality. Several scholars have suggested that the Fourteenth Amendment, which guarantees American citizens “equal protection of the laws,”<sup>112</sup> altered the principles behind the Constitution to be more accepting of equality-oriented campaign finance reform.<sup>113</sup> Such claims have some merit. The Court has read the Fourteenth Amendment to guarantee a level of formal equality between voters.<sup>114</sup> The Court has also recognized pre-Election Day activities under its legal doctrine.<sup>115</sup> The crucial question, therefore, becomes whether the Fourteenth Amendment demands more. Bradley Smith says no. He notes that the Fourteenth Amendment is worded in the negative.<sup>116</sup> As such, he contends that the Fourteenth Amendment reinforces the Free Speech Clause by acting as “a limit on government power, not a grant of power.”<sup>117</sup> The Court seems to share this understanding.<sup>118</sup> The Court’s political process jurisprudence has always had a strong emphasis on the enforcement of individual rights.<sup>119</sup> The Court has also rejected the equality arguments for campaign finance reform in a manner that follows the free speech theories mentioned above<sup>120</sup>—that the principle of equality stands not just for more political access, but for the belief that all men have the right to be treated as equal, rational, autonomous agents pursuing their own self-governance.<sup>121</sup> Such actions belie a new constitutional direction.

#### D. The Court Responds

The Supreme Court has repeatedly rejected the equality rationale behind campaign finance legislation. This rejection first occurred in *Buckley v. Valeo*,<sup>122</sup> the Supreme Court decision that pioneered the contribution-expenditure distinction. There, the

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112. U.S. CONST. amend. XIV, § 1.

113. See, e.g., SMITH, *supra* note 50, at 138.

114. See *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

115. See *Morse v. Rep. Party of Va.*, 517 U.S. 186 (1996).

116. See SMITH, *supra* note 50, at 140.

117. *Id.*

118. See *id.* at 140–41.

119. See, e.g., Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, in PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE, *supra* note 25, at 183.

120. See *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

121. See generally *id.*

122. *Id.*

per curiam opinion dismissed the government's interest in equalizing the relative ability of individuals to influence the outcome of elections as "wholly foreign to the First Amendment."<sup>123</sup> The First Amendment, the majority averred, "cannot properly be made to depend on a person's financial ability to engage in public discussion."<sup>124</sup> The Court's observations were thus visibly grounded in the free speech theories aforementioned. It rejected the enhancement scheme as incompatible with individual rights, and, more interestingly, it viewed the equality rationale as incompatible with democratic equality because it did not treat every citizen's right to free speech with equal respect and concern. The government's respect was instead incumbent on wealth. The Court, therefore, found equality an inadequate interest to justify placing significant burdens on an enumerated constitutional right and would only permit the burden if Congress could show that the regulation combated corruption or the appearance of corruption.<sup>125</sup> The Court has repeatedly sustained this reading of the Constitution but for a few exceptions.<sup>126</sup>

The Supreme Court's modifications of campaign finance laws were not minor. They completely altered the legislation's character and effects. For instance, as mentioned above, Congress crafted FECA to be a comprehensive, enclosed regulatory scheme, in which the Act's four corners complemented each other in their shared goal of creating parity amongst political actors. The Court's decision to bar expenditure limits radically tilted that structure. It produced a system where candidates face an unlimited demand for campaign funds but a tapered supply.<sup>127</sup> This change inflated both the value of individual campaign contributions and the priority of fundraising efforts in a campaign. Candidates resultantly devoted an increasingly inordinate amount of time to fundraising efforts. Moreover, the

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123. *Id.* at 49.

124. *Id.*

125. *Id.* at 48–49.

126. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2824–26 (2011); *Citizens United v. FEC*, 130 S. Ct. 876, 904, 908 (2010); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 478–79 (2007); *see also* Elizabeth Garrett, *New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, 52 *HOW. L.J.* 655, 657–58 (2009) (explaining the equality motivations of Justice Marshall's concurrence). *But see* *McConnell v. FEC*, 540 U.S. 93, 205 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990).

127. Issacharoff & Karlan, *supra* note 51, at 1710–11.

regulations push the flow of money away from the candidates and political parties, and towards advocacy groups that are largely unaccountable to the voting public.<sup>128</sup> Arguably, then, the campaign finance laws reduced the quality of political life.<sup>129</sup>

Multiple Supreme Court Justices recognized that their actions would irreparably undercut reform efforts, but invalidated the legislation nonetheless. For example, Chief Justice Burger admitted that the Court's decision did "violence to the intent of Congress"<sup>130</sup> and questioned whether the remaining "residue" left a workable program.<sup>131</sup> Nonetheless, Justice Burger voted to strike down contribution controls in addition to expenditure limits.<sup>132</sup> More recent Justices have not been kinder. Writing for the majority in *Davis v. FEC*, Justice Alito acknowledged that the government instituted the Millionaire's Amendment to ameliorate the deleterious effects of BRCA's tight contribution limits.<sup>133</sup> That did not deter him from writing the majority opinion that invalidated the provision. He argued that if the applicable limits distorted the political process, then Congress should raise or eliminate those limits.<sup>134</sup> Complications from congressional legislation, even if those complications arose from the Court's own interference, did not warrant incursions on First Amendment rights.<sup>135</sup> Free speech represented a higher value than the deference owed to Congress.

The Court's interference in campaign finance reform in large part stems from the Justices' distrust of Congress's motivations. The Court shares the Founders' presumption that public officials are inherently self-interested. It also shares the belief in the power of speech to check government abuse.<sup>136</sup> The Court is, therefore, particularly cautious when confronting legislation that could perpetuate the tenure of those who control legislative power, especially when that enactment infringes upon a

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128. *See id.* at 1714.

129. *See id.* at 1711 (increased obsession with fundraising); *McSweeney, supra* note 15, at 45 (increased campaign costs).

130. *Buckley v. Valeo*, 424 U.S. 1, 235 (1976) (Burger, J., concurring in part and dissenting in part).

131. *Id.* at 236.

132. *Id.* at 256.

133. *See Davis v. FEC*, 554 U.S. 724, 742–43 (2008).

134. *See id.* at 743.

135. *See id.* at 743–44.

136. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (First Amendment "premised on mistrust of governmental power").

fundamental right.<sup>137</sup> As Justice Scalia makes clear in his dissent in *McConnell v. FEC*, “The first instinct of power is the retention of power, and . . . that is best achieved by the suppression of election-time speech.”<sup>138</sup> This outlook has caused multiple Justices to regard campaign finance reform as a crafty plot to silence dissent.<sup>139</sup> It has also led them to discard their normal deference to a co-equal branch.<sup>140</sup> The Justices do not view their relationship as one of comity, but one of necessary antagonism. They are, therefore, perfectly willing to exercise a countermajoritarian role in the regulation of political speech.

The Justices exercise this countermajoritarian role even when the reform originates outside the legislature’s suspect motivations.<sup>141</sup> Although not applicable in federal law, several states provide for public referenda as a means of initiating reform, and, on occasion, these referenda address the challenges of campaign funding and its potential solutions.<sup>142</sup> The public parentage of such laws, however, does not shelter them from judicial scrutiny.<sup>143</sup> The language of the First Amendment is absolute; it does not distinguish between self-interested constraints on speech and community-oriented ones. Rather, it protects the speakers from government infringement, even when that infringement manifests the will of the majority. Recent Courts, against the advice of a vocal minority,<sup>144</sup> have interpreted this as a presumption against all government encroachments on political speech.<sup>145</sup> They have, in a manner, extended their presumption of mistrust to all democratic outlets, not just those characterized by indirect representation. Ma-

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137. *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964).

138. *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., dissenting).

139. *Id.* at 307 (Kennedy, J., dissenting); *Buckley v. Valeo*, 424 U.S. 1, 236–37 (1976) (Burger, C.J., dissenting). *But see Citizens United*, 130 S. Ct. at 929 (Stevens, J., dissenting).

140. *Citizens United*, 130 S. Ct. at 911.

141. *See, e.g., Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011) (invalidating the Arizona Citizens Clean Elections Act passed by initiative in 1998); *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (invalidating portions of a Vermont campaign finance statute).

142. *See, e.g., Arizona Citizens Clean Elections Act*, ARIZ. REV. STAT. ANN. §§ 16-940 to 16-961 (2012).

143. *See, e.g., Bennett*, 131 S. Ct. at 2806.

144. *Id.* at 2830 (Kagan, J., dissenting).

145. *See, e.g., Citizens United*, 130 S. Ct. 876; *Davis v. FEC*, 554 U.S. 724, 744–45 (2008) (overturning the ‘BCRA Millionaire’s Amendment’ as a violation of candidates’ First Amendment rights).

majoritarianism itself owns the proclivity towards censorship of dissent, and it is that proclivity that must be thwarted.

Let me conclude this Part with one last observation. The Supreme Court's campaign finance jurisprudence has been neither consistent nor uniform.<sup>146</sup> The general thrust has been protective of liberty, but that may change. American acceptance of campaign finance reform is, after all, transitory and uncertain. Several Justices have indicated a willingness to accept equality as a permissible ground for imposing restrictions on political speech.<sup>147</sup> Others have indicated their partial acceptance of the enhancement doctrine.<sup>148</sup> A shift in the Court's makeup could swing the Court's receptiveness toward a new constitutional understanding of equality and the First Amendment. There remain, however, several Justices on the Court poised to overturn the compromise reached in *Buckley* and invalidate all contribution regulations.<sup>149</sup> An alternative shift in the Court's makeup, therefore, could swing the Supreme Court toward a more absolutist understanding of the First Amendment. The future of American campaign finance reform is uncertain. What is certain is that the Constitution contains a presumption that there are some rights that cannot be trusted to a temporary majority, and so long as judges have an institutional incentive to distrust that majority, the courts will remain a battleground for election reform. The ingrained mistrust of majoritarian rule may not guarantee a judicial consensus against government regulation of campaign speech, but it certainly provides a venue and motive for constitutional misgivings to come alive.

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146. Compare *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding financial limits on corporations' direct donations to campaigns and bans on 'soft money' donations to party committees), and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (finding a corporation's ability to purchase advertising supporting candidates for election was not protected from state prohibition by the First Amendment), with *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007) (finding a corporation's right to fund campaigns intended to educate the public protected by the First Amendment), and *Citizens United*, 130 S. Ct. 876 (finding a corporation's right to purchase electioneering advertising protected by the First Amendment).

147. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649–50 (1996) (Stevens, J., dissenting).

148. *Bennett*, 131 S. Ct. at 2835–36 (Kagan, J., dissenting).

149. *McConnell*, 540 U.S. at 248, 254–55 (Scalia, J., dissenting); *Colo. Republican Fed. Campaign Comm'n*, 518 U.S. at 640–41 (Thomas, J., concurring in the judgment and dissenting in part).

## II. CAMPAIGN FINANCE IN THE UNITED KINGDOM

Campaign finance reform in the United Kingdom is best characterized as a “pragmatic evolution.”<sup>150</sup> Unlike other nations, the United Kingdom has enjoyed comparably low levels of scandal. Indeed, many thought that the UK’s political system was such that corruption by donation was hard, if not impossible, to perfect.<sup>151</sup> As a consequence, reform was gradual. The British government did not adopt comprehensive renovations to its regulatory scheme. Instead, it typically enacted single-issue reforms that addressed specific problems as they arose.<sup>152</sup> This behavior was heightened by the fact that the British Parliament often found its reform efforts stifled, not by the conscious intervention of other constitutional actors, but by political realities. Proposed reforms, therefore, needed a swell of popular support before they could be enacted.<sup>153</sup> This resulted in a patchwork of legislation that was rational at its onset, but quickly became outdated and deficient. Before the passage of the Political Parties, Elections and Referendums Act of 2000 (PPERA),<sup>154</sup> the UK’s regulatory regime was “both partial and fragmented . . . [with] [s]ome key issues of party funding [being] subjected to detailed regulation whilst others have only been constrained by the mores of the relevant actors.”<sup>155</sup> It was a regime ripe for sleaze.

A. *An Allergy to “Sleaze”*

Parliament enacted PERA soon after the question of campaign funding reached its peak in the late 1990s. Questions had surfaced regarding the source and purpose behind several

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150. Justin Fisher, *Party Finance and Corruption: Britain*, in PARTY FINANCE AND POLITICAL CORRUPTION 15 (Robert Williams ed., 2000).

151. EWING, *supra* note 35, at 25.

152. COMMITTEE ON STANDARDS IN PUBLIC LIFE, FIFTH REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE: THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM 24–25 (1998) [hereinafter NEILL COMMITTEE REPORT].

153. *Id.* at 24 (noting that reports of the Houghton Committee and the Home Affairs Committee came to naught).

154. Political Parties, Elections, and Referendums Act 2000, c. 41, §§ 1–163, schs. 1–23 (U.K.) [hereinafter PERA] (amended 2006 & 2009).

155. Navraj Singh Ghaleigh, *Expenditure, Donations and Public Funding Under the United Kingdom’s Political Parties, Elections, and Referendums Act 2000—And Beyond?*, in PARTY FINANCE AND THE CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE 36 (Keith D. Ewing & Samuel Issacharoff eds., 2006).

large donations to the Labour Party,<sup>156</sup> combined with earlier accusations regarding foreign contributions,<sup>157</sup> political pressure was such that Parliament could enact a new regulatory regime that addressed many of the erstwhile scheme's shortcomings. The legislation had multiple objectives. In part, the legislation aimed to avert accusations of sleaze and restore the public's confidence that the government represented the public interest and not the coffers of big money.<sup>158</sup> The legislation also sought to ensure that political parties were adequately funded; for some, that objective meant preserving a level playing field between major parties.<sup>159</sup> In response to these assorted objectives, Parliament revised practically every aspect of party funding. It was an across-the-board transformation that presented, for the first time, a complete sketch of Parliament's vision for free and fair elections.

To flesh this out further, Parliament amended the supply side of campaign funding to forestall accusations of sleaze. Specifically, it modified contribution guidelines to regulate the source of party donations and to introduce accountability measures.<sup>160</sup> The previous system had two critical errors, which Parliament felt obliged to address. First, the old regulatory regime failed to define a "permissible donor," permitting foreign corporations and interest groups to contribute to political races.<sup>161</sup> Second, the old regime included little to no transparency.<sup>162</sup> Political parties had no legal obligation to disclose their finances, meaning that parties could profit from huge donations without being forced to account for either the identity of their benefactors or any reciprocal benefit that those supporters may have received in kind.<sup>163</sup> Both omissions had caused multiple "sleaze" scandals and had created an impression that the

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156. *Blair apologises for mishandling F1 row*, BBC NEWS, Nov. 17, 1997, [http://news.bbc.co.uk/2/hi/uk\\_news/31780.stm](http://news.bbc.co.uk/2/hi/uk_news/31780.stm); *Labour backbenchers demand F1 inquiry*, BBC NEWS, Nov. 15, 1997, [http://news.bbc.co.uk/2/hi/uk\\_news/31726.stm](http://news.bbc.co.uk/2/hi/uk_news/31726.stm).

157. Nicholas Rufford, *Australian was Major's £27m secret*, SUNDAY TIMES, Nov. 17, 2002, [http://www.thesundaytimes.co.uk/sto/news/uk\\_news/article220317.ece](http://www.thesundaytimes.co.uk/sto/news/uk_news/article220317.ece).

158. See NEILL COMMITTEE REPORT, *supra* note 152, at 4.

159. See *id.* at 120.

160. PPERA, *supra* note 154, at c. 41 §§ 50–69.

161. EWING, *supra* note 35, at 91.

162. HOME AFFAIRS COMMITTEE, FUNDING OF POLITICAL PARTIES, 1994, H.C. 301, at xxv–xxvi (U.K.).

163. Keith D. Ewing, *The Disclosure of Political Donations in Britain*, in PARTY FUNDING AND THE CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE 57–59 (Keith D. Ewing & Samuel Issacharoff eds., 2006).

government was in hock to its wealthy patrons. As a consequence, these were among the first issues PPERA tackled. The legislation defined a permissible donor to include only individuals on the electoral register and companies incorporated or registered in the United Kingdom. The legislation also introduced several disclosure requirements, one of which compelled parties to report all donations in excess of £5000.<sup>164</sup> Although these reforms were modest, Parliament hoped that they would eliminate the appearance of quid pro quo corruption.

Importantly, Parliament did not include a private contribution ceiling amongst its anti-sleaze measures. A variety of intuitional and philosophical concerns prompted this decision. Past decades had seen a reduction in both party membership and the support offered by institutional donors.<sup>165</sup> Accordingly, both major British political parties had come to rely heavily on so-called "high value donors" to stay solvent.<sup>166</sup> Parliament recognized that without these large benefactors the major parties would not be able to sufficiently fund their activities, including their parliamentary responsibilities, and since Parliament refused to ratify direct subventions to political parties, it continued an historical British practice and refused to place an upper bound on political contributions. Members of Parliament also viewed contributions as an important political right. As expressed by the Neill Committee, "Individuals should have the freedom to contribute to political parties, and the parties should be free to compete for donations. That is part of a healthy democracy."<sup>167</sup> With respect to sleaze, disclosure would "remove illegitimate pressure, whether apparent or real."<sup>168</sup> Parliament had a choice between controlling how much came in to the party or where those funds originated; it viewed the latter as the least restrictive.

PPERA also revised the demand side of campaign funding, but while contribution reforms focused on eliminating sleaze, spending reforms and public funding proposals mainly worked toward establishing a fair electoral system. In contrast to the United States, the United Kingdom's regulatory scheme

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164. PPERA, *supra* note 154, at c. 41, § 62 (4).

165. NEILL COMMITTEE REPORT, *supra* note 152, at 31–32.

166. NEILL COMMITTEE REPORT, *supra* note 152, at 31–33; Ghaleigh, *supra* note 155, at 38.

167. NEILL COMMITTEE REPORT, *supra* note 152, at 79.

168. *Id.*



has always leaned heavily on controlling election expenditures, because the government deemed them easier to manage than contribution controls<sup>169</sup> and because lessons from the United States' experience illustrated how money, like water, always seeks an outlet.<sup>170</sup> To give some context, erstwhile legislation placed a severe cap on constituency-level election expenditures,<sup>171</sup> and, to close off a potential loophole, a later amendment prohibited non-candidates from incurring expenditures as well.<sup>172</sup> By the 1997 election, the average candidate could only spend £8300 in aggregate, while a non-candidate could only expend £5.<sup>173</sup> The caps were a partial success. They effectively held down many campaign costs, but they also suffered from a stunted scope—that is, they only covered constituency-level expenditures. National expenditures were excluded.<sup>174</sup> This allowed parties to shift spending towards generic party propaganda and contributed to an “arms race” between the major political parties.<sup>175</sup> Around the same time, the non-candidate expenditure limit was successfully challenged at the European Court of Human Rights (ECHR).<sup>176</sup> The decision stoked fears that the election system was vulnerable to big money interests.<sup>177</sup>

Parliament responded. Upon the recommendation of the Neill Committee,<sup>178</sup> PPERA imposed a national campaign expenditure ceiling of roughly £20 million on the political parties.<sup>179</sup> The cap applies regardless of whether the expenditure promotes the success of an individual candidate or the success of the party itself.<sup>180</sup> In addition, PPERA amended the expenditure regulations for non-candidates by increasing the limits for

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169. These restrictions began in 1883 with the first Parliamentary attempt to control campaign expenditures, the Parliamentary Elections Act, commonly known as the Corrupt and Illegal Practices Act, 1883, 46 & 47 Vict., c. 51, sch. 1 (U.K.).

170. See NEILL COMMITTEE REPORT, *supra* note 152, at 1816.

171. Ghaleigh, *supra* note 155, at 36.

172. Representation of the People Act, 1983, c. 2, § 75, (U.K.); Ghaleigh, *supra* note 155, at 37.

173. Ghaleigh, *supra* note 155, at 36 n.11.

174. *Id.* at 37.

175. *Id.* at 44; EWING, *supra* note 35, at 5.

176. *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (1998).

177. See, e.g., NEILL COMMITTEE REPORT, *supra* note 152, at 244.

178. *Id.* at 2.

179. See PPERA, note 154, at c. 41, § 79; see also Ghaleigh, *supra* note 155, at 44–45, 45 n.60.

180. See PPERA, *supra* note 154, at c. 41, § 72.

local expenditures by “third parties” from £5 to £500.<sup>181</sup> It also created a new category of political participants called “restricted third parties” who could spend substantial funds nationally once they notified the Electoral Commission of their intention.<sup>182</sup> It is significant that Parliament passed these last two reforms with reluctance,<sup>183</sup> and only to satisfy a judgment from the ECHR that found the previous £5 restriction an improper barrier to third party participation.<sup>184</sup> The ECHR had determined that such a barrier constituted an unjustifiable restriction on freedom of expression and demanded that the British government enlarge the permitted sum; however, it did not reject low non-candidate restrictions outright.<sup>185</sup> The revised expenditure ceilings, therefore, represented a proposed compromise. Parliament viewed “third party” expenditure limits as a necessary instrument in containing campaign costs and ranked the participatory rights of “third parties” below the rights of candidates and major political parties to participate in a “level playing field.”<sup>186</sup> Whether Parliament retains the power to make such a determination will be addressed later in the Article.

Finally, the Act addressed public funding of election expenditures. At the time the Act was passed, there were concerns that political parties could not meet their growing costs without additional sources of public funds.<sup>187</sup> As touched upon earlier, British political parties suffered losses in membership and institutional donors.<sup>188</sup> Concurrently, the price tag for elections rose.<sup>189</sup> As a result, reformers<sup>190</sup> suggested that the government make up the difference through a more comprehensive public funding program; existing efforts worked only on an ad hoc basis through a range of discrete mechanisms, such as the free use of the postal system and a generous amount of free broadcast media, rather than more common devices, such as direct subventions to political parties.<sup>191</sup> The British political system,

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181. *See id.* at c. 41, § 131.

182. *See id.* at c. 41, §§ 88, 94.

183. Ghaleigh, *supra* note 155, at 46.

184. *See* Bowman v. United Kingdom, 26 Eur. Ct. H.R. 1, 19–20 (1998).

185. *See id.* at 17–19.

186. R. v. Jones, [1999] 2 Cr. App. R. 253 at 255 (Eng.).

187. *See, e.g.*, NEILL COMMITTEE REPORT, *supra* note 152, at 91.

188. *See id.* at 31–32.

189. *See id.* at 36–38.

190. *See id.* at 89.

191. *See* Ghaleigh, *supra* note 155, at 53.

however, has a traditional aversion to direct state funding.<sup>192</sup> Both the Labour and Conservative Parties, the two major forces in British politics, opposed comprehensive state aid at the time of PPERA's enactment.<sup>193</sup> The Conservatives in particular thought that the injection of large sums of state money represented a "threat" to the voluntary nature of the U.K. political system.<sup>194</sup> Unsurprisingly, PPERA made only modest revisions to the public funding scheme. It rejected across-the-board subsidies and instead expanded the availability of government money, which funded the parliamentary work of opposition parties.<sup>195</sup> PPERA did not affect existing ad-hoc funding.<sup>196</sup>

### B. *The Residual Right to Free Speech*

With one exception, the framework for campaign finance regulations in the United Kingdom did not arise from the intervention of constitutional actors outside of Parliament.<sup>197</sup> It instead formed around the political realities, organizational choices, and constitutional values present in the British political system as defined and assessed by the legislature. Parliament, unlike the U.S. Congress, possesses the discretion to draft a hierarchy of participatory rights and then assemble a regulatory regime that projects its assessment onto the nation's electoral system. It works in a nation where free speech rights are defined by a temporary majority, not an entrenched constitutional text.

The United Kingdom does not possess a Bill of Rights that identifies, enshrines and protects its citizens' political liberties. Instead, the United Kingdom's constitution historically espouses a concept of absolute parliamentary sovereignty, where political realities and social mores, rather than judicially enforced legal checks, work to constrain legislative overreach.<sup>198</sup> As a consequence, the "liberties of the subject" were derived from the common law and not a body of fundamental rights as

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192. *See id.* at 39.

193. *See* NEILL COMMITTEE REPORT, *supra* note 152, at 89.

194. *See id.* at 241.

195. PPERA, *supra* note 154, at c. 41, § 12 (U.K.).

196. *See* Ghaleigh, *supra* note 155, at 53.

197. The exception is the European Court of Human Rights's decision that limiting constituency-level expenditures by non-candidates to £5 violates the European Convention on Human Rights. *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1, 19–20 (1999).

198. *See* BRADLEY & EWING, *supra* note 11, at 58.

developed in the United States.<sup>199</sup> Specifically, these liberties arose from two constitutional principles. First, every man possesses the general right of autonomy provided he neither violates the substantive law nor infringes upon the rights of others.<sup>200</sup> Second, public authorities can only act when authorized by some rule or statute.<sup>201</sup> Together, these two principles fashion an assemblage of “residual rights,” so termed because they are comprised of “the residue left when all restrictions have taken effect.”<sup>202</sup> Free expression, therefore, is not so much a right under traditional British law as a freedom which exists only where statutes and common law rules do not restrict it.<sup>203</sup> Parliament, therefore, has the authority to subordinate free expression to other governmental interests.<sup>204</sup>

### C. *Parliamentary Sovereignty*

The residual nature of individual rights under the British system reflects the traditional role Parliament plays in the United Kingdom’s constitutional structure. Under the traditional model, the U.K. Parliament is legally sovereign.<sup>205</sup> There are no legal limitations upon its legislative competence, and no other constitutional actor, including the courts, may question or review the validity of its legislation.<sup>206</sup> Dicey, in his seminal work, *Introduction to the Law of the Constitution*, summarized the principle: “Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”<sup>207</sup> This understanding of parliamentary sovereignty has several critical implications. First and foremost, Parliament cannot bind its successors.<sup>208</sup> Since Parliament bears no legal limitation on its powers, it cannot be legally beholden to an historical majority and

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199. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 203 (6th ed. 1902).

200. See BRADLEY & EWING, *supra* note 11, at 571.

201. See DICEY, *supra* note 199, at 204.

202. BRADLEY & EWING, *supra* note 11, at 572.

203. See *id.*

204. See *id.*

205. DICEY, *supra* note 199, at 37.

206. BRADLEY & EWING, *supra* note 11, at 58, 60.

207. DICEY, *supra* note 199, at 38.

208. *Id.* at 65 (quoting ALPHEUS TODD, *PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES* 192 (London, Longmans, Green & Co. 1880)).

continue to remain sovereign.<sup>209</sup> Second, and cognate to the previous point, Parliament cannot entrench a piece of legislation, such as a Bill of Rights; every act is implicitly repealed when it comes into conflict with later legislation.<sup>210</sup> Hence Parliamentary sovereignty cannot exist in concert with a body of fundamental rights, untouchable by ordinary legislation. All rights are answerable to the will of an evolving majority.

Accordingly, unlike most modern democracies, the United Kingdom does not have a single constitutional text that acts as a wellspring for government grants of authority.<sup>211</sup> Indeed, much of the British constitution rests on conventions outside of positive law.<sup>212</sup> The system must, therefore, find alternative mechanisms to ward off abuse. One such mechanism is found in the rule of law. Dicey identified two foundational pillars of the British constitution: the sovereignty of Parliament and the rule of law.<sup>213</sup> Of the two, he placed the supremacy of Parliament at the constitution's center,<sup>214</sup> but he nevertheless recognized that the rule of law assumes an indispensable constitutional role as a leash on public authority.<sup>215</sup> The rule of law acts as a principle of institutional morality that encourages public officials to obey a set of values in the execution of their duties. Although it works to increase the political checks encircling public bodies, it operates primarily by fostering self-constraint amongst members of the government. Public officials feel morally obligated to respect the rule of law, so they encroach on an individual's liberty only when justified by both law and necessity. If they refuse, the official would be subject to other political checks.<sup>216</sup>

Further, the court's jurisdiction of judicial review is "supervisory," that is, the judiciary makes certain that public officials act only in accordance with some rule or statute.<sup>217</sup> The judiciary ensures that the government is conducted according to law and thereby helps secure observance of the rule of law.<sup>218</sup> This

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209. *See id.* at 65 & n.1.

210. *But see* R v. Sec. of State for the Home Dep't, *Ex parte Pierson*, [1998] A.C. 539 (H.L.) at 591 (Eng.).

211. BRADLEY & EWING, *supra* note 11, at 60.

212. DICEY, *supra* note 199, at 24–25.

213. *See id.* at 34.

214. *See id.* at 37.

215. *See id.* at 183–84.

216. BRADLEY & EWING, *supra* note 11, at 107.

217. OLIVER, *supra* note 12, at 89.

218. *See* BRADLEY & EWING, *supra* note 11, at 414.

includes examining a decision for reasonableness, “arbitrariness, consistency and respect for fundamental rights.”<sup>219</sup> The courts, however, cannot question or review the validity of legislation.<sup>220</sup> They are subordinate to the legislature, and they are limited to interpreting and applying the will of Parliament.<sup>221</sup> A level of comity exists between the two institutions.<sup>222</sup>

The limited role of the judiciary, however, does not suggest that the courts stand by complacently in the event that the government infringes on fundamental liberties. The courts in fact utilize several means to restrict the scope of legislation hostile to fundamental rights. The first goes hand-in-hand with the courts’ grant of supervisory review: Here, the courts review the administrative discretion of public officials with the premise that the courts will judge the reasonableness of the administrator’s actions in light of the liberty interests involved.<sup>223</sup> The respect for fundamental rights is an accepted part of a decision’s reasonableness, and therefore “any restriction of the right to freedom of expression” requires “an important competing public interest.”<sup>224</sup> Second, the courts have refused to presume that Parliament intended to legislate contrary to either the rule of law<sup>225</sup> or fundamental rights.<sup>226</sup> This effectively forestalls the implied repeal of parliamentary legislation because the court will not interpret or apply the law in a manner that abridges fundamental rights without express language to the contrary.<sup>227</sup> Moreover, this canon has the added benefit of exposing Parliament to the system’s full breadth of political checks since it cannot hide its intentions. As Lord Hoffman succinctly put it, “Parliament can, if it chooses, legislate contrary to fundamental principles of human rights . . . [b]ut the principle of legality means that Parliament must squarely confront what it is doing

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219. OLIVER, *supra* note 12, at 91; *see also* Associated Provincial Picture Houses Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223 at 229 (Eng.).

220. BRADLEY & EWING, *supra* note 11, at 414.

221. *See* DICEY, *supra* note 199, at 38.

222. OLIVER, *supra* note 12, at 19.

223. KROTOSZYNSKI, *supra* note 7, at 194–95.

224. R. v. Sec’y of State for the Home Dep’t, *Ex parte* Brind, [1991] 1 A.C. 696 (H.L.) at 748–49 (Eng.).

225. R. v. Sec’y of Dep’t, *Ex parte* Pierson, [1998] A.C. 539 (H.L.) at 587 (Eng.).

226. *See* R. v. Sec’y of State for the Home Dep’t, *Ex parte* Simms, [2000] 2 A.C. 115 (H.L.) at 130 (Eng.).

227. *See id.*; *see also* Jeffrey Jowell, *The Rule of Law Today*, in *THE CHANGING CONSTITUTION* 17, 20 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004).

and accept the political cost.”<sup>228</sup> Thus, while both techniques fail in the face of an unambiguous statute, these canons have the effect of increasing political scrutiny on Parliament.<sup>229</sup>

Meaningfully, the frequency with which the courts use these devices is tempered by the comity that exists between Parliament and the judiciary. Comity between the courts and Parliament is a strong cultural value in the United Kingdom. According to Professor Dawn Oliver, this comity is a voluntary concern, explicable by the generally high level of trust in British society<sup>230</sup>—a trust evident in the system’s reliance on self-constraint amongst members of the government as a defense against legislative overreach. This emphasis on trust is significant in explaining the divergent reactions the United States and the United Kingdom have to campaign finance reform. The U.K. constitution presumes that Members of Parliament and other public officials typically act in the public interest—that these men and women are benevolent in the exercise of their administrative discretion.<sup>231</sup> This presumption, however, is incongruent with American political thought, if not in direct opposition. The U.S. Constitution, and the First Amendment in particular, is premised on mistrust of government.<sup>232</sup> The Constitution presumes that public officials will not act with self-control; it presumes that men are naturally selfish and that the first instinct of government is the retention of power.<sup>233</sup> These opposing presumptions about the nature of authority filter down into the attitudes of other public bodies. In consequence, whereas the American judiciary responds with virulence to any legislation that appears to either perpetuate those in control of legislative power or infringe upon a fundamental right,<sup>234</sup> the British judiciary presumes that Parliament did not legislate

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228. *Simms*, 2 A.C. at 131.

229. See generally OLIVER, *supra* note 12.

230. *Id.* at 19–20.

231. Lord Lester of Herne Hill, QC & Lydia Clapinska, *Human Rights and the British Constitution*, in *THE CHANGING CONSTITUTION* 62, 64 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004).

232. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

233. *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part).

234. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964) (invalidating existing and proposed Alabama state legislative apportionment plans for debasing the right to vote).

contrary to the rule of law<sup>235</sup> and continues to maintain a relationship of comity. It is a presumption that fosters deference even when the judiciary has the opportunity to rule on the merits of parliamentary laws.

D. *Challenges to Parliamentary Sovereignty*

The historic model of absolute parliamentary sovereignty is no longer one-hundred percent accurate. Over the past few decades, the United Kingdom has witnessed several bits of constitutional reform that have seemingly ensconced certain civil rights within the polity's constitutional structure. Parliament accepted the right of individual petition to the European Court of Human Rights—henceforth sharing political, if not legal, sovereignty with the ECHR.<sup>236</sup> In addition, constitutional rights were partially codified by the Human Rights Act.<sup>237</sup> Such reforms have led several scholars to theorize that the United Kingdom is shifting from a political constitution to a more law-based constitution.<sup>238</sup> As will be discussed, however, the constitutional reforms did not remove Parliament's final legal authority in constitutional matters. It only amplified the political costs that Parliament must endure before it inhibits political liberties, such as the right to free speech or the right to associate. Moreover, the European Convention on Human Rights, and thereby the Human Rights Act, explicitly subjects the right of free expression to any restriction found "necessary in a democratic society."<sup>239</sup> When combined with the usual "margin of appreciation" shown by the ECHR and the customary comity practiced by the U.K. judiciary, the provision grants Parliament a wide scope of authority before it comes into conflict with either body. Unlike its American counterpart, Parliament continues to retain vast, if not absolute, discretion in its determinations on how to maintain the democratic integrity of its elections.

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235. *R. v. Sec'y of State for the Home Dep't, Ex parte Pierson*, [1998] A.C. 539, 591 (H.L.).

236. Lester & Clapinska, *supra* note 231, at 67.

237. Human Rights Act, 1998, c. 42, § 1, sch. 1 (U.K.).

238. See, e.g., OLIVER, *supra* note 12, at v–vi; THE CHANGING CONSTITUTION, *supra* note 227, at xiii–xvi; ADAM TOMKINS, PUBLIC LAW 21–24 (2003).

239. ECHR, *supra* note 94, art. 10, § 2.



1. *Implications of the European Convention  
on Human Rights*

Parliament's ratification of the European Convention on Human Rights and its acceptance of the right of individual petition to the ECHR imposed forceful political checks on its own ability to legislate in certain areas; it did not cede Parliament's legal sovereignty. As stated above, Parliament may not legally bind its successors. Therefore, every act of Parliament has equal weight, and Parliament retains the domestic legal right to withdraw itself from the ECHR's jurisdiction. However, practically speaking, some matters authorized by law are such that once done it becomes nigh impossible for Parliament to undo them by further act.<sup>240</sup> The example often given is that of liberated colonies. A future Parliament may attempt to rescind a former colony's independence, but any legislation to that effect would have no practical impact outside of the United Kingdom.<sup>241</sup> Likewise, Parliament can create a political culture such that it becomes near impossible to achieve the consensus necessary to withdraw from the ECHR. Such actions do not undermine the paramount nature of evolving public majorities in British law, but rather complement the dynamics of the United Kingdom's "political constitution." They are political, not legal, entrenchments. Thus, in the case of the ECHR, Parliament retains the final judgment on whether the governmental interests implicated by its inability to realize its ideal regulatory regime merits the political costs of refusing the ECHR's judgment. Whether those checks signify a new point of constitutional balance is a question beyond the margins of this Article.

Parliament is unlikely to find that the ECHR's intervention in its campaign finance laws is worth the political costs of non-compliance. As a result, it is necessary to determine how the Convention treats freedom of expression and how much latitude Strasbourg grants contracting states. The European Convention on Human Rights has a very different structure than the First Amendment; it accommodates a wider range of restraints and recognizes a larger pool of legitimate government objectives.<sup>242</sup> Article 10 of the Convention states, "Everyone has

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240. BRADLEY & EWING, *supra* note 11, at 66–68.

241. *Id.* at 66–67.

242. EWING, *supra* note 35, at 40.

the right to freedom of expression;<sup>243</sup> it then immediately stipulates that the right “may be subject to such . . . restrictions . . . as are . . . necessary in a democratic society.”<sup>244</sup> The ECHR has already resolved that furthering political equality represents a valid ground for curtailing political speech.<sup>245</sup> Indeed, even the *Bowman* Court conceded that Parliament’s purpose behind the non-candidate expenditure limit was legitimate.<sup>246</sup> The Court simply thought that a £5 restriction was disproportionate to the aim of achieving equality between candidates. It did not contest the premise behind the act, just whether it was “necessary.”<sup>247</sup> A higher cap would most likely pass the ECHR’s scrutiny.<sup>248</sup> In addition, the ECHR accords contracting states a ‘margin of appreciation’ when satisfying their human rights obligations.<sup>249</sup> Although the margin generally narrows in cases involving political speech,<sup>250</sup> the Court has generally given contracting states wide discretion with regards to “the organisation of their electoral system.”<sup>251</sup> Parliament only outstripped that discretion because the £5 limit constituted, in the majority’s mind, a “total barrier” to political participation.<sup>252</sup> Again, a less severe ban that offered Mrs. Bowman alternative opportunities for expression would have satisfied the ECHR. Strasbourg thus offers Parliament great leeway in structuring its campaign finance regime in a way amicable to equality.

## 2. *Implications of the Human Rights Act*

Parliament partially codified a bill of rights with the Human Rights Act 1998. The Act incorporates certain provisions of the European Convention on Human Rights to make them directly enforceable in U.K. courts.<sup>253</sup> The Act represents an important

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243. ECHR, *supra* note 94, art. 10, § 1.

244. *Id.* art. 10, § 2.

245. *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1, 17 (1998); *see also* *Vgt Verein Gegen Tierfabriken v. Switzerland*, 34 Eur. Ct. H.R. 159, 176–77 (2002).

246. *Bowman*, 26 Eur. Ct. H.R. at 17.

247. *Id.* at 17–19.

248. *See* NEILL COMMITTEE REPORT, *supra* note 152, at 130–31.

249. *Bowman*, 26 Eur. Ct. H.R. at 18.

250. *See Tierfabriken*, 34 Eur. Ct. H.R. at 175.

251. *Bowman*, 26 Eur. Ct. H.R. at 18.

252. *Id.* at 19.

253. *See* *R. v. Sec’y of State for the Home Dep’t, Ex parte Brind*, [1991] 1 A.C. 696 (H.L.) at 717–18 (Eng.).

shift in U.K. constitutionalism. Not only did the Human Rights Act offer the first textual guarantee for multiple rights—one of which was freedom of speech<sup>254</sup>—but it also transforms multiple “residual” liberties into a protected class. It introduces law-based principles into an otherwise political-based ethos.<sup>255</sup> The Human Rights Act, however, does not create American-style judicial review.<sup>256</sup> Parliament unambiguously declined to extend the power to set aside primary legislation, in part because Parliament feared that the power would “draw the judiciary into serious conflict with Parliament.”<sup>257</sup> Instead, the Act requires that U.K. courts interpret legislation, so far as possible, to be compatible with the ECHR even if the courts must “read in” or “read out” words.<sup>258</sup> If a saving construction is not possible, the courts are then to make a declaration of incompatibility, where notwithstanding the declaration, the offending legislation would remain valid and in effect.<sup>259</sup> The declaration simply puts Parliament and the public on notice that a violation occurred; it ensures that Parliament squarely confronts what it is doing and accepts the political costs of its actions.

The Act establishes some law-based obstructions that modify the court’s relationship with Parliament. Even though the Act does not affect the primacy of Parliament, it does alter the court’s approach to parliamentary sovereignty.<sup>260</sup> Heretofore, the courts have attempted to discover the meaning of an act as it was intended by Parliament. In doing so, the courts might rely on a number of presumptions—for instance, that Parliament did not intend to legislate contrary to the rule of law—but the Court could not give a piece of legislation an artificial or strained reading. Under the Human Rights Act, however, the courts are required to stretch the meaning of legislation so that it is brought into line with the ECHR even if they realize that Parliament intended to act to the contrary.<sup>261</sup> Thus, Parliament

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254. See KROTOSZYNSKI, *supra* note 7, at 183–84.

255. See OLIVER, *supra* note 12, at 123–24.

256. *Id.* at 114.

257. HOUSE OF COMMONS, RESEARCH PAPER 98/24: THE HUMAN RIGHTS BILL, BILL 119 OF 1997–98 (quoting Home Office, *Rights Brought Home: The Human Rights Bill*, CM 3782 at 9–10 (1997)) available at <http://www.parliament.uk/documents/commons/lib/research/rp98/rp98-024.pdf>.

258. OLIVER, *supra* note 12, at 113–14.

259. See *id.* at 114.

260. See *id.*

261. *Id.*

granted the Human Rights Act the status of being first-among-equals,<sup>262</sup> where it arcs over all legislation until it collides with an unmoving text. The courts, therefore, can use the Human Rights Act to restrain the scope of rights-infringing legislation, but must nevertheless submit to the clear and unambiguous language of a later act. Parliament retains the ability to legislate in violation of its citizens' incorporated rights, but it must do so in a way that fully accepts responsibility for the incursion.

Although the Human Rights Act equips the courts with a law-based obstruction to majoritarian rule, there are two factors that dissuade its use with respect to campaign finance reform. First, the Human Rights Act incorporates Article 10's "necessary in a democratic society" qualification.<sup>263</sup> This means that Parliament may subordinate the right of free expression to a competing government interest. Also, the ECHR has expressly conceded that the right to equal political access satisfies the qualification so long as the regulation does not act as a complete barrier,<sup>264</sup> and although domestic courts are not strictly obliged to follow Strasbourg's rulings, they are required to give practical recognition to the principles it lays down.<sup>265</sup> Second, and more significant, the principle of comity urges the courts to exercise restraint. Where courts are empowered to annul legislation, the relations between Parliament and the courts are likely to sour. As Professor Dawn Oliver observes, this dynamic can reduce trust in and among the public bodies, thereby diminishing their respect for the rule of law and undermining the self-control that functions as the primary check against abuse of power.<sup>266</sup> The courts therefore hesitate before confronting an act of Parliament enacted in good faith, and Parliament maintains its primacy in weighing the constitutional principles behind the integrity of its elections.

#### CONCLUSION

In sharp contrast to the U.S. Congress, the U.K. Parliament claims vast discretion over its government's campaign finance

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262. *Id.* at 100.

263. Human Rights Act, 1998, c. 42, § 1, sch. 1 (Eng.).

264. *See Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1, 18–19 (1998).

265. *See Kay v. Lambeth London Borough Council*, [2006] 2 A.C. 465 (H.L.) at 491 (Eng.).

266. OLIVER, *supra* note 12, at 33–34.

policies. Parliament boasts the authority to structure a regulatory regime that projects its assessment of how the nation's constitutional principles, organizational choices, and political realities necessitate an emphasis on either political liberty or political equality. With one exception, it has done so without the direct interference of other constitutional actors. The U.S. Congress, on the other hand, shares this power with the federal judiciary and has had its judgment gainsaid time and time again. In part, Parliament's leeway arises from the customary nature of the British constitution and the constitution's emphasis on evolving majorities as the proper manifestation of democratic principles. This emphasis on dynamic public settlements rather than entrenched historical consensuses, as embraced in the United States, has resulted in a system of government that grants the legislature uncontested primacy in areas of public policy, where individual rights are protected through a series of political checks that promote self-constraint along with respect for the rule of law. It resulted in a political-based constitution, not a law-based one.

This story, however, is not complete. Over the past few decades, the United Kingdom has witnessed several constitutional reforms that have seemingly introduced law-based principles into the polity's constitutional ethos, specifically the acceptance of individual petition to the European Court of Human Rights and the enactment of the Human Rights Act. Although it is debatable whether these changes have ushered in a new point of constitutional balance, political conditions are such that it is doubtful that Parliament would view the minor constraints on its competencies as worth the political costs of noncompliance. As such, Parliament shares political, if not legal, sovereignty with these law-reviewing bodies. Even still, Parliament maintains the ability to enact its vision of free and fair elections unencumbered.

What explains the difference in treatment of campaign finance between the two countries? In part this difference owes to the differing structures within the respective texts—the American Constitution employs uncompromising language whereas the European Convention on Human Rights contains an explicit qualification. And in part it owes to the historical deference exhibited by the courts—the ECHR employs a “margin of appreciation,” and the U.K. judiciary exercises a practice of comity. I, however, propose an additional explanation.

The above analysis exposes one key distinction between the United States and the United Kingdom that not only accounts

for the different levels of discretion given to Congress and Parliament in campaign finance legislation but also accounts for the two partial explanations just above. That is trust. The United States and the United Kingdom begin with opposing presumptions on the trustworthiness of government officials. These presumptions shape both the protection of individual rights and the relationship between the legislature and the judiciary within each constitutional system. The U.S. Constitution is premised on the mistrust of government. The American Founders presumed that Congress would seek to aggrandize power and that public majorities would seek to silence dissent. Consequently, they shielded the right of free speech—which they viewed as both concomitant with human dignity and an essential check on government abuse—from legislative manipulation. They also fostered a competitive struggle between the courts and Congress as an additional restraint. The protection of liberty, not comity, was the intended overarching value. American courts, therefore, have an institutional incentive to intervene. This incentive does not guarantee the courts' intervention in matters of campaign finance reform; a vocal minority stands poised to accept a new constitutional understanding of equality and the First Amendment. Nevertheless, the inbuilt mistrust of government does nurture constitutional doubts and supplies a venue for that disbelief to take form. Conversely, the United Kingdom presumes that Parliament acts in the public interest, restrained by its respect for the rule of law. The system therefore relies on political checks and self-restraint to safeguard basic freedoms. Public bodies voluntarily yield to one another in their respective competencies lest their quarrels erode the public trust and undermine the government's self-restraint. The courts have an institutional incentive to foster this shared comity.

This observation has an important implication. I asked at the beginning of this Article: How does constitutionalism affect public efforts at strengthening political integrity through campaign finance reform? I asked with the expectation that the answer would depend on the values entrenched by the nation's institutional arrangements. This is true to a limited extent, but not completely. Constitutionalism offers public bodies the means—whether by full judicial review or by a declaration of incompatibility—to interfere with the majoritarian process, but the choice to intervene depends on the level of trust anchored in the system. The choice depends on whether the relevant

constitutional actors trust the legislators to enact campaign finance legislation that faithfully realizes the polity's cultural values. This is clearly evident in the British and American experiences, where the level of judicialization reflects the level of trust present in the system. Thus, the way in which a government implements the public's ideal recipe of liberty and equality is not solely incumbent on the type of institutional arrangements present but rather the intensity with which those institutions are willing to engage each other on questions of fundamental liberties. A better question, then, is not to ask whether constitutionalism exists, but to ask why that constitutionalism was put into in practice in the first place.