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Campaign Finance: Problems and Solution to Today's Democracy

SENIOR THEISIS PROJECT

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Accreditations

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Introduction

The body politic is an important yet ambiguous structure in all of our lives. Some of us may not be aware of this force that we interact with every day, but that does not change that this is the reality that we all live in. Politics, the decisions within it and its following consequences, public policy, have a fundamental impact on how we operate on a day-to-day basis. It is in the houses in which we reside, the vehicles we drive, the roads we drive those vehicles on, the jobs we work, the families we raise, and the many other relationships that we unknowingly have with and experiences that are shaped by politics. It is integral to all aspects of life whether we like it or not. Ages ago, the groups we were intended to be a part of were a lot smaller. As times have progressed however, and our societies have advanced, we have become massive entities in scale and population. Our country of these United States alone represents over 300 million individuals. That is out of several billion in the world and growing. We find ourselves fortunate that we live in a country where one of the oldest forms of democracy plays out to represent the people and its needs. To make government act by and for the people with the idea of "Life, Liberty, and the Pursuit of Happiness" being a clear mantra for us to follow. These past years have tested this theory and continues to do so today.

For many, they see the system as having been corrupted over past generations piece by piece. The representative republic that we once all knew to be is not championing the republican manner nor being truly representative of the majority. Instead, it may be moving towards an

oligarchical system of elites, with them defining public policy with their money and influence. This has caused the abandonment of those below them, leaving them to fend for themselves. The past few decades have been very contentious and both sides of the political spectrum argue fiercely with fiery and creed-filled debate. Many court cases have been litigated, laws have been passed, and systems have been set to make what our electoral system is today. What has come of these decisions and events? The idea of big business being able to be represented in politics for the sake of representation. Does this go against our principles, or does it fall in line with them in order to be fairer to those within the organization? Is it fair that a megacorporation hold power in a government that was intended to be run by its constituents of every occupation instead of the select few who happen to be of higher economic standings? These are some questions that we have about our own political system. Today, we see money play a much larger role in our election process. This means it inherently influences those who are elected, that means that public policy also is often decided and by money which can have ramifications for future generations. This thesis examines in depth how this system represents the values and opinions of "the people" in the country.

Is our once bright republic not as bright as it once was? Or may people be overreacting in their concern where it may not be necessary? This thesis we will examine different studies, research, and readings to find out if this is the case. This thesis will encompass how our current system of laws and regulations that regulate money in campaigns and elections work within the political system. We will look at cases, for example, where arguments were made for or against this system and we will examine how elected representatives carry out policy having received funds from specific. By the end of this thesis, I hope to be able to conclude whether the system we have works democratically if at all. If it is indeed flawed, then where can we look to in order

to improve it? This question is presented to us all for our exploration. Is our regulatory system of campaign finance sufficiently carrying out its purpose to ensure that American democracy is working by fairly representing a broad range of voters and interests?

What happens when the system does not work and protect those it was designed for? A recent example is the Campaign Legal Center (CLC) filing suit in multiple cases with the Federal Election Commission when it failed to act on complaints filed during elections about how and where money came from and how funds were dealt with by the FEC ineffectively. One instance with Democracy 21 where both they and the CLC filed against the regulatory body because they "failed to act on five complaints calling on the agency to investigate donors who broke disclosure laws by hiding behind opaque corporate entities." (Democracy 21, 2017) the two groups have gone on to sue the FEC multiple times on behalf of the law for years now and have gone after millions of dollars' worth of illegal contributions. They also work to establish and enforce transparency laws to show where big money goes to influence elected state officials. Another example is Representative of California, Duncan Hunter, and his wife, who were caught using campaign funds to pay for their own lifestyles, but they were caught and punished. Another example, while not illegal to the degrees as Hunter, but still unsettling is Michael Bloomberg and Tom Steyer. Both spent $900 million and almost $200 million respectively in order to fund their presidential campaigns. Although neither candidate succeeded in his presidential bid, both and most notably the Steyer basically insisted on being allowed to be included on the debate stage by sheer spending power. Whether it be a Democrat, Republican or Independent that does this; all cases are wrong. It should be noted that two of these instances are with private money, that being Bloomberg and Steyer. In Hunter's case it was public funds. Hunter broke the law, whilst the others did not. One is unequivocally corrupt and guilty,

Hunter's case. However, all three have an appearance of corruption. When you have a society that is built upon the notion that government should not be trusted at the start, these instances all have some degree of negative impact on the trust within the government.

This thesis will consist of five chapters. In the first chapter, we will talk about the history of campaign finance, beginning with the campaign legislation passed by the Congress. Then we will look at past Supreme Court decisions, including opinions from justices on the court both former and contemporary. This chapter will also examine the idea of Constitutional Rot within the democratic system by Jack Balkin, a constitutional scholar who believes the failing of our systems is because there is a lack of faith within our own citizenry. We will be looking at his ideas in regard to economic inequality and how this effects representation, which could lead to a loss of faith in our institutions and the eventual road to a constitutional crisis if we do not act on changing campaign finance. The second chapter will address the main area of concern, that campaigns are corrupt and that we are not acting in the best form of democratic fashion. The third chapter looks at alternative policies that to the status quo, what constitutional scholars hypothesize, and what our neighboring democratic governments do to control the effect that money has within systems of governance. The fourth chapter will be our prognosis of the system and what we should do going forward. Do we need to change, or should we leave the system as is? Some final conclusions will be drawn in the sixth chapter, and we will also give credit to those from whom I had the pleasure of learning while researching this topic.

Chapter One: History of Campaign Finance

-Policy and Legislation

With respect to campaign finance reform, the first piece of legislation to be passed in the United States was in 1907 with the Tillman Act. This legislation stated that large corporations were banned from using their funds from their own company treasuries to contribute to federal campaigns for elected office. It was the first law that dealt with money in campaigns. Passed by Democratic Senator Benjamin R. Tillman of South Carolina, the act is technically in effect today. However, it contains a series of large loopholes that made it possible for corporations to skirt the law in many ways. The legislation was circumvented recently by decisions such as *Citizens United (2010)* (Bitzer, 2009)

The second piece of legislation is the Hatch Act. This legislation was introduced in 1939 and was created for the purpose of ensuring that federal workers operate government programs on a non-partisan fashion. This was to ensure that the system of the federal government ran on the system of meritocracy, not on political affiliation or biases/influences. Essentially it placed boundaries on what is permitted from government workers can do politically. They are restricted from making campaign solicitations or campaigning. This curbed corruption in a different manner that could still affect modes of governance such as elections or campaign financing. The employees who are most restricted are those within the Federal Election Commission (FEC), the Election Assistance Commission, and even the Federal Bureau of Investigation (FBI). It restricts a large number of actions that individuals in these workforces can participate in order to ensure

that there are no “political” intentions carried out by government workers who manage programs and policies. (osc.gov, 2022)

The next round of legislation, and probably the most pivotal in campaign finance comes in the form of the Federal Election Campaign Act of 1971. This act was in response to the growing fear of increased campaign expenditures and the open avoidance of contribution/revenue limitations that were already put in place. The limitations that were previously set were so low that it was unfeasible to even follow them. Instead, what candidates would do is, they would take their contributions and place them within “committees” and thus go around the direct contribution route thereby skirting the system. This act raised the limitations that were already in place and expanded the scope to which those standards applied. It included covering those loopholes within the law previously. It also expanded the area to which the law covered campaign finances and featured an expanded definition of what a political committee was. These committees were defined as “clubs, associations, or other group of persons which receives contributions” and that these groups would be under the same scrutiny and regulation that had been applied to those that qualified for scrutiny in the regulatory system. It also set up the use of disclosure reports that required “candidate committees, political party committees, and political action committees participating in federal election activities to disclose sums of contributions.” (Ballotpedia, 2022) The act also introduced political action committees, where businesses, unions, and large corporations could contribute and give money in an indirect fashion to use for federal elections. The idea was that it is a “indirect” contribution, it does not have the same power as a “direct” contribution. Indirect spending is spending on behalf of the candidate or party to which they were contributing to.

In 1974, the act was amended, which would lead to the creation of the Federal Election Commission (FEC). This commission was to act as a bureaucratic regulatory body to ensure that election and campaign laws were implemented correctly. In this Commission, there are a total of six members sitting on committee at a time and no more than three persons may have the same partisan associations. Seats on the board are decided every two years with two seats becoming available during that process. The President appoints these commissioners, with congressional approval. The bureaucratic nature of this commission may cause issue with some in the public, however. The reason being is that these people were not elected but appointed to these seats and they bring their political affiliations to these positions. The enforcement of a nonpartisanship among members has been problematic, with most members voting along party lines.

Finally, we have the last significant effort to reform the campaign finance system of note. The McCain-Feingold Bipartisan Campaign Reform Act (BCRA) of 2002. This was legislation that further amended the 1971 Act which deals with the reduction of special interest influence, non-candidate campaign expenditures, and other areas where money and possible corruption might occur. Soft money is the key topic of concern in this legislation. We will talk about this term in *McConnell v. FEC*. Soft money, to define it, is unregulated money which is used generally speaking for political donations to state and national governments. Soft money can be donated to political parties and to other groups for election purposes such as “Get Out the Vote”. Soft money creates an appearance of corruption because large amounts of money can be raised that cannot be traced easily. Soft money is not considered a federal funded resource and was not regulated by the same rules as “hard money” donations would. On the issue of soft money, the act states in 2 USC 441i that, “In General.—A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or

direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act."(*BCRA, Sec. 323*) When it comes to campaign finance law, this was the most recent of legislative semi-wins on the subject.

It also dealt with the topic of issue advocacy, during election cycles. We know that means that when we turn on the television or scroll on social media that there will be ads on the screen during elections. There are two types of advertisements that one might see. Expressive advocacy, where there is an expressed desire for one electoral outcome and then there is also issue advocacy, where the ad expresses a position on an issue. Issue advocacy talks about general issues, not candidates. The advertisements also do not say "vote" for a specific candidate or even specifically urge voters to vote for a specific candidate. They may state names or bring up candidates in reference to an issue, but they cannot express support for or against any one candidate. In the BCRA, the Congress defined issue advocacy as electioneering communication. Their definition stating that it is considered as such if it is being expressly issued for or against political candidates using contributions from a corporation or labor union and they cannot be run within thirty days of elections using broadcasting formats such as television or radio in a primary election and sixty days within a general election. The example of this advertisement will be clear to the voter who it is going for or against, it just will not say directly. An example can be a Pro-Life advertisement that may depict a certain party with visual cues in the commercial, just not that candidate. In sum, the definition prevented corporations and unions from being able to run the advertisements within the above time frames. (Ballotpedia, 2022)

These laws form the basis for election and campaign regulation in the United States. They are the main framework for what we have today for campaign finance and in this next

section we will talk about how many of these rules and regulations were either overturned or modified by the Supreme Court.

-Judicial Decisions on Campaigns & Elections through time and its development

Campaign finance has gone through many phases and policy changes throughout the past century, because of differences in court makeups and differing subsequential ideological decisions on landmark cases. Campaign finance has been a topic rehashed many times over with different generations of people. Under the auspices of previous justices, the Supreme Court maintained firmer lines and clearer boundaries on how campaign finance was handled and also how it should be enforced to ensure that elections were not swayed in by money by the use of an overbalance of dollar support or soft power moves, but over time the tilt has moved in the other directions. A key example is *Buckley v. Valeo (1976)* where the court restructured how campaign finance was regulated. The court rejected the notion that government could not regulate or justify restrictions on those who wish to participate in elections and that it is wholly foreign to our First Amendment right to restrict elements of one portion of the populace in order to enhance others also within that populace. (Post, Page 48) The court in this case makes the argument that no matter what type of background a citizen of the United States comes from whether that be wealth, demographic makeup, or otherwise, nothing should restrict them or hamper their right to express their views in any way or to disseminate information within the public square. The Court makes the case that everyone should be treated on equal footing when it involves the election process. (Post, Page 48) This is how small "d" democracy is supposed to work. Everyone living in the United States should have an equal voice with their vote.

Now, they express this idea by setting expenditure limits on outside sources giving directly to campaigns. In the case the Court wrote that with the Federal Election Campaign

Finance Act of 1971, “impose a $ 1,000 limitation on contributions to a single candidate, a $ 5,000 limitation on contributions by a political committee to a single candidate, and a $ 25,000 limitation on total contributions by an individual during any calendar year.” This in the court’s opinion is constitutionally valid and is upheld because what it does is “constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions.” (*Buckley v. Valeo, 97*) However, the court did reject the idea of restricting or putting limitations on how much a campaign spends. Citing it as unconstitutional on the basis that it restricted candidates running for public office as well as voters and other groups that might be interested in using their First Amendment rights under the Constitution of freedom of expression.

Another case is *McConnell v. FEC (2003)* where Senator Mitch McConnell took issue with the act known as the McCain-Feingold law which placed restrictions on how corporations and labor unions could use expenditures within elections, drawing on the case *Austin v Michigan Chamber of Commerce* that held if corporate entities wanted to become involved in statewide elections, then it must set up a PAC in order to do so. The McCain-Feingold law did the same thing but on the federal level. The plaintiffs of the case argued for Austin to be struck down and for the law to be reversed. However, in a 5-4 decision, with Saundra Day O’Connor casting the deciding vote, the court held that Austin was valid. Further, the Court viewed the concept of “soft money”, which could be used to influence officials with things or events as a form of “pay to play” in politics. (Hansen, Page 27-28) This had become a primary method for how campaigns could enrich themselves, which was “you supply, we’ll provide”. The main argument that was decided by the court in this case however was that overall, the provisions of McCain-Feingold were affirmed as constitutional. First that issue ads were indeed political in intent and thus were

viewed a format of spending, which the law prevented from being collected by political parties and their campaigns. Second, if advertisements were run before elections that mentioned they were for or against a political candidate would be treated as such, meaning that corporate and union treasuries must register or establish with a PAC as previously ruled in *Austin*.

What happened after that decision was that the Court would change because of the retirement of Justice O'Connor. Her replacement, Samuel Alito, is known as an Originalist in regard to Supreme Court doctrine and he brought different views to the bench. We can see change in how the court decided campaign finance law after Alito's appointment, specifically with the decision of *Citizens United v FEC*. This decision was the case that changed everything in terms of how we conduct elections in the currently. There are organizations in the pursuit of its overturn and also in its defense. The ripple effects of this case have been wide ranging and affect much the conduct of campaigns today.

The background of the case is important because in the decision, the Court relies on *Austin v. Michigan v. Chamber of Commerce (1990)* and *McConnell (2003)*. The case is premised upon the showing of a movie on Hillary Clinton that was to be aired during the presidential primaries by the corporation Citizens United. This raised the question, as to whether the corporation was an outside entity raising a political viewpoint in expressive advocacy with electioneering communication. It was corporate funded. However, the Court was not sure if it was applicable or not to the rules regarding § 441b so it brought the case up for consideration. The reason for this was to determine whether this film was outside of the rules of § 441b and if it was not, then was the entirety of the film facially valid or if was to be deemed unconstitutional. The court decided 5-4 that the rules were not applicable, therefore overruling the restrictions that were established in *Austin* and *McConnell*. In regard to these entities the Court ruled that,

“Differential treatment of media corporations and other corporations cannot be squared with the First Amendment, and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' political speech.” (*Citizens United*, 314)

It went on to address further its stance on where political speech comes from and whether or not that matters. To the Court, it does not matter where the source of the political speech comes from, be a single individual or a corporation. Speech in the Court’s opinion does not lose its First Amendment protections because of that distinction. Every entity is entitled to contribute, spread, and advocate information/speech that the First Amendment protects. Therefore, the Court decided to reject the notion that opinions or speech could be treated differently based on the idea of “natural persons”. More importantly, they rejected the idea that government has any role or duty in “equalizing” speech for the public because of their size or composition. “First Amendment standards must give the benefit of any doubt to protecting rather than stifling speech.” (*Citizens United*, 327) This is where lines blur for some individuals. It is true that government has a role to play a role in people’s lives, but the line for that role is constantly changing because there are varying opinions about where that line may be drawn. Government encroachment on individual’s freedoms has always been a point of contention for both political parties. Speech is one of the most fundamental issues and as such is a hot button issue. The question from this case is two-fold: Is there a necessity to equalize the voice of all individuals to ensure the equal advocation of all views and interests? Or should the government have no role to equalize any voices in the dissemination of information when it comes to our political process? We should acknowledge the very real concerns the public may have with government interference on what is “allowed” in the public forum or how the government can police or control election outcomes. Having a completely hands off approach with what is said or

disseminated, is something that many people would prefer. The argument on the other side of the case would be, “If it isn’t the government doing the influencing, then it would be another outside entity.” That entity is not beholden to the public like the government is, thereby making corruption, or the appearance of corruption, all more likely since there are no guardrails for regulated in fair play.

When it comes to campaign finance and its overall relationship to the body politic as a whole, then my thoughts are that there are various points to keep in mind. To which we will explore together and find out more about as we read through other’s opinions and solutions to campaign finance. What is the concept of money in politics in general or its ever-increasing usage? When we are talking about outside money to be specific. Increasing the usage of money in politics and the expansion of it play a role in how we operate our institutions elections systems seems troublesome. That this increase from outside influences may in fact inflate opinions not truly being expressed the electorate. However, another perspective may be one of concern for overpowerful government stifling whenever they desire or have a personal interest in doing so. That there should be no arbiter of truth because we run into the issue that now someone has that power of control. We cannot fact-check a governing body that serves the purpose of confirming what is protected speech and what is not, without the deprivation of essential freedoms. Whether this be in the form of ads, endorsements, sponsors or just contributions. There are no laws, regulations, rules, or otherwise to ensure that even the appearance of corruption is properly watched after, but what is and is not a step too far? Where is a line needed to be drawn to ensure the fairness and safety of a republicanism system? Should there be a line drawn at all? How can the system now, left to its own devices, affect the nation’s society?

-Constitutional Rot

To that end, I want to talk about what I mean by "corruption" and what that definition entails in this setting. What many people may view as corruption can be very different by how we are defining it here in this thesis. In an open society, trust is a large portion of how a democratic system operates. Corruption, in campaign finance has broader meaning. There is corruption in the form of "I pay you money, you do this action/say this thing to the benefit of me." This is literally bribery, and it is what most people think of when defining corruption in politics. Although this does occur every now and then, this is not the main definition being pursued in this writing. There are actually two concerning issues. Actual corruption and the appearance of corruption. While those running for office may not receive direct bribes from rich donors and other organizations, they do receive dollars for their campaigns and for their political events, which makes the appearance of pay to play. With the ever-increasing need for money in elections, those with resources are more than too happy to offer their assistance for campaigns.

We all understand the concept of "Scratch my back, and I will scratch yours." It isn't direct, but people can make connections to dots, they can puzzle things together, even if there is no direct corruption there. If an interest funds a campaign event at a certain dollar amount and then that public official turns around and votes a way that helps the contributor? It appears to the citizenry that the politician was influenced. However, what if that large donor was an environmentalist and that's one of the issues that the candidate ran on? What if it just so happens that they believe in what that donor believes in, even if it was an uncomfortable amount of money given? When at contributions are made in a society that is trusting and open those contributions may not be seen as an issue. In a system where trust is low, then that seems suspicious to the citizenry. It is still a large amount given to someone in power, and the idea that it "could" affect their judgments on policy is what can be defined as "the appearance of". It

draws into question the validity of the contribution and even of the legislation. In our system of government, we rely on and expect our institutions to operate democratically. So, what happens when that faith is gone?

Scholars argue that democratic institutions are built on a foundation of civic virtues, which create a healthy relationship between the people and their government (Balkin, 200). These virtues include trust, cooperation, and the political will to work with one another in order to make sure that the republic will operate in ways that it was intended by the founders. (Balkin, Page 638) Today however, we find ourselves in a moment where this is not the case. In recent years and various election cycles, we find ourselves in a situation where Congress has all-time low approval ratings, nobody trusts government to carry out its basic tasks, and neighbors hate one another because of their partisan identification. The economic class divide is as large as it has ever been, and a large majority of citizens have no faith in the systems that we elect our leaders. If this decay is not eventually addressed soon, then it could lead to a complete breakdown of our own democratic government.

In this section, we will draw on Jack Balkin's "Constitutional Rot Theory" and other scholars such as Lawrence Lessig, Larry Bartels, and Richard Hansen to identify different ways in which democratic representation is no longer working. We will be looking at representation through social class and how the preferences of politicians play out in Congress because of their campaign contributions and looking at other influences that may occur because of interest groups' lobbying efforts. We will also look into how elections work today and how they have changed over time through court decisions, legislation, and the ability of the Supreme court to define specific terms such as corruption.

Until the 1970's, elections did not have as many large entities contributing private money to campaigns as we do today. The Tillman Act of 1907 barred direct contributions to candidates within an election. There were even further restrictions that were passed in the 1940's that barred businesses and unions from independently spending money on federal elections instead, making them set up registered Political Action Committees (PACs). However, after the major Supreme Court case of *Citizens United*, large corporations are now able to independently spend money on federal campaigns because of the view that corporations, under the First Amendment have the right to spend unlimited amounts of money. (Hansen, Page 18) Money as a form of free speech was not the standard used in earlier court rulings. Also, what constitutes "corruption" has been interpreted very broadly or very narrowly depending on different courts, including rulings on the "appearance of corruption". This has led to a cycle of laws and regulations within the campaign finance system to be upheld and struck down time and again. (Hansen, Page 24)

According to Balkin, there are "Four Horsemen" that lead to constitutional rot, the first being the loss of trust between the people and their elected officials. Another is the increasing amount of economic inequality within society. (Balkin, Page 19) Since Justice Alito joined the Court, the floodgates have opened and trust in the government have fallen dramatically. One reason for this decline, according to Larry Bartels, is that the range of citizens' views and opinions are not well represented within the Congress. Being responsive to the full range of constituents, which is a standard of democratic representation, does not appear in the data provided by Bartels. If you are a low-income constituent, the responsiveness of your representative to your political needs or preferences is less likely in both political parties. Lower socio-economic class constituents only had about half the level of responsiveness from their congressional delegates as those from the higher income groups. (Bartels, Page 239)

Bartels states that “Far from being ‘considered as political equals’ low-income citizens seem to have been entirely unconsidered in the Senate’s policymaking process in the past few era’s polls.” (Bartels, Page 246) So much so, that in fact, by the 1990’s average middle-class income earners held about half of the political power that higher-income earners had. Since then, political responsiveness has degraded even more. (Bartels, Page 246)

The public’s unhappiness manifests itself as “anger” within a research study from the University of Maryland on voter “anger” with the government. (Kull, 2016) A scholarly study found over the entirety of recording public opinion on the question of approval/disapproval of government, current respondents held dissatisfaction of the government at a historically high level. Ninety-two percent of those surveyed believed that government benefited “big interests” rather than the whole population. Another staggering eighty-five percent of the public believed that Congress did not serve the common good, believing that big business and lobbying held too much influence and control as well thinking those elected were more beholden to the interests of the higher-ranking donors’ priorities than that of their own necessities. (Lessig, Page XIII) This brings up a plethora of constitutional issues, not in just how citizens feel about their government, but how the government itself operates and further how with these political deficiencies create power swings that intensify this feeling of mistrust and anger towards the institutions that are intended to represent them. When problems are not solved on a regular basis and the Congress can never operate on a bipartisan basis to help pass important legislation, then even more faith is lost.

If this situation is to be addressed then it should be noted that, “most of the time, constitutional reform has been an inherently cross-partisan effort. Every amendment sine the Fifteenth Amendment was endorsed by both major political parties before it was ratified.”

(Lessig, Page 248) Additionally, important landmark public policy changes have been passed with bi-partisan support. With the decline of bi-partisanship, citizens lose interest in voting, they begin to tune out politics which leads to less knowledge of policymaking and government operations which leads to further loss of representation, and potentially outright aggression towards those within the system. Balkin is very worried about this scenario because this loss of faith increases the chance of demagogues seizing power. These are individuals who use an already rotting system to their advantage and actively work to increase the volatility within the system. They often use scapegoats, and divisive tactics, to sow even more distrust in institutions even outside government with the media, knowledge communities, and other independent organizations that work to provide factual and objective information. "Demagogues promise to restore the honor and status of the country's forgotten people and defeat the sneering elites who view ordinary people with contempt." (Balkin, Page 640) This does not solve the distrust or cure any of the issues within society, it only exacerbates them. Propaganda to promote their policies or agenda goals are aimed at targeting against "the other" in politics and it creates antagonism towards one group or another, whether that be politicians from different parties or groups in the population.

In this thesis I mainly focus on two of the "Four Horsemen" that Balkin describes, but he notes that all four are in play in the current political moment. "We have wealth inequality not seen since the First Gilded Age, deep distrust of institutions, severe polarization, loss of mutual accommodation and cooperation between politicians of different parties, and a series of policy disasters." (Balkin, Page 641) I believe that even with just the two that I have focused on within this thesis, they will eventually lead to the other two regardless. Once one group of the population believes that their best interests are no longer being considered, they then move away

from citizens democratic values and methods of creating change and turn to more drastic measures.

For Balkin, constitutional rot is a long-drawn-out process, and it takes years, decades even, to be realized. (Balkin, Page 27) Even if some see it, others may not recognize it or worse; people see the situation and instead of wanting to solve it, they will try to profit from it for themselves. These are the demagogues that Balkin refers to. Demagogues do not have to be in public office. They can be in the media, community organizations, or be people of high celebrity. Who has influence and can sway the opinions of those dissatisfied with the current system of government. The longer it goes unaddressed, the more issues accumulate for the public to see. This includes more corruption, more polarization, and more ineffective governing. Balkin states that at a certain point, constitutional rot leads to a destructive end. The last one that he recalls is the Civil War, where millions of Americans perished. It is hard to fathom that we would have that large of a backlash today, but something in the same nature of the same destructive cycle will occur. (Balkin, Page 651)

A representative democracy depends on a certain level of trust within society along with the view that the country's common good is being given priority. Balkin notes that representative democracies, "rely on norms of cooperation, devotion to the public good, and civic virtue, republics are delicate things, easily corrupted, and always subject to decay." (Balkin, Page 637) When representative democracies trend towards oligarchy or plutocracy then the aims of our constitutional republic become fundamentally weak. We have already witnessed what the possibilities might be with events in 2021. When many armed Trump supporters stormed the Capitol Building in Washington. What we saw on January Sixth were people who seemed to feel that they had no other choice but to storm the Capitol because they felt they were cheated by

elites who had stolen their president's election, which Trump himself encouraged the feelings of outrage. Further, they did not trust government institutions, independent media, or experts on what the outcome was of the 2020 Presidential Election.

Balkin does not believe it recent events that are to be the end of the cycle of constitutional rot, even going so far to say we may be in for a harsh future. (Balkin, Page 651) Although we went wrong in a plethora of different areas, opening the flood gates of money, as Citizens United did is viewed as a contributing factor to constitutional rot. (Hansen, Page 159) The flow of money in politics, like water, suggests that it would have eventually found another route to corrupt and influence the same entities now.

To reform the current system, it is important to change not only how our elections are financed, but also to improve on how our representative democracy operates in general. People from all demographics have to feel as though they are fairly represented. In the end, there are no simple solutions and there is no certainty that this will be solved before the destructive phase of this constitutional rot ends. However, if we believe Balkin, there is an end to it and there will be a new age of constitutional creativity ahead of us to hopefully look forward to. (Balkin, Page 651)

Chapter 2: The Problems

-Changing of the Courts

How courts lean ideologically or philosophically can define what is brought to their attention in a given era which can have large ramifications in areas such as campaign finance laws, and regulations. In recent years, there have been major setbacks with how the Court views campaign finance. Precedent on campaign finance and elections has been established by the Supreme Court, so lower courts must interpret what has already been decided. Even if a lower court would like to overrule a precedent in place, it is legally difficult to do. This is because when the Supreme Court rules on issues, especially those that are pertaining to constitutional issues, its word is final. There is no ability for another court to rule against the Supreme Court's. The only pathway to overturn a Supreme Court decision without the court itself doing so is by passing legislation through Congress and having it become law. Even then, it must be able to sustain scrutiny from the Supreme Court if they were to examine it.

In recent times, the Supreme Court has increasingly moved in a textualist and originalist direction. Before President Biden won the White House in the 2020, Donald Trump replaced Antonin Scalia, Anthony Kennedy, and Ruth Bader Ginsburg with his own nominees: Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett. These justices represent a large shift in court doctrine if going in the same direction and if any of those justices leaned in a different ideological framework beforehand, which Ginsberg had, as she was one of the more liberal justices sitting on the bench. Before President Trump's picks, other justices added hadn't been as consequential besides the filling of Sandra Day O'Connor seat with Justice Samuel Alito. This is most likely what led to the majority opinion in *Citizens United (2010)* and cases thereafter.

Previously, with some notable exceptions, Supreme Court justices were not as vehemently fought over as they are today. It was not uncommon for justices to be confirmed with bipartisan support and by large numbers. For example, when Richard Nixon nominated Warren E. Berger, he received a vote of 74-3. Another Nixon nominee was Harry Blackmun, who was confirmed by a vote of 94-0. Antonin Scalia was nominated for the court by Reagan and received a vote of 98-0, and David Souter was confirmed during the Presidency of G. H. W. Bush by a vote of 90-9. Contested nominations are now the norm. With the rise in polarization, distrust in institutions, and the "rot" that has taken hold within the hearts and minds of the country. It has raised the stakes of what occurs in those institutions. When Harry Reid went for the nuclear option with the filibuster for Supreme Court nominations in 2013, it made things more complicated to be sure as well. It is plausible to think the decision had less to do with Harry Reid's idea of it being the more democratic way of governing by simple majority and more to do with the "not giving an inch", tribal mentality to those on either side of the isle rather. However, what might have been seen as a way to win more legislatively in regard to court appointments, has since came back to bite the Democrats. This brings up issues as to how justices would be confirmed then and how they will be confirmed in future nominations.

-Money in Politics "Flows like a River"

Money is elusive, not only is it illusive, but it's also persuasive. It has influence and can sway a large number of individuals, sometimes not even knowing the effect that money is playing on their decision making. Richard Hansen's argues that there are three key roles that money plays in domestic politics. There is this, *money and legislative influence, money and electoral outcomes, and campaign laws and public confidence.* This thesis will focus primarily on money's influence on legislation, because citizen's trust in Congress has declined significantly. As of January 18th,

2021, citizens gave a congressional approval rating of just 20%. This is also a year of midterm elections, where control of the house and the senate will be decided. With President Biden unable to pass much of his legislative agenda, Americans are once again poised to the partisan control of Congress back to the Republicans. Why was it so difficult to pass legislation? They hold the House and Senate, but with very slim majorities. This meaning that all of the Democrats must stay together, especially in the Senate, if legislation is to pass. However, Joe Manchin and Kiersten Sinema have made this very difficult.

Joe Manchin opposed President Biden's Build Back Better initiative, his key domestic proposal. In the Senator's own words, he's a "West Virginia Democrat". He represents the people of his state. So, let us test that theory with his statement and public opinion. According to Data for Progress, "57% of West Virginians support Build Back Better and its policies." (Winter & Sperry, 2021) If Manchin were representing what his West Virginian voters wanted, he should support the proposals. So, what has happened? Let's look at where he gets his campaign money from. One of the many provisions that Senator Manchin opposed in the bill was the lowering of drug prices. Manchin's daughter, Heather Bresch, "was the president and chief executive officer of Mylar Inc., a pharmaceutical company that specialized in generic drugs. The company raised the price of a two-pack of EpiPen from around $124 dollars in 2009 to $609 in 2016." (Suter, 2021) This was a large scandal at the time and in recent months, leaked emails have also come to light where the very same daughter was caught conspiring to price gouge people. It would also be noteworthy to note that this is a splinter company from Pfizer. Mylan is the generic drug company that Bresch has been the CEO of since the year 2012. Mylan has also been one of Senator Manchin's top contributors. "Mylan was one of the largest campaign contributors to Manchin's campaigns in five election cycles, donating around $211,000 to his campaigns since

2009 through PACs and employees…. In Manchin's second Senate election in 2016, Mylan was the second highest contributor". (Suter, 2021)

Manchin heads the Senate committee for Energy and Natural Resources. There have been many bills and legislative actions taken by his own party. Machin has made no effort to ensure the passage of many of these bills unless they are small in scale or are more of about research. According to an article with OpenSecrets, the senator from West Virginia has relied heavily on his fossil fuel industry contributors to campaign for his seat. "PACs and individuals affiliated with FirstEnergy Corp are together one of Manchin's biggest contributors and have given the senator $147,950 since 2009." (McFadden, 2021) Other fossil fuel industries that have contributed to his campaign include Valero, Exxon, the Natural Fuel Gas Corporation, the American Chemistry Council, Shell, and more. All have made serious direct contributions according to the FEC along with multiple contributions to political action committees. In 2018, the political action committee known as the United Mine Workers of America, which happens to be one of the largest unions to represent the mining industry contributed over $418,000.00 to Manchin's reelection bid. It may also be fair to point out that Manchin himself is the very top recipient of campaign contributions of the entire United States Congress. Lizzie Fletcher, a Democratic Congresswoman from Texas is the second highest receiver of funds with $156,150.00 in contributions. Manchin outpaces her by approximately $468,660.00 and nobody comes close to that number. This boost is from natural gas and oil money. He ranks second in that category with $47,900.00.

Moving to the Courts, how could money influence Supreme Court justices and how can they be bought or paid for? Surprisingly, millions of dollars of funds are spent on advocacy for or against, and the campaign to have them move up the theoretical totem pole. We do not have to

look far back in history to find some egregious examples. During Donald Trump's Administration, he had the politically extraordinary opportunity to select not one, but three justices to the Supreme Court. How were these justices selected and confirmed, especially when one of three garnered massive media attention for sexual assault allegations from his past years?

According to OpenSecrets, "A secretive network spending millions of dollars to confirm President Donald Trump's Supreme Court picks terminated multiple 501(c)(4) nonprofit nodes" (Massoglia, 2020) which has made it extremely more difficult to know where money is being raised from when it comes to outside groups that hold an interest on who is seated on the bench. A Federalist Society executive, Leonard Leo, was one of Trump's top judicial advisors who worked on appointing judges, including Justice Kavanaugh, the one accused of the alleged sexual harassment allegations in his youth. Mr. Leo has many groups outside of the network, the, "money among interlocking groups tied to Leo, nonprofits in the network…shelled out millions of dollars to consultants and other dark money groups, many of which supported Kavanaugh's confirmation to the Supreme Court." (Massoglia, 2020) Another Judge, Neil Gorsuch saw massive amounts of money spent on his behalf in order to ensure that he was seated on the high court. One of many groups that funneled dark money through back channels such as the Koch brothers, in funding. "Judicial Crisis Network, which spent $10 million to boost Neil Gorsuch's Supreme Court confirmation, mostly on TV ads. A donation to Donald Trump's inaugural committee of over a million dollars was anonymously made. However, the donation was linked with the Judicial Education Project via their tax returns with JEP's payment of over $600,000 to an outside group. It cannot be figured out quite exactly how this money was transferred because the company is considered a limited liability company and their disclosure requirements are not as stringent as that of other corporations.

"Money finds a way" is an apt statement because people are always trying to create new ways to make it more difficult to uncover where money comes from and how it circulates. Before the company Wellspring, a group funded through discrete means, donated, "$500,000 to People United for Privacy, a member of the Koch network's State Policy Network that launched ad campaigns pushing against donor disclosure rules that might expose the identities of big donors" (Massoglia, 2020) right before they dissolved the year thereafter.

Corruption is going to occur, and unfaithful actors will always search for or attempt to create crevices to slip through. What should be the government's role be in mitigating these occurrences and what are the citizen's best interest methods to keep the arbiters of these institutions honest and transparent? With our own iteration of democracy, we must balance practicing the values we proclaim to be most important whilst being able to thoroughly regulate without stepping over constitutional freedoms. That is not an easy task. There will always be intellects that argue where the boundaries lie. A more thoughtful question may be, should there be arbiters of what those boundaries be or should we argue that they were originally set correctly and they just need to be reset? The founders intended there to be no impediment to the voice of the people. They fought against what they saw as a tyrannical government enforcing taxation without due representation of the colonies and took away their ability to govern themselves. They saw a system of government that would protect the people. Would it therefore be that large of a stretch to extend the logic that a tyrannical or just simply overbearing entity may not be a government, but a corporation that is driven based on profit motives and quotas and not "for the people"? Could it be argued that corporation have an undue influence because of their large reach that the majority of Americans do not have?

Chapter 3: The Alternative Opinions and Constitutional Ideas

-***Stevens' Dissent on Citizens United***

The Supreme Court Decisions, especially landmark cases, have varying opinions on how the case should be ruled. Just because a Court decides in favor of one outcome over another, does not mean that a ruling is unanimous. Judges on the courts have differing opinions and those differing opinions have led the way in making substantial change, whether that be in Civil Rights, slavery, Labor Law, or other serious issues. Earlier this thesis reviewed the majority opinions on several landmark cases in regard to campaign finance, but what about issues that were raised in the dissenting opinions.

Let us talk about the landmark case of *Citizens United v. FEC (2010)* and the dissenting opinion of Justice John Paul Stevens. He was joined in his opinion by Justices Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor as well. In the start of his opinion, Justice Stevens states that, "The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case." (*Citizens United, 394*) He argues against the notion that a large conglomerate or corporation could not and should not be treated as a natural person, he concedes that they contribute much to our society, however, that doesn't stop him from stating that they are not people, Corporation cannot run for an elected office or hold it for that matter. Even if they were able to, what Stevens describes as "nonresidents" or those that do not fit within the framework of what a might be considered a natural person or citizen of the United States, may not hold the same motivations that the electorates own might have. He also notes that these entities hold power within the form of holding an abundance of various resources that are unattainable for the majority of the citizens. For him, this creates concern in the outcome or the process of an electoral cycle.

Stevens also dissents from the majority by noting that the majority are going against almost an entire century of judicial precedent already established within prior decisions and legislation. “The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty” (*Citizens United, 395*) He continues that the court is not even deciding on the questions or narratives of the litigants of the case, but coming up with the idea of being “facially unconstitutional” by using alternatives, that of *Austin v. Michigan Chamber of Commerce* when neither even mentioned in the Citizens United Case at all. So, where was the necessity to bring it into the discussion, unless there was the intention of seeking out an issue to strike it down? This is completely in violation of what the courts are supposed to do. Steven describes it as taking a sledgehammer to legislation passed by Congress rather than trying to use a scalpel. Stare Decisis was being violated in this decision as well. Stevens states he isn’t a hard-liner when it comes to stare decisis in fact. However, he doesn’t believe the decision in the case rises to the judicial standard in justifying a change in doctrine that’s already been settled. Justice Steven writes, “I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of Austin” (*Citizens United, 409*) Where Stevens makes a good point is when he makes the comment that, if there isn’t a necessity to decide more on a case, then it should not be brought up again to decide extra unnecessary opinion on it. He thinks the court is overstepping their power on this case, and to the detriment to the institution which they uphold.

Stevens also goes upon many of the oddities that they majority opinion takes part in, going against past standards, one being that of stare decisis, even while he himself is not one dead set on the doctrine of it, the majority rule completely throws it out the judicial window in

terms of proper usage. He also talks about the lack of drawing back on full contextual details such as *First National Bank of Boston v. Bellotti (1978)* where the court has never undertaken the principle of absolutism when it came to many things that they have decided in previous cases on the election and campaign financing subjects. In fact, when the majority states that they cannot make the distinction between persons and the press with the case of *Minneapolis Star and Tribune Co. v Minnesota Commerce of Revenue (1983),* Stevens rebuts that with past cases that did just that, in where "that the constitutional rights of certain categories of speakers, in certain contexts, 'are not automatically coextensive with the rights' that are normally accorded to members of our society" (*Citizens United, 421*) Iterating that there are many instances in the past and present where freedom of speech does not apply, such as in the workplace, in schools, prisoners, military, and even foreigners within the United States. These restrictions are in place because there is a governmental interest in doing so to produce a specific outcome that the state wants completed. In this context, we have regulated, and the governments may do so in contexts including in electoral concerns especially. The Framers took it as a given that it would be necessary for the public welfare. On the basis of the majority opinion however, that point is wrong and that all speech, no matter what context, is permissible. Stevens stipulates that, "if the majority's conclusion were correct, it would tell us only that the First Amendment was understood to protect political speech in *certain* media. It would tell us little about whether the Amendment was understood to protect general treasury electioneering expenditures…by corporations, and to what extent." (*Citizens United, 429*)

-Constitutional Scholar Theories

People all around the country have given thought to what may be alternative solution to the system that we have in place right now. Some rooted in deep political theory and relying on a

firmer grasp with political science in the sense of how democracies operate philosophically, and we also have those that illustrate their ideas in a more direct, simplified way. Robert Post makes a theoretical argument rooted in court decisions and previous interpretations that there is an obligation in his eyes that the government has to manage elections to ensure that they meet their intended purposes. He takes a legal framework that I do not believe many have. “When government creates institutions in order to accomplish specific ends, it must organize persons within these institutions to accomplish relevant “governmental functions”. The state must manage the behavior of such persons, and so it must also manage their speech.” (Post, Pg. 80)

He goes on to talk about the theory of managerial authority and managerial domain. The authority is much like what post would describe as where the suppression of speech in an instance is in lieu of achieving a specific goal. The example he gives to this would that of a relationship between a school and a student. This being a necessity in order to achieve what the institution of a school was created for. The domain would be where this authority has any power, being the school grounds. “Managerial domains are inevitable in modern states because they are required to achieve the goals that have been democratically determined.” (Post, Pg. 81) He argues that as it this “domain” is not the actual public discourse, then it possible to regulate in the interest of the institution’s mission. Post draws clear lines as to what counts and what doesn’t count as public discourse in order to ensure that free speech is still protected and that determine what is done in terms of political ends, is done democratically. He talks about how these lines must be drawn because of Organizational Theory where the institutions are open and able to operate in order to maintain a level of integrity to the institution. The problem with the theory however is that it has a difficult time when social systems are involved and typically within any system ran by people, there is a social system integrated with it. The Hatch Act tries to draw

some “lines and boundaries” in order to achieve what Post is illustrating, however Post thinks it should be taken further in regard to actual speech or what the court in *Citizens United v. FEC (2010)* states as speech. So, money, equating to free speech, can be regulated. What is money? It’s a type of thing that holds value and is used for a purpose. So are mailboxes, yet many mailboxes within the country are not state owned, but they are used by the Postal Service in order to put your packages and mail within them. “The Court has held that privately funded and maintained mailbox can be regulated as if it were Postal Service property, on the ground that mailboxes are “an essential part of the Postal Service’s nationwide system for the delivery and receipt of mail.” (Post, Pg. 83)

-Frank Michelman’s Perspective

A different yet similar perspective is that of Frank Michelman. Responding to Post’s arguments, he suggests that Post’s planning out in his plan for overturning Citizens United uses a “both more and a less “conservative” doctrinal path to correction of the catastrophe” (Post, Page 108) He states that Post rejects the notion from the more conservative lens that radical moves to which he believes are the only options. Michelman believes that the judicial doctrine of strict scrutiny is what lays as the main obstacles in the overturning of Citizens United. In his own words, his running theory is that currently “under established doctrine, the model of strict scrutiny simply cannot accept, either as a super protected constitutional concern that sets strict scrutiny going or as a state’s “compelling interest”” (Post, Page 109). However, noting that if we were to use Post’s idea of strict scrutiny, which is to say only relevant what is relevant when in the context of the current experience of the public, then democratic legitimation, Post’s term for how the government election system and campaign finance is viewed by the public, would be the

compelling state interest in this moment and pull a plug on what we know as strict scrutiny's unbending usage.

His idea is the usage of strict scrutiny in a "weak form" rather than how it is applied today in Supreme Court doctrine, that of solely "strong form" strict scrutiny. The weak form of strict scrutiny would in Frank Michelman's opinion open the way for courts to issue decisions on a more independent basis and consider the idea that when deciding strict scrutiny in one of its procedural forms that, "standard is 'law', not 'fact' and 'strict scrutiny' means in our constitutional legal practice as it currently stands, that the judicial branch carries a nondelegable responsibility for an independent-minded application of it at the case at hand." (Post, Page 119) Stating it more plainly and easier to understand; the courts of the land in the current doctrinal interpretation is that strict scrutiny is only to be used in a hyper-aggressive or "strong" footing. Where current "law" overrides anything and everything including fact.

Now to completely explain the thoughts of Robert Post's definition of fact when it comes to his democratic legitimation is different. It is not what a scientist may use the word for as Michelman points out. When it comes to the term "fact" in regard to democratic legitimation, Post believes that the subjective experience of individual is just as much fact as literal a textual fact may be, because it is experience of the real world. Why would it not be? If real people are experiencing real situations where the system that is at play now has positive or negative effects on its people, then would it not be considered truthful? It could be seen as a sort of truth or a product of the system. However, these types of facts would not even be considered to the state's compelling interest in any way if applying strong-form of strict scrutiny because of not only of their subjectiveness, but because as it stands, these facts would not even pass the fifth protocol of strict scrutiny, which is if a regulation were anywhere near necessary, in order to be implemented

then it would need to be specifically "tailored" to that end and be as little restricting as possible. Using weak form will make it far easier to not only circumvent the courts' unbending decision making but form a path that would lead to incentives which could in turn go about ensuring the safety of electoral integrity and democratic legitimation. Turning over this doctrine or changing it is no easy task as Michealman points out, but it is possible, and it would in his mind have a higher likelihood of succeeding.

-Pamela S. Karlan's Perspective

Pamela Karlan's response and own opinion of Robert Post's thoughts are intriguing and thought provoking. She does not fully agree with the notion that electoral integrity and people's trust within the system is purely based on the idea that Citizen's United is the number one cause or leading factor to the issue that we are facing in the current moment. She believes otherwise that the sole focus on Citizens United obfuscates on the plethora of reasons that discursive democracy within the representative system is at stake. She states that, "if we are concerned about the health of representative democracy, we should be looking for causes beyond corporate spending on candidate elections." (Post, Page 143)

She believes the focusing on that alone takes away what she believes are institutional instances that cause the representative distance between the voters and the elected officials to widen which would lead to what we have been describing as constitutional rot. She questions if his concern of electoral integrity would call for anything that has not already been presented to the public. If it's nothing new being brought to the table, what difference will it make if it is not the root of the problem? She also states that "because electoral integrity is a subjective concept, it can be used to justify highly contestable electoral regulations." (Post, Page 143) She goes on to say even bring up the term itself with the Supreme Court if you were to present a case might

hamper your chances, not improve them. Karlan iterates that we're only talking about two subjects that take place within all of politics, contending that there must be more that plays a role in the current predicament. "Even if electoral integrity in part a function of political spending, it may be that we should be focusing on other aspects of the electoral domain as the areas where reform might be more productive at changing the effects of political money." (Post, Page 143)

The point is also made that decreasing confidence in electoral integrity and our constitutional rot was well underway before the Citizens United decision was made and before that court ruling, large corporate spending was banned on a larger scale. Yet, there was still decreasing confidence beforehand. It was even occurring during the Bipartisan Campaign Reform Act in 2000, so that tells us there are other fundamental issues at play. She suggests that it may be the way in which politics are played out within media conglomerates, the continuous advertisements by the runners of those organizations, with their own political agenda. The language which the public sees in recent times, demonizing one another certainly can be used as an example of what Karlan may be pointing to as possible flaws within the system. Looking at the ads from individuals' ideological perspective, not just companies, "Think Sheldon Adelson and Foster Friess and George Soros and the Koch Brothers, rather than Apple or Wal-Mart." (Post, Page 145) Karlan makes an interesting point, when political ads that are blatantly negative towards one political candidate, oftentimes you will see accusation thrown at one another with the idea of politicians being in the pocket of certain high-profile individuals. You even hear news media report on accusations which garners it attention. Reporters have to report on that, its their job to be the fact checkers and look into these sorts of interactions between political forces. "When we turn from the question whether political spending is the problem to whether regulation can improve electoral integrity, the evidence is similarly complicated." (Post, Page

145) People support reform to change what we have as a regulatory system in campaign finance and election. However, it also happens to be the case that people believe that no matter what is done corruption will eek its way into the institutions of power in one fashion or another. What if the issue was not necessarily money in general, but a specific type of money that comes from specified people? We have talked about dark money before and what the meaning behind it is, so we have a starting point as what to think about. In long winded form, Karlan explains her position

-Campaign Systems in Other Nations

There are also other nations and democratic allies around the world that we may look to for examples of how they represent the people in the democratic process. A few countries, with close history to the United States which might offer some insightful ideas are places like The United Kingdom or Canada. Even countries that are below the radar that high favoring of Representative Democracy such as The Netherlands or Sweden. According to Pew Research, about 52% of the citizenry polled within the United Kingdom are fairly content with how their democracy is ran, for Canadians, that number is a boastful 70% of its own populace. With The Netherlands, their approval of how things are handled within their democracy is a staggering 77%. The Swedish government is even more interesting. "About nine-in-ten Swedes (92%) say representative democracy is a good way of governing their country, the highest share of any country in the survey. A majority of Swedes (57%) also say direct democracy – in which citizens, not elected officials, vote directly on major issues – is a good way to govern." (Pew Research Center, 2017) Where is the United States in comparison? We are at 46%. So, what can we learn from these other countries and how they handle their democracies? Let's take a look.

We'll first look at the United Kingdom, and the United States and one of her oldest allies has much to compare and contrast. The United Kingdom is a constitutional monarchy and was setup with a parliamentary system to govern. Overtime the Royal Family has given up much of its governing power and doesn't delve into politics much besides foreign affairs and diplomatic matters. This system of government and its growth into what it is today is what a Harvard writing by Kathleen Hunker states as a "pragmatic evolution" because of the nation's relatively low number of scandals with money in politics. The United Kingdom did pass legislation around the same time as the United States did in regard to campaign finance. The Political Parties, Elections and Referendums Act (PPERA) of 2000 was brought to the parliament's attention in the 1990's "amidst allegations of large donations that were made to the Labor Party as well as accusations that foreign entities were also giving funds." (Hunker, Page 1122) In the Act, it contained a newly defined term of what are considered "permissible donors" as previously, that definition had been vaguely defined and not well described in their previous laws. Now the law states that permissible donors are "only individuals on the electoral register and companies incorporated or registered within the United Kingdom" (Hunker, Page 1122) The Act also acquired new disclosure requirements, but its main public mission was to "eliminate the sleaze". The government did this, in contrast to the United States by leaning heavily on controlling election expenditures as they were deemed easier to have a watchful eye and control over. In later years amendments would be introduced to the Act and one of which that would impose a restriction on political parties' campaign expenditures on the national level in the tune of £20,000,000. This limit applies to the parties regardless of if it is to promote a candidate or the party at large. This cannot be said whatsoever about the political spending system within the United States. (Hunker, Page 1123)

However, there also has to be stated a very large difference between the British government and the United States government and it regards free speech. As we know, the United States has a Bill of Rights, where the rights are not granted by government, but instead that these rights are inherited to the people by virtue of being a natural being. The mindset that you have these rights regardless of what government may say or do and that it is the job of government to protect those rights. The United Kingdom in contrast does not have Bill of Rights of their own. They have "no… fundamentally enshrined laws to free speech" (Hunker, Page 1126) So, there is no protection against government encroaching on freedom of speech if they believe there to be a government interest that goes beyond what the deem more important. To understand this further, here is an explanation of how the parliament operates, "Parliament…has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament." (Hunker, Page 1126) That means whatever the Parliament deems to pass in their session is what is passed. They are answerable to what Hunker calls that ever-evolving majority and that they cannot be impeded by previous parliamentary groups or the courts. In essence nothing is considered "permanent" such as our Bill of Rights is perceived. There is also a major difference in public perception when it comes to how our populaces view our governing bodies. The United States Constitution was "setup in a mistrusting manner." England on the other hand, people are more trusting of and willing to give leeway to.

Next, let's take a look into a different, but smaller country that isn't often referenced, Sweden. This country does not have much in terms of history when it comes to campaign finance and only in recent years has even enacted disclosure requirements, allowing as many funds into the system that individuals can contribute. However, the system of elections that Sweden uses is

funded mainly through the public dollar by almost two-thirds in total. The culture again is the culprit behind the ability for the populace and the government to have and maintain this system of elections. In the book, *Checkbook Elections? Political Finance in Comparative Perspective* by Pippa Norris and Andrea Abel van Es, they describe how the people of Sweden have a system vastly different than our own in the United States. The elections are done through a "proportional list" system. "A system of partially opened lists, allowing voters to choose among the candidates on the lists" (Norris, Page 160n) and even though this system doesn't have that much of an effect on who exactly is put on the ballot and elected, it still worth mentioning. Another large characteristic to consider, though with each passing election cycle becomes less so, is how they campaign. They are a large grass-roots campaigning country in comparison to other countries. All parties left and right are all part of larger organizations such as "youth organizations, women's wings, pensioner groups and even funeral parlors." (Norris, Page 161)

Something that will surprise you however is that in terms of actual campaign financing, is that there is "no distinction between ongoing political party activities and campaign activities." (Norris, Page 162) Meaning there are no regulations when it comes to raising, spending, funding, or expending resources in the election system. There is also no distinction made when an election cycle is occurring. Furthermore, most parties have differing ways of funding their political activities. Yes, the government provides funds for government officials and candidates however it is allocated on the basis of representation within their government. However, the money outside of the Swedish government was not tracked or watched over. "Until the 2014 legislation, there was no readily available information about the financial activities of electoral candidates (and also with the new law the disclosure rules are limited to successful candidates who ran personal campaigns in the open list electoral system)." (Norris, Page 167)

Norris and Andrea both go on to say that this 2014 legislation was not to respond to any problems that the Swedes were having previously or in the current moment, but in case of possibilities for issues to arise in the future. A “just in case” mentality. The legislation itself is not even that regulatory, it is argued though by those for the regulation that the public funding and the openness of their politics will ensure that large political parties do not feel urged to take money from in their words, “unsavory sources”. (Norris, Page 175) Hopefully this would boost public confidence and participation in politics amongst the populist, as they had witnessed a decline among the country in recent years. Sweden cannot be taken without Context, because more than likely using the same type of system, copy and paste, within the United States would not produce the same results. People who look to Sweden use it to argue that leaner government leads to less corruption. However, Sweden is one country, using one system with a specific set of circumstances and correlation cannot therefore be causation. You could take aspects such as the idea of public funding and test that part of the system to a setting within the United States, but the “openness” aspect and little regulation, just applied, may spell disaster and floodgates being released for rampant corruption.

Chapter 4: What Should Be Done Now?

There are many paths that the nation could take in order to try to rectify the issues plaguing our election system and campaign in general. Scholar, pundits, even political candidates for years have had ideas as to how to tackle these issues. We have talked about some of these ideas previously with different scholars and Robert Post's view on a possible solution. The constitutional scholars are more engaged on a court doctrine level and in-depth textual sense; thus, their ideas cannot affect immediate policy change. The following ideas come from people of many backgrounds, different points in American history, and with varying degree of usage. The one change that we have seen repeatedly proposed in history and would have an immediate impact would be changing the structure of the Courts.

-Change Through the Courts

Historically we have seen the size of the courts change in number and in scope of their constitutional authority, in all levels of government ranging from the local to the federal. The Supreme Court itself has seen seats to the court added, removed, and re-added over the course of the nation's history. During the New Deal Era, Franklin D. Roosevelt packed the courts in order to pursue his economic agenda. He had the authority and also a firm control on the levers of power within the legislature as well. Could this be done now in order to change the court decisions in the future and overturn decisions such as *Citizen's United*? It is possible to do so, it does not seem too far-fetched to impose terms on Supreme Court Justices as well, like that of a politician. This is also a very volatile political move, either side could use this as a battering ram to rile up bases and take power or incite outrage. So, without broad political support, things could become ugly very quickly. During the 2020 Democratic Presidential Primaries, Pete Buttigieg brought the idea to the debate stage with adding judges to a total of fifteen justices on the court. "He suggests 10 justices divided equally between those "affiliated with" one or the

other of two major parties; those 10 would select five more. That arrangement, he claimed in the October Democratic debate." (Wheeler, 2020) He cites that this would hopefully depolarize the court and make the political intensity decrease.

There is also the idea of term limiting judges, this idea has been used for other positions within the government. Presidents and some governors have this limit, and it has been debated for many years that federally elected Representatives and Senators should have this limit as well. So, why not extend the same idea to the Court with term limits set for a revolving Supreme Court where it could stay closer to public opinion? Would this solve the issue of viewing the selection of justices to the court as a life-or-death situation? Or would this further polarize the court's and increase their involvement in the political process, rather than the judicial? The changing of how the court system operates is not a policy change to immediately change an election system, but more how to cool down the boiling-over pot of political tension and faithless-based politics.

-Constitutional Amendments and Political Pressuring

A prominent idea that has been proposed for years could be an amendment to our Constitution in the form of election/campaign finance securement. How this would play out in implementation or what the amendment would possibly entail is a fascinating subject to many scholars. There have been other policy or constitutional issues where the idea of adding amendments have been discussed before. The most recent would be that of the Electoral College with the Presidential Election which we have every four years. This idea entails having state legislatures enact popular vote policies where the states' electoral college votes would automatically be designated to whomever won the popular vote, thereby bypassing the electoral college election system. According to the Congressional Research Service, they would categorize this movement as an interstate compact agreement. As of now, "compacts have

addressed such wide-ranging concerns as mental health treatment, law enforcement and crime control, education, driver licensing and enforcement, environmental conservation, energy, nuclear waste control, facilities operations, transportation, economic development, insurance regulation, placement of children and juveniles, disaster assistance, and pollution control. Approximately 200 interstate compacts are in effect today." (Congressional Research Service, 2019) However, it goes on to state that legally, this compact agreement would be on thin ice and would need major political support to survive. The reason being compacts are not hampered or fought against by the federal government until they believe it to be encroaching on the federal government's power. The Compact Clause, which lays out the boundaries "prohibits states from entering into compacts without congressional consent only when the underlying compact is "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." (Congressional Research Service, 2019)

This would be done, to pressure the government into invoking a constitutional convention in order to solve the issue. It could not be a long-standing effort. If it loses steam, then it loses all possibility of pressuring the government into doing so or even considering a constitutional amendment. Even a change in how elections operate would be a victory for this type of policy agenda. If it were to go that far, which is a longshot to begin with, then what is a constitutional convention? The last constitutional convention to occur was in September of 1787. The convention was called because the current government of the United States at that time, the Articles of Confederation, was so weak and ill equipped that the need for change and reform was deemed necessary in order for the country to survive. Two-thirds of the states in the nation must be willing to do so in order to initiate such a convention and that may pose a problem with

current circumstances and how today's politics operate. It does not mean that in the future there could be a political realignment and the constitutional convention could be brought up as a pathway to a solution. Because this suggestion has been discussed for many years it at least deserves to be mentioned.

-Materialistic Ways to Change the System

Other ideas include the ideas of "*Level-Up*" elections, a "*Voucher*" or "*Lottery*" system, a change in use of normal dollars to "*Democracy Dollars*", or even exploring the expansion of more direct democracy methods such as federal ballot initiatives. The Level-Up System of elections was tried by Arizona. If one opponent had a large sum of money versus another which did not, then the state would pick up the difference so that the opponents would be competing on a more level playing field. This leveling up of the candidate made it easier for them to convey their messages and fight back against the candidate with the larger amount of money. Sadly, this system was cut-short, before there were extensive results on how this might work. It did offer a glimpse of what might have been if the option had been pursued more fully. If we cannot get money out of politics in the "election" part of the process, then we could use money to help the advantaged candidate and ensure other voices are heard on an equal basis. However, this could be seen as unconstitutional intervention from government on elections and giving money to candidates provided by taxpayers is not terribly popular. Also, by intervening and giving funds to candidates with little support, runs the risk of being perceived as a problem. A person, for example, with ten votes and the same exposure should not receive the same amount of funds as the governor of a state who has recognition and plenty more votes. The point, thought, is the principle of all voices being heard in elections.

The Voucher system is another idea, albeit on less firm grounds with what may be deemed as acceptable as a solution. This is a system where you would be given "vouchers" in order to give your candidate of choice a vote/campaign funding. This would in essence replace money in politics and make it more based on population, and not on pure financial standing. You run the risk still of the collecting or purchases of the vouchers of groups of individuals, but the hammering out of details and regulation could possibly give life to this idea. This system was experimented with in Seattle, Washington in 2015 to be used in municipal elections. The program began it's experiment in the 2017 elections where "each voter in Seattle would receive four 25-dollar vouchers to assign to the municipal candidate(s) of their choice". (McCabe, Page 324) This program went into depth about how this program would affect the populace during the election and were looking to use this experimental system to see many different results including turnout by demographics, participation of differing groups and representativeness or responsiveness to the system. The program however did not include everyone, including candidates. You had to opt into the program and participate of your own volition, and results were found not solely using a voucher system of elections. So, the data in this study will not give us a clear answer, it does give us an idea to how it might play out, however. One part to be critical about in this study, the same demographics that are hard to mobilize to vote still face the same issues under the voucher. On average the people who were not only more likely to make dollar-donations also used their vouchers as well whilst those that do not normally participate in elections did not use their vouchers in this study either. However, McCabe and Heerwig allude that "This relationship may be driven by campaign donors' familiarity with local politics and disclosure forms, as well as higher overall levels of political interest and efficacy." (McCabe, Page 335)

The end result of this program in Seattle was seen as a predecessor to a more successful future. This was the first time the program was ever used, so there were bound to be complexities and situations that could not be seen or understood until they were met in the experiment, "Although the newness of Seattle's program limits the types of claims we are able to make about participation-oriented financing programs, the inaugural implementation of the Democracy Vouchers program does suggest that these participation-oriented programs have the potential to shift the composition of campaign donors in a direction that will lead to greater representational equality." (McCabe, Page 336)

Next, we have a very different method of elections that seem less likely but still worth mentioning. The "Lottery" system is where parts of the population would be "selected" at random to participate in an election. Meaning not everyone in the population would be involved and that it would be fairly limited in scope. These selected individuals would then be presented the candidates and then vote on who will govern the country essentially. This system of government has never been tested, only theorized in the American system, but its possible appeal is that it would help stamp down on gerrymandering and corrupt activities that occur today. In *Choosing Representatives by Lottery Voting* by the Yale Law Journal in 1984 wrote that the system has indeed been used before our American Representative Democracy. The Greeks used this form of election system, "In ancient Athens, sortition was a prominent feature of the representative-selection process under the Cleisthenic Constitution; the Venetian republic also relied heavily on the lot." (Amar, Page 1290)

The paper discusses how we use the lottery system only to select jurors to sit on juries, yet not for any other governing function, which is believed to be a mistake. The journal discusses how this can in effect drown out the minority from ever having any real stake in the governing

body and leads to their eventual tuning out of participating in elections. With an election system, the system of majority rules would instead turn the system into a natural proportional system of representation which selects at random those who participate. “By forcing majorities to draw district maps behind a ‘veil of ignorance,’ lottery voting would thus prevent gerrymanders," protect minorities, and transform redistricting into a system of ‘perfect procedural justice.’” (Amar, Page 1295) we run into many issues however when the constitution becomes involved in this election system, especially when it comes to how our republican government operates and our “Fourteenth Amendment's guarantee of equal protection of the laws applies by its terms to states and has been held to apply to the federal government as a component of the Fifth Amendment's due process clause. An argument could be made that, by introducing chance into the electoral process, lottery voting is arbitrary, anti-rational, and therefore violative of equal protection principles.” (Amar, Page 1306) While Amar does explain his reasoning that it is not violating anyone’s constitutional rights, others may interpret differently.

Another is Democracy Dollars an idea that is similar to the voucher system of elections and has been in recent conversation, during the 2020 Democratic Presidential Primary, mainly by then candidate Andrew Yang. In this system, citizens would be given a certain amount of “Democracy Dollars” to spend within elections and would level the playing field in order to make sure all voices have a fair chance at being heard by the public. The voters could spend it however they like. They could give it all to one candidate whom they prefer against all others, or they could divide the Democracy Dollars among multiple candidates on a tiered ranking to who they believe is best for them and hedge their bets. It would not give any side or voice an advantage in terms of resources, but it would enhance the ability of all ideological perspectives to be heard and be elected on a purely merit-based system. The regulation behind the idea of this

type of dollar would also further enhance the idea of equality. Democracy Dollars would be used be issued and used for specified elections, only to be used for that election and would expire after that electoral cycle, so you could not mix and match, or build-up democracy dollars to have an unfair amount of say-so. “Studies show that the vouchers enabled donations among higher proportions of both young donors and those with lower incomes. This type of public financing also gets different candidates into races – those who don’t have wealthy networks…. By amplifying the voices of the American people, the government will be forced to listen.” (Forward Party, 2022)

The final option to explore is the possible expansion of true direct democracy. Direct democracy, where the public itself decides on issues through national popular vote in the form of ballot initiatives. This would be an interesting experiment for many reasons. First, this would completely bypass the legislative branch of government and practically creating a fourth branch, the people themselves in a manner of speaking. The second reason is that this would also put all issues that currently are in the minds of the populace up for debate on the national scale, it would give more reasons to come to the polls and vote every election. Healthcare, the war on drugs, climate change, and much more could be decided by a majority during the general election by the American people with a direct ballot initiative rather than delegate that to representatives of the constituents that the populace themselves, may not trust all that much to get the job done. In a way, it is like venting steam from a release valve. Does it fix the problem altogether? No, however it does take pressure away from the situation in order to have more time to fix the main issue. That leads us into our third reason, which is that this system really bypasses much of the monetary influence that comes with elections. It is hard to sway many Americans on key issues oftentimes. Although ads, political action committees and other political organizations might

affect some voters' opinions, there are certain matters that the American public may already have a consensus on, but elected officials do not.

The final intriguing reason is that ballot initiatives open the door for a wave of new participants in the elections we run. Mark A. Smith, author of *Ballot Initiatives and the Democratic Citizen* states that, "ballot initiatives clearly invite a stronger citizen role than do other kinds of elections. Moreover, the rhetoric that surrounds their usage, which voters in states that allow them are regularly exposed to, emphasizes themes of empowering citizens, making government more responsive to the will of the people, and seizing control of policy making from the hands of parties, special interests, and insulated legislators" (Smith, Page 893) This strategy might not only incline more people to vote, it has the potential to act as a metaphorical blade to cutaway constitutional rot and ensure a gain in trust for governing institutions once again. The article also discusses how participation drives up more knowledge about the political landscape in terms of policies and candidates. This gives voters a more detailed understanding of who they are voting for and on what they are voting. A well-informed citizenry has a better chance of being the arbiters of their government and keeping a balanced trust. They also have a better chance of taking part in not only elections, but everyday governing routines because they now see the direct effect of how politics shapes and affects their lives. The only devil's advocate question to ponder on is what about the theory of "majority rules, minority rights"? Would we be overstepping and virtually leaving behind our system of representative democracy, or just enhancing it? Also, would this system past the scrutiny of the Supreme Court?

Chapter 5: Conclusions and Accreditations

This thesis has gone over a plethora of different aspect of campaign finance and elections. We have reviewed the history in terms of legislation passed by Congress through the years, Supreme Court Decisions spanning back decades that have built up to what we have established today and the ramifications of what it all entails. We have discussed the concerns of what this system has had on the impact of the polity at large. We discussed at length in the second chapter about constitutional rot and how that affects trust within our democratic institutions. Since we already distrust government to begin with, this should be seen as a massive concern that could dissolve into a constitutional crisis or worse, a catastrophic body politic event. We know that the regulatory system of the United States on the federal, state, and local level is less than stellar because poor execution and oversight. Corruption and the appearance of corruption in this regard can be treated as one in the same because the end result is the same—voter distrust of elections and institutions.

We concluded in this thesis that something needed to be done to fix our regulatory system of campaign finance and elections, however we did not give a singular cure all that many might be looking for. Like many things, there hardly is ever one singular answer for a problem that is so complex and expansive among a country of over three-hundred and thirty million individuals. Instead, we provided a large amount of information that we can select from in order to mix and match what might be possible solutions that might help improve situation. Scholars, policy experiments, local systems of smaller levels of government, court dissents, and even other democratic regimes have been brought to table and discussed to try and solve the tantamount issue of money in campaigns and elections. Could all possibly work? Yes, some might have a higher chance at being successful or even being attempted than others. Whether that be because of constitutional issues, political will, or practicality. I think that this thesis, when all is settled,

provides a framework for moving forward. Mainly for the reader to not think this is the end of our democratic experiment. I hope that the reader takes the opposite view, that there are many paths for success moving forward, and that there is more than one way to move forward. We must be willing to take those steps forward.

"We the People" still matters right now and we as citizens have political power whether we realize it or not. Constitution rot, while present, can be resolved and removed from institutions reputations. There are still plenty of ways people can gain back their trust within institutions. Now, that does not mean it is an easy path. Nothing of great consequence ever is, however when America and her people are faced with a challenge we rise to the occasion on a regular basis. We continue to progress as time goes on, and while change takes time, it still takes place all the same. We can look to so many issues where the people fight for a just cause and eventuality is all but certain. We as a nation just have to tighten our resolve and keep pushing forward.

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