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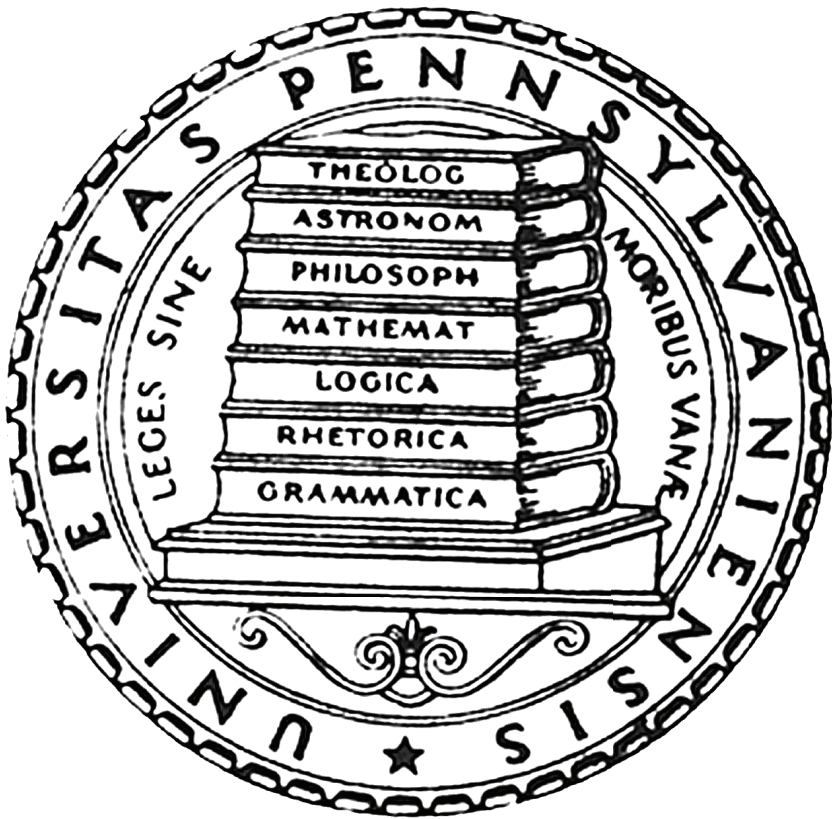
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Letter from the Editors

Dear Reader,

The Penn Undergraduate Law Journal is pleased to present its readers with the publication's third installment, which brings together three scintillating articles that explore the topics of campaign finance reform in the U.S., cohabitation laws in South Africa, and the due process rights of intellectually disabled capital defendants. In keeping with the journal's interdisciplinary mission, these papers offer wide and detailed treatment of disparate legal topics, with discussions that bear fruitfully on a number of topical issues in the United States and abroad.

The first piece, authored by Andrew Leiendecker of American University, provides a thorough analysis of U.S. Supreme Court cases concerning campaign finance reform under the tenure of Chief Justice John Roberts. Leiendecker divides his work into chapters that focus on six cases, each of which is discussed and assessed individually. The author interweaves these individual explorations and identifies three potential concerns arising from the Court's treatment of campaign finance laws, arguing in particular that a reduction in the stringency of such laws undermines citizens' faith in the integrity of the country's legal system and the equity of its legal proceedings.

Tracy-Lee Lusty of the University of Cape Town authored the second article, which addresses the gaps and inadequacies of South African family law with respect to the legal status of domestic partnerships, highlighting, in particular, its inequitable treatment of opposite-sex cohabitants. Following a discussion of relevant case law, the author contends that the passage of the *Domestic Partnership Bill*, which was crafted to extend legal recognition to domestic partnerships, would ameliorate the de facto discrimination experienced by those engaged in domestic partnerships in South Africa. Lusty caps her argument with an appeal to the legal frameworks of Holland and Sweden as paragons of domestic partnership legislation.

Our final paper comes from Aubrey Rose, also of American University. Her article examines the very recent reversal of *Hall v. Florida* (2014), in which the U.S. Supreme Court scrapped a rigid IQ requirement for evidentiary proceedings concerning the scope of intellectual disabilities for defendants in capital punishment cases. Rose begins her piece by offering a detailed treatment of eighth amendment jurisprudence, with a nuanced exploration of case precedents, and rounds off her argument with an illuminating discussion of *Hall v. Florida's* implications for future Court cases. Rose concludes that Court will be faced with defining the phrase "full and meaningful inquiry" in instances of evidentiary proceedings that concern intellectual disabilities.

The Executive Board of the Penn Undergraduate Law Journal extends a

sincere thank you to its corporate sponsors as well as its Faculty Advisory Board. Their feedback and contributions make the printing of this journal possible. Our editors, who spend weeks working on teams to polish pieces for publication, deserve our high praise and deep appreciation. Business, blog, layout, and communications teams are equally deserving of appreciation. Their efforts strengthen our reputation as the country's premier undergraduate legal publication and heighten our publication's visibility domestically and abroad.

It is the Editorial Board's distinct honor to present its readership with the third issue of the Penn Undergraduate Law Journal.

Thank you,



Tomas E. Piedrahita



Gautam Narasimhan

Founders & Editors-in-Chief

ARTICLE**STARE INDECISIS: CAMPAIGN FINANCE REFORM
JURISPRUDENCE UNDER THE ROBERTS COURT**Andrew Leiendecker[†]

ABSTRACT: *The following research paper consists of a detailed examination of the Supreme Court's campaign finance reform jurisprudence under the leadership of Chief Justice John Roberts. This paper examines the holdings and implications of six primary cases: Randall v. Sorrell (2006), FEC v. Wisconsin Right to Life (2007), Davis v. FEC (2008), Citizens United v. FEC (2010), Arizona Free Enterprise Club PAC v. Bennett (2011), and McCutcheon v. FEC (2014). In examining these cases, three overarching problems emerge. First, the Court must reexamine and expand their definition of corruption as applied to campaign finance activities. Second, the Court has severely departed from the pre-Roberts standard (illustrated in Austin v. Michigan Chamber of Commerce and Nixon v. Shrink Missouri Government PAC) of legislative deference on issues of campaign finance. And third, the Roberts Court's conservative majority appears to be growing more and more comfortable with reversing or ignoring precedential campaign finance cases, including Austin, Nixon, McConnell v. FEC (2003), and even Buckley v. Valeo (1976). This has allowed for a dramatic reduction in the amount of campaign finance regulation in American elections, resulting in an empowering of wealthy individuals, candidates, and corporations to dominate an election cycle at the expense of the voices of everyday Americans, which threatens to undermine the public's continued faith in our democratic process and the reputation of the Supreme Court itself. Three potential solutions are available for remedying the errors of the Roberts Court: legislative action, constitutional amendment, or a change to the Court's membership. Of these three, only a change to the Court's membership is a viable option in the current political environment, making the 2016 presidential election of paramount importance for the future of campaign finance reform.*

[†]Andrew graduated cum laude with university honors from American University in 2014, receiving a B.A. in Communications, Law, Economics, and Government (CLEG). He spent the 2012-13 academic year studying international law and economics at the London School of Economics and Political Science, and is currently pursuing his J.D. at the University of Minnesota Law School. Andrew would like to thank Professor Edelson for his advice and support during the writing of this paper.

I. INTRODUCTION

John Roberts was confirmed as Chief Justice of the United States Supreme Court on September 29, 2005, following his nomination by Republican President George W. Bush.¹ Appointed at the age of 50, Chief Justice Roberts is destined to be one of the foremost voices in the American legal system for the next several decades. He has played and continues to play a critical role in establishing U.S. legal doctrine on such pressing issues as immigration, same-sex marriage, healthcare reform, and gun control. However, the first eight years of Chief Justice Roberts's tenure have come to be defined, in large part, by six crucial rulings in the area of campaign finance law: *Randall v. Sorrell* (2006), *FEC v. Wisconsin Right to Life* (2007), *Davis v. FEC* (2008), *Citizens United v. FEC* (2010), *Arizona Free Enterprise Freedom Club PAC v. Bennett* (2011), and *McCutcheon v. FEC* (2014). Despite often appearing to rely on the precedent of such cases as *Buckley v. Valeo* (1976), these six cases have resulted in an overhaul of U.S. campaign finance law, carving a path towards unlimited spending and limited accountability for wealthy individuals, corporations, political parties, and candidates themselves.

This investigation will take the following form. First, a brief prologue outlines the development of U.S. campaign finance law in the pre-Roberts era. We will then engage in a detailed examination of the Roberts Court's campaign finance cases, including discussions of each decision's implications. Next, we will analyze the pitfalls of these rulings when taken as a whole and conclude with the consequences for U.S. elections going forward. Through this discussion, it becomes clear that these rulings pose a severe threat to the integrity of the U.S. political system. In particular, the rulings fail to adhere to the Court's precedential policy of legislative deference, reduce the accountability and transparency of corporate donations, and weaken the ability for average Americans to have their voices heard in a meaningful way. While the majority of the issues may be resolved by simply returning to the prior system of campaign finance laws, these cases also make it painfully clear that the Court must expand their definition of corruption. As it stands, acknowledging the government's compelling interest in preventing only *quid pro quo* corruption and its appearance does not cover all the mechanisms by which individuals and corporations may gain improper influence over politicians in the modern era. Without an expanded definition, the continued ability for wealthy persons to gain access to state and federal governments may prove highly damaging to the American democratic process.

We will also consider the impact these decisions have had and may have on the reputation of the Supreme Court as a legal body. As the Court appears to

¹ *Biographies of the Current Justices of the Supreme Court*, Supreme Court of the United States (USA.GOV March 22, 2014), online at <http://www.supremecourt.gov/about/biographies.aspx> (visited Oct 28, 2014).

become more politicized and divisive, the long-term legitimacy of the institution may become endangered. However, the question remains of whether this is a new trend developing under Chief Justice Roberts or one that has been embedded in the institution for many years. And finally, we will consider possible steps that may be taken to remedy the pitfalls created by these rulings, including legislative action, constitutional amendments, reconsideration by the Court, and changes to the Court's membership.

II. PROLOGUE: FROM BUCKLEY TO MCCONNELL

Before discussing the decisions of the Roberts Court, it is important to establish the basic findings of five key prior campaign finance rulings: *Buckley v. Valeo* (1976), *First National Bank of Boston v. Bellotti* (1978), *Austin v. Michigan Chamber of Commerce* (1990), *Nixon v. Shrink Missouri Government PAC* (2000), and *McConnell v. FEC* (2003). These cases cover a wide variety of subjects, but for our purposes we will discuss only the facets of these cases that directly apply to the six campaign finance cases decided by the Roberts Court.

Buckley v. Valeo (424 U.S. 1) is in many ways the grandfather of all modern campaign finance decisions. The case analyzed the constitutionality of the Federal Election Campaign Act of 1971 (FECA)'s limits on campaign contributions, expenditures (by individuals, candidates, and campaigns), and public funding for presidential campaigns.² The Court issued a 7-1 ruling finding FECA's contribution limits constitutional but found all its other limitations or restrictions on campaign finance in violation of the First Amendment.³

The Federal Election Campaign Act was passed in 1971 and amended in 1974.⁴ Under the Act, individuals donating to political campaigns were prohibited "from contributing more than \$25,000 in a single year [to all candidates] or more than \$1,000 to any single candidate for an election campaign and from spending more than \$1,000 a year relative to a clearly identified candidate"⁵ As the Court has consistently upheld the principle that spending money is a form of speech, any restriction on an individual's ability to contribute to a campaign effectively restricts their First Amendment right to voice political support via donation. The reason for this is that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."⁶

While the Court did find "[FECA's] contribution and expenditure limitations [to] impose direct quantity restrictions on political communication and as-

² *Buckley v. Valeo*, 424 US 1, 7 (1976).

³ *Id.* at 58.

⁴ *Id.* at 7.

⁵ *Id.* at 13.

⁶ *Buckley*, 424 US at 19 (cited in note 2).

sociation,”⁷ they ruled that FECA’s contribution limitations were constitutional. Thus, restricting an individual’s political contributions limits his or her ability to engage in political communication, which constitutes a restriction on their First Amendment rights. However, the Court found contribution limitations to be only “a marginal restriction upon the contributor’s ability to engage in free communication,”⁸ and thus justifiable at the levels set by FECA. After all, nothing in FECA limited an individual’s ability to speak in favor of a candidate or political party.⁹ The only way in which contribution limits could run into legal issues would be if they prevented a campaign from “amassing the resources necessary for effective advocacy,”¹⁰ meaning the limits would be burdensome if they were so low that campaigns were unable to promote their candidate and ideas. As the Court wrote, “the overall effect of [FECA’s] contribution ceilings is [...] to require candidates and political committees to raise funds from a greater number of persons and compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression.”¹¹ In fact, one could argue that contribution limits, to an extent, actually encourage individuals to exercise their freedom of speech. While donations are an effective way to indicate the “intensity of [one’s] support for [a] candidate,”¹² due to the quantity of donations a candidate receives an individual’s donation is rarely more than symbolic gesture.¹³ Engaging in “direct political expression” allows an individual to not only demonstrate their support, but also actively assist a candidate in promoting their ideas and policies to the general public, potentially increasing the likelihood of a candidate being elected.

Perhaps the most interesting reasoning the Court put forth in justifying contribution limits is the leeway they found in the First Amendment. Citing the 1973 case *CSC v. Letter Carriers* (413 U.S. 548) as precedent, the Court stated that “even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”¹⁴ The Court has previously applied strict scrutiny to alleged First Amendment violations – cases such as *Schenck v. United States*¹⁵ and *Tinker v. Des Moines*

7 Id at 18.

8 Id at 20-21.

9 Id at 21.

10 *Buckley*, 424 US at 21 (cited in note 2).

11 Id at 22.

12 Id at 21.

13 Id at 21.

14 *Buckley*, 424 US at 25 (cited in note 2).

15 *Schenck v. United States*, 249 US 47, 50 (1919). *Schenck v. United States* allowed for generally permitted speech to be prohibited if it is “used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent.”

Independent Community School District (1969)¹⁶ allowed First Amendment rights to be suspended under certain circumstances. However, *Buckley* marked the first time such exceptions were made for political speech. The important interest in this case is “limit[ing] the actuality and appearance of corruption”¹⁷ in the U.S. political system. Without contribution ceilings, individuals have the ability to contribute unlimited funds to “secure political *quid pro quo*’s,”¹⁸ a clear form of corruption. Even if there is no evidence of actual corruption, the fact that wealthy individuals may be able to engage in such *quid pro quos* may create the appearance of such corruption amongst the general public, thereby threatening the perceived legitimacy of the political process. Due to the important interest in preventing corruption and its appearance, as well as the fact that contribution limits amount to merely a “marginal restriction” on an individual’s freedoms of association and communication, the Court ruled that the \$1,000 contribution ceiling enforced by FECA was constitutionally valid.¹⁹ Similar reasoning was used to also hold the \$5,000 ceiling on committee contributions²⁰ and \$25,000 ceiling on aggregate individual and committee contributions as valid.²¹

However, despite ruling in favor of FECA’s contribution ceilings, the Court struck down the Act’s restrictions on independent and candidate expenditures. FECA’s limits on expenditures are similar to its limits on contributions, limiting individuals and associations to no more than \$1,000 of expenditures “relative to a clearly identified candidate,”²² while also limiting the amount of personal funds candidates may spend on their own campaigns.²³ Similar to its rulings on FECA’s

16 *Tinker v. Des Moines Sch. Dist.*, 393 US 503, 509 (1969). *Tinker v. Des Moines Independent Community School District* found that student speech in a public school was permissible unless “[school officials are] able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint [...] [and that] would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”

17 *Buckley*, 424 US at 26 (cited in note 2).

18 *Id* at 26.

19 *Id* at 35.

20 *Id* at 36.

21 *Buckley*, 424 U.S. at 38 (cited in note 2).

22 *Id* at 39.

23 *Id* at 51 (The ceiling on personal funds is dependent on the office a candidate is running for: “\$50,000 for Presidential or Vice Presidential candidates [...] \$35,000 for senatorial candidates, and \$25,000 for most candidates for the House of Representatives”).

contribution limitations, the Court applied strict scrutiny²⁴ to determine whether, if a restriction on a First Amendment right has occurred, that restriction is narrowly tailored to directly advance a “compelling government interest.”²⁵

Applying this standard, the Court concluded that “the governmental interest in preventing corruption and [its appearance] is inadequate to justify [FECA’s] ceiling on independent expenditures” for two reasons.²⁶ First, FECA’s expenditure limits were not effective in preventing corruption; candidates may spend as much as they like, “so long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate.”²⁷ Second, the Court found that “equalizing the relative ability of individuals and groups to influence the outcome of elections”²⁸ was not a legitimate government interest. Citing several cases as precedent,²⁹ the Court strongly rejected the notion that First Amendment rights could be restricted in the interest of societal equality, writing that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”³⁰ While contribution limitations constitute a marginal restriction on speech, expenditure limitations impose a direct restriction and are thus constitutionally invalid.³¹

For similar reasons the Court found any restrictions on the amount of personal funds a candidate could use to advance his or her own campaign were unconstitutional. Simply put, there is no compelling government interest in restricting personal expenditures, as the limitations in no way advance the interest in preventing corruption or its appearance.³² If anything, it actually lessens the risk of corruption, as it makes a candidate less reliant on “outside contributions” and

24 Brief for the Appellee, *McCutcheon v. Federal Election Commission*, No. 12-536, *18-19 (filed July 18, 2013) (The standard the Court used to examine expenditure limits is different from the standard they used on contribution limits, reflecting the different degrees of impact the two forms of limits have on political speech. As contribution limits only have a marginal impact on political speech, leaving other avenues for speech unrestricted, only an important government interest is needed to justify a restriction. As such, the Court applied intermediate scrutiny to examine the contribution limits in *Buckley*. However, as expenditure limits impose an actual quantitative restriction on political speech, the burden on an individual’s First Amendment rights is much greater, causing the Court to apply strict scrutiny).

25 *Strict Scrutiny*, Wex Legal Dictionary (Cornell University Law School), online at http://www.law.cornell.edu/wex/strict_scrutiny (visited Oct 28, 2014).

26 *Buckley*, 424 US at 45 (cited in note 2).

27 *Id* at 45.

28 *Id* at 48.

29 In particular, *New York Times Co. v. Sullivan* (1964); *Associated Press v. United States* (1945); *Roth v. United States* (1957).

30 *Buckley*, 424 US at 48-49 (cited in note 2).

31 *Id* at 39.

32 *Id* at 53.

hence less susceptible to corruption.³³

The Court also addressed FECA's cap on total permissible expenditures.³⁴ In addition to preventing corruption and equalizing candidates' financial resources, the primary justification for these limits was to reduce the "skyrocketing costs of political campaigns."³⁵ This argument was again rejected, as the Court ruled it was the responsibility of the public to "retain control over the quantity and range of debate on [...] issues in a political campaign."³⁶ It is an entirely subjective task to determine what level of spending is and is not "wasteful, excessive, or unwise,"³⁷ and as such it is beyond the power of the Court or Congress to make such a determination.

While clearly defining the restrictions on individuals and PACs that are and are not permissible, *Buckley* did not broach the subject of independent corporate expenditures. This issue was first addressed two years later, in *First National Bank of Boston v. Bellotti*. *Bellotti* challenged the constitutionality of a Massachusetts state law that "prohibited [national banking associations] and other specified business corporations from making contributions or expenditures for the purpose of influencing or affecting [a person's] vote."³⁸ The question in this case was whether or not First Amendment rights apply not only to individuals, but also to corporations. In a 5-4 decision, the Court found that the Massachusetts law "abridges [freedoms of] expression that the First Amendment was meant to protect."³⁹ Citing its ruling in *Mills v. Alabama* (1966), which found that "a major purpose of the First Amendment was to protect the free discussion of governmental affairs,"⁴⁰ the Court concluded that prohibiting an entity from engaging in expression solely based on that entity's corporate status is unconstitutional, as "the inherent worth of the speech [...] does not depend upon the identity of its source."⁴¹ Thus, on its face, there was no constitutional basis for restricting the First Amendment rights of a corporation or union any more than those of an individual. Just as in *Buckley*, the only way for such a restriction to be permissible would be if it directly advanced a compelling government interest, which, for the case of restricting political speech, may only be the desire to prevent corruption or the appearance of corruption. The Court found no evidence of corruption, and thus no compelling interest advanced by the statute. However, the Court did affirm that if claims of corruption "were supported by record or legislative findings that corporate advocacy threatened imminently to

33 *Id* at 53.

34 *Buckley*, 424 U.S. at 54 (cited in note 2).

35 *Id* at 57.

36 *Id* at 57.

37 *Id* at 57.

38 *First Nat'l Bank of Boston v. Bellotti*, 435 US 765, 765 (1978).

39 *Id* at 776.

40 *Id* at 776, citing *Mills v. Alabama*, 384 US 214, 218 (1966).

41 *Id* at 777.

undermine democratic processes,⁴² a different conclusion may have been drawn.

The question of restrictions on corporate expenditures was raised again in 1990, with *Austin v. Michigan Chamber of Commerce*. *Austin* dealt with a challenge to a section of the Michigan Campaign Finance Act (MCFA) that “prohibit[ed] corporations, excluding media corporations, from using general treasury funds for [...] independent expenditures in connection with state candidate elections.”⁴³ However, the Act did permit companies to use PAC funds or other separate funds for purposes of political speech.⁴⁴ In a 6-3 decision, the Court applied strict scrutiny and found that MCFA was constitutionally valid, thereby permitting restrictions on corporations’ independent political expenditures. While forcing companies to rely entirely on PAC or other funds to engage in political speech did constitute a burden,⁴⁵ the restrictions were nevertheless justified to prevent corruption or its appearance.⁴⁶ The problem with massive corporate expenditures is they can skew the general perception of how much public support exists for a particular political position.⁴⁷ Commonly referred to as the anti-distortion rationale,⁴⁸ the Court found the government had a legitimate interest in ensuring that corporate wealth did not “unfairly influence elections.”⁴⁹ If corporations were allowed to distort public perception of popular support through unlimited independent expenditures, there would be a significant risk of overwhelming the voice of individuals. This is different from the *quid pro quo* corruption that the *Buckley* Court sought to prevent, but nonetheless just as valid to the Court. *Austin* marked the first time the Court recognized a compelling interest in ensuring “expenditures reflect actual public support for the political ideas espoused by corporations.”⁵⁰

The *Buckley* and *Austin* precedents were used in two key decisions at the beginning of the 21st century, *Nixon v. Shrink Missouri Government PAC* and *McConnell v. FEC*. *Nixon* dealt with a Missouri law, passed via a ballot initiative, that imposed contribution limits on individuals.⁵¹ Depending on the size of the voting constituencies, these new contribution limits ranged from \$250 to \$1,000 for statewide elections and were adjusted for inflation every two years.⁵² The Court upheld the law in a 6-3 majority for two key reasons. First, just as in *Buckley*, Missouri had a genuine and compelling interest in “prevent[ing] corruption and the appearance

42 *Bellotti*, 435 US at 789 (cited in note 38).

43 *Austin v. Michigan Chamber of Commerce*, 494 US 652, 652 (1990).

44 *Id* at 654.

45 *Id* at 658.

46 *Id* at 659.

47 *Bellotti*, 435 U.S. at 660 (cited in note 38).

48 Daniel P. Tokaji, *Election Law in a Nutshell* 296 (West 2013).

49 *Austin*, 494 U.S. at 660 (cited in note 44).

50 Grant Fevurly, *Davis v. Federal Election Commission: A Further Step Towards Campaign Finance Deregulation and the Preservation of the Millionaires’ Club*, 81 U Colo L Rev 627 (2010).

51 *Nixon v. Shrink Missouri Government PAC*, 528 US 377, 382 (2000).

52 *Id* at 382.

of it that flows from munificent campaign contributions.”⁵³ Contribution ceilings are but a partial but justified burden on First Amendment rights. Also significant is that 74% of Missouri residents voted in favor of the law, indicating that the public thought these limits were necessary to prevent corruption and its appearance.⁵⁴ As these limits only applied to state elections, the Court deemed it appropriate to defer to the wisdom of the general public, just as in *Austin*, where the Court saw fit to defer to the state legislature.

Finally we come to *McConnell v. FEC*. *McConnell*, which was concerned with the Bipartisan Campaign Reform Act (BCRA), a 2002 law that amended parts of FECA addressing soft money and issue advertising.⁵⁵ Section 323 of the Act “prohibit[ed] national party committees and their agents from soliciting, receiving, directing, or spending any soft money.”⁵⁶ Soft money refers to political contributions that are made “to political parties for activities intended to influence state or local elections,” including for get-out-the-vote drives and generic party advertising.⁵⁷ These donations had been largely unregulated and provide individuals and corporations a loophole to FECA’s caps on federal election contributions.⁵⁸ ⁵⁹ The BCRA would serve to prevent soft money from unfairly influencing federal elections and candidates.⁶⁰ A facial challenge was raised against the law, meaning the *McConnell* petitioners argued that the entire law was unconstitutional in all circumstances.

The Court upheld Section 323 as constitutional, as it advanced a compelling government interest and, just as in *Austin*, it was deemed appropriate to “show proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.”⁶¹ First, just as in *Buckley*, restricting soft money donations is but a “marginal” intrusion on First Amendment speech⁶² that serves to prevent corruption.⁶³ Furthermore, while in *Buckley* the threat of corruption was mostly hypothetical, the Court in *McConnell* found actual evidence of attempted corruption, as “lobbyists, CEOs, and wealthy individuals

53 *Id.* at 390.

54 *Id.* at 394.

55 *McConnell v. FEC*, 540 US 93, 114 (2003).

56 *Id.* at 133.

57 *Id.* at 123.

58 *Id.* at 122.

59 *McConnell*, 540 US at 124 (cited in note 56) (as the Court notes, “in 1996 the top five corporate soft-money donors gave, in total, more than \$9 million in non-federal funds to the two national party committees,” far above what they would be permitted to donate under FECA).

60 *Id.* at 123-124.

61 *Id.* at 137.

62 *Id.* at 138.

63 *McConnell*, 540 US at 145 (cited in note 56). “It is not only plausible, but likely, that candidates would feel grateful for such [large soft money] donations and that donors would seek to exploit that gratitude.”

[...] have candidly admitted donating substantial sums of money to national committees [...] for the express purpose of securing influence over federal officials.”⁶⁴ While there was no legislative record proving actual instances of corruption, the Court agreed with Congress that soft money donations gave the appearance of corruption to the general public.

The second major issue in *McConnell*, as it applies to the Roberts’ Court cases, was the Court’s ruling on BCRA’s issue advertising provisions. Section 203 of the BCRA prohibits all electioneering communications, including both express and issue advocacy, that are paid for with a corporation’s general treasury funds in the days leading up to an election.⁶⁵ However, corporations remained free to fund advertisements through political action committees (PACs).⁶⁶ Just as in *Austin*, the Court found a compelling government interest in ensuring corporations do not overwhelm and distort public support for a particular candidate or issue.⁶⁷ Prohibiting corporate advertising in the days leading up to elections serves this purpose but is not an absolute restriction on speech, as PAC money may still be used to fund electioneering communications.⁶⁸

Having provided a brief consideration of the five essential pre-Roberts cases, we will now examine the campaign finance decisions of the Roberts Court and how these decisions helped to shape, and sometimes contradict, its rulings.

III. RANDALL V. SORRELL

A. *The Case*

Randall v. Sorrell (2006) was the first campaign finance case heard by the Roberts Court. In a 6-3 judgment the Court declared Vermont’s Act 64, which imposed expenditure limits and comparatively low contribution limits, unconstitutional.⁶⁹ It is important to note that the controlling opinion in *Randall* was a plurality opinion, only being signed by Justices Breyer, Alito (in part), and Roberts, while

64 *Id.* at 147.

65 *Id.* at 206. The blackout period for primary elections is the 30 preceding days, for general elections it is 60 days.

66 *Id.* at 204.

67 *McConnell*, 540 US at 205 (cited in note 56).

68 *Id.* at 210-211. The *McConnell* decision did provide one exception to the BCRA’s general prohibition on corporate electioneering communications. The Court held that nonprofit corporations who were “formed for the express purpose of promoting political ideas, and cannot engage in business activities [...] ha[ve] no shareholders or other persons affiliated so as to have a claim on its assets or earnings [...] [and] [were] not established by a business corporation or labor union” were exempt from the BCRA’s prohibition, a holding consistent with its findings in the 1986 case *FEC v. Massachusetts Citizens for Life*.

69 Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 *Ohio St L J* 849, 851 (2007).

Justices Kennedy, Thomas, Scalia, and Alito filed concurring opinions. A plurality decision occurs when “five or more justices agree on the result in a particular case but no single rationale or opinion garners five votes.”⁷⁰ The judgment has power, in the sense that the order to uphold or reject the law at issue has full force, but the legal rationale to reach that conclusion does not necessarily serve as binding precedent for future cases.

In 1997 the state of Vermont passed Public Act Number 64 (Act 64), which both limited the amount a person⁷¹ could donate to a political candidate during any election cycle and placed a cap on expenditures a candidate could make during a state election campaign.⁷² The total expenditure limitations, including primaries and general elections, amounted to \$300,000 for gubernatorial candidates, \$100,000 for lieutenant governor, \$45,000 for all other statewide offices such as attorney general, \$4,000 for state senator, and \$2,000 for state representatives.^{73 74} Act 64 defined an expenditure as:

[A] payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.⁷⁵

As such, any coordinated spending⁷⁶ between a political party or individual and a campaign in excess of \$50 was to be counted against the campaign’s overall expenditure allowance.⁷⁷ With regard to contribution restrictions, Act 64 limited political donations to \$400 for all statewide offices, including governor, \$300 for state senators, and \$200 for state representatives.⁷⁸ Across all state elections, no individual could donate more than an aggregate total of \$2,000 during a 2-year general election cycle.⁷⁹ Significantly, these contribution limits were not adjusted for inflation, and both individuals and political committees were subject to these

70 James F. Spriggs and David R. Stras, *Explaining Plurality Decisions*, 99 *Georgetown L J*, 515, 515 (2011).

71 It is important to note here that, in this case and all future cases discussed, the Supreme Court uses the term person in the broadest of terms, so as to include individuals, corporations, and political committees.

72 *Randall v. Sorrell*, 548 US 230, 238 (2006) (Breyer) (plurality).

73 *Id.* at 237.

74 *Id.* at 237. These restrictions were to be adjusted for inflation on a bi-annual basis.

75 *Id.* at 238 (citing Act 64).

76 Here meaning spending that is either “intentionally facilitated by, solicited by or approved” (Sec. 8. 17 V.S.A. § 2809) by the campaign (*Ibid.*, p. 238).

77 *Randall*, 548 U.S. at 238 (cited in note 72) (Brennan) (plurality). Here meaning spending that is either “intentionally facilitated by, solicited by or approved” (Sec. 8. 17 V.S.A. § 2809) by the campaign).

78 *Id.* at 238.

79 *Id.* at 239.

restrictions.⁸⁰ These components of Act 64 were challenged by a large group of “individuals who have run for state office in Vermont, citizens who vote [...] and contribute to Vermont campaigns, and political parties and committees that participate in Vermont politics,”⁸¹ henceforth collectively referred to as Randall. In this case the plurality addressed two primary issues of Act 64’s expenditure and contribution limits.⁸²

The precedent established in *Buckley* played a crucial role in the plurality’s decision in *Randall*. Simply put, marginal restrictions on First Amendment freedoms may be justified when narrowly tailored to serve a compelling government interest, but direct, quantity restrictions, such as expenditure limits, cannot be justified. It was clear to the Randall petitioners that if the Court applied *Buckley* to their case, they would certainly lose. As such, Randall challenged *Buckley*’s application, arguing it was outdated for two reasons: (1) post-1976 evidence has proven that “contribution limits alone cannot effectively deter corruption,”⁸³ and (2) the *Buckley* court had not considered the fact that “limits help to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters.”⁸⁴

The plurality found neither of these arguments compelling, instead relying on the principle of *stare decisis*, which “commands judicial respect for a court’s earlier decisions and the rules of law they embody.”⁸⁵ By adhering to precedent, the Court may have more consistency in its decisions over time, reducing confusion and increasing the credibility of its decisions. As determined in *Arizona v. Rumsey* (1984),⁸⁶ “any departure from the doctrine of *stare decisis* demands special justification.”⁸⁷ There must be an extraordinary set of circumstances for precedence not to apply, as we have seen in cases such as *Brown v. Board of Education* (1954)⁸⁸ or *Lawrence v. Texas* (2003),⁸⁹ but this rarely occurs. *Randall* was not such a case. The plurality found no special justification for overruling or ignoring *Buckley*, as Randall had failed to prove not only that there were increased levels of corruption in Vermont politics, thus forcing them to enact these expenditure limits, but also “that expenditure limits are the only way to attack that problem.”⁹⁰ Furthermore, the plurality indicated that a key reason for not overturning *Buckley* was that doing so would cause problems for campaign finance laws; in particular, the Court wrote

80 Id at 238.

81 *Randall*, 548 U.S. at 239-240 (cited in note 72) (Brennan) (plurality).

82 Id at 246.

83 Id at 243.

84 Id at 243.

85 *Randall*, 548 U.S. at 243 (cited in note 72) (Brennan) (plurality).

86 *Arizona v. Rumsey*, 467 U.S. 203 (1984).

87 Id at 212.

88 *Brown v. Board of Education*, 347 U.S. 483 (1954).

89 *Lawrence v. Texas*, 539 U.S. 558 (2003).

90 *Randall*, 548 U.S. at 244 (cited in note 72) (Brennan) (plurality).

that “overruling *Buckley* now would dramatically undermine [Congress and state legislatures’] reliance on our settled precedent.”⁹¹ Randall’s second argument – that *Buckley* did not consider how expenditure limits would result in candidates spending more time campaigning to the average citizen – did not prove persuasive to the plurality, which instead held that the *Buckley* court was aware of “the connection between expenditure limits and a reduction in fundraising time”⁹² but ruled against the limits regardless. As there were no extraordinary circumstances to dictate otherwise, the plurality simply relied on *Buckley*’s precedent to declare Act 64’s expenditure limits unconstitutional.

The second issue the Court addressed was Act 64’s contribution limits. As discussed earlier, *Buckley* ruled that a ceiling on contributions might be justified so long as the restriction is “closely drawn to avoid unnecessary abridgement of associational freedoms.”⁹³ In that case, the contribution ceiling was \$1,000, and since *Buckley*, the Court had allowed similar contribution limits to be implemented across the nation, as these restrictions have not impeded the ability of candidates to engage in effective advocacy,⁹⁴ i.e. candidates still had enough resources to actively campaign. However, due to Act 64’s low contribution ceilings, the plurality concluded that they were not “closely drawn,”⁹⁵ and in fact could “harm the electoral process by preventing challengers from mounting effective campaigns.”⁹⁶ The plurality did not declare all contribution limits unconstitutional, staying consistent with *Buckley*, but found Vermont’s limits to be unreasonably low. Act 64 put in place the lowest contribution limits in the country, with all other state limits being at least double those of Vermont.⁹⁷ Making a simple statistical comparison, the plurality found that Act 64’s ceiling was only 11% of the amount allowed under *Buckley*,⁹⁸ a significant difference. In previous rulings, the lowest contribution limit allowed by the Court prior to *Randall* was found in *Nixon*, where the Court allowed a limit of \$1,275 adjusted for inflation,⁹⁹ which made Vermont’s restriction less than one-sixth of Missouri’s limit.

While, quantitatively, Act 64’s restrictions were clearly more intrusive than any previously approved by the Court, the Act’s constitutionality hinged on whether contribution limits had a substantive effect on Vermont elections. The plurality considered five factors in the Act’s constitutionality. First, data suggested

91 *Id* at 244.

92 *Id* at 245.

93 *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

94 *Randall*, 548 U.S. at 248 (cited in note 72) (Brennan) (plurality).

95 *Id* at 249.

96 *Id* at 248-249.

97 *Id* at 250.

98 *Randall*, 548 U.S. at 250 (cited in note 72) (Brennan) (plurality). Adjusted to its 1976 value, Act 64 only permitted \$113.91 of contributions, compared to the \$1,000 restriction under FEC.

99 *Id* at 251.

that the contribution ceiling “[would] significantly restrict the amount of funding available for challengers to run competitive campaigns.”¹⁰⁰ Here the plurality cited a study that found that, if Act 64 had been in place for the 1998 elections, Republican challengers for state offices would have seen their funds decrease between 18% and 53%.¹⁰¹ Moreover, when one focuses only on the impact Act 64 has on political parties, which are subject to the same restrictions as individuals, Republican Party contributions for state senatorial candidates would have been cut by 85%,¹⁰² while the contributions for governor would have been slashed by 99%.¹⁰³ The key here is that while these restrictions affect both incumbent and challengers alike, the plurality stated that generally a challenger must outspend an incumbent in order to “overcome the name-recognition advantage [they] enjoy.”¹⁰⁴ As Act 64’s low contribution limits would make it virtually impossible for either candidate to outspend the other, these limits infringe upon the ability for a challenger to run an “effective challenge” against an incumbent, and thereby reduce the competitiveness of elections.¹⁰⁵

As Act 64’s limits allowed political parties to donate no more than \$400 to a state race, there was also a threat to individuals’ right of association. The plurality hypothesized a scenario where 6,000 individuals wanted to donate to Vermont’s Democratic Party as an example.¹⁰⁶ If they each donated only one dollar, the actual contribution they could make to any one state legislature race would be three cents, “thereby thwarting the aims of the [...] donors from making a meaningful contribution.”¹⁰⁷ There is nothing inherently wrong with limits on political party contributions -- the Court upheld such limits in *Colorado II* (533 U.S. 431)--¹⁰⁸ but those were far higher than those allowed by Act 64, which would effectively “reduce the voice of political parties in Vermont to a whisper.”¹⁰⁹

The plurality found three other issues with Act 64’s contribution limits. Act 64 counted any expenses accumulated while volunteering for a campaign as contributions,¹¹⁰ meaning that simply mailing a few hundred letters would cause

100 Id at 253.

101 Id at 253.

102 *Randall*, 548 U.S. at 254 (cited in note 72) (Brennan) (plurality). “The Republican Party made contributions [...] in amounts that averaged \$2,001 [...] Act 64 would reduce these contributions to \$300 per campaign.”

103 Id at 254. “The party contributed \$40,600 to its gubernatorial candidate [...] The Act would have reduced that contribution by 99%, to \$400.”

104 Id at 256.

105 Id at 255.

106 *Randall*, 548 U.S. at 258 (cited in note 72) (Brennan) (plurality).

107 Id at 258.

108 Id at 259.

109 Id at 259.

110 *Randall*, 548 U.S. at 259 (cited in note 72) (Brennan) (plurality).

an individual to meet or exceed their contribution quota.¹¹¹ This again is a problem brought about by the excessively low limits, as “these [...] problems are unlikely to affect the constitutionality of a limit that is reasonably high.”¹¹² Act 64’s contribution limits are not adjusted for inflation, so even in the eight-year span between the law’s implementation and its constitutional challenge, the \$200 donation’s actual value had decreased by 20%.¹¹³ Finally, reaffirming its reasoning for rejecting Act 64’s expenditure limits, there was no evidence of higher levels of corruption in Vermont than in any other state, nor any other special justification for the highly intrusive limits. The plurality soundly rejected Act 64’s contribution limits, as they were not “narrowly tailored,”¹¹⁴ though they made it clear that *Buckley*’s precedent still applied. If Act 64 had similarly imposed a contribution limit of \$1,000, the plurality would likely have ruled the law constitutional.

Separate concurring opinions were filed by Justices Kennedy and Thomas, who agreed with the plurality’s conclusion but not its reasoning. While Justice Kennedy expressed some concern about the plurality’s ability to “explain why \$200 is too restrictive a limit while \$1,500 is not,”¹¹⁵ he expressed no alternative legal solution. Justice Thomas, joined by Justice Scalia, believed that the plurality did not go far enough in evaluating *Buckley*. Instead, Thomas believed the Court should “overrul[e] *Buckley* and replac[e] it with a standard faithful to the First Amendment.”¹¹⁶ Thomas found contribution limits to be just as intrusive on First Amendment freedoms as expenditure limits, as “statements of general support [such as contributions] are as deserving of constitutional protection as those that communicate specific reasons for that support.”¹¹⁷ In other words, Justice Thomas believes any infringement on an individual’s First Amendment rights to be unconstitutional, regardless of how insignificant such infringement may be.¹¹⁸

B. *The Implications*

Clearly *Randall* marked a significant moment in American campaign finance law. While on one hand the plurality applied *stare decisis*, adhering to *Buckley*’s precedent in regards to expenditure limits, they also ruled for the first time against a state implementing campaign contribution limits.¹¹⁹ Historically, the

111 Id at 260.

112 Id at 260.

113 Id at 261. “\$200 in 2006 dollars has a real value of \$160.66 in 1996 dollars.”

114 *Randall*, 548 U.S. at 261 (cited in note 72) (Brennan) (plurality).

115 Id at 265 (Kennedy, A., concurring).

116 Id at 266 (Thomas, J., concurring).

117 Id at 267 (Thomas, J., concurring).

118 *Randall*, 548 U.S. at 266 (cited in note 72) (Thomas, J., concurring).

119 Richard Briffault, WRTL and *Randall*: The Roberts Court and the Unsettling of Campaign Finance Law, 68 Ohio St L J 807, 809 (2007).

Court had deferred to states, reasoning that state legislatures are more suited than the federal government to determine appropriate campaign finance laws for their own elections. But perhaps the most concerning element of the *Randall* plurality is how it reached its decision. When considering the amount of quantifiable evidence on the benefit of contribution limits ignored by the plurality,¹²⁰ it seems as if it were guided more by ideology than actual legal reasoning. This is made most clear by the plurality's statement regarding Act 64's contribution limits, which it argued served as a legislative tool to unjustly restrict the ability of challengers to "run competitive campaigns."¹²¹ To reach this conclusion, one must ignore both quantitative evidence and textual evidence in Act 64, as both indicate that, according to the state legislature, contribution limits are an effective mechanism to increase electoral competition.¹²²

The plurality's primary assumption justifying its rejection of Act 64's contribution limits is that these limits have a greater negative effect on challengers than they do on incumbents. There are certainly valid theoretical arguments on both sides. As the plurality argued, incumbents have a natural advantage over challengers by virtue of their name recognition; therefore, removing contribution limits could enable a challenger to outspend an incumbent, often a necessary tool to overcome a lack of experience and prior publicity. However, it is also name recognition and public record that make it easier for incumbents to receive contributions. Having previously run for office, the incumbent has an established public voter base, and their voting record may make it easier for them to attract larger donations from the most powerful members of their respective party. If it is easier for incumbents to receive large contributions than challengers, a lower contribution limit may help to level the playing field, allowing the incumbent and challenger to have similar funds available for their campaigns. This theory is supported by Briffault, who writes that:

Given the built-in advantages that incumbents enjoy in obtaining large contributions, any law that limits the size of contributions is likely to have a greater absolute monetary impact on incumbents, so it would not be surpris-

120 Hasen, 68 Ohio St L J at 884-885 (cited in note 69). (In addition to several studies discussed on pages 24-25, the plurality ignored the fact that in 1999, after Act 64's implementation, the city of Burlington, Vermont held a mayoral election between Peter Clavelle and Kurt Wright. In this election, both candidates "were able to amass sufficient resources to run effective campaigns [...] Clavelle raised almost \$39,000, more than he raised in three of his four previous campaigns [...] [and] by his own statements, Wright ran an effective campaign in a competitive race.")

121 *Randall*, 548 U.S. at 253 (cited in note 72) (Brennan) (plurality).

122 Ver St Leg Act 64, § 1-12 (1997), online at <http://www.leg.state.vt.us/docs/1998/acts/act064.htm> (retrieved Nov 16, 2014). Section 1 of Act 64 states that "Public financing of campaigns, coupled with generally applicable contribution and expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates, both of which will increase the debate of issues and ideas."

ing if contribution limits curbed the ability of incumbents to financially outdistance challengers, and thus generally reduced the incumbent-challenger spending gap and, potentially, the vote gap.¹²³

Political scientists have conducted many studies over the years examining the effects of contribution and/or expenditure limitations, and while these results are not consistent across the board, many contradict the plurality's strong statement that contribution limits interfere with a challenger's ability "to mount an effective challenge."¹²⁴ Perhaps the most significant modern findings on the question of the impact of contribution limits on electoral competitiveness came from Stratmann of George Mason University. Stratmann conducted two studies following the *Randall* decision. The first study examined the tangible effects of campaign contributions on elections and whether these effects are different between states that have contribution limits and those that lack them.¹²⁵ Examining 478 state elections in 45 states occurring from 1980 to 2001,¹²⁶ Stratmann and Aparicio-Castillo found that "contribution limits lead to closer elections [...] the share of incumbent contributions is lower in states with stricter contribution limits [...] challenger contributions do not differ between states with and without limits [...] [and] the contribution gap [between incumbents and challengers] narrows with stricter limits."¹²⁷ However, while the study found that election margins were narrowed, there was no evidence to suggest that contribution limits result in a higher turnover rate for incumbents.¹²⁸ Regardless of this, this study is clear evidence against the idea that contribution limits serve as "incumbency protection devices."¹²⁹

The second Stratmann study investigated whether contribution limits result in a more productive use of campaign funds, particularly by incumbents.¹³⁰ Increased productivity could possibly compensate for any potential loss of funds, supporting the idea that limits do not restrict the ability of challengers to run effective campaigns. Stratmann examined campaign contributions in single member state district elections in 1996, 1998, and 1998 across 37 states.¹³² He concluded that "campaign advertising is more productive when candidates' spending ability

123 Briffault, 68 Ohio St. L.J. 807 at 830 (cited in note 119).

124 *Randall v. Sorrell*, 548 U.S. 230, 255 (2006) (Brennan) (plurality).

125 Thomas Stratmann and Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?* 127 Public Choice 177, 177-206 (2006).

126 *Id.* at 184-185.

127 *Id.* at 198.

128 *Id.* at 199.

129 Stratmann and Aparicio-Castillo, 127 Public Choice at 199 (cited in note 125).

130 Thomas Stratmann and Francisco J. Aparicio-Castillo, *Contribution Limits and the Effectiveness of Campaign Spending*, 129 Public Choice 461, 461 (Dec 2006).

131 *Id.* at 461.

132 *Id.* at 466.

is curtailed by contribution limits,¹³³ and that there is a substantial decrease in campaign productivity in states without limits, “for both incumbents and challengers.”¹³⁴ Furthermore, the ratio of incumbent to challenger spending in states lacking contribution limits was 4 to 1, while the ratio in states implementing limits dropped to 2.5 to 1.¹³⁵ Overall, Stratmann’s research clearly indicates that contribution limits reduce the donation gap between challengers and incumbents, result in more competitive elections, and increase the ability for challengers to mount effective campaigns for office.

Even without this data, given the facts of *Randall*, the legislators clearly did not intend to provide incumbents electoral protection. As noted, but subsequently ignored, in the plurality’s opinion, Act 64 prohibited incumbents from making expenditures totaling more than 85% of the limits afforded to challengers in state elections, and 90% of the limits in state Senate and House races.¹³⁶ While the plurality struck this policy down along with all other expenditure limits by applying *stare decisis*, it is clear that incumbency protection was not an objective of the law.

The plurality decision’s flaws become even more apparent when considering the Court’s activity in other areas of election law, primarily gerrymandering. Hasen discusses this dichotomy, noting the significant contradiction between the plurality’s decision in *Randall* and the Court’s ruling in *LULAC v. Perry* (2006).¹³⁷ Given that the primary motivation in ruling against Act 64’s contribution limits was allegedly an effort to preserve electoral competitiveness, one would think the Court would take a strong stance against partisan gerrymandering, the practice of drawing congressional districts “with the purpose of giving one political group an advantage over another.”¹³⁸ The effects of gerrymandering are evidenced by the results of the 2012 House elections, when Democratic challengers and incumbents received half a million more votes than their Republican counterparts¹³⁹ despite Republicans winning 33 more seats.¹⁴⁰ Therefore, gerrymandering reduces the number of competitive campaigns across the nation by creating unnatural advantages

133 Id at 471.

134 Stratmann and Aparicio-Castillo, 129 Public Choice at 472 (cited in note 130).

135 Id at 472.

136 *Randall*, 548 U.S. at 237-238 (cited in note 124) (Brennan) (plurality).

137 *LULAC v. Perry*, 548 U.S. 399 (2006).

138 See *Gerrymander*, Wex Legal Dictionary (Cornell University Law School), online at <http://www.law.cornell.edu/wex/gerrymander> (visited Oct 28, 2014).

139 See Ezra Klein, *House Democrats got more votes than House Republicans. Yet Boehner says he’s got a mandate?* The Washington Post (The Washington Post Nov 9, 2012), online at <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/09/house-democrats-got-more-votes-than-house-republicans-yet-boehner-says-hes-got-a-mandate/> (visited Oct 28, 2014).

140 See *2012 U.S. House Elections Results*, The Washington Post (The Washington Post Nov 6, 2012), online at <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/house/> (visited October 28, 2014).

for a specific political party. Despite the plurality's assertions in *Randall* regarding the value of increasing competitiveness, in *LULAC* the Court rejected prohibiting gerrymandering to promote electoral competition, on the basis that "a reliable standard for identifying unconstitutional political gerrymanders" does not exist.¹⁴¹ Furthermore, the majority made no attempt to establish such a standard¹⁴² and refused to adopt a context-based test, as discussed later in *FEC v. WRTL*. If the Court valued electoral competitiveness, its lack of initiative to prevent gerrymandering and its failure to consider the positive impact of contribution limits are highly concerning.

IV. FEDERAL ELECTION COMMISSION V. WISCONSIN RIGHT TO LIFE

A. *The Case*

Federal Election Commission v. Wisconsin Right to Life (WRTL) was a 2007 case focused on the topic of express versus issue advocacy. The key legal challenge in this case was against Section 203 of the BCRA, which:

Ma[de] it a crime for any labor union or incorporated entity [...] to use its general treasury funds to pay for [...] any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office.¹⁴³

Pre-*WRTL* Section 203 applied to both express and issue advertisements. Express advocacy is defined in *Buckley* as advertisements containing at least one of the following eight terms: "vote for, elect, support, cast your ballot for, [Candidate's name] for Congress, vote against, defeat, [or] reject."¹⁴⁴ This differs from issue advocacy, where the primary purpose is not to advocate for the election or defeat of a politician, but instead promote awareness or activism about a political issue.

Wisconsin Right to Life (WRTL) is a pro-life, tax-exempt advocacy corporation¹⁴⁵ which advocates for prohibitions on embryonic stem cell research¹⁴⁶ and euthanasia.¹⁴⁷ The factual issue in this case concerned three broadcast advertise-

141 Hasen, 68 Ohio St L J at 872 (cited in note 69).

142 Id at 872.

143 *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 457-458 (2007).

144 *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

145 *WRTL*, 551 U.S. at 458 (cited in note 143).

146 See Wisconsin Right to Life. *Contact Us*. WRTL (2014), online at <http://wrtl.org/contact-us/> (visited Oct 28, 2014).

147 See Wisconsin Right to Life. *Fast Facts (Stem Cells)*, WRTL (2014), online at <http://wrtl.org/assisted-suicide/fast-facts-assisted-suicide/> (visited Oct 28, 2014).

ments run by WRTL leading up to the 2004 Wisconsin senatorial primaries and general election, paid for with general treasury funds.¹⁴⁸ These ads, two airing on radio and one on television, advocated against U.S. Senate filibuster rules; the text of one of these ads, entitled “Wedding,” read as follows:

Sometimes it’s just not fair to delay an important decision. But in Washington it’s happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple yes or no vote. So qualified candidates don’t get a chance to serve. It’s politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster.¹⁴⁹

The advertisement ended with a disclaimer that “[WRTL] is responsible for the content of this advertising and [is] not authorized by any candidate or candidate’s committee.”¹⁵⁰ WRTL had planned to run these ads throughout the month of August, but by doing so they would come within 30 days of the Democratic Wisconsin primaries,¹⁵¹ thus violating Section 203.¹⁵² WRTL filed suit against the Federal Election Commission (FEC), contending this prohibition unduly infringed on their First Amendment rights.¹⁵³ In a 5-4 decision, written by Chief Justice Roberts, the Court ruled in favor of WRTL, declaring Section 203 unconstitutional as applied to issue advocacy advertisements, implicitly overturning a portion of *McConnell*.

The question in this case is simply whether WRTL’s advertisements were a form of issue or express advocacy, but the Court failed to establish a reliable test to examine this distinction. If the ads “are intended to influence the voters’ decisions and have that effect,”¹⁵⁴ they may be constitutionally prohibited, as stated in *McConnell*.¹⁵⁵ But if the ad’s intention is to merely discuss an issue, the Court viewed such speech to be a fundamental First Amendment right that may not be infringed. However, this is problematic – to prove intent one must prove motivation, which is nearly impossible after the fact, as the creator of the advertisement would almost certainly assure their accusers that their intentions were pure. And furthermore, how much does intent matter? If a creator intends one message but its final message is perceived otherwise, does the intent or the product have greater relevance? These obvious flaws led the Court to reject the adoption of any standard whose central premise was determining an advertisement’s intent, as “an intent-based test

148 *WRTL*, 551 U.S. at 460 (cited in note 143).

149 *Id* at 458-459.

150 *Id* at 459.

151 *Id* at 464. In which Senator Feingold was running unopposed.

152 *WRTL*, 551 U.S. at 460 (cited in note 143).

153 *Id* at 460.

154 *Id* at 449 and 465-466, citing *McConnell*

155 *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

would chill core political speech by opening the door to a trial on every ad within the terms of Section 203.”¹⁵⁶ An intent-based test may even serve to curtail speech, as the only defense a speaker or company would have is the un-provable argument that “[their] motives were pure.”¹⁵⁷ The Court also considered the possibility of implementing an effects test, determining the type of advocacy based on “the actual effect speech will have [...] on a particular segment of the target audience.”¹⁵⁸ But again, this test runs into the same problems as the intent test, namely that we are seeking objective opinions from individuals who are naturally subjective, in this case asking the audience what effect the advertisements had on them. Although the Court has used effects tests in other First Amendment cases such as *Texas v. Johnson*,¹⁵⁹ as applied to political advertisements, the Court believed such a test to “[place] the speaker wholly at the mercy of the varied understanding of his hearers,”¹⁶⁰ and thus it cannot be considered a fair or reliable test.

Permitting either an intent-based or effects-based test may deter a person or institution from engaging in speech, due to the potential consequences of speaking. The Court believed these tests to be direct violations of the First Amendment, citing *Bellotti*, which stated “[t]he freedom of speech ... guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”¹⁶¹ The Court believed any test should focus on “the substance of the communication [...] [to] give the benefit of any doubt to protecting rather than stifling speech.”¹⁶² The Court’s test (the substance test) stated an ad should only be considered express advocacy if there is “no reasonable interpretation” other than the ad being designed to compel voters to support or reject a political candidate.¹⁶³ Using these criteria, the Court found the WRTL’s filibuster advertisements to clearly fall outside of express advocacy for two reasons: (1) The ads focused on a legislative issue, not a candidate, and (2) The ads gave no mention of the upcoming senatorial elections, nor of any Republican alternative to Senator Feingold.¹⁶⁴ The FEC argued these two features are common of express advocacy ads, as the “most effective campaign ads

156 *WRTL*, 551 U.S. at 468 (cited in note 143).

157 *Id* at 469.

158 *Id* at 469.

159 *Texas v. Johnson*, 491 U.S. 397, 404 (1989). A 1989 case concerning symbolic speech, *Texas v. Johnson* examined whether flag burning could be considered speech under the First Amendment. To make such a determination, the Court saw it appropriate “[to ask] whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.”

160 *WRTL*, 551 U.S. at 469 (cited in note 143), citing *Buckley*.

161 *Id* at 469, citing *Bellotti*.

162 *Id* at 469.

163 *Id* at 469-470.

164 *WRTL*, 551 U.S. at 470 (cited in note 143).

[...] avoid the magic words”¹⁶⁵ that would directly implicate them as advocacy. The Court rejected this argument, as it “perversely maintain[ed] that the less an issue ad resembles express advocacy, the more likely it is to be the functional equivalent.”¹⁶⁶ This would make genuine issue ads the most susceptible to Section 203’s jurisdiction, which would put undue restraint on a person’s First Amendment rights.¹⁶⁷ The Court formalizes in this decision that the only situations to which Section 203 may constitutionally apply are advertisements that are explicitly forms of express advocacy. This will allow many express advocacy ads to slip past the FEC unregulated, so long as they omit the “magic words.” But as “the distinction between discussion of issues [...] and advocacy of election or defeat of candidates [...] often dissolve in practical application,”¹⁶⁸ this is an inevitable result if the Court’s intentions are to ensure no protected speech is suppressed.¹⁶⁹

The last issue the Court addressed was whether regulating ads similar to those aired by WRTL might further any compelling interests. As before, the Court relied on precedent. Previously, the Court had “never recognized a compelling interest in regulating ads [...] that are neither express advocacy nor its functional equivalent,”¹⁷⁰ and they saw no need to alter the standard here. Critics of *WRTL* made the same argument heard and rejected in *Randall*, contending that communications run by corporations and non-profits in the weeks before elections are expenditures, and the government has a legitimate interest in restricting these expenditures to prevent the presence or appearance of corruption. However, the Court stated again that corruption could only be suspected in express advocacy ads, and to equate them with issue ads such as those aired by WRTL would be to “ignore their value as political speech.”¹⁷¹

Overall, *FEC v. Wisconsin Right to Life* permitted Section 203 of the BCRA to regulate ads that could only be interpreted as express advocacy, significantly expanding the types of electioneering communication that may be produced by corporations and non-profits in the weeks leading up to elections. If there is even the slightest indication that an ad advocates an issue, not simply a candidate, the Constitution demands the speech be permitted, and that “the benefit of the doubt [be given] to speech, not censorship.”¹⁷²

165 *Id* at 471, citing *McConnell*.

166 *Id* at 471.

167 *Id* at 471.

168 *WRTL*, 551 U.S. at 474 (cited in note 143).

169 *Id* at 474.

170 *Id* at 476.

171 *Id* at 479.

172 *WRTL*, 551 U.S. at 482 (cited in note 143).

B. *The Implications*

WRTL indicated the path the Roberts Court intended to take in all future campaign finance cases. Significantly, it implicitly overruled a significant portion of *McConnell* by granting such an all-inclusive exemption to Section 203. In rejecting *McConnell* and failing to consider either the effect or context of corporate ads, the Court clearly positioned itself as a pro-business, pro-capitalist institution. Furthermore, one cannot help but question why the Court would reject the application of a context-based test to issue advocacy, as such tests have been used in a wide variety of other First Amendment issues.¹⁷³ If the state has a legitimate interest in preventing both corruption and its appearance, the effect ads have on the public is a good measure of popular perception of government integrity.

While *McConnell* held that the BCRA Section 203, which prohibited corporate advertising in the weeks leading up to elections, was constitutional, *WRTL* severely undermined this ruling by only allowed explicit express advocacy to be restricted. This was the first sign that the Roberts Court majority was willing to discard prior rulings to advance certain ideological agendas. By failing to either formally overturn *McConnell* or establish a legitimate test in *WRTL*, the Court contradicted itself. In later chapters we will examine why the Roberts Court has, to some extent, fallen out of good grace with the majority of the American public; the characteristic indecisiveness of *WRTL* may be one key explanation.

Upon examination, the majority's new standard appears highly flawed for several reasons. The standard involves a purely textual, literal analysis, giving no consideration to the actual effect or context of the advertisements, as this would place undue scrutiny on legitimate issue ads. An ad must be "the linguistic equivalent of an express ad" for the BCRA to apply.¹⁷⁴ Even if an ad could be construed as express advocacy, it must still be allowed. The obvious problem with this test is that it applies to virtually all advertisements that refrain from using the magic words outlined in *Buckley*. To illustrate, Justice Souter's dissenting opinion called upon an issue ad broadcast in Montana preceding the 1996 elections.¹⁷⁵ The ad stated as follows:

Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But her nose was not broken. He talks law and order... but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call

173 See *Texas v. Johnson*, 491 U.S. 397, (1989); *Jacobellis v. Ohio*, 378 U.S. 184, (1964); *Schenck v. United States*, 249 U.S. 47, (1919).

174 Richard Briffault, *WRTL II: The Sharpest Turn in Campaign Finance's Long and Winding Road*, 1 Albany Gov't L Rev 101, 117 (2013).

175 *WRTL*, 551 U.S. at 515 (cited in note 143) (Souter dissenting).

Bill Yellowtail. Tell him to support family values.¹⁷⁶

As this ad did not explicitly endorse voting for or against Bill Yellowtail, under the majority's standard, this would be considered issue advocacy and thus outside the BCRA's jurisdiction, despite the fact that "no one [can] deny [...] the message called for defeating Yellowtail."¹⁷⁷ The ad's goal is to portray Bill Yellowtail as a man unfit for office, yet just a brief mention of his voting record allows this ad to be considered issue advocacy.

A similar analysis could be made of WRTL's advertisements. While they are certainly more subtle than the Yellowtail ad, when considering the ad's political context, there is no doubt that it attempted to do more than promote awareness about judicial filibustering. It is strange how robustly the majority rejects the prospect of factoring in context and actual effect, when it is only context that reveals the true meaning of words. Considering the context of words resulted in one of the Court's most well-known standards, the clear and present danger test. In *Schenck v. United States* (1919) the Court addressed whether Congress had the power to prevent an individual from "print[ing] and circulat[ing] to men who had been called and accepted for military service [...] a document [...] [that] intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few."¹⁷⁸ Under normal circumstances such actions would clearly be permissible free speech; however, these pamphlets were circulated during wartime.¹⁷⁹ Considering this context, the Court stated that "[certain] words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such nature and use in such circumstances to create a clear and present danger [...] which Congress has a right to prevent."¹⁸⁰ It is only through considering the context, and to a lesser extent the meaning and intent, of words that the Court may determine the danger they may pose. This line of reasoning makes the Court's assertion in *WRTL* that it is unable, or unwilling, to make similar judgments all the more baffling.

In general, the trends in issue advocacy spending and timing of these ads demonstrate that they may seek to achieve more than merely raising awareness about an issue. Issue advocacy spending quadrupled from 1996 to 2000, up to \$500 million, and "by the last two months before the election[s] almost all televised issue spots made a case for or against a candidate."¹⁸¹ If the majority of issue ads were exclusively about the issues, it cannot be a coincidence that the quantity and

176 *Id.* at 516 (Souter dissenting), citing *McConnell*.

177 *Id.* at 516 (Souter dissenting).

178 *Schenck v. United States*, 249 U.S. at 49-51 (1919).

179 *Id.* at 49.

180 *Id.* at 50.

181 *WRTL*, 551 U.S. at 517-518 (cited in note 143) (Souter dissenting).

proportion of “issue ads” directly attacking a candidate increase in the weeks leading up to an election. Instead, those issue ads are most certainly geared towards the election or defeat of a certain candidate. This view was validated in *McConnell*, which “looked to the statements of officeholders, candidates, [...] campaign strategists, and political scientists [...] to find that ads [in the weeks leading up to elections] [...] are the most effective campaign ads.”¹⁸² The reason why *McConnell* distinguished ads aired four weeks before an election from those aired six months prior was the electoral context.

There is no reason for the Court to refrain from adopting a reasonable person standard, that if a reasonable person would construe an advertisement as express advocacy, it may be prohibited. Applying this standard to the WRTL ad clearly reveals its electoral aspirations. Consider three important factors:

1. WRTL’s PAC actively campaigned against Senator Feingold during his 2004 campaign.¹⁸³
2. The advertisements prompted listeners and viewers to visit BeFair.org, a website which “displayed a document that criticized the two Senators [Feingold and Kohl] for voting to filibuster [...] and accused them of ‘putting politics into the court system [...] and costing taxpayers money.’”¹⁸⁴
3. The ads were aired with “no apparent relation to any Senate filibuster vote but was keyed to the timing of the senatorial election.”¹⁸⁵
4. Each ended with a disclaimer that “any candidate or candidates’ committee”¹⁸⁶ had not authorized the advertisement’s content.

These contextual clues indicate that WRTL was actively opposed to Senator Feingold’s reelection, inviting their audience to visit a website expressly calling for their defeat and recognizing that “the ads would be perceived by the voters who heard them as electoral ads.”¹⁸⁷ If not, there would be no reason to use the term candidate in their disclaimer.

Another issue the Court fails to consider is the connection between the effect of an act and the appearance of corruption. If the public perceives a corporate advertisement as evidence of a *quid pro quo* agreement between the business and a politician, it may create an appearance of corruption, which the government has a compelling interest to prevent. Statistics seem to indicate corporate advertisements do have this effect. As Justice Souter cited in his dissent, in 2002 over 71% of the

182 Briffault, 1 Albany Gov’t L Rev at 119 (cited in note 174).

183 *WRTL*, 551 U.S. at 523 (cited in note 143) (Souter dissenting).

184 *Id* at 524.

185 *Id* at 524.

186 Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 Ohio St L J 807, 821 (2007).

187 *Id* at 821.

American public thought “Members of Congress cast votes based on the views of their big contributors, even when those views differ from the Member’s own beliefs [...] while only a quarter think Members often base their votes on perceptions of what is best for the country.”¹⁸⁸ Being bombarded with corporate advertising in the weeks leading up to elections does nothing to quell the concerns of the general public, and if anything, exacerbates them.

The Court’s refusal to adopt a previously constitutionally established, context-based standard that would prevent corporate advertising from overwhelming individual voices can be explained by the justices’ ideological persuasions. All of the campaign finance cases heard under the Roberts Court have had the same five-judge majority:¹⁸⁹ Justices Roberts, Alito, Scalia, Thomas, and Kennedy. With rare exceptions, the five justices in the *WRTL* majority vote consistently conservative, meaning they typically vote in line with Republican ideals. The Republican Party and its historically pro-business approach would most benefit from de facto unrestricted corporate advertising. This trend dates back to the 1980s, a decade marked by a significant increase in the power of businesses in Washington due to the proliferation of political action committees.¹⁹⁰ The Republican Party’s advocacy for deregulation and lower corporate tax rates made the party very attractive to powerful business groups. As a result of their increased influence, Republicans were able to outspend Democrats by more than six to one during the Reagan era.¹⁹¹ It is not implausible to deduce that the reason the majority handpicks which evidence and precedent to consider is that a primary consideration is ensuring the continued strength of the Republican Party in a society whose youth is becoming more liberal with every passing election.¹⁹² That would certainly explain the majority’s unwillingness to factor basic elements such as context into its new advocacy test. This issue will be discussed further in later chapters, and it is an important element to keep in mind when considering our final four cases.

V. DAVIS V. FEDERAL ELECTION COMMISSION

A. *The Case*

While *Buckley* and *Randall* seemed to put an end to the legal debate on contribution limits, allowing them unless they prevented a candidate from engag-

188 *WRTL*, 551 U.S. at 507 (cited in note 143) (Souter dissenting).

189 With the exception of *Randall*, on which they were joined by Justice Breyer in judgment.

190 Jacob S. Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer – And Turned Its Back on the Middle Class* 164 (Simon & Schuster 2010).

191 *Id.* at 166-167.

192 See Sheryl Gay Stolberg, *Young, Liberal and Open to Big Government*, (New York Times, February 10, 2013) online at http://www.nytimes.com/2013/02/11/us/politics/in-montana-young-liberal-and-open-to-big-government.html?_r=0 (visited Nov 2, 2014).

ing in effective advocacy, the issue was once again raised in *Davis v. FEC*. In *Davis*, the Court considered the constitutionality of “impos[ing]” different campaign contribution limits on candidates competing for the same congressional seat.¹⁹³

Davis v. FEC considered a challenge to Section 319 of the BCRA, henceforth referred to as the Millionaire’s Amendment.¹⁹⁴ The Millionaire’s Amendment was established to level the playing field where there was a great disparity in personal wealth between candidates for the same office. If one candidate is deemed to be self-financing,¹⁹⁵ an opponent “[could] receive individual contributions at triple the normal limit.”¹⁹⁶ Because individual contribution limits at the time were \$2,300, the opponents of self-financing candidates were allowed to receive individual contributions of up to \$6,900.¹⁹⁷ Jack Davis, a self-financed Democratic candidate for New York’s 26th Congressional District, filed suit against the FEC, challenging the constitutionality of the Millionaire’s Amendment after two unsuccessful runs for office in 2004 and 2006.¹⁹⁸ The case did not examine the constitutionality of the FEC’s contribution limits but rather the constitutionality of subjecting two candidates running for the same office to different limits.

In a 5-4 majority decision, the Court ruled in favor of Davis, declaring Section 319 of the BCRA unconstitutional, as it placed an undue burden on the First Amendment rights of self-financed candidates.¹⁹⁹ The problem with Section 319 was not that it had higher contribution limits, but that “it raise[d] the limits only for the non-self-financing candidate.”²⁰⁰ After examining its history, the Court found it had never allowed different contribution limits to be imposed on candidates in the same election,²⁰¹ and there was no special circumstance in the present to justify deviating from this standard. Most importantly, the non-self-financing candidate’s contribution limits were increased on the condition that the self-financing candidate’s expenses exceeded a certain amount. Although the amendment was not an explicit cap on Davis’s personal expenditures, the Court viewed Section 319 as “impos[ing] an unprecedented penalty on any candidate who robustly exercises [their] First Amendment right [of political speech].”²⁰² Essentially, the Court be-

193 *Davis v. FEC*, 554 U.S. 724, 728 (2008).

194 *Id.* at 729.

195 *Id.* at 729. A candidate’s “self-financing” status is determined by calculating the opposition personal funds amount (OPFA). The OPFA is “a statistic that compares the expenditure of personal funds by competing candidates and also takes into account to some degree certain other fundraising.” When a candidate’s personal expenditures cause the OPFA to exceed \$350,000, that candidate is deemed to be self-financed.

196 *Id.* at 729.

197 *Davis*, 554 U.S. at 731 (cited in note 193).

198 *Id.* at 731.

199 *Id.* at 744.

200 *Id.* at 738.

201 *Davis*, 554 U.S. at 738 (cited in note 193).

202 *Id.* at 739.

lieved Davis would be punished for engaging in free speech, as his speech would empower his opponent to raise more money and run a fiercer campaign against him.²⁰³ The Court equated this restriction to the more explicit expenditure limits discussed in *Buckley*, which, as discussed earlier, rejected any restrictions on a candidate's ability to use their personal finances to engage in political speech.²⁰⁴ *Buckley* also allowed a candidate to spend unlimited personal funds if he or she abstained from receiving public financing, but Section 319 provides no similar option. Instead, the Court found, it forces a candidate to either "abide by a limit on personal expenditures or endure the burden that is placed on that right by activation of a scheme of discriminatory contribution limits."²⁰⁵

As seen in *Randall* and *WRTL*, even a significant imposition on First Amendment rights may be justified if it is narrowly tailored to fulfill a compelling state interest,²⁰⁶ including the interest in eliminating corruption or its appearance. The amendment in *Davis* failed to match this standard. Again relying on *Buckley*'s precedent, which "reasoned that reliance on personal funds reduces the threat of corruption,"²⁰⁷ the Court found Section 319 did not advance any compelling government interest because it discouraged expenditures. The more candidates spend of their own funds on a campaign, the less dependent they are on big money donors, thus making them less beholden to these donors once in office.

The second compelling interest cited by the FEC was that, by discouraging excessive expenditures, Section 319 served to "level electoral opportunities for candidates of different personal wealth."²⁰⁸ FEC effectively asked the Court to overturn the portion of *Buckley* that held "the interest in equalizing the financial resources of candidates competing for federal office is [not] [...] a justification for restricting the scope of federal election campaigns."²⁰⁹ The Court again rejected the FEC's argument. As there was nothing about Section 319 to provide the special justification to ignore *Buckley*, the Court upheld *Buckley*'s standard that restricting the speech of one party to "enhance the relative voice of others is wholly foreign to the First Amendment."²¹⁰ Overall, the Court found that Section 319 advanced no compelling government interest because it did not serve to prevent corruption and cannot be allowed to equalize the financial standing of competing candidates. Financial wealth is undeniably an advantage when running for office, but if the Court, or by extension Congress, were to rule that this was an advantage that could

203 *Id.* at 738.

204 *Id.* at 738.

205 *Davis*, 554 U.S. at 740 (cited in note 193).

206 *Ibid.*, citing *FEC v. Massachusetts Citizens for Life* (479 U.S. 238).

207 *Ibid.*, p. 740-741, citing *Buckley*.

208 *Ibid.*, p. 741, citing the FEC Brief for the Appellee, p. 34.

209 *Buckley v. Valeo*, 424 U.S. 1, 56 (1976).

210 *Davis*, 554 U.S. at 741-742 (cited in note 193), citing *Buckley*.

be regulated, they would be actively “influenc[ing] voters’ choices”²¹¹ by restricting an individual’s political speech. As this would clearly be an unconstitutional burden in the Court’s view, Section 319 of the BCRA was held to violate the First Amendment.²¹²

B. *The Implications*

The deciding factor in *Davis v. FEC* was the Court’s rejection of the notion that equalizing electoral opportunities is a compelling government interest. In making such a determination, the Court failed to understand the direct relationship between electoral equality and the public’s perception of corruption.

The Millionaire’s Amendment clearly sets out to equalize electoral opportunities and increase competitiveness by providing less wealthy candidates a way to compete with self-financed candidates, provided their message is potent enough to encourage donations. Section 319 does not automatically triple a candidate’s contributions, as the candidate still has to persuade the public to contribute. In fact, the statute could serve to increase the amount of speech in a given election. Both the *Austin* and *Nixon* precedents support the notion that certain forms of speech may be restricted in the interest of preventing “the corrosive and distorting effects of immense aggregations of wealth [...] that have little or no correlation to the public’s support.”²¹³ If spending money is the equivalent of speech, the Millionaire’s Amendment may have a marginal effect on a self-financed candidate’s desire to speak, but nothing in the Amendment actively prohibits them from speaking. Their ability to speak remains the same. It can, at best, be described as a marginal restriction on their First Amendment rights, far more marginal than the contribution limits upheld in *Buckley* and *Nixon*. It is important to note that in his challenge, Jack Davis could not prove Section 319 “cause[d] him – or any other self-funding candidate – any First Amendment injury whatsoever.”²¹⁴ Given this lack of evidence, any potential constitutional infringement remained entirely theoretical, and if no injury occurred throughout the entirety of two congressional elections cycles, one must question whether a valid threat would truly emerge.

The problem with striking down the Millionaire’s Amendment is that, in most congressional elections, a candidate simply has to outspend his or her opponent to ensure victory. A 2012 report by the Center for Responsive Politics found that “since the 2000 election, candidates who spent more money in open

211 *Id.* at 742.

212 *Id.* at 744.

213 Grant Fevurly, *Davis v. Federal Election Commission: A Further Step Towards Campaign Finance Deregulation and the Preservation of the Millionaire’s Club*, 81 U Colo L Rev 627, 655 (2010), citing *Austin*.

214 *Davis*, 554 U.S. at 753 (cited in note 193) (Stevens dissenting).

seat House races won 86 percent of the time.²¹⁵ It should come as no surprise then that more than half the members of the 113th Congress are millionaires, with an average net worth of \$1,008,787.²¹⁶ These statistics clearly indicate the great advantage that independently wealthy candidates have when seeking office. This threatens to create the image of a plutocratic government in the eyes of the American public, where only the wealthiest individuals have the power to influence and seek office. The dangers of plutocracy are discussed at length by Hasen, who classifies anti-plutocracy as one of three basic democratic principles that must be protected, alongside the guarantee of essential political rights and the ability to engage in collective action.²¹⁷ With success in the U.S. political system dependent, in large part, on wealth, it may be a responsibility for the government to provide the less fortunate with “a subsidy to engage in political activity.”²¹⁸ Such a subsidy may be justified by preventing the appearance of corruption in Washington. As previously discussed, with only 25% of the public believing “Members [of Congress] often base their votes on perceptions of what is best for the country or their constituents,”²¹⁹ the general public is clearly concerned about the current state of Congress.²²⁰ As the public becomes more knowledgeable about the financial status of members of Congress, they may begin to view Congress as nothing more than a club of millionaires who spend their way into office in order to implement policies that preserve their social status and position of power (i.e. tax breaks, business deregulation, and an indifference to the long-term viability of social programs). While this is not *quid pro quo* corruption, effectively allowing individuals to purchase congressional seats could certainly be viewed as evidence of a corrupt democratic process. The role of Congress is to represent the will of the people; the active consideration of any factor outside the will of the people could be corruptive behavior. Whether a candidate is able to win through use of large donor funds or large personal funds, allowing money to be such a fundamental prerequisite for public service threatens the integrity of the political process. Thus, minimizing the

215 See Stephanie Condon, *Why is Congress a millionaires club?* (CBS News March 27, 2012), online at <http://www.cbsnews.com/news/why-is-congress-a-millionaires-club/> (visited Nov 2, 2014).

216 See Carly Cody, *Majority In Congress Are Millionaires*, (NPR January 13, 2014), online at <http://www.npr.org/blogs/itsallpolitics/2014/01/10/261398205/majority-in-congress-are-millionaires> (visited Nov 2, 2014).

217 Richard Hasen, *The Supreme Court and Election Law* 11 (New York University Press 2003).

218 *Id.* at 86.

219 *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 507 (2007) (Souter dissenting).

220 See Elizabeth Mendes, *Americans Down on Congress, OK With Own Representative*, (Gallup Politics May 9, 2013), online at <http://www.gallup.com/poll/162362/americans-down-congress-own-representative.aspx> (visited Nov 2, 2014). Of course, barring action by the Court or Congress itself, any movement against the emerging plutocracy in national politics will require a substantial change in the general public’s view of Congress. Despite a 16% approval rating of Congress as a whole in May 2013, the public still held their own representatives in fair standing, with a 44% approval rating. If change is to occur, the public must begin to associate their own representative with the general disdain they feel for Congress.

role of money in elections might reduce the threat of corruption.

Another approach to this issue is to ask what purpose elections serve to the general public. In a hypothetical scenario, if two candidates for a given race receive equal funding, their policy stances, in addition to incumbency, would matter much more for election success than they do in an absence of equal funding. Providing less wealthy candidates the opportunity to match the funds of their self-financed opponent could decrease the plutocratic government forming in Washington, “combat the perception that congressional seats are for sale to the highest bidder,”²²¹ and promise a greater focus on political discourse, leading to a more informed general public.

VI. CITIZENS UNITED V. FEC

A. *The Case*

The most infamous campaign finance case decided by the Roberts Court is *Citizens United v. FEC*, a landmark case for several reasons. While the Roberts Court had been adamant about deferring to *stare decisis* in deciding previous campaign finance cases, a 5-4 decision, written by Justice Kennedy, overturned the entirety of *Austin* and a significant portion of *McConnell*, finding that any restriction on independent corporate expenditures was constitutionally invalid.²²²

Citizens United is a conservative nonprofit organization funded by both individuals and for-profit corporations.²²³ The incident in *Citizens United* involved a political film released by the organization in 2008, entitled *Hillary: The Movie*.²²⁴ *Hillary* was available for purchase on “Elections ’08,” a video-on-demand channel, but advertisements for the film were run on both broadcast and cable television.²²⁵ *Citizens United* sought to air *Hillary* during the Democratic presidential primaries, but doing so would have violated Section 441 of the BCRA, which prohibited electioneering communication that “can be received by 50,000 or more persons in a State where a primary election is being held within 30 days.”²²⁶ As *Hillary* was to air on a “cable video-on-demand system that had 34.5 million subscribers,”²²⁷ it would clearly exceed the 50,000 person threshold and thus be subjected to Section 441 penalties. Furthermore, as *Hillary* was clearly “a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President,” it did

221 *Davis*, 554 U.S. at 749 (cited in note 193) (Stevens dissenting).

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

223 *Id.* at 311.

224 *Id.* at 311.

225 *Id.* at 311.

226 *Citizens United* 558 U.S. at 310 (cited in note 222), citing BCRA §100.29(b)(3)(ii).

227 *Id.* at 323.

not meet the *WRTL* exception for issue advocacy ads.²²⁸ Citizens United challenged Section 441 as unconstitutional, and the Court found itself asked to reconsider *Austin*, and part of *McConnell*, in determining the validity of Citizens United's claim.²²⁹

The Court had several issues to address in *Citizens United*: (1) whether PACs provide sufficient free speech opportunities for corporations, (2) whether corporations should receive the same First Amendment protections as individuals, and (3) whether Section 441 was narrowly tailored to advance a compelling government interest.

Political Action Committees (PACs) are institutions that allow corporations or individuals to engage in political speech.²³⁰ While a corporation is prohibited under the BCRA from engaging in express advocacy, as reaffirmed in *WRTL*, it may use an associated PAC to raise money "from individual[s] associated with the corporation, [...] contribut[e] directly to candidates for federal office, and [...] us[e] [the money] without limitation to pay for independent expenditures to communicate to the general public the corporation's views on such candidates."²³¹ This effectively allows a corporation to subvert any BCRA restrictions by establishing a PAC, which would provide them a route to nearly unlimited political speech.²³² However, the Court found that the existence of PACs as a mechanism for corporate political speech did not justify the restrictions on independent corporate expenditures and direct contributions, as "PACs are burdensome alternatives [that are] expensive to administer and subject to extensive regulations."²³³ The Court provided evidence for these sentiments in the fact that "fewer than 2,000 of the millions of corporations in [America] have PACs."²³⁴ Additionally, there is a fairly lengthy process to establish a PAC, meaning that if a company lacks foresight, it may be unable to form a PAC in time to influence a "current campaign."²³⁵ If a company were permitted to engage in electioneering communication using general treasury funds, it would not face the burden that comes with forming and running a PAC, and thus a PAC cannot be considered a reasonable substitute for free corporate

228 Id at 316.

229 Id at 326.

230 *Citizens United* 558 U.S. at 337 (cited in note 222).

231 Brief for the Appellee. *Citizens United v. Federal Election Commission*, No 08-205, *3 (U.S. Sup Ct filed Feb 17, 2009) ("Brief for the Appellee"), online at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_205_Appellee.authcheckdam.pdf (retrieved Nov 16, 2014).

232 See *Contribution Limits 2013-14*, (Federal Election Commission), online at <http://www.fec.gov/pages/brochures/contriblimits.shtml> (visited Nov 2, 2014). (While allowed to engage in unlimited independent expenditures, PACs have a direct contribution ceiling of \$5,000 to a single candidate per election and an annual \$15,000 limit to national party committee donations).

233 *Citizens United*, 558 U.S. at 337 (cited in note 222).

234 Id at 338.

235 Id at 339.

speech.²³⁶

The Court then turned to the question of whether corporate speech should be entitled to the same constitutional freedoms as individual speech. Citing precedent, the Court upheld its long standing tradition that “political speech does not lose First Amendment protection simply because its source is a corporation,”²³⁷ citing *Buckley* and *Bellotti* as precedent. *Buckley* focused on Section 608 of FECA, which regarded individual contribution and expenditure limits, but did not address Section 610, which imposed a “ban on corporate and union independent expenditures.”²³⁸ However, considering the Court’s ruling on Section 608 that expenditure limits are unconstitutional, the majority in *Citizens United* believed that the *Buckley* Court would have overturned Section 610 if it had been challenged.²³⁹ Similarly, *Bellotti* concluded “the government lacks the power to ban corporations from speaking,”²⁴⁰ which the majority read to extend to any political speech restrictions.²⁴¹

As PACs are not a valid substitute for direct independent corporate expenditures, and as corporations have the same political speech rights as individuals, Section 441 could only be upheld as constitutional if it were narrowly tailored to advance a compelling government interest. In *Austin*, the Court held that restrictions on corporate expenditures were valid under the anti-distortion principle. Corporations generally have access to far greater financial resources than individuals, so the government has a compelling interest to ensure these funds are not used to promote ideas “that have little or no correlation to the public’s support for the corporation’s political ideas.”²⁴² However, the Roberts Court found this restriction on political speech “based on the speaker’s corporate identity” problematic.²⁴³ This flies in the face of *Buckley* and *Bellotti*, both of which found that “equalizing the relative ability of individuals and groups to influence [...] elections” is not a compelling government interest, a view that was reaffirmed in *Davis*.²⁴⁴

Furthermore, the Court considered the actual ability of corporations to distort politics. As “more than 75% of corporations whose income is taxed under federal law [...] have less than \$1 million in receipts per year,”²⁴⁵ any anti-distortion principle applied to all companies is not narrowly tailored. Consequently, the Roberts Court found the *Austin* decision to be an anomaly and overruled it, invalidat-

236 Id at 339-340.

237 *Citizens United*, 558 U.S. at 342 (cited in note 222), citing, in part, *Bellotti*.

238 Id at 346.

239 Id at 346.

240 Id at 347.

241 *Citizens United*, 558 U.S. at 347 (cited in note 222).

242 Id at 348, citing *Austin*.

243 Id at 348.

244 Id at 350, citing *Buckley*.

245 *Citizens United*, 558 U.S. at 354 (cited in note 222).

ing anti-distortion as a compelling government interest.²⁴⁶ To the Court, *Austin* and *McConnell* were in conflict with *Buckley* and *Bellotti*, and instead of attempting to rectify or explain this contradiction, it simply chose to overrule the former cases.

The FEC also attempted to justify Section 441 by arguing that it served to advance the government's interest in preventing corruption or the appearance of corruption.²⁴⁷ Just as in *Davis*, *WRTL*, and *Randall*, the Court rejected this argument using the *Buckley* precedent. As the expenditures are made independently from the candidates, there is no opportunity for any *quid pro quo* corruption.²⁴⁸ However, while past decisions have shut down the notion that independent expenditures could induce government corruption, the majority in *Citizens United* leaves open a window for future reconsideration of the validity of expenditure limits, writing that "when Congress finds that a [corruption] problem exists, we must give that finding due deference."²⁴⁹ Thus, if Congress were to uncover evidence suggesting corporations are able to "corrupt" politicians through independent expenditures, and if the Court took this evidence as valid, it is possible that the Court may reverse its position on the of expenditures and corruption in the future. However, as discussed later, at the time of *Citizens United*, the Court had access to the *McConnell* record, a summary of a more than 100,000 page trial record documenting evidence that "powerfully demonstrates that electioneering communications paid for ... [by] labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting."²⁵⁰ Similarly, a public opinion poll that found "80% of [the American public] believed that those who engaged in electioneering communications received special consideration from the elected officials they had supported."²⁵¹ At the very least, these documents provide evidence of an appearance of corruption, yet Kennedy and the majority chose to ignore it.

The final compelling government interest argued by the FEC was the "interest in protecting dissenting shareholders from being compelled to fund corporate political speech."²⁵² One could argue that failing to provide shareholders an option to prevent their funds from use in political speech leads to coercion, given shareholders' limited ability to choose what political speech their money supports. The majority did not directly address whether protecting shareholders was a compelling government interest, but in the case of Section 441, they found this interest was not actually present. If the purpose of Section 441 were to protect shareholders

246 Id at 364-365.

247 Id at 356.

248 Id at 357.

249 Id at 361.

250 Alexander Polikoff, So How Did We Get Into This Mess? Observations on the Legitimacy of *Citizens United*, 105 Nw U L Rev 203, 219 (2011).

251 Id at 219.

252 Id at 46.

from coercion to support a certain political party by investing in a company, the restriction on independent expenditures would apply at all times, not merely during the months leading up to an election.²⁵³ Furthermore, Section 441 does not distinguish between different forms of corporations. Included among the corporations restricted by Section 441 are “nonprofit corporations and for-profit corporations with only single shareholders,”²⁵⁴ neither of which have any dissenting shareholders to deal with. Thus, even if Section 441 were designed to protect shareholders’ interests, it would fail to pass strict scrutiny, as the law is not narrowly tailored to apply only to publicly traded companies. As the FEC failed to justify Section 441’s restrictions on independent corporate political expenditures, the Court was also forced to overturn “the part of *McConnell* that upheld BCRA[‘s] [...] restrictions on corporate independent expenditures.”²⁵⁵

B. *The Implications*

The most significant concern with *Citizens United* is that it enables corporations to hold potentially corruptive levels of influence over politicians and manipulate and alter voter choice patterns. Before discussing the legal pitfalls of the majority’s holding, let us briefly consider the historical context and practical legal implications *Citizens United* created. While *WRTL* effectively overruled a portion of *McConnell*, *Citizens United* marked the first time in the Court’s history that a campaign finance decision was formally overturned.²⁵⁶ Significantly, *Citizens United* never asked the Court to reconsider the constitutionality of *Austin* or *McConnell*,^{257 258} instead only seeking an as-applied challenge to the BCRA.²⁵⁹ The Court nevertheless rejected those decisions and essentially rendered *WRTL* null and void by declaring all independent corporate expenditures valid, eliminating the need to distinguish between express and issue advocacy.²⁶⁰ In Justice Stevens’s view, the majority turning an as-applied challenge into a facial challenge to sections of the BCRA runs in direct contradiction to the Court’s behavioral precedent, as it is a “fundamental principle of judicial restraint that courts should [...] [not] formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”²⁶¹ With this context, it seems clear that the *Citizens United* decision

253 *Id.* at 46.

254 *Citizens United*, 558 U.S. at 362 (cited in note 222).

255 *Id.* at 365.

256 Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* § at 563 (Simon 2013).

257 *Id.* at 563.

258 *Citizen United* 558 U.S. at 396 (cited in note 222) (Stevens dissenting).

259 *Id.* at 397 (Stevens dissenting).

260 Coyle, *The Roberts Court* at 227 (cited in note 256).

261 *Citizens United* 558 U.S. at 399 (cited in note 222) (Stevens dissenting), citing *Washington State Grange*, 552 U.S., at 450.

was a predetermined attack on campaign finance reform.

Two legal decisions in the wake of *Citizens United* clearly illustrate the danger this opinion poses to the legitimacy of American elections: first, the Supreme Court's ruling in *American Trade Partnership v. Bullock*, and second, the D.C. Appellate Court's *SpeechNow.org v. FEC*. In *Bullock*, the Court held that *Citizens United* applies just as forcefully to state and local elections as it does to federal campaigns,²⁶² reversing the decision of the Montana State Supreme Court with a sharp one-page per curiam opinion.²⁶³ Just as in *Randall* and *Arizona PAC*, the Supreme Court intervened in a matter entirely contained within a single state (in this case, Montana). The pre-Roberts Supreme Court practiced, with almost no exception, a policy of legislative deference when dealing with matters of state or local campaign finance, as demonstrated in our previous discussion on *Austin*, *Nixon*, and *McConnell*. If Montana's legislative and judicial branches "concluded that [they] had a compelling interest in limiting independent expenditures by corporations,"²⁶⁴ precedent would suggest the Court does not have the authority to rule otherwise, but clearly the Roberts majority disagreed. In fact, the Roberts Court has completely abandoned the notion of legislative deference as it relates to campaign finance law, with *Randall* and *Arizona PAC* overturning state laws and *WRTL*, *Davis*, and *Citizens United* overruling the judgment of the U.S. Congress.

An even more concerning post-*Citizens* decision is *SpeechNow.org v. FEC*. Applying *Citizens United*'s holding that corporations could engage in unlimited independent expenditures, *SpeechNow* ruled against limits on individual contributions to PACs that engage in independent expenditures.²⁶⁵ This allowed for the creation of SuperPACs, organizations that "can raise and spend unlimited amounts as long as they do it independent of any candidate."²⁶⁶ While they are prohibited from directly donating to candidates,²⁶⁷ SuperPACs often lack true independence from the candidates they support. As Coyle writes, "[in 2012] a number of former campaign aides move[d] to create [SuperPACs] and then used their funds on behalf of their former bosses."²⁶⁸ For example, SuperPACs explicitly designed to support

262 See Rachel Weiner, *Supreme Court's Montana decision strengthens Citizens United*, The Fix Blog (Washington Post 25 June 2012), online at http://www.washingtonpost.com/blogs/the-fix/post/supreme-courts-montana-decision-strengthens-citizens-united/2012/06/25/gJQA8Vln1V_blog.html.

263 *American Trade Partnership v. Bullock*, 567 U.S. 2490, 2491 (2012).

264 *Id.* at 2491.

265 Coyle, *The Roberts Court* at 275 (cited in note 256).

266 *Id.* at 275.

267 See Center for Responsive Politics. "Super PACs." *OpenSecrets.org* (22 March 2014). Retrieved from: <https://www.opensecrets.org/pacs/superpacs.php?cycle=2014>

268 Coyle, *The Roberts Court* at 275-276 (cited in note 256).

Barack Obama and Mitt Romney were both operated by former staffers.²⁶⁹ Restore Our Future, the pro-Romney SuperPAC, spent \$88,572,350 on Obama opposition ads during the 2012 campaign,²⁷¹ while the pro-Obama SuperPAC, Priorities USA Action, spent \$65,166,189.²⁷² As SuperPACs can accept unlimited individual contributions, and as the actual degree of separation between SuperPACs and political campaigns is often hazy, the D.C. Court's ruling in *SpeechNow* essentially allows individuals and corporations to subvert direct contribution limits.

Citizens United has opened a troubling route for the legal future of campaign finance reform,²⁷³ but the decision significantly impacted the American political process, since the allowance of unlimited corporate expenditures threatens to crowd out individual political speech. For-profit corporations do not inform the public but rather distort public opinion with little opposition. As Wilson notes, while the majority "argued that lifting the ban on corporate spending would give small corporations the power to push back against large corporate interests,"²⁷⁴ in actuality, eliminating expenditure limits allows large corporations to strengthen their dominance.²⁷⁵ Large corporations typically have pro-business interests, such as "less stringent environmental protection laws, caps on products liability awards, tax breaks for businesses, and fewer employee protection laws," which run contrary to other societal goals.²⁷⁶ The elimination of expenditure limits allows these messages to be propagated with diminished backlash or criticism from individuals or small businesses.²⁷⁷ For example, during the 2008 election cycle Exxon Mobil reported a profit of \$85 billion.²⁷⁸ As Wilson notes, these profits are "in excess of sixteen times the total expenditures of all federal elections [\$5.3 billion]."²⁷⁹ Beyond Exxon, the collective profits of the 100 most powerful American companies

269 See *Super PACs* (Center for Responsive Politics Mar 22, 2014) online at <https://www.opensecrets.org/pacs/superpacs.php?cycle=2014> (visited March 22, 2014).

270 See Melanie Mason, *Pro-Romney 'super PAC' reports \$12 million haul*. (LA Times Jul 5, 2012), online at <http://articles.latimes.com/2011/jul/05/news/la-pn-romney-fundraising-20110705> (visited Oct 28, 2014).

271 See Center for Responsive Politics. "Restore Our Future Independent Expenditures." *Open-Secrets.org* (11 Apr 2013). Retrieved from: <https://www.opensecrets.org/pacs/indexpend.php?strID=C00490045&cycle=2012>

272 See *Restore Our Future Independent Expenditures* (Center for Responsive Politics April 11, 2013) online at <https://www.opensecrets.org/pacs/indexpend.php?strID=C00490045&cycle=2012> (visited Oct 28, 2014).

273 At least in regards to reforms that aim to reduce the amount of money in U.S. elections.

274 Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 Cardozo L Rev 2365, 2389 (2010).

275 Id at 2389.

276 Id at 2389-2390.

277 Id at 2390.

278 Wilson, 31 Cardozo L Rev at 2382 (cited in note 274).

279 Id at 2382.

topped \$600 billion in 2008.²⁸⁰ If even 1% of these profits were spent on political speech, “the resulting \$6 billion fund would double what the Obama or McCain campaigns spent, or what every candidate for a House or Senate seat spent, during the 2008 election cycle.”²⁸¹ These figures clearly indicate the ability of a corporation such as Exxon to dominate the airwaves in support of a particular candidate or party, if it chose to do so. Furthermore, legitimizing unlimited expenditures creates intense competition to gain influence over politicians, which disadvantages small businesses and individuals. In fact, politicians might even encourage such behavior. As noted in Justice Stevens’s dissent, “some corporations [...] fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded.”²⁸² Following this chain of thought, if the public perceives that politicians are selling out to the highest bidder, or even putting themselves up on the auction block, faith in government and electoral processes may be eroded. It appears that preventing both corruption and the appearance of corruption is a compelling government interest that the Court’s majority has chosen to ignore.

If these advertisements had no effect on the voting populace, the Court’s arguments may be more persuasive; however, a study by Saint Louis University suggests otherwise. A conventional, though not universally accepted, theory of voter behavior is rational choice theory, meaning that voters will elect the candidate they believe will maximize their personal gain.²⁸³ However, this theory does not hold up under empirical research. As voters are typically aware that “individual vote[s] will have little impact [...] the very act of voting is irrational from a strict utility perspective.”²⁸⁴ This insignificance of one’s own vote leaves voters susceptible to outside influence and disincentivizes them from seeking out perfect, unbiased information. As a result, voters leave themselves “particularly vulnerable to manipulation by political candidates and parties.”²⁸⁵ Political candidates and parties are obviously not neutral bystanders in an election, and thus the information they provide for voters will be slanted to compel the voter to choose a certain candidate. Their ads are explicitly designed to “manipulat[e] voters’ decision-making processes.”²⁸⁶ Furthermore, the ability to manipulate voter choice is almost entirely determined by “the party who ultimately has the most power to shape future

280 Polikoff, 105 Nw U L Rev Colloquy at 203 (cited in note 250).

281 Id at 203.

282 *Citizens United* 558 U.S. at 468 (cited in note 222) (Stevens dissenting).

283 Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court’s Campaign Finance Jurisprudence*. 2010-17 SLU Sch L Legal Stud Research Paper Series, No. 2010-17, p. 687.

284 Id at 689.

285 Id at 717.

286 Id at 717.

decision[s].²⁸⁷ In elections, that power is money, and *Citizens United* provided corporations with the power to substantially affect the outcome of elections. A fundamental prerequisite of democracy is the integrity of the electoral process; allowing corporations to spend unlimited funds to manipulate and alter voter choices directly opposes this principle.

The tangible effect of *Citizens United* on state elections has already become evident. A study by Indiana University examined the effect of *Citizens United* on spending in state elections, comparing eleven states that had “banned corporate independent expenditures” to five states whose laws were not altered by the decision.^{288 289} States that had previously banned corporate expenditures saw an 80% increase in independent spending from 2006 to 2010, after *Citizens United*.²⁹⁰ Thirteen million dollars of this increase may be explained by a general rise in political expenditures, as the control states saw a 34.2% rise in spending, leaving a majority of the increase unaccounted for.²⁹¹ The study also found a 77% increase in “501(c) nonprofit organizations and 527 political committees” spending in altered states.²⁹² Due to highly complicated disclosure laws,²⁹³ it is difficult to determine exactly the source of this increase, but, given the dramatic increase occurred directly after corporations were freed to spend at will, it seems safe to conclude a causal relationship. This increase greatly decreases the power of individuals to engage in effective political speech, as they must still adhere to individual contribution limits; it also has a detrimental effect on national political parties. This issue was raised by Justice Stevens, who wrote that, since political parties are still prohibited from using soft money for advertisements,²⁹⁴ “the Court’s ruling [...] dramatically enhances the role of corporations and unions – and the narrow interests they represent – vis-à-vis the role of political parties [...] in determining who will hold public office.”²⁹⁵ In sharply reducing the ability of individuals and political parties to engage in effective campaign advocacy, the Court’s majority has seriously damaged the American political process.

Naturally, not all legal scholars agree with this conclusion. Melone ar-

287 Wilson, 2010-17 SLU Sch L Legal Stud Research Paper Series at 687 (cited in note 283).

288 Douglas M. Spencer and Abby K. Wood *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 Ind L J 315, 317 (Winter 2014).

289 *Id.* at 317. Analysis of federal election spending was excluded, as “there [was] no control group against which to compare changes in spending behavior before and after an event.”

290 *Id.* at 342.

291 *Id.* at 342.

292 Spencer, Wood 89 Ind L J at 347 (cited in note 288).

293 *Id.* at 347. “501(c) organization are not required by law to disclose the identity of their donors [...] political committees are required to disclose their donors, [but] the information is not easily accessible, requiring formal public-records requests.”

294 *Citizens United* 558 U.S. at 412 (cited in note 222) (Stevens dissenting).

295 *Id.* at 412.

gues that “it is difficult to comprehend why wealth is singularly distorting,”²⁹⁶ and removing inequalities of opportunity brought about by wealth will not eliminate corruption or other natural advantages.²⁹⁷ Furthermore, Melone argues unlimited expenditures will increase issue debates, as “a corporate political advertisement supporting or opposing a particular position or candidate [...] will generate an immediate response by corporations with competing views.”²⁹⁸ The flaw in this argument is the assumption that corporations will have opposing views on an issue. The idea that Verizon and AT&T will have competing views on a policy issue, as Melone insinuates,²⁹⁹ is simply unsound. If all of the major corporations within a given industry are united in their support for a particular business-friendly candidate or policy, due to *Citizens United*, it will prove near impossible for small businesses and individuals with opposing views to make their voices heard over the corporations’ limitless spending. The final, common argument made by defendants of the *Citizens United* decision is that corporations are not responsible for inciting corruptive behavior in politicians, as “[their] money has no purchasing power if nothing is for sale.”³⁰⁰ It may be true that politicians are selling their votes, as some corporations fear,³⁰¹ but at the very least, corporations enable such acts, since without a desire on the part of corporations to purchase influence, politicians’ offers have no value.

Lastly, *Buckley* reveals how blatantly the majority ignored precedent in *Citizens United*. *Buckley* found individual expenditure limits to be unconstitutional while upholding contribution limits; however, the plaintiffs and the Court left a separate section of FECA that imposed restrictions on corporate election spending untouched.³⁰² This is especially significant as plaintiffs challenged “virtually everything else in the FECA,”³⁰³ indicating they believed such a challenge would fail before the Court. Furthermore, if the *Buckley* Court viewed restrictions on corporate speech as a serious First Amendment offense, they likely would have addressed the issue regardless of the plaintiffs’ remissness. By failing to lump corporate expenditure limits in with the unconstitutionality of individual expenditure limits, the *Buckley* Court insinuated that the two cannot be treated as comparable rights, implying that individuals and corporation have different free speech rights. As Justice Stevens wrote, by concluding that corporate speech must be treated the same

296 Matthew Melone, *Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DePaul L. Rev. 29, 93 (Fall, 2010).

297 *Id.* at 93.

298 *Id.* at 94.

299 *Id.* at 94. “It is not too much to assume, for example, that an advertisement by the cable industry supporting a position favorable to its interest would be met vigorously by a competing advertisement from Verizon Communications, AT&T, or DirectTV.”

300 Melone 60 DePaul L Rev at 97 (cited in note 296).

301 *Citizens United* 558 U.S. at 468 (cited in note 222) (Stevens dissenting).

302 Polikoff, 105 Nw U L Rev Colloquy at 212-213 (cited in note 250).

303 *Id.* at 213.

as individual speech, the majority is ignoring “every single case in which the Court has reviewed campaign finance legislation in the decades since [*Buckley*].”³⁰⁴ In *Citizens United*, the Court’s majority picked and chose which precedents and data to credit in pursuit of a clear ideological goal, the propagation of business-friendly electoral policies at the expense of the voice of individual Americans.

VII. ARIZONA FREE ENTERPRISE CLUB’S FREEDOM CLUB PAC V. BENNETT

A. *The Case*

A spiritual sequel to *Davis v. FEC*, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* (*Arizona PAC*) also addressed the constitutionality of efforts to equalize candidate funding through modifying campaign finance laws. The case dealt with a challenge to the Arizona Citizens Clean Elections Act (ACCEA), which provided additional resources to candidates running on public financing against a self-financed, privately funded candidate.³⁰⁵ To receive public funding a candidate must agree to limit their personal expenditures to \$500 or less, abide by an expenditure cap, and “participate in at least one public debate.”³⁰⁶ Significantly, privately funded candidates have no direct expenditure cap imposed on them; their spending is only restricted through contribution limits of \$410 per contributor for state legislative races and \$840 for statewide races.³⁰⁷ While the restrictions on publicly financed candidates may appear burdensome, the benefit the ACCEA provides is access to matching funds. Matching funds seek to equalize the financial circumstances of publicly financed and self-financed candidates, who tend to have access to far greater financial resources. Matching funds are distributed to publicly financed candidates when a self-financed candidate exceeds the primary or general election “allotment of state funds to publicly financed candidate[s].”³⁰⁸ Expenditures by a self-financed candidate include both campaign expenditures and “expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate.”³⁰⁹ After the financing ceiling is reached, the matching funds are disbursed as follows:

1. **In primaries:** Publicly financed candidates receive one dollar³¹⁰ for “each

304 *Citizens United*, 558 U.S. at 441 (cited in note 222) (Stevens dissenting).

305 *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, No 10-238, slip op at 2 (Jun 27, 2011).

306 *Id* at 2.

307 *Id* at 4.

308 *Id* at 3.

309 *Arizona PAC*, No 10-328 at 3 (cited in note 305).

310 *Id* at 3. “Less a 6% reduction [...] to account for fundraising expenses.”

additional dollar that a privately financed candidate spends.”³¹¹

2. **In general elections:** Publicly financed candidates receive one dollar of public financing for “every dollar that a candidate receives in contributions,” including personal expenditures.³¹²

Furthermore, if a self-financed candidate is running against multiple publicly financed candidates, and the self-financed candidate’s spending exceeds the public financing limits, one dollar will be given by the government to each of his publicly financed opponents.³¹³ This law was challenged by several candidates for office and PACs in Arizona on the ground that it impermissibly infringed upon their First Amendment right of free speech.³¹⁴ In a 5-4 majority decision, the Court declared, just as in *Davis*, that the distortive elements of the ACCEA imposed unconstitutional burdens on the free speech of self-financed candidates and independent groups. The Court needed to address two primary questions in reaching its decision in *Arizona PAC*: whether the precedent set in *Davis* applies to *Arizona PAC*, and whether the ACCEA is otherwise permissible under strict scrutiny, either in preventing corruption or its appearance or in “leveling electoral opportunities”³¹⁵ for candidates.

As both *Davis* and *Arizona PAC* involved indirect restrictions on the expenditures of self-financed candidates, the Court found that the *Davis* precedent was applicable.³¹⁶ The cases are not completely analogous, but, if anything, in the eyes of the majority, the ACCEA was even more problematic than the Millionaire’s Amendment.³¹⁷ While in *Davis* a non-self-financed candidate still had to work for additional contributions, the ACCEA provides a “direct and automatic release of public money”³¹⁸ to the publicly financed candidate. As mentioned above, in situations where a self-financed candidate has multiple opponents, exceeding the public financing limits would significantly reduce their relative financial standing, instead of simply leveling it.³¹⁹ However, the Court found the most problematic component of the ACCEA was the inclusion of independent group expenditures when calculating a self-financed candidate’s expenses.³²⁰ As independent group expenditures are, by definition, made without consulting with a candidate, this imposes an undue burden on both the candidate and the PACs supporting them. Candidates may

311 *Id* at 3.

312 *Id* at 3-4.

313 *Arizona PAC*, No 10-328 at 4 (cited in note 305).

314 *Id* at 6-7.

315 *Id* at 22.

316 *Id* at 10.

317 *Arizona PAC*, No 10-328 at 11 (cited in note 305).

318 *Id* at 11.

319 *Id* at 12.

320 *Id* at 12.

refrain from certain expenditures in anticipation or PAC spending, and vice versa, in order to prevent the combined spending from exceeding the public financing cap. This is especially potent for independent groups, whom the Court saw as being placed in a position where they must “either opt to change [their] message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether.”³²¹ The Court found this to be an impermissible burden on the First Amendment rights of both the candidates and the independent groups.³²²

While facially invalid, the ACCEA could still be upheld under strict scrutiny if it served a compelling government interest and was narrowly tailored to that end. Arizona argued that the matching provisions “result[ed] in more speech by increasing debate about issues of public concern,”³²³ as provisions increase the overall amount of money circulating in any given election. However, the Court took issue with this argument, arguing that any matching provision inevitably dissuades a self-financed candidate from engaging in campaign expenditures, thus indirectly reducing his or her speech. While their publicly financed opponents may have increased speech, this comes at the expense of the freedom of self-financed candidates. Harkening back to *Buckley*, the Court found this “beggar thy neighbor approach”³²⁴ to be “wholly foreign to the First Amendment.”³²⁵ Simply put, the Court had not and did not find the equalizing of electoral opportunities to serve a compelling state interest if the price to equalize such opportunities resulted in “undue burdens on political speech.”³²⁶

The Court also rejected the claim that the ACCEA prevented corruption and its appearance. The ACCEA did not focus on contribution limits, the only type of campaign finance restriction the Court has historically found to prevent corruption; instead, the law dealt with two types of expenditures: personal candidate expenditures and independent group expenditures. Relying on precedent, the Court rejected the argument of corruption prevention, as it had previously found that the use of personal funds actually reduces corruption, making candidates less reliant on big money donors. Thus, the Court concluded that “discouraging the use of personal funds disserves the anticorruption interest.”³²⁷ Regarding independent expenditures, the Court cited *Citizens United*, which also upheld the findings in *Buckley* that “by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”³²⁸ The independent

321 *Arizona PAC*, No 10-328 at 13 (cited in note 305).

322 *Id.* at 14.

323 *Id.* at 15, citing, in part, the Brief for State Respondents.

324 *Id.* at 15.

325 *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

326 *Arizona PAC*, No 10-328 at 24 (cited in note 305).

327 *Id.* at 25, citing *Davis v. FEC*.

328 *Id.* at 26.

group and the campaign would not have the opportunity to arrange a *quid pro quo*, thus eliminating the threat of corruption. As *Arizona PAC* clearly succumbed to the same constitutional pitfalls as *Davis*, the Court found the ACCEA to be unconstitutionally burdensome on the free speech of both self-financed candidates and independent groups.

B. *The Implications*

Many of the criticisms of *Davis* also apply to *Arizona PAC*, primarily that by equalizing candidate finances one allows greater focus to be placed on actual political discussion. Perhaps the most concerning element of the Court's decision is the disregard of not only the state legislature but also the will of the people of Arizona. The Clean Elections Act was passed following "AzScam," a massive scandal that caught "nearly 10% of the State's legislators [...] accepting campaign contributions or bribes in exchange for supporting a piece of legislation."³²⁹ The Act was passed via public referendum with 51.1% of the vote.³³⁰ The timeline of events indicates this reform was a direct response to AzScam, with the public financing program clearly intended to prevent future corruption. This rationale would be consistent with the Court's holding in *Buckley*, which found public financing constitutionally permissible, as it "reliev[es] [...] candidates from the rigors of soliciting private contributions"³³¹ and "reduces the deleterious influence of large contributions on our political process."³³² Similar to self-financing, public financing reduces the threat of corruption, as candidates are not as dependent on large donations to fund their campaigns. In *Austin* and *Nixon*, the Court delegated to the state, deeming them more knowledgeable judges of what campaign finance laws were necessary for their state elections. However just as in *Randall*, the Court rejected the notion of legislative deference and dictated state laws on their own terms. *Arizona PAC* is especially concerning because the Court directly overruled the express will of the people.

One must also question the Court's rationale for discarding Arizona's matching funds provision. If public financing is constitutional, it should follow that the mechanisms required to implement public financing are also constitutional, but the majority disagreed. It interpreted the matching funds provision of Arizona's law as equalizing electoral opportunities through restricting the speech of one party to enhance the speech of another, an invalid government interest. What the majority ignores is that the only way for a public financing system to be efficient

³²⁹ *Id.* at 27.

³³⁰ See Arizona Secretary of State, *State of Arizona Official Canvass – 1998 General Election* *15 (State of Arizona Nov 3, 1998) online at <http://www.azsos.gov/election/1998/General/Canvass1998GE.pdf> (visited Oct 28, 2014).

³³¹ *Buckley*, 424 U.S. at 96 (cited in note 325).

³³² *Id.* at 91.

is by implementing a matching funds mechanism. Justice Kagan illustrated this problem in her dissenting opinion. If public financing is a fixed, lump-sum amount, as the majority seems to prefer, it is probable the sum will not be sufficient to run a competitive campaign. Instead, the sum “will either dissuade candidates from participating [by being too low] or waste taxpayer money [by providing unnecessary funds].”³³³ Furthermore, it is hard to imagine self-financed candidates would prefer their opponents receive one massive lump-sum instead of several partial payments. As Justice Kagan put it, “would you prefer that your opponent receive a guaranteed, upfront payments of \$150,000, or that he receive only \$50,000, with the possibility [...] that you mostly get to control [...] of collecting another \$100,000 somewhere down the road?”³³⁴ Clearly the latter would be far more preferable and would also reduce corruption. If the self-financed candidate suddenly finds him or herself in a deep financial hole as a public funding going to his or her opponent, he or she may be more susceptible to large, conditioned contributions than if they get to effectively dictate the amount of funding their opponent receives.

Relying on precedent certainly casts doubt on the majority’s ruling; a study from Arizona State University Law School examines the effect the ACCEA had on Arizona’s state elections from 2000 to 2008 and supports the arguments made by Arizona. The matching funds system was clearly appealing, as participation in the program rose from “just over one quarter of all candidates [...] in 2000 [to] 64% participat[ing] by 2008.”³³⁵ There was also a marked improvement to the competitiveness of elections, an important interest the Court sought to preserve in *Randall*: the percentage of state legislators running unopposed dropped from 40% to 15%, and there was both a decreased average margin of victory³³⁶ and an increased number of races decided by less than 10%.^{337 338} Perhaps most significantly, despite the Court’s insistence that matching funds would cause self-financed candidates to decrease or cap their spending, “total campaign expenditures in midterm elections grew from \$1 million to over \$12 million” in the decade following the ACCEA’s implementation.³³⁹ Thus, the Act accomplished two significant goals: (1) increasing the competitiveness of elections without restricting speech and (2) expanding the amount of political speech, likely leading to a more informed public.

Similarly, the ACCEA actually increased political speech in Arizona; in 2000, the first election cycle during which the ACCEA applied, the average candi-

333 *Arizona PAC*, No 10-328 at 7 (cited in note 305) (Kagan dissenting).

334 *Id* at 18 (Kagan dissenting).

335 David Gartner, *The Future of Clean Elections*, 45 *Ariz St L J* 733, 737 (2013).

336 *Id* at 738. “The average margin of victory declined from 31.1% to 26.9.”

337 *Id* at 738. “The percentage of close races with less than a ten point margin grew from 29.2% to 36.6%.”

338 *Id* at 738.

339 Gartner, 45 *Ariz St L J* at 739 (cited in note 335).

date for the Arizona state legislature received \$26,057 in contributions.³⁴⁰ In 2008, the average candidate received \$44,701, an increase of 71.6%.³⁴¹ During that same time period the percent share of total contributions given via public financing increased from 25.8% in 2000 to 62.1% in 2008.³⁴² Private spending, on the other hand, saw a gross decline of 35.8%. However, we must remember the number of candidates using public financing from 2000 to 2008 increased by approximately 140% (25% up to 64%³⁴³). Similarly, separating public and private candidates can yield interesting insights; in 2000 there were approximately 174 self-financed candidates splitting \$4,487,027 for an average of \$25,787 per candidate.³⁴⁴³⁴⁵ On the other hand, in 2008 there were approximately 70 self-financed candidates splitting \$3,303,196 for an average of \$47,188 per candidate.³⁴⁶³⁴⁷ This amounts to an eight-year increase of 83%, a more significant increase in contributions than the 71.6% publicly financed candidates received³⁴⁸. Clearly the ACCEA had no effect in reducing the speech of self-financed candidates; instead their speech was greatly expanded.

The Court certainly had this information available to them at the time of its decision, which further confuses its rationale. As Justice Kagan noted, the matching funds provision is tantamount to a subsidy, not a restriction,³⁴⁹ and it has been held time and time again that “government subsidies of speech, designed ‘to stimulate expression, are consistent with the First Amendment’ [...] because

340 See *Arizona 2000 – Current Elections Totals* (National Institute on Money in State Politics 2000), online at http://www.followthemoney.org/database/state_overview.phtml?s=AZ&y=2000 (visited Oct 28, 2014).

341 See *Arizona 2008 – Current Elections Totals* (National Institute on Money in State Politics 2008), online at http://www.followthemoney.org/database/state_overview.phtml?s=AZ&y=2008 (visited on Oct 28, 2014).

342 *Id.*

343 Gartner, 45 *Ariz St L J* at 737 (cited in note 335).

344 See *Arizona 2000 – Current Elections Totals – Senate Candidates* (National Institute on Money in State Politics 2000), online at http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=AZ&y=2000&f=S (visited Oct 28, 2014).

345 See *Arizona 2000 – Current Elections Totals – House/Assembly Candidates* (National Institute on Money in State Politics 2000), online at http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=AZ&y=2000&f=H (visited Oct 28, 2014).

346 See *Arizona 2008 – Current Elections Totals – Senate Candidates* (National Institute on Money in State Politics 2008), online at http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=AZ&y=2008&f=S (visited Oct 28, 2014).

347 See *Arizona 2008 – Current Elections Totals – House/Assembly Candidates* (National Institute on Money in State Politics 2008), online at http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=AZ&y=2008&f=H (visited Oct 28, 2014).

348 See *Arizona 2008 – Current Elections Totals* (National Institute on Money in State Politics 2008), online at http://www.followthemoney.org/database/state_overview.phtml?s=AZ&y=2008 (visited on Oct 28, 2014).

349 *Arizona PAC*, No 10-328 at 11 (cited in note 305) (Kagan dissenting).

subsidies, by definition and contra the majority, do not restrict any speech.³⁵⁰ The Court has a lengthy history of not prohibiting speech subsidies, and past inaction should provide just as significant of precedent as action does. Even if we accept the majority's logic that matching funds serves to suppress the speech of self-financed candidates, such suppression does not pose a substantial burden, for the data on Arizona's elections clearly indicates that no such suppression occurred. But even without these statistics, matching funds in concept would, at most, run the risk of possibly discouraging a candidate from engaging in political speech.³⁵¹ The possibility of a candidate choosing to refrain from spending a small amount of money cannot be considered a substantial burden anymore than contribution limits. If anything, contribution limits are more substantial than the ACCEA, as they do impose a quantitative cap on an individual's monetary speech. But the Court has consistently held that contribution limits are constitutionally permissible, and if a more burdensome policy has been held constitutional, it must follow that the less burdensome matching funds provision is justifiable.

By overturning the ACCEA, the majority has furthered the threat of turning American politics into a plutocracy. The *Arizona PAC* holding crippled public financing systems across the nation,³⁵² making it far more difficult for all but independently wealthy, PAC-supported candidates to be elected to public office. After the decision of *Arizona PAC*, and in light of the preceding four decisions discussed herein, it seems apparent that the Roberts Court majority has chosen quantity over quality when it comes to campaign expenditures, maximizing the volume of speech at the expense of providing for a reasoned, democratic dialogue amongst the public at large.

VIII. MCCUTCHEON V. FEDERAL ELECTION COMMISSION

A. *The Case*

McCutcheon v. Federal Election Commission (2014) involved a challenge to the constitutionality of aggregate individual contribution limits. As discussed earlier, in *Buckley*, the Court upheld individual contribution limits because they serve the narrowly tailored compelling government interest of preventing corruption and its appearance. As of 2014, the federal limit for direct individual donations to a single candidate during an election cycle is \$5,200, allowing maximum donations of \$2,600 for a candidate's primary and general election campaigns.³⁵³

350 Id at 11, citing, in part, *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 234 (2000).

351 Id at 15.

352 Gartner, 45 Ariz St L J at 743 (cited in note 335).

353 See *Contribution Limits 2013-14* (Federal Election Commission 2014), online at <http://www.fec.gov/pages/brochures/contriblimits.shtml> visited (Oct 28, 2014).

Instead of these individual limits, *McCutcheon* addressed the aggregate limits an individual may donate during a biennial cycle – \$48,600 to federal candidates and \$74,600 to national political party committees.³⁵⁴ Given this aggregate limit, current law allows an individual to donate the maximum base amount to only nine candidates and two party committees. The appellant, McCutcheon,³⁵⁵ was a businessman who, after contributing \$33,088 to congressional candidates in the 2012 elections,³⁵⁶ sought to make contributions of \$1,776 to twelve additional candidates.³⁵⁷ While each of these donations fell below the \$2,600 base general election ceiling, the total sum of the donations would cause McCutcheon to exceed the FEC’s aggregate limit. Additionally, McCutcheon sought to donate \$25,000 to each of the three Republican national party committees,³⁵⁸ and while each of these would be valid under the FEC’s \$32,400 limit on donations to national political parties, collectively they would exceed the aggregate ceiling of \$74,600.³⁶⁰ The question in *McCutcheon* is whether these aggregate limits advance a compelling government interest or pose an impermissible burden on an individual’s First Amendment rights.

The McCutcheon appellants made two primary arguments in support of removing aggregate limits: first, that the anti-circumvention interest cited by *Buckley* in upholding these limits is outdated, and second, that the limits do not advance any compelling government interest.³⁶¹ The appellants first contended that aggregate contribution limits imposed a quantity restriction on an individual’s speech, as they serve to “prevent an individual from associating with, expressing support for, and assisting too many candidates [...] in a single election.”³⁶² In other words, aggregate ceilings are just as intrusive as the expenditure limits declared unconstitutional in *Buckley*, and they are far more restrictive than the individual contribution limits, which constitute simply a marginal restriction on speech.³⁶³ While even a highly intrusive restriction on free speech may be justified when serving a

354 *Id.*

355 *McCutcheon v Federal Election Commission*, No 12-536, slip op at 50-6 (Apr 2, 2014). McCutcheon was also joined by the Republican National Committee (RNC), who “wish[ed] to receive the contributions that McCutcheon and similarly situated individuals would like to make [...] [that were] otherwise permissible under the base limits for national party committees but foreclosed by the aggregate limit on contributions to political committees.”

356 Brief for Appellant Shaun McCutcheon, *Shaun McCutcheon v. Federal Election Commission*, *11 (U.S. Sup Ct filed May 6, 2013) (“McCutcheon May 6 Brief”). “[McCutcheon donated] \$1,776 to each of 15 challengers attempting to unseat incumbents.”

357 *Id.* at *11-12.

358 *Id.* at *12.

359 These being the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), and the National Republican Senatorial Committee (NRSC).

360 McCutcheon May 6 Brief at *12.

361 *Id.* at *17-18.

362 *Id.* at *17.

363 *Id.* at *17.

compelling government interest, the appellants saw no viable interest in this case. Because the individual contribution limits of \$5,200 per cycle remain in place, the appellants argued that “whether a person contributes that permissible amount to one candidate or 20 candidates makes no constitutional difference.”³⁶⁴ Simply put, if donating the maximum amount to nine candidates is not a corruptible act, it is unclear what, if anything, about the tenth donation suddenly allows for *quid pro quo* corruption.³⁶⁵ After all, regardless of how many candidates an individual donates to, each candidate is only receiving a small, non-corruptible amount,³⁶⁶ by definition creating no opportunity for *quid pro quo* corruption.

The appellants believed that the anti-circumvention rationale forwarded by the *Buckley* Court was rendered moot by subsequent legislation, thus not providing an avenue for corruption.³⁶⁷ At the time of *Buckley*, there were no limitations on the amount an individual could donate to a specific PAC or other political organization,³⁶⁸ potentially permitting an individual to subvert direct contribution restrictions by donating large amounts of money to organizations likely to repurpose the money in support of certain politicians.³⁶⁹ Thus, in *Buckley*, the aggregate limits served “as a surrogate base limit on contributions to PACs and political party committees.”³⁷⁰ However, since the passage of the BCRA, limitations had been placed on the amount an individual may donate to political organizations.³⁷¹ Additionally, during the *Buckley* era, no laws prevented an individual or corporation from forming multiple PACs, allowing them to exceed their individual contribution limits by donating money to their respective PACs and then passing said donations onto a given candidate or political party.³⁷² But again, subsequent legislative action had defined that “all contributions to political committees that are established, financed, or controlled by the same corporation, union, or other person [...] are now considered to have been made by a single political committee,” eliminating any threat of circumvention.³⁷³

Unsurprisingly, the Roberts Court ruled in favor of McCutcheon, declar-

364 McCutcheon May 6 Brief at *18.

365 *McCutcheon*, No 12-536 at 21-22 (cited in note 355).

366 McCutcheon May 6 Brief at *18

367 *Id* at *18-19.

368 *Id* at *35.

369 *Id* at *40-41, citing *Buckley*. As explained in *Buckley*, aggregate limits had the effect of “preventing evasion of the \$1,000 contribution limitations by a person who might otherwise contribute massive amounts of money to a particular candidate through use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate’s political party.”

370 McCutcheon May 6 Brief at *41.

371 See Federal Election Commission, *Contribution Limits 2013-14*, FEC.gov, online at <http://www.fec.gov/pages/brochures/contriblimits.shtml> (visited Nov 16, 2014). Individuals are prohibited from contributing more than \$5,000 “to any [...] political committee per calendar year.”

372 McCutcheon May 6 Brief *42.

373 *Id* at *42.

ing aggregate individual contribution limits unconstitutional. Just as with previous campaign finance rulings, the justices divided 5-4 along ideological lines. Chief Justice Roberts authored the plurality opinion,³⁷⁴ joined by Justices Scalia, Kennedy, and Alito,³⁷⁵ finding that FECA's aggregate contribution limits failed to advance any compelling government interest, instead "seriously restricting participation in the democratic process."³⁷⁶ The plurality agreed with the appellants on virtually all points, finding the anti-circumvention legislation enacted in the years between *Buckley* and *McCutcheon* broad enough to eliminate any legitimate threat of individuals evading base limits to gain influence.³⁷⁷ The most important anti-circumvention developments cited by the Court were (1) the 1976 FECA amendments, which "added limits on contributions to political committees"³⁷⁸ and "prohibit[ed] donors from creating or controlling multiple affiliated political committees,"³⁷⁹ and (2) the FEC's expansion of their definition of earmarking to include "any [spending] designation, whether direct or indirect, express or implied, oral or written."³⁸⁰ More significantly, the plurality overruled the portion of *Buckley* addressing aggregate limits and rejected the notion that eliminating aggregate limits could lead to individuals receiving corruptible influence over a political party.

While the Roberts Court did circumvent *Buckley* to a small, informal degree in *Randall*, *McCutcheon* marks the first time the Court directly overturned a portion of *Buckley*. As mentioned above, *Buckley* held that aggregate contribution limits were valid in serving to prevent circumvention of the base limits, for they amounted to no more than "[a] quite modest restraint upon protected political activity."³⁸¹ In addition to the plurality's finding that subsequent legislation rendered the circumvention rationale irrelevant, it also found that *Buckley* did not address aggregate limits with due consideration, given the Court allotted a mere three sentences on the topic.³⁸² This freed the plurality, in its view, to reconsider and reject that portion of the *Buckley* precedent, finding that "an aggregate limit on *how many* candidates and committees an individual may support through contributions

374 Which, just as in *Randall*, serves as the judgment of the Court.

375 *McCutcheon*, No 12-536 at 1 (cited in note 355) (Thomas concurring). Justice Thomas filed a concurring opinion agreeing in the plurality's judgment, but differed in his desire to see *Buckley* overturned in its entirety.

376 *McCutcheon*, No 12-536 at 3 (cited in note 355).

377 *Id* at 11-13.

378 *Id* at 11-12. "Because a donor's contributions to a political committee are now limited, a donor cannot flood the committee with huge amounts of money so that each contribution the committee makes is perceived as a contribution from him."

379 *Id* at 12. "The rule eliminates a donor's ability to create and use his own political committees to direct funds in excess of the individual base limits."

380 *McCutcheon*, No 12-536 at 12 (cited in note 355), citing, in part, 11 CFR §110.6(b)(1).

381 *Id* at 15, citing *Buckley* at 38.

382 *Id* at 13.

is not a modest restraint at all.”³⁸³ The plurality held that these limits imposed a significant burden on political speech, as the only option for individuals wishing to contribute to more than nine candidates in a cycle was to reduce the amount donated to each candidate.³⁸⁴ Just as in *Davis*, the plurality found “penaliz[ing] an individual for robustly exercising his First Amendment rights”³⁸⁵ to be repugnant to the Constitution. Thus, for the first time in the history of the Court’s campaign finance jurisprudence, a portion of *Buckley* was directly overturned.

Perhaps the most concerning component of *McCutcheon* is the plurality’s strict adherence to a narrow definition of corruption, firmly rejecting the notion that eliminating aggregate limits could, in any way, allow individuals to corrupt politicians. As the base contribution limits of \$5200 remained in effect, contributions to individual candidates would still, in the view of the plurality, be too insignificant to be corruptive to the individual. Instead, any corruption would occur on the party level, for instance “a large check [...] given to a legislator [...] to be appropriately divided among numerous candidates and committees.”³⁸⁶ After all, if an individual approaches the Republican or Democratic leadership with a million dollar check to be divided amongst candidates in the most competitive races, they could exert more influence than an individual donating \$5,200 to a handful of candidates. Such influence could be considered corruptive, especially if there are strings attached to the individual’s donation. The Roberts plurality rejected this argument, viewing this type of donation as evidence of “general, broad-based support of a political party”³⁸⁷ as opposed to corruption or attempted corruption. As established in *Buckley* and reaffirmed in several subsequent cases,³⁸⁸ *quid pro quo* corruption can only arise with large contributions to a specific candidate.³⁸⁹ While an individual making a massive contribution to a political party may evoke gratitude from politicians, in the plurality’s view, these contributions do not create any sense of obligation to said donor,³⁹⁰ as “there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate [...] and money within the base limits given widely to a candidate’s party.”³⁹¹ To the plurality, equating wide spread donations within a political party to *quid pro quo* corruption would “dramatically expand government regulation of the political process”³⁹² to an un-

383 *Id* at 15.

384 *McCutcheon*, No 12-536 at 16 (cited in note 355).

385 *Id* at 16, citing, in part, *Davis* at 739.

386 *Id* at 37.

387 *Id* at 37.

388 *Citizens Against Rent Control/Coalition for Fair Housing v. Berkley*, 454 U.S. 290, 290 (1981); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); *McConnell v. FEC*, 520 U.S. 93 (2003).

389 *McCutcheon*, No 12-536 at 37 (cited in note 355), citing *Buckley*

390 *Id* at 38.

391 *Id* at 38.

392 *Id* at 38.

constitutionally restrictive level. As legislative action essentially eliminated the risk of circumventing base limits, and as *quid pro quo* corruption cannot arise out of donating non-corruptible amounts to a large number of candidates, the Roberts plurality declared aggregate individual contribution limits unconstitutional.³⁹³

B. *The Implications*

Most would agree that the plurality made a compelling case for the decay of the anti-circumvention interest in the years since *Buckley*, but this decay is ultimately irrelevant if the removal of aggregate limits has the potential to create corruption or the appearance of corruption. The crucial flaw in the plurality's argument is that they view each politician as entirely separate from his or her political party. Donating to ten candidates instead of nine does not increase the threat of corruption, but the plurality's logic runs into problems when one jumps from nine donations to fifty, to one hundred, or to every congressional race. Eliminating aggregate contribution limits allows for a single individual to donate the maximum permissible amount to every single congressional candidate, which, when combining primary and general election donations, amounts to \$2.4 million in direct contributions, \$2.26 million to House candidates and \$171,600 to Senate candidates.³⁹⁴ In 2012, Democrat and Republican candidates for the House of Representatives spent a total of \$1.1 billion,³⁹⁵ which means just 492 individuals could have bankrolled the entirety of the 2012 House elections if aggregate limits were eliminated.³⁹⁶ The ability of a small group of incredibly wealthy individuals to donate large sums of money to political parties opens the doors for *quid pro quo* corruption. Some, including the plurality, would suggest that collusion of the incredibly wealthy is farfetched, but the rise in independent expenditures follow-

393 *McCutcheon*, No 12-536 at 39-40 (cited in note 355).

394 Federal Election Commission, *Winding Down Your Federal Campaign*, Federal Election Commission at 2 (2009). In any given election there are 435 House races and either 33 or 34 Senate races, a total of 468 congressional races. An individual may donate \$5,200 to a candidate over a single election cycle, \$2,600 for primary elections and \$2,600 for general elections. Furthermore, federal candidates are allowed to donate \$2,000 of their own fundraising to any other federal candidate, which may incentivize individuals to donate the maximum amount to even the least competitive races with the hope, or even expectation, that their money will be repurposed and passed along to the more competitive races.

395 See OpenSecrets.org, *Price of Admission*, (16 Apr 2013), Center for Responsive Politics, online at <http://www.opensecrets.org/bigpicture/stats.php?cycle=2012&display=A&type=A> (visited October 28, 2014). Democrat candidates raised a total of \$485.8 million, while Republican candidates raised \$615.7 million.

396 *Id.* The ability for a small group of individuals to have such influence on Senate elections is admittedly far smaller. As the average Senate candidate raised more than four times the average House candidate, bringing total Senate race costs to \$700 million, it would take 4,074 of these maximum donors to completely finance the 2012 Senatorial races. While still a small number, coordination on such a scale seems far less likely than in the House.

ing *Citizens United* indicates otherwise. As reported by POLITICO, in 2012 alone “100 of the wealthiest people in America gave \$339,490,176 to super PACs, or an average contribution of \$3.4 million per donor.”³⁹⁷ If these Americans were willing to donate \$3.4 million for independent expenditures, they might jump at the opportunity to gain more direct influence over politicians through massive direct contributions.

Even if there is no packaging of contributions, empowering an individual to donate \$2.4 million to a political party puts that individual in a position to exert far more influence over Congress than the average American. To suggest otherwise, that eliminating aggregate limits will in no way risk increasing *quid pro quo* corruption in the federal government, is naïve. *McCutcheon* undeniably creates the possibility for a handful of the wealthiest Americans to dictate the outcome of U.S. congressional elections, certainly devaluing the donations and political speech of the average American. This indirectly discourages average Americans from partaking in political speech; as Justice Breyer wrote in the *McCutcheon* dissent, the ability for several dozen individuals to dictate the outcome of U.S. elections “can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose [...] and a cynical public can lose interest in political participation altogether.”³⁹⁸ The purpose of the First Amendment, in no small part, is to “create a democracy responsive to the people [...] where laws reflect the very thoughts, views, ideas, and sentiments [of the public].”³⁹⁹ The great irony, then, of the *McCutcheon* decision is that in seeking to strengthen the First Amendment rights of a select few, the plurality has debilitated the ability of the average American to utilize their First Amendment rights. As seen in the aftermath of *Citizens United*, the *McCutcheon* decision will undoubtedly weaken the public’s faith in the democratic process and strengthen the already widespread perception that elections, and thus access, can be purchased by the highest bidder.

As mentioned above, one of the most significant components of the *McCutcheon* decision was the partial overturning of *Buckley*. Although the plurality overturned a mere paragraph of the 139-page decision, this action marks a significant deviation from the Court’s prior practice of rigid adherence to *Buckley* and shows a growing willingness of the Court to disregard precedent with each new campaign finance case. The *Randall* plurality made great efforts to ensure its overruling of Vermont’s contribution limits was not misinterpreted as a rejection of *Buckley*. *WRTL* saw the Court effectively overturn the portion of *McConnell* permitting a time-based restriction on electioneering communications by corpora-

397 Fred Wertheimer, *Legalized Bribery* (POLITICO January 19, 2014), online at http://www.politico.com/magazine/story/2014/01/citizens-united-campaign-finance-legalized-bribery-102366.html#U0BO_Cg2Hk8 (visited October 28, 2014).

398 *McCutcheon*, No 12-536 at 7 (cited in note 355) (Breyer dissenting).

399 *Id.* at 7 (Breyer dissenting).

tions and other organizations; in *Davis*, the Court essentially ignored the holdings in *Austin* and *Nixon*; the *Citizens United* majority directly overturned *Austin* and a large portion of *McConnell*. And now, in *McCutcheon*, the Roberts plurality overturned a small but significant portion of *Buckley* regarding aggregate contribution limits. While the plurality justified overturning this holding by arguing that there was no longer a risk of circumventing these limits,⁴⁰⁰ a secondary rationale was that aggregate limits imposed a substantial restraint on an individual's free speech.⁴⁰¹ Simply put, the plurality disagreed with the precedential standard and chose to modify it, just as they did to a far greater degree in *Citizens United*. However, this initial challenge to *Buckley*'s previously unquestioned status as precedent may lead to more aggressive rulings by the Roberts Court in future years. Since the Court accepted the reconsideration of *Buckley*'s ruling on aggregate limits, they may be open to a reconsideration of base limits in the near future. After all, as noted by Hasen, "Roberts goes out of his way [in *McCutcheon*] to say that [...] base limits were not challenged, [but] he does not do anything to affirm that those limits are safe [from future challenge]."⁴⁰² Instead, the plurality simply states that "[i]t is worth keeping in mind that the base limits themselves are a prophylactic measure [...] restrictions on direct contributions and preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements."⁴⁰³ Thus, a challenge to individual base contribution limits may soon come before the Court, and the Court may view base limits, just as they have come to view aggregate limits, as an outdated preventative mechanism. Of course, much of this depends on the future composition of the Court, but if *Buckley* is further weakened in the future, *McCutcheon*'s seemingly inconsequential discrediting of one paragraph may be eventually viewed as the first sign of a tangible threat to *Buckley*'s continued precedential status in the Court's campaign finance decisions.

IX. PRESENT AND FUTURE

Nine years into the Roberts Court, we now have a system of campaign finance law that prohibits low contribution limits, though just how low remains numerically undefined. This series of cases has prevented the government from providing effective subsidies to non-independently wealth candidates, whether via increased contribution limits or a matching funds system; the cases have allowed

400 *McCutcheon*, No 12-536 at 11-13 (cited in note 355).

401 *Id* at 15.

402 Richard Hasen, *Die Another Day: The subtle awfulness of the McCutcheon v. FEC campaign finance decision*, (Slate April 2, 2014), online at http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html (visited October 28, 2014).

403 *McCutcheon*, No 12-536 at 32-33 (cited in note 355), citing, in part *Citizens United* at 357 (internal quotations omitted).

corporations to spend unlimited amounts of money on independent advertisements, including express advocacy ads in the weeks leading up to primary and general elections; finally, they have created the opportunity for wealthy individuals to contribute millions of dollars in direct candidate donations. We have discussed the implications of each individual case at great depth in the preceding chapters, but when examining the cases as a whole, a singular issue becomes clear – the Court must redefine exactly what may be considered corruption. If no redefinition comes, there must be great concern about the reputation of the Roberts Court and how that reputation may negatively impact the Court’s legitimacy in the future. Given the public’s response to these cases and the actual effect already seen in U.S. elections, the new status quo must be changed to preserve the integrity of American politics.

A. Corruption

The Roberts cases have made it clear that *quid pro quo* corruption, an express agreement between a politician and an individual or institution, is the only form of corruption the government has a compelling interest to prevent. Both *WRTL* and *Citizens United* evidenced this view towards corruption through the majority’s continual rejection of the notion that independent expenditures may in any way lead to corruption.⁴⁰⁴ Unless the Court adjusts its standard for corruption, meaningful change to campaign finance law will be difficult to effect in future years.

There are two key areas in which the definition of corruption must be expanded. First, there must be an understanding by the Court that not all forms of corruption are upfront, express agreements. A corporation could plausibly run a series of advertisements supporting a candidate under the implicit understanding that these ads will only continue if the politician votes in a certain way while in office. As such agreements would be made behind closed doors, there is no obvious evidence of this occurring, but ample evidence proves that these independent expenditures create the appearance of this corruption, which may be shorthand as *ex post* corruption.

One needs to look no further than public polls. Regarding general government corruption, a Pew Research Center survey found 54% of the American public “[find] the federal government is mostly corrupt,” with only 31% believing the opposite.⁴⁰⁵ In the weeks preceding the 2012 presidential election, a Gallup poll found 87% of Americans viewed “reducing corruption in the federal govern-

404 *Citizens United v. Federal Election Commission*, 558 U.S. 310, 357 (2010).

405 Alice Lipowicz, *Perception of Government could Affect Agency Hiring* (The Business of Federal Technology (April 30, 2012), online at <http://fcw.com/Articles/2012/04/30/Pew-survey-corruption.aspx> (visited October 28, 2014).

ment” as an important policy goal.⁴⁰⁶ Perhaps most damning, a 2012 survey by the Brennan Center for Justice asked whether respondents believed “new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption.”⁴⁰⁷ Sixty-nine percent of respondents agreed with the statement, including nearly 75% of Democrats and Republicans, with only 15% disagreeing.⁴⁰⁸ Equally compelling, 77% of respondents answered in the affirmative when asked whether they “agreed that members of Congress are more likely to act in the interest of a group that spent millions to elect them than to act in the public interest.”⁴⁰⁹ Given these statistics, it cannot be doubted that unlimited expenditures have created a widespread appearance of corruption among the general public. If the Court expands its definition of corruption to include actions that appear to induce corruptive behavior, Congress would clearly be authorized to prevent the occurrence of these activities, thus allowing for restrictions on corporate independent spending.

A second area in which the definition of corruption could be expanded is the effect of corruptive behavior on the public – that is, the impact corporate spending has on corrupting the voting populace. The Court recognized in *Austin*, under its anti-distortion rationale, the importance of ensuring corporations do not use their massive wealth to influence elections disproportionately, and as demonstrated in Chapter Four, behavioral research undertaken at St. Louis University has found corporate spending does distort voter preference. Given this, the Court could adopt a standard allowing the government to regulate spending that, on the basis of quantitative evidence, corrupts voter choice through distortive advertising.

If the Court were to incorporate these two new definitions of corruption, along with a return to the pre-Roberts standard practice of legislative deference on campaign finance disputes, many of the problems exposed in the Roberts cases could be remedied. These changes would allow state legislatures to reclaim control over state and local elections (correcting *Randall* and *Bullock*) as well as public funding (*Arizona PAC*), while also creating an avenue for reversing *Citizens United* and *McCutcheon*, which would have the effect of reducing corruption of both the voting public and elected officials. Of course, none of these changes are possible without changes to either the Court’s makeup or the American legal system.

406 Tim Mak, *Poll: Corruption is No. 2 Issue for 2013* (POLITICO July 25, 2012), online at <http://www.politico.com/news/stories/0712/79109.html> (visited October 28, 2014).

407 Brennan Center for Justice, *National Survey: Super PACs, Corruption, and Democracy* (New York University School of Law April 24, 2012) * 2, online at http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/SuperPACs_Corruption_Democracy.pdf (visited October 28, 2014).

408 Id at *2.

409 Id at *2.

B. *Future Days*

Concerning potential alterations to the Roberts Court rulings, there are three pursuable avenues: legislative action, constitutional amendment, or judicial turnover.

What would appear to be the most immediate option for amending campaign finance law is legislative action. The closest a new campaign finance law has come to being passed by Congress was in the summer of 2010. At his annual State of the Union address following the *Citizens United* decision, President Obama scolded the Supreme Court for “revers[ing] a century of law that [...] will open floodgates for special interests – including foreign corporations – to spend without limit in our elections.”⁴¹⁰ This led to Senate Democrats proposing the DISCLOSE ACT, which sought to “impose new donor and contribution disclose requirements on nearly all organizations that air political ads [...] [and] require the sponsor of the ad to appear in it and take responsibility for it [...] [and] also reduce foreign influence over American elections.”⁴¹¹ Unfortunately, this bill was defeated on cloture, never coming to the Senate floor for vote.⁴¹² A successor bill, also dubbed the DISCLOSE ACT, met a similar fate in 2012 following a two-day filibuster by Republican senators.⁴¹³ The problem with legislative action is it must operate within the permissible legal framework established by the Court. And as the Court has made it clear that expenditure limits on candidates and independent organizations are entirely unconstitutional, Congress has little ability to alter the current regime of campaign finance. The only area the Court has continually upheld as constitutional are disclosure requirements, hence the effort to pass the DISCLOSE Act. However, while disclosure requirements certainly increase accountability in elections, they do little to reduce the amount of political spending and potential corruptive actions by corporations and other entities.

With the acknowledgment of legislative action’s limitations, a widely supported solution to the Roberts Court rulings, specifically *Citizens United*, has been the passage of a constitutional amendment. Over the past four years, Democrats in the House and Senate have introduced several amendments that would reverse

410 Office of the Press Secretary, *Remarks by the President in State of the Union Address* (The White House Jan 27, 2010), online at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (visited Oct 28, 2014).

411 See Associated Press, *DISCLOSE Act Faces GOP Filibuster In Senate* (The Huffington Post July 26, 2010), online at http://www.huffingtonpost.com/2010/07/27/disclose-act-faces-gop-fi_n_660461.html (October 28, 2014).

412 Library of Congress, *Bill Summary & Status – 111th Congress (2009-201) – S. 3628* (THOMAS September 23, 2010), online at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03628> (visited October 28, 2014).

413 See Ted Barrett, *Senate Republicans block DISCLOSE Act for second straight day* (CNN July 17, 2012) online at: <http://www.cnn.com/2012/07/17/politics/senate-disclose-act/> (visited October 28, 2014).

Citizens United by “giv[ing] Congress and the states the ability to limit spending in election campaigns.”⁴¹⁴ Such an amendment also has strong support from the public, with a poll in the fall of 2010 finding 46% of Americans believing that “Congress should consider taking drastic measures such as a constitutional amendment overturning [*Citizens United*],”⁴¹⁵ with only 36% disagreeing.⁴¹⁶ While solid support from the public and Democrats is evident, the major hurdle any constitutional amendment will face is the overwhelming majority in Congress and the states for ratification. Such a majority unlikely to emerge given the hostile political environment of our present day government.

Article V of the U.S. Constitution states the process by which the document may be amended is as follows:⁴¹⁷

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution [...] [which] shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States.⁴¹⁸

Thus, to successfully ratify an amendment, one needs the vote of 67 Senators, 292 Representatives, and a majority in 38 state legislatures. These requirements are far too stringent for an amendment to pass today. As Republican senators universally opposed campaign finance reform that merely strengthened disclosure standards, they would likely be even more vehemently opposed to more intrusive policies, likely arguing that the direct reversal of *Citizens United* would infringe upon separation of powers. Unless a dramatic change to the Senate body results in at least 67 members being Democrats, a virtual impossibility given the current political climate, any attempted change will be stifled, even if every Senate Democrat were to support it. But one need only look at the historical division of the Senate to realize that a two-thirds majority is exceedingly difficult to obtain. Republicans haven’t

414 See Caitlin MacNeal, *Citizens United Constitutional Amendments Introduced In The Senate* (The Huffington Post June 19, 2013), online at http://www.huffingtonpost.com/2013/06/19/citizens-united-constitutional-amendment_n_3465636.html (visited on October 28, 2014).

415 See Ryan Grim, *Voters Strongly Back Amending Constitution To Restrict Corporate Political Spending* (The Huffington Post May 25, 2011), online at http://www.huffingtonpost.com/2010/11/23/voters-strongly-back-amen_n_787526.html (visited October 28, 2014).

416 *Id.*

417 Thomas E Baker, *Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution*, 10 *Widener J Pub L* 1, 4 (2000). Article V also provides that the Constitution may be amended “on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments” followed by state ratification (U.S. Const. art. V.). However, the national convention process has never been successfully implemented to pass an amendment, and thus it seems safe to assume that this avenue would not be successful to revoke *Citizens United*.

418 US Const Art V.

held such a large majority since Ulysses S. Grant was president,⁴¹⁹ and Democrats must go back half a century to the 89th Congress and the Johnson presidency.⁴²⁰ Even more farfetched is the notion that such an amendment would receive a two-thirds majority in the House of Representatives. As discussed in Chapter One, in *LULAC* the Court made it clear that little federal action would be taken to prevent gerrymandering in the foreseeable future. Thus, just as in the 2012 elections, the ability for conservative state legislatures to manipulate congressional districts will allow the Republican Party to remain competitive for the House majority for many years to come, despite consistently losing the aggregate popular vote to Democrat candidates. Additionally, it seems safe to say the election of 2008 was a watershed moment for Democrats, perhaps a generational peak of activism and support. Even in this election Democrats were only able to garner a 59% majority in the House, 35 seats short of the two-thirds threshold.⁴²¹ If Democrats were unable to breach that mark in 2008, it seems hard to believe they will be able to in the near future. Without one party receiving the 67% supermajority in both houses of Congress, something that has not happened since Franklin Delano Roosevelt's second term, any constitutional amendment is unlikely to gain approval given the understandably contentious nature of permanent policy change. Even if an anti-*Citizens* amendment could pass the Senate and the House, it then would need majority support in 38 state legislatures. Again, the current composition of state legislatures suggests any amendment would be decidedly rejected. As of January 2014, 26 state legislatures were under Republican control, 19 under Democrat control, and 4 were split between their state House and Senate.⁴²² Just as in the U.S. Congress, the majority of Republican state legislatures would be unlikely to vote to amend the Constitution under any circumstances, let alone one that would threaten to weaken their electoral chances, as corporate spending has historically proven to assist Republicans more than Democrats.⁴²³

Given the improbability of successful legislative action, proponents for reform may best focus their efforts on the Supreme Court itself. Two possible Court actions may alter the post-*Citizens* laws: reconsideration or judicial turnover. As noted in the chapter on *Citizens*, Justice Kennedy left open a slight window for reconsideration of independent corporate expenditures should Congress provide

419 See Senate.gov, *Party Division in the Senate, 1789-Present* (United States Senate), online at http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (visited October 28, 2014).

420 Id.

421 See Office of the Historian, *Party Divisions of the House of Representatives, 1789-Present* (United States House of Representatives March 22, 2014), online at <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (visited October 28, 2014).

422 See National Conference of State Legislatures, *2014 State and Legislative Partisan Composition* (NCSL January 31, 2014) online at http://www.ncsl.org/documents/statevote/legiscontrol_2014.pdf (visited October 28, 2014).

423 Id at 37.

persuasive evidence of the existence of corruption or its appearance as a result of corporate spending. However, such proclamations appear dubious, as at the time of the *Citizens United* ruling, such evidence was readily available for the Court. As pointed out by Polikoff and discussed in Chapter Four, in the lead-up to the Court's decision in *McConnell* "one of the trial judges [in the case] [...] summarized [...] a trial record that ran over 100,000 pages."⁴²⁴ Within this summary were four crucial findings:⁴²⁵

1. "Corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications."
2. "Members of Congress express appreciation for those communications [...] [and] seek to have corporations and unions run such advertisements."
3. "After elections are over, corporations and unions often seek 'credit' for their support."
4. "80% of respondents [to a poll] said they believed that those who engaged in electioneering communications received special consideration from the elected officials they had supported."

This record played no small role in the Court affirming the BCRA in *McConnell*, and no evidence indicates a massive change in the relationship between politicians and corporations occurred between 2003 and 2010 to render such restrictions unnecessary. If such clear evidence as that presented in the *McConnell* record was wholly rejected by Kennedy and the *Citizens* majority, it is hard to imagine what form of evidence would prove persuasive, especially considering the public embarrassment the Court would endure should the same justices who voted for *Citizens* reverse their views. Any legal action by the current Roberts Court seems highly unlikely.

The best prospect for campaign finance reform advocates will be a change in the Court's membership. On the present Court there are four justices who are supportive of increased campaign finance regulations: Justices Breyer, Ginsberg, Sotomayor, and Kagan. All it would take to initiate a new wave of campaign finance reform is the retirement of one of the five conservative justices, which considering the age of the justices is likely to occur within the next five years. The two most likely candidates for a near future retirement on the conservative side are Justices Scalia and Kennedy, both Reagan appointees rapidly approaching 80.⁴²⁶ Of the liberal judges, Justice Ginsberg, at 81, can be expected to retire in the very

424 Alexander Polikoff, So How Did We Get Into This Mess? Observations on the Legitimacy of *Citizens United*, 105 Nw U L Rev 203, 219 (2011).

425 *Id.* at 219.

426 See Supreme Court of the United States. *Biographies of Current Justices of the Supreme Court* (USA.GOV March 22, 2014). online at <http://www.supremecourt.gov/about/biographies.aspx> (visited October 28, 2014).

near future. These two factors make the 2016 Presidential election pivotal for the future of campaign finance reform, as whoever is elected President in 2016, if they are subsequently reelected in 2020, will be virtually guaranteed at least three Supreme Court appointments.⁴²⁷ Thus, if a Republican is elected President in a tight race, a six judge conservative majority in the Court is likely to emerge, rendering all hopes of immediate campaign finance reform moot. Of course, if 2016 sees the election of Hillary Clinton or another Democrat, the opposite will hold true, and the five or six liberal judges could begin the return to the precedent set out in *Buckley*.

C. *The Roberts Court's Legacy*

As we discussed in Chapter Four, numerous polls have revealed an overwhelming majority of the American public disapprove of the Court's ruling in these campaign finance cases, particularly *Citizens United*, instead favoring laws that restrict certain political expenditures. The disapproval of *Citizens United* extends to a general disapproval of the Supreme Court, with Gallop reporting in 2013 that only 43% of Americans approve of "the way the Supreme Court is handling its job."⁴²⁸ This is a far cry from the 61% favorability the Court held pre-*Citizens*, marking just the second time since 2000 that "more Americans disapprove of the court [...] than approve."⁴²⁹ Just as significantly, Chief Justice Roberts has seen his personal favorability fall from 50% in 2005 down to 31% today.⁴³⁰ If Roberts is aware of these numbers, they likely cause concern for his legacy as Chief Justice in years to come, specifically due to the highly-politicized nature of the most significant decisions. Roberts expressed such concern in a 2006 interview with *The New Republic*, stating, "I do think the rule of law is threatened by a steady term after term after term focus on 5-4 decisions [...] I think the Court is ripe for a similar refocus on functioning as an institution, because if it doesn't, it's going to lose its credibility and legitimacy as an institution."⁴³¹ Despite Roberts's sentiments, since his appointment, the Court has issued a higher percentage of 5-4 decisions than

427 However, if it appears likely that the Republican nominee will be elected in 2016, it would not be surprising to see Justice Ginsberg take an early retirement so as to ensure at least four liberal justices remain on the bench.

428 See Andrew Dugan, *Americans' Approval of Supreme Court Near All-Time Low* (Gallup Politics July 19, 2013), online at: <http://www.gallup.com/poll/163586/americans-approval-supreme-court-near-time-low.aspx> (visited November 2, 2014).

429 *Id.*

430 *Id.*

431 See Jeffrey Rosen, *Are Liberals Trying to Intimidate John Roberts?* (The New Republic May 28, 2012), online at: <http://www.newrepublic.com/article/politics/103656/obamacare-affordable-care-act-critics-response> (visited November 2, 2014).

any other Court in American history, 21.5%.⁴³² However, this is only one percentage point higher than the Rehnquist Court and is consistent with an upward trend in split decisions since the end of the Second World War.⁴³³ Even if the Roberts Court is the most politicized Court only marginally, there is no denying the public perceives the Court as such. A 2012 *New York Times* poll found “about three in four Americans agreed that personal or political views influence current Court decisions.”⁴³⁴ Just as with corruption of politicians, the simple appearance of a politicized Court harms the Court’s credibility as much as evidence of the politicization of the Roberts Court.

Perhaps the first sign of the impact of the public’s backlash to *Citizens United* on the Court, particularly on Chief Justice Roberts, was the 2012 *National Federation of Independent Business v. Sebelius* ruling, which saw Roberts joining the four liberal justices in upholding the Affordable Care Act’s (ACA) individual mandate. Where this decision becomes most interesting is determining why Roberts allied with the liberal justices over his fellow conservatives; perhaps an explanation lies within the growing public frustration with the Court. It has been widely reported that Roberts originally allied with his conservative counterparts before switching to uphold the individual mandate, this “according to two sources with specific knowledge of the deliberations.”⁴³⁵ Nobody except Roberts truly knows his reasons for reversing on such a historic case, but there appear to be two possibilities. One is that Roberts, who resisted the notion that Congress intended the individual mandate to be a tax during oral arguments, completely reversed his legal opinion during the drafting of the decision. A second, and more plausible, possibility is that Roberts looked to the political landscape and realized the potentially devastating ramifications for the credibility of his Court if they were to effectively strike down the landmark legislation of President Obama during his reelection campaign. As CBS News reported, unlike other members of the Court, “Roberts pays attention to media coverage [...] is keenly aware of his leadership role on the court, and [...] is sensitive to how the court is perceived by the public.”⁴³⁶ Ruling against the ACA would be fairly consistent with the Court’s campaign finance practice of rejecting legislative deference, but, in this case, such behavior would have directly impacted the reelection prospects of President Obama, and the public backlash against the Court, particularly by liberals, would have been deafening.

432 See David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court* (The Atlantic June 29, 2012), online at: <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/> (visited November 2, 2014).

433 Id.

434 Id, internal quotations omitted.

435 Jan Crawford, *Roberts switched views to uphold health care law*, (CBS News July 2, 2012), online at: <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> (visited November 2, 2014).

436 Id.

A second highly politicized, controversial opinion in three years could potentially alienate the public past the point of no return, threatening his legacy and his Court's status as an allegedly apolitical institution. If this is the case, the backlash to *Citizens United* may have created an increased awareness of legacy in Roberts. Of course, the subsequent decision in *McCutcheon*, authored by Roberts, may well indicate that any concern over legacy may not extend to issues of campaign finance, or, at a minimum, the concern has not yet reached a level that the Court and Roberts are actively considering. Perhaps a similar backlash to *McCutcheon* may compel the Court to rule more prudently on future campaign finance decisions. If instead the Court continues to strip away campaign finance regulations, its legacy in regard to campaign finance will no doubt be one of empowering businesses and wealthy individuals to exert disproportionate political influence at the expense of the voices of average Americans, perhaps irreversibly.

While there is no doubt the current legacy of the Roberts Court will amount to one of great public disdain, strengthening political activism and polarization, and a lack of legislative deference, it is fair to question whether the justices are to blame for such developments or if responsibility falls to the executive branch. After all, with the retirement of Justice Stevens in 2010, for the first time in history "the ideologies of the nine [Supreme Court] justices are aligned with the politics of the presidents who appointed them."⁴³⁷ Historically the Court has seen frequent across the aisle appointments, from President Eisenhower appointing a liberal Chief Justice in Earl Warren,⁴³⁸ to President Truman appointing liberal Justice Harry Blackmun,⁴³⁹ to President Kennedy appointing conservative Justice Byron White.⁴⁴⁰ Such bipartisanship appointments have vaporized during the past three presidencies, a key factor in explaining the increased politicization of the Court since the latter years of the Rehnquist Court. It is imperative for the Court's reputation to extinguish the public perception of being a politicized body, and the most direct method for countering such claims would be to return to an era of bipartisanship in Presidential Supreme Court nominees.

X. CONCLUSION

Whether the executive or the judicial branch is more to blame, there is

437 Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* at 5 (Simon & Schuster, May 2013).

438 See UC San Diego, *Earl Warren (1891-1974)* (Earl Warren College 2014), online at: <https://warren.ucsd.edu/about/biography.html> (visited November 2, 2014).

439 See Oyez Project, *Harry A. Blackmun*, (IIT Chicago-Kent College of Law March 14, 2014), online at: http://www.oyez.org/justices/harry_a_blackmun (visited November 2, 2014).

440 See Bootie Cosgrove-Mather, *Former Justice Byron White Dies* (CBS News April 15, 2002), online at: <http://www.cbsnews.com/news/former-justice-byron-white-dies/> (visited November 2, 2014).

no denying the Supreme Court has seen increased politicization and polarization under the leadership of Chief Justice John Roberts, especially as related to campaign finance reform. Over the six campaign finance reform cases heard by the Roberts Court, the conservative majority has demonstrated a strong proclivity for pro-business rulings that, if continued, threatens to silence the voice of Americans in the political process. This has been accomplished through an overly narrow definition of corruption, a refusal to view electoral equality as a compelling government interest, and a lack of judicial restraint by failing to defer to state and national legislatures. Such an activist Court is a far cry from the judicial modesty Roberts purported to apply during his confirmation hearing,⁴⁴¹ as is the Court's tendency to pick and choose which pieces of precedent to apply or ignore during any given case. The Roberts Court has certainly painted its campaign finance rulings as being consistent with *Buckley* and *Bellotti*, but for the most part it has ignored the rulings of the Rehnquist Court, which established a compelling government interest in preventing corporations from distorting elections through excessive expenditures and set a clear policy of deference to legislatures on matters of electoral regulations. Studies have already revealed the consequences of the Roberts Court rulings, in both debilitating the ability for non-self-financed candidates to run successful campaigns and marginalizing the political speech of everyday Americans. The key to winning an election in America is no longer to appeal to the average American, the fiftieth percentile; it's to appeal to the average incredibly wealthy American, the fiftieth percentile of the one percent. How this trend will impact the long term prosperity and opportunities for average Americans remains to be seen; nonetheless, when the reelection of those in power depends almost exclusively on the contributions of the wealthiest individuals and corporations alone, whose policy goals differ substantially from those that benefit society at large, the prospects cannot be promising for our democracy.

441 New York Times. "Transcript – Second Day of Hearings on the Nomination of Judge Roberts." *The New York Times* (13 Sept 2005). online at <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=all> (retrieved Nov 16, 2014). On the first day of Roberts's confirmation hearing, he stated that "I prefer to be known as a modest judge [...] the role of the judge is limited; the judge is to decide the cases before them; they're not to legislate; they're not to execute the laws. Another party of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of stare decisis."

ARTICLE

THE RESURRECTION OF THE DOMESTIC PARTNERSHIP BILL: A PANACEA FOR REFORM OF SOUTH AFRICAN FAMILY LAW

Tracey-Lee Lusty[†]

“By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she must bear the consequences.”¹

ABSTRACT: Conflicting case law and pronouncements by the South African Constitutional Court have led to various anomalies that have left the current position in South African family law fraught with inconsistencies, especially regarding the differing treatment of same-sex and opposite-sex domestic partnerships. This article discusses and distinguishes landmark South African cases in an attempt to demonstrate the current position of de facto discrimination for opposite-sex cohabitants. The article also looks at the enactment of the Civil Union Act 17 of 2006, focusing on the excised ‘domestic partnership’ provisions from the draft Civil Union Bill. The article contends that domestic partnerships should be recognized in South Africa and that the Domestic Partnership Bill (crafted from the excised provisions of the Civil Union Act) be enacted to eradicate the inconsistencies that opposite-sex cohabitantes currently face.

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¹ *Volks NO v Robinson and Others*, 5 BCLR 446, para 154 (CC 2005).

I. INTRODUCTION AND CONTEXT

The Constitution of South Africa has, since the transition into the constitutional dispensation in 1994, provided its people with access to many new rights.² From basic human rights such as equality, dignity and various freedoms, to the progressive realisation of socio-economic rights, the Constitution of South Africa is continuously praised as being one of the most advanced in the world.

One of the most striking examples of South Africa's conformity with its international law obligations was the recent enactment of the Civil Union Act.³ The Act, which was prompted by the decision in *Minister of Home Affairs v Fourie*, gave legal recognition to same-sex marriage.⁴ South Africa also recognizes a multiplicity of marital relations, emphasising its commitment to transformative constitutionalism.⁵ Surprisingly, marriage-like cohabitation relationships, also termed "domestic partnerships," "life partnerships" or "permanent life partnerships" by the Constitutional Court, lack legal recognition. Legal issues raised by domestic partners were acknowledged and dealt with by the Constitutional Court in both landmark decisions of *Gory v Kolver* and *Volks v Robinson*.⁶ The need for domestic partnership legislation was acknowledged in a draft of the Civil Union Act.⁷ The section relating to domestic partnerships, often referred to as "Chapter 3", was regrettably excised before the final Civil Union Act was enacted. However, the promise of separate Domestic Partnership legislation never materialised. Almost a decade later, South Africans who choose to cohabit but not formally marry still find themselves unprotected with only a glimmer of hope that the Domestic Partnership Bill will be enacted.⁸

This paper will discuss and distinguish landmark cases in an attempt to demonstrate the current position of *de facto* discrimination for opposite-sex cohabitants, as well as discuss the proposed Domestic Partnership Bill. The paper will contend that domestic partnerships should be recognized in South Africa. A comparative analysis of the marriage laws in the Netherlands and other progressive countries will elucidate options for reform of the current legislative landscape pertaining to marriage laws in South Africa. Finally, a position will be advocated as to whether or not the Civil Union Act can coexist with the (once enacted) proposed Domestic Partnership legislation.

2 Constitution of the Republic of South Africa

3 Civil Union Act 17, 2006.

4 *Minster of Home Affairs and Another v Fourie and Another*, 3 SA 524 (CC 2005).

5 See, for example, Marriage Act 25 of 1961, the Recognition of Customary Marriages Act 120 of 1998 (RCMA) and the Civil Union Act 17 of 2006.

6 *Gory v Kolver NO and Others*, 3 BCLR 249 (CC 2007); *Volks v Robinson*, 5 BCLR at para 154.

7 Civil Union Bill, Draft, 2006.

8 Domestic Partnership Bill, 2008.

II. A BRIEF HISTORICAL OVERVIEW: A MULTIPLICITY OF MARITAL ARRANGEMENTS

The South African family law pertaining to marital relations provides for various forms of marriage. These are “civil/common-law” monogamous marriages between two adult heterosexual partners solemnised and performed in terms of the Marriage Act.⁹ These are contrasted to monogamous or polygamous “customary marriages,” provided that the marriage meets the requirements of customary law (before 1998) or the requirements of the Recognition of Customary Marriages Act.¹⁰ Religious marriages are not yet formally recognized, although the courts have extended piecemeal recognition to Muslim¹¹ and Hindu marriages.¹²

In 2006, the Constitutional Court in *Fourie* recognized, for the first time, same-sex couples’ right to conclude a valid marriage.¹³ The Court held that the common law definition of marriage and S30(1) of the Marriage Act was “under-inclusive and unconstitutional” as it excluded from its ambit provision for homosexual couples to celebrate their union.¹⁴ The Court, however, suspended its declaration of invalidity and gave Parliament one year to enact legislation that provides for same-sex marriage, the failure of which would result in an automatic amendment to the Marriage Act that provides for the recognition of same-sex marriage.¹⁵ As a result, the Civil Union Act was enacted and now provides for same-sex and heterosexual couples to conclude a civil union.¹⁶ Significantly, a civil union in terms of the Act is for all purposes the equivalent of a marriage as solemnised under the Marriage Act.¹⁷

The relationship that has yet to receive any legal recognition is domestic partnership. Contemporary South Africa defines a domestic partnership as a relationship that is stable and monogamous, and one in which the couple do not wish

9 Marriage Act, 1961.

10 Id; Customary Law as defined by the Marriage Act means the customs and usages traditionally observed among the indigenous African peoples of South Africa and form part of the culture of those peoples; Marriage Act, Section 1.

11 *Ryland v Edros*, 2 SA 690 (C 1997); *Amod v Multilateral Motor Vehicle Accidents Fund*, 4 SA 753 (SCA 1998); *Daniels v Campbell and Others*, 5 SA 331 (CC 2004); *Khan v Khan*, 2 SA 272 (T 2005); and *Hassam v Jacobs NO and Others*, 5 SA 572 (CC 2009).

12 *Govender v Ragavayah NO and Others*, 3 SA 178 (D 2009).

13 *Minster of Home Affairs v Fourie*, 1 SA.

14 Id at paragraph 82.

15 Marriage Act.

16 Civil Union Act; BS Smith and JA Robinson, *An Embarrassment of Riches or a Profusion of Confusion? An Evaluation of the Continued Existence of the Civil Union Act of 2006 in Light of Prospective Domestic Partnerships Legislation in South Africa*, 13 PELJ 30, 75 (2010). Until the proposed Domestic Partnership Bill is enacted, the civil partnership will be the only mechanism through which such recognition outside of marriage can be obtained.

17 Civil Union Act, Section 13.

to marry but live together intimately in a relationship that is akin to marriage.¹⁸ The lack of recognition for domestic partnerships in South Africa has meant that these couples have had to rely on the ordinary legal rules and mechanisms such as estoppel, the law of contract, unjustified enrichment or the Roman-Dutch universal partnership to protect their rights.¹⁹ These relationships have not been formalised in terms of the Marriage Act, the Civil Union Act or the Recognition of Customary Marriages Act.

The status quo of the legal system is fraught with inconsistencies, especially regarding the differing treatment of same-sex and opposite-sex domestic partnerships by the judiciary. In 2005, the Constitutional Court in *Volks* declined a spousal maintenance claim by an opposite-sex cohabitant after the death of her partner. Similar claims made by same-sex partners in other judgements, including *Gory*, demonstrate same-sex partners enjoy superior protection.²⁰ These judgements were made when same-sex couples had no means to secure any formal union. After the passage of the Civil Union Act of 2006, all same-sex partnerships retained these rights irrespective of whether they have formed a civil union. This anomaly has been acknowledged by the Constitutional Court but has been left to Parliament to resolve.²¹ Once enacted, the Domestic Partnership Bill, will go far in remedying the *de facto* discrimination currently experienced by opposite-sex cohabitants caused by this binding precedent.

III. DE FACTO DISCRIMINATION FOR OPPOSITE SEX COHABITATION: THE REGRESSIVE IMPLICATIONS OF RECENT JUDICIAL DECISIONS

The right to dignity provides that “everyone has inherent dignity and the right to have their dignity respected and protected.”²² Moreover, the right to equality holds that everyone is equal before the eyes of the law and has a right to equal benefit and protection of the law.²³ However, the legislature retains the ability to use ostensibly discriminatory means to bring about substantive equality.²⁴ In terms of the principles of equality and fairness, one is likely to conclude that no legal benefits should flow from a cohabitation relationship where the parties are not mar-

18 Francois du Bois, *Principles of South African Law*, at 363; June Sinclair, 1 *Law of Marriage* at 267.

19 *Butters v Mncora*, ZASCA 29 (SCA 2012); Smith and Robinson, An Embarrassment, at 41 (cited in Note 16).

20 Consider *Du Toit and Another v Minister of Welfare and Population Development and Others*, 2 SA 198 (CC 2003); *J and Another v Director-General, Department of Home Affairs and Others*, 5 SA 621 (CC 2003); *Satchwell v President of Republic of South Africa and Another*, 4 SA 266 (CC 2003); *Gory v Klover*, 3 BCLR at 249.

21 *Gory v Klover*, 3 BCLR at para 29-31.

22 Constitution of the Republic of South Africa, Section 10.

23 *Id* at Section 9(1).

24 *Id* at Section 9(2).

ried. In South Africa however, this is not the case. The question, then, is whether or not the law distinguishes between opposite-sex and same-sex cohabitants and, if so, whether or not the discrimination is just. Through the examination of two anomalies found in conflicting case law, this article contends that the law creates *de facto and unjust* discrimination for opposite-sex cohabitants.²⁵

A. Legal uncertainty caused by conflicting case law

The first anomaly concerns the issue of maintenance. In the landmark case *Volks v Robinson*, the Constitutional Court had to decide whether Mrs. Robinson, a survivor in a heterosexual life partnership, could be considered a “spouse” for the purposes of the Maintenance of Surviving Spouses Act.²⁶ On the facts, the deceased had supported Mrs. Robinson financially for fifteen years and had cited her as a dependent member on his medical aid scheme.²⁷ After his death, Mrs Robinson instituted a claim under S2(1) of the Maintenance of Surviving Spouses Act, arguing that since she and the deceased had lived together in a marriage-like relationship akin to that of a husband and a wife, she too should be afforded the same protection as that of a survivor in a heterosexual marriage. The Constitutional Court per Skweyiya, however, rejected her arguments and held that to extend the definition to include those survivors of heterosexual life partnerships would be to “unduly strain” the text and would be “manifestly inconsistent” with its purpose.²⁸ Skweyiya concluded that the law could legitimately distinguish between married and unmarried persons due to the rights and obligations that are attached to marriage; since she had not exercised her choice to marry, those rights were unavailable to her.²⁹ The decision is therefore evidence that no duty of support exists between opposite-sex cohabitants, and if couples want such a benefit, they will have to marry or register a civil union.

This case sits in stark contrast to the *Du Plessis v Road Accident Fund* case which was decided a year before.³⁰ In this case, the SCA developed the common law action for damages for loss of support to include a claim by a person in a same-sex life partnership. The Court held that the partners had undertaken a reciprocal duty of support and held further, that a development of the common law would go a long way in ensuring that the law reflects the ethos of the constitutional dispensation.³¹

25 Smith and Robinson, *The South African Civil Union Act 2006: Progressive Legislation with Re-pressive Implications?*, IJLPF 356, 370 (2008).

26 The Maintenance of Surviving Spouses Act, 1990.

27 *Volks NO v Robinson and Others*, 5 BCLR 446, para 3-5 (CC 2005).

28 *Id* at para 40-45.

29 *Id* at para 54-56.

30 *Du Plessis v Road Accident Fund*, SA 359 (SCA 2005).

31 *Id* at para 17-33,37.

As Cronje and Heaton succinctly put it, the result of the above anomaly is that “even if heterosexual [cohabitants] undertake a reciprocal duty of support, the surviving heterosexual [cohabitant] does not have a claim for damages for loss of support, while a surviving same-sex [cohabitant] has such a claim.”³² Thus, the discrimination is quite clear: In both cases the parties had undertaken a contractual duty of support, but in *Du Plessis* the Court was willing to develop the common law in terms of section 173 of the Constitution for same-sex cohabitants. However, in *Volks*, the Court refused to amend the law.³³ In line with the reasoning of the Court *a quo* in *Volks*, it is apparent that the law’s failure to protect opposite-sex cohabitants is a violation of the right to equality in that it discriminates against opposite-sex cohabitants on the basis of marital status, sexual orientation, gender and impairs their dignity.³⁴ This is especially so for women in opposite-sex cohabitation relationships, as generally the choice to marry is not one that they can make. It seems that the Constitutional Court missed an opportunity to acknowledge the reality that not all women in opposite-sex cohabitation relationships have the autonomy to make such a decision.

The second anomaly concerns intestate succession in South Africa and the operation of the Intestate Succession Act.³⁵ Before the enactment of the Civil Union Act, same-sex life partnerships were afforded piecemeal recognition through constitutional litigation. In another landmark decision, the Court in *Gory*, (which was handed down seven days before the enactment of the Civil Union Act) extended the Intestate Succession Act to include within its ambit same-sex couples in permanent life partnerships. The Court held that the omission in S1(1) of the Act “or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” after the word “spouse” was unconstitutional and thus had to be read into the Act with retrospective effect.³⁶ Therefore, same-sex cohabitants would be able to inherit under the laws of intestate succession as would a spouse in a marriage.³⁷ But for many commentators, the most controversial aspect of the case can be found in the *dicta* in paragraph 29 in which the Court states that “[U]nless specifically amended, S1(1) [of the ISA] will apply to permanent same-sex life partners who have undertaken reciprocal duties of support but who do not “marry” under any new dispensation.”³⁸ This is controversial because the Constitutional Court chose to ignore the rationale it used in *Volks* regarding the

32 D.S.P. Cronje and Jacqueline Heaton, 2 *South African Family Law* 232 (2003).

33 Smith and Robinson, Civil Union Act at 372 (cited in Note 25).

34 H Kruuse, “Here’s to you Mrs Robinson’: Peculiarities and paragraph 29 in determining the treatment of domestic partnerships”, *South African Journal on Human Rights* 380, 383 (2009).

35 Intestate Succession Act, 1987.

36 *Id* at section 1(1); *Gory v Kolver NO and Others*, 3 BCLR 249 para 66 (CC 2007).

37 Pierre de Vos and J Barnard, “Same-sex marriage, civil unions and domestic partnerships in South Africa: critical reflections on an ongoing saga”, *South African Law Journal* 795, 823 (2007).

38 Kruuse, Mrs. Robinson at 384 (cited in Note 34).

lack of “legal impediment” by finding in *Gory* that same-sex couples will continue to benefit regardless of whether they choose to enter into a civil union or civil partnership in “any new dispensation” (*i.e.*, in terms of the future passage of the Civil Union Act). This is a clear, if not the clearest, form of discrimination.

Wood-Bodely contends that the discrimination provided for by *Gory*, warranted by the reality of homophobia in society, aims to achieve substantive equality.³⁹ Kruise, on the other hand, argues that this argument “undermines the right to equal protection and benefit of the law.” Furthermore, she rejects Wood-Bodely’s requirement that the Court adopt a “hierarchy of unlisted and listed grounds in the equality provision” by positing sexual orientation above all others. This, she argues, ignores the reality of patriarchy and poverty that also plague our society. Furthermore, it ignores the lived reality of women who are subject to gender inequality in cohabitation relationships.⁴⁰

These situations identify a common discriminatory theme. It is clear from the case law that same-sex cohabitating couples do not need to take steps to have their partnership registered in terms of a civil union in order to have a loss of support claim. However, opposite-sex cohabitantes are not afforded this same privilege. Similarly, with an intestate succession claim, opposite-sex cohabitantes are not included in the ambit of the Intestate Succession Act, while same-sex couples can still enjoy the benefit without having to have their partnerships registered. The Constitutional Court’s unwillingness to develop the law for opposite-sex cohabitantes further displays the fragmented situation of domestic partnerships in South Africa.⁴¹

IV. THE PROMISE, THE SAVIOUR, THE DOMESTIC PARTNERSHIP BILL: A BRIEF INTRODUCTION

One commendable aspect of the draft bill of the Civil Union Act was the inclusion of the domestic partnership provisions.⁴² Clause 18(1) of the Bill provided that if couples did not wish to register a civil union or partnership, they could instead have the economic aspects of their relationship regulated by either a registered or unregistered domestic partnership. It was on the recommendation of the SALC that these provisions be passed with the Bill. However, these provisions (often named “Chapter 3”) were excised from the Act before it was enacted. The legislature then promised to enact these provisions in an entirely independent statute, called the Domestic Partnership Bill. Such legislation has yet to be passed. By excising these provisions, parliament “failed to address the role patriarchy plays

39 *Id* at 385.

40 *Id*.

41 Smith and Robinson, Civil Union Act (cited in Note 25).

42 Civil Union Draft Bill, 2006.

in relationships where primarily women are unable to forge a marriage.⁴³ If it weren't for the removal of these provisions from the original Civil Union Bill, the legal position for opposite-sex cohabitantes would look very different today. Instead, the legislature rushed to meet a deadline and, in doing so, fell short of providing mechanisms for all relationship types. The promise of the Domestic Partnership Bill still lingers, and if enacted, would go far in eradicating the *de facto* discrimination currently experienced by opposite-sex cohabitantes.

The Bill was originally drafted to afford all partners equality before the law and equal benefit and protection of the law in both registered and unregistered domestic partnerships. Partners may, by way of a domestic partnership agreement, conclude a registered domestic partnership provided they are both 18 years of age.⁴⁴ There is no general community of property between the partners in a registered domestic partnership. However, partners may apply for a property division order within two years after the termination by death or separation.⁴⁵ Partners in a registered domestic partnership owe each other a duty of support, may not without consent of the other party, sell or mortgage the joint property and both have a right to occupy the family home.⁴⁶ In addition, a court may make any just and equitable maintenance order upon termination of the registered domestic partnership.⁴⁷ A partner in a registered domestic partnership is regarded as a "spouse" for the purposes of the Maintenance of Surviving Spouses Act and the Intestate Succession Act.⁴⁸ Similarly, in terms of an unregistered domestic partnership, after death or separation, a partner may apply to the court for a maintenance order, intestate succession order, or a property division order even though no duty of support is owed between the parties.⁴⁹

The Domestic Partnership Bill would go a long way in eradicating the *de facto* discrimination currently experienced by opposite-sex cohabitantes. It is unfortunate that the Department of Home Affairs has not taken more initiative in advocating for the Domestic Partnership Bill, as its promulgation would promote legal certainty and uphold the constitutional principles of equality and dignity.

43 de Vos and Barnard, *Critical Reflections* at 822 (cited in Note 37).

44 Marriage Act, clause 4(1).

45 *Id.* at clause 7(1), 22(1).

46 *Id.* at clause 9, 10, 11.

47 *Id.* at clause 18(1).

48 Marriage Act clause 19, 20.

49 *Id.* at clause 26(1).

V. A COMPARATIVE ANALYSIS AND THE NEED FOR REFORM: OPTIONS FOR SOUTH AFRICAN FAMILY LAW

A. *Arguments in favour and against legal recognition of cohabitation*

Various commentators argue against the idea of cohabitation as a legal mechanism through which government regulates family affairs. First, it has been argued that the extension of property and maintenance rights to opposite-sex cohabitants would harm conventional marriage, as recognising numerous alternative mechanisms for regulation would lead to the weakening and dilution of the formal marriage.⁵⁰ Linked to this is a policy argument that suggests that recognition will undermine the sanctity of marriage by discouraging people from formally marrying.⁵¹ Some authors, such as Sinclair, argue that these positions are melodramatic because, notwithstanding the numerous alternative forms of family life, conventional marriage has continued to survive for thousands of years.⁵²

Some have also argued that recognising cohabitation would mean reinforcing the already stereotyped notion of female dependence.⁵³ Again, Sinclair refutes this position by contending that inadequate welfare is a reality in South Africa and therefore the state has a duty to ensure an equitable distribution of resources between persons in private relationships.⁵⁴ It has also been argued that cohabitants should seek remedies in the law of contract, unjustified enrichment, or estoppel and reserve the principles of family law for those who have chosen to make a “formal” commitment.⁵⁵ However, the purpose of family law, as argued by Goldblatt, is to protect those who are vulnerable in family relations and to ensure fairness in family disputes.⁵⁶ In order to achieve equality and dignity, the courts must recognize alternative forms of family life, especially when vulnerable members are parties in these familial relationships.⁵⁷

It could be argued that allowing the legislature to intervene would mean undermining a person’s right to exercise his or her autonomy. This is in line with liberation arguments, which contend that society is becoming increasingly over-regulated by state intervention, hence blurring the divide between the public and private spheres. This state materialism is unwanted and seen as an infringement on

50 B. Clark, “Families and Domestic Partnerships” *South African Law Journal* 634, 644 (2002)

51 Beth Goldblatt, “Regulating Domestic Partnerships: A necessary step in the development of South African Family Law” *South African Law Journal* 610, 617 (2003).

52 Sinclair, *Marriage* at 143 (cited in Note 18).

53 Clark, *Families* at 645 (cited in Note 50).

54 Sinclair, *Marriage* at 301 (cited in Note 18).

55 Clark, *Families* at 645 (cited in Note 50).

56 Goldblatt, *Necessary Step* at 611 (cited in Note 51).

57 See, for example, *Dawood v Minister of Home Affairs* SA 936 (2000 CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* SA 1 (2000 CC) para 88.

one's freedom of choice to contract.⁵⁸ However, those who espouse such a position miss a crucial premise of these liberation and autonomy arguments: the principle of equality. These arguments fail to realize the unequal positions of women who cannot freely exercise this choice.

Of course, there are important constitutional arguments, premised on the right to equality, to be made in favour of the recognition of opposite-sex cohabitation. Since the right to equality prohibits discrimination on the ground of marital status, sexual orientation, sex, or gender, it seems surprising that the legislature has done nothing to remedy the obvious *de facto* discrimination towards opposite-sex cohabitants in South Africa. Even more interesting is the fact that the Constitutional Court has been willing to view the law in its social context but has failed to do so in this instance. Isolating marriage as the only true institution that deserves protection would amount to discrimination on the basis of marital status.⁵⁹

The need for legal recognition of cohabitation relationships in South Africa is especially important given the widespread ignorance of the law, poverty, inequality in gender relations, and the high prevalence of HIV/AIDS. In regard to the latter, often a partner in a domestic relationship will be abandoned when their HIV status becomes known. In these circumstances, the law has not provided a mechanism to safeguard these cohabitants. These factors make it pressing for the legislature to recognize and regulate cohabitation in South Africa.

B. *A critical comparative perspective and the need for reform*

The Netherlands makes provisions for three mechanisms of regulation. In 2001 the Netherlands became the first country in the world to recognize same-sex marriage. Article 30(1) of the Dutch Civil Code (*Burgerlijk Wetboek*) provides that both heterosexual and homosexual couples may conclude a civil marriage.⁶⁰ The only major legal difference in these types of marriages are the minor restrictions imposed on homosexual marriages. Married homosexual couples cannot partake in inter-country adoptions and only the biological parent in the homosexual marriage is regarded as the parent of the child, unless the spouse adopts that child as his/her own.⁶¹ By affording civil marriage to same-sex couples, the Dutch Parliament has effortlessly achieved a realistic and equitable system.⁶² Secondly, three years before civil marriage was extended to same-sex couples, the legislature of the Netherlands voted to allow both opposite-sex and same-sex unmarried couples to register partnership (*geregistreerd partnerschap*).⁶³ For the most part, the legal

58 Goldblatt, 120 South African Law Journal at 616 (cited in note 51).

59 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* SA 1 (2000 CC).

60 Smith, 22 International Journal of Law at 374 (cited in note 25).

61 *Id* at 375.

62 *Id*.

63 *Id*.

consequences of a registered partnership are akin to that of a civil marriage, except for a few subtleties. These are the inter-country adoption limitation (as with same-sex couples to a civil marriage), the non-recognition of a non-biological parent unless adoption has taken place (also like a civil marriage), and that the termination of the registered partnership can be done by agreement without having to apply to court.⁶⁴ Lastly, the Netherlands also recognized informal cohabitation agreements for both opposite-sex and same-sex couples who do not wish to formalise their relationship by way of a civil marriage or registered partnership.⁶⁵ Thus in the Netherlands, cohabitating homosexual couples are able to attain virtually the same recognition and rights as heterosexual married couples.⁶⁶

Sweden, too, has also been a forerunner in developing legislation that recognizes cohabitation.⁶⁷ In 1998, the Norwegian government appointed a commission of inquiry entitled "Cohabitation and Society." This report endorsed the recognition of opposite-sex cohabitation provided that partners are together for more than two years or have children together.⁶⁸ Australia, a non-European country, also gives legal recognition to *de facto* relationships. Section 4(1) of the Property (Relationships) Act⁶⁹ of New South Wales and section 4AA(1) of the Family Law Act,⁷⁰ gives automatic recognition to these *de facto* relationships.⁷¹ It is also extremely encouraging to note that clause 26(2)(a)-(i) of the Domestic Partnership Bill fits squarely with the requirements provided in section 4(2)(a)-(i) of the Australian Act.⁷²

From the above it is clear that progressive European countries have extended recognition of several types of inter-personal relationships. In particular, the Dutch laws offer an appropriate prototype for South African reform, as their laws are clearly demarcated and straightforward. Currently, the South African law is blurred and confusing and creates *de facto* discrimination via the "separate but equal" language of the Civil Union Act. More importantly, South African law maintains an unsatisfactory legal position for unmarried opposite-sex cohabitantes. The paragraphs that follow provide suggestions for reform of the current legal position including the repeal of the Civil Union Act, amendment of the Marriage Act to include same-sex marriage, and the enactment of the Domestic Partnership Bill.

64 Smith, 22 International Journal of Law at 376 (cited in note 25).

65 Id.

66 Clark, Families at 647 (cited in Note 50).

67 Id at 645.

68 Id.

69 of 1984.

70 of 1975.

71 Goldblatt, 120 South African Law Journal at 620 (cited in note 51).

72 Australian Act at section 4(2)(a)-(i).

*C. The Domestic Partnership Bill versus the Civil Union Act:
Why the Civil Union Act should be repealed*

There are various reasons why the Civil Union Act should be repealed. First, consider the Dutch developments, which were a result of proactive steps by the legislature, not the piecemeal *ad hoc* pronouncements of the South African judiciary. In terms of this developmental process in the Netherlands, the same-sex legislation was a gradual, thoughtful, and thorough process that took five years to implement, whereas in South Africa the legislature was given only one year to enact such legislation. Even more alarming is the fact that the Civil Union Act was tabled a mere three weeks before its enactment, and the final document was never subject to public scrutiny or comment as required by participatory democracy.⁷³ Another procedural point to consider is that before the Civil Union Act was enacted, the ANC advised the Home Affairs Portfolio Committee that all provisions relating to “domestic partnerships” be excised with the promise that separate domestic partnership legislation would be enacted the following year. Notwithstanding this instruction, it appears that the Portfolio Committee made provision for civil partnerships, hence legislating on it anyway.⁷⁴ It has been argued that the South African legislature “sought to achieve too much too fast without careful consideration of the end result.”⁷⁵

In addition, unlike the clear delineation between a civil marriage and a registered partnership in the Dutch law, in South Africa, couples who do not wish to marry may formalise their relationship in terms of a civil partnership. However the consequences of the civil partnership are not merely similar (as in the Netherlands) but identical to a civil marriage under the Marriage Act.⁷⁶ Importantly, South Africa now has two pieces of legislation that appear to do the same thing. The Marriage Act provides for heterosexual civil marriage, while the Civil Union Act provides for a “civil union” that provides the legal consequences equivalent to that of a civil marriage. The Civil Union Act provides for this “marriage” without actually affording the partners to *marry*, allowing the “separate but equal” regime to persist.

While the Civil Union Act must be commended on succeeding in its primary objective of realising same-sex marriage in South Africa, the Act is a fine example of bad drafting and the unfortunate consequence of a rushed job. It begs to reason whether or not the Civil Union Act can really be said to provide a “true alternative to marriage.”⁷⁷ Accordingly, the Civil Union Act should be repealed and the Marriage Act amended to provide for the solemnisation of both heterosex-

73 Smith and Robinson, *An Embarrassment*, at 49 (cited in note 16).

74 Smith and Robinson, *Civil Union Act* at 378 (cited in Note 25).

75 *Id.* at 379.

76 *Civil Union Act*, Section 13.

77 Smith and Robinson, *An Embarrassment* at 48 (cited in note 16).

ual and homosexual civil marriages. Furthermore, on the prior recommendation of the SALC, the South African legislature should reconsider implementing an “Orthodox Marriage Act” for persons subscribing to religious tenets and who would rather have their marriage solemnised in such a manner. Of course, the suggested Orthodox Marriage Act would afford the equivalent legal consequences as those provided for by the sister Marriage Act.

In light of the foregoing discussion, it seems that the Civil Union Act’s only real contribution has been civil partnership. In repealing the Civil Union Act, the provisions relating to civil partnership would also be lost. The co-existence of a civil partnership provision seems dubious and illogical if the proposed Domestic Partnership Bill were to be enacted. The Bill would make provision for registered and unregistered domestic partnerships with the former being identical to the civil partnership currently provided for in terms of the Civil Union Act.⁷⁸ Therefore, a further argument for repealing the Civil Union Act (and the civil partnership provisions) is that the Domestic Partnership Bill (once enacted), will provide the “true alternative to marriage.” This is because, as it stands, a civil partnership is a marriage in all but its name, but a registered domestic partnership under the Domestic Partnership Bill would co-exist with the institution of marriage and not pretend to be one.

The Domestic Partnership Bill, however, may still need to be revised before its final enactment. The Bill makes no provision for the reality that in South Africa persons are likely to conclude dual domestic partnerships. There is also uncertainty in whether or not a person in a customary marriage can be party to an *unregistered* domestic partnership.⁷⁹ The Bill thus ignores the reality that a person in customary marriage is often times also party to a domestic partnership.

Notwithstanding, the unregistered domestic partnership provisions make allowance for both opposite-sex and same-sex cohabitantes, upon death of a partner or separation thereof, to apply to court to receive benefits provided for by the Bill (as mentioned in Part IV). The Domestic Partnership Bill eradicates the anomalies mentioned in Part III for opposite-sex cohabitantes and restores equality in cohabitation relationships in South Africa. By following the above formula for reform, South Africa would eliminate the current *de facto* discrimination experienced by opposite-sex cohabitantes.

VI. CONCLUSION

In recent years, the judiciary’s piecemeal recognition of a myriad of protections for same-sex cohabitants, coupled with harsh precedent set by the Consti-

78 Marriage Act, Chapter 3, 4.

79 cf clause 3 that prohibits registration of a domestic partnership if a person is party to a customary marriage.

tutional Court in *Volks*, have left opposite-sex cohabitants insufficiently protected. The random *ad hoc* pronouncements made regarding inter-personal relationships have created an uncertain, illogical and somewhat dubious system of law. After considering the ordered and demarcated laws of the Netherlands, the paper has proposed that in order to remedy the effect of the current *de facto* discrimination experienced by opposite-sex cohabitants in South Africa, the legislature should repeal the Civil Union Act and instead:

- (a) incorporate same-sex marriage into the definition of marriage in the Marriage Act;
- (b) enact a sister “Orthodox Marriages Act” on the prior recommendation of the SALC and;
- (c) enact the proposed Domestic Partnership Bill.

By doing the aforementioned, the legislature will successfully end the current “separate but equal” regime in which the choice of “civil marriage” is unavailable to same-sex couples. Instead, by incorporating the definition of same-sex marriage into the Marriage Act, the legislature will restore equality (and dignity) to these persons by providing them with the same civil, state-sanctioned marriage status. Similarly, the enactment of the Domestic Partnership Bill is especially desirable as the protection of vulnerable members in our society is constitutionally mandated and such an enactment would ameliorate the discriminatory inconsistencies currently experienced by unmarried opposite-sex cohabitants.

ARTICLE

BEYOND *HALL V. FLORIDA*: A GREATER DUE PROCESS OPPORTUNITY THAN ONE IQ POINT

Aubrey Rose[†]

ABSTRACT: Twelve years after the Court banned the execution of people with intellectual disabilities in Atkins v. Virginia, the Court re-visited this ruling in Hall v. Florida in June 2014 and struck down a bright-line rule that forced a capital defendant to present an intelligence quotient (IQ) score of 70 or below before receiving a full evidentiary hearing on all the evidence of his intellectual disability. The Court in Hall stated that defendants facing a sanction as grave as death must have a fair opportunity to demonstrate that the Constitution prohibits their execution. This general statement prompts a larger constitutional question under the Fourteenth Amendment of whether a capital defendant has a due process opportunity to present all relevant evidence of his intellectual disability in an evidentiary hearing when the government is seeking to deprive him of life. This article argues that the Court's previous case law suggests that all hearings related to capital sentencing, even evidentiary hearings to determine a disability that constitutionally exclude a defendant from death, should be full and meaningful procedural inquiries undertaken to reduce the risk of an unconstitutional execution.

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I. INTRODUCTION

Twelve years after *Atkins v. Virginia*¹ categorically barred the execution of defendants with intellectual disabilities² under the Eighth Amendment³ in 2002, the Court in *Hall v. Florida*⁴ in June 2014 provided the States with the first procedural rule to help courts accurately identify capital defendants with intellectual disabilities.⁵ In *Hall*, the Court ruled that a rigid Florida statute⁶ that forced a capital defendant to present an intelligence quotient (IQ) score of 70 or below was an unconstitutional threshold that prevented a full *Atkins* hearing to review all the available evidence of an intellectual disability. While the Court's opinion in *Hall* focused on how the bright-line rule of 70 or below conflicted with the consensus of the medical community,⁷ the Court ultimately found the rule to be unconstitutional because it created an unacceptable risk that a person with an intellectual disability would be executed.⁸ The Court's assertion that defendants facing the gravest sanction must have a "fair opportunity to show that the Constitution prohibits their execu-

1 *Atkins v. Virginia*, 536 US 304 (2002).

2 *Id.* at 321. ("the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.")

3 US Const Amend VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

4 See *Hall v. Florida*, 134 S. Ct. 1986 (2014). See also Petition for Writ of Certiorari, *Hall v. Florida*, Cert. Granted, No 12–10882 (Supreme Court, filed Jun 6 2013) and the lower court opinion at *Hall v. Florida*, 109 So.3d 704 (2012).

5 Since the Court's ruling in *Atkins v. Virginia*, 536 US 304 (2002), "intellectual disability" has replaced mental retardation (MR) as the accepted term for clinical diagnosis in the medical and mental health field. Seven years since the American Association on Mental Retardation (AAMR) transformed into the American Association on Intellectual and Developmental Disabilities (AAIDD) and four years since Rosa's Law, Public L No 111–256, 124 Stat 2643 (2010), codified at 20 USC §1400 was passed in October 2010 to formally amend references from mental retardation to intellectual disability in federal law, the Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014) finally modified its terminology from the language of "mental retardation" (MR) in court briefs, rulings, and legal literature. See *Hall v. Florida*, 134 S. Ct. 1986 (2014). See James W. Ellis, *The Law's Understanding of Intellectual Disability as a Disability*, 51 *Intellectual and Developmental Disabilities* 102 (2013).

6 Fla Stat §921.137 (2012) ("(1) As used in this section, the term "mental retardation" means significantly sub average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly sub average general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.") Under Fla Stat §921.137 (2012), Fla Rule of Criminal Procedure 3.203 (2014) was adopted by the Florida Supreme Court to outline the process for capital defendants to file *Atkins* claims.

7 See *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). ("Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test.")

8 *Id.* at 1990. ("This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.")

tion⁹ prompts a larger constitutional question under the Fourteenth Amendment¹⁰ of whether states must provide constitutionally sufficient due process¹¹ through a full and meaningful inquiry on all the evidence of a capital defendant's intellectual disability before depriving the citizen of life.

This article argues that the Court's previous case law on capital sentencing suggests that a capital defendant should have a meaningful opportunity to present his full and best case for death ineligibility in all hearings related to capital sentencing, whether it is presenting a wide array of mitigating factors in an individualized sentencing hearing or a comprehensive evidentiary hearing on eligibility for a categorical bar on execution under *Hall v. Florida*. In Part I, this article discusses how the Court's opinion in *Hall v. Florida* failed to address the critical legal question of whether a capital defendant has a due process opportunity to present all relevant evidence of his intellectual disability in an evidentiary hearing to determine eligibility for a categorical bar on execution. To explain why an open gap in the Court's understanding of procedural guidelines for evidentiary hearings on categorical bars exists today, Part II will describe the sharp shift in the Court's Eighth Amendment jurisprudence on the death penalty, from the stalwart principle of individualized sentencing in capital trials to the new concept of categorical bars on execution. Part III argues that despite this shift the previous case law on procedural due process before a government deprivation of life suggests that all hearings related to capital sentencing, even evidentiary hearings, should provide a full and meaningful procedural inquiry to prevent the risk of an unconstitutional execution. Part IV will demonstrate how this alternative argument could have been applied to strike down Florida's IQ cut-off in *Hall v. Florida*, and Part V will reveal why the

9 *Id.* at 2001.

10 US Const Amend XIV, § 1. ("Nor shall any State deprive any person of life, liberty or property, without due process of law.")

11 See both US Const Amend XIV, § 1. ("Nor shall any State deprive any person of life, liberty or property, without due process of law.") and US Const Amend V ("No person shall be...deprived of life, liberty, or property, without due process of law."). The Fifth Amendment and Fourteenth Amendment both contain the Due Process Clause, that no one shall be "deprived of life, liberty, or property without due process of law." However, the Fifth Amendment, as part of the original Bill of Rights, applies explicitly to the federal government and its actions against citizens. The Fourteenth Amendment, ratified later in 1868 after the Civil War, is meant to be binding on the States as actors. Under what is referred to as the incorporation doctrine, the Court has made the first ten amendments of the U.S. Constitution applicable to the states, not just the federal government, through the Due Process Clause of the Fourteenth Amendment. This understanding is crucial because case law on a state's treatment of a particular substantive right in the Bill of Rights, such as US Const Amend VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), the Eighth Amendment, will refer to the Court holding as in violation of both the particular amendment and the Fourteenth Amendment that makes the amendment binding on the State's conduct. When a Fourteenth Amendment case is referred to in this article, it will only be referring to those cases that explicitly analyze due process in capital sentencing, not simply mentioning the Fourteenth Amendment to apply the Eighth Amendment to the States.

clarification of this due process opportunity is critical for capital defendants today.

II. *HALL V. FLORIDA*: THE BRIGHT LINE RULE THAT DETERMINES LIFE OR DEATH

In *Atkins v. Virginia*¹² in 2002, the Court categorically barred the execution of individuals with intellectual disabilities as a violation of the Cruel and Unusual Punishment clause of the Eighth Amendment.¹³ Thirteen years ago, the Court in *Penry v. Lynaugh*¹⁴ had affirmed that an intellectual disability must be considered a mitigating factor that diminishes an individual's personal culpability for a crime. *Atkins* overruled the constitutional rule in *Penry* by transforming a claim of intellectual disability from a single mitigating factor in a capital sentencing hearing¹⁵ to an automatic exclusion from the death penalty. Instead of allowing juries to weigh intellectual disability as a single factor in the sentencing decision for each capital defendant, the Court reasoned that all intellectually disabled defendants should be categorically excluded from the death penalty because the disability a) diminishes his or her personal culpability¹⁶ and b) severely disadvantages him in capital proceedings.¹⁷

After instituting this constitutional absolute under the Eighth Amendment, the Court in *Atkins* left to the States "the task of developing appropriate ways to enforce the constitutional restriction"¹⁸ by forming their own state-specific statutes to

¹² *Atkins v. Virginia*, 536 US 304 (2002).

¹³ *Id.* at 321. ("[T]he Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.")

¹⁴ See *Penry v. Lynaugh*, 492 US 302 (1989) (the jury must be instructed that mental retardation is a mitigating factor in a capital sentencing hearing).

¹⁵ *Id.* at 340. ("In sum, mental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone. So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether "death is the appropriate punishment" can be made in each particular case.")

¹⁶ *Atkins v. Virginia*, 536 US 304, 305 (2002). ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.")

¹⁷ *Id.* ("Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes.")

¹⁸ *Id.* at 317.

implement the categorical bar on execution.¹⁹ After 2002, legal scholars published recommended statutory language for state legislatures on how best to implement a procedure for *Atkins* claims.²⁰ These scholars recommended that state legislatures craft procedures to properly adjudicate new intellectual disability claims through a pre-trial motion²¹ in order to settle the question of ineligibility of death before proceeding to conviction and sentencing in a capital trial. In order to retrospectively apply the categorical bar on execution, the scholars recommended that statutes also outline a process for post-conviction claims²² in a habeas proceeding for inmates already on death row to bring intellectual disability claims to relieve their death sentences.²³

Twelve years after *Atkins v. Virginia* barred the execution of defendants with intellectual disabilities but provided wide procedural discretion to the states

19 The State of Florida's sovereign interest in its traditional police power, including the right to enact and enforce its own criminal laws and procedures, is ultimately limited by the U.S. Constitution. On the one hand, Article VI Sec. 2 of the U.S. Constitution, the Supremacy Clause, establishes that states are bound to the U.S. Constitution as "the supreme law of the land." See US Const Art VI, § cl 2 ("The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.") After *Marbury v. Madison*, 5 US 137 (1803) established the principle of judicial review, the Court has further found that, under US Const Art VI, § cl 2, the Supreme Court's interpretation of constitutional provisions are binding on the states. On the other hand, the Tenth Amendment proclaims that powers not granted to the U.S. are reserved to the States or the people. See US Const Amend X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.") At the most rudimentary level, the Tenth Amendment provides the States with traditional policing powers, the authority to regulate local matters related to "public health, safety and morals." See *Barnes v. Glen Theatre*, 501 US 560, 569 (1991). ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.") In order to specifically regulate the public safety and morals of the local citizens, the Tenth Amendment grants the State legislatures discretion in fashioning their own distinct penal codes to regulate behavior and subsequent rules of criminal procedure in the state courts.

20 See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 *Mental and Physical Disability Law Rep.* 11 (2003). This law review article is cited in the Brief amici curiae of American Psychological Association, *Hall v. Florida*, No. 12 – 10882, 12 (Supreme Court filed Dec 23 2013).

21 For two models of recommended statutory language for the adjudication of new *Atkins v. Virginia*, 536 US 304 (2002) cases, see James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 *Mental and Physical Disability Law Rep.* 11 (2003) at 19 – 20.

22 For recommended statutory language for the adjudication of post-conviction *Atkins v. Virginia*, 536 US 304 (2002) cases, see James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 *Mental and Physical Disability Law Rep.* 11 (2003) at 23.

23 Although the Court in *Atkins v. Virginia*, 536 US 304 (2002) did not explicitly state that *Atkins* provided retrospective relief to inmates on death row, the Court's previous decision in *Penry v. Lynaugh*, 492 US 302 (1989) asserted that this constitutional question related to intellectual disabilities and the death penalty is not a rule that can be prevented from habeas corpus action under *Teague v. Lane*, 489 US 288 (1989).

to enforce the categorical bar, *Hall v. Florida*²⁴ marked the first opportunity²⁵ for the Court to assess the constitutionality of a post-*Atkins* state statute.²⁶ While the clinical guidelines for an intellectual disability include a comprehensive assessment of the defendant's intellectual and adaptive functioning in everyday life,²⁷ the Florida Supreme Court in 2007 interpreted the state's *Atkins* statute, Fla. Stat. §921.137,²⁸ to mean any capital defendant who does not have an IQ score of 70 or under is barred from demonstrating any and all relevant evidence of an intellectual disability before a court of law.²⁹ Outside of Florida, nine other states³⁰ had established

24 See also Petition for Writ of Certiorari, *Hall v. Florida*, Cert. Granted (No. 12 – 10882), (Supreme Court, filed Jun 6 2013) For lower court opinion, see *Hall v. Florida*, 109 So.3d 704 (2012).

25 Outside of *Hall v. Florida*, 134 S. Ct. 1986 (2014), the only other post *Atkins v. Virginia*, 536 US 304 (2002) case to be reviewed by the Supreme Court is *Bobbie v. Bies*, 556 US 825 (2009) (lower courts are not precluded under the Double Jeopardy Clause from conducting a rehearing on the defendant's mental retardation after *Atkins* categorically barred the execution of persons with mental retardation).

26 Fla Stat §921.137 (2012). Fla Rule of Criminal Procedure 3.203 (2014) was adopted by the Florida Supreme Court to outline the process for capital defendants to file *Atkins* claims under Fla Stat §921.137 (2012).

27 See *Atkins v. Virginia*, 536 US 304, 308 (2002). The Court references the American Psychiatric Association definition: “the essential feature of Mental Retardation is significantly sub average general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. The onset must occur before age 18.” The three components listed above can be seen as general Criteria A, B & C for a clinical diagnosis of mental retardation.

28 Fla Stat §921.137 (2012). (“(1) As used in this section, the term “mental retardation” means significantly sub average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term “significantly sub average general intellectual functioning,” for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.”)

29 See *Cherry v. State*, 959 So. 2d 702, 713 (Fla Supreme Court 2007). (“Both section 921.137 and rule 3.203 provide that significantly sub average general intellectual functioning means ‘performance that is two or more standard deviations from the mean score on a standardized intelligence test.’ One standard deviation on the WAIS-III, the IQ test administered in this case, is 15 points, so two standard deviations away from the mean of 100 is an IQ score of 70...The statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of the statutes...”)

30 Outside Florida, the nine states that implement IQ cut-offs include Kentucky, Virginia, Kansas, Delaware, Idaho, North Carolina, South Dakota, Tennessee, and Washington. See Ky Rev Stat Ann § 532.130(2), Va Code Ann §19.2-264.3:1.1, Kan Stat Ann §21-6622, Title 11 Del Code Ann § 4209(D) (3), Idaho Code Ann § 19-2515A, NC Gen Stat § 15A-2005, SD Cod Laws § 23A-27A-26.2, Tenn Code Ann § 39-13-203, Wash Rev Code § 10.95.030. Please note that Delaware has repealed the death penalty except for inmates currently on death row and the Governor of Washington suspended the death penalty in 2014. For examples of how these statutes have been interpreted as a bright line rule by the court opinions in Alabama, Kentucky and Virginia, see *Smith v. State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008); *Bowling v. Commonwealth*, 163 S.W.3d 361, 375 (KY 2005) & *Johnson v. Commonwealth*, 591 S.E.2d 47, 59 (VA 2004).

post-*Atkins* statutes that set a strict IQ cut-off at 70 or lower for defendants to qualify for an evidentiary hearing. While the majority of states with capital punishment had not adopted IQ cut-offs, this procedural approach in ten states became a source of controversy for capital defendants who were denied a more comprehensive assessment of their intellectual disability claim in a full evidentiary hearing.

In challenging this rigid state statute, the petitioner, Freddie Lee Hall,³¹ came before the Supreme Court with a compelling amount of evidence for his intellectual disability.³² First and foremost, before *Atkins v. Virginia* barred the execution of the intellectually disabled in 2002, the jury for the re-sentencing hearing in December 1990 found that Freddie Lee Hall “has been mentally retarded his whole life.”³³ Beginning as early as 1986, a team of highly trained clinicians and neurologists had conducted the first thorough evaluation of Mr. Hall and found that his intellectual disability had severely limited his capacity to function as an adult in society.³⁴ Medical records demonstrated that he suffered from significant organic brain damage.³⁵ Mr. Hall’s school performance records from middle school confirmed that his teachers consistently classified him as intellectually disabled and tried to place him with a special instructor.³⁶ Even Mr. Hall’s former trial lawyers testified at his re-sentencing hearing that his intellectual disability prevented him

31 Petitioner Freddie Lee Hall was convicted in 1978 with a co-defendant, Mack Ruffin, for the murder of a young pregnant woman, Karol Hurst. There were no witnesses. The co-defendant, Mack Ruffin, received a life sentence and Freddie Lee Hall received a death sentence. Ruffin reportedly admitted that he alone shot Hurst. See the Brief for the Respondent, *Hall v. Florida*, cert. granted, No. 12 – 10882, *53, (Supreme Court filed Jan 27 2014).

32 For a comprehensive list of all the evidence of Mr. Hall’s mental retardation, see Brief for Petitioner, *Hall v. Florida*, cert. granted, No. 12 – 10882, *6 – 8, “A. Hall’s Lifelong Mental Retardation” and *10 – 14, “D: Evidence of Mental Retardation Presented At Hall’s Resentencing,” (Supreme Court filed Dec 16 2013).

33 At the time of Mr. Hall’s re-sentencing hearing in 1990, the constitutional rule in *Penry v. Lynaugh*, 492 US 302 (1989) instructed juries to weigh mental retardation as a single mitigating factor in an individualized sentencing hearing for a capital defendant. The jury at Mr. Hall’s re-sentencing hearing acknowledged that “substantial evidence supports a finding” that “Freddie Lee Hall has been mentally retarded his entire life.” The jury also recognized that there was “uncontroverted” evidence of Hall’s organic brain damage and “overwhelming” evidence of “abuse and torture as a child” and “tremendous emotional deprivation and disturbance throughout his life.” Despite the weight of these mitigating factors, the jury sentenced Mr. Hall to death by a vote of 8 to 4. The court found that “learning disabilities, mental retardation, and other mental difficulties...cannot be used to justify, excuse or extenuate Hall’s moral culpability.” See Brief for Petitioner, *Hall v. Florida*, cert. granted, No. 12 – 10882, *14–15 (Supreme Court filed Dec 16 2013).

34 A well-known psychiatrist at New York University, Dr. Dorothy Lewis, led this team of clinicians, a neurologist, a neuropsychologist, a professor specializing in learning disabilities, and a graduate student in psychology. The team ultimately found that Mr. Hall was “extremely impaired psychiatrically, neurologically and intellectually.” See Brief for Petitioner, *Hall v. Florida*, cert. granted, No. 12 – 10882, *12 (Supreme Court filed Dec 16 2013).

35 *Id* at 6. The re-sentencing jury in 1990 found the evidence of organic brain damage to be “uncontroverted.”

36 *Id* at 7.

from assisting in his own defense, comparing his communication skills to that of counsel's four-year old daughter.³⁷

The trial court had previously recognized Mr. Hall's intellectual disability and compelling evidence waited at the doorstep of an evidentiary hearing on the *Atkins* claim. However, Mr. Hall's most recent IQ score came to 71.³⁸ Therefore, under the Florida Supreme Court's interpretation of Fla. Stat. §921.137, Mr. Hall was prevented from even pursuing an evidentiary hearing on all the relevant evidence of his intellectual disability. Instead of contradicting the merit of the overwhelming evidence of Mr. Hall's disability presented in previous hearings, the State of Florida simply asserted that the facts of the crime were reason enough to question Mr. Hall's intellectual disability³⁹ and his latest IQ score meant that he did not meet the definition of an intellectual disability under Florida's strict statutory scheme.⁴⁰ If the Court in *Hall v. Florida* had not ruled for the petitioner, the State would have been permitted to move forward with the execution of Freddie Lee Hall despite the Eighth Amendment's bar on the execution of the intellectually disabled.

While the Court's majority opinion in *Hall* was framed by Justice Kennedy as an improper application of the medical definition of intellectual disabilities affirmed in *Atkins*,⁴¹ *Hall v. Florida* reached the Supreme Court for review precise-

37 *Id* at 11.

38 See *Hall v. Florida*, 109 So.3d 704, 719 (2012). Over the course of the case's litigation, various experts have determined Hall's IQ to be 60, 76, 79, and 80.

39 See the Brief for the Respondent, *Hall v. Florida*, cert. granted, No. 12 – 10882, *51, (Supreme Court filed Jan 27 2014). "A: The Facts of the Crime Are Flatly Inconsistent with Hall's Belated Claims of Mental Retardation." The argument that the sophistication of the crime, demonstrated through the crime facts, can override evidence of mental retardation is commonly employed in court discussions across death penalty jurisdictions. For example, in *Ex parte Briseño*, 135 S.W.3d 1 (TX Court of Criminal Appeals 2004), the Texas CCA in 2004 fashioned their own "Briseño Factors" test for determining eligibility for the *Atkins* categorical bar on execution. In this seven-part test instituted to help guide jury decision-making, the seventh question is "putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" See *Ex parte Briseño*, 135 S.W.3d 1, 8 (TX Court of Criminal Appeals 2004). Tests that purposely conflate the determination of mental retardation and the facts of the crime have been challenged at the Supreme Court level and harshly criticized by the mental health and medical community. See Petition for Writ of Certiorari, *Wilson v. Thaler*, cert. denied, No. 12-5349 (US Court of Appeals July 19, 2012), and Brief amicus curiae of American Association on Intellectual and Developmental Disabilities, *Wilson v. Thaler*, cert. denied, No. 12-5349 (US Court of Appeals Aug 7, 2012).

40 For the full argument of the State of Florida against the evidence of intellectual disability in Mr. Hall's case, see the Brief for the Respondent, *Hall v. Florida*, cert. granted, No. 12 – 10882, *53, (Supreme Court filed Jan 27 2014), "B: The Totality of Hall's Medical Evidence Fails to Show That His Mental State is Attributable to Mental Retardation."

41 See Brief amici curiae of American Psychological Association, *Hall v. Florida*, No. 12 – 10882, (Supreme Court filed Dec 23 2013) and Brief amici curiae of The American Association on Intellectual and Developmental Disabilities, *Hall v. Florida*, No. 12 – 10882 (Supreme Court filed Dec 23 2013).

ly because Florida's bright-line rule had truncated a full and meaningful inquiry on the evidence of Mr. Hall's intellectual disability when it could determine life or death for the capital defendant. Since the Florida statute effectively ended the evidentiary inquiry on the intellectual disability prematurely,⁴² the cases of Mr. Hall and similar capital defendants⁴³ raise doubts about whether the imposition of a bright-line rule can adequately protect capital defendants from an erroneous ruling. While the Court's decision in June 2014 answered the narrow legal question presented by the petitioner at the original writ of certiorari,⁴⁴ this article will tackle the broader question: the extent of the due process opportunity for capital defendants in evidentiary hearings for eligibility for categorical bars on execution, which lies at the core of *Hall v. Florida*.

Justice Kennedy directed attention to the question of due process in capital sentencing when he suggested that a defendant must have a "fair opportunity"⁴⁵ to present his best case against death due to the gravity of the sanction. In oral

42 Incidentally, when a defendant meets Florida's bright-line rule and presents an IQ score under 70, the court has, in the past, pursued a lengthy inquiry to review the possibility of an incorrect administration of the IQ test. For example, in *Diaz v. State*, SC11-949, 2013 WL 6170645 (FL 2013) in November 2013, the Florida Supreme Court requested that a capital defendant with a strikingly low IQ of 57 have a full evidentiary hearing to further investigate the evidence that he was malingering. Given that the state did not afford a full hearing for all the possible evidence of Mr. Hall's mental retardation but pursued a lengthy inquiry to disprove Mr. Diaz's mental retardation, the State of Florida appears to expend more resources to investigate malingering defendants evading execution than the full procedure necessary to minimize the risk of an unconstitutional execution of a defendant with mental retardation. For more information, see *Diaz v. State*, SC11-949, 2013 WL 6170645 (FL 2013).

43 Beyond Freddie Lee Hall, the data suggests that Florida's bright-line rule has potentially discouraged a significant number of sincere and meritorious Atkins claims. An empirical study of Atkins claims from 2002 to 2009 found that 50 percent of defendants with losing Atkins claims in Florida were able to substantiate severe limitations in adaptive functioning but lost just on the first prong of intellectual functioning. In approximately 25 percent of all cases in Florida, the IQ cutoff score was the only reason the defendant's Atkins claim was denied. This statistic also does not include the larger unknown number of life plea deals that were denied when capital defense attorneys presented early evidence of Atkins claims to prosecutors before proceeding to trial. For more information, see John H. Blume, Sheri Lynn Johnson and Christopher Seeds. An Empirical Look at Atkins Claims and its Application in Capital Cases, 76 TENNESSEE L. REV. 625 (2009).

44 For the constitutional question granted for review when the Supreme Court granted a writ of certiorari in *Hall v. Florida*, see Petition for Writ of Certiorari, *Hall v. Florida*, Cert. Granted No 12-10882 (Supreme Court, filed Jun 6 2013) at i. ("Whether Florida's statutory scheme for identifying defendants with mental retardation in capital cases— which, as interpreted by the Supreme Court of Florida, categorically bars defendants who do not have an intelligence quotient (IQ) test score of 70 or below from demonstrating mental retardation and precludes consideration of the standard error of measurement for IQ tests—violates the Eighth Amendment prohibition on the execution of persons with mental retardation as articulated in *Atkins v. Virginia*, 536 U.S. 304 (2002).")

45 See *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). ("The death penalty is the gravest sentence our society may impose. Persons facing the most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.")

arguments for *Hall* at the Supreme Court in March 2014,⁴⁶ the dialogue between the justices and the Solicitor General of Florida further implied the need for a more extensive discussion on what procedural due process looks like for capital defendants in the 21st century. In referencing the Court's previous Eighth Amendment case law on the death penalty, Justice Kagan drew a connection between the evidentiary inquiry at issue in *Hall v. Florida* and the Court's consistent holding that the individualized sentencing hearing must allow a capital defendant to make his strongest case against execution.⁴⁷ Together,⁴⁸ Justice Kennedy's reference to a "fair opportunity"⁴⁹ in the majority opinion and Justice Kagan's line of questioning in oral arguments of *Hall v. Florida* both urge a systematic review of the Court's previous Eighth Amendment jurisprudence on the death penalty. Furthermore, they both push for an assessment of what procedural expectations can be derived from the case law when a capital defendant's life is on the line in an evidentiary hearing on a categorical bar on execution.

III. FROM INDIVIDUALIZED SENTENCING TO CATEGORICAL BARS: EIGHTH AMENDMENT JURISPRUDENCE AT A NEW JUNCTURE

While Justice Kagan asserts that the Court's previous Eighth Amendment case law on the death penalty has relevant precedent to be applied in the case before the Court, *Hall v. Florida* reached the Supreme Court at a time when barring classes of individuals from execution was still an entirely new trend in Eighth Amendment jurisprudence. The controversy before the Court in *Hall v. Florida* cannot be properly understood without an appreciation for the historical development of the Court's Eighth Amendment jurisprudence from the principle of individualized sentencing in capital trials to the new concept of categorical bars on execution, such as the *Atkins* bar. After all, this sharp shift gave birth to a new and separate capital proceeding, the evidentiary hearing to determine an intellectual

46 See Oral Argument Transcript, *Hall v. Florida*, 134 S. Ct. 1986 (2014). For the transcript of oral arguments, see Oral Argument Transcript, *Hall v. Florida*, No. 1210882, March 3, 2014 at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_7758.pdf.

47 Oral Argument Transcript, *Hall v. Florida*, 134 S. Ct. 1986 (2014), at 33. (Justice Kagan: "But, General, the ultimate determination here is whether somebody is mentally retarded; and the IQ test is just a part of that. It's a part of one prong of that ultimate determination. And what your cutoff does is it essentially says the inquiry has to stop there. And the question is how is that at all consistent with anything we ever say when it comes to the death penalty? Because we have this whole line of cases that says when it comes to meting out the death penalty, we actually do individualized consideration and we allow people to make their best case about why they're not eligible for the death penalty. And essentially what your cutoff does is it stops that in its tracks, as to a person who may or may not even have a true IQ of over 70, and let alone it stops people in their tracks who may not be mentally who may be mentally retarded.")

48 See Brief for Petitioner, *Hall v. Florida*, cert. granted, No. 12 – 10882 (Supreme Court filed Dec 16 2013) at i.

49 See *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

disability at issue in *Hall v. Florida*.

A. *The Individualized Sentencing Hearing*

Since the Court first assessed the constitutionality of the death penalty under the Eighth Amendment in the seminal cases, *Furman v. Georgia*⁵⁰ and *Gregg v. Georgia*⁵¹ in the 1970s, the capital trial has been set apart as a peculiar context, subject to special procedural restraints. The first prominent procedural guideline to emerge in the peculiar context of a capital trial was the individualized sentencing hearing, an entirely separate opportunity to weigh mitigating circumstances against aggravating ones in determining an appropriate sentence. The introduction of the individualized sentencing hearing was originally revered as a progressive step away from mandatory death sentences⁵² and an expression of respect for the “uniqueness of the individual”⁵³ before the Court. The rationale for a separate individualized sentencing hearing emerged from the Court’s pursuit to restrain the “arbitrary and capricious”⁵⁴ application of the death penalty in *Furman* and *Gregg* in the 1970s.

When the Court first grappled with the constitutionality of the death penalty on its face under the Eighth Amendment,⁵⁵ the Court in *Furman*, in a per curiam decision, decided to strike down capital sentencing statutes that had unrestricted jury discretion because it resulted in arbitrary decisions of life or death.⁵⁶ With five separate concurring opinions and a scathing dissent, the Court in *Furman* presented no universal holding on the constitutionality of the death penalty, but rather

50 *Furman v. Georgia*, 408 US 238 (1972) (the application of the death penalty with unrestricted jury discretion results in arbitrariness that violates the Eight Amendment). In *Furman*, the petitioner challenged a Georgia capital sentencing statute that called for death for a murder committed during the commission of a felony. *Furman* was consolidated with two other cases, and *Jackson v. Georgia* and *Branch v. Texas* 408 US 238 (1972), which challenged two separate death sentences in Georgia and Texas.

51 *Gregg v. Georgia*, 428 US 153 (1976) (the death penalty is constitutional on its face and in application if subject to procedural guidelines). *Gregg v. Georgia* upheld a Georgia statute that, in order to remedy the arbitrary application of the death penalty criticized in *Furman*, provided for a bifurcated proceeding separating the guilt and sentencing phases of capital trials and required the jury to find at least one of ten statutory aggravating factors before imposing death.

52 *Furman v. Georgia*, 408 US 238, 402 (1972) (Burger dissenting).

53 *Lockett v. Ohio*, 438 US 586, 605 (1978).

54 See *Gregg v. Georgia*, 428 US 153, 155 (1976). (“The concerns expressed in *Furman* that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute...”)

55 While two concurring opinions by Justice Brennan and Marshall found the death penalty unconstitutional on its face, three concurrences by Justice Douglas, Stewart, and White found the death penalty unconstitutional only as applied under the current state statutes before the Court. Justice Stewart famously remarked that the selective application of the death penalty was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” See *Furman v. Georgia*, 408 US. 309 (1972) (Stewart, J., concurring).

56 See *Furman v. Georgia*, 408 US 238, 240 (1972).

urged states to re-examine their capital punishment statutes to ensure that the administration of the penalty was neither arbitrary nor capricious.⁵⁷ Since *Furman*'s command to reign in the application of the death penalty did not come with any specific directions, states crafted different kinds of post-*Furman* capital statutes to limit the faults in the death penalty's application.

While some state legislatures crafted capital sentencing statutes with procedural standards to guide life or death decisions, others swiftly adopted mandatory death penalties for a small list of serious crimes to remove discretion from the equation.⁵⁸ Four years later, the Court in *Gregg v. Georgia*⁵⁹ effectively ended the de facto moratorium on the death penalty. The Court upheld the Georgia capital sentencing statute under review because it proscribed a set of procedural standards, such as bifurcated guilt and sentencing hearings and automatic appeals to the Georgia Supreme Court, to remedy the arbitrariness noted in *Furman*.⁶⁰ With the ruling in *Gregg v. Georgia*, the Court ultimately found that the death penalty could remain constitutional under the Eighth Amendment only if it were subject to certain procedural restraints, such as the bifurcated capital proceeding with a separate individualized sentencing hearing for each capital defendant.

Moving forward, the mere existence of a separate individualized sentencing hearing was not enough to ensure fair and reliable outcomes in decisions of life and death. After *Gregg* instituted separate capital sentencing hearings to reduce arbitrary and capricious decisions of life or death, a distinct line of case law, which

57 *Id* at 256. The most powerful instruction to state legislatures was provided in *Furman*'s dissenting opinion. See *Furman v. Georgia*, 408 US 238, 403 (1972) (Burger dissenting). ("Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress.")

58 The history of states' legislative reaction to *Furman* is well detailed in the Court opinion in *Lockett v. Ohio*, 438 US 586, 600 (1978).

59 For a complete list of the cases decided together with *Gregg*, see *Gregg v. Georgia*, 428 US 153, (1976) (upheld GA statute providing for a bifurcated proceeding separating the guilt and sentencing phases of capital trials and requiring the jury to find at least one of ten statutory aggravating factors before imposing death), *Proffitt v. Florida*, 428 US 242 (1976) (upheld FL statute generally similar to GA, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggravating factors against statutory mitigating factors) and *Jurek v. Texas*, 428 US 262, (1976) (upheld TX statute construed as narrowing death-eligible class). In contrast, two state statutes were invalidated, *Woodson v. North Carolina*, 428 US 280, (1976) and *Roberts v. Louisiana*, 428 US 325, (1976) (struck down NC and LA statutes that both mandated death penalty for first-degree murder).

60 *Gregg v. Georgia*, 428 US 153, 155 (1976). ("The concerns expressed in *Furman* that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information.")

is now referred to as the Court's "death-is-different" jurisprudence,⁶¹ continued to proscribe procedural standards for decision-making during the sentencing hearing itself, well after the conviction.⁶² In this body of case law, the Court consistently maintained that a capital sentencing hearing is qualitatively different⁶³ from other ones because the possible outcome of death is a) severe in fully denying the humanity of the convict and b) irreversible.⁶⁴ The qualitative difference of death means there is a "corresponding difference in the need for reliability"⁶⁵ in an individualized sentencing hearing.

One of the easiest ways to ensure reliable outcomes in an individualized sentencing hearing is to provide the defendant the opportunity to make his best case about why he is not eligible for the death penalty.⁶⁶ Therefore, from the Court's Eighth Amendment jurisprudence on the death penalty the "make your best case against death" principle can be considered a second strong procedural guideline after a separate sentencing itself. In the late 1970s, the Court took the promotion

61 For a more detailed description of this term, see Jeffrey Abramson, *Death-is-Different Jurisprudence and the Capital Jury*, 2 Ohio State Journal of Criminal Law 117 (2004).

62 Even before the Court bifurcated the capital proceeding into conviction and sentencing, special procedural precautions were allotted in the capital trial when life was at stake. Even before *Gideon v. Wainwright*, 372 US 335 (1963) established the right to be provided an attorney in all felony cases, the Court considered the particular context of death eligibility grave enough to insist that capital defendants be provided counsel under *Powell v. Alabama*, 287 US 45 (1932) and *Betts v. Brady*, 316 US 455 (1942). The only other key pre-*Furman* death penalty cases are *Andres v. United States*, 333 US 740 (1948) (when the lower court gives vague instructions to the jury of their full sentencing discretion in capital trials, the verdict must be unanimous so that the favor goes to the accused) and *Witherspoon v. Illinois*, 391 US 510 (1968) (persons with conscientious scruples against the death penalty can not be automatically excluded from sentencing juries in capital cases).

63 See *Woodson v. North Carolina*, 428 US 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.")

64 See *Spaziano v. Florida*, 468 US 447, 468 (1984) (Stevens concurring in part and dissenting in part) ("[I]n the 12 years since *Furman*... every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment.") and *California v. Ramos*, 463 US 992, 998 (1983) ("The Court... has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"). Also see *Gardner v. Florida*, 430 US 349, 357 (1977) ("Death is a different kind of punishment from any other which may be imposed in this country... from the point of view of the defendant, it is different in both its severity and its finality.")

65 *Woodson v. North Carolina*, 428 US 280, 305 (1976).

66 See *Jurek v. Texas*, 428 US 262, 271 (1976). ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.")

of “open and far-ranging argument”⁶⁷ in a capital sentencing hearing to the next level by refusing to impose any unnecessary limitations on mitigating evidence that the defendant desired to proffer. By providing the capital defendant the fullest opportunity to offer evidence, the Court chose to highlight the “compassionate or mitigating factors stemming from the diverse frailties of humankind”⁶⁸ and prevent defendants from being treated as a “faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”⁶⁹

In 1978, *Lockett v. Ohio*⁷⁰ solidified the “make your best case against death” principle⁷¹ by proclaiming that the capital defendant has a constitutional due process opportunity⁷² under the Fourteenth Amendment to present a wide range of mitigating factors, including character, prior record, and age.⁷³ After *Lockett*, the sentencer could not “be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”⁷⁴ While the finality of death demands a greater degree of reliability, *Lockett* found that restrictive statutory lists of mitigating evidence reduce reliability in capital sentencing.⁷⁵ Under these lists, the increased risk that the death penalty will be im-

67 *Gregg v. Georgia*, 428 US 153, 203 (1976) (“We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument.”)

68 *Woodson v. North Carolina*, 428 US 280, 304 (1976).

69 *Id.*

70 See *Lockett v. Ohio*, 438 US 586 (1978) and *Bell v. Ohio* 438 US 637 (1978).

71 This principle is often referred to as the Lockett principle. See, for example, Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L Rev 1147 (1990). For the purposes of clarity in this paper, the principle will be referenced as the “make your best case against death” principle.

72 *Lockett v. Ohio*, 438 US 586, 605 (1978). (“Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various post-conviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.”)

73 *Id.*

74 *Id.* at 604.

75 *Id.* at 604.

posed instead of a lesser penalty is appropriate⁷⁶ is “unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.”⁷⁷

The “make your best case against death” principle in *Lockett* has been consistently used as a precedent when the Court has stressed the value of a lengthy inquiry into why a defendant should receive a sentence less than death.⁷⁸ *Eddings v. Oklahoma*⁷⁹ was the first case to directly reference the *Lockett* principle when it vacated a death sentence because family history was precluded as mitigating evidence.⁸⁰ The Court in the 1980s then affirmed a wide-ranging list of mitigating factors that defendants proffered in sentencing hearings, from childhood neglect to good conduct in jail.⁸¹ The more conservative Rehnquist Court decided that the weighing of aggravating circumstances should not be limited by statute, thus balancing out the preference towards the capital defendant.⁸² However, the Court has still insisted that unrestricted mitigating evidence is critical to the prevention of unwarranted executions in individualized sentencing hearings.⁸³ Up until the turn of the century, the Court’s Eighth and Fourteenth Amendment jurisprudence had focused almost entirely on prescribing the appropriate procedural guidelines for

76 *Lockett v. Ohio*, 438 US 586, 605 (1978) (“There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.”)

77 *Id.*

78 Since *Lockett*, the value of allowing all possible mitigating evidence stands in preceding case law. See, for example, *Green v. Georgia* 442 US 95 (1979) (mitigating evidence cannot be excluded from a sentencing hearing as hearsay) and *Hitchcock v. Dugger*, 481 US 393 (1987) (jury instruction cannot limit the consideration of mitigating factors to just the factors specifically enumerated in statute).

79 *Eddings v. Oklahoma* 455 US 104 (1982).

80 *Id.* at 104 – 105.

81 See *Skipper v. South Carolina*, 476 US 1 (1986) (jury must be permitted to consider evidence of defendant’s good conduct in jail); *Penry v. Lynaugh*, 492 US 302 (1989) (jury must be permitted to consider the defendant’s evidence of mental retardation) and *Abdul-Kabir v. Quarterman*, 550 US 233 (2007) (jury must be permitted to consider the defendant’s evidence of childhood neglect and mental illness damage outside of the context of assessment of future dangerousness).

82 See *Blystone v. Pennsylvania*, 494 US 299 (1990) (upheld PA death penalty statute that requires the jury to impose death if one aggravating factor can be proven on top of no mitigating factors presented), *Boyd v. California*, 494 US 370 (1990) (upheld CA death penalty statute that requires the jury to impose death if the aggravating factors generally outweigh the mitigating factors), and *Walton v. Arizona*, 497 US 639 (1990) (upheld a AZ death penalty statute that mandated a sentence of death unless the defendant could show mitigating evidence sufficient to outweigh aggravating factors; found that the listed aggravating factor “especially heinous, cruel or depraved” was not unconstitutionally vague).

83 See *Blystone v. Pennsylvania*, 494 US 299, 305 (1990) and Justice Scalia’s unanimous opinion in *Hitchcock v. Dugger*, 481 US 393 (1987) (which vacated a death sentence because the judge instructed the jury to ignore the mitigating evidence not specifically enumerated in the Florida statute).

individualized sentencing hearings so as to ensure that the application of the death penalty remain constitutional.

B. *Categorical Bars on Execution*

After a generation of cases focused on procedural guidelines that only strengthened individualized sentencing, the Court shifted abruptly to creating classes of individuals who should be categorically barred from death under the Eighth Amendment.⁸⁴ Despite Chief Justice Burger's previous warning that the "blunt constitutional command cannot be sharpened to carve neat distinctions,"⁸⁵ the Court's most recent Eighth Amendment jurisprudence has given birth to three distinct categorical bars on the execution of the severely mentally ill defendants who are too "incompetent to be executed,"⁸⁶ defendants with intellectual disabilities,⁸⁷ and juveniles.⁸⁸ While each regulation has effectively worked to narrow the pool of defendants eligible for execution, there are distinct reasons why defendants with severe mental illness are barred from execution based on *competency* and why juveniles and intellectually disabled defendants are barred from execution based on *diminished culpability*. This distinction is key to understanding the conflict between the new categorical bars on the execution based on *diminished culpability* and the Court's previous stalwart principle of individualized sentencing.

In the 1980s, the first categorical bar on execution was arguably *Ford v. Wainwright*,⁸⁹ in which the Court barred the execution of individuals with severe mental illness that impairs their understanding of the fact and purpose of their

84 See *Ford v. Wainwright*, 477 US 399 (1986) (categorical bar on the execution of 'insane' individuals that cannot comprehend the meaning of the penalty), *Roper v. Simmons*, 543 US 551 (2005) (categorical bar on the execution of minors), and *Atkins v. Virginia*, 536 US 304 (2002) (categorical bar on the execution of individuals with mental retardation).

85 *Furman v. Georgia*, 408 US 238, 391 (1972) (Burger dissenting).

86 *Ford v. Wainwright*, 477 US 399 (1986) (categorical bar on the execution of 'insane' individuals that cannot comprehend the meaning of the penalty).

87 See *Atkins v. Virginia*, 536 US 304 (2002). Before *Atkins* categorically barred the execution of the intellectually disabled, see *Penry v. Lynaugh*, 492 US 302 (1989) (mental retardation must be considered as a mitigating factor in capital sentencing). Thirteen years before, the Court in *Penry* specifically found that there was no national consensus against the execution of the mentally retarded at the time to warrant a categorical bar.

88 See *Roper v. Simmons*, 543 US 551 (2005). Before *Roper* categorically barred the execution of juveniles eighteen and under, see *Thompson v. Oklahoma* 487 US 815 (1988) (struck down executions of individuals who were under sixteen when committed offenses under Eighth and Fourteenth Amendments).

89 *Ford v. Wainwright*, 477 US 399 (1986).

execution.⁹⁰ The Court in *Ford* reasoned that this categorical bar was necessary under the Eighth Amendment because the execution of a person who does not understand the imminent penalty has no retributive value.⁹¹ While these two principles are often conflated, the *Ford* categorical bar on execution only blocks an execution after a post-conviction evidentiary hearing establishes the defendant's lack of acute mental awareness.⁹² This is distinct from the plea of insanity,⁹³ which is a legal defense based on diminished culpability that can be raised during capital and non-capital trials alike. As a determination that occurs in a habeas corpus proceeding⁹⁴ after sentencing, the *Ford* mandate bars a class of individuals from execution based on competency but does not necessarily infringe on the local decision maker's discretion over determining the culpability of a capital defendant in an individualized sentencing hearing.

While the *Ford* categorical bar in the 1980s did not directly confront the principle of the individualized sentencing hearing, *Atkins v. Virginia*⁹⁵ and *Roper v. Simmons*⁹⁶ thrust the Eighth Amendment into uncharted territory at the turn of the

90 While the majority opinion in *Ford v. Wainwright*, 477 US 399, 410 (1986) explicitly stated that the "Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane," Justice Powell's concurring opinion further defined 'insane' as the level of mental deficiency where the inmate does not "know the fact of their impending execution and the reason for it." See *Ford v. Wainwright*, 477 US 399, 422 (1986). Based on Justice Powell's concurrence that clarified that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it," the standard for the *Ford* categorical bar was further clarified in *Panetti v. Quarterman*, 551 US 930 (2007) where the Court insisted that a death row inmate must have the mental capacity to understand, not just a factual understanding of his imminent execution, but a rational understanding of the State's justification for the execution.

91 *Ford v. Wainwright*, 477 US 399, 409 (1986) ("For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.")

92 *Id.* at 410. ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane. Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would bar his execution.")

93 See, for example, *United States v. Brawner*, 471 F.2d 969 (1972) (the defendant can be found not responsible for a crime, if at the time of the crime, the defendant lacked the substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law) and *Durham v. U.S.*, 214 F.2d 862 (1954). While there is no controlling Supreme Court case on the insanity defense, each state has its own standard for a determination of insanity that merits acquittal and civil commitment to a psychiatric institution instead of the typical criminal sanction of incarceration.

94 *Ford v. Wainwright*, 477 US 399, 410 (1986) ("Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would bar his execution.")

95 *Atkins v. Virginia*, 536 US 304 (2002).

96 *Roper v. Simmons*, 543 US 551 (2005) (categorical bar on the execution of defendants who are 18 or younger). Before *Roper v. Simmons*, the Court had barred the execution of defendants who are 16 or younger in age in *Thompson v. Oklahoma* 487 US 815 (1988).

21st century. This included a new “diminished culpability”⁹⁷ line of reasoning for categorical bars related to sentencing in a capital trial. In assessing whether the death penalty is constitutional under the Eighth Amendment, the Court in *Gregg v. Georgia* established that the legitimate State goals of retribution and deterrence⁹⁸ justify the use of the death penalty. Following this logic, categorical bars on execution rest on the notion that a particular set of characteristics should always produce an understanding of diminished culpability and render the values of retribution and deterrence automatically suspect in any particular death sentence.⁹⁹ Under *Roper*, the Court found that a juvenile’s characteristics, including poor impulse control and vulnerability to outside pressures, established diminished culpability for juveniles.¹⁰⁰ Under *Atkins*, the Court found that the characteristics of an intellectually disabled individual, including poor reasoning capacities and limited ability to learn from previous experiences, established diminished culpability for the intellectually disabled.¹⁰¹

97 See *Atkins v. Virginia*, 536 US 304, 305 (2002) (“Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but *diminish their personal culpability*.”). See *Roper v. Simmons*, 543 US 551, 551 (2005) (“After observing that mental retardation diminishes personal culpability even if the offender can distinguish right from wrong...the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment places a substantive restriction on the State’s power to take such an offender’s life. Just as the *Atkins* Court reconsidered the issue decided in *Penry*, the Court now reconsiders the issue decided in *Stanford*.”)

98 *Gregg v. Georgia*, 428 US 153, 183 (1976).

99 For example, see *Roper v. Simmons*, 543 US 551, 554 (2005) (“Once juveniles’ diminished culpability is recognized, it is evidence that neither of the two penological justifications for the death penalty – retribution and deterrence of capital crimes by prospective offenders – provides adequate justification for imposing that penalty on juveniles.”)

100 *Roper v. Simmons*, 543 US 551, 554 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’ Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders...Juveniles’ susceptibility to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’ Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievable depraved character.”)

101 See *Atkins v. Virginia*, 536 US 304, 305 (2002) (“Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but *diminish their personal culpability*.”)

While the Court's previous Eighth Amendment jurisprudence lauded the individualized sentencing hearing as a critical component of capital sentencing,¹⁰² the new categorical bars on execution are the ultimate denial of trust in the sentencer to determine a balanced outcome in an individualized sentencing hearing. The fact that an individual is a juvenile or intellectually disabled was once one of many factors considered at the hearing.¹⁰³ By elevating the factors of age and intellectual disability to merit categorical bars, the Court boldly proclaimed in *Roper* and *Atkins* that either factor alone is always enough to negate any other aggravating factors involved in the defendant's specific case. Justice Scalia's consistent body of dissenting case law¹⁰⁴ against categorical bars on the execution of juveniles and the intellectually disabled warns about the implications of "upsetting particularized judgment on the basis of a constitutional absolute"¹⁰⁵ and the development of new motions and evidentiary hearings that will turn "the process of a capital trial into a game"¹⁰⁶ for capital defendants who wish to evade the death penalty.

In order to confront the question of why treating intellectual disabilities or youth as a mitigating factor in an individualized sentencing hearing is inadequate under the Eighth Amendment, the case law points to distrust in the jury or judge's capacity to make a proper judgment in an individualized sentencing hearing. Whereas the Court once proscribed procedural guidelines to empower the jury in a capital sentencing hearing to make a fair decision between life or death, categorical bars on execution are now based on the premise that the jury a) may not properly weigh the single mitigating factor against the aggravating factors and b) may inadvertently count the mitigating factor against the capital defendant. In *Roper*, Justice Kennedy addressed both of these concerns when he suggested "an unacceptable likelihood that the brutality or cold-blooded nature of a particular crime would overpower mitigating arguments based on youth"¹⁰⁷ and that in some cases, the defendant's youth might inadvertently be counted against him.¹⁰⁸ While *Atkins* did not lay out distrust of the local decision-maker as clearly as *Roper*, the

102 *Lockett v. Ohio*, 438 US 586, 605 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.")

103 See *Eddings v. Oklahoma*, 455 US 104 (1982) and *Stanford v. Kentucky*, 492 U.S. 361 (1989) for juveniles (execution of individuals who were 16 or over is not cruel and unusual punishment). See *Penry v. Lynaugh*, 492 US 302 (1989) for persons with intellectual disabilities.

104 See *Atkins v. Virginia*, 536 US 304, 350–351 (2002) (Scalia dissenting) and *Roper v. Simmons*, 543 U.S. 551, 614 (2005) (Scalia dissenting).

105 *Thompson v. Oklahoma*, 487 US 815, 863–864 (1988) (Scalia dissenting).

106 See *Atkins v. Virginia*, 536 US 304, 353 (2002) (Scalia dissenting).

107 *Roper v. Simmons*, 543 US 551, 572 (2005).

108 In the original trial proceedings that lead to *Roper v. Simmons*, 543 US 551 (2005), the Court opinion noted that the prosecutor in the *Roper* case had actually suggested that the defendant's youth be considered an aggravating factor against him.

dissenting opinion in *Penry v. Lynaugh* over a decade before similarly argued that there was “no assurance that an adequate individualized determination of whether the death penalty is a proportionate punishment will be made at the conclusion of a capital trial”¹⁰⁹ and that an intellectual disability would, in fact, be counted against the capital defendant.¹¹⁰

Since the recent categorical bars mark a distinct rupture in the Court’s reasoning for the principle of individualized sentencing, the proper application of previous Eighth Amendment case law to the present procedures for evidentiary hearings on categorical bars on execution is significantly more complex. Given the complicated and novel nature of this trend, the Court has yet to thoroughly discuss the procedures demanded for “the particular situation”¹¹¹ of an evidentiary hearing that determines eligibility for a categorical bar on execution. While determining the offender’s age does not require an evidentiary hearing for *Roper*, the *Atkins* categorical bar requires a separate motion¹¹² and an evidentiary hearing,¹¹³ which is ultimately under the state’s discretionary power. Instead of grappling with what procedural guidelines should be delineated, the Court decided to delegate proce-

109 *Penry v. Lynaugh*, 492 US 302, 347 (1989) (Brennan dissenting).

110 In Justice Brennan’s dissenting opinion, he quoted a local newspaper editorial that read “it appears to us that there is all the more reason to execute a killer if he is also ... retarded. Killers often kill again; a retarded killer is more to be feared than a ... normal killer. There is also far less possibility of his ever becoming a useful citizen.” See *Penry v. Lynaugh*, 492 US 302, 347 (1989) (Brennan dissenting).

111 The Court often references the legal axiom that procedural due process “calls for such procedural protections as the particular situation demands” when rationalizing deference to states’ rights and keeping procedural due process expectations low and flexible. See *Ford v. Wainwright*, 477 US 399, 425 (1986). Referring to *Morrissey v. Brewer*, 408 US 471, 481 (1972) and *Mathews v. Eldridge*, 424 US 319, 334 (1976).

112 See, for example, Florida Rule of Criminal Procedure 3.203 (c), which delineates the appropriate process for filing a Motion for Determination of Intellectual Disability as a Bar to Execution, 90 days prior to the defendant’s trial.

113 See, for example, Florida Rule of Criminal Procedure 3.203 (e) (“Hearing on Motion to Determine Intellectual Disability: The circuit court shall conduct an evidentiary hearing on the motion for a determination of intellectual disability. At the hearing, the court shall consider the findings of the experts and all other evidence on the issue of whether the defendant is intellectually disabled. The court shall enter a written order prohibiting the imposition of the death penalty and setting forth the court’s specific findings in support of the court’s determination if the court finds that the defendant is intellectually disabled as defined in subdivision (b) of this rule. The court shall stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order. If the court determines that the defendant has not established intellectual disability, the court shall enter a written order setting forth the court’s specific findings in support of the court’s determination.”)

dural discretion to the states for the evidentiary hearings on categorical bars¹¹⁴ and ultimately leaving states with “substantial leeway to determine what process best balances the various interests at stake.”¹¹⁵

IV. “MAKING YOUR BEST CASE AGAINST DEATH” IN EVIDENTIARY HEARINGS ON CATEGORICAL BARS

Despite the sharp shift individualized sentencing to categorical bars, Justice Kagan’s remarks in *Hall v. Florida*¹¹⁶ re-affirmed that the Court’s previous principles under the Fourteenth Amendment need not be abandoned in determining of whether a basic due process opportunity is necessary to ensure reliable outcomes. In regards to the procedure for determining eligibility for the categorical bar on execution for the severely mentally ill, the Court stated, “it would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.”¹¹⁷ After all, the two contexts, an individualized sentencing hearing and an evidentiary hearing, share the same possible outcome of an unconstitutional government deprivation of life. In both contexts, if the “fact finder loses the substantial benefit of potentially probative information, the result is a much greater likelihood of an erroneous decision.”¹¹⁸

Dissenting voices on the Court have expectedly rejected the comparison of the individualized sentencing hearing and the evidentiary hearing as analogous “particular situations”¹¹⁹ for expectations of procedural due process. In the dissent-

114 See *Ford v. Wainwright*, 477 US 399, 417 (1986) (“we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon execution of sentences.”) and *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (“as was our approach in *Ford v. Wainwright*, with regard to insanity, ‘we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.’”)

115 *Ford v. Wainwright*, 477 US 399, 426 (1986). This leeway was solidified when the Court explicitly stated in *Bobby v. Bies*, 556 US 825 (2009) that *Atkins* did not “provide definitive procedural or substantive guides” for determining *Atkins* eligibility.

116 Oral Argument Transcript, *Hall v. Florida*, Docket No. 12-10822, *33 (March 3, 2014). (Justice Kagan: “And the question is how is that at all consistent with anything we ever say when it comes to the death penalty? Because we have this whole line of cases that says when it comes to meting out the death penalty, we actually do individualized consideration and we allow people to make their best case about why they’re not eligible for the death penalty. And essentially what your cutoff does is it stops that in its tracks, as to a person who may or may not even have a true IQ of over 70, and let alone it stops people in their tracks who may not be mentally who may be mentally retarded.”)

117 *Ford v. Wainwright*, 477 US 399, 414 (1986).

118 *Id.*

119 The Court often references the legal axiom that procedural due process “calls for such procedural protections as the particular situation demands” when rationalizing deference to states’ rights and keeping procedural due process expectations low and flexible. See *Ford v. Wainwright*, 477 US 399, 425 (1986). Referring to *Morrissey v. Brewer*, 408 US 471, 481 (1972) and *Mathews v. Eldridge*, 424 US 319, 334 (1976).

ing opinion in *Ford*,¹²⁰ Justices O'Connor and White argued that capital defendants have a lesser expectation of due process in evidentiary hearings that resolve issues outside of conviction and sentencing. While the Justices recognized that the capital convict has a strong interest in avoiding an erroneous determination, they argue, "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly."¹²¹ However, the majority in *Ford* ultimately refuted this argument, claiming that a fact determination that acts "as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding."¹²²

If *Ford* claims that determine competency post-conviction and post-sentencing are subject to no less stringent standards, then the Court's previous guidelines certainly apply to pre-trial sentencing determination of the *Atkins* evidentiary hearing.¹²³ If the *Atkins* evidentiary hearing¹²⁴ can be envisioned as an alternative sentencing hearing simply focused on one mitigating factor, the reasoning of the dissenting justices in *Ford* does not apply. Justice Powell reasoned that the Court's previous case law on procedure for capital sentencing did not apply to *Ford* claims because the question of competency determines when, but not whether, the execution can take place.¹²⁵ However, the evidentiary hearing on a capital defendant's intellectual disability does determine whether an execution can take place and therefore triggers the Court's previous case law under the Fourteenth Amendment.

Furthermore, the risk of an unconstitutional execution in an evidentiary hearing is even higher than the risk in an individualized sentencing hearing

120 For full dissenting opinion, see *Ford v. Wainwright*, 477 US 399, 427 – 435 (1986) (O'Connor and White dissenting).

121 *Ford v. Wainwright*, 477 US 399, 429 (1986).

122 *Id.* at 411 – 412.

123 *Id.* As stated in the Article's "Part I (B): Categorical Bars" above, the *Ford* categorical bar on execution for persons with severe mental retardation is a post-conviction and post-sentencing habeas proceeding based on competency. Therefore, the *Ford* categorical bar is, in part, distinct from the *Roper* and *Atkins* categorical bars on execution based on diminished culpability.

124 Most *Atkins* hearings do take place before a capital trial, to determine whether the prosecutor should even file for a motion to seek the death penalty. See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 *Mental and Physical Disability L. Rptr.* 11 (2003).

125 *Ford v. Wainwright*, 477 US 399, 425 (1986) ("First, the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question raised is not *whether*, but *when*, his execution may take place. This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all. It follows that this Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings — *e. g.*, *Lockett v. Ohio*, 438 US 586 (1978) (plurality opinion); *Turner v. Murray*, 476 US 28 (1986) — do not apply in this context.")

because all the relevant evidence revolves around a single fact. If this fact were erroneously determined, it would automatically result in an unconstitutional execution. While the outcome of an individualized sentencing hearing hinges on the proper weighing of several factors, there is a “particularly acute need for guarding against error”¹²⁶ in an evidentiary hearing on the categorical bar on execution. This is because “the ultimate decision will turn on the finding of a single fact.”¹²⁷ Since the Court has chosen to elevate the intellectual disability to a categorical bar, the alternative evidentiary hearing to determine an intellectual disability should at least afford the same meaningful due process opportunity for capital defendants to prove their claims as an individualized sentencing hearing would afford them to make their best case against death.

Therefore, this article proposes that procedures for evidentiary hearings on eligibility for categorical bars retain the “make your best case against death” principle from *Lockett* under the Fourteenth Amendment. While *Ford* acknowledged that certain legitimate pragmatic considerations¹²⁸ may “supply the boundaries of the procedural safeguards that feasibly can be provided”¹²⁹ in an evidentiary hearing, the “the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims...the stakes are high, and the ‘evidence’ will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible.”¹³⁰ Just as *Lockett* suggests, any state statute that unnecessarily restricts,¹³¹ “the adversary presentation of relevant information”¹³² in an evidentiary hearing creates a risk of violating the Fourteenth Amendment. Going forward, procedures must provide unrestricted “adversary presentation of relevant information”¹³³ with the only limitations to this adversary presentation as the legitimate pragmatic considerations that “supply the boundaries of the procedural safeguards that feasibly can be provided.”¹³⁴

126 *Ford v. Wainwright*, 477 US 399, 411 (1986).

127 *Id.* at 412.

128 *Id.* (“It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity...Other legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided.”)

129 *Id.* at 417.

130 *Ford v. Wainwright*, 477 US 399, 417 (1986).

131 *Lockett v. Ohio*, 438 US 586, 605 (1978).

132 *Ford v. Wainwright*, 477 US 399, 417 (1986).

133 *Id.*

134 *Id.*

V. *HALL V. FLORIDA*:
A GREATER DUE PROCESS OPPORTUNITY THAN ONE IQ POINT

When the government is considering such a critical decision as taking a citizen's life, a capital defendant must have a meaningful opportunity to present his full and best case for death ineligibility, whether it is presenting a wide array of mitigating factors in an individualized sentencing hearing¹³⁵ or comprehensively assessing evidence of an intellectual disability in a full *Atkins* evidentiary hearing. Under the proposed standard of review above, the Court in *Hall v. Florida* could have determined that Florida's IQ cutoff directly restricted the "adversary presentation of relevant information"¹³⁶ when death was on the table. A thorough application of the above standard would have then required a review of whether a) Florida's bright-line rule restricted relevant information that would have decreased the risk of an erroneous ruling and b) Florida's bright-line rule was motivated by legitimate pragmatic considerations of the State that are compelling enough to limit the capital defendant's due process opportunity that ensures greater reliability in the heavy determination of life or death.

The first step of this analysis is to discuss the relevant evidence of an intellectual disability that the Florida rule would restrict from consideration. An accurate determination of intellectual disability is ultimately a complex and comprehensive assessment¹³⁷ that cannot be reduced to a showing of an IQ score. To encourage accurate determinations, a full evidentiary hearing for eligibility for the *Atkins* categorical bar on execution must include a due process opportunity to present all relevant evidence related to the three prongs of the clinical definition of an intellectual disability. In *Atkins*, the Court affirmed the clinical definition of mental retardation, as (1) sub-average intellectual functioning and (2) significant limitations in adaptive skills such as communication, self-care, and self-direction that (3) manifests before 18.¹³⁸ The court can review the second part of this definition through medical, school and employment records, as well as testimony from clinicians and lay witnesses to provide a full picture of the capital defendant's

135 *Lockett v. Ohio*, 438 US 586, 605 (1978).

136 *Ford v. Wainwright*, 477 US 399, 417 (1986).

137 For an overview of the medical definition of intellectual disability, See *Frequently Asked Questions on Intellectual Disabilities and the AAIDD Definition*, (American Association on Intellectual and Developmental Disabilities 2008), online at http://aaid.org/docs/default-source/sis-docs/aaiddfaqonid_template.pdf?sfvrsn=2. (Visited Feb 22 2014)

138 *Atkins v. Virginia*, 536 US 304, 318 (2002).

limited functioning in society.¹³⁹ While the Court might be tempted to review the first prong, sub-average intellectual functioning, through a single professionally administered intelligence quotient score, such as the Wechsler Adult Intelligence Scale, even an IQ score is not an entirely reliable indicator. According to the professional community, an IQ must be read as a range rather than a precise number in order to account for the standard error of measurement (SEM).¹⁴⁰ Since no standardized test score has perfect accuracy, the SEM acts as a confidence interval of plus or minus 5 IQ points.¹⁴¹ A more complete due process opportunity to present all evidence relevant to the clinical definition of an intellectual disability increases the reliability of the ultimate determination.

Despite the medical community's insistence on comprehensively assessing and determining an intellectual disability, it is unsurprising that state legislatures and the courts would be tempted to fashion strict bright-line rules that produce clear-cut laws.¹⁴² After establishing why the presentation of unrestricted relevant information of an intellectual disability would increase the reliability of the determination, the next question is whether the State's interests in the IQ cutoff are compelling enough to question the due process opportunity. In *Hall v. Florida*, the State contends that its pragmatic interest in an IQ cutoff rule promotes judicial efficiency and decreases the number of nonmeritorious claims presented to the court.¹⁴³ This interest in judicial efficiency is a justifiably democratic interest when the citizens of the state have voted for the death penalty and expect punishment to

139 The AAIDD was the first professional organization to introduce adaptive behavior as a second prong to the diagnostic criteria of an intellectual disability. At the time of *Atkins*, the AAIDD diagnosis of mental retardation involved adaptive limitations in two of ten skill areas but has since revised the criteria to a showing of significant limitations in one of three skill areas related to everyday functioning. See American Association on Mental Retardation, *Mental Retardation Definition, Classification and Systems of Support* (American Association on Mental Retardation, 10th ed 2002). According to an empirical study of *Atkins* claims from 2002 to 2009, the most successfully proven adaptive deficits in court are functional academics, social skills, and work skills because school and employment records can demonstrate these limitations. See John H. Blume, Sheri Lynn Johnson and Christopher Seeds, *An Empirical Look at Atkins Claims and its Application in Capital Cases*, 76 Tennessee L Rev 625, 635 (2009).

140 See American Association on Intellectual and Developmental Disabilities, *User's Guide: Mental Retardation Definition, Classification and Systems of Support* at 36 (10th ed 2007).

141 For example, if an individual's IQ score is tested as 70, clinicians can say with 95% confidence that the person's true IQ score is in between 65 to 75. See Brief of Amici Curiae American Psychological Association, American Psychiatric Association, et. al., *Hall v. Florida*, Docket No. 12-10882, *6 (US filed December 23, 2013)

142 See Brief for Respondent, *Hall v. Florida*, Docket No. 12-10882, *48-51 (US filed July 18, 2013) at "C. Hall's Proposed Approach Would Undermine Important State Interests That Depend On Objective, Settled Measures".

143 *Id.* and Oral Argument Transcript, *Hall v. Florida*, Docket No. 12-10822, *48 (March 3, 2014). (Solicitor General: "And if we apply the rule that the Petitioner has suggested, it would double the number of people who are eligible for the exemption. And that is inconsistent with Florida's purposes of the death penalty.")

be administered swiftly when appropriate.¹⁴⁴

The Solicitor General in *Hall v. Florida* made the proposition in oral arguments that removing the IQ cutoff rule would result in double the amount of *Atkins* claims before the Court.¹⁴⁵ This proposition alludes to the warning in Justice Scalia's dissenting opinion in *Atkins* that "time will tell" if courts would be flooded with an overwhelming number of frivolous *Atkins* post-conviction claims.¹⁴⁶ On face value, the doubling of *Atkins* claims appears to be a reasonable administrative concern. However, the most recent national empirical data on *Atkins* claims suggests otherwise.¹⁴⁷ Out of the less than 3,100 inmates¹⁴⁸ on death row nationally in the United States, only approximately 240 *Atkins* post-conviction claims were pending up to 2009.¹⁴⁹ This means about seven percent of all death row inmates have filed *Atkins* claims.¹⁵⁰ Though one of the largest death rows in the United States, Florida's death row still only holds approximately four hundred inmates.¹⁵¹ If the national percentage can be generalized by state, Florida's court system has likely only experienced twenty to thirty *Atkins* evidentiary hearings in the post-conviction setting. If the Solicitor General's prediction is accurate, that number doubled would be approximately sixty, at the very most. If greater scrutiny is applied to the State's interest in the bright-line rule, the judicial efficiency does not appear compelling enough to rival the capital defendant's due process opportunity, which prevents unconstitutional execution by the State.

Just as the dissenting Justices in *Ford* used concern over "the potential for false claims and deliberate delay in this context"¹⁵² to justify a lesser expectation of due process for capital defendants, the true motivation behind Florida's bright-line rule appears to be an attempt to reduce the risk that a few malingering defendants

144 Id at 48. (Solicitor General: "Well, the people of Florida have decided that the death penalty is an appropriate punishment for the most horrific crimes, like the crime at issue... and so Florida has an interest in ensuring that people who evade execution because mental retardation are people who are, in fact, mentally retarded. And if we apply the rule that the Petitioner has suggested, it would double the number of people who are eligible for the exemption. And that is inconsistent with Florida's purposes of the death penalty.")

145 Id. ("And if we apply the rule that the Petitioner has suggested, it would double the number of people who are eligible for the exemption.")

146 *Atkins v. Virginia*, 536 US 304, 353-354 (2002) (Scalia dissenting)

147 See John H. Blume, Sheri Lynn Johnson and Christopher Seeds, *An Empirical Look at Atkins Claims and its Application in Capital Cases*, 76 Tennessee L Rev 625, 633 (2009).

148 The most recent national death row statistic is at 3,088. The national death row statistic has slowly decreased from 3,593 in 2000 for the past fourteen years. See Death Penalty Information Center, online at <http://www.dpic.com> (last updated October 2, 2013).

149 See Blume, 76 Tennessee L Rev at 633 (cited in note 147).

150 Id.

151 See Death Penalty Information Center, online at <http://www.dpic.com> (last updated October 2, 2013). The most current Florida death row statistic is 412, as of October 2013.

152 *Ford v. Wainwright*, 477 US 399, 429 (1986).

may be able to prove claims to evade punishment.¹⁵³ Concern over these defendants is not unfounded because “whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured, the capital defendant who feigns mental retardation risks nothing at all.”¹⁵⁴ However, this discounts the decision maker’s capacity to be discerning when the full evidence of mental retardation is presented to the court.¹⁵⁵ More importantly, as a matter of principle, previous case law on evidentiary hearings reminds the State of Florida that the “lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and providing redress for those with substantial claims and of encouraging accuracy in the fact-finding determination.”¹⁵⁶ Fear of a capital defendant proving a false claim should never take priority over providing the defendant a due process opportunity to bring a meritorious claim and the pursuit of accurate decision-making, which is in the interest of the U.S. Constitution and society as a whole.

As the majority eloquently stated in *Ford*, “if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.”¹⁵⁷ While the State of Florida barely risks the possibility of a few deceptive defendants turning the capital trial process into a game, the corresponding risk of error for the defendant with evidence of intellectual disability under a strict IQ cutoff statute is an unconstitutional deprivation of life. Therefore, the irreversible error of death calls for the state to burden the risk of error. The IQ cutoff in Fla. Stat. §921.137 should be struck down because it diminishes the capital defendant’s due process opportunity and does not compel

153 Oral Argument Transcript, *Hall v. Florida*, Docket No. 12-10822, *48 (March 3, 2014). (Solicitor General: “Well, the people of Florida have decided that the death penalty is an appropriate punishment for the most horrific crimes, like the crime at issue...and so Florida has an interest in ensuring that people who evade execution because mental retardation are people who are, in fact, mentally retarded.”)

154 *Atkins v. Virginia*, 536 US 304, 353 (2002) (Scalia dissenting).

155 Oral Argument Transcript, *Hall v. Florida*, Docket No. 12-10822, *30 (March 3, 2014). (Justice Breyer: “What Atkins says is there are three parts, as you say. One part is significantly subaverage intellectual functioning. That’s the first part. And so what you say is, if it’s above a 70 on an IQ test, or a couple of them, that’s the end of it. We don’t go further. All right. What they say is, I want to tell the jury something, or the judge if the judge is deciding it: “Judge, I have an expert here. Thank you.” Expert: “I want to tell you, Your Honor, that that number 70 is subject to error.” It could be and indeed the State can do the same thing. If it’s 68, the number 68 is subject to error. So if somebody measures 68 you could bring in the witness, and you would say 5 percent of the time, it’s within 5 points either way...Now, I think you would do the same thing if you wanted to, on the down side, I guess. And that might lead people not to being executed. You see? And that’s their position, though, I think. And they get to do it on the upside. All right, what’s wrong with that? It doesn’t sound so terrible.”)

156 *Ford v. Wainwright*, 477 US 399, 417 (1986).

157 *Id.* at 411.

practical considerations.

VI. THE LARGER PICTURE

Despite the decrease in support of the death penalty¹⁵⁸ and trends towards abolition nationwide today, *Hall v. Florida* came before the Supreme Court at a time when federal constitutional jurisprudence on the Fourteenth Amendment's due process opportunity in capital sentencing is still vital to ensuring fundamental fairness for capital defendants as the number of executions wanes in death penalty states.¹⁵⁹ On the one hand, the visible trend of at least one state eliminating the death penalty each year since 2001¹⁶⁰ has created a sense of perceived momentum behind death penalty abolition on a national scale. On the other hand, in the thirty-two states with active death rows,¹⁶¹ the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹⁶² has made it much more difficult to challenge state procedures related to death sentences through habeas appeal since federal courts must defer to the judgment of state courts in capital cases.¹⁶³ While habeas corpus appeals once constituted a strong procedural mechanism for averting unlawful execution, the AEDPA has constrained the courts in their ability to offer relief, making federal constitutional jurisprudence on the Fourteenth

158 As of March 2013, Pew Research Center has reported that around fifty-five percent of Americans currently support the death penalty, noting the significant decline from over seventy-eight percent in 1996, the height of the "tough on crime" decade. In even the past few years, Pew noted a significant drop in the number of individuals who say they "strongly favor" the death penalty from twenty-eight percent to eighteen percent. For more information, see Michael Lipka, *Support for death penalty drops among Americans*, Pew Research Center (Pew Research Centre February 12, 2014), online at <http://www.pewresearch.org/fact-tank/2014/02/12/support-for-death-penalty-drops-among-americans/> (Visited Feb. 20, 2014)

159 The national number of executions per year has drastically decreased since the apex of 1999. While the national number of executions per year in 1999 was 98, the number has steadily decreased to 39 in 2013. See Death Penalty Information Center, *Executions Per Year Since 1976*, <http://www.deathpenaltyinfo.org/executions-year>. While the number of executions per year is waning, the national number of inmates on active state death rows is still as large as 3,088 in 2013. See Death Penalty Information Center, *Size of Death Row By Year*, (Death Penalty Information Center), online at <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#year> (Visited Oct 17, 2013)

160 See Death Penalty Information Center, *States With and Without the Death Penalty*, (Death Penalty Information Centre) online at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>. (Visited Feb 20, 2014)

161 *Id.*

162 See Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat 1214 (1996)

163 The AEDPA instituted a standard of review that raises the bar for individuals seeking federal court relief by commanding federal courts to uphold state court rulings in capital cases as long as it is not an "unreasonable application of clearly established federal law." See David Rubenstein, *AEDPA's Ratchet: Invoking the Miranda Right to Counsel after the Antiterrorism and Effective Death Penalty Act*, 86 Wash L Rev 905 (2011).

Amendment's due process opportunity for capital defendants all the more critical.

An instructive example of the AEDPA's current constraint is the 11th Circuit's most recent ruling in *Hill v. Humphrey*,¹⁶⁴ a challenge to the execution of Warren Lee Hill whose *Hill v. Georgia*¹⁶⁵ cert petition on his intellectual disability was conferenced alongside *Hall* but ultimately denied by the Roberts Court in September 2013. In *Hill v. Humphrey*, the 11th Circuit reviewed Georgia's *Atkins* statute¹⁶⁶ that insists that an intellectual disability be proven "beyond a reasonable doubt" in an evidentiary hearing on eligibility for the categorical bar.¹⁶⁷ With seven state experts supporting Mr. Hill's diagnosis of a severe intellectual disability, the state habeas court found Warren Hill intellectually disabled under a preponderance of the evidence standard¹⁶⁸ but not under the highest beyond a reasonable doubt standard. The State of Georgia is the only state to adopt this high standard of proof for an intellectual disability claim¹⁶⁹ and only one such claim out of twenty-two capital cases has been successful under the reasonable doubt standard.¹⁷⁰ Despite a strong procedural due process argument in Mr. Hill's case, the 11th Circuit panel denied relief because under the AEDPA, the Court cannot determine "whether Georgia's burden of proof is constitutionally permissible, but only that no decision of the United States Supreme Court clearly establishes that it is unconstitutional."¹⁷¹

Constrained by the AEDPA in its options for granting relief, the 11th Circuit opinion in *Hill v. Humphrey* identified the potential need for a clarification from the Court on what due process is needed in evidentiary hearings of the intellectually disabled. The 11th Circuit explicitly acknowledged that it did not "gain-say the possibility that the Supreme Court may later announce that a reasonable doubt standard for establishing the mental retardation exception to execution is constitutionally impermissible."¹⁷² Justice Barkett's dissent in the 11th Circuit panel opinion¹⁷³ decried the interpretation bind of AEDPA and outlined a procedural due process argument against state statutory schemes that preclude a meaningful opportunity to have an intellectual claim heard in a capital case. Given that this

164 See *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011).

165 See Petition for Writ of Certiorari, *In Re Warren Lee Hill, Jr.*, Cert. denied No. 12-10469 (Supreme Court filed May 22, 2013) See S.Ct. 571 U.S. Order list published on December 2, 2013.

166 See Georgia. O.C.G.A. § 17-7-131(c)(3) (2008).

167 For lower court opinion, see *Hill v. Humphrey*, 662 F.3d 1335, 1384 (11th Cir. 2011).

168 See *Hill v. Humphrey*, 662 F.3d 1335, 1384 (11th Cir. 2011).

169 An overwhelming majority of the states place the burden of proof at "preponderance of the evidence" and only four states place the burden of proof at "clear and convincing." See Fla. Stat. Ann. § 921.137(4) (2008), Ariz. Rev. Stat. § 13-703.02(G) (2007), Ind. Code Ann. § 35-36-9-4(B) (2008), and N.C. Gen. Stat. § 15A-2005(c), (f) (2008) (standard of proof is preponderance of the evidence if determined by a jury, clear and convincing evidence if determined by a court).

170 See *Hill v. Humphrey*, 662 F.3d 1335, 1365-1386 (11th Cir. 2011) (Barkett dissenting).

171 *Id.* at 1360.

172 *Id.* at 1348.

173 *Hill v. Humphrey*, 662 F.3d 1335, 1365-1386 (11th Cir. 2011) (Barkett dissenting).

important procedural due process argument is struggling to rise past the U.S. circuit courts, the Court's ruling in *Hall v. Florida* presented the best opportunity to resolve a critical discussion on the extent of the capital defendant's due process in evidentiary hearings on categorical bars today.

VII. CONCLUSION

In the Roberts Court's ruling on *Hall v. Florida*, Justice Kennedy stated in the conclusion that defendants facing a sanction as grave as death must have a fair opportunity to demonstrate that the Constitution prohibits their execution. However, the Court is still confronted with the lingering question of what a full and meaningful inquiry on the evidence of a capital defendant's intellectual disability, or rather, "making your best case against death," looks like in death penalty jurisdictions across the country today. Considering the clear need for reliability in any factual finding that may deprive a citizen of life, *Atkins* statutes should not institute pragmatic measures to decrease the risk of a malingering defendant evading punishment if these measures greatly increase the risk of the unconstitutional execution of an intellectually disabled defendant. As long as jurisdictions continue to "tinker with the machinery of death"¹⁷⁴ and the lives of capital defendants, the Court should honor the substantive regulations on the death penalty with the procedures that allow a capital defendant the fullest and most meaningful opportunity to qualify for categorical bars under the Eighth Amendment, beginning with *Atkins* and *Hall v. Florida*.

174 *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun dissenting) ("From this day forward, I no longer shall tinker with the machinery of death").







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