
WE ARE NOT INTERESTED: HOW DOMINANT POLITICAL PARTIES USE CAMPAIGN FINANCE LAW TO LOCK INTEREST GROUPS AND THIRD PARTIES OUT OF THE SYSTEM

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ABSTRACT

The scholarship on “politics as markets” reveals that dominant political parties use “lockups” to control the political system. So stronger, process-oriented judicial review is necessary to disrupt existing lockups. This Note comparatively applies this scholarship to campaign finance laws in the United States and United Kingdom. It shows that these countries’ campaign finance regimes function as lockups that permit the major parties to dominate their countries’ politics. Lockups allow these parties to control elections and the national discourse. These campaign finance lockups raise significant normative concerns because they restrict alternative voices’ political participation. This challenges democracies’ need for varied, pluralist free speech. In both nations, judicial review has disrupted the system and weakened these lockups, but this disruption has been more extensive in the United States. Finally, this disruption may bring its own costs by giving wealthy elites further, disproportionate speechmaking power.

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INTRODUCTION

Campaign finance regimes govern elections, a democratic society's most fundamental process. These laws determine who may speak at what time and which political messages reach the voters.¹ Their structures determine political parties' and interest groups'² access to contributions, as well as how those same organizations may spend those contributions. These groups' resources and messages in turn shape voters' choices among the candidates.³

Because of their power, campaign finance laws can make or break parties and interest groups in the political process. The potential for these laws to stifle speech and restrict political actors means that the organizations creating the rules (i.e. the system's dominant political parties⁴) might use regulation to weaken potential challengers and ensure their control.⁵ Such lockups might take the form of restrictions on interest group or third-party campaign expenditures. The dominant political parties might ban or severely restrict other groups' expenditures as a way to maintain their duopoly.⁶ Such restrictions would increase barriers to entry for third parties and make it impossible for interest groups to raise important issues that the major parties ignore. In this scenario, judicial review could act as an intervening mechanism to shake up and restructure the system, but such disruption risks disproportionately enhancing wealthy

1. Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 PEPP. L. REV. 373, 373–74 (2009) [hereinafter Issacharoff, *Constitutional Logic*].

2. Throughout this Note, the term “interest groups” refers to organizations that have a desire to participate in the political process, but are not affiliated with either of the major parties. This broad term includes third parties, as well as advocacy or issue-specific activist groups.

3. See Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1275 (1994) (arguing that interest groups are “indispensable players in the democratic process” because they help voters overcome collective action problems and provide valuable monitoring mechanisms that “reduce legislative shirking”).

4. In this Note, the terms “major parties” or “dominant parties” refer interchangeably to the two top parties that alternate political control. In the United States, these are the Democratic and Republican parties, and in the United Kingdom, the Conservative and Labour Parties. See, e.g., *Democratic, Republican Parties Dominate US Politics*, VOICE OF AMERICA, <http://www.voanews.com/content/a-13-2008-08-15-voa28-66681027/558207.html> (last updated Oct. 27, 2009); *UK Election Results Through Time - 1945 to 2005*, BBC, http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/8654338.stm (last visited May 5, 2016).

5. See Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648–52 (1998) (discussing how political parties use regulations to weaken potential challengers).

6. *Id.* at 688 (“In the absence of serious judicial scrutiny in this area, a two-party Congress will be free to create a bipartisan cartel . . .”).

citizens' speech.⁷

This Note will examine how the rules governing interest group campaign expenditures within the United States' and United Kingdom's campaign finance regimes serve as barriers to entry that preserve the major parties' political power. It will draw on the law and economics concept of lockups—mechanisms that political parties use to eliminate competitors and capture the political process.⁸ It will then examine how judicial review has disrupted existing campaign finance systems, which restrict interest group spending more than major party spending. Overall, this analysis shows that campaign finance regimes in both countries are lockups: they allow the major parties to dominate their political processes through disproportionate limits on other groups' campaign expenditures. These restrictions not only make it harder for third parties and interest groups to compete, but also impede their ability to discuss important national issues. In both countries, judicial review has disrupted the system, but this disruption has been more extensive and long lasting in the United States. Judicial review has removed most of the United States' campaign finance lockups, but has failed to eliminate the United Kingdom's restrictions.

Part I of this Note will explain the background scholarship that lays the foundation for this analysis. Part I.A. will describe partisan lockups and their impact on the political process. Part I.B. will discuss the potential for judicial review to disrupt existing partisan lockups. Parts I.C. and I.D. will summarize the existing campaign finance regimes in the United States and the United Kingdom with respect to interest group expenditures. Part II.A. will argue that lockups serve dual functions. First, they increase the dominant parties' electoral prospects; second, lockups allow the parties to control national political discussions. Part II.B. will show how lockups in both countries have both strengthened the dominant parties' duopoly and restricted third parties' and interest groups' roles. Part II.C. and II.D. will go on to analyze how judicial review, primarily in the United States, has disrupted these discriminatory campaign finance laws. This Note concludes with thoughts on the theory's implications and avenues for further research.

7. *Id.* at 648 (“Where courts can discern that existing partisan forces have manipulated these background rules, courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment.”).

8. *Id.* at 644 (“[D]ominant parties manage to lock up political institutions to forestall competition, with a principal focus on the failure of the institution best positioned to destabilize these lockups . . .”).

I. BACKGROUND

A. LOCKUPS

Political parties are the principal actors in both American and British politics. In the United States, the Democratic and Republican parties have dominated since the Civil War,⁹ while in the United Kingdom the Labour and Conservative parties have alternated government control since the 1920s.¹⁰ In both countries, these dominant parties are unique political organizations in that only these parties “routinely, pervasively, and legitimately exercise their influence from within the government.”¹¹ This enormous power and influence means “that both public political life and political education are in their hands.”¹² So these parties craft the regulations that their competitors—third parties and political interest groups—must follow if they wish to participate in the political process. Because the major parties seek to maximize their electoral returns,¹³ their greater relative strength incentivizes them to weaken potential challengers.¹⁴ Campaign finance restrictions provide the perfect tools. So although parties are essential to democracy, their systemic dominance means that they also “provide the perfect vehicle for deeply anticompetitive impulses.”¹⁵

Samuel Issacharoff and Richard Pildes characterize such self-interested behavior as partisan “lockups” of the political process.¹⁶ They appropriate the term from corporate governance scholarship, which uses it to explain “devices that constrain the effectiveness of the voting power of shareholders by entrenching the incumbent position of firm management.”¹⁷ These include mechanisms such as restrictions on new

9. *Democratic, Republican Parties Dominate US Politics*, *supra* note 4.

10. *UK Election Results Through Time - 1945 to 2005*, *supra* note 4.

11. Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHL-KENT L. REV. 493, 495 (2000) (quoting Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1758 (1993)).

12. *Id.*

13. *Id.* at 516 (quoting John P. Frenreis et al., *The Electoral Relevance of Local Party Organizations*, 84 AM. POL. SCI. REV. 225, 227 (1990)).

14. See Issacharof & Pildes, *supra* note 5, at 644 (arguing that partisan and ideological competition declined in the United States during the twentieth century partly due to the ways that “two dominant parties managed to manipulate and capture the ground rules of political competition so as to freeze out serious challengers”).

15. *Id.* at 668.

16. *Id.* at 648–52.

17. *Id.* at 648.

shareholders' voting rights, control of shareholder meetings, and poison pill provisions that penalize shareholders for allowing a firm to be taken over against the management's wishes.¹⁸ Issacharoff and Pildes argue that the risk of political lockups is "analogous to the problem of monopoly economic power: Incumbents do not have to change the existing rules of competition to remain in office as long as they possess the power to fend off challengers."¹⁹ Therefore, "differential expertise and intensity of interest, obscure and often remote effects, and vested interests in maintaining the political status quo" create a risk that dominant political parties will "capture democratic structures."²⁰

So lockups and democratic capture stem from political parties' desire to insulate themselves from competition.²¹ Issacharoff and Pildes argue that lockups appear when parties use their political power to erect "entry barriers against potential third-party challengers—a political version of the corporate 'poison pill.'"²² In effect, parties "act as monopolists who create significant entry barriers."²³ This may occur when a single dominant party shuts out the other party or intraparty challengers through a "[]commitment pact among existing elites that frustrates easy penetration by outsiders."²⁴

18. *Id.* at 648–49.

19. *Id.* at 709.

20. *Id.* The lockup model is subject to several criticisms. *See, e.g.*, Yasmin Dawood, *Electoral Fairness and The Law of Democracy: A Structural Rights Approach to Judicial Review*, 62 U. TORONTO L.J. 499, 511 (2012) [hereinafter Dawood, *Electoral Fairness*] (summarizing criticisms of the lockup model); Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1423–26 (2008) (explaining criticisms of the model as applied to partisan gerrymandering). There are three major criticisms. First, that the model does not specify an appropriate level of political competition. *See* Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 725 (1998) [hereinafter Hasen, *Comment*] ("What is missing from functional lockup theory, then, is a theory of *appropriate* political competition."). Second, that structural features of American politics, such as first-past-the-post voting, cause the entrenched two-party system. *See, e.g.*, David Schleicher, "Politics as Markets" *Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 188–92 (2006) ("Issacharoff and Pildes fail to take into account how the permanence of the two-party system impacts the efficiency of electoral markets."). Third, that lockups in the two-party context are not harmful because a strong two-party system promotes stability, reduces the power of special interests, and provides valuable voter cues. *See, e.g.*, Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States To Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 345–50 (1997) (explaining and critiquing the views of "responsible party government" scholars that a two-party system promotes political stability, antifactionalism, and voting cues). This Note does not engage with these criticisms, instead the lockup model is solely applied comparatively and in consideration to the relevance of judicial review.

21. Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1610 (1999).

22. Issacharoff & Pildes, *supra* note 5, at 651.

23. *Id.* at 709.

24. *Id.* at 651. The authors cite the *White Primary Cases*, which reveal that prohibitions on black

This might occur through restrictions on write-in voting that can prevent a disgruntled voter from expressing dissatisfaction with his or her party's nominees²⁵ or racially restricted primaries.²⁶

Hence, parties may also use government power to erect "anticompetitive obstacle[s]" that further "bipolar or oligopolistic party domination."²⁷ Regardless of which party is currently the majority, both parties have a "shared objective"²⁸ to "monopolize power."²⁹ Writing separately, Pildes identifies "characteristic ways that dominant" parties "leverage their power into more enduring constraints on the political competition than they would otherwise face."³⁰ These barriers include ballot access restrictions, such as Minnesota's ban on fusion candidates (candidates appearing under more than one party listing) that the Supreme Court upheld in *Timmons v. Twin Cities Area New Party*.³¹ Most relevant for this Note, the dominant parties may fortify their primacy through campaign finance laws that limit public financing to the major parties and protect their contribution streams. For instance, Issacharoff and Pildes argue that parties employed the Federal Election Campaign Act of 1974 as a "major party protection act."³² While it entitled the top two parties' candidates to \$140 million in public funds, it offered nothing for third parties.³³

Scholars have noted the potential for campaign finance laws to serve as partisan lockups; but, for the most part, authors have yet to export this

participation, in addition to perpetuating white supremacy, also worked "as a partisan tool to deter any internal party factions from seeking to forge destabilizing coalitions with black allies." *Id.*

25. *Id.* at 670–74 (arguing that the Supreme Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992) which upheld Hawaii's requirement that primary voters choose a single ballot for all offices, prevents primary voters' "disaffection from coalescing behind a specific alternative candidate to the choice of the Democratic Party").

26. *Id.* at 652–58 (identifying racially restricted Democratic Party primaries in Texas as a monopolistic lockup).

27. *Id.* at 683.

28. *Id.*

29. *Id.* (quoting E.E. SCHATTSCHEIDER, PARTY GOVERNMENT 68 (1942)).

30. Pildes, *supra* note 21, at 1607.

31. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). Pildes and Issacharoff argue that ballot access restrictions work because they not only prevent third-party candidates and independents from getting on the ballot, but also force these groups to "expend a major portion of their scarce resources in doing so." Issacharoff & Pildes, *supra* note 5, at 686–87.

32. Issacharoff & Pildes, *supra* note 5, at 688 (quoting STEVEN J. ROSTENSTONE, ROY L. BEHR & EDWARD H. LAZARUS, THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE 26 (2d ed. 1996)).

33. *Id.* at 689.

idea to other constitutional democracies and deploy it comparatively.³⁴ This Note will apply the theory to campaign finance laws in both the United States and the United Kingdom—attempting to understand how dominant political parties preserve their power and how judicial review in each country affects their respective systems. It will argue that the dominant parties designed major campaign finance laws as lockups. These lockups raise barriers to third-party entry and impede interest groups' ability to criticize the major parties' candidates. So they ultimately prevent such groups from affecting the national political discourse. Lockups raise significant normative concerns, but extensive judicial review can disrupt and limit their insidious effects. Yet judicial review also brings a potential cost—increased dominance of the political process by wealthy interest group backers.

B. THE ROLE OF JUDICIAL REVIEW

Judicial review is a potential solution to lockups. Issacharoff and Pildes argue for enhanced judicial review that focuses on the underlying partisan structure.³⁵ They argue that the judiciary should intervene to ensure a competitive partisan environment and prevent incumbent parties from abusing the political process for their own protection.³⁶ Such intervention would put “competitive pressure” on the major parties and create a process that better responds to voter interests.³⁷ Therefore, they call

34. Yasmin Dawood uses the lockup approach to develop a Canada-specific structuralist approach that she recommends the Supreme Court of Canada operationalize by “interpret[ing] the right to vote as encompassing a new democratic right—the right to a fair and legitimate democratic process.” Dawood, *Electoral Fairness*, *supra* note 20, at 499, 503–04. Similarly, Kofi Oteng Kufuor uses the work of Issacharoff and Pildes to argue Ghana's ruling party raised barriers to entry for nascent political parties shortly after taking power. Kofi Oteng Kufuor, *The Market for Political Parties in Ghana*, 16 *TULSA J. COMP. & INT'L L.* 193, 193–94 (2009).

35. Issacharoff & Pildes, *supra* note 5, at 648 (“In cases involving the regulation of politics, we argue that courts should shift from the conventional first-order focus on rights and equality to a second-order focus on the background markets in partisan control.”).

36. *Id.* (“Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention. Where courts can discern that existing partisan forces have manipulated these background rules, courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment.”).

37. *Id.* at 680. *See also* Hasen, *Comment*, *supra* note 20, at 727 (critiquing claims that the two-party system promotes stability, protects against rent-seeking interest groups, or provides effective ideological cues to voters). *But see* Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 *U. PA. L. REV.* 793, 794 (2001) (“I argue against the prevailing assumption that more choices necessarily result in better democracy. Democratic theory recognizes numerous forms of legitimate party systems and electoral rules, and gives us no basis to conclude that multiparty systems are more democratic than two-party systems, or that closed party nomination rules are less democratic than open or blanket systems that offer voters more choices.”).

for the Supreme Court to “discern which regulations of politics are anticompetitive and lock up democratic competition in impermissible ways.”³⁸ The Court should also “read into the Constitution an indispensable commitment to the preservation of an appropriately competitive political order” that dictates judicial intervention as necessary.³⁹

Michael Klarman argues, without using the language of lockups, that judicial review is appropriate in cases of “legislative entrenchment.”⁴⁰ This occurs when legislatures solidify their hold on office contrary to the preferences of their constituents.⁴¹ In these situations, elected representatives are behaving in a counter-majoritarian fashion, warranting the judiciary to act in an “anti-entrenchment” manner.⁴² In the case of campaign finance, this review might include compelling legislative fixes or “subject[ing] legislatively enacted campaign finance reform to close scrutiny with an eye toward uncovering entrenchment.”⁴³ He further suggests current Supreme Court scrutiny incorrectly focuses on the free speech aspects of campaign finance regulation; this further entrenches the major political parties.⁴⁴

Finally, Elizabeth Garrett adopts a more restrained view. She argues that the judiciary has only a limited interest in preserving a “dynamic and competitive political environment to protect the interests of major and minor parties and their members.”⁴⁵ Garrett recommends that “judicial review should be limited to extreme examples of anticompetitive laws and regulations designed to ensure the success of one party over the other or of the major over the minor parties.”⁴⁶ She argues that intraparty competition inhibits partisan dominance because it ensures a healthy marketplace of

38. Issacharoff & Pildes, *supra* note 5, at 680.

39. *Id.* at 716–17. Cf. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997) (arguing that courts do not face the counter-majoritarian problem in policing legislative action that seeks merely to perpetuate legislators’ power or the longevity of a temporary majority). *But see* Schleicher, *supra* note 20, at 197–98 (arguing that current Supreme Court jurisprudence uses an appropriately balanced approach in regulating a first-past-the-post system’s natural duopoly).

40. Klarman, *supra* note 39, at 497–99.

41. *Id.* at 498.

42. *Id.* at 497–99.

43. *Id.* at 537.

44. *Id.* at 522–23.

45. Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 96 (2002).

46. *Id.* at 143. Garrett argues that Issacharoff and Pildes have “underestimated the degree of dynamism in the system and the extent of protection afforded by the political process and thus have too readily accepted judicial review.” *Id.* at 146.

ideas within parties.⁴⁷ Hence, laws should only be particularly suspect if: (1) they are retroactively applied or “developed immediately after a new element of political competition has emerged and targeted at that development,”⁴⁸ (2) “relatively temporary,”⁴⁹ or (3) do not “apply generally.”⁵⁰

Overall, these scholars offer a unifying theme: the judiciary should critically evaluate anticompetitive laws and consider the possibility that legislation may disproportionately advantage major parties over time. This commonality—not the subtler differences in their approaches—is most important for this Note. This Note will use the Supreme Court’s campaign finance decisions, as well as the European Court of Human Rights’ (ECHR) decision in *Bowman v. United Kingdom*,⁵¹ to discuss how judicial review can ensure a competitive partisan process.

C. UNITED STATES

Congress founded the United States campaign finance framework on two statutes: the Federal Election Campaign Act of 1971 (“FECA”)⁵² and the Bipartisan Campaign Reform Act of 2002 (“BCRA”).⁵³ Both severely limited interest groups’ power to make political expenditures. But the Supreme Court ultimately limited both laws and strengthened interest groups’ rights to make campaign expenditures.⁵⁴

1. *Buckley* and FECA

Passed in the post-Watergate era, FECA was “the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress.”⁵⁵ The legislation limited contribution and expenditures, required greater disclosure, and

47. *Id.* at 143 (“Judicial intervention should be rare because competition is possible not only among parties but also within parties.”).

48. *Id.* at 149.

49. *Id.* at 150.

50. *Id.*

51. *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175 (1998).

52. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 3–20 (1972) (codified as amended at 52 U.S.C. §§ 30101–30146 (2012)). *See also* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1263–1304 (codified as amended at 52 U.S.C. §§ 30101–30146 (2012)).

53. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 81–117 (codified as amended at 52 U.S.C. §§ 30101–30146 (2012)).

54. *See Buckley v. Valeo*, 424 U.S. 1, 143 (1976); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

55. *Buckley*, 424 U.S. at 7 (quoting *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975)).

created a public financing system for presidential candidates.⁵⁶ In particular, FECA limited independent expenditures by individuals and interest groups “relative to a clearly defined candidate” to \$1,000 per year.⁵⁷

The Court rejected this limitation because it threatened to “reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”⁵⁸ Noting the need to finance political speech in a modern media environment, the Court stated the \$1,000 ceiling would shut groups unaffiliated with candidates or political parties out of the process.⁵⁹ The limit effectively banned interest groups from using certain “indispensable instruments of effective political speech” because their expense would quickly exceed the \$1,000 ceiling.⁶⁰ The limitation not only restricted the groups themselves, but also impinged on interest group members’ freedoms of association and speech.⁶¹

So preventing corruption was insufficient to support the \$1,000 limit on independent expenditures.⁶² The Court also rejected arguments that the government could equalize the playing field between groups. The Court concluded that the First Amendment prohibited the government from restricting some groups’ speech to enhance others’ speech.⁶³

56. *Id.* (detailing FECA’s primary provisions).

57. *Id.*

58. *Id.* at 19–20.

59. *Id.* (“The \$1,000 ceiling on spending ‘relative to a clearly identified candidate,’ would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.”) (citation omitted) (quoting 18 U.S.C. § 608(e)(1) (Supp. IV 1970)).

60. *Id.* at 19 (“The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”).

61. *Id.* at 22 (“[T]he Act’s \$1,000 limitation on independent expenditures ‘relative to a clearly identified candidate’ precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. The Act’s constraints on the ability of independent associations and candidate’s campaign organizations to expend resources on political expression ‘is simultaneously an interference with the freedom of [their] adherents.’”) (citations omitted) (first quoting 18 U.S.C. § 608(e)(1) (Supp. IV 1970); then quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)).

62. *Id.* at 45 (“We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)’s ceiling on independent expenditures.”).

63. *Id.* at 48–49 (“[T]he 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, which was designed ‘to secure the “the widest possible dissemination of information from diverse and

Soon after *Buckley, First National Bank of Boston v. Bellotti*⁶⁴ strengthened the First Amendment rights of interest groups—particularly corporations. The Court struck down a Massachusetts law that prohibited corporations from expending funds or making contributions on referendums “other than one[s] materially affecting any of the property, business or assets of the corporation.”⁶⁵ The Court invalidated the law because “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”⁶⁶ Therefore, protected speech does not lose its “protection simply because its source is a corporation that cannot prove . . . a material effect on its business or property.”⁶⁷

2. *Citizens United* and the BCRA

The BCRA attempted to rectify many of campaign finance’s ongoing problems, some related to the Court’s decision in *Buckley*. With regard to interest groups, the BCRA banned labor union and corporate expenditures that expressly advocated for a federal candidate’s election or defeat.⁶⁸ They also could not pay for any “electioneering communications” from their general treasuries.⁶⁹ The law defined “electioneering communications” as communications that are: (1) made within thirty days of a primary or sixty days of a general election, (2) focused on the “relevant electorate,” and (3) reference a “clearly identified candidate for Federal office.”⁷⁰ Instead of using their general treasuries to fund these communications, the groups had to pay from “separately segregated funds.”⁷¹ These separate funds were a

antagonistic sources,” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”) (citation omitted) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

64. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978)

65. *Bellotti*, 435 U.S. at 768 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

66. *Id.* at 777.

67. *Id.* at 784.

68. *Citizens United v. FEC*, 558 U.S. 310, 320 (2010) (“Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.”) (citing 2 U.S.C. § 441b (2000)).

69. *Id.* at 320–21 (“BCRA § 203 amended § 441b to prohibit any ‘electioneering communication’ as well.”) (quoting 2 U.S.C. § 441(b)(2) (2006)).

70. *Id.* at 321 (“An electioneering communication is defined as ‘any broadcast, cable, or satellite communication’ that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a primary or 60 days of a general election.”) (quoting 2 U.S.C. § 434(f)(3)(A)).

71. *Id.* (“Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a ‘separate segregated fund’

midway point between business or labor funds and their desired political expression.⁷² The funds could only receive donations from stockholders, employees, and members of the organization—thereby permitting the interest group to participate in political activity without aggregating wealth from many sources.⁷³ The Court initially approved this requirement in *McConnell v. FEC*,⁷⁴ relying on the Court's 1989 decision in *Austin v. Michigan State Chamber of Commerce*.⁷⁵ *Austin* held that Michigan's campaign finance laws could prohibit nonprofit corporations from conducting election activity for or against candidates.⁷⁶

After *Austin* and *McConnell*, *Citizens United* was a return to judicial intervention in favor of protecting interest group campaign expenditures.⁷⁷ A nonprofit corporation, Citizens United, sought to release a film, entitled *Hillary: The Movie* ("Hillary"), through video-on-demand and promote the film with advertisements on cable and television.⁷⁸ Citizens United feared the BCRA's ban on corporate-funded independent expenditures might apply to *Hillary* and its advertisements, so the nonprofit sought declaratory and injunctive relief against the FEC on First Amendment grounds.⁷⁹

After finding that the ban applied to *Hillary*, the Court invalidated the BCRA's ban on corporate independent expenditures.⁸⁰ The Court rejected Congress's attempts to distinguish corporate speech from other types of speech: "The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit

(known as a political action committee, or PAC) for these purposes.") (quoting 2 U.S.C. § 441b(b)(2)).

72. Kathleen Hunker, *Elections Across the Pond: Comparing Campaign Finance Regimes in the United States and United Kingdom*, 36 HARV. J.L. & PUB. POL'Y 1099, 1112 (2013) ("Congress could not ban the political expenditures of corporations and labor unions outright; it thus decided to place an obstruction between the organizations and . . . their general treasuries.").

73. *Citizens United*, 558 U.S. at 321 ("The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union.") (citing 2 U.S.C. § 441b(b)(2)).

74. *McConnell v. FEC*, 540 U.S. 93, 203–11 (2003) (affirming lower court's judgment upholding the regulation).

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

76. *Id.* at 668–69.

77. See BeVier, *supra* note 3, at 1269–70 ("*Austin* signals a departure from *Buckley*'s limiting principles.").

78. *Citizens United*, 558 U.S. at 319–20.

79. *Id.* at 321.

80. *Id.* at 365–66.

corporations.”⁸¹ Although the government argued that corporations’ greater wealth justified stringent regulations, the Court rejected this argument and dismissed the government’s “antidistortion” argument that corporate speech would have a disproportionate, distorting role on the public debate.⁸² Instead, corporate speech would strengthen the marketplace of ideas.⁸³

D. UNITED KINGDOM

1. Early Twentieth-Century Campaign Finance

Nineteenth- and twentieth-century British campaign finance law emphasized the Victorian-era belief that elections focused on the individual candidate, not the candidate’s political party.⁸⁴ So pre-2000 British election law restricted individual parliamentary candidates, but did nothing to limit national political parties or require them to disclose their contributions.⁸⁵ For instance, the most recent law before the 2000 revision, the 1983 Representation of the People Act (“RPA”),⁸⁶ imposed a limit that depended on the constituency’s size, but generally fluctuated between £9,000–10,000 per candidate.⁸⁷

The RPA also imposed tight expenditure limits on third parties and interest groups. With the exception of newspapers, individuals, interest groups, or third parties could spend a maximum of 50 pence in support of or opposition to a candidate.⁸⁸ The limit later increased to £5, the only increase since 1949.⁸⁹ Yet in the same time period, Members of Parliament (“MPs”) increased limits on their personal campaign spending by £4,515.⁹⁰ This shows the MPs’ reluctance to permit increased funding for what would likely be critical advertisements.⁹¹ To prevent interest groups or

81. *Id.* at 364–65.

82. *Id.* at 313–14.

83. *Id.* at 364 (“Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.”).

84. Andrew C. Geddis, *Confronting the “Problem” of Third Party Expenditures in United Kingdom Election Law*, 27 *BROOK. J. INT’L L.* 103, 110–11 (2001).

85. *Id.*

86. Representation of the People Act 1983, c. 2 (UK).

87. Keith D. Ewing, *Promoting Political Equality: Spending Limits in British Electoral Law*, 2 *ELECTION L.J.* 499, 501 (2003) [hereinafter Ewing, *Promoting Equality*].

88. *Id.* at 504.

89. Geddis, *supra* note 84, at 124.

90. *Id.*

91. *Id.* (“Changing the limit would require Members of Parliament to agree to expose themselves to more criticism of their candidacies and their persons at election time—a prospect that is unlikely to

candidates from evading the restrictions, any individual expenditure above the £5 limit required a candidate's approval and would be deducted from the candidate's expenditure limit.⁹² Because the candidates' limits were already restricted, candidates were reluctant to authorize third-party spending that would reduce their total spending.⁹³ Therefore, "the £5 limit became, for all intents and purposes, the maximum spending allowed to a third party."⁹⁴

2. *Bowman v. United Kingdom*

Bowman, a case heard in the European Court of Human Rights ("ECHR"),⁹⁵ brought United Kingdom restrictions on third-party spending into conflict with the European Convention on Human Rights ("Convention"). The Society for the Protection of the Unborn Child ("SPUC") is a 50,000-member British organization opposed to abortion and human embryo experimentation.⁹⁶ The SPUC seeks to change current British law, which permits abortion and embryo experimentation.⁹⁷ The major political parties do not take positions on abortion and embryo experimentation; instead they permit MPs to vote their conscience on bills.⁹⁸

Lacking publicity, the SPUC and its executive director, Phyllis Bowman, distributed 1.5 million leaflets to inform constituents of their local candidates' voting records.⁹⁹ These leaflets told constituents that the SPUC was not directing voters how to vote, but that it was critical for them "to check on Candidates' voting intentions on abortion and on the use of the human embryo as a guinea-pig."¹⁰⁰ The leaflet then proceeded to describe each candidate's stated position and voting records, if any, on the issues.¹⁰¹ The British government charged Bowman after she violated the

fill them with delight. Evidence of the reluctance of Members of Parliament to open themselves to such outside criticism may be found in the fact that in the period since 1949, they had voted to increase the base amount that they themselves could spend on campaigning for election by £4,515, whilst raising the spending limit for third parties by just £4.50.").

92. Ewing, *Promoting Equality*, *supra* note 87, at 504.

93. Geddis, *supra* note 84, at 112.

94. *Id.*

95. *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175 (1998).

96. *Id.* at 180.

97. *Id.*

98. *Id.*

99. *Id.* at 180–81.

100. *Id.*

101. *Id.*

£5 limit on individual and interest group spending, but she was acquitted on procedural grounds.¹⁰² Despite this result, she successfully appealed to the ECHR, arguing that her freedom of expression had been violated.¹⁰³

Article 10 of the European Convention on Human Rights protects the right to freedom of expression: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority.”¹⁰⁴ The Convention permits states to create “formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others.”¹⁰⁵ The British government argued that the limit protected the rights of others because it: (1) promoted fairness between candidates by preventing wealthy third parties from campaigning for or against a candidate and thereby causing the candidate to divert a portion of his budget to a response, (2) ensured candidates remained independent of moneyed interest groups, and (3) kept the election’s political debate focused on matters of “general concern” rather than shifting it to focus on single issues raised by interest groups.¹⁰⁶ The ECHR agreed that the law pursued a legitimate aim of protecting the rights of others, including the candidates for election and the constituency’s electorate.¹⁰⁷

But the restriction was not sufficiently “necessary in a democratic society.”¹⁰⁸ Here, the court found the restriction was disproportionate to its purpose because “there was a pressing need to permit such matters to be put on the political agenda prior to elections.”¹⁰⁹ Furthermore, because other channels of information-spreading (such as television, radio or standing as a candidate herself) were prohibitively expensive, the challenged law “operated, for all practical purposes, as a total barrier to Mrs. Bowman’s publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate.”¹¹⁰ Therefore, the ECHR invalidated the £5 limit and Parliament later raised the limit to £500

102. *Id.* at 182.

103. Ewing, *Promoting Equality*, *supra* note 87, at 505.

104. *Bowman*, 63 Eur. Ct. H.R. at 185–86 (quoting Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222).

105. *Id.* at 186.

106. *Id.* at 187.

107. *Id.*

108. *Id.* (quoting Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222).

109. *Id.* at 188.

110. *Id.* at 189.

in future legislation.¹¹¹

3. The PPERA

Contemporary British campaign finance law began with the Political Parties, Elections and Referendums Act of 2000 (“PPERA”).¹¹² The PPERA provided a comprehensive regulatory response to allegations of foreign contributions, questionable donations to the Labour Party, and increasingly large election expenditures.¹¹³ Because of the PPERA, “[t]he spending limits in British electoral law are more wide ranging and comprehensive than in almost any comparable democracy.”¹¹⁴ The law primarily adopted the recommendations of the Committee on Standards in Public Life (popularly known as the Neill Committee after its chairman, Lord Neill of Bladen).¹¹⁵ In response to the need for reform, the Neill Committee used written submissions by political parties and public hearings to draft legislative recommendations.¹¹⁶

The new regulatory framework sought to restore public confidence in British elections through increasing disclosure regulations and spending restrictions designed to ensure fair elections.¹¹⁷ Importantly, the reforms did not include any ceiling on political contributions. The Neill Committee felt that the right to make and receive contributions was key to a successful democracy and that expenditure limits would sufficiently “lessen the need for large donations.”¹¹⁸ Furthermore, the lack of a contribution ceiling

111. Geddis, *supra* note 84, at 128–29 (explaining the post-*Bowman* raise).

112. Political Parties, Elections and Referendums Act 2000, c. 41 (UK).

113. *See generally* KEITH D. EWING, THE COST OF DEMOCRACY: PARTY FUNDING IN MODERN BRITISH POLITICS 1–13 (2007) [hereinafter, EWING, COST] (arguing that foreign contributions, questionable donations, and increasingly large campaign expenditures meant that “the question of party funding became more prominent in the 1990s as part of the overall question of the ‘sleaze’ that was affecting the British political system”).

114. Ewing, *Promoting Equality*, *supra* note 87, at 522.

115. COMMITTEE ON STANDARDS IN PUBLIC LIFE, THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM, 1998, Cm. 4057–I [hereinafter NEILL COMMITTEE REPORT]. *See also* Geddis, *supra* note 84, at 128 (“Following the release of the Neill Committee’s Report, the Labour Government advanced a set of legislative proposals designed to overhaul the rules governing spending on elections in line with the report’s recommendations. Parliament in turn passed these proposals into law via PPERA.”).

116. EWING, COST, *supra* note 113, at 17.

117. *Id.* at 17–21; Hunker, *supra* note 72, at 1122 (“[S]pending reforms and public funding proposals mainly worked toward establishing a fair electoral system.”).

118. NEILL COMMITTEE REPORT, *supra* note 115, at 79 (“Individuals should have the freedom to contribute to political parties, and the parties should be free to compete for donations. That is part of a healthy democracy. We are recommending limits on the expenditure of political parties, and we believe that may tend to lessen the need for large donations.”).

showed a realization “that without these large benefactors the major parties would not be able to sufficiently fund their activities.”¹¹⁹

In contrast to the lack of contribution limits, the PPERA imposed nationwide restrictions on campaign expenditures for parties of all sizes. Campaign expenditures are “expenses incurred by or on behalf of [a] party . . . for election purposes.”¹²⁰ Under the PPERA, election purposes means for the “purpose of or in connection with promoting or procuring electoral success for the party” or “otherwise enhancing” its standing or that of its candidates “in connection with future relevant elections.”¹²¹ This is a broad, inclusive definition that includes:

- a. Party political broadcasts
- b. Advertising
- c. Unsolicited material sent to electors
- d. Any manifesto or other document setting out the party’s policies
- e. Market research or canvassing conducted for purpose of ascertaining voting intentions
- f. The provision of services or facilities in connection with press conferences or other dealings with the media
- g. Transport of people (such as the party leader) with a view to obtaining publicity in connection with an election campaign
- h. Rallies and other events organized to obtain publicity in connection with the election.¹²²

For parties, the PPERA sets nationwide spending limits based on the number of seats that a party contests. It sets a nationwide limit of £19.5 million for the parties that contest over 600 seats.¹²³ The new limits excluded certain forms of crucial party spending, including party newsletters, unsolicited material addressed to party members, and property, services, or facilities made available to the party from public funds.¹²⁴

119. Hunker, *supra* note 72, at 1122.

120. Political Parties, Elections and Referendums Act 2000, c. 41, § 72(2) (UK); Keith D. Ewing & Jacob Rowbottom, *The Role of Spending Controls: New Electoral Actors and New Campaign Techniques*, in *THE FUNDING OF POLITICAL PARTIES: WHERE NOW?* 77, 79 (Keith D. Ewing et al. eds., 2012); Geddis, *supra* note 84, at 127–28.

121. Political Parties, Elections and Referendums Act 2000, c. 41, § 72.

122. Ewing & Rowbottom, *supra* note 120, at 79 (citing Political Parties, Elections and Referendums Act 2000, c. 41, § 72, sch. 8).

123. *Id.* See also NEILL COMMITTEE REPORT, *supra* note 115, at 9 (recommending a £20 million limit for parties contesting greater than 600 seats and that all other expenditure limits should be based on the number of seats contested).

124. Political Parties, Elections and Referendums Act 2000, c. 41, § 72, sch. 8; EWING, COST, *supra* note 113, at 152.

Under the PPERA, the Secretary of State sets individual candidate spending limits before the election.¹²⁵ In the May 2015 election, the limits were £39,400 per candidate per constituency, plus a variable amount based on the constituency's size and type.¹²⁶

The PPERA also contains stringent restrictions on third party and interest group spending. The three largest parties' testimony to the Neill Committee repeatedly emphasized the need for strict limits on third-party spending.¹²⁷ The Neill Committee accepted the parties' rationales; the body never debated whether "limiting the ability of third parties to make expenditures on local constituency races was a desirable policy."¹²⁸

The Neill Committee believed outside spending restrictions were necessary to preserve the system's integrity for three reasons. First, it feared that spending exceeding the major parties' spending limits might be funneled into proxy interest group campaigns.¹²⁹ The Neill Committee believed American politics showed a number of ways interest group spending could help the dominant parties evade spending limits.¹³⁰ Hence, further restrictions on interest group spending were necessary to protect the parties' limits. Second, MPs worried that interest group spending on par with the major parties' spending might drown out the major parties. This would lead to a "cacophony in which the voices of the political parties

125. The Representation of the People (Variation of Limits of Candidates' Election Expenses) Order 2014, SI 2014/1870, art. 1 n.(a) (Eng. & Wales).

126. See THE ELECTORAL COMM'N, GUIDANCE FOR CANDIDATES AND AGENTS: SPENDING AND DONATIONS 7 (2015), http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf.

127. NEILL COMMITTEE REPORT, *supra* note 115, at 131 ("All the major parties, in their evidence to this Committee expressed awareness of this third-party problem and concern about it.")

128. Geddis, *supra* note 84, at 127.

129. NEILL COMMITTEE REPORT, *supra* note 115, at 131–32 ("The parties themselves could set up, as we remarked earlier, a wide range of front organisations. Alternatively, even without any collusion between the parties and outsiders, individuals or organisations could engage in large-scale propaganda that was clearly intended either to promote the election of one party or to discourage the election of another. . . . The Conservatives pointed out that 'an expenditure cap, like disclosure, would also be open to abuse,' adding that 'if political parties are to limit their spending they may seek to persuade other groups to spend on their behalf.' The Labour Party stated flatly: 'it would make no sense to impose a limit on political parties only to see these eclipsed by free-spending pressure groups.' The Liberal Democrats similarly noted that 'there must be some restriction on incurring expenditure on behalf of a candidate (or that candidate's opponents) if there are to be any sensible limits to election expenditure.'"). See, e.g., Ewing & Rowbottom, *supra* note 120, at 81; Geddis, *supra* note 84, at 127–28.

130. NEILL COMMITTEE REPORT, *supra* note 115, at 131 ("Such limits are obviously needed and obviously need to be enforced. Otherwise, as American experience has shown, there are any number of ways in which the spending limits on the political parties could be evaded.")

would struggle to be heard.”¹³¹ Third, the Neill Committee feared outside spending would divert funds away from the major parties’ campaigns because it would require them “to use up some of their limited resources in dealing with attacks from other organizations.”¹³²

So, in response, the PPERA limited interest groups’ campaign spending on both the local and national levels.¹³³ At the local level, all outside groups may only spend a maximum of £500 designed to “promot[e] or procur[e] the election” of a candidate in an individual constituency.¹³⁴ This is an increase from the £5 limit struck down by the ECHR in *Bowman*.¹³⁵ The Neill Committee first recommended this higher limit as an amount sufficient to cover local newspaper advertisements or the production and distribution of leaflets in a constituency.¹³⁶ It has not yet been litigated in the ECHR.¹³⁷

The national regulatory framework sets two different limits: a lower limit for the majority of third-party groups and a higher limit for recognized third parties that register with the Election Commission. The PPERA limits non-recognized groups to a maximum of £10,000 in England and £5,000 each in Scotland, Wales, or Northern Ireland.¹³⁸ To spend more than this, third parties must file a notification with the Election Commission to become recognized.¹³⁹ Recognition permits the recognized party to spend up to £793,500 in England, £108,000 in Scotland, £60,000 in Wales, and £27,000 in Northern Ireland.¹⁴⁰ Given that the national limit is £19.5 million, this means recognized third parties may spend about five percent of what the dominant parties may spend nationwide.¹⁴¹ So

131. Ewing & Rowbottom, *supra* note 120, at 82.

132. *Id.* See, e.g., Colin Feasby, *Issue Advocacy and Third Parties in the United Kingdom and Canada*, 48 MCGILL L.J. 11, 20 (2003) (“Unchecked third party expenditures have the potential to destabilize the relative equality of resources among the candidates and political parties established by political finance legislation. In particular, the activities of third parties may threaten to disturb the détente among candidates and political parties imposed by spending limits. Third parties may, by formal agreement, implicit arrangement, or otherwise, undermine expenditure limits on candidates and parties by pursuing coordinated or complimentary campaigns.”).

133. Geddis, *supra* note 84, at 129.

134. Political Parties, Elections and Referendums Act 2000, c. 41, § 131(3) (UK).

135. *Infra* note 208 and accompanying text.

136. Ewing, *Promoting Equality*, *supra* note 87, at 505–07.

137. *Id.*

138. Political Parties, Elections and Referendums Act 2000, c. 41, § 94.

139. *Id.* § 88.

140. *Id.* § 94, sch. 10. See also NEILL COMMITTEE REPORT, *supra* note 115, at 134 (“[W]e propose that registered third parties should be able to spend up to 5 per cent of the permitted maximum for parties contesting more than 600 parliamentary constituencies.”).

141. Compare Political Parties, Elections and Referendums Act 2000, c. 41, § 79, sch. 9, with *id.*

recognition entitles a third party to a higher spending limit, but also imposes restrictions on the permissible donors.¹⁴² And recognition requires the recognized third party to file a public, post-election return of its spending that lists all donations over £5,000.¹⁴³

Finally, despite relatively low limits, few outside groups reach the PPERA's maximum spending.¹⁴⁴ In total, recognized third parties spent £1.7 million in the 2005 election and £1.8 million in the 2010 elections.¹⁴⁵ These levels pale in comparison to the maximum permitted spending and the national parties' campaign expenditures. Possibly because of these restrictions, few third parties have chosen to become recognized. In the 2010 general election, there were twenty-two recognized third parties, none of which spent more than £555,554.¹⁴⁶ And these groups have primarily steered clear of active involvement in the battle between the major political parties. In 2005, only two recognized third parties spent more than £100,000.¹⁴⁷ Although in 2010 this increased to seven groups, all but one focused on "anti-racism, animal welfare, or constitutional reform."¹⁴⁸ Furthermore, only one trade union participated in high-election spending.¹⁴⁹ Perhaps most surprisingly, compared to American elections, no business organizations have become recognized to gain higher spending limits.¹⁵⁰

II. DISCUSSION

A. THE IMPACT OF CAMPAIGN FINANCE AS A LOCKUP

Campaign finance, like other partisan lockups, combines with the electoral system to entrench the dominant parties. The regulations discussed in this Note work as lockups in two ways: first, they increase the difficulty for third parties to win elections, and second, they decrease the ability of third parties and interest groups to influence the national political discourse. This shows that lockups have an independent effect on the

§ 94, sch. 10.

142. *Id.* §§ 90–100 (explaining the reporting requirements and donation restrictions recognized third parties must follow).

143. *Id.* §§ 95, sch. 11, 96.

144. *See* Ewing & Rowbottom, *supra* note 120, at 82–83.

145. *Id.* at 83.

146. *Id.* at 82.

147. *Id.* at 83.

148. *Id.*

149. *Id.*

150. *Id.*

political process and carry significant normative implications for democracy.

Critics of the lockup model argue that it incorrectly blames lockups for entrenching the dominant parties' power, when this actually results from elections' structures. Presidential elections, single-member districts, and direct primaries favor larger parties.¹⁵¹ So British and American democracies are natural duopolies because electoral systems with both first-past-the-post voting and single-member districts inherently tend toward stable two-party systems.¹⁵² Other critics argue that lockups protect incumbents—not political parties.¹⁵³ Incumbent lockups could result from structural features that favor incumbents; these include incumbents' higher profile, ability to take credit for delivering constituent services, and franking privileges. Under either a process- or incumbent-based structural account, legal restrictions do not reduce interest groups' and third parties' competitive possibilities. Even without existing campaign finance regulations, the electoral system's structures would shut them out of the office.

But these structural explanations are incomplete because they ignore parties' need to control the national issue agenda. Dominant parties win elections, both against each other and against third parties, by elevating salient public issues and making a case that their partisan outlook will best deliver on these issues. The political scientist John Sides calls this agenda manipulation "heresthetics."¹⁵⁴ Parties use heresthetics to "structure the election's agenda so that the issues where their positions are popular come to the fore in voters' minds," which causes a larger number of voters to support them.¹⁵⁵ Campaign expenditures set the agenda in each party's favor.¹⁵⁶

151. Dawood, *Electoral Fairness*, *supra* note 20 ("Another criticism is that the strong two-party system in the United States is not caused by obstacles to third parties but by a host of structural features including single-member districts, direct primaries and presidential elections.").

152. This tendency is "Duverger's Law," named after the French political scientist Maurice Duverger. See Schleicher, *supra* note 20, at 168–69 (explaining Duverger's Law and arguing that "the existence of the two-party system is not a result of the behavior of the parties; it is the result of single-member district/FPTP elections").

153. See Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 662–64 (2002) ("[I]ncumbent protection, rather than true partisan division of the political marketplace, provides a better explanation for incumbent safety.").

154. John Sides, *The Origins of Campaign Agendas*, 36 BRIT. J. POL. SCI. 407, 409 (2006) ("Heresthetics is the art of agenda manipulation . . .").

155. *Id.* at 410.

156. See *id.* at 417 (suggesting that candidates focus advertising on issues that seem advantageous

Third parties and interest groups can also use campaign expenditures to control the issue agenda. Even if outside groups cannot field competitive candidates, campaign expenditures allow them to offer alternative perspectives on ongoing issues or raise new ones that the major parties have ignored. As the Neill Committee feared, wealthy interest groups may use issue-specific campaigns to reframe issues in ways damaging to one or both major parties. This would force the parties to expend limited campaign funds fighting the groups.¹⁵⁷

The *Bowman* decision shows how interest groups could—absent lockups—influence the agenda in a direction unfavorable to the major parties. *Bowman* and the SPUC sought to critique both the Labour and Conservative parties on the issue of abortion.¹⁵⁸ If the SPUC could run a sustained, high-spending campaign it might successfully raise the issue of abortion in the national consciousness.¹⁵⁹ Such a campaign could compel the Labour and Conservative parties to take positions on abortion, or increase the relative popularity of third parties with established records on the issue. This threat means that dominant parties must limit the ability of third parties and interest groups to make campaign expenditures.¹⁶⁰ Restricting third parties' and interest groups' spending gives the dominant parties greater control of the issue agenda. Because the issue agenda ultimately shapes the election, better control of the agenda helps a party lock up control of the electoral process.

Therefore, campaign finance regimes function as lockups in two ways. First, the regulations help dominant parties stay in office by limiting third parties' abilities to launch effective electoral challenges. Second, the regulations entrench partisan control of the issue agenda. This allows major parties to focus on issues flattering to them and frame issues in their favor, preventing interest groups and third parties from influencing the political conversation that occurs during an election.

This second finding has major normative implications that conflict

to them).

157. See Ewing & Rowbottom, *supra* note 120, at 81–82 (noting drafters' fears that interest group spending could create a "cacophony in which the voices of the political party would struggle to be heard," and "that third party expenditure would require the political parties to use up some of their limited resources in dealing with attacks from other organizations").

158. *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175, 180–82 (1998).

159. Cf. Geddis, *supra* note 84, at 136–39 (hypothesizing how a major SPUC advertising blitz could affect a snap parliamentary election).

160. See *id.*

with the purposes of free speech. Disadvantageous campaign finance regulations not only reduce the competitive abilities of third parties and interest groups, but also limit these groups' abilities to highlight issues that the major parties ignore. So these issues may go unresolved as no group's solution gets public traction or major party attention. A related problem is that these restrictions prevent third parties and interest groups from offering alternative solutions partisan leaders have not yet considered. This risks policy stagnation. It also threatens to give voters a limited choice of democratic visions—rather than the multitude a pluralistic society demands. Finally, dominant parties may inaccurately characterize issues—or even deceive voters—because outside issue-specific campaigns cannot serve as an integrity check.

B. ARE THESE LOCKUPS?

In both the United States and the United Kingdom, the election laws described above are lockups that perpetuate the dominant parties power.

Before *Buckley*, FECA imposed an annual \$1,000 limit on individual or group campaign expenditures for or against a candidate.¹⁶¹ Yet although the law imposed expenditure limits on individual candidates, it failed to impose any such limits on overall party spending. This reveals that the parties hoped to restrict other groups' spending abilities while retaining their own influence. Furthermore, the BCRA required that interest groups use segregated funds. This reduced the groups' fundraising abilities (because they had a limited pool of donors to draw on and faced burdensome regulations),¹⁶² regardless of whether the interest group at issue was an industrial giant or a politically oriented nonprofit. This suggests that the legislature was primarily concerned with limiting all interest groups' power to voice critical opinions—not protecting a company's shareholders from financing corporate spending they disagreed with.¹⁶³ Finally, neither FECA nor the BCRA provided for any third-party public-funding mechanism. But each cycle they allotted several hundred million dollars in taxpayer money for the dominant parties—further entrenching a massive financial disparity between the dominant parties and

161. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976).

162. *Citizens United v. FEC*, 558 U.S. 310, 337–38 (2010) (explaining that regulations make PACs “burdensome alternatives” for corporations).

163. *See First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 (1978) (“[T]he legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people . . .”).

all other groups.¹⁶⁴ Especially when considered together, these choices suggest that the dominant parties used campaign finance regulations to keep interest groups less powerful.

In the United Kingdom, the parties designed and passed the PPERA partly out of an explicit desire to keep interest groups from interfering in the political process. The parties created two sets of rules: one applies solely to the major parties that contest every constituency and one applies to interest groups or third parties.¹⁶⁵ Under the PPERA, a dominant party can spend nearly twenty times what an interest group might spend on a nationwide campaign.¹⁶⁶ And the exemptions for party newsletters, unsolicited material addressed to party members, and property, services, or facilities made available to the party from public funds mean that the true spending disparity is even greater.¹⁶⁷

Legislative history shows the PPERA's drafters intended this disparity. The Neill Committee sought to preserve dominant parties' shares of contributions and centrality in the electoral process. Similarly, the Committee sought to preserve partisan control over the political discussion.¹⁶⁸ If an interest group like Bowman's SPUC could run a competitive national campaign, that might shift the discourse away from the parties' platforms towards other, potentially polarizing issues when such spending would be most salient.¹⁶⁹ So it used nationwide and constituency-specific spending limits to restrict interest groups' financial participation.¹⁷⁰ The nationwide restrictions limit interest groups' ability to attract attention. And the £500 limit on individual constituency expenditures means that interest groups can never match candidates'

164. See Issacharoff & Pildes, *supra* note 5, at 689.

165. Compare Political Parties, Elections and Referendums Act 2000, c. 41, § 79, sch. 9 (UK), with *id.* § 94, sch. 10.

166. *Id.*

167. See Political Parties, Elections and Referendums Act 2000, c. 41, § 72, sch. 8. See also EWING, COST, *supra* note 113, at 152.

168. See Ewing & Rowbottom, *supra* note 120, at 80.

169. See Geddis, *supra* note 84, at 138–39.

170. See Ewing & Rowbottom, *supra* note 120, at 81. See, e.g., Feasby, *supra* note 132 (“Unchecked third party expenditures have the potential to destabilize the relative equality of resources among candidates and political parties established by political finance legislation. In particular, the activities of third parties may threaten to disturb the détente among candidates and political parties imposed by spending limits. Third parties may, by formal agreement, implicit arrangement, or otherwise, undermine expenditure limitations on candidates and parties by pursuing coordinated or complimentary campaigns.”).

spending abilities in an individual district.¹⁷¹ Together, these limits suggest that the United Kingdom's dominant parties used the PPERA's expenditure restrictions to reduce interest groups' and nascent third parties' abilities to speak loudly in the political process.¹⁷²

C. THE SUPREME COURT'S ROLE IN REDUCING LOCKUPS

The Supreme Court's campaign finance decisions have effectively dismantled partisan expenditure lockups in the United States. The Court has implicitly adopted a lockup-focused inquiry—striking down laws that advantage incumbents or political parties over other speakers. The Court has intervened multiple times to protect political associations' free speech rights.¹⁷³ Each time it has expressed concerns that election laws might effectively shut interest groups out of the political process and benefit incumbents. This approach is similar to Issacharoff and Pildes's because it focuses on identifying partisan monopolies and anticompetitive laws.¹⁷⁴ The Court's willingness to invalidate anticompetitive laws also reflects Klarman's concern that legislators act in a counter-majoritarian fashion when passing anticompetitive campaign finance laws.¹⁷⁵

The resulting decisions have disrupted existing campaign finance lockups by invalidating restrictions on interest group and third party campaign expenditures. In *Buckley*, the Court struck down FECA's \$1,000 ceiling on contributions because it “exclude[d] all citizens and groups

171. Cf. Issacharoff, *Constitutional Logic*, *supra* note 1, at 379–80 (explaining that limitations on non-party spending protect candidates from potentially destabilizing interest group expenditures). Compare Political Parties, Elections and Referendums Act 2000, c. 41, § 131 (limiting third party constituency-level expenditures to £500), with *If You Are Planning to Stand as a Candidate in the 2014–15 Elections There Are Rules You Need to Follow*, U.K. ELECTORAL COMM'N, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/162724/reg-period-timeline-candidate.pdf (last visited Apr. 12, 2016) (stating a per-candidate spending limit of £30,700 plus 6 or 9 pence per voter, depending on whether the constituency is a borough or county).

172. See Issacharoff, *Constitutional Logic*, *supra* note 1, at 382 (“Shutting down debate during the election period forecloses the ability of activists and non-elected political actors to engage their fellow citizens when political attention is galvanized around elections.”).

173. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) (“The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”); *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (“[T]he Act’s \$1,000 limitation on independent expenditures ‘relative to a clearly identified candidate’ precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. The Act’s constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression ‘is simultaneously an interference with the freedom of [their] adherents.’”) (citations omitted) (first quoting 18 U.S.C. § 608(e)(1) (Supp. IV 1970); then quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)).

174. See Issacharoff & Pildes, *supra* note 5, at 670–81.

175. Klarman, *supra* note 39, at 537.

except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.”¹⁷⁶ Similarly, *Bellotti* raised the bar for future restrictions on interest groups with its holding that speech deserved protection regardless of the speaker’s identity. This holding contrasts with the PPERA’s drafters’ belief that parties are superior political vehicles.¹⁷⁷

Justice Scalia in particular emphasized how campaign finance laws act as lockups and restrict valuable interest group participation. He repeatedly argued that interest groups’ speech plays a crucial role in democratic society.¹⁷⁸ In his dissents in both *Austin* and *McConnell*, he heavily critiqued campaign finance laws restricting interest group expenditures; he argued that they serve as incumbent-protection measures that violate the First Amendment.¹⁷⁹ Justice Scalia saw these laws as lockups that ensure incumbents’ control of government,¹⁸⁰ even specifically comparing the incumbents to monopolists.¹⁸¹ His critique echoes Issacharoff and Pildes’s emphasis on critically evaluating anticompetitive laws.¹⁸² His emphasis on incumbent protection also reflects Klarman’s fear that legislatures act in a

176. *Buckley*, 424 U.S. at 19–20 (footnote omitted).

177. *Compare* First Nat’l Bank of Bos. v. *Bellotti*, 435 U.S. 765, 777 (1978) (“[I]nherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.”), with NEILL COMMITTEE REPORT, *supra* note 115, at 131 (explaining the Committee’s concerns that interest group spending might interfere with party spending).

178. *See* *McConnell v. FEC*, 540 U.S. 93, 258 (2003) (Scalia, J., dissenting) (“A candidate should not be insulated from the most effective speech that the major participants in the economy and major incorporated interest groups can generate.”).

179. *Id.* at 249 (“[T]he present legislation targets for prohibition certain categories of campaign speech that are particularly harmful to incumbents.”); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting). Although Justice Scalia in both dissents focused on incumbents, his writings also reveal judicial concern that campaign finance laws could squelch interest groups’ free speech rights.

180. *McConnell*, 540 U.S. at 262–63 (“This litigation is about preventing criticism of the government The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”). Although Scalia did not specifically use the term lockup, his emphasis on incumbent and monopoly protection suggests a view similar to lockups.

181. *Austin*, 494 U.S. at 692 (Scalia, J., dissenting) (“The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition.”).

182. *See* Issacharoff & Pildes, *supra* note 5, at 683 (arguing that parties are like monopolists). *Compare* *Austin*, 494 U.S. at 692 (Scalia, J., dissenting), with Issacharoff & Pildes, *supra* note 5, at 680 (“The task then is to discern which regulations of politics are anticompetitive and lock up democratic competition in impermissible ways.”).

counter-majoritarian fashion to hold onto power.¹⁸³ Justice Scalia cited the BCRA's "Millionaire's Amendment" as evidence of monopoly because the law raises contribution limits for candidates running against self-financed challengers. This primarily occurs when wealthy challengers self-fund themselves against incumbents.¹⁸⁴ Hence, the law preserves incumbents' monopoly against self-financed challengers.

Citizens United further extended the reasoning established in *Buckley*, *Bellotti*, and Scalia's *McConnell* and *Austin* dissents. It sought to place interest groups and political parties on equal expenditure footing. In holding that corporations could make election expenditures from their general treasuries, the Court again rejected the foundational principles behind parties' lockup efforts. It further rejected any attempted "categorical distinction" based on organizational type; instead, it reiterated that corporate interest group participation was essential to the free exchange of ideas.¹⁸⁵ This holding implicitly rejected the PPERA drafters' fear that interest groups might hijack the debate.¹⁸⁶ Instead, the Court embraced this possibility and used it as a rationale for unfettered corporate speech.¹⁸⁷ These rulings show that the Court has rejected the restrained approach urged by Garrett and adopted a more expansive approach.¹⁸⁸ This expansive approach targets monopolistic, campaign finance lockups.

So despite repeated partisan effort, post-*Citizens United* American campaign finance law displays few characteristics of lockups. The dominant parties designed the earliest campaign finance law, FECA, as a

183. Klarman, *supra* note 39, at 537.

184. *McConnell*, 540 U.S. at 249 (Scalia, J., dissenting) ("Is it an oversight, do you suppose, that the so-called 'millionaire provisions' raise the contribution limit for a candidate running against an individual who devotes to the campaign (as challengers often do) great personal wealth, but do not raise the limit for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election 'war chest?').

185. See *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) ("Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.").

186. Compare *id.* at 365 ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."), with *Ewing & Rowbottom*, *supra* note 120, at 81 (arguing interest groups might shift debate away from matters of general concern).

187. See *Citizens United*, 558 U.S. at 364 ("The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.").

188. Compare *id.* at 365 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."), with *Garrett*, *supra* note 45, at 149–50 (arguing intervention is only appropriate if the laws are targeted at specific groups or apply retroactively).

lockup that limited independent expenditures to \$1,000 per cycle.¹⁸⁹ The Court quickly struck it down in *Buckley*.¹⁹⁰ After *Bellotti*, the Court further ensured that all types of interest groups remained free to make campaign expenditures independent of the major parties.¹⁹¹ Similarly, *Citizens United* invalidated the BCRA's attempt to restrict how interest groups could participate in elections.¹⁹² Therefore, despite bipartisan attempts to restrict the amount interest groups could spend on political campaigns, judicial review has significantly weakened campaign finance lockups in the United States. At the federal level, interest groups and third parties face only regulatory filing burdens—not limits on expenditures.

Finally, although the Court's campaign finance jurisprudence may have weakened partisan lockups, future research should synthesize the research on partisan lockups with the ongoing inquiry into the risk that campaign finance changes may lock non-wealthy individuals out of the process. This latter issue is crucial to understanding the interplay between lockups, campaign finance, and effective democratic governance. Although the Court's decisions may have weakened partisan lockups, many scholars and politicians fear that the decisions—particularly *Citizens United*—have had an insidious effect on the political process. In effect, critics fear that the Court's recent campaign finance jurisprudence has traded partisan lockups for financial ones—strengthening the wealthy and major corporations' ability to dominate campaign spending.¹⁹³ For instance, President Obama attacked *Citizens United* in his 2010 State of the Union address. He worried that it would “open the floodgates for special interests” and cause elections to “be bankrolled by America's most powerful interests, or worse, by foreign entities.”¹⁹⁴ Similarly, the Brennan Center for Justice reported that

189. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (explaining FECA's restrictions).

190. *Id.* at 51, 58.

191. *See* *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”).

192. *Citizens United*, 588 U.S. at 364–65 (“The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

193. *See id.* *See also, e.g.*, Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 51 (2012) (“With opportunities for unlimited independent expenditures by outside groups, we are likely to see political elites trending away from grassroots mobilization . . . back to a heavier focus on a relatively small group of ultra-wealthy donors who give huge amounts.”).

194. 156 CONG. REC. S266 (daily ed. Jan. 27, 2010) (State of the Union Address of President Barack Obama) (“Last week, the Supreme Court reversed a century of law to open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. Well, I don't

since *Citizens United* there has been over a billion dollars in spending by super PACs on United States Senate elections.¹⁹⁵ Sixty percent of that spending came from 195 individuals and their spouses.¹⁹⁶ And in the 2014 election, “the 100 biggest donors to all types of political committees together gave \$323 million, almost matching the \$356 million in small donations that came from an estimated 4.75 million people.”¹⁹⁷ Worried by these trends, the decision’s critics have suggested further disclosure requirements and limits on foreign corporate spending to mitigate the decision’s impact.¹⁹⁸ Other politicians, such as Senator Tom Udall (D-NM), have supported a constitutional amendment to reverse the decision.¹⁹⁹ These arguments suggest that judicial action against lockups may cause collateral damage—effectively trading a partisan lockup for a wealth one.

Conservative scholars and politicians disagree. They argue that *Citizens United* is crucial to protecting “the free speech protections the First Amendment guarantees to all Americans” and ensuring that “incumbent politicians” lack the power “to write the rules on who gets to speak and who doesn’t.”²⁰⁰ These defenders argue that *Citizens United* is consistent with past constitutional jurisprudence and strengthens First Amendment protection for important political speech.²⁰¹ For instance, Floyd Abrams, who represented Senator Mitch McConnell as amicus curiae in the case, writes, “[w]hen I think of *Citizens United*, I think of Citizens United. I think of the political documentary it produced, one designed to persuade the public to reject a candidate for the presidency. And I ask myself a question: if that’s not what the First Amendment is about, what is?”²⁰²

think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities.”).

195. IAN VANDEWALKER, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 7 (2015), <https://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf>.

196. *Id.*

197. *Id.*

198. Jess Bravin & Brody Mullins, *New Rules Proposed on Campaign Donors*, WALL ST. J. (Feb. 12, 2010), <http://www.wsj.com/articles/SB10001424052748703382904575059941933737002>.

199. Press Release, Senator Tom Udall (D-NM), Udall Introduces Constitutional Amendment on Campaign Finance Reform (June 18, 2013), http://www.tomudall.senate.gov/?p=press_release&id=1329.

200. See, e.g., Mitch McConnell, *The Democrats’ Assault on Free Speech*, POLITICO MAG. (Sept. 7, 2014), <http://www.politico.com/magazine/story/2014/09/the-democrats-assault-on-free-speech-110641.html#ixzz3RIR1a3n9>.

201. See Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (2010), <http://yalelawjournal.org/forum/citizens-united-and-its-critics> (arguing critics ignore that the *Citizens United* decision protects exactly the type of political speech that the First Amendment is designed to protect).

202. *Id.*

Other scholars question the decision's impact. For instance, Pildes argues that *Citizens United* did not increase the amount of money in the political process—instead it merely redirected existing “soft money.”²⁰³ While *McConnell* had channeled these funds to political parties, *Citizens United* allowed them to flow to super PACs instead.²⁰⁴ So *Citizens United* permitted new forms of campaign spending outside of the party apparatus, but did not create a new lockup controlled by the wealthy. Finally, some political economists, such as Stephen Ansolabehere, ask if an increased role for the wealthy in democracy even matters. He argues that political giving is motivated more by a desire to participate in the political process, rather than any type of quid pro quo transaction.²⁰⁵ Hence, disparities in political giving or spending might not matter because neither has insidious political effects.

Future research should link the ideas briefly mentioned above with this Note's concerns. This is a crucial research area because it bears on the concerns that lockups raise. Partisan lockups may be less threatening—and

203. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 839–41 (2014).

204. *Id.* (“McCain-Feingold, at least as much or more than *Citizens United*, accounts for the role of non-party entities in the way our elections are run today. . . . *Citizens United* has become a too-convenient whipping post for those concerned about an excessive role for money in American elections. In fact, *Citizens United* has played a minor role in the recent explosion of non-party money, partly because the logic of *Buckley* itself made it inevitable that the First Amendment would prohibit caps on contributions to non-party entities that engaged only in independent election spending.”). See also Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 220 (2010) (“*Citizens United* invalidated the federal ban on corporations’ ability to advocate expressly for or against political candidates, but it did not portend the complete collapse of other campaign finance regulation.”); Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES (July 17, 2012), http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all&_r=0&pagewanted=print (“[W]hile the sheer amount of dollars seems considerably more ominous after *Citizens United*, the percentage of change from one presidential election to the next has remained pretty consistent since the passage of McCain-Feingold. And this suggests that the rising amount of outside money was probably bound to reach ever more staggering levels with or without *Citizens United*.”); *The ACLU and Citizens United*, ACLU, <https://www.aclu.org/free-speech/aclu-and-citizens-united> (last visited Apr. 13, 2016) (“[T]he mixture of money and politics long predates *Citizens United* and would not disappear even if *Citizens United* were overruled. The 2008 presidential election, which took place before *Citizens United*, was the most expensive in U.S. history until that point. The super PACs that have emerged in the 2012 election cycle have been funded with a significant amount of money from individuals, not corporations, and individual spending was not even at issue in *Citizens United*.”).

205. Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 116–18 (2003) (“Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes. . . . [C]ampaign contributing should not be viewed as an investment, but rather as a form of consumption—or, in the language of politics, participation.”).

potentially preferable—to an open system if the only alternative is domination by elites and massive corporations. Or, if, as Pildes and Ansolabehere suggest, increased campaign spending stems from forces beyond recent campaign finance decisions, then criticisms of *Citizens United* may be best explained as self-serving attempts by political partisans to defend their lockups. If lockup disruption has promoted richer and more varied political speech, this strengthens the case for more searching judicial review.

Further research may also uncover alternatives that would prevent wealth-lockups of campaign finance without entrenching the incumbent parties. For instance, the government could delegate more campaign finance rulemaking to an independent agency that would seek to balance these competing problems. The Court could also adopt more restrained judicial review that balances these competing concerns, such as Garrett's suggested focus on retroactive or targeted legislation.²⁰⁶ Finally, Congress could pass comprehensive public financing for political campaigns. Such legislation would give all groups and candidates equivalent funds so it might eliminate spending disparities that disproportionately favor the wealthy or the major parties.

Overall, these examples suggest that judicial review in the United States has destabilized and weakened lockups that protect the dominant political parties' power—though potentially at the risk of strengthening wealthy donors' power to influence elections. The Supreme Court's decisions have repeatedly emphasized the critical role interest groups play in the political process—even going so far as to value their free speech rights equally to the major parties'. This jurisprudence emphasizes the First Amendment's power to ensure equal treatment for different speakers: it disrupts lockups that advantage incumbents or parties over other speakers. Its emphasis on encouraging varied voices in the democratic process implicitly adopts the process-based concerns of scholars such as Issacharoff and Pildes.

D. *BOWMAN* AS AN INTERVENING MECHANISM

Bowman's judicial review dented—but did not dismantle—lockups in the United Kingdom.²⁰⁷ The case shows that singular instances of judicial

206. Garrett, *supra* note 45, at 149–50.

207. Geddis, *supra* note 84, at 116 (“*Bowman* was tantamount to a process of judicial review as to whether Parliament’s decision to limit third party spending on constituency races was an abridgment of any of the individual rights or freedoms guaranteed under the Convention.”).

review are insufficient to dismantle partisan lockup because parties will limit the disruption to preserve their power. More robust judicial review, like the Supreme Court's in *Buckley* and *Citizens United*, will be necessary to significantly weaken the United Kingdom's lockups.

Bowman's judicial review weakened the British government's electoral lockup. First, the ECHR identified the £5 spending limit as a lockup and rejected the British government's argument that *Bowman* could have participated effectively through other means, such as standing as a candidate herself.²⁰⁸ So the ECHR recognized that the limit effectively barred *Bowman* from influencing her constituency to favor anti-abortion candidates.²⁰⁹ In effect, the ECHR noticed that the restriction locked out groups like *Bowman's* SPUC.²¹⁰ The court found that the limit was "less the result of an openly reached, deliberative decision on how the participation of third parties in the British electoral process should be regulated, and more of a self-interested legislative measure retained to protect individual candidates, including incumbent Members of Parliament, from external criticism come election time."²¹¹ Therefore, it was the type of "participatory restraint designed to protect political 'insiders' at the expense of 'outsiders' that the ECHR should seek to eliminate if it is to properly carry out its role of 'policing the process of representation.'"²¹²

Second, *Bowman* served as an intervening mechanism, nudging a system biased against third parties in a somewhat more balanced direction. Although increasing the limit for interest group spending on a single constituency to £500 does not sound like a significant victory, it was only the second increase since 1949.²¹³ And, while the first increase had been from fifty pence to £5, the second, post-*Bowman* increase was from £5 to £500.²¹⁴ This shows how judicial review can dismantle partisan lockups—

208. *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175, 187–88 (1998) ("They pointed out that there had been other means of communication open to Mrs. *Bowman*, for example, she could have started her own newspaper, had letters or articles published in the press, given interviews on radio and television, stood for election herself or published leaflets for the purpose of informing the electorate without promoting or opposing any particular candidate.").

209. *Id.* at 189 ("In summary, therefore, the Court finds that section 75 of the 1983 Act operated, for all practical purposes, as a total barrier to Mrs. *Bowman's* publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate.").

210. *See id.*

211. *Geddis*, *supra* note 84, at 124.

212. *Id.* at 124–25 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)).

213. *Id.* at 124.

214. NEILL COMMITTEE REPORT, *supra* note 115, at 9.

even in societies that usually lack such exacting review. Parliament would never have raised the limit without the ECHR's intervention. Although the new limit still pales in comparison to major party candidates' spending, £500 gives concerned citizens a limited ability to criticize candidates or publicize important issues. Judicial review thereby encourages greater political participation from individuals (like *Bowman*) and groups (such as the SPUC) that the major political parties would never have responded to. So *Bowman* weakened the United Kingdom's lockup system by forcing the parties to increase expenditure limits.

But, the ECHR's decision also reveals the limits of weak, isolated judicial review.²¹⁵ While the ECHR rejected the £5 limit, it endorsed the British government's arguments that the restriction ensured the discussion did not shift away from matters of "general concern" and helped keep candidates independent of powerful interest groups.²¹⁶ And, although the decision prompted Parliament to raise the limit enough to "cover . . . the production and distribution of a leaflet throughout a constituency or the publication of an advertisement in a local newspaper,"²¹⁷ the ECHR made clear that the Convention accords member states a "margin of appreciation" when writing free speech laws.²¹⁸ This margin gives the United Kingdom discretion in the exact restrictions it makes and means that Parliament has significant flexibility in structuring British campaign finance regulations.²¹⁹ Without further judicial review, it is impossible to know exactly how wide that margin is.

Furthermore, the limited increase reveals that major parties' responses to judicial review often seek to preserve their lockups. Although £500 is an increase from previous limits, it remains insufficient for interest groups to

215. Issacharoff, *Constitutional Logic*, *supra* note 1, at 385–86 (explaining that the Neill Committee and other British government bodies have narrowly construed *Bowman*).

216. See *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175, 187 (1998) ("[T]he application of this law to Mrs. Bowman pursued the legitimate aim of protecting the rights of others, namely the candidates for election and the electorate in Halifax and, to the extent that the prosecution was intended to have a deterrent effect, elsewhere in the United Kingdom.").

217. See NEILL COMMITTEE REPORT, *supra* note 115, at 129.

218. *Bowman*, 63 Eur. Ct. H.R. at 188–89 ("Nonetheless, in certain circumstances the two rights [free elections and freedom of expression] may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the 'free expression of the opinion of the people in the choice of the legislature.' The Court recognises that, in striking the balance between these two rights, the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral system.").

219. Hunker, *supra* note 72, at 1132 ("Again, a less severe ban that offered Mrs. Bowman alternative opportunities for expression would have satisfied the ECHR. Strasbourg thus offers Parliament great leeway in structuring its campaign finance regime.").

affect an election's outcome or participate in the national conversation on even footing with the major parties' candidates. And the PPERA's post-*Bowman* restrictions on national spending mean that candidates outside of the main parties' orthodoxy can spend very limited outside funds. So an interest group's issue-specific campaign against one of the dominant parties will likely be drowned out by the expenditure disparity.

In sum, *Bowman* dented, but did not dismantle, existing lockups. *Bowman*'s limited impact and the additional limits passed by the major parties after *Bowman* show that judicial review requires constant oversight to monitor potential lockups. While the United States has seen repeated cases on the issue of interest group free speech restrictions, *Bowman* is the only case to change the United Kingdom's restrictions on interest group political participation. Even more consequentially, Parliamentary supremacy and the lack of a written constitution mean that judicial review has limited viability—the British courts cannot undo Parliament-instituted lockups.²²⁰ So in practice, the “margin of appreciation” afforded the United Kingdom by the ECHR means decisions like *Bowman* will continue to be few and far between.

CONCLUSION

This Note builds on the concept of lockups, bringing the theory into a comparative context. Focusing on interest groups and third parties allowed the Note to draw a sharp contrast between United States and United Kingdom laws while investigating the concept's application in each country. Finally, this Note used these topics to consider the role judicial review might and has played in disrupting both societies' lockups.

Overall, both countries' legal regimes display characteristics of lockups and have experienced disruptive judicial review. Both the PPERA and FECA significantly limited the amount of money interest groups could spend on elections relative to candidates or political parties. Similarly, the BCRA checked interest groups' potential spending methods through segregated funds, while the PPERA requires interest groups to become “recognized” to be able to spend even five percent of the dominant parties' limit. This finding—that both American and British political parties use

220. *Id.* at 1126–27 (“Under the traditional model, the U.K. Parliament is legally sovereign. There are no legal limitations upon its legislative competence, and no other constitutional actor, including the courts, may question or review the validity of its legislation. . . . Accordingly, unlike most modern democracies, the United Kingdom does not have a single constitutional text that acts as a wellspring for government grants of authority.”).

campaign finance law to limit the competition they face from other political actors—extends the concept of lockups across national borders. It also opens up more opportunities to explore lockups beyond the United States. And it further shows that lockups may be useful tools for evaluating parties' roles in foreign political systems.

Both systems also experienced disruptive judicial review from *Bowman*, *Buckley*, and *Citizens United*. But the American decisions have had more lasting effects because they cemented the interest groups' right to play a prominent role in American elections. These decisions show how judicial review in a variety of systems can identify and remove lockups. Judicial review in the United States has significantly disrupted lockups, while the weaker judicial review available in the United Kingdom has had a much more limited impact. In the American context, the decisions examined in this Note show that the Supreme Court can and has worked to destabilize lockups by implicitly adopting the process-oriented judicial review urged by scholars such as Issacharoff, Pildes, and Klarman.²²¹ These decisions also raise a critical question about judicial review's ultimate impact: does searching judicial review of partisan lockups risk trading them for lockups by the wealthy?

This Note hopes to take a step towards better understanding the role campaign finance regimes play throughout the political process. Future research should examine the potential for dominant parties to use campaign finance against each other, with the ultimate partisan goal being to move from a duopoly to a monopoly. Developing a more nuanced understanding of campaign finance restrictions as lockups will give scholars and citizens greater insight into how political parties avoid electoral competition. Over time, this will lead to better campaign finance regulations that preserve the process's integrity and prevent takeovers of our democracy by entrenched elites, but still allow third parties and interest groups to offer voters new ideas and choices.

Furthermore, this Note illuminates the interplay between parties' desire for power and campaign finance regulations. It shows that campaign finance can serve a double function—protecting democratic integrity, but also restricting political competition. Going forward, research in the field should apply the same type of inquiry used in this Note to other constitutional democracies' campaign finance systems, as well as examine lockups in the United States and United Kingdom from new angles. Such

221. See Issacharoff & Pildes, *supra* note 5, at 648; Klarman, *supra* note 39, at 537.

an approach will give scholars insight into how dominant parties preserve their power—as well as courts' power to check them.