Spring 2014

High Courts and Election Law Reform in the United States and India

Manoj Mate, *Whittier Law School*

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Manoj Mate*

* Assistant Professor of Law, Whittier Law School; J.D., Harvard Law School; M.A., Ph.D., Political Science, University of California, Berkeley. This Article was presented at the 2013 Southern California Public Law Junior Faculty Workshop at Western State Law School, the 2013 Annual Meeting of the Law and Society Association in Boston, Massachusetts, and the 2014 Meeting of the Southern California Law and Social Science Forum at Whittier Law School. I thank Bruce Cain, Thad Kousser, David Menefee-Libey, Stewart Chang, Meera Deo, Jonathan Glater, Priya Gupta, Betsy Rosenblatt, Bill Patton, Nelson Rose, Peter Reich, David Welkowitz, and Anne Meuweuse for their comments and insights.

Abstract

Over the past decade, the push for electoral reform in India and the United States – the world's two largest democracies – has been prominent in the politics and governance of both nations. The supreme courts in each country have played important, but distinct, roles in recent electoral reform efforts, responding to different facets and regimes of political corruption. In the 1990s, the Indian Supreme Court became increasingly assertive in requiring greater levels of disclosure and transparency for political parties in India. In a series of decisions in 2002 and 2003, the Indian Supreme Court challenged the Central Government's failure to promote transparency and disclosure in elections, and asserted a more active role in advancing electoral reforms by expanding the scope of the "right to information" and ordering the promulgation of disclosure requirements for legislative candidates. In contrast, the United States Supreme Court has become more assertive in challenging government reforms and asserting limits on campaign finance reform laws aimed at curbing the power and influence of corporate spending on elections over the past decade.

This Article seeks to elaborate on the divergent approaches of each high court by analyzing the evolution of free speech jurisprudence in the area of campaign finance and electoral reform. It then seeks to provide an explanatory account for the divergent approaches to electoral reform within each judiciary. Several key factors account for the divergent approaches of the two supreme courts: the distinct jurisprudence of each court in the area of fundamental rights, the composition of the courts, and the nature of corruption in each system. This Article concludes by analyzing both the normative and prescriptive implications of the different approaches to electoral reform in each country, proposing a new conception of the participatory model of speech as encompassing a broader set of approaches to advancing the goal of participation in election law reform, and suggesting that the different approaches in the U.S. and Indian Supreme Courts reflect the "liberal" and "positive rights" conceptions of the participatory model.

Introduction

More stringent regulation of money in politics has become a global phenomenon, and governments around the world have sought to bolster

political regulation regimes through new rounds of reform. These reforms vary in their scope and type and include enhanced disclosure mechanisms, limits on political expenditures and contributions, and systems of public financing.[1] Regulatory agencies, civil society movements, and courts have all played a crucial role in this global push for reform.

Consistent with this trend, over the past two decades, the push for electoral reform has figured prominently in the politics and governance of India and the United States, as both countries grapple with the problem of corruption.[2] The Supreme Courts in each country have played important but distinct roles in recent electoral reform efforts. This Article analyzes and compares the role and approach of each court in political financing and electoral reform.[3] While the Supreme Court of India (hereinafter "Indian Supreme Court") has played an increasingly active and assertive role in *advancing* electoral reform initiatives in India, the U.S. Supreme Court has become more assertive in *challenging* electoral and campaign finance reform laws and regulations.

Over the past decade, national campaigns aimed at political and electoral reform have become more prevalent in India.[4] For instance, the increase of criminalization and corruption within the Indian political system in the 1990s ultimately led to a nationwide "Right to Information"

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[1] *See, e.g.*, Stephen Ansolabehere, *The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure*, 6 ELECTION L.J. 163 (2007); K.D. EWING & SAMUEL ISSACHAROFF, PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE (K.D. Ewing & Samuel Issacharoff eds., 2006).

[2] For recent works that have addressed the issue of corruption in the electoral process and in election law in the United States see RICHARD HASEN, THE SUPREME COURT AND ELECTION LAW (2003); LAWRENCE LESSIG'S REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT xi (2011); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009). For an earlier article that compares campaign finance reform regimes in the U.S. and India, see Ellen Weintraub & Samuel Brown, *Following the Money: Campaign Finance Disclosure in India and the United States*, 11 ELECTION L.J. 241 (2012).

[3] By electoral reform, the Author refers to the Indian and U.S. Supreme Court's most significant decisions involving the regulation of corruption and money in politics. In the United States, these decisions have primarily involved campaign finance reform regulation. In India, the Author defines electoral reform decisions as including both campaign finance reform, and disclosure and transparency reforms that extend beyond campaign finance issues.

[4] For a background on election law and reform in India, see David Gilmartin & Robert Moog, *Introduction to Election Law in India*, 11 ELECTION L.J. 136 (2012); Ujjwal Kumar Singh, *Between Moral Force and Supplementary Legality:* M.V. Rajeev Gowda & E. Sridharan, *Reforming India's Party Financing and Election Expenditure Laws*, 11 ELECTION L.J. 226 (2012); *A Model Code of Conduct and the Election Commission of India*, 11 ELECTION L.J. 149 (2012).

("RTI") campaign led by social activist Anna Hazare.[5] By means of India's judicial system, the RTI campaign fought for a more comprehensive transparency and accountability policy in elections and other government affairs.[6] Hazare's campaign eventually culminated in the enactment of the Right to Information Act.[7]

Since the 1990s, the Indian Supreme Court played a key role in initiating reforms to enhance electoral transparency and accountability by expanding disclosure requirements for political parties.[8] In the early 2000s, the Indian Court expanded disclosure requirements to candidates for Parliament and State Assemblies and issued decisions that ordered the Election Commission of India to promulgate new disclosure regulations.[9] These new regulations required candidates to disclose to the public information on their financial assets, criminal records, and educational backgrounds.[10] Through these decisions, the Indian Court articulated a new conception of free speech based on an expansive right to information under the Indian Constitution's Article 19.[11]

The Indian Supreme Court's active championing of political and electoral reform stands in sharp contrast to the decisions of the U.S. Supreme Court in the realm of campaign finance reform. While the Indian Supreme Court has played an active role in advancing electoral reform, the U.S. Supreme Court has become more assertive in invalidating campaign finance reform laws and regulations under the First Amendment's protection of free speech. Beginning with *Buckley v. Valeo*, the U.S. Supreme Court recognized that the government's interest in preventing corruption or the appearance of corruption permitted Congress to impose regulations on political contributions.[12] However, the U.S. Court also recognized that the First Amendment offers broad protection for political expenditures in campaigns and elections.[13] Although the U.S. Court oscillated in its approach to the regulation of *corporate* expenditures in subsequent decisions, it gradually expanded protection for corporate

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[5] Vinay Sitapati, *What Anna Hazare's Movement and India's New Middle Classes Say about Each Other*, ECONOMIC AND POLITICAL WEEKLY (Mumbai), July 23, 2011, at 3-4.

[6] *See id.*

[7] More recently, the "India Against Corruption" campaign, headed by social activist Anna Hazare, sought to restore accountability and probity in governance through the creation of the Lokpal, an accountability mechanism for auditing government corruption. *See id.* at 3. Hazare's followers have since expanded these efforts to mobilize a national political organization to contest elections in order to advance a broader anti-corruption agenda. *See id.*

[8] *Id.*; *see* Gilmartin & Moog, *supra* note 4, at 138.

[9] Gowda & Sridharan, *supra* note 4, at 230-33.

[10] *Id.*

[11] INDIA CONST. art. 19, § 1(a).

[12] Buckley v. Valeo, 424 U.S. 1 (1976).

[13] *Id.* at 25-27.

expenditures and, in 2010, in *Citizens United v. United States*, eventually invalidated corporate expenditure limits in candidate elections.[14]

This Article suggests that three factors account for the divergent judicial responses to electoral reform in India and the United States: (1) the distinct constitutional jurisprudence and fundamental rights doctrines in both countries; (2) the composition of both countries' courts; and (3) the nature of corruption in both countries' political systems. This Article argues that these three factors have helped to shape the distinct jurisprudential approaches and respective models of campaign finance reform. Comparing these two models also provides normative and theoretical insights into the nature of free speech jurisprudence and corruption in each polity. This comparative analysis explores how these divergent approaches to election law reform can be understood in light of existing free speech theory, and may provide insights and guidance to reformers in the United States based on India's unique "positive rights" participatory model.

Part I of this Article compares the approaches of the Indian Supreme Court and U.S. Supreme Court in decisions concerning electoral reform laws. Part II provides an explanatory account of the divergent approaches taken by the Indian Supreme Court and U.S. Supreme Court, focusing on the differences in the fundamental rights jurisprudence, the composition and structure of each court, and the nature of corruption within each system. Part III then situates each court's approach to free speech within the broader theoretical constructions of the First Amendment in the United States and re-conceptualizes the participatory model as encompassing a plurality of approaches that advance the goal of participation in representative democracy. After comparing the "liberal" participatory model in U.S. election law to India's "positive rights" participatory model, this Article concludes by suggesting that the Indian model may provide a compelling framework for advancing campaign finance and electoral reform in the United States and in other polities globally.

I. High Courts and Electoral Reform in India and the United States

A. *The Indian Supreme Court's Expanding Role in Electoral Reform*

Established under the original Indian Constitution, the Indian Election Commission plays a central role in the oversight and regulation of all elections in India.[15] The primary statutory framework governing India's elections and campaign finance laws is the Representation of the People Act of 1951, which has been amended several times.[16] The Act imposes

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[14] Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[15] Gilmartin & Moog, *supra* note 4, at 138.

[16] Gowda & Sridharan, *supra* note 4, at 227.

limits on expenditures in political campaigns, while allowing corporate contributions to political parties.[17]

In 1969, Prime Minister Gandhi banned corporate donations to political parties.[18] Finding themselves short of the funds required to run election campaigns, political parties started courting black market donors by promising those donors licenses and kickbacks.[19] As a result of the shift of political fundraising from corporate donations to black money, the early efforts at electoral reform during the 1970s and 1980s were largely unsuccessful.[20] For example, in 1974, in *Kanwar Lal Gupta*, the Indian Supreme Court held that spending by political parties on behalf of candidates must be included as part of those candidates' election expenses to comply with reporting requirements for expenditure limits.[21] However, Parliament overturned the decision by amending the Representation of People Act in 1975 to again exempt party expenditures from inclusion in candidates' election expenses.[22] In the late 1970s and early 1980s, the Central Government relaxed restrictions on political parties and monetary contributions.[23] In 1985, the Government amended the Companies Act to legalize corporate donations to political parties under certain conditions.[24]

Beginning in the 1990s, rising levels of corruption and "criminalization" in politics led to calls for reform both inside and outside the Central Government.[25] In October 1993, former Home Secretary N.N. Vohra submitted a report ("Vohra Report") to the Central Government that examined the rampant criminalization of politics and highlighted "the nexus between the criminal gangs, police, bureaucracy and politicians" in various regions of India.[26] The Vohra Report found that criminal gangs and mafias had developed extensive networks with ties to local politicians, bureaucrats, and government officials.[27] In addition, the Vohra Report noted the rise of black money and its influence on politics:

> [B]ig smuggling Syndicates, having international linkages, have spread into and infected the various economic and financial activities including havala transactions, circulation of black money and opera-

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[17] *Id.* at 232.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 227.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 228.
[24] *Id.*
[25] *Id.* at 228-29.
[26] Ass'n for Democratic Reforms v. Union of India, 2000 A.I.R. 2001 (Del.) 126, 130-31) (citing MINISTRY OF HOME AFFAIRS, THE VOHRA COMMITTEE REPORT, § 3.3 (1993) (India)).
[27] *Id.*

> tions, of a vicious parallel economy causing serious damage to the economic fibre of the country. These Syndicates have acquired substantial financial and muscle power and social respectability and have successfully corrupted the Government machinery at all levels and yield enough influence to make the task of Investigating and prosecuting agencies extremely difficult even the members of the Judicial system have not escaped the embrace of the Mafia.[28]

The Vohra Report and other public reports during the 1990s also highlighted how syndicates, mafias, and gangs were successfully using violence and force to influence elections by capturing polling booths or frightening opposition voters away from the polls.[29] The impact of this violence reflected the dramatic increase in re-polling and violence in elections in the late 1980s and early 1990s. According to *The Pathology of Corruption*, a book cited in the Delhi High Court's decision, re-polling rose from sixty-five booths in the 1957 national elections to 1,670 booths in 1989.[30] Thirty-three people were killed in the 1984 national Lok Sabha elections, 130 in the 1989 elections, and 198 in the 1991 elections.[31] Over the past two decades, poll violence has spread from Bihar and Uttar Pradesh to many other states in India.[32] A minister in the Bihar state government observed, "I am honest enough to declare that I keep goondas [hired thugs]. For, without them, it is virtually impossible to win elections."[33]

Beginning in the 1990s, the Indian Supreme Court became more assertive in pushing for electoral reform.[34] Specifically, the Indian Court aggressively enforced existing disclosure requirements for political parties and promulgated new requirements for national and state legislative candidates.[35] In *Common Cause v. Union of India*, the Court held that Explanation 1 of Section 77(1) of the Representation of People's Act required political parties to declare their annual incomes to the Income Tax Department.[36] Although Section 77(1) of the Act stipulated that party expenditures would not count toward candidate expenditures for the purposes of expenditure limits provided that the party disclosed its income and expenditures, until the Indian Court's decision in 1996, parties had largely evaded the income disclosure requirement.[37]

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[28] *Id.*

[29] *Id.*

[30] *Id.*; S.S. GILL, THE PATHOLOGY OF CORRUPTION 190 (1998).

[31] Ass'n for Democratic Reforms, 2000 A.I.R at 130-31.

[32] *Id.*

[33] *Id.*; GILL, *supra* note 30.

[34] *See* Gilmartin & Moog, *supra* note 4, at 138.

[35] *Id.*

[36] Common Causea Registered Soc'y v. Union of India, (1996) 706 J.T. 258 (1996) (India), *available at* http://www.right2info.org/resources/publications/case-pdfs/india_common-cause-v.-union-of-india.

[37] *Id.*; GILL, *supra* note 30.

Several key institutions and actors played a role in advancing disclosure requirements and other transparency reforms in national and state elections, including the national RTI campaign, the Election Commission, the Law Commission, and the Indian Supreme Court.[38] Following the release of the Vohra Report, civil society organizations launched the national RTI campaign.[39] Among other reforms, the RTI campaign demanded new financial disclosure requirements, as well as the disclosure of criminal records of candidates for Parliament and the state legislature.

Under the leadership of Chief Election Commissioner T.N. Seshan, the Election Commission of India entered the political fray and announced that it would take steps to break the nexus between politicians and criminals.[40] According to the Election Commission, forty out of the 545 members of Parliament, and 700 of the 4,072 members of state legislative assemblies had a criminal background.[41] In response to increasing public pressure for reform, the Government ordered the Law Commission of India to review the Representation of the People Act of 1951 to "make the electoral process more fair, transparent, and equitable and to reduce the distortions and evils that have crept into the Indian electoral system . . . ."[42] The government also encouraged the Law Commission to recommend other "reform measures."[43]

In May 1999, the Law Commission submitted its 170th report recommending electoral reforms to the Law Ministry.[44] In its report, the Law Commission recommended barring candidates convicted of certain criminal offences from contesting seats in the Lok Sabha.[45] In addition, the report also recommended requiring all candidates for the Lok Sabha to disclose prior criminal records and provide statements of the financial assets owned by the candidates and their families.[46] However, the government failed to take any action in implementing the Law Commission's reform recommendations.[47]

In 1999, the Association for Democratic Reforms, a political reform group, filed a public interest litigation ("PIL") case in the Delhi High

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[38] *See* Gilmartin & Moog, *supra* note 4, at 138.

[39] *See* Sitapati, *supra* note 5.

[40] Catherine Shepherd & Ritu Sarin, *Of Crime and Politics: How to Keep Ex-Cons Out of Power,* ASIAWEEK MAGAZINE, *available at* http://www-cgi.cnn.com/ASIANOW/asiaweek/97/1205/nat8.html.

[41] *The Unholy Nexus,* INDIAN EXPRESS, (Mumbai), Aug. 22, 1997; *see also* B. Venkatesh Kumar, *Electoral Reform Bill: Too Little Too Late*, ECON. & POL.WEEKLY, July 27, 2002, *available at* http://environmentportal.in/files/Electoral%20Reform%20Bill.pdf.

[42] Union of India v. Ass'n for Democratic Reforms (2002) 5 S.C.C. 294 (India).

[43] *Id*.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

Court, seeking direction to implement the recommendations of the Law Commission report and an order commanding the Election Commission to implement the disclosure requirements.[48] In a remarkable decision, the Delhi High Court, in *Association for Democratic Reforms v. India*, held that citizens had a fundamental right to receive information concerning the criminal activities and financial assets of candidates prior to casting their vote.[49] The Delhi High Court based its decision on earlier jurisprudence interpreting Article 19(1)(a)'s freedom of speech and expression provision.[50]

Accordingly, the Delhi High Court directed the Election Commission to issue new regulations requiring that candidates for the Lok Sabha and State Legislative Assembly disclose prior criminal records and records of financial assets. In addition, the Delhi High Court ordered the Election Commission to require the disclosure of facts "giving insight to candidate's competence, capacity and suitability for acting as parliamentarian or legislator including details of his/her educational qualifications" and information which the Election Commission deemed "necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature."[51] The government appealed this decision to the Indian Supreme Court, and the opposition Congress Party intervened in the action on the government's behalf.[52] Additionally, the People's Union for Civil Liberties ("PUCL") joined the action, filing a PIL writ petition in support of heightened disclosure requirements.[53] The government and Congress Party argued that the Delhi High Court should not have issued any directions to the Election Commission until the Lok Sabha had enacted amendments to the Representation of the People Act of 1951 and the Election Commission rules.[54]

The Indian Supreme Court rejected the government's and Congress Party's arguments, ruling that, per its earlier ruling in *Vineet Narain* and other decisions, the Indian Supreme Court had the power to "issue direc-

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[48] *Id.*

[49] *See* Ronojoy Sen, *Identifying Criminals and Crorepatis in Indian Politics: An Analysis of Two Supreme Court Rulings*, 11 ELECTION L.J. 216, 219-20 (2012).

[50] *Id.*

[51] Ass'n for Democratic Reforms v. Union of India, 2000 A.I.R. 2001 (Del.) 126 (India).

[52] *See* Union of India v. Ass'n for Democratic Reforms (2002) 5 S.C.C. 294 (India)

[53] The PUCL thus sought a directive to be issued to the Election Commission "(a) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP/MLA; (b) to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offence has been framed against him/her, and (c) to frame such guidelines under Article 141 of the constitution by taking into consideration the 170th Report of the Law Commission of India." *Id.*

[54] *Id.*

tions to fill the vacuum" of legislation "till such time the legislature steps in to cover the gap or the executive discharges its role."[55] The Indian Supreme Court thus upheld the decision of the Delhi High Court and issued directions to the Election Commission to promulgate disclosure requirements subject to some minor modifications.[56] In June 2002, the Election Commission issued disclosure requirements in conformity with the Supreme Court' decision.[57]

However, in August 2002, the government enacted the Representation of the People Ordinance ("Ordinance").[58] Section 33B of the Act overturned the Indian Supreme Court's earlier decision in *Association for Democratic Reforms*. Section 33B provided as follows:

> Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election which is not required to be disclosed or furnished under this Act or the rules made thereunder.[59]

In addition, the Ordinance included a watered-down version of the requirements ordered by the Indian Supreme Court in 2002.[60] For instance, the Ordinance did not require candidates to disclose acquittals or discharges of criminal offenses, their assets and liabilities, or their educational qualifications.[61] The PUCL filed a PIL shortly thereafter challenging the validity of the Ordinance on the grounds that it violated the voters' fundamental right under Article 19(1)(a) of the Indian Constitution to know the antecedents of a candidate.[62]

In *PUCL v. Union of India*, the Indian Supreme Court invalidated Section 33B of the Act as unconstitutional, ruling that Section 33B went beyond the legislative competence of Parliament and violated the voters' fundamental right to know candidates' antecedents under Article 19(1)(a).[63] Significantly, the Supreme Court did acknowledge that, but for Section 33B, the Ordinance, which adopted some of the disclosure

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[55] *Id.*

[56] *Id.* at 299. The Indian Supreme Court, in modifying the High Court's proposed disclosure requirements, effectively followed the recommendations contained in the EC's submissions to the Indian Supreme Court. The Indian Supreme Court, thus, removed the disclosure requirement of information regarding the capacity and capability of the political parties, on the ground that it was up to parties themselves to "project capacity and capability" directly to the voters. *Id*

[57] Op-Ed., *Ruling for Reform*, THE HINDU, (Madras), Mar. 15, 2003.

[58] People's Union for Civil Liberties v. Union of India (2003) 4 S.C.C. 399 (India).

[59] *Id*.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

requirements, was a step in the right direction.[64] However, the Supreme Court also noted that the new legislation did not require candidate disclosure of acquittals or discharges of criminal offenses, assets and liabilities, or educational qualifications.[65] The Court ordered that the Election Commission require disclosure of these items.[66] On April 1, 2003, the Election Commission issued new guidelines in line with the Supreme Court's decision in *PUCL v. Union of India*.[67]

Across the board, scholarly opinion leading up to both decisions was universally supportive of the reforms that the Indian Court ultimately endorsed and the 2002 Election Commission order. The *Times of India, the Hindu, the Indian Express, the Hindustan Times, and the Statesman* all issued editorials supportive of the recommendations of the Law Commission's 170th Report, and of both of the Court's decisions.[68] All of the leading newspaper editorials praised the Court for promoting the rule of law and reining in criminality and corruption in the government.[69] These editorials reflected the frustrations of professional and intellectual elites, and the middle classes, with political corruption. For example, in response to the Court's initial decision in the *ADR* (2002) decision, the *Hindu* observed:

> The Supreme Court's verdict in this case is one more instance where the scope of the Election Commission's powers have been widened only because Parliament failed to do the needful. Be that as it may, the verdict and its fallout are only a small step in the task of cleansing the electoral process of criminal elements. Persons with criminal records manage to get elected not because the voters are unaware of their antecedents. They achieve their ends because they manage to terrorize the voters in many instances or appeal to them on narrow sectarian or populist grounds. This being the reality, the task of cleaning the political stable of criminal elements will be possible only when civil society wakes up to the challenge. The Court's directive can, however, aid such efforts.[70]

National public opinion was also firmly behind the Indian Supreme Court.[71] As one of the leaders of Lok Satta, a prominent reform group that took part in the Right to Information campaign, observed,

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[64] *Id.*

[65] *See* Sen, *supra* note 49, at 220.

[66] *See id.*

[67] People's Union for Civil Liberties v. Union of India (2003) 4 S.C.C. 399 (India).

[68] *See* MANOJ MATE, THE VARIABLE POWER OF COURTS: THE EXPANSION OF THE POWER OF THE SUPREME COURT OF INDIA IN FUNDAMENTAL RIGHTS AND GOVERNANCE DECISIONS 191 (2010).

[69] *Id.*

[70] Op-Ed., *The Voter's Right to Know*, THE HINDU (Madras), May 4, 2002.

[71] *See, e.g.*, Jayaprakash Narayan, *Time to Respond to the People*, THE HINDU (Madras), Aug. 27, 2002.

> Never before during peacetime have people at large been united so strongly on any issue over the past 50 years. Several surveys, opinion polls and ballots showed that an overwhelming majority of the people — 95 percent or more — are in favor of full disclosure of criminal records and financial details of candidates. The parties too exhibited an impressive unity of purpose in thwarting disclosures.[72]

The Indian Supreme Court was ultimately able to secure at least partial compliance with its 2003 decision.[73] Thus, the Election Commission held elections for State Assembly in Madhya Pradesh, Chattisgarh, Rajstahan, Delhi, and Mizoram in November and December of 2003 in accordance with the new disclosure and accountability requirements.[74] In 2004, the national Lok Sabha elections were also held in accordance with the new disclosure and accountability guidelines.[75] More recently, the Central Information Commission (CIC), ruled in June 2013 that political parties were "public authorities" under the Right to Information Act because they were substantially funded by the Government. Consequently the CIC ruled that political parties were subject to the disclosure requirements of the RTI Act. As of February 2014, none of the six major parties that were issued notices by the CIC have come into compliance with the CIC order.[76]

B. *The U.S. Supreme Court's Response to Campaign Finance Reform*

As with India, the impetus behind campaign finance and electoral reforms in the United States was corruption in politics.[77] Congress enacted the Federal Election Campaign Act ("FECA") in 1971, imposing new campaign finance disclosure requirements on candidates in federal elections.[78] Following the Watergate scandal, Congress amended FECA, imposing limits on contributions to candidates, mandating disclosure of political contributions and expenditures, and initiating public financing of presidential campaigns.[79] The amendments to FECA also established the Federal Election Commission to enforce FECA and promulgate regulations.[80]

The U.S. Supreme Court's decision-making in the area of campaign finance and electoral reform has been markedly different from that of the

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[72] *Id.*

[73] *See* MATE, *supra* note 68, at 192.

[74] *Id.*

[75] *Id.*

[76] "CIC puts 6 parties on notice for not implementing RTI," THE HINDU, February 11, 2014, *available at* http://www.thehindu.com/news/national/cic-puts-6-parties-on-notice-for-not-implementing-rti/article5673516.ece

[77] *See, e.g.*, Weintraub & Brown, *supra* note 2, at 249.

[78] 2 U.S.C. § 441a (West 2013).

[79] *See* Weintraub & Brown, *supra* note 2, at 243.

[80] *Id.* at 248.

Indian Supreme Court.[81] Beginning with the U.S. Supreme Court's decision in *Buckley v. Valeo* in 1976, the U.S. Supreme Court's jurisprudence has assertively challenged restrictions on campaign expenditures as conflicting with the First Amendment and has deferred to federal restrictions on contributions.[82] In *Buckley*, the U.S. Supreme Court invalidated restrictions on candidate expenditures in the 1974 FECA law, while upholding FECA's restrictions on contributions to candidates, parties, and political committees.[83] The U.S. Supreme Court held that restrictions on contributions imposed "only a marginal restriction upon the contributor's ability to engage in free communication," but that restrictions on independent expenditures significantly affected the ability of individuals and groups to engage in direct advocacy and "represent substantial . . . restraints on the quantity and diversity of political speech."[84]

The U.S. Supreme Court in *Buckley* justified its differential approach toward political contributions and expenditures with a corruption-based rationale, holding that political contributions posed a greater threat of *quid pro quo* corruption than expenditures.[85] In so holding, the U.S. Supreme Court rejected the "equality" rationale as an alternate compelling interest or justification for placing limits on expenditures.[86] According to this rationale, the government has an interest in "equalizing the relative ability of individuals and groups to influence the outcomes of elections."[87] In rejecting the equality rationale, the U.S. Supreme Court noted that the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[88]

Two years later, the U.S. Supreme Court in *First National Bank v. Bellotti* invalidated restrictions on corporate expenditures in referenda campaigns concerning issues not materially affecting a corporation's "property, business, or assets."[89] Again, as the U.S. Supreme Court did in *Buckley*, it adopted a narrow conception of corruption as a compelling interest, holding that corporate expenditures in referenda campaigns constituted a core element of political speech and that limits on expenditures for referenda campaigns did not present the same risk of corruption as

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[81] *Id.* at 257.

[82] Richard Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of Mcconnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 37 (2004) (citing Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

[83] *Buckley*, 424 U.S. at 19-21.

[84] Hasen, *supra* note 82, at 37 (citing Buckley v. Valeo, 424 U.S. 1, 19-21 (1976)).

[85] *Buckley*, 424 U.S. at 45.

[86] *Id.* at 54.

[87] *Id.* at 48.

[88] *See* Hasen *supra* note 82, at 37-38; Buckley, 424 U.S. at 48-49.

[89] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 768 (1978); *see* Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227 (1986).

candidate elections.[90] Quite different from its rationale in *Buckley*, the U.S. Supreme Court based its decision in *Bellotti* on protecting the interests of listeners and their ability to hear speech.[91] Additionally, the U.S. Supreme Court rejected two alternative rationales advanced by the government: (1) that corporate participation would exert an undue influence on the vote's outcome and undermine the people's confidence in the democratic process and integrity of government, and (2) that corporate speech might drown out other points of view, known as the "equality" or "anti distortion" rationale.[92] The U.S. Supreme Court in *Buckley* and *Bellotti,* thus, embraced a robust conception of First Amendment protections for corporate speech and expenditures, while retaining a very narrow and limited conception of corruption as a compelling interest to justify campaign-financing regulation.[93]

After *Buckley* and *Bellotti*, what the U.S. Supreme Court has accepted as compelling interests justifying regulation has evolved and vacillated considerably. In articulating compelling interests, the U.S. Supreme Court has applied two alternate approaches. Under the first approach, exemplified by the U.S. Supreme Court's decision in *Austin v. Michigan Chamber of Commerce*, the U.S. Supreme Court appeared to move away from *Buckley's* core holdings by adopting a more deferential level of scrutiny and embracing an equality-based or anti-distortion rationale in upholding restrictions on contributions and independent expenditures.[94] The U.S. Supreme Court seemingly operated under an equality-based or anti-distortion rationale in *Austin* by upholding limits on corporate expenditures in ballot measure campaigns.[95]

Additionally, in 2002, the U.S. Congress enacted the Bipartisan Campaign Reform Act ("BCRA"), which imposed new limits on political contributions and expenditures.[96] In line with *Austin*, the Court upheld a majority of the provisions of BCRA in *McConnell v. F.E.C.* in 2003.[97]

The second approach in the U.S. Supreme Court's campaign finance jurisprudence, exemplified by the U.S. Supreme Court's decisions in *Bellotti* and *Citizens United*, reflects a much stronger and more robust conception of free speech, in which the U.S. Supreme Court has been more assertive in striking down restrictions on expenditures and contributions.

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[90] *Bellotti*, 435 U.S. at 819.

[91] *See id.* at 766.

[92] *Id.* at 776-80.

[93] *Id.*

[94] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990).

[95] *See* Hasen, *supra* note 82, at 41-42; Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law (And Why the Canadian Approach is Superior),* 8 (Ohio State Pub. Law Working Paper Series, No. 140, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746868.

[96] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

[97] Hasen, *supra* note 82, at 47-50.

Bellotti upheld the right of corporations to spend unlimited funds to support or oppose ballot initiatives.[98] In *FEC v. Wisconsin Right to Life* and other cases such as *Randall v. Sorrell* (invalidating limits on candidate campaign expenditures and low contribution limits) and *Davis v. FEC* (invalidating the "millionaire's amendment"), the U.S. Supreme Court has been assertive in challenging restrictions on corporate speech.[99]

The Court's decision in *Citizens United* marked the culmination of this progression, invalidating restrictions on independent expenditures in candidate campaigns.[100] In *Citizens United*, the U.S. Supreme Court adjudicated a challenge to the constitutionality of Section 441b of the Bipartisan Campaign Reform Act. This provision prohibited corporations and unions from using general treasury funds to make independent expenditures for "electioneering communications" or for express advocacy — speech that expressly advocated the election or defeat of a candidate.[101]

Drawing on its early landmark decision in *Buckley*, the Court in *Citizens United* adopted a narrow view of corruption, holding that only *quid pro quo* or material corruption may justify restrictions on campaign contributions or expenditures and that independent expenditures by corporations do not foster or facilitate *quid pro quo* corruption.[102] *Citizens United* rejected the equality or anti-distortion rationale advanced in *Austin* and *McConnell,* returning to a rationale focused on eliminating *quid pro quo* corruption or the appearance of corruption as an acceptable to justify limits on contributions.[103]

Citizens United solidified the Court's current approach toward campaign finance reform, signaling a continued trend toward a high level of assertiveness in challenging restrictions and limits on corporate independent expenditures, based on a robust conception of free speech.[104] The Court held that corporations have a constitutional right to make unlimited independent expenditures out of their own treasuries to expressly advocate on behalf of candidates.[105] In doing so, the Court moved away from earlier decisions suggesting that alternate rationales, such as an expanded conception of corruption, equality, and concerns of anti-distortion and legitimacy, could justify restrictions on corporate expendi-

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[98] *Id*. at 39-40; First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 765 (1978).

[99] Hasen, *supra* note 82*,* at 39-40; *see* FEC v. Wis. Right to Life, 551 U.S. 449 (2007); *see also* Randall v. Sorrell, 548 U.S. 230 (2006); *see also* Davis v. FEC, 554 U.S. 724 (2010).

[100] Citizens United v. FEC, 558 U.S. 310, 312 (2010); *see* Richard Hasen, *Citizens United and the Illusion of Coherence*, 109 MICHIGAN L. REV. 581, 586 (2010); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L & POL'Y REV. 217, 219-24 (2001).

[101] *Citizens United*, 558 U.S. at 312-313.

[102] Hasen, *supra* note 100, at 594-97.

[103] *Id.* at 594-97.

[104] *Id.* at 594-95.

[105] *Id.* at 594-96.

tures.[106] Indeed, the decision marked a major turning point, as the U.S. Supreme Court for the first time recognized the right of corporations to make expenditures with regard to candidate elections as opposed to ballot measures, also known as "issue advocacy."[107] After *Citizens United*, corporations anonymously spent large amounts on campaign spending, thus making the source of the funding difficult to track.[108] Now, for-profit corporations are able to fund campaign speech anonymously using non-profit organizations as conduits.[109]

II. Understanding the Divergence in the Courts' Approaches to Election Law Reform

There are three factors that help explain the differences in the U.S. and Indian Supreme Courts' approaches toward campaign finance regulation and electoral reform: (1) constitutional structure and prior jurisprudence; (2) structure and composition of the courts; and (3) the natures of corruption in both countries' political systems.[110]

A. *Constitutional Structure and Prior Rights Jurisprudence and Traditions*

Buckley provides the doctrinal framework for the United States' campaign finance jurisprudence.[111] This framework embraces a strong conception of First Amendment freedoms and robust protections for core political speech by way of campaign expenditures.[112] The U.S. Supreme Court's activism and assertiveness in *Buckley, Bellotti, Citizens United* and other recent decisions invalidating corporate expenditure limits reflect, in part, the U.S. Supreme Court's earlier First Amendment free speech jurisprudence. In *Buckley,* the U.S. Supreme Court noted that FECA's contribution and expenditure limitations "operated in an area of the most fundamental First Amendment activities."[113] Additionally, the *Buckley* decision cited to two earlier cases recognizing that the First Amendment affords the broadest protection to political expression in order "to assure the unfettered interchange of ideas for the bringing

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[106] *See* Levitt, *supra* note 100, at 225.

[107] *Id. at* 220

[108] *Id.* at 228-29.

[109] *Id.* at 219-24.

[110] It should be noted here that Weintraub and Brown do provide a brief comparison of differences between First Amendment jurisprudence and the Indian Supreme Court's interpretation of Article 19(1), but do not provide an in-depth discussion of the Indian Supreme Court's previous decisions recognizing a right to information based on Article 19(1)(a). *See* Weintraub & Brown, *supra* note 2.

[111] Buckley v. Valeo, 424 U.S. 1, 45-46 (1976).

[112] *Id.*

[113] *Id.* at 49.

about of political and social changes desired by the people."[114] The U.S. Supreme Court's decisions in *Buckley* and *Citizens United* reflect U.S. constitutional structure and history, as well as jurisprudential traditions, effectively recognizing that the scope of First Amendment protections includes core political speech that may not be limited or regulated absent a compelling interest.[115]

The U.S. Supreme Court's assertiveness in invalidating campaign finance reform regulations appears to be consistent with institutionalist models of judicial-decision making. Indeed, as Keck suggests, the U.S. Court has been assertive in defending its inherited jurisprudential traditions in the area of free speech.[116] Richards and Kritzer further suggest that judges' decision-making in this area is driven by fidelity to existing jurisprudential regimes in constitutional law.[117]

The Indian Supreme Court, on the other hand, has relied on India's unique constitutional structure and earlier jurisprudential traditions in pushing for greater electoral transparency. Unlike the U.S. Constitution, the Indian Constitution contains both fundamental rights and directive principles — a set of aspirational principles that include social reform goals.[118] According to Granville Austin, a leading scholar, the Indian Constitution outlines a path to social revolution.[119] Additionally, another leading scholar, Gary Jacobsohn, has described the Indian Constitution as a "militant constitution" that seeks to radically transform and reform inequalities in India's social structure, including caste-based discrimination.[120] For example, the Indian Constitution contains provisions that obligate the state to provide affirmative action in order to end caste-based discrimination.[121] The Indian Constitution also contains directive

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[114] *Id.* (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

[115] *See* Michael Dorf, *The Marginality of Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 739, 741 (2010); Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 914-15 (1963).

[116] Thomas Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?* 101 AM. POL. SCI. REV. 321, 321-28 (2007); Thomas Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 515 (2007).

[117] *See* Mark Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*. 96 AM. POL. SCI. REV. 305, 307 (2002).

[118] *See* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1966).

[119] *See id*. at 50 (describing one of the central goals of the Indian Constitution as advancing the "social revolution"); GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE (1994).

[120] GARY JACOBSOHN, CONSTITUTIONAL IDENTITY 217 (2010) (suggesting that the Indian Constitution is a "militant" constitution that sought to transform and restructure Indian society).

[121] *See* MARK GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 41 (1984).

principles that seek to advance the cause of social justice and equality.[122] Where the U.S. Constitution embraces strong protection for individual or negative rights and liberties, the Indian Constitution contains provisions and protections that call on the state to actively implement reforms that advance equality and social justice.

Additionally, the Indian Supreme Court's activism in electoral reform decisions was a product of its earlier decisions establishing broad conceptions of the Indian Constitution's fundamental rights provisions and the Indian Supreme Court's expansive interpretation of a positive right to information based on Article 19.[123] Stemming from the unique nature of India's constitution, an activist group of Supreme Court judges has interpreted the fundamental rights provisions of the Indian Constitution as containing a broad range of positive rights, including the right to food, education, and clean air.[124] The Court has also established a robust conception of the right to information based on its interpretation of Article 19(1) of the Indian Constitution.[125]

The Indian conception of free speech is radically different from the scope of the First Amendment's free speech protections, as interpreted by the U.S. Supreme Court. For example, in *State of Uttar Pradesh v. Raj Narain*, the Indian Supreme Court held that Article 19(1) guarantees freedoms of speech and expression, as well as the right of a citizen to receive information.[126] In *Raj Narain*, the Indian Supreme Court observed:

> In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the country have a right to know every public act, everything that is done in a public way, by their public functionaries . . . . The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which

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[122] *See id.*

[123] *See* Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases,* 28 BERKELEY J. INT'L L. 216, 247-52 (2010).

[124] *See* People's Union for Civil Liberties v. Union of India (2007) 1 S.C.C. 728 (recognizing a right to food and ordering state governments and union territories to implement the Integrated Child Development Scheme); *see* Mohini Jain v. Union of India, A.I.R. 1992 S.C. 1858 (recognizing a right to education); *see*, *e.g.*, M.C. Mehta (Taj Trapezium Matter) v. Union of India (1997) 2 S.C.C. 353 (ordering factories to use cleaner fuels or relocate to prevent further degradation to the Taj Mahal caused by pollution).

[125] *See, e.g.*, People's Union for Civil Liberties v. Union of India (2003) 5 S.C.C. 294, 295 (India).

[126] *See* State of Uttar Pradesh v. Raj Narain, (1975) 4 S.C.C. 428 (India).

> should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.[127]

The Court in *SP Gupta v. Union of India* built on the *Raj Narain* decision by articulating the rationale behind the right to information.[128] Writing for the majority, Justice P.N. Bhagwati observed:

> [C]itizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government.[129]

The Indian Supreme Court further expanded the scope of the right to information in the landmark decision *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal*.[130] In this decision, the Court ruled that private broadcasters have a right to telecast cricket tournaments, but since Doordarshan, the state-owned television network, still had exclusive telecasting rights, TWI, a private broadcaster, would have to pay fees to Doordarshan to broadcast each match.[131] The Court held that the viewers of matches have a right to information, the right to freedom of speech and expression in Article 19(1)(a) included the right to acquire information and disseminate it, and that distribution of television airwaves had to be done in an equitable manner between the government and private channels.[132] The Court thus adopted an instrumental conception of the right to information, suggesting that the State had an affirmative obligation to provide information to citizens to level the playing field for all:

> The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation, and non-information all equally create an uniformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchic organizations.[133]

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[127] PUCL v. Union of India (2003) 5 S.C.C. 294, 295, (citing State of Uttar Pradesh v. Raj Narain, (1975) 4 S.C.C. 428) (India).

[128] *Id.*

[129] *Id.* (citing S.P. Gupta v. Union of India (1981) Supp. S.C.C. 87) (India).

[130] *Id.* at 298, (citing Sec'y, Ministry of Info. & Broad. . Gov't of India v. Cricket Ass'n of Bengal (1995) 2 S.C.C. 123, 161) (India).

[131] Sec'y, Ministry of Info. & Broad., Gov't of India v. Cricket Ass'n of Bengal (1995) 2 S.C.C. 161, 166-67 (India).

[132] *Id.*

[133] *Id.* at 163-64.

Building on these earlier decisions, the Court expanded the right to information to include information about candidates for Parliament and state legislatures.[134] On this basis, the Court ordered the Election Commission to promulgate disclosure provisions requiring candidates to disclose information about their criminal records, financial assets, and educational backgrounds.[135]

Additionally, the extraordinary activism of the Indian Supreme Court is a product of the gradual expansion of the Court's power and jurisdiction over the past four decades.[136] The scope of the modern Indian judiciary's power can be traced to the Indian Supreme Court's earlier jurisprudence establishing PIL in the late 1970s and early 1980s.[137] Following the end of the Emergency Rule regime of Indira Gandhi and the election of the Janata Party regime, a group of senior activist justices expansively interpreted Article 32[138] of the Indian Constitution to widen standing doctrine ("*locus standi*"), thereby expanding access to the Court to third party advocates and public interest groups.[139] The Court expanded access to public interest litigants by relaxing formal pleading and evidentiary requirements.[140] The Court also expanded its equitable and remedial powers, enabling it to enhance monitoring and oversight in PIL cases.[141] At the same time, the increased media coverage on state repression of human rights and governance failures led to a surge in public interest claims challenging these governance failures in court.[142]

National newspapers, such as the *Indian Express*, published investigative reports on the excesses of the Emergency Rule period and also highlighted the atrocities committed by state and local police, the abhorrent condition of prisons, and the abuses in the systems of protective custody, including mental homes for women and children.[143] This shift in media attention "enabled social action groups to elevate what were regarded as petty instances of injustice and tyranny at the local level into national

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[134] *See* Sitapati, *supra* note 5.

[135] *See id.*

[136] PRAVEEN KUMAR GANDHI, SOCIAL ACTION THROUGH LAW: PARTNERSHIP FOR SOCIAL JUSTICE 60-62 (1985).

[137] *Id.* at 62.

[138] INDIA CONST. art. 32, §§ 1-2 ("Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.")

[139] *See* GANDHI, *supra* note 136, at 61-62.

[140] *Id.* at 65.

[141] *Id.* at 64-66.

[142] *Id.* at 64.

[143] *Id.* at 65.

issues, calling attention to the pathology of public and dominant group power . . . ."[144] In commenting on the importance of the media in bolstering PIL, Baxi observed:

> All this enhanced the visibility of the court and generated new types of claims for accountability for wielding of judicial power and this deepened the tendency towards judicial populism. Justices of the Supreme Court, notably Justices Krishna Iyer and Bhagwati, began converting much of constitutional litigation into SAL, through a variety of techniques or juristic activism.[145]

During the Janata years, the Court – led by Prime Minister Indira Gandhi appointees Justices P.N. Bhagwati and V. R.Krishna Iyer – also pioneered a new activist jurisprudential regime in the area of fundamental rights, providing the substantive doctrinal foundation for the Indian Supreme Court's expanded role in governance.[146] In *Maneka Gandhi v. Union of India,*[147] the Indian Supreme Court dramatically broadened Article 21's[148] right to life and liberty by effectively reading the concept of due process into that provision, and broadened rights-based scrutiny of government actions under Article 14's right to equality before the law[149] and Article 19's seven "fundamental freedoms."[150]

Interestingly, PIL was an extension of the legal aid movement that had been launched by Indira Gandhi during the Emergency Rule – a significant component of her social-egalitarian Twenty-Point Programme.[151] Justices Krishna Iyer and Bhagwati had been leading advocates in the

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[144] *Id.* at 63-64.

[145] *Id.*

[146] *Id.*

[147] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 (India).

[148] INDIA CONST. art. 21 provides: "Protection of Life and Personal Liberty – No person shall be deprived of life or personal liberty except according to procedure established by law."

[149] INDIA CONST. art. 14 reads: "Equality before law – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

[150] INDIA CONST. art. 19 provides:

Protection of certain rights regarding freedom of speech, etc. –
(1) All citizens shall have the right –
(a) to freedom of speech and expression;
(b) to assembly peaceable and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) *to acquire, hold, and dispose of private property* [repealed by 44th Amendment]
(g) to practice any profession, or to carry on any occupation, trade or business.

[151] Gandhi's Twenty Point Programme largely focused on economic policies and included proposals for land reforms, rural housing, abolishing bonded labor, fighting tax evasion, smuggling, expanding worker participation in the industrial sector, and

government for policies and programs expanding legal aid[152] and access to justice. They pushed for the organization of legal aid camps in villages, encouraged high court justices to adjudicate grievances in villages, and established people's courts ("*lokadalats*").[153]

Therefore, the Indian Supreme Court assumed a new function of oversight and accountability, by which it would review national and state government entities' actions. In his opinion in the *Fertilizer Corp. Kamgar Union v. Union of India Case,*[154] Justice Iyer described this function by noting that law "is a social auditor and this audit function can be put into action only when someone with real public interest ignites this jurisdiction."[155] Starting in 1977 and through the 1980s, the Indian Supreme Court took on challenges to illegal government actions and the state's repression of human rights by expanding the scope of its equitable and remedial powers in PIL cases.[156]

The Indian Court's PIL jurisprudence in the 1980s was typical of what one would expect from a "regime" court. It performed the role of an "agent" of the Central Government, reigning in the lawlessness and arbitrariness of state and local governments and the bureaucracy, such as state repression in human rights cases and state and local noncompliance with environmental laws.[157] During these years, the Indian Court avoided challenges to the Central Government's policies directly.[158] In the post-1990 era, however, the Court dramatically expanded its role in governance, becoming more assertive in challenging the power of the Central Government.[159] The Court was able to do so because it faced a

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combating rural indebtedness. *See* Aaron S. Klieman, *Indira's India: Democracy and Crisis Government*, 96 POL. SCI. Q. 241, 251 (1981).

[152] As Chief Justice of the Gujarat High Court, Bhagwati chaired the state legal aid committee, which issued recommendations for broadening legal aid and access to justice. GOVERNMENT OF GUJARAT, REPORT OF THE LEGAL AID COMMITTEE (1971). Similarly, Justice Iyer chaired a Central Government panel that called for restructuring the legal system. GOVERNMENT OF INDIA, MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, REPORT OF THE EXPERT COMMITTEE ON LEGAL AID: PROCESSUAL JUSTICE TO THE PEOPLE (1973).

[153] Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, *in* THE ROLE OF JUDICIARY IN PLURAL SOCIETIES 32, 36 (Radhika Coomaraswamy & Neelan Tiruchelvan, eds., 1987).

[154] Fertilizer Corp. Kamgar Union v. Union of India, (1981) 1 S.C.C. 568.

[155] *See* S.P. Gupta, (1981) Supp. S.C.C. 87. at 218 (citing *Fertilizer Corp.*, (1981) 1 S.C.C. 568 at 585).

[156] Lloyd I. Rudolph & Susanne Rudolph, *Redoing the Constitutional Design: From an Interventionist to a Regulatory State*, *in* THE SUCCESS OF INDIA'S DEMOCRACY, 127, 134 (Atul Kohli ed., 2001).

[157] *Id.*

[158] Baxi, *supra* note 153 at 32, 36.

[159] Rudolph, *supra* note 156 at 127, 132.

significantly more hospitable political environment characterized by weaker coalition governments in Delhi.[160]

B. *Structure and Composition of the Courts*

Key differences in the structure and composition of the U.S. and Indian Supreme Courts can also explain the differences that exist in each court's approach to electoral reform. The appointment of justices to the U.S. Supreme Court is a political process in which the President nominates justices that typically share the President's political or ideological worldview. As a result, judicial decision-making in the U.S. Supreme Court is influenced not only by the law and institutional factors,[161] but also by the justices' own political or policy values that they share with the party of the President that appointed them.[162]

The evolution of the U.S. Supreme Court's approach to campaign finance reform can thus also be explained by changes in the composition of the Court. Its original decision in *Buckley* – upholding contribution

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[160] *Id.* at 138; *see* Pradeep Chhibber & Ken Kollman, THE FORMATION OF NATIONAL PARTY SYSTEMS: FEDERALISM AND PARTY COMPETITION IN CANADA, GREAT BRITAIN, INDIA, AND THE UNITED STATES 132-43 (2004) (characterizing the post-1990 era as a provincializing period); Atul Kohli, *State-Society Relations in India's Changing Democracy*, in INDIA'S DEMOCRACY: AN ANALYSIS OF CHANGING STATE-SOCIETY RELATIONS 305, 305 (Atul Kohli ed., 1988).

[161] *See* Rogers M. Smith, Political Jurisprudence, The "New Institutionalism" and the Future of Public Law, 82(1) AM. POL. SCI. REV. 89, 89-108 (1988); Keck, *supra* note 116 at 511-44; Keith Whittington, *Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99(4) AM. POL. SCI. REV. 583, 583-96 (2005); Keith E. Whittington, Once More Unto the Breach: PostBehaviorialist Approaches to Judicial Politics, 25(2) LAW & SOC. INQUIRY 601, 601-34 (2000).

[162] *See* Howard Gillman & Cornell Clayton eds., THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (1999) (presenting perspectives on the institutionalist model of judicial decision-making); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86-97 (2002) (explaining the attitudinal model of judicial decision-making). In addition, it should be noted that another important factor that has influenced both the U.S. and Indian Courts' jurisprudence are "support structures," including the Federalist Society in the United States and the Election Commission of India, right to information advocacy groups, and public interest lawyers in India. *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY & THE CONSERVATIVE COUNTERREVOLUTION (forthcoming, Oxford Univ. Press 2014) (examining the role the Federalist Society played in influencing and shaping the conservative jurisprudence of the U.S. Supreme Court); Alistair McMillan, *The Election Commission of India and the Regulation and Administration of Electoral Politics*, 11 ELECTION L.J. 187 (2012); CHARLES EPP, THE RIGHTS REVOLUTION (1994) (highlighting the importance of legal support structures in advancing fundamental rights in the United States, United Kingdom, and India, and finding that India did not have a rights revolution because of the lack of such structures).

limits and invalidating expenditure limits – not only reflected Justice Burger Court's adherence to a tradition of robust protections for core political speech, but also a combination of conservative and political pragmatism and moderation of the Burger Court.[163] The Court's shift toward greater deference to government regulations in campaign finance reform arguably reflected the transition toward a more progressive court majority – consisting of Justices Marshall, Brennan, White, Blackmun, and Stevens – in the *Austin*[164] decision in 1990 and the majority – consisting of Justices Stevens, O'Connor, joined by Justices Souter, Ginsburg, and Breyer – in *McConnell* in 2003.[165] However, following the appointment of Chief Justice Roberts (replacing Rehnquist) and Justice Samuel Alito (replacing O'Connor) to the U.S. Supreme Court, it shifted decidedly toward a more conservative and assertive posture in rejecting the equality rationales that had been embraced by *Austin* and *McConnell*.[166]

In contrast to the U.S. Supreme Court, the Indian Court is a much larger court, now consisting of the Chief Justice and thirty justices that sit in bench panels of two, three, five, or more.[167] This organizational structure allows for greater levels of specialization among judges and a higher degree of policy entrepreneurship and innovation, as individual, often senior, judges are able to wield high levels of influence on smaller bench panels.[168] In addition, the Indian Court's judges are now appointed through a professionalized model of selection, as a result of earlier decisions in the *Second Judges Case*[169] and the *Third Judges Case*.[170] Under

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[163] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

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

[165] McConnell v. FEC 540 U.S. 93 (2003).

[166] *See* Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law (And Why the Canadian Approach is Superior)* 1-18 (Ohio St. Univ. Moritz College of Law Pub. Law & Legal Theory Working Paper Grp., Paper No. 140, 2011); *see also* Amanda Hollis-Brusky,IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY & THE CONSERVATIVE COUNTERREVOLUTION (forthcoming, Oxford Univ. Press 2014) (examining the role the Federalist Society played in influencing and shaping the conservative jurisprudence of the U.S. Supreme Court).

[167] *History*, THE SUPREME COURT OF INDIA, http://supremecourtofindia.nic.in/history.htm (last visited Feb. 2, 2014),

[168] Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 101, 188, 206 (2013).

[169] *See* Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441, 709-10 [hereinafter *Second Judges Case*] (holding that Article 222 requires that executive must have the concurrence of Chief Justice and collegium of senior justices for approval of judicial appointments).

[170] *In re Special Reference No. 1 of 1998*, (1998) 7 S.C.C. 739, 772 [hereinafter "*Third Judges Case*"] (revisiting its decision in the *Second Judges* Case and ruling that the Chief Justice must consult with a collegium of the four, instead of two, senior-most justices on the Indian Supreme Court); *see* Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE:

this model, the Chief Justice and senior justices recommend justices for appointment to open seats on the Indian Supreme Court, and the Prime Minister must accord deference and weight to these recommendations in selecting justices. As a result, justices are selected largely on the basis of non-political considerations, including professional merit, regional considerations, and caste.

In order to see how these factors shape the institutional perspectives and policy worldviews that may drive or discourage judicial activism and assertiveness, one must look at both the unique institutional environment and intellectual atmosphere of the Indian Supreme Court to see how these factors shape the institutional perspectives and policy worldviews that may drive or discourage judicial activism and assertiveness.[171] The judges' sense of their institutional mission and judicial role is merely a part of judges' overall intellectual identity and policy worldviews, which high court judges, at least in India, tend to share with other professional and intellectual elites in India.[172] The Indian Supreme Court's activism and assertiveness in the *Common Cause* and *Right to Information* cases can, thus, be explained by understanding the broader intellectual worldviews and policy values of the political, professional, and intellectual elites, who broadly supported far-reaching systemic reform of India's political system and policies advancing good governance and accountability.[173] In each of these decisions, the Indian Supreme Court justified court-ordered transparency initiatives by referencing increasing levels of criminality and corruption in elections and government, as well as the government's failure to take actions to address these problems.[174]

This author suggests that the justices' own policy values embodied in those decisions and remedies generally reflected the broader outlook and sensibilities of professional and intellectual elites within the Indian media, NGOs, academia, the Bar, and in some cases, national public opinion.[175] Like many professional and intellectual elites, judges in India have become increasingly frustrated by increasing levels of corruption and graft, the lack of transparency and accountability, and weak or inef-

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ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159, 188 (B.N. Kirpal et al. eds., 2000).

[171] Manoj Mate, THE VARIABLE POWER OF COURTS: THE EXPANSION OF THE POWER OF THE SUPREME COURT OF INDIA IN FUNDAMENTAL RIGHTS AND GOVERNANCE DECISIONS 206 (Jan. 1, 2010) (unpublished Ph.D., dissertation, University of California Berkeley) (on file with author).

[172] *Id.*

[173] *Id.* at 162.

[174] *Id.* at 192.

[175] *See* Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India, in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 262, 283 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

fective governance in the executive branches.[176] The justices felt the need to act and intervene to save the rule of law and to preserve good governance, due to the perceived failures of the executive and legislative branches to uphold such norms.[177]

C. *The Nature of Corruption*

A third key difference between approaches to campaign finance reform in the U.S. and India centers on the nature of corruption in each polity. This distinction can be traced to these two nations' different positions or trajectories on the democracy development curve.[178] Although material corruption dominated U.S. politics in the early half of the 1900s, it has faded away over the past decades and given way to systemic corruption, in which the growth of big money and corporate expenditures and contributions have overwhelmed the electoral process, resulting in what Lawrence Lessig has referred to as "dependence corruption."[179] In developing countries and democracies, "material corruption" – which refers to the use of office and government positions to gain material advantage, as well as criminality in politics – tends to be pervasive, while in more developed democracies, the focus tends to be on institutional corruption and, thus, on preventing money from corrupting the democratic system.[180] Consistent with this logic, the focus of reform in India has largely centered on fighting actual material corruption tied to actions in government and campaigns, including the growing criminalization of politics. In contrast, the focus of reform in the United States has shifted

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[176] Rajeev Dhavan, *Judges and Indian Democracy*, *in* TRANSFORMING INDIA (Francine Frankel et al., eds., 2000), *cited in* Mate, *supra* note 175.

[177] *See* T.R. Andhyarujina, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA (1992), *cited in* Mate, *supra* note 175; Justice J.S. Verma 'The Constitutional Obligation of the Judiciary – R.C. Ghiya Memorial Lecture', (1997) 7 *Supreme Court Cases* (Journal section), 1, *cited in* Mate, *supra* note 175; *see* Dhavan, *supra* note 176.

[178] *See* BRUCE CAIN, FIXING AMERICAN DEMOCRACY: THE QUANDARIES OF POLITICAL REFORM, CHAPTER 2 (manuscript on file with the author) (discussing the problem of "corruption confusion" in the election law literature, in which material corruption is conflated with democratic distortion).

[179] Michael Johnson, SYNDROMES OF CORRUPTION; WEALTH, POWER, AND DEMOCRACY (2005); Lawrence Lessig, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT 7 (2011) ("The great threat to our republic today comes not from the hidden bribery of the Gilded Age, when case was secreted among members of Congress to buy privilege and secure wealth. The great threat today is instead in plain sight. It is the economy of influence now transparent to all, which has normalized a process that draws our democracy away from the will of the people."); *see* John Joseph Wallis, *The Concept of Systemic Corruption in American History*, in CORRUPTION AND REFORM 24, 27 (Edward Glaeser & Claudia Goldin eds., 2006).

[180] *See* Cain, *supra* note 178, Chapter 2.

from fighting material corruption to fighting institutional corruption and democratic distortion, or unequal influence.[181]

1. Material Corruption, Criminality, and the Indian Supreme Court

The growth of an unregulated black money economy in India and the increased criminalization of Indian politics have had a devastating effect on India's political system.[182] In light of widespread noncompliance with India's existing campaign finance reform regulations and the growing criminalization of Indian politics,[183] the Indian Supreme Court has mainly focused on attempting to fight material corruption by expanding the right to information and promulgating disclosure requirements for legislative candidates.[184]

In both of the *Right to Information* cases, the Delhi High Court and Indian Supreme Court recognized the need to address the criminalization of politics, including the influence of criminal syndicates over campaigns and elections, as well as the growing influence of a parallel black money economy on the political system and the bureaucracy.[185] Relying on reports and submissions from the Election Commission, the Law Commission, and the Vohra Committee report, the courts in each of these cases made concrete references to the criminalization of politics. In the original *ADR v. India* decision decided by the Delhi High Court, the Indian Supreme Court cited to the Election Commission's report, "Electoral Reforms" (Views and Proposals), which noted:

> It is widely believed that there is a growing nexus between the political parties and anti-social elements, which is leading to criminalization of politics, where the criminal themselves are now joining election fray and often even getting elected . . . . Some of them have even adorned ministerial births and, thus, law breakers have become law makers.[186]

Significantly, the Vohra Committee Report of 1995 highlighted the extent to which a vast network of criminal gangs and syndicates had developed contacts with bureaucrats and government officials at all levels, and were effectively undermining the effectiveness of government bureaucracies.[187] Additionally, the Vohra Committee Report highlighted how this infiltration of criminal elements into Indian politics undermined

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[181] *Id.*

[182] *See* M.V. Rajeev Gowda & E. Sridharan, *supra* note 4, at 227-28; 232-36.

[183] *See* Sen, *supra* note 49 at 224.

[184] *See, e.g.*, Ass'n for Democratic Reforms v. Union of India, 2000 A.I.R. 2001 (Del.) 126 (India) (citing Vohra Committee Report); People's Union for Civil Liberties v. Union of India (2003) 5 S.C.C. 294, 295 (India).

[185] *Id.*

[186] Ass'n for Democratic Reforms v. Union of India, 2000 A.I.R. at 126, 130 (India) (citing Vohra Committee Report).

[187] *Id.* at 133-34.

the fairness of elections and the government's ability to prosecute narco-terrorism networks and how government investigations into the Bombay blast case and the communal riots in Surat and Ahmedabad had uncovered "extensive linkages of the underworld in the various governmental agencies, political circles, business sector and the film world."[188] Drawing on this extensive evidence of criminality and corruption, the Indian Supreme Court in the *Right to Information Cases* sought to curtail material corruption and total non-compliance with the existing limits on campaign expenditures by focusing on initiatives to increase voter awareness of a candidate's record in terms of material wealth and criminal actions involving corrupt acts.[189] However, the promise of complete transparency in Indian elections is far from a reality today, as most corporate and other forms of expenditures in Indian elections is "dark" money and goes unreported. Indeed, none of the six major political parties that had been ordered by the Central Information Commission to come into compliance with the disclosure requirements of the Right to Information Act have complied with the CIC's order.

2. Institutional Corruption, Democratic Distortion, and the U.S. Supreme Court

In contrast to India's efforts, campaign finance reform initiatives in the United States and the U.S. Supreme Court's decisions involving challenges to campaign finance reform have generally aimed at addressing institutional corruption, which refers to *quid pro quo* corruption or other forms of direct influence corruption.[190] A second goal of reform in the United States has been to achieve equality and level the playing field in order to regulate money in politics.[191]

In *Buckley* and subsequent decisions, including *Citizens United*, the U.S. Supreme Court has largely justified its decision to allow restrictions on contributions, but not on expenditures, based on a narrow conception of influence corruption that focuses on the extent to which political contributions raise the risk of *quid pro quo* corruption.[192] In other decisions, including *Austin* and *McConnell*, the U.S. Supreme Court effectively embraced an equality or anti-distortion rationale, which focused on the extent to which corporate spending drowns out other political voices and

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[188] *Id.* at 134 (citing Vohra Committee Report).

[189] *See, e.g.*, Ass'n for Democratic Reforms v. Union of India, 2000 A.I.R. 2001 (Del.) 126 (India) (citing Vohra Committee Report); People's Union for Civil Liberties v. Union of India (2003) 5 S.C.C. 294, 295 (India).

[190] *See* Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).

[191] *See* Weintraub, *supra* note 2 at 257.

[192] Buckley v. Valeo, 424 U.S. 1 (1976); Citizens United v. FEC, 558 U.S. 310 (2010).

distorts the electoral process.[193] Thus, the U.S. Supreme Court in *McConnell* accepted the rationale of promoting fairness and competitiveness in elections by accepting the regulation of both expenditures and contributions.[194] However, the U.S. Supreme Court in *Citizens United* reaffirmed its approach in *Buckley* and rejected the equality rationale for campaign finance regulation.[195]

III. Theoretical and Normative Implications of the Indian and U.S. Models of Free Speech

The foregoing account highlighted how the unique jurisprudential traditions, structure, and composition of the Indian and U.S. Supreme Courts, and the nature of corruption in each system help account for each court's divergent approaches in interpreting the scope of free speech in the electoral reform context. Each courts' approach also raises important normative and theoretical issues that underlie each country's jurisprudence. Part III situates each court's approach within the broader theoretical literature on the scope and interpretation of First Amendment free speech rights. This Part concludes by suggesting that the Indian Supreme Court's development and expansion of the right to information in the *Association for Democratic Reforms* and *PUCL* decisions present important challenges to existing theories of free speech and electoral speech, and may provide crucial insights for those seeking to advance and defend the cause of campaign finance reform within the federal courts.

A. *Theories of Free Speech and the First Amendment*

There are three main competing models of free speech that identify different animating values at the core of the First Amendment's protections for free speech in the United States: (1) the "marketplace of ideas" model; (2) the autonomy model; and (3) democratic self-government models of speech.[196]

1. The Marketplace of Ideas Model

One dominant model or approach to the interpretation of the scope of free speech under the First Amendment is the "marketplace of ideas" model or approach. Justice Oliver Wendell Holmes articulated this approach in his dissent in the *Abrams* decision, in which he voted to

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[193] *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); McConnell v. Federal Election Comm'n 540 U.S. 93 (2003).

[194] McConnell v. Federal Election Com'n 540 U.S. 93 (2003); *see* Ansolabehere, *supra* note 1 at 17; Hasen, *supra* note 100, at 589.

[195] *Citizens United,* 558 U.S. 310; *see also* Hasen, *supra* note 100, at 594-97.

[196] *See* Robert Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477, 478 (2011); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 Cal. L. Rev. 2353 (2000).

invalidate the petitioners' conviction for the distribution and dissemination of literature urging revolutionary action.[197] In his dissent, Holmes argued that "[t]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."[198] The majority decisions in *Buckley*, *Citizens United*, and several other decisions invalidating restrictions on campaign expenditures have drawn on the "pluralist theory of the marketplace of ideas" that is fundamental to modern conceptions of Madisonian pluralism.[199] According to this theoretical approach, the goal of the First Amendment is to enhance open competition among a broad spectrum of interests through an unrestricted marketplace of ideas.[200] According to this approach, a free and unregulated marketplace of ideas can help lead to more democratic outcomes and provide for more accountability in government.[201]

2. The Autonomy Model

Within the scholarship on the First Amendment and free speech, leading scholars have suggested that much of the Court's free speech jurisprudence has been dominated by a broader concern for the protection of the autonomy of the individual speaker.[202] Leading scholars have argued that the protection of autonomy and individual self-expression lie at the core of First Amendment.[203] While autonomy has been recognized and accepted as a core First Amendment value, scholars like Robert Post

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[197] *Id.* at 2359-60 (citing Abrams v. United States, 250 U.S. 616, 630 (1919)).

[198] Abrams, 250 U.S. at 630; *see* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 966-67 (2009); *see* Steven Ansolabehere, *Arizona Free Enterprise v. Bennett and the Problem of Campaign Finance*, 2011 SUP. CT. REV. 39, 66 (2011).

[199] *See* Post, *supra* note 196, at 2363; *see* ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951); THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961).

[200] Post, *First Amendment Jurisprudence, supra* note 196, at 2360.

[201] *See* Jessica Levinson, *The Original Sin of Campaign Finance Law*: *Why Buckley v. Valeo is Wrong*, 47 U. RICH. L. REV. 881, 905 (2013).

[202] *See* Christina Wells, Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence, 32 HARV. C.R.-C.L. L. REV. 159, 159-60 (1997).

[203] James Weinstein, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 491, 502 (2011), citing C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47 (1989); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 625-29 (1982); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 59-70 (1975); Seana Shiffrin, *Speech, Death and Double Effect*, 78 N.Y.U. L. REV. 1135, 1158-85 (2003).

have argued that modern First Amendment doctrine can be better explained as advancing the "value of democratic self-governance."[204]

3. Democratic Self-Government Rationales

a. *Meiklejohn's Communicative-Informational Model*

In contrast to the marketplace of ideas approach, democratic self-government theory models focus on the importance of the First Amendment to the functions of democratic governance. Broadly speaking, there are two main democratic self-government approaches in the literature on First Amendment. The first of these approaches is the "communicative-informational" model advanced by scholars including Alexander Meiklejohn, Owen Fiss, Cass Sunstein and others.[205]

According to this model, the First Amendment protects "the communicative processes necessary to disseminate the information and ideas required for citizens to vote in a fully informed and intelligent way."[206] As Robert Post observes, the communicative-informational model "analogizes democracy to a town meeting" where "the state is imagined as a moderator, regulating and abridging speech," as the doing of the business under actual conditions may require.[207] According to the communicative-informational model, "the point of ultimate interest is not the words of the speakers, but the minds of the hearers," so that the First Amendment is seen as safeguarding collective processes of decision making rather than individual rights."[208] Meiklejohn thus suggests that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[209] The communicative-informational model, therefore, "focuses on the capacity of citizens to receive and utilize information in deciding future action."[210] In this respect, Meiklejohn's participatory self-government model of the First Amendment seeks to improve the

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[204] Post, *Participatory Democracy and Free Speech*, *supra* note 196, at 481-82.

[205] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24-27 (1965); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discours*e, 64 U. COLO. L. REV. 1109 (1993).

[206] Post, *supra* note 196 at 2367. *See generally* Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Alexander Meiklejohn, THE FIRST AMENDMENT IS AN ABSOLUTE, 1961 SUP. CT. REV. 245 (1961).

[207] Post, *supra* note 196 at 2367 (*citing* Meiklejohn, POLITICAL FREEDOM, *supra* note 205 at 24).

[208] *Id.*

[209] *Id.* (citing MEIKLEJOHN, *supra* note 205, at 26).

[210] Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1941 (1998-1999).

quality of voting and governance, while also promoting greater accountability.[211]

From the perspective of election law, the communicative-informational model comes closest to providing support for the equality or anti-distortion rationale advanced by the U.S. Supreme Court in *Austin* and *McConnell*. Both decisions accepted that restrictions on campaign expenditures were constitutional because such restrictions would counter the potentially corrosive and distortive effects of unrestricted corporate speech.[212] The concern then is not necessarily guaranteeing the rights of all individuals to speak and participate in particular public or political debates, but rather to regulate the supply and quality of available information for the deliberative process of voting and governance. A central tenet of the communicative-informational model is that the First Amendment "does not require that, on every occasion, every citizen shall take part in public debate . . . ."[213]

Other scholars and jurists have advanced a similar participatory self-government approach to the First Amendment. For example, in his book *Active Liberty*, Justice Breyer argues that one of the central goals of the First Amendment is to enhance political participation and that limits on campaign expenditures and campaign contributions can help improve voter confidence.[214] In doing so, these limits encourage participation in the political process by addressing systemic corruption and the corrosive effect of massive corporate spending in elections, while encouraging candidates and other political actors to seek a broader base of political support.[215]

b. *Post's "Participatory" Model*

An alternative approach within the family of democratic self-government theory is what Post describes as the "participatory" model of the First Amendment, which focuses on the role of "public discourse in estab-

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[211] *See* Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761 (1986); Larry Rosenthal, *The Emerging First Amendment Law of Managerial Perspective*, 77 FORDHAM L. REV. 33 (2005).

[212] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); McConnell v. Federal Election Com'n 540 U.S. 93 (2003).

[213] *See* MEIKLEJOHN, *supra* note 205 at 26.

[214] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 46-49 (2005).

[215] *Id.*; s*ee also* Cass Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE. L. J. 1719 (2006). Hasen has also analyzed Justice Breyer's invocation of the participatory self-government rationale in his concurring opinion in *Nixon v. Shrink Missouri*. *See* Hasen, *supra* note 82 at 44 (citing Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 400-404 (2000). Many other scholars have advanced democratic participation as a primary goal in interpreting the First Amendment, including Owen Fiss, Cass Sunstein, and Steven Holmes. *See generally*, Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1985-86).

lishing democratic legitimacy."[216] The participatory model of free speech "focuses on speakers as participants in the autonomous construction of democratic identity."[217] According to Post, "[i]n the context of elections, the participatory model would require that public discourse remain sufficiently open to citizens and candidates as to serve for them the function of securing democratic legitimacy by enabling the reconciliation of individual and collective self-determination."[218] As Post argues, the U.S. Supreme Court has in some ways rejected aspects of both the marketplace of ideas and the communicative-informational model in its campaign finance reform decisions and has "consistently opted to protect individual autonomy against regulations of public discourse designed to maintain the integrity of collective thinking processes."[219] Post focuses on the rights of individual speakers and the ability of individuals and groups to speak and express themselves fully in order to shape public opinion through public discourse.[220] Post's participatory model is rooted in American constitutional history and structure, as well as jurisprudential traditions, which effectively recognize that First Amendment protections have few limits when it comes to core political speech.[221]

In his recent Tanner Lectures on the *Citizens United* decision, Post clarified his conception of the participatory model of free speech in the context of election law and campaign finance reform in distinguishing between two realms of speech — the realm of public discourse, and other areas of speech (including corporate speech) whose regulation can be justified by certain state interests, including electoral integrity and the promotion of informed public decision making. According to Post, public discourse (or discursive democracy) refers to "the communicative processes by which persons participate in the formation of public opinion."[222]

Post thus argues that the First Amendment provides robust protections to public discourse because that discourse furthers and serves the cause of democratic legitimation by allowing individuals to use speech for self-expression and to "establish worth, standing, and respect" for their own voice.[223] However, Post goes on to note that ordinary corporate speech is not part of the traditional realm of public discourse because corporations

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[216] Post, *supra* note 210, at 1841.

[217] *Id.*

[218] *Id.*

[219] Post, *supra* note 210, at 2369.

[220] *Id.* at 2369.

[221] *See* Michael Dorf, The Marginality of Citizens United, 20 CORNELL J.L & PUB. POL'Y 739 (2010); Thomas Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877 (1963).

[222] ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (THE TANNER LECTURES IN HUMAN VALUES) (2014), 49.

[223] *Id.* at 68.

"are not natural persons who can experience the subjective value of democratic legitimation," and "do not possess original First Amendment rights to participate in public discourse as speakers."[224] Additionally, Post argues that the government can be justified in regulating corporate speech in order to advance the compelling interest of *electoral integrity* — which entails ensuring that representative democracy is responsive to and reflects discursive democracy or public opinion.[225] Post faults the *Citizens United* majority for failing to acknowledge that corporate speech can potentially undermine public confidence in the electoral process and representative institutions and thus should not be accorded the same protections as public discourse.[226] In addition, Post also argues that restrictions on corporate speech may also promote informed public decision-making.[227]

IV. Comparing Free Speech and Election Law in the U.S. and India: Divergent Conceptions of the Participatory Model

Drawing on the different theoretical conceptions presented in Part III, Part IV suggests that the U.S. and Indian Supreme Courts' approaches to election law reform can arguably be classified as constituting two competing conceptions of the participatory model of election law reform.[228] This Article uses the term "participatory model" in a much broader sense than Post's conception, referring to approaches that seek to enhance participation in the political process in different ways, including speech, expression, and voting. As such, Part IV refers to the model adopted by the U.S. Supreme Court in *Citizens United* as a "liberal" conception of the participatory model that differs from Post's approach. The current U.S. approach to election law review, as embodied in *Citizens United*, reflects aspects of both the marketplace of ideas approach, and a laissez-faire

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[224] Post, *supra* note 222, at 71.

[225] *Id.* at 85.

[226] *Id.* at 63-66,

[227] *Id.* at 77-79. Post argues that the government possesses managerial authority to regulate speech in the context of elections "in ways that would be impermissible within public discourse," and argues for the establishment of a managerial domain "within which government may regulate the expenditures and contributions of ordinary corporations in order to promote the purposes of an election." *Id*. at 81, 86. Post also references the U.S. Supreme Court's earlier decision in *Red Lion Broadcasting Co. v. FCC* as recognizing the "constitutional imperative of informed public decision making as a compelling interest that can justify restrictions on speech." *Id*. at 77.

[228] This Article uses the term "participatory model" to describe a much broader conception than Post's participatory model. This Article employs the term to describe models of election regulation or reform that seek to enhance and promote participation as a goal in the electoral process. A fuller analysis of the participatory model is beyond the scope of this Article.

conception of the participatory model based on *Bellotti* that protects corporate speech in order to advance and promote informed decision-making. In contrast, the approach of the Indian Supreme Court can be described as a "positive rights" or "informational rights" participatory model.[229]

A. *The "Liberal" Participatory Model: Citizens United*

The U.S. Supreme Court's decision in *Citizens United* (and other pro-corporate speech decisions) arguably advances a liberal conception of the democratic self-governance rationale or justification — what I refer to as a "liberal" participatory model. In advancing this liberal participatory model, the Court thus relies on both the marketplace of ideas rationale, and the interest in protecting the flow of information to voters in an election (what Post calls the interest in informed public decision-making) in holding that the First Amendment does not allow for the government to disfavor certain speech in an effort to promote equality and prevent democratic distortion.[230] The Court in *Buckley* had originally advanced a marketplace of ideas justification in holding that, "[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 assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[231] *Citizens United* fuses this marketplace of ideas rationale with the interest in informed public decision-making advanced in *Bellotti*,[232] in recognizing that "voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[233] As Kathleen Sullivan notes:

> The free-speech-as-liberty approach that prevails in Citizens United, however, is not a theory of free speech as autonomy, nor a theory focused on the dignitary interests of speakers. It is rather a negative

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[229] It is also worth noting that one could classify the U.S. Supreme Court's approach in *Austin* and *McConnell*, as well as the Canadian Supreme Court's approach in the *Libman* and *Harper* decisions, as examples of an "egalitarian" participatory model. *See* Colin Feasby, *Political Theory and the Constitutionality of the Political Finance Regime*, *in* PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE (Ewing and Issacharoff eds., 2006); Janet Hiebert, *Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise*, *in* PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE (Ewing and Issacharoff eds., 2006); Yasmin Dawood, Democracy and the Freedom of Speech: Rethinking the Conflict Between Liberty and Equality, CAN. J. OF L. & JUR. (forthcoming 2013).

[230] Citizens United v. FEC, 558 U.S. 310 (2010).

[231] Post, *supra* note 210 (citing Buckley v. Valeo, 424 U.S. 1, 49 (1976)).

[232] Post, supra note 222 at 85.

[233] *Citizens United*, 558 U.S. at 341.

> theory that focuses on the interests of listeners, in a system of freedom of speech, to assess speech and speakers without paternalistic government intervention.[234]

The U.S. Supreme Court's current campaign finance reform jurisprudence, as reflected in *Citizens United* and other recent decisions, has thus effectively embraced a liberal participatory model in asserting a robust conception of free speech that includes protections for corporate speech. The Court in *Citizens United*, in contrast to Post's model, rejected the distinction between the regulation of public discourse (discursive democracy), and the regulation of corporate speech in elections, and instead included corporate speech as part of public discourse or discursive democracy, based on the informational flow rationale set forth originally in *Bellotti*. In addition, unlike Post, the majority in *Citizens United* did not acknowledge the potentially significant impact of corporate spending in elections on electoral integrity — the ability of representative democracy to reflect and be responsive to public opinion. Instead, the Court embraced the idea that corporate speech should be considered a vital part of public discourse, and that strict scrutiny should apply to restrictions on corporate speech given that such restrictions could diminish the flow of information to voters.

B. *The "Positive Rights" Participatory Model: The Right to Information Cases in India*

In contrast to the liberal participatory model's emphasis on the marketplace of ideas and an *interest* in the flow of information to voters and informed public decision making, the Indian "positive rights" participatory model focuses more specifically on the *rights* of listeners to information and centers on individuals' ability to actually vote and effectively participate in the political system. In many ways, the Indian Supreme Court's jurisprudence regarding the right to information, and the expansion of that right in the context of election reform and transparency in the *ADR* and *PUCL* cases, reflect the social-egalitarian ethos of the Indian Constitution,[235] as well as a broader shift toward supporting the cause of political reform and anti-corruption initiatives among Indian judges and other elite classes.[236] The Indian approach in some respects appears to align with Meiklejohn's communicative-informational model of free speech, which focuses on both the provider and receiver of information.[237] However, the positive rights participatory model goes further in two key aspects.

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[234] Kathleen Sullivan, *Two Concepts of Free Speech*, 124 HARV. L. REV. 143, 173 (2010).

[235] *See* AUSTIN, *supra* note 118, at 50; JACOBSOHN *supra* note 120, at 238-52.

[236] See MATE, *supra* note 68, at 22-24.

[237] MEIKLEJOHN, supra note 205, at 24-27.

First, in contrast to the marketplace of ideas model, autonomy model, and variants of the participatory self-government models outlined above, which are premised on a negative rights model of speech, the informational rights participatory model recognizes that the right to information is a *positive* right. While the communicative-informational model of speech identifies situations in which the government may be justified in limiting or moderating speech to enhance discourse that promotes better-informed voting and governance,[238] the positive rights participatory model suggests that the judiciary and government may have an *affirmative obligation* to provide voters with information to promote better decision making and governance. Drawing on India's unique constitutional structure and jurisprudence of positive rights, the Indian judiciary has indicated that the government has an obligation to provide citizens with information about specific candidates' criminal records or evidence of questionable financial dealings and assets.[239] The positive rights participatory model goes much further than the communicative-informational model in recognizing the "accountability" function of the right to free speech, and the state's obligation to provide information to voters to enhance decision-making and governance.

Second, the Indian model recognizes that the right to information is a constitutional, as opposed to a statutory, right, which has important implications for governance. In the United States, the right to information has been recognized as a statutory right under the Freedom of Information Act and is arguably an important constitutional interest in the election law context.[240] While the U.S. Supreme Court and federal courts have affirmed the FECA disclosure requirements and subsequent election laws, these provisions have done little to address the issue of unregulated campaign expenditures by corporations and other groups, in part because the primary problem is systemic corruption, not material corruption. In contrast, reformers in India have targeted material corruption and criminality and have championed the constitutional right to information as one of the central mechanisms for addressing criminality and corruption in Indian politics. However, since the Indian Supreme Court has recognized the right to information as a constitutional right, the judiciary can play a much more active role in defining the scope and enforcing this right. In contrast to the liberal participatory model, which focuses on balancing individual rights to speech and expression with competing government rationales, such as corruption or equality, the positive rights participatory model recognizes a positive right to information as an independent justification for restricting corporate speech and requiring enhanced efforts on the part of the government to inform and educate voters, and relies on an

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[238] *Id.*

[239] Union of India v. Ass'n for Democratic Reforms (2002) 5 S.C.C. 294 (India).

[240] *See* Lloyd Hitoshi Mayer, Politics and the Public's Right to Know, 13 ELECTION L.J. 138 (2014).

activist judiciary and other institutions (including the Indian Election Commission) to enforce this positive right.

Conclusion

The Indian "positive rights" participatory model suggests an alternate rationale around which a new consensus might be built to justify restrictions and limitations on corporate expenditures, and heightened disclosure requirements about contributions to groups making independent expenditures in elections. Although the U.S. Constitution differs markedly from the Indian Constitution in that it does not recognize a strong tradition of positive rights, previous decisions of the U.S. Supreme Court do suggest the existence of a correlative right to information based on the First Amendment.[241]

The U.S. Supreme Court in its earlier decisions has recognized a strong "voter informational interest" that justifies disclosure laws. Indeed, the U.S. Supreme Court in *Buckley*, in upholding the disclosure regime of FECA, suggested that disclosure laws serve three state interests in candidate elections: (1) the voter informational interest; (2) an anti-corruption interest; and (3) an anti-circumvention interest.[242] The U.S. Supreme Court in *McConnell* and *Citizens United* similarly noted a strong voter informational interest in disclosure laws. In *Citizens United*, the Court held that disclosure regulations enable voters to "make informed decisions in the political marketplace" and also allow voters to see whether particular candidates are "in the pocket of so-called moneyed interests."[243]

However, as illustrated by election activity in the post-*Citizens United* era, "dark spending" became increasingly prevalent as groups circumvented existing disclosure requirements by making contributions to social welfare organizations (501(c)(4) groups) and trade associations (501(c)(6) groups) in the 2010 and 2012 elections.[244] Faced with this new deluge of independent expenditures through organizational forms that do not require disclosure, reformers must now adapt to a new political terrain.

In this new context, a participatory model of free speech based on recognition of a constitutional right to information may provide a viable alternative to justifying new limits on expenditures and new disclosure requirements. To develop an argument that a right to information may

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[241] Susan Mart, *The Right to Information*, 95 Law Libr. J. 175, 177 (2003) (citing Thomas v. Collins, 323 U.S. 515 (1945)); *see also* Caroline Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. Rev 972-77 (2009); Eugene Ho, *The Constitutional Right to Watch Television: Analyzing the Digital Switchover in the Context of the First Amendment*, 57 Am. U. L. Rev. 193-96 (2007).

[242] Ciara Torres-Spialscy, Transparent Elections After Citizens United, Brennan Center for Justice 8 (2011).

[243] *Id.* at 8 (citing Citizens United v. FEC, 558 U.S. 310, 370-71 (2010)).

[244] *Id.* at 6.

exist in the context of campaign finance reform and political speech, one could start by returning to *Bellotti*, in which the Court invalidated limits on corporate expenditures in referenda campaigns on First Amendment grounds.[245] Significantly, the majority in *Bellotti* partly based its decision on an information-based rationale:

> Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas . . . . Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification.[246]

Indeed, the U.S. Supreme Court in *Bellotti* referenced a series of precedents suggesting the existence of a right to receive information from door to door pamphleteers and from publications, as well as the right of labor workers to receive information from labor organizers.[247] *Bellotti* even referred to Justice Douglas's opinion in *Griswold v. Connecticut*, which implicitly suggested the existence of a right to information that was peripheral to the First Amendment, and suggested that this right was fundamental to the exercise of free speech rights.[248]

The U.S. Supreme Court in *Bellotti* also referenced its earlier decision in *Red Lion Broadcasting v. FCC*, in which the Court upheld the fairness doctrine.[249] The Court in *Red Lion* went so far as to emphasize the rights of listeners, and held that the goal of the fairness doctrine was "to promote public access to a diversity of information from broadcasting."[250] Justice White in that case observed:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged by either Congress or by the FCC.[251]

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[245] First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[246] *Id.* at 782.

[247] Carl Schneider, *Free Speech and Corporate Freedom*, 59 S. Cal. L. Rev. 1227, 1246-51 (1985-86) (citing Martin v. Struthers, 319 U.S. 141 (1943); Thomas v. Collins, 323 U.S. 515 (1945); Lamont v. Postmaster General, 381 U.S. 301 (1965)).

[248] Mart, *supra* note 241, at 177; *see* Griswold v. Connecticut, 381 U.S. 479 (1965).

[249] Belotti, 435 U.S. at 783 (citing Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969)).

[250] Mart, *supra* note 241, at 177 (citing Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969)).

[251] *Id.*

The *Red Lion* decision, along with precedent cited to in *Bellotti* suggest that the First Amendment can be interpreted more broadly to imply not only a right of free speech and expression, but also a right to receive information. Although the Court in *Bellotti* and *Citizens United* relied on the voter informational interest to justify invalidating restrictions on corporate speech, the same interest may also be invoked to justify upholding such restrictions given the potential distortive impact of corporate spending on elections, in line with Meiklejohn's communicative-informational model.

The positive rights participatory model from the Indian right to information cases provides an important alternative to the marketplace of ideas, autonomy, and democratic self-governance rationales. Such an alternative approach can also provide an important theoretical justification for addressing corruption through limits on corporate and independent expenditures, as well as enhanced transparency and disclosure requirements. The Indian experience with reform suggests how the right to information, or at the very least, the interest in protecting the flow of information to voters in campaigns and elections, may also be viewed as a crucial part of addressing material corruption within the polity.

The recognition of a constitutional right to information within the First Amendment could thus help bolster the cause of reform by justifying restrictions on corporate speech that interfere with informational rights, and perhaps imposing new obligations on the government to provide voters with information in elections and campaigns.[252] The recognition of a positive right to information could justify and bolster efforts by governments to proactively provide voters with greater levels of information.[253] The positive rights participatory model (or informational rights model)

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[252] Recognition of a positive right to information at the state level could, for example, require state governments to not only expand campaign finance disclosure requirements, but also provide voters with more information about candidates, initiatives, and other measures. *See, e.g.*, John Kastil and Katie Knobloch, Evaluation Report to the Oregon State Legislature on the 2010 Oregon Citizens' Initiative Review (finding that voters who read Citizens' Initiative Review statements became more knowledgeable on Measures 73 and 74 and much less likely to vote for these measures).

[253] Although the U.S. Constitution has not been interpreted by a majority of the Court as embracing positive rights, some decisions and opinions of individual justices have suggested the existence of positive rights, such as a right to education. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J, dissenting); *see* Susan Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 N.W.U. L. Rev. 550 (1992). In addition, state constitutions in the United States contain positive rights. *See* Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights (2013) (illustrating how positive rights have been enshrined in state constitutions in the United States).

presents a compelling alternative to other models of free speech in the context of electoral reform, in that it can provide more powerful justifications for government regulation of corporate speech in the United States and India, where corporate power may distort or limit the flow of information to voters, and undermine public confidence in the electoral process.