# THE FIRST AMENDMENT, FREEDOM OF SPEECH, AND PLUTOCRACY: *CITIZENS UNITED v. FEDERAL ELECTION COMMISSION* AND *FRIEDRICHS v. CALIFORNIA TEACHERS ASSOCIATION*

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## ABSTRACT

This analysis will address the free speech issues related to the legal controversy in *Citizens United v. Federal Election Commission* (2010), and *Friedrichs v. California Teachers Association* (2016). The legal interpretation argued by the Supreme Court both in favor of *Citizens United* and *Friedrichs*, deviates from past legal precedents. In *Citizens United* the Supreme Court has argued that free speech rights extents to corporations while at the same time the free speech of non-union members in *Friedrichs* is violated since it is a form of coerced speech. The Supreme Court has ruled in the past that it is illegal to allow free riders not to pay union dues in the collective bargaining process. Historically, the Supreme Court has argued that political advocacy is inherent to labor negotiations on behalf of union and non-union members. As such, necessary fees in the form of union dues, or reduced dues, is legally acceptable and not a violation of free speech or a form of political coercion. Nevertheless, the difficulty remains in separating free speech from coercing speech through union dues. We argue for a clearer legal understanding of free speech based on the legal hermeneutics of John Stuart Mill, Thomas Emerson, and other legal theorists within this tradition. We further argue that *Citizens United* and *Friedrichs*, as argued by the current Supreme Court, distorts and weakens the notion of free speech and thus results in elitist plutocratic

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formations within society, undermining democratic rule as cited by legal scholars Richard Hasen and Erwin Chemerinsky.

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"We can either have democracy in this country or we can have great wealth concentrated in the hands of a few, but we can't have both."

Louis Brandeis
U.S. Supreme Court Justice (1856-1941)

## *CITIZENS UNITED AND FRIEDRICHS*: FREE SPEECH RULINGS

In 2010 the Supreme Court of the United States (SCOTUS), in *Citizens United v. Federal Election Commission*, addressed the legality of the regulation of campaign spending by organizations. The Supreme Court ruled (5-4) that freedom of speech prohibited the government from restricting independent political expenditures by nonprofit corporations. The principles articulated by the Supreme Court in the case have also been extended to for-profit corporations, labor unions, and other associations. This decision reaffirmed *Buckley v. Valeo* (1976), in which corporations are considered persons with free speech rights, and that the fundamental rights to freedom of speech, expression, and association were violated by Federal Election Campaign Amendment (FECA) 1974, the First and Fifth Amendments, and that spending money in order to influence elections is a legitimate form of "free speech" protected by the Constitution.[1]

[1] Earlier federal laws relevant to *Citizens United*, are the Federal Election Campaign Amendments (FECA 1971) and (FECA 1974). Despite the veto attempt of FECA 1974 by President Gerald Ford, Congress passed FECA 1974 and a number of key amendments to

Then six years later, 2016, the SCOTUS ruled in favor of plaintiff Rebecca Friedrichs in *Friedricks v. California Teachers Association*, arguing that the First Amendment does indeed protect public employees from being "compelled" to subsidize

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FECA 1971. This was the first systematic post-Watergate effort by the federal government to provide some form of regulation to campaign funding. The amended 1974 law did the following:

- limit the number of contributions to candidates for federal office.
- require candidates to reveal their political supporters.
- provide public funds for presidential elections.
- limit expenditures of candidates and committees, with the exception of candidates for president, who agree to receive public funds instead.
- limit independent contributions to $1000.00.
- limit candidate expenditures from personal funding sources.
- create a new method of appointing members to the Federal Election Committee (FEC).

Also see The Bipartisan Campaign Reform Act of 2002 (BCRA, McCain–Feingold Act, Pub.L. 107–155, 116 Stat. 81, enacted March 27, 2002, H.R. 2356) is a United States federal law that amended the Federal Election Campaign Act of 1971, which regulates the financing of political campaigns. Its chief sponsors were Senators Russ Feingold (D-WI) and John McCain (R-AZ). The law became effective on 6 November 2002, and the new legal limits became effective on January 1, 2003. As noted in *McConnell v. FEC* (2003), a recent United States Supreme Court ruling on the BCRA, the Act was designed to address two issues: (1) the increased role of soft money in campaign financing, by prohibiting national political party committees from raising or spending any funds not subject to federal limits, even for state and local races or issue discussion; (2) the proliferation of issue advocacy ads, by defining as "electioneering communications" broadcast ads that name a federal candidate within 30 days of a primary or caucus or 60 days of a general election, and prohibiting any such ad paid for by a corporation (including non-profit issue organizations such as Right to Life or the Environmental Defense Fund) or paid for by an unincorporated entity using any corporate or union general treasury funds. The decision in *Citizens United v. FEC* overturned this provision, but not the ban on foreign corporations or foreign nationals in decisions regarding political spending.

union negotiations and related political activities.[2] While government may place limitations on speech, *Garcetti v. Ceballos* (2006), it cannot compel speech. In effect the Supreme Court overturned the 1977 precedent set by *Abood v. Detroit Board of Education* (1977), and placed in question the legal concept of freedom of speech (Lee, 2015).

Both cases, *Citizens United* and *Friedrichs*, involve interpretations of free speech that, arguably, have been seriously misconstrued by the Supreme Court. We argue for a clearer legal understanding of free speech based on the legal hermeneutics of John Stuart Mill, Thomas Emerson, and other legal theorists within this tradition, such as Gerald Dworkin, Cass Sunstein, and Richard Thaler. We further argue that *Citizens United* and *Friedrichs*, as argued by the current Supreme Court, distorts and weakens the notion of free speech and thus facilitates in elite oligarchic plutocratic form of governance, undermining majoritarian democratic rule as argued by legal scholars Richard Hasen and Erwin Chemerinsky.

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[2] In 2014 a group of disgruntled public school teachers from Southern California alleged that the State of California was violating their First Amendment "free speech" rights by mandating that they help bear the costs associated with collective bargaining benefits. Even though the teachers were not members of the union representing their school district, the plaintiff's held that forcing them to pay a fee, though reduced, in support of collective bargaining is tantamount to "compelled speech," specifically since the union's political activities were in opposition to the plaintiff's. The established legal precedent, in *Abood*, argues that such workers benefit from union-negotiated agreements and should therefore be responsible for some form of compensation to the union for the benefits they receive. As such, the SCOTUS has upheld the "fair share" payment concept in *Abood* for the past forty years arguing that employees are not denied their First Amendment rights or their right to critique the union and the policies that it attempts to negotiate. This also implies that employees may exercise their freedom of speech in order to decertify the union itself or oppose union leadership in order to bring about different leadership altogether.

## CONSTITUTIONAL DOCTRINE: THE PUBLIC SERVICE MODEL

The appropriate context for analyzing free speech in *Friedrichs* is within the "*public service model"* since *Friedrichs* is directly related to a public sector union issue. The development of this model emerged during the 1950s in which public agencies started to apply constitutional law to their operations. Before then, public employees had very few protected constitutional rights in their employment. It was assumed that through the "doctrine of privilege," working for any government agency was considered a privilege and therefore, public employees were employed "at will." Justice Oliver Wendell Holmes argued this point in *McAuliffe v. Mayor of New Bedford* (1892)3 stating that public employees may have a right to express their opinion but not a public sector job. Over time this standard proved to be arbitrary and eventually through case law, the court found an alternative method for defining the constitutional rights of public employees. This has become known as the "*public service model*."[4] Basically the "public service model" is still utilized by judges in order to balance four competing concerns: (1) the public employee's or applicant's interests as a member of the political community in exercising constitutional rights and enjoying constitutional protection from arbitrary, discriminatory, or repressive treatment by a government employer; (2) the government's interest as an employer in having an efficient and effective workforce; (3) the public's interest in the operation of public administration and government more generally; and (4)

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3 From the end of the nineteenth century to the middle of the twentieth century, the Court considered government employment not a right but a privilege, a distinction Oliver Wendell Holmes captured in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892). For a Supreme Court case echoing this reasoning, see *Adler v. Board of Education*, 342 U.S. 485 (1952).

[4] This model also proved to be imprecise in application, described by Chief Justice William Rehnquist as an "ad hoc weighing" which depends to a large extent on how justices view (with little criteria) for the underlying interests at stake (*Cleveland Board of Education v. Loudermill*, 1985:562).

the judiciary's interest in avoiding undue involvement in day-to-day decisions (Rosenbloom, 2014: 149-152).

***Freedom of Speech***

In *Rankin v. McPherson* (1987) the modern constitutional approach to addressing employees' constitutional rights to free speech are outlined more precisely. While working in the office of Constable Rankin as a probationary clerk in Texas, nineteen-year-old, Ardith McPherson, made an inflammatory remark regarding the assassination attempt on President Ronald Reagan. After overhearing this comment, another coworker reported it to Constable Rankin, who fired McPherson after hearing her admit to making the comment. McPherson in turn sued for reinstatement, back pay, and other relief, as she believed her right to free speech was violated under the First and Fourteenth Amendments. The Supreme Court's majority decision noted that, even if McPherson were discharged as an at will employee, she may nevertheless be entitled to reinstatement since she was exercising her constitutional right to freedom of expression.

The Court in this case, presents a further explanation regarding the structure of public employees' right to free speech by considering whether the remarks made by the employee include matters of *public interest*. For example, freedom of speech, understood as a contribution to the free "marketplace of ideas," is a vital component to the operation of constitutional democracy. Legal scholars such as Richard Posner actually argue that free speech is vital to society that it can even benefit the overall economic productivity.[5] Private statements or expressions however, that concern items of clothing that an employee is wearing, hairstyle, or intelligence, have very little protection when they interfere with the function of public offices. The 5-4 majority in *Rankin* concluded that McPherson's remark touched upon matters of public interest since it was made in the context of a discussion of Reagan's policies, and McPherson, an African

5 See Richard A. Posner, "Free Speech in an Economic Perspective," *University of Chicago Law School*, 1986; Richard A. Posner, *Economic Analysis of Law*, 9th Edition, 2014. Posner uses Coase's "Theory of the Firm" to structure his economic analysis of free speech.

American woman, apparently offered it as a way of punctuating her disdain for the administration's attitude toward minorities.

Applying the public service model to the *Rankin* case serves as a structure in which the Court must consider the employee's responsibilities within the agency when the issue of dismissing an employee for statements that somehow undermines the mission of the public employer. It is understood that an employee's burden of caution and responsibility, for the words they speak, will vary in form with the extent of authority and accountability that the employee's role entails. The Court's rationale was that McPherson's role in her job was not significant enough for potential harm to the public employer. She was an employee who had very little public contact and no access to confidential personnel information and policymaking abilities. Therefore the employee's private speech would have minimal negative effects and is outweighed by the employee's First Amendment rights. It is within this context that the public service model establishes a foundation for legal decisions that influence public sector employment and related issues to employment and public service.

## *Whistleblowing*

The Supreme Court's decision in *Garcetti v. Ceballos* (2006) made an employee's First Amendment protection much narrower under the public service model. The plaintiff in the case, Ceballos, was a district attorney who claimed that he had been passed up for a promotion for criticizing the legitimacy of a warrant. In a 5-4 decision, the Court argued that because his statements were made pursuant to his position as a public employee, rather than as a private citizen, his speech had no First Amendment protection. The Court held that the First Amendment does not protect public employee free speech made pursuant to one's professional duties, regardless of whether the content of the remarks is deemed a matter of public concern. The Court states that, "Restricting free speech that owes its existence to a public employee's professional responsibilities *does not* infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control

over what the employer itself has commissioned or created" (*Garcetti v. Ceballos*, 2006:421-422). As such, a public employee's expression as part of his or her work does not necessarily enjoy First Amendment protection under certain conditions.

The complete impact of *Garcetti* is not yet known since it clearly establishes a new precedent. It appears that Justice Kennedy's opinion for the majority seems to suggest that whistle-blowers have more constitutional protection in their role as private citizens than they do as public employees. For instance, an employee garners more First Amendment protection if he or she raises a concern through external channels such as the media rather than through the professional chain of command or other internal channels established to protect whistle-blowers. Furthermore, instead of relying on the First Amendment to shield them from retaliatory action, the Court urges public employees who whistle-blow to familiarize themselves with and rely on protective statutes, such as the federal Civil Service Reform Act of 1978, as well as relevant state and local statutory protections. If a statement is covered by the terms of such statutes, it is automatically considered a matter of public concern and the government is prohibited from retaliating, regardless of how disruptive the comments may be. Yet when the SCOTUS overruled the Ninth Circuit Court of Appeal's decision in favor of Ceballos, the Court ran into a semantical difficulty in differentiating between a public employee and citizen, which prior legal precedents had ruled differently.

## *Political Campaigns*

Partisan management or campaigning are not included within the context of public employees' constitutional right to free speech structured under the public service model. The government interest in the Supreme Court's view regarding workplace efficiency and appearance of partisan neutrality outweighs the damage that government restrictions on political activity do to public employees' rights. As such, these measures also protect civil servants from being coerced by elected and politically appointed officials to support party and candidates (*United*

*Public Workers v. Mitchell*, 1947; *Civil Service Commission v. National Association of Letter Carriers*, 1973). The Court has given wide berth to government employers in this policy area by allowing considerable flexibility in the drafting restrictions (*Broadrick v. Oklahoma*, 1973).

Governments may not necessarily make choices to impose politically neutral regulations because they are apt to be constitutional. Comprehensive restrictions on public employees' participation in partisan activities are not likely to occur. For example, the 1993 Federal Hatch Act reforms allow most federal employees to distribute partisan campaign literature, solicit votes, work for partisan campaigns, and hold office in political parties. The amended law does not extend to members of the Senior Executive Service, however, and does not un-Hatch some agencies including the Merit Systems Protective Board, and positions, such as Administrative Law Judges, due to the fact that such positions have specific missions and functions where partisanship could be in conflict.

## *Freedom of Association*

Modern constitutional law, with regard to public employee First Amendment rights of freedom of association, is significant with respect to *Friedrichs*. For the most part, public employees' right to voluntarily join an organization (such as labor unions, political parties) is well established, as well as their right to reject associating with or supporting organizations (*AFSCME v. Woodward*, 1969; *Elfbrandt v. Russell*, 1966*; Shelton v. Tucker*, 1960; *Elrod v. Burns*, 1976; *Abood v. Detroit Board of Education*, 1977).

First, no public worker can be required to join a union. Although, an agency shop is allowed under law, nonunion affiliates must pay a "fair share" fee to the union that stands for their shared bargaining unit. The Supreme Court "rejected the claim that it was unconstitutional for a public employer to designate the union as the exclusive collective-bargaining representative of its employees, and to require nonunion employees… to pay a fair share [fair share principle] of the union's cost of negotiating and administering a collective-

bargaining agreement" (*Chicago Teachers Union v. Hudson*, 1986:243-244). But the Court also held that "nonunion employees do have a constitutional right to 'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as an exclusive bargaining representative" (*Chicago Teachers Union v. Hudson*, 1986:244).

Specific procedural safeguards support a public worker's First Amendment protection against being required to underwrite a union's political agenda. In the words of the Supreme Court, "… the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow account for the amounts reasonably in dispute while such challenges are pending" (*Chicago Teachers Union v. Hudson*, 1986:249).

Starting with its holding in *Elrod v. Burns* (1976), the Court rectified substantial constitutional barriers to the use of political partisanship in public personnel decisions. Richard Elrod, elected sheriff of Cook County, Illinois, intimidated or threatened to dismiss Sheriff's office workers, Burns et al., who were not members of or sponsored by the Democratic Party. The workers conducting the suit were all Republicans holding non-civil service jobs and had no statutory or administrative protection against random discharge. The Supreme Court ruled for the first time that patronage sponsored dismissals violate public employees' freedom of association and belief. However, the Court was split on this ruling and unable to establish a majority opinion regarding the standard that the government must meet when dismissing someone based on partisan affiliation. Then four years later, in *Branti v. Finkel* (1980), the Court revisited the issue of questionably sponsored dismissals. Two employees of the Rockland County, New York, Public Defenders Office were let go for their positions due to their association with the Republican Party.

The Court's majority now concurred that "the ultimate inquiry is not whether the label 'policy maker' or 'confidential' fits a particular position, rather, the question is whether hiring

authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved" (p. 518). This standard ensures a heavy burden of proof on elected officials and political appointees who would fire employees due to their partisan affiliation.[6] As such, the standard is established to protect employees from arbitrary decisions that impact their lives. For these reasons, specifically in the case of *Friedrichs*, it appears the *Friedrichs* conflicts with the four criteria of the public service model. This is clearly a standard that the Supreme Court failed to utilize in its assessment of *Friedichs*. It is precisely because of this oversight that the Supreme Court has failed in it duties.

## *Privacy*

The Fourth Amendment maintains protection to private citizens against "unreasonable" government searches and seizures. Traditionally, courts have assessed Fourth Amendment issues in the criminal justice context. During the 1980s, however, as drug testing became more prominent, the range of the amendment's application to public workers emerged as a principal issue. In law enforcement cases, the amendment necessitates that searches and seizures be pursuant to warrants, or, where these are questionable, probable cause (reasonable suspicion that an individual is engaged in criminal wrong doing). Regarding the public service model, courts have interpreted the Fourth Amendment to allow government employers to meet a much lower standard to allow administrative (non-law enforcement) searches. Consistent with the public service model, this lower threshold both exhibits and facilitates the government's important interest on the output of its workers and the efficiency of its agencies.

In *O'Connor v. Ortega* (1987), a split Supreme Court held that individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The justices also concurred that the appropriate threshold question is whether the worker has a "reasonable

[6] See *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

expectation" of privacy in the work environment. Such an expectation is defined, according the courts, as one that society is ready to share. If there is no justifiable expectation of privacy, then the search will not infringe upon the Fourth Amendment. On the other hand, if there is this expectation, then the search must be sensible in its origin and range. In practice, this approach often entails that judges interpret cases individually rather than according to broad principles. Thus the "reasonable expectation" in *O'Connor* indicates that workplace searches of offices, desks, files, and so on to be situated on a "rational suspicion" that a worker may have engaged in behavior for which discipline would be suitable. Nevertheless, a reasonable expectation is a clear standard upon which privacy is to the understood and interpreted in legal reasoning.

### *Liberty*

The broad issue of public workers' constitutional freedom has been the topic of notable litigation as well. This region of jurisprudence, called *substantive due process*, centers on the definition of the word liberty in the Fifth and Fourteenth Amendments, which appropriately prohibit the federal government and states (and their political subunits) from denying anyone within their jurisdictions of life, liberty, or property without due process of law. Courts have interpreted the due process clause to incorporate those basic rights that are "implicit in ordered liberty" and are "deeply rooted" in our society's history and traditions. Many of these rights, including, for example, the right to use contraception or the right to travel, are not indicated explicitly in the text of the Constitution.

It is ordinary, even natural, for government employers to employ control over public workers, particularly where content of public policy, workplace efficiency, and employee morale are concerned. To this end, Senator Sam Ervin found that in the 1960s public workers were requested "to lobby in local city councils for fair housing ordinances, to go out and make speeches on any number of subjects, to supply flower and grass seed for beautification projects, and to paint other people's houses" (United States Senate, 1967, p. 9). Nowadays, it is more

common for federal employers to pressure workers to get involved in blood drives, charitable campaigns, or other similar programs. A court will deem such stipulations unconstitutional only if they are discovered to violate and employee's fundamental rights, or if the court decides the stipulations to be nothing more than slightly connected to the interests of the government (see *United States v. National Treasury Employees Union*, 1995). Thus freedom of speech, as it applies to political involvement, whistleblowing, association, privacy, and liberty, have been broadly addressed as to the specific background on how freedom of speech is understood legally within a public service model.

In assessing freedom of speech and related legal rights in the public sector, and applying the "public service model" to these issues, it can be concluded that in the *Friedichs* case, freedom of speech and association rights have not been violated and that the SCOTUS failed in their legal assessment by not applying the correct legal framework (public service model) for a correct legal ruling. With this, we now turn our attention to the *Citizens United* case.

## FREE SPEECH FRAMEWORK: MILL

In order to understand the legal context for *Citizens United* it is imperative to review the concept of "free speech" in John Stuart Mill, Thomas Emerson, and other legal theorists who have contributed significantly to this discourse. Here we attempt to analyze, whether or not, the SCOTUS misinterpreted the tradition of free speech and its impact on *Citizens United*.

John Stuart Mill has been one of the major defenders of free speech and expression in modern legal theory. His concept of free speech and expression is therefore crucial in understanding and analyzing the *Citizens United v. Federal Election Commission* (2010) decision by the Supreme Court, and how this has similarly influenced the *Friedrichs* decision.

To do this, however, it is first important to understand that Mill's concept of free speech and expression is based on his notion of

law and morality, which is nothing less than a logical extension of his social and political philosophy, utilitarianism (Mill, 1863). The essence of this theory is based on the idea that the greatest good and most desirable option for a given society is what is morally optimal for the greatest number of people. Thus the "utility" of a specific moral act and legal remedy can be justified upon majoritarian criteria of the "good." Within this framework, Mill's goal is nonetheless, to maintain and uphold "individual freedom" as the basic foundation of liberal justice, morality, and law.

One of the problems with liberal utilitarian theories of justice is the question of how a given polity is able to balance minority "rights" in a majoritarian democratic setting. In liberal democracies there exists a competing struggle between the demands of legitimate authority and individual liberty (Mill, 1859). For Mill, individual liberty manifested in freedom of speech and expression, is to ensure that the rights of individuals who do not benefit from majority, are upheld. Suffice it to say, majoritarian priorities in a polity are a given in liberal theory, but for Mill there may be exceptions. Mill states, "All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed – by law in the first place, and by opinion on many things which are not fit subjects for the operation of law" (Mill, 1859, p. 8). Mill is clear that his concern for liberty does not extend to all individuals and all societies specifically those colonies controlled at the time by England. He states that "Despotism is a legitimate mode of government in dealing with barbarians" (Mill, 1859, p. 8).[7]

In liberal theory, rights are a type of demand that one is owed by society and the state. This usually involves a particular outcome such as a public policy. These rights are understood as the right to freedom, specifically, the right to be left alone and free from other's interference in one's life. This is a "negative" form of freedom and is the basis of Mill's concept of justice and political philosophy. For Mill, justice understood as individual

[7] Contemporary philosophers Domenico Losurdo and David Theo Goldberg have strongly criticized Mill as a racist and an apologist for colonialism based on this quote found in *On Liberty*.

freedom translates into the right of each individual to be free to do whatever s/he wants to do, as long as it does not interfere with the similar rights of others. The classic statement of this position is found in Mill's, *On Liberty*. Although there may be some consensus that justice (maximizing individual freedom) ought to serve the public interest and everyone's interests as well, Mill's utilitarianism nevertheless, seems to favor the majority, while at the same time sacrificing the individual freedoms of some.

It is because of this vexing problem – individual liberties and majoritarian rule - that Mill attempts to salvage his concept of justice and rights based on what he defines as the "harm principle." In it Mill defends the rights of individuals and minorities against the potential tyranny of majorities. Mill foresees the problem that individual freedom can be threatened in a democracy just as easily as it can be in authoritarian and totalitarian states. He argues that individual liberty is to be considered inviolable except when other people are threatened with harm. Intervention in the form of societal influence or through lawful policy coercion is therefore justified in the protection and safeguarding of others. Thus Mill states that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill, 1859, p. 9).

Mill's main concern in *On Liberty* is to identify the extent to which government and public interest have authority over individuals and individual action. If an action harms other people or presents a public danger, then government does have the right and authority to prevent it or dissuade (through public policy and law) a person from doing it. But if an action is not harmful to others, the government has no such authority. In the question of freedom of speech, as stated above, this means that governments according to Mill have no authority to censor some comment or publication unless it clearly harms, or potentially harms, other people. This is completely different from annoying or personally offending others, for example, with the issue of free speech. While Mill is particularly concerned with protecting individuals against "the tyranny of the majority," the public interest demands government coercion to a certain "point." That "point" (*law's*

*ability to interfere with individual liberty*) does not interfere with personal affairs or opinions for Mill.

Here Mill attempts to nuance this apparent contradiction between the pursuit of individual freedom and its limitations - through public policy and law - by differentiating between "self-regarding" and "other-regarding" actions by autonomous persons. In this situation a self-regarding action is one that is morally permissible as long as it does not harm anyone else. An other-regarding action is one that is not morally permissible if that action causes harm to other persons. Other-regarding actions can be interfered with by societal coercion or law, or tolerated through some form of regulation. A self-regarding action cannot be interfered with according to Mill. An example of a self-regarding action would be an individual's right to smoke while the second hand smoke would be considered an example of an other-regarding action which would directly affect the health on non-smokers. Government has a right to therefore prevent this, given some form of consensus that the second-hand smoke causes harm. Under self-regulating actions, individuals are responsible for their own actions, whether the outcome is negative or positive, since they freely choose this option. Under other-regulating actions, actions that cause harm to others can be interfered with since those individuals did not freely choose to accept the negative outcomes.

Ultimately, the perception of "freedom" and what exactly constitutes "harm" remains a criterion that can be left to subjective interpretations. As such, this problem presents some unique challenges for society and governments because the concept and definition of "freedom" can be understood in a pluralistic manner. That is, second-hand smoke might be proven to be of no risk to individuals and societies. It can also be argued that second-hand smoke is not that harmful to others given other forms of air pollution. The "potential" threat can be manipulated to mean anything to justify, or not, the suppression of free speech, depending on how "life-threatening" it might be perceived. This is because there is no absolute criteria to define the "good" other than the absolute in defense of individual freedom from interference in one's life, which, as argued above, can be subject to individual interpretation, at least with respect to

other-regarding actions. While this critique, arguably, presents a challenge to Mill's harm principle, it provides a model that best fits a democratic society where controversial issues such as these (smoking bans and limits on free speech) can be debated and resolved, at least conditionally, through public policy.

Mill is particularly concerned with protecting individuals against "the tyranny of the majority," and so the public interest might demand government interference or coercion to a certain "point." That "point" (law's ability to interfere with individual liberty) is still very difficult to define. The point at which society and law define what is free speech or harmful speech, i.e., access to pornography or censorship of pornography, compelling business owners to conduct business with gays or lesbians or not compelling businesses, etc., is still a vexing legal issue. To extend prohibitions on these actions may require some form of legal "paternalism" in which the government may have to decide not only how to prevent harm to others, but even limiting actions of individuals that do not cause anyone else harm, i.e., the personal use of addictive drugs, which in turn could lead to harming others through DUI violations, drug related crime, and various public safety concerns. The point of Mill's development and refinement of free speech and expression is to promote a forum in a democratic society where open discourse promotes a constructive dialogue among the body politic.

### *The Harm Principle*

Mill's "harm principle" is derived from, and a modification to, his philosophical system known as utilitarianism. This system of thought is the foundation for Mill's concept of justice and law. The basic idea defining utilitarianism is that whatever is good and desirable ethically and politically is what is optimal for the greatest number of people. Specific moral acts can then be justified accordingly based on their "utility." As a result, it seems difficult to argue with the perceived "fairness" of a socially constructed theory such as this. However, there are criticisms of this position. Thus the problem of minority rights within utilitarianism can be jeopardized in favor of the majority. Here, the potential sacrificing of individual freedoms is not merely a

random unforeseen consequence, but a real and demonstrable outcome. The public good might require the restriction of a person's free speech rights since this right could potentially harm others by inciting violence and presenting a "clear and present danger" as stipulated in prior Supreme Court rulings. For the most part it seems clear that Mill understands this specific criticism. Mill still seeks to secure the free speech rights of individuals precisely because "individual freedom" is the foundation of liberal utilitarianism. Mill thus attempts to refortify his concept of justice – individual freedom – based on the "harm principle."

In Mill's *On Liberty*, the concept of individual freedom entails the fundamental right of each person to do whatever s/he wants as long as it does not interfere with the similar rights of others or cause them harm. Mill, nevertheless, defends the rights of individuals against the potential "despotism" of democratic majorities. This is because Mill argues that the individual person's rights can be threatened in a democratic society like they once were under the dictatorial regimes of the British monarchy or the oppression felt under the revolutionary backlash of tyrants such as Oliver Cromwell. Nonetheless, Mill makes the case that individual freedom is to be considered absolute except when others are harmed, or potentially harmed. Exceptions to the priority of freedom can be made through lawful policy coercion and is therefore justified in the protection and safeguarding of others. Thus Mill states that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill, 1859, p. 9).

Mill intends to clarify the point to which law and public policy has legitimate authority over autonomous individuals. Simply put, if a particular act harms other people, or constitutes a public threat to safety, then government has the duty to prevent or dissuade such an action. If an action is not harmful to others, then government has no legitimate authority to intervene. But this perception, "harm to others" still remains far too subjective. At what point does lawful authority, through social coercion or law, decide to intervene on behalf of others? It is still up for grabs. In anticipating this problem, Mill distinguishes between

"self-regarding" actions and "other-regarding actions." A self-regarding action is one that is morally permissible as long as it does not harm anyone else, while other-regarding actions are those that are not morally permissible if that action causes harm to other persons. It follows that a self-regarding action, then, cannot be interfered with according to Mill, while other-regarding actions can be interfered with by societal coercion or law, or tolerated through some form of rule, regulation, or policy.

As stated earlier, Mill's goal with the harm principle is to safeguard individuals against "the tyranny of the majority." The public interest can therefore place demands on government to interfere or coerce in the lives of people insofar as a distinction can be made between self-regarding and other regarding actions. However, even with the additional criteria of self-regarding and other regarding actions, the very application of these new criteria still demands a precarious judgment call. For example, it is still far too subjective to define what is free speech or harmful speech, access to pornography or censorship of pornography, compelling business owners to do business with gays or lesbians or not compelling businesses, being forced to wear a motorcycle helmet or not, smoking cigarettes or not, based on self-regarding and other regarding actions. To use one of these examples, cigarette smoking, this can be considered a self-regarding action since it only involves a single autonomous person who is responsible for their own actions. But this could also be considered other-regarding since second-hand smoke can harm others, or other-regarding if the possibility of cancer occurred from cigarette smoking and would translate into expensive medical costs which would impact increased costs for others covered by the same insurance policy.

Other examples include the personal use of addictive drugs, which in turn could lead to harming others though DUI violations, drug related crime, and various public safety concerns. Compounding the issue of self-regarding and other regarding actions can be evaluated further through examples such as one in modern day Germany in which it is illegal for Holocaust deniers to speak out publicly. This still remains a complex issue that is not easily resolved through practical

judgments rooted in utilitarianism. Nevertheless, this is where Dworkin and his concept of "paternalism," attempts to resolve these types of issues. The complexity of this notion of the harm principle is still on that can clearly be debated within civil society and throughout academic settings.

***Emerson's Interpretive Legacy***

It would seem, arguably, that Thomas Emerson, would take issue with *Buckley v. Valeo*. But before addressing this issue, it would first be helpful to analyze Emerson's "Toward a General Theory of the First Amendment," to better understand Emerson's legal grounding in First Amendment issues (Emerson, 1963). In "Toward a General Theory …" Emerson argues that there exists in legal scholarship a lack of theoretical structures upon which to analyze and evaluate how exactly to interpret the first amendment. No one concerned with freedom of expression in the United States, then and now, can fail to be alarmed by the perceived threat to first amendment doctrine. This is especially controversial with the recent SCOTUS decision in *Citizens United*. In spite of the increasing number of decisions regarding the first amendment, Emerson believes that there is no adequate or comprehensive theory for interpreting this legislation upon which most people can agree.

Proponents of the "absolute" or "literal" interpretation of the first amendment have failed to define the bounds of their position or to account for such apparent exceptions to the absolute test as the law, specifically in the case of libel, child labor laws, and in the case at hand, free speech and expression with respect to the regulation of election campaigns (Bork, 2008; 1990; 1986; 1971; Scalia, 1989a; 1989b; 1997). These views have been dismissed as impractical or illogical, or even both. At the other end of the interpretive spectrum, the "balancing" test according to Emerson, has tended to reduce the first amendment, especially when a legislative judgment is weighed in the balance, to a limp and lifeless formality, for example in *Dennis v. United States* 1951. Here the SCOTUS ruled that Dennis was guilty of sedition by advocating the overthrow of the United States government by simply expressing the theory in public. Among

"intermediate" positions, the "clear and present danger" test is the best known. Not only has this formula often been ignored, but is hardly applicable to many of the first amendment issues which now arise. Other efforts to formulate an overall theory have not had much success, either.

To be clear, Emerson is against an interpretation of the first amendment which involves "balancing" and a narrow literal interpretation of the text, or what Emerson titles, the "Legal Theory of Reconciliation." In his "Toward a General Theory" Emerson attempts to read the first amendment against the larger background of what a liberal constitution is trying to achieve in a democratic society. Emerson, in his "Legal Theory of Reconciliation," "freedom of expression," attempts to establish a criteria as an integral function of democratic society, supporting individual expression on one hand, and the need to protect society and the common good. For Emerson it must include four components when interpreting the first amendment. They are: (1) assessing individual self-fulfillment; (2) means of attaining truth; (3) securing participation in decision-making; and (4) maintaining the balance between change and stability. This criteria, arguably, grounds the first amendment more securely in a democratic society's need for a rule of law that is not interpreted too broadly or too unstructured, and that eradicated for the most part the illusory "ad hoc" balancing of the first amendment which had become the customary method of interpreting. Simply distinguishing between "harmful" speech and "non-harmful" speech was no longer workable because of the subjective, arbitrary, and ambiguous nature of interpreting the meaning of freedom of speech.

The outcome of this will result, according to Emerson, in: (1) a more vibrant and better functioning democracy; (2) clarifying difficulties interpreting the first amendment; and (3) helping legal institutions maintain a democratic rule of law in maintaining a just democracy. So the question of what social interest might be gained by the prohibition of speech and expression answers to three standards: (1) a clear and present danger to society; (2) incitement to violence; and (3) a clear distinction between expression and action. Fundamentally, without freedom of speech and expression, individuals in a

democratic society are in effect locked out of the democratic process. The question of democratic governance is therefore one of the critical issues at stake in this debate.

***Emerson's Application to Buckley v. Valeo***

We argue that *Buckley v.Valeo*, as interpreted within the tradition of free speech in Emerson's "Toward a General Theory of the First Amendment," model, tends to undermine the free speech and expression of citizens, and in turn legally prioritizes the speech of wealthy elites, since free speech and expression have now been defined by the SCOTUS in terms of monetary value. In essence, this now gives a weighted advantage to the rich (i.e., elites, corporations, etc.) who can then use their financial resources at an unfair advantage over non-elites. The point of the first amendment's right to free speech and expression according to Emerson, and the basis for his "Legal Theory of Reconciliation," is for free speech and expression to serve and facilitate the valid function of a democratic self-governing society. Speech was *not* intended to be translated into financial contributions by the wealthiest citizens in the United States who use this wealth to influence political campaigns for their purposes. Based on these theories, Emerson argues that free speech and expression must answer to the criteria of individual self-fulfillment, attaining information and truth, securing participation in self-governance, and balancing out the original intent of these rights and interpreting them in a modern context. Moreover, that the elites in society have this right too, would be missing the point according to Emerson since average citizens are not able to afford the same financial access to politicians and their political influence. Recent research by Richard Hasan and Irwin Chemerinsky demonstrates the clear direction in which the law and courts are being drawn, that is, toward the interests of elites, oligarchs, and plutocrats (Hasan, 2016; 2011; Chemerinsky, 2010).[8]

[8] See Richard L. Hasen, *Plutocrats United*, 2016; Richard L. Hasen, "Citizens United and the Illusion of Coherence," *Michigan Law Review*, 2011; and Erwin Chemerinsky,*The conservative assault on the Supreme Court*, 2010.

The operating assumption here, specifically in *Buckley v. Valeo* (1976) and *Citizens United v. FEC* (2010) is that the more money a politician receives from a person and/or Political Action Committee (PAC) the more likely that politician will honor the political desires of those wealthy donors with favorable legislation. The shocking correlations that exist between huge sums of money and how politicians vote on issues cannot be ignored. This includes corporate elites on one hand and union representation on the other, for conservative or liberal politics it makes no fundamental difference. The point is that individual voters have very little say in what they believe to be their rational interests. Not all people have the same financial input to "express" their political preferences and choices in their elected representatives. Their financial wealth and resources have a distinct political advantage over the average person and particularly the poor. Average citizens and the poor do not have this type of input or "expression" and are thus limited in their speech because financial contributions to political candidates by wealthier individuals operating to attain their political ends takes priority over the expressed desires of constituents who do not have the same influence as wealthier contributors, at least as this is argued in prior court rulings.

The ruling that wealthier candidates' freedom of speech and expression, in light of Emerson's criteria, appears to be "buying" votes and does not fit into Emerson's notion of free speech and expression which is to serve as a democratic society. This form of free speech and expression therefore undermines democratic society and representative government of fair and equal representation within the rule of law. It seems apparent that Emerson's position on interpreting the first amendment invalidates *Buckley v. Valeo* and for that matter *Citizens United v. FEC* 2010. More ominously, the SCOTUS has reinforced rigid class distinctions as a result of these two rulings.

***Paternalism and Dworkin***

Gerald Dworkin seeks to address the tradition of the positivists and libertarians who argue that there is no legitimate right for government to interfere in a person's life (Dworkin, 1972). In the

liberal tradition of Mill, positivists and libertarians argue that individual freedom is absolute and all forms of paternalism are illegitimate, precisely because limiting a person or group's autonomy - even for their own good – violates individual sovereignty. Mill opposes paternalism based on the belief that individuals know what is best for their own good, not the state. Human moral equality demands recognition of others' liberty while paternalism violates human autonomy. So paternalism addresses the standards for intervention in people's lives. Dworkin is of the opinion that Mill's harm principle does not completely resolve the concepts of freedom and autonomy through self-regarding and other-regarding actions.

In assessing this issue, Dworkin argues that the harm principle can be divided into two parts: (1) interference in people's lives can be justified to protect one self and others, (2) interference in people's lives can never be justified to protect an individual's own good. Most significantly, it is with the second criteria that Dworkin asserts a remedy for Mill's harm principle. As such, Dworkin establishes a notion in which a person's life (freedom and autonomy) can be interfered with for that person's good. He defines it as "paternalism" which is "interference with a person's liberty for his own good" to protect or prevent that person from harming himself/herself. This can be a compelling argument since for Dworkin it is not easy to separate an individual's private actions from the effects in can have on others.

In *Paternalism*, Dworkin lists a number of examples, paternalistic laws designed to interfere with individual freedom to protect others from harming themselves, such as being forced to wear a motorcycle helmet, driver's licenses, licensing doctors, etc. Some examples, such as consenting sexual behavior between same-sex adults are questionable. Nevertheless, Dworkin argues that interfering or intervening in such examples does not violate the freedom and autonomy of these individuals since compulsion in these unique circumstances does not provide a benefit that outweighs the harm brought by intervention. Consequently, a greater good exists in attempting to maximize choice and that any blanket rule prohibiting intervention is not consistent with Mill's harm principle. In other words, according to Dworkin,

Mill would agree that there are some legitimate reasons for intervening in self-regarding actions. Strict positivists and libertarians would disagree. The limitations of the law in this situation are understood to be conditioned by a unique context which is both beneficial to society and for each person's individual good. In this sense the law is not to be interpreted on a literal basis as some originalists maintain. Rather the law is to be understood in a more contextual manner so that the law itself is not manipulated for "political" or "subjective" purposes.

***Reinforcing Theory: Sunstein, Thaler, and Dworkin***

A number of Western European and South American countries provide candidates with funding on an equal and limited basis. This would be one way to prevent big money from replacing free speech and undermining democracy in the United States. But we believe campaign finance reform by itself will not be enough to save free speech and expression from being coopted by elites. We argue for a more precise moral and political grounding upon which to structure the nature of free speech and expression since elites could potentially find other ways to influence political outcomes based on their superabundance of resources and political influence other than direct financial contributions. Our next analysis will therefore critically examine John Stuart Mill's argument for the limits of the law and how Mill's argument for these limits fits in with a utilitarian justification of the law. We will then examine how Mill would view Sunstein and Thaler's libertarian paternalism and how Sunstein and Thaler's moral and political constructs can more adequately protect freedom of speech and expression from elite domination (Sunstein, 2006; 1997; Sunstein and Thaler, 2008; 2003).

In order to address this question of elite domination in other forms than direct monetary funding to political operatives, it seems that a brief review of Mill's "harm principle" in *On Liberty* (1859) and Dworkin's notion of "paternalism" is in order. This, arguably, is the best way to approach an assessment on whether or not Sunstein and Thaler's concept of "libertarian paternalism" would be compatible with Mill's harm principle and acceptable to Mill since we argue that Mill's perspective on

freedom of speech and expression is the most dominant philosophical expression in legal discourse today. In this regard, Mill secures the much needed philosophical foundation for any expression of freedom of speech and expression within a liberal democracy.

***Libertarian Paternalism: Sunstein and Thaler***

Sunstein and Thaler attempt to further reform both Mill's harm principle and the revised interpretation of the harm principle in Dworkin's paternalism, which addresses the complexity of self-regarding actions that can harm others. They argue that libertarian paternalism (LP) prioritizes "freedom of choice" in the libertarian tradition (dogmatic anti-paternalism), while allowing individuals to promote their own welfare through both the private and public sectors. Dworkin's paternalism is too coercive for Sunstein and Thaler, yet they argue that some form of paternalism is inevitable since people make "bad" decisions or are ill-informed on other rational choices. Sunstein and Thaler argue that there exists a "false assumption that almost all people, almost all of the time, make choices that are in their best interest or at the very least are better, by their own lights, than the choices that would be made by third parties." LP therefore provides a framework or "choice architecture" as a flexible "context" that will better inform individual choice while allowing those same individuals to opt-out of those choice options which they do not want. In LP they present a series of examples of opting-in and opting out of various programs, such as public and private 401K plans. LP attempts to provide a freedom of choice in conformity with individual preferences, something Dworkin and Mill neglect in the harm principle and Dworkin's remediation of it in paternalism. The outcome is to prevent irrational behavior and unintended negative consequences, since Sunstein and Thaler reject what they believe to be a false premise in that individuals always make the best decisions for themselves.

A persisting question remains: Have Sunstein and Thaler resolved the problem of defining what exactly is an acceptable moral criteria in this framework and perceived "coerciveness" of

Dworkin's paternalism? Sunstein and Thaler attempt a type of balance or compromise between libertarian freedom of choice (Mill's position) and the need to appease paternalists who are skeptical regarding freedom of choice and the unforeseen outcomes that result for "bad" decisions. While Sunstein and Thaler provide a helpful framework for optimizing choice, it seems there is little evidence that the LP model can ultimately find a solution to self-regarding actions that can have potential negative impacts on others. At some adjudicated point, pragmatic decisions are made by governing bodies to address the "publics" and the assorted issues that still emerge from public choice theory, be they externalities such as free riders, monopolies, asymetrical information, and imperfect competition.

While we believe Sunstein and Thaler's LP would be acceptable to Mill since Sunstein and Thaler maintain the fundamental elements of utilitarianism and the harm principle, it nevertheless fails to resolve self-regarding behavior that negatively impacts others. Specifically, this relates to economic policy, healthcare policy, education policy, etc. Opting-out of a program does not guarantee the "correct" decision and could potentially result in worse outcomes. Government's function still remains a coercive one, or one that will intervene on the side of justice through law and policy, even under the framework of LP by allowing opt-outs, since rational choices are not always clear.[9]

## SUMMARY

What results from this analysis of the SCOTUS rulings is that: (1) the *Friederichs* decision is not analyzed by the Supreme Court based on the "public service model" while the *Citizens*

[9] See Cass Sunstein, "Fear and Liberty," *Social Research: An International Quarterly*, 2004, 71(4): 967-996; Robert Paul Wolff, *In Defense of Anarchism*, Harper & Row, 1970. For a discussion on the media and free speech see J. McDonald Ladd, and G.S. Lentz, "Exploiting a Rare Communication Shift to Document the Persuasive Power of the New Media," *American Journal of Political Science*, 53(2), April 2009, 394-410; Robert McChesney, *Rich Media, Poor Democracy: Communication Politics in Dubious Times*, New York: New Press, 2000.

*United* free speech criteria (established by Mill, Emerson, Sunstein, and Thaler) is distorted by confusing corporations and persons thus undermining the notion of free speech; and (2) the "fair share" model set in legal precedent in *Abood* deviates from this legal precedent with little substantive legal rationale while the distortion of free speech in *Buckley* is effectively maintained by its continued specious reasoning. By undermining the "fair share" principle supporting mandatory union dues and promoting free speech based on financial contributions to political campaigns, democracy itself is undermined.[10] As cited in Chemerinsky, Hasan, Gilens, Page, and Bartels, the emergence of plutocratic and oligarchic rule is reinforced within democratic governance, to varying degrees, and made ineffective if not undermined completely for those participating in a majoritarian democracy. *Friedrichs* and *Buckley* have made democratic governance virtually the exclusive right of elites and the wealthiest participants within a democratic society.

## CONCLUSION

In *Friederichs* the five Republican appointees on the Court (Roberts, Alito, Scalia, Thomas, and Kennedy) concluded that it was unconstitutional to force a teacher to pay her "fair share" of union dues if she objects to paying for union activities that she does not support. Justice Kennedy simply described the "fair share" fees as "coerced speech," or "compelled speech," which

[10] Our point here is to indicate the potential danger in the SCOTUS decisions of *Friedrichs* and *Buckley*, and to argue that the SCOTUS decisions will lead to deeper institutional plutocratic and oligarchic reinforcements within democratic governance in the United States. For a persuasive analysis of this see Chemerinsky and Hasan (previously cited) and the social science research of Martin Gilens and Benjamin Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens," *Perspectives on Politics*, *12(*3), September 2014, 564-581; Larry Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age,* New York: Russell Sage Foundation and Princeton University Press, 2008; Larry Bartels, "Economic Inequality and Political Representation," Woodrow Wilson School of Public and International Affairs, Princeton University, Working Paper, August 2005, 1-52.

violates the First Amendment. And with the recent addition of Neil Gorsuch to the Supreme Court, the likelihood of *Friederichs* and *Buckley* appear to be established law for the foreseeable future. Nevertheless, in *Friedrichs* it is uncertain how this will adversely impact unions.

In the past, the Supreme Court has argued that the free-speech rights of public employees is, limited as in *Rankin*. Though public employees may speak out as citizens regarding matters of "public concern," the same right does not hold to disputes in the workplace. This is a very different situation form *Friedrichs* and thus constitutes a false equivalence. Nevertheless, there is little doubt that conservative members of the Supreme Court consider the forced fees a violation of free speech. Their qualm, specifically in the case of Justice Kennedy, was with the fact that employees and teachers who disagree on specific union issues are still obligated to subsidize the unions precisely on those issues.

Yet for Kennedy the state is, at times, happy to "suppress speech" based on Kennedy's opinion in *Garcetti*, where Kennedy allowed for the suppression of the speech by the prosecutor who objected and was demoted for complaining about the handling of a suspect police search warrant. What this in effect underscored was the fact that Kennedy believes paying fees to a union is a greater attack on free speech than demoting or terminating a worker for speaking out in the workplace. The obvious contradiction here is based on arbitrary criteria resulting from an incoherent application of the law. In the case of *Citizens United*, if upheld, the continuation of unlimited corporate funding could potentially lead to the undermining of democratic governance based due to unlimited campaign contributions to political candidates.

We argue that *Friedrichs* and *Buckley* are the result of conservative judicial activism, and an attack on labor funded by right-wing anti-union political action committees and special interests as citeded in the works of Chemerinsky and Hasan. As the Republican majority on the Supreme Court is poised to scuttle public-sector unions and thereby pave the way for "right-to-work" laws as an imperative, it is important to see the larger picture. The Republican Court's agenda is clearly aimed at

disempowering the majority to further empower a privileged minority within elite settings in society, which is the point of "big money" in politics with *Friederichs* and *Citizens United*.[11] It explains the anti-union agenda to lay the foundation for a neoliberal local and international economy, privatized, devoid of worker rights and to permanently entrench the powerful in America through the court system. What remains is an oligarchic system that is dominated, for all intents and purposes, by elites and plutocrats representing the wealthiest interests in the United States.

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***Acronyms***

| | |
|---|---|
| FECA | Federal Election Campaign Amendment |
| FEC | Federal Election Commission |
| LP | Liberal Paternalism |
| SCOTUS | Supreme Court of the United States |

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[11] This could also explain *McCutcheon v. FEC* (2014), why they gutted the Voting Rights Act in *Shelby v. Holder* (2013), and basically closed the door to class action law suits against big corporations, in *AT&T Mobility v. Concepcion* (2011), and *Comcast v. Behrend* (2013).

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