

---

## DEBATE

---

---

---

### THE ROLE OF JUDGES IN ELECTION LAW

---

---

The role of judges in election law is both important and controversial. Discussion about the appropriate role of judicial activism arises in many areas, but election law raises particular concerns going to the heart of the democratic process. In *Judicial Activism and Passivism in Election Law*, Professor Dan Tokaji argues that the judicial default should be passivism, but when minority rights are at stake or those in power seek to entrench themselves, judicial activism is warranted and necessary. Professor Tokaji evaluates three recent cases in which the Supreme Court tackled election law and campaign finance—*Bush v. Gore*, *Crawford v. Marion County Election Board*, and *Citizens United v. FEC*. He argues that in *Bush v. Gore*, the Court appropriately intervened where both minority rights and the potential for entrenchment were involved. The later two cases, however, failed to strike the appropriate balance: the Court in *Crawford* neglected to act where it was necessary to prevent entrenchment, and in *Citizens United*, intervened in a way that undermined legislation intended to bring about equality. The Roberts Court, concludes Tokaji, lacks a coherent constitutional theory of judicial activism, at least in matters of election law. Allison Hayward, in *Judging Politics in a Federalist System*, responds that Tokaji’s definition of “election law” need not have a coherent constitutional theory because it is not a discrete area of law. Hayward suggests that deference is warranted when a branch of government acts within its constitutionally prescribed limits; when it does not, the courts need not defer. Hayward distinguishes *Bush v. Gore* and *Crawford* on a basis of consistent application of the standard at issue, going on to argue that equal protection does not have a place in either case; thus the Court appropriately deferred to the legislative branch. *Citizens United*, however she concludes, is a free speech case rather than an election law case, and deserves strict scrutiny.

## OPENING STATEMENT

*Judicial Activism and Passivism in Election Law*Daniel P. Tokaji<sup>†</sup>

One of the few things that unites politicians across the political spectrum is a penchant for complaining about judicial activism. The trouble is that they don't agree on what it is or when it is appropriate. For decades, conservatives have complained of activism when it comes to constitutional decisions regarding desegregation, criminal procedure, abortion, and gay rights. In recent years, liberals have become increasingly concerned about judicial activism by the Rehnquist and Roberts Courts in striking down key parts of the Religious Freedom Restoration Act, Violence Against Women Act, Americans with Disabilities Act, Bipartisan Campaign Reform Act, and other federal laws. Some fear that health care reform or section 5 of the Voting Rights Act will be the next to fall.

To issue a blanket condemnation of judicial activism is, of course, too simplistic. The challenge lies in articulating a principled basis for assessing what counts as "good" and "bad" activism. It is fine and proper to insist on fidelity to the text of the Constitution. But open-ended terms like "equal protection," "due process," and "the freedom of speech" will not interpret themselves. Their application instead demands a coherent theory that identifies the proper role of an independent and largely unaccountable judiciary in our democracy. Otherwise, constitutional law will appear to many citizens as—and may in fact be—nothing more than politics by another name.

Nowhere is this challenge more prominent and pressing than in the field of election law, as exemplified by three prominent cases: *Bush v. Gore*, 531 U.S. 98 (2000), *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010). To many observers, including some legal scholars, these cases have the flavor of U.S. Supreme Court Justices indulging their own political preferences in the form of intractable constitutional law. This Opening Statement considers what sort of analysis courts should apply when it comes to election administration and campaign finance, two topics that have received a great deal of public and scholarly attention in recent years. Using these cases as illustrative, I attempt to define

---

<sup>†</sup> Professor of Law, Moritz College of Law, The Ohio State University.

when judicial activism is warranted—and when “passivism” is more appropriate—when dealing with the regulation of democratic politics.

### I. JUSTIFICATIONS FOR JUDICIAL ACTIVISM

It is a point of common agreement that if judges are to undo the handiwork of elected officials, then they ought to have very good reasons for doing so. That is, courts should generally defer to the preferences of the citizenry as expressed through their elected representatives at the federal, state, and local levels.

This general principle applies to election law as well as to other fields. There are, after all, multiple values at play in the regulation of the political process, including liberty, equality, integrity, transparency, and competitiveness. When those values collide, as they sometimes do, people of goodwill may disagree over which to prioritize. In addition, disagreements sometimes occur over the real-world impact of a particular practice. Take, for example, the debate over voter identification, where Democrats and Republicans tend to divide not only on whether to emphasize the value of access or integrity, but also on the effects of such policies. It is generally the job of elected officials—not unelected judges—to resolve factual disagreements and to reconcile competing values. Thus, passivism, not activism, should be the norm in judicial decisionmaking.

On the other hand, courts sometimes are justified in according less deference to rules structuring the political process. There are two main justifications for distrusting political actors and, accordingly, for close judicial scrutiny of some election laws and practices.

The first is the risk that a majority will seek to weaken a minority of citizens by excluding them from full participation. The most obvious example is the systematic exclusion of African Americans from Southern politics through most of the twentieth century. The Court’s decision in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), is an example of judicial activism in this area that almost everyone now considers justified. In *Harper*, the Court struck down a \$1.50 poll tax as a violation of equal protection. *Harper* did not expressly rely on the racially discriminatory character of the poll tax, but instead relied on the likelihood that the tax would inhibit participation of economically disadvantaged voters. *Id.* at 668. This type of rationale for intervention may be thought of as minority protection, in the sense that such intervention protects a minority of citizens from an exclusionary practice that the majority favors.

The other main reason for judicial intervention in elections is the risk that elected officials will promote their own self-interest at the expense of the polity. As Justice Scalia has put it, “The first instinct of power is the retention of power.” *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). Incumbent officeholders may adopt self-entrenching measures that make it difficult for voters to remove them from office. Alternatively, they may seek to hold on to power through inaction—that is, through measures that leave in place electoral rules that prevent challengers from competing and that frustrate the will of the minority. This rationale might thus be thought of as a form of majority protection, in the sense that it prevents elected officials from serving their own interests at the expense of the citizenry.

A prominent example of entrenchment through inaction is the egregious malapportionment of state legislative bodies that had developed by the mid-twentieth century. Before the articulation of the “one person, one vote” rule in *Reynolds v. Sims*, 377 U.S. 533, 558 (1964), state legislatures were under no constitutional mandate to redraw legislative districts after each decennial census. In many states, redistricting had not occurred for decades. As a result, the most populous legislative district often had a population that was many times the size of the least populous. See *Reynolds*, 377 U.S. at 545. The consequence was severe underrepresentation of voters in more heavily populated urban districts and effective minority rule by voters in less populated rural districts. In Alabama, for example, 25.1% of the state’s population resided in districts that controlled a majority of state senate seats. *Id.* Of course, incumbent legislators who benefited from this system of unequal representation had no incentive to change it. Judicial intervention was necessary, and ultimately came through *Reynolds*’s articulation of the “one person, one vote” principle requiring that legislative districts be equally populated.

This does not, of course, mean that every law that arguably burdens minority participation or promotes incumbent self-interest should be struck down. The baseline presumption should still be that elected officials get to decide how best to promote the sometimes competing values in our democracy. But the decisions of elected officials are less trustworthy—and the argument for searching judicial review is accordingly stronger—when there is evidence that an electoral practice will impair participation by a political minority or serve the interests of those in power.

## II. *BUSH V. GORE*: LOOKING BETTER WITH AGE

In assessing judicial activism in the realm of election law, it is useful to examine some of the Supreme Court's most controversial decisions of recent years with these justifications for judicial intervention in mind. Viewed in this light, *Bush v. Gore* looks better now than it did to most commentators at the time it was decided.

The majority in *Bush* concluded that the "arbitrary and disparate treatment" of voters in Florida's 2000 recount denied those voters equal protection. *Bush*, 531 U.S. at 104-11. The Court cited just four equal protection cases: *Harper*, *Reynolds*, and two other "one person, one vote" cases—*Moore v. Ogilvie*, 394 U.S. 814 (1969), and *Gray v. Sanders*, 372 U.S. 368 (1963). The problem with Florida's recount, according to the majority, was the lack of clear rules for determining which ballots should count. 531 U.S. at 106. Reading between the lines, the Court was concerned with the discretion that state law gave to local officials and state judges, which would allow those state officials and judges to manipulate the rules to benefit their preferred candidate. See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2488-90 (2003). Put another way, the lack of a sufficiently clear standard threatened to result in the unfair exclusion of some voters and in skewed election results.

In this sense, *Bush v. Gore* may be understood as marrying *Harper's* concern with exclusion and *Reynolds's* concern with entrenchment. To be more precise, the Court's holding rests on a fear that state officials will abuse their discretion in a way that would unfairly prevent some voters from participating in the election. There is no doubt that *Bush v. Gore* was an activist decision in that it reached beyond existing precedent to hold a state's method of recounting votes unconstitutional. But it is a decision whose activism—at least with regard to its equal protection holding—may be justified by the need to prevent inequality and rein in official discretion.

This assessment is not to deny that there are good reasons for criticizing *Bush v. Gore*. The Court did a poor job explaining its reasoning and failed to specify the level of scrutiny it applied. It explicitly left open the boundaries of the equal protection principle upon which it relied, although this is not all that unusual for a decision that breaks new constitutional ground. Most problematic was the remedy the Court ordered, which called for an end to the recount, rather than an instruction that the Florida Supreme Court should decide whether to continue the recount under a clearer standard. 531 U.S.

at 110-11. With these qualifications, the equal protection reasoning of *Bush v. Gore* looks better with a decade of hindsight than it did to many at the time.

The Court deserves greater criticism for what has happened since 2000. It has avoided *Bush v. Gore* like the plague, refusing to cite it in any decision since then—including equal protection cases implicating equality of participation. See Chad Flanders, *Please Don't Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 144 (2006), <http://www.yalelawjournal.org/images/pdfs/75.pdf>. The Court has done nothing to clarify the equal protection principle that it relied upon in *Bush v. Gore* but instead, as explained below, has actually muddied the waters further. It has treated *Bush v. Gore* as an embarrassment. The real embarrassment, however, is the Court's avoidance of the decision, which suggests that majority Justices have been unwilling to abide by the principle that they relied upon in that case.

### III. CRAWFORD: FAILING TO PROTECT PARTICIPATION

*Crawford v. Marion County Election Board* is the most important election administration decision since 2000—and the one in which the Court most conspicuously failed to cite *Bush v. Gore* or wrestle with its implications. In *Crawford*, the Court upheld Indiana's law—enacted by a party-line vote, 553 U.S. at 203 n.21—which required most voters to present government-issued photo identification in order to have their votes counted. *Id.* at 185-86. Although no opinion commanded a majority, five Justices endorsed a sliding-scale test for evaluating barriers to participation. 553 U.S. at 189-90 (Stevens, J., for himself, Roberts, C.J. and Kennedy, J.); *id.* at 210 (Souter, J., joined by Ginsburg, J., dissenting). Under this standard, the strength of the government's interest varies depending on the severity of the burden that the challenged electoral practice imposes. For example, if voters were able to show that a registration requirement discriminates against a class of voters, or that it imposes a "severe" burden on their right to vote, then the state would have to show that this burden is narrowly tailored to serve a compelling interest. *Id.* at 190. On the other hand, if an electoral practice is "reasonable" and "nondiscriminatory," then a more relaxed level of scrutiny applies. *Id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

The obvious problem with this generic standard is that it provides little guidance in resolving hard cases, particularly ones where the evidence is scant or conflicting. *Crawford* itself is a prime example. On the record before the Court, there was little evidence to show that

the law would seriously burden any individual voters or group of voters. At the same time, Indiana produced no evidence showing any serious problem with voter fraud that would require implementation of a voter identification law. The state was unable to document even one instance of in-person voter impersonation—the only type of misconduct that the law would prevent. *Id.* at 194.

Given the paucity of evidence, it should come as little surprise that the Justices who applied essentially the same standard came to different conclusions. The lead opinion by Justice Stevens found the state's mostly hypothetical concerns sufficient to uphold the law, while the dissenting Justices found the burden to be unjustified by the state's proffered interests. Given the vagueness of the legal standards applied, it is easy to see how different Justices reached different conclusions.

The main problem with *Crawford* is the majority Justices' failure to reckon with the consequences of *Harper*. Recall that the *Harper* Court struck down a poll tax that had a tendency to exclude economically disadvantaged voters, and in doing so, applied a standard that we would now refer to as strict scrutiny. 383 U.S. at 670 (holding that rules infringing on fundamental rights must be "closely scrutinized and carefully confined"). The Court did so even without finding statistical evidence of a disparate impact on any particular group of voters, much less intentional discrimination toward any group. The Court's rationale was that the poll tax's burden weighed especially heavily on economically disadvantaged voters and therefore denied "the opportunity for equal participation by all voters." *Id.* (quoting *Reynolds*, 377 U.S. at 566).

By the same token, there was evidence in *Crawford* that certain groups of voters were more likely to lack government-issued photo identification. Those groups included poor, elderly, disabled, and homeless voters. 553 U.S. at 199 (plurality); *id.* at 212 n.4, 216 (Souter, J., dissenting). That evidence should have been enough to place a heavier burden of justification on the state, especially given the party-line vote by which Indiana's law was enacted. The absence of any evidence of in-person voting fraud—the only illegality that the law purported to prevent—suggests that the real motivation was the Republican majority's desire to make it more difficult for Democratic-leaning voters to participate. The constitutional argument against Indiana's law thus recalls the entrenchment concerns that led the Court to intervene in *Reynolds* and in other "one person, one vote" cases. In these cases, the concern is that a legislative majority is acting to entrench itself.

*Crawford* was therefore a case in which the Court was unduly passivist. Given the danger that it would deny equal participation and the

“danger signs” tending to show partisan motivation, the Court should have applied heightened scrutiny. See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 359 (2007). Had the Court applied such a test, there would have been no serious doubt as to the law’s unconstitutionality, given the state’s failure to produce any evidence that it would stop illegal voting.

#### IV. *CITIZENS UNITED*: DENYING EQUALITY

While the Court has been too passive when dealing with barriers to voter participation, it has been overly aggressive when dealing with the regulation of campaign finance. The most controversial example in recent years is the decision in *Citizens United*, in which the Court struck down a key component of the Bipartisan Campaign Reform Act (BCRA). *Citizens United*, 130 S. Ct. at 917. *Citizens United*’s conclusion that corporate expenditures on elections are a form of speech that the First Amendment protects has generated the most criticism. But the real problem with *Citizens United* is its rejection of political equality as a countervailing democratic value that may sometimes justify limits on campaign spending.

*Citizens United* struck down the BCRA’s prohibition on corporations funding “electioneering” expenditures from their treasuries. *Id.* at 886. The majority opinion subjected the law to strict scrutiny under the First Amendment after finding that the law imposed a burden on corporate speech. *Id.* at 898. This part of the Court’s holding broke no new ground. There are, moreover, good reasons for applying a heightened level of scrutiny to laws that impede election-related expression. When incumbent legislators act to impose limits on political spending, they may be acting to promote their own interests in reelection—for example, by making it more difficult for challengers to compete. Of course, legislators may also promote their own interest by *failing* to enact limits on campaign spending, since the status quo may well inure to the advantage of incumbents. Still, it is at least possible that limits on campaign spending may impede competition, and therefore, it is appropriate for the Court to apply some form of heightened scrutiny.

The real significance of *Citizens United* is its rejection of political equality as a justification for imposing limits on campaign spending. In *Austin v. Michigan Chamber of Commerce*, the Court allowed restrictions on corporate expenditures based on the state interest in curbing “the corrosive and distorting effects of immense aggregations of

wealth that are accumulated with the help of the corporate form.” 494 U.S. 652, 659-60 (1990). This reasoning was an equality rationale; it was designed to promote the ideal of equality in the realm of democratic politics. *Citizens United*, however, overruled *Austin*, taking equality as a justification for limits on corporate expenditures off the table. *Citizens United* also rejected the argument that the interest in preventing corruption of the electoral process could justify a ban on corporate electioneering. Whether corporations have unequal access to the political process and unequal influence on its outputs was beside the point, from the Court’s perspective, because only the reality or appearance of quid pro quo corruption can justify spending limits. *Id.* at 910-11.

*Citizens United*’s holding is consistent with the main thrust of Supreme Court precedent over the past four decades, which has mostly rejected equality as a justification for campaign finance regulation. The most notable example before *Citizens United* was *Buckley v. Valeo*, which held 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.” 424 U.S. 1, 48-49 (1976). The problem with this line of precedent is that it usurps the role of legislative bodies in determining how best to balance the various competing values at play in our democracy. There is no doubt that money is essential to effective speech in the context of political campaigns. The corollary of this proposition is that those without significant financial resources lack the capacity for effective speech. In a system of unlimited spending, there is a pronounced risk that the speech of the “have-a-lots” will overwhelm the speech of the “have-nots.” This is anathema to a society that is committed to the principle of “one person, one vote.” See generally Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law (and Why the Canadian Approach Is Superior)*, (The Ohio State Univ. Moritz Coll. of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 140, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1746868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746868) (providing a more detailed explanation of *Citizens United*’s overruling of the *Austin* antidistortion rationale).

To be sure, citizens may have legitimate disagreements as to whether the value of political equality should outweigh other values, such as liberty. The problem with *Citizens United* is that it entirely removes equality from the conversation. After *Citizens United*, legislative bodies may not even consider political equality as a justification for limits on political spending. If they do, any limits they impose are sure to be struck down. For this reason, *Citizens United* represents unjustified activism. In prohibiting legislative bodies from even considering

equality as a justification for campaign finance regulation, the Court arrogates to itself the power to determine the democratic values that our electoral system may serve. The interest in preventing voter exclusion or in preventing incumbent entrenchment cannot justify its activism.

#### CONCLUSION

Some of the most controversial Supreme Court decisions in recent years have involved constitutional challenges to election laws. The strong political valence of these cases tends to induce accusations that the Court is engaging in judicial activism. The real challenge, however, is to articulate a coherent basis for when activism is and is not appropriate in the regulation of the political process.

This Opening Statement has identified two justifications for unelected judges' supplanting elected officials' judgment in electoral process decisions: the protection of minorities and the prevention of self-interested behavior by those in power. Judged by these criteria, *Bush v. Gore's* equal protection holding may be understood as justifiable activism. The Court's more recent decisions in *Crawford* and *Citizens United* do not stand up as well—though for very different reasons. *Crawford* was too passivist, failing to closely scrutinize an election rule that burdened certain voters while benefiting the majority party. By contrast, the Court in *Citizens United* exhibited an inappropriate degree of activism, taking equality off the table as a justification for limits on campaign spending.

Those who disagree with this assessment have the burden of articulating a coherent theory of constitutional interpretation under which the Court's activism in *Citizens United*—as well as its passivism in *Crawford*—may be justified. So far, the Roberts Court has failed miserably at this task.

## REBUTTAL

*Judging Politics in a Federalist System*Allison R. Hayward<sup>†</sup>

I want to respond to Professor Tokaji's Opening Statement first by saying something about election law as a discrete legal area. Deeming "election law" a field of study is somewhat like deeming the former Yugoslavia a country. You can draw a line around almost anything, but if the interior lacks unifying features or principles, the exercise may not yield anything useful. Indeed, if you group unlike things together and expect them to cohere when they should not, spurious discord results. This is the problem that occurs when Professor Tokaji—and many others—demand a "coherent" constitutional theory to explain election law holdings. In this Rebuttal, I will discuss the same three cases Professor Tokaji discussed—*Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), *Bush v. Gore*, 531 U.S. 98 (2000), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010)—because they exemplify the problem I am trying to describe.

Constitutional adjudication, the context in which judges (and particularly Supreme Court Justices) are often tarred as "activists," involves two major considerations. Professor Tokaji focuses on the protection of individual rights, as set forth in the amendments to the Constitution. But the Constitution also sets forth a structure. It describes three branches of the federal government and a division of labor between federal and state governments, which is defined by the Constitutional limits on federal power. When state and federal governments operate within the Constitution's limits, the choices of those governments deserve the courts' deference. If they do not operate therein, then no deference is warranted.

The Constitution specifies a few places where only the states, and not the federal government, should operate. One of those areas is specified in Article I, Section 4, which declares, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1. A case like *Crawford* implicates this state power.

---

<sup>†</sup> Vice President of Policy, Center for Competitive Politics; Assistant Professor of Law, George Mason University School of Law, 2006–10.

I agree with Professor Tokaji's description of the posture of *Crawford*. In retrospect, the litigants might have done better to allow a record of effects to mature and to instead bring an as-applied challenge, claiming that the law created an unconstitutional burden on voting. As it was, the Court heard a case where there was little evidence of injury or efficacy—which contrasts with the position the Court was in when it considered the poll tax in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Given *Crawford*'s posture, the Court reasonably concluded that the state's voter identification law deserved deference against this facial challenge. When litigants challenge election-administration laws, they run up against the constitutional text that grants authority over election administration to the states. In such cases, the Court has dealt with the competing rights of states and voters by constructing a balancing test, which is suboptimal if one prioritizes clarity and predictability. See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); see also Bryan P. Jensen, *Crawford v. Marion County Election Board: The Missed Opportunity to Remedy the Ambiguity and Unpredictability of Burdick*, 86 DENV. U. L. REV. 535 (2009).

The Court considered the frontiers of state discretion in *Bush v. Gore*. Generally, Florida's administrators, lawmakers, and courts should deal with the counting of citizens' ballots under Article I, Section 4. Yet while states may have the power to regulate elections, they cannot impose arbitrary and inconsistent election-administration procedures. They cannot be lawless. The Court's remedy in *Bush v. Gore* still sticks in the craw of many people, and I understand why this is so. However, the Court's majority preferred finality, which I can also understand.

Opponents of the Indiana voter identification law in *Crawford* might argue that the state's voter identification law is ineffective at reaching the more likely instances of voter fraud. As an initial matter, I think there is a distinction to be drawn between a state voting regulation that is marginally effective but applied consistently over the state and standardless ballot-counting that leads to inconsistencies within the state. But even if there isn't a distinction, election-administration doctrine and standards of review allow for state discretion in situations where Congress, in its infinite wisdom, has left the issue to the states' authority. Were Congress to step in and impose a national voter identification requirement (or a national standard for assessing dimpled chads, or a national felon-voting standard), then that law would also be assessed under the more deferential standards applied to election-administration rules and regulations. Of course, there is a place for

an equal protection claim—when the antecedent discriminatory intent and impact are apparent. But that is not the case in *Bush v. Gore* or *Crawford*.

Not that constitutional litigators need my advice, but I think that a strategy of pursuing voter identification cases with *Harper* as the leading case will not work. It seems that courts would find a voter identification law unconstitutional in one of two situations. First, the law would fail in a situation where the litigants can show both a disparate impact on a protected minority group and the intent to discriminate against that group. This is the classic equal protection formulation a lawyer would argue in challenging any kind of governmental act. Second, the litigants could, in the right situation, classify the voter identification law as arbitrary, ineffective, and counterproductive, such that the state's use of it cannot be justified as applied to specific cohorts of voters—even when the burden on voters is modest. Today, the Court and federal circuits are not going to find a “wealth discrimination” *Harper*-esque argument convincing. We may not all be Keynesians anymore, but we all are, for now at least, capitalists. See Ike Brannon, *We Were All Keynesians Then*, CATO INST. (Jan. 9, 2006), [http://www.cato.org/pub\\_display.php?pub\\_id=5362](http://www.cato.org/pub_display.php?pub_id=5362).

All of this says nothing about how campaign regulations should be evaluated. Campaign finance restrictions are not election-administration laws. They are content-based restrictions on speech and association. Campaigns and elections are both political, but they are not the same thing. There is no constitutionally directed state authority at issue. It does not make sense to lump them into some “election law” classification that includes election-administration cases, ethics and lobbying rules, and redistricting, among other things. Accordingly, “judicial activism” should not be evaluated in the same way.

The holding of *Citizens United*, that the federal ban on independent expenditures and electioneering communications is unconstitutional, must be correct. 130 S. Ct. at 886. There is no characteristic uniting all corporations that justifies a uniform, outright federal ban. Could wealth be one such characteristic? Not all corporations have wealth—and many other entities in society are wealthy yet are not subject to the expenditure ban. And no, it doesn't matter that corporations aren't “real people.” The freedom of speech and assembly under the Constitution protects the rights of speakers to speak and of listeners to hear a message. There may be messages that aren't protected—obscenity and libel, for example—but any source of a message gets to speak. Imagine the situation if this weren't true: a Republican

Congress could selectively silence public employee unions, or governmental incumbents could impose content-based restrictions indirectly.

If the Supreme Court had been a more straightforward activist in its approach to First Amendment cases in 1957, we wouldn't be having the argument over the holding in *Citizens United* today. See *United States v. UAW-CIO*, 352 U.S. 567 (1957); Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421 (2008). In *UAW-CIO*, the Court was presented with a labor union's constitutional challenge to the campaign expenditure ban. *Id.* at 568 (describing the ban under 18 U.S.C. § 610 (1952)). The leading legal thinkers of the time thought the ban was unconstitutional. See Hayward, *supra*, at 460-61. The Court was unduly passive, and after holding that the union's expenditures constituted a violation of the expenditure ban, it then remanded the case. *UAW-CIO*, 352 U.S. at 589-93. The Court thus avoided the constitutional question. The ban's constitutionality had to be assessed eventually, and it is stunning (and unfortunate) that it took until 2010 to resolve this question.

In short, Professor Tokaji has drawn a line around three cases and found them inconsistent. I would draw a line around only two, *Bush v. Gore* and *Crawford*, and conclude that they are consistent. *Citizens United* is simply a different creature—it's a speech case, not an elections case. Speech cases involving content-based restrictions deserve strict scrutiny; elections cases are judged by something more deferential. To me, it isn't any more complicated than that.

## CLOSING STATEMENT

*Electoral Equality: Why Campaign Finance Isn't So Special*

Daniel P. Tokaji

In her inimitably engaging and enlightening style, Allison Hayward tries to draw a bright line between the two domains of election law discussed in my Opening Statement: election administration and campaign finance. She defends the Court's holding in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), on the ground that "it's a speech case, not an elections case." Because restrictions on speech are usually subject to strict scrutiny, she argues, the Court was correct in striking down the prohibition on corporate electioneering in *Citizens United*. By contrast, burdens on voting, including ones that bear disproportionately on economically disadvantaged citizens, are generally subject to a more deferential review.

Hayward provides a fair description of current doctrine. But my main point is that this doctrine is defective—more precisely, this doctrine is not justified by a coherent conception of the proper role of courts in a democracy. By way of reply, I will explain my underlying concern with the Court's approach to the regulation of elections, focusing mostly on campaign finance, the topic on which we most sharply diverge.

Let me return to the premise of my argument. Principled judicial activism demands a reconciliation of the Court's stringent approach to burdens on campaign spending with its generally tolerant approach to burdens on voting. Hayward's key move—the first of two I contest here—is to isolate campaign finance because it involves speech, not elections. It is certainly true that campaign finance involves speech . . . but it also involves elections. Proponents of campaign finance regulation are concerned about the effect that vast inequalities in financial resources will have on election results and on the decisions elected officials make once in office.

More importantly, the characterization of campaign spending as speech—or at least "speechy," as Professor Richard Briffault has put it—does not end the constitutional conversation, but only begins it. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 119 n.3 (2010) (explaining the origin of Briffault's phrase). The term "freedom of speech," like "equal protection of the laws," is not self-defining. It demands interpretation, both with regard to the level of protection that different forms of expression receive and the countervailing justifications that may warrant regulation. Although the United States provides broader protection for speech than other democracies,

the Supreme Court has never embraced the free speech absolutism most famously espoused by Justices Black and Douglas. Some categories of speech—such as obscenity and fighting words—receive no protection at all. Others—such as commercial speech and campaign contributions—are reviewed under less than strict scrutiny. These different levels of scrutiny reflect judgments about both the value of the speech in question and countervailing values that warrant regulation.

As First Amendment doctrine developed in the twentieth century, the Court recognized a number of countervailing values that may sometimes justify limits on speech, even protected speech. These values include some indisputably important ones, such as the prevention of imminent violence, threats to national security, and corruption; the Court has also recognized countervailing interests that are less weighty, such as the protection of public morals and even aesthetics.<sup>1</sup> My point here is not to argue for or against any of these decisions or the interests they recognize. Rather, the point is that our First Amendment tradition recognizes that speech must sometimes give way to other values.

The main problem with the Supreme Court's campaign finance jurisprudence is the Court's rejection of political equality as a countervailing value. Hayward claims that the Court's holding in *Citizens United*, striking down the federal prohibition on corporate electioneering, "must be correct." But this is only true if one agrees that the Court was right in taking equality off the table as a value that may sometimes justify restrictions on campaign spending.

The Court's holding in *Citizens United* does not just create a conflict between free speech and equal protection. It also creates a conflict within the First Amendment. For if one accepts the proposition that money facilitates election-related speech, then it follows that those without resources effectively lack speech—or, more precisely, lack the ability to be heard in the electoral marketplace. As Kathleen Sullivan has recently observed, there is both a libertarian strain and an egalitarian strain to our First Amendment tradition. See Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010). In the context of campaign finance regulation, these two strains are in direct conflict.

---

<sup>1</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (national security); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (aesthetics); *Buckley v. Valeo*, 424 U.S. 1 (1976) (corruption); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (public morals); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (imminent violence).

What justifies the Court's rejection of equality as a justification for campaign finance regulation? The best answer that deregulationists can offer is that limits on campaign spending may lead to the entrenchment of incumbents. This is partially true. As Justice Scalia has put it, the "first instinct of power is the retention of power." *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). Some regulatory schemes may well have the effect of helping incumbents and hurting challengers. But not all regulations will have that effect. To the contrary, a completely unregulated political marketplace may be to the greatest advantage of incumbent officeholders—after all, the smart money will most likely be with them.

Whether a particular scheme of regulation actually promotes equality and whether it impedes competition are difficult empirical questions. The problem with the Court's jurisprudence is that it forecloses empirical answers by eliminating equality as a value that can ever justify limits on campaign spending. This is the central flaw in the Court's campaign finance activism, from which the erroneous decision in *Citizens United* follows.

This point brings me back to the subject of election administration. Despite the Court's longstanding recognition that the right to vote is fundamental, and thus protected by the Fourteenth Amendment, the Roberts Court has been quite passive when it comes to laws and practices that burden voting. Aside from *Bush v. Gore*, 531 U.S. 98 (2000), the Court has been insufficiently sensitive to the risk that incumbent officeholders may manipulate political rules to their own advantage. The leading example so far is the Court's decision to uphold Indiana's strict voter identification law in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), despite the law's tendency to impose a burden on voting by citizens of limited means.

Hayward plays the federalism card here, asserting that Article I, Section 4 gives the states power to make election rules. That is certainly true; but again, this delegation of power only begins the inquiry, since states' election systems must comply with the Fourteenth Amendment. The Supreme Court has long held that voting is a fundamental right and, therefore, that infringements on this right—like restrictions on most speech—warrant strict scrutiny. The difficult question is identifying which burdens on voting trigger heightened scrutiny, and what countervailing interest may justify those burdens. In this area, the Court has virtually ignored Justice Scalia's warning about the first instinct of power.

To be clear, my point is not that the same constitutional rule should apply in all election law contexts. The problems that arise in these two

areas are not identical. But they are not apples and oranges, either. Both election administration and campaign finance raise the question of the proper role of the courts in the regulation of the political process. It is not sufficient to answer that one involves speech and the other elections. A better answer would look to whether political actors can be trusted to balance the competing democratic values at stake and to whether they have done so reliably, in particular circumstances. Unfortunately, this is not the approach that the Roberts Court has taken.

## CLOSING STATEMENT

*Is Egalitarianism Valuable?*

Allison R. Hayward

I am sorry that this will be the last word in our Debate. Although I would have liked to pin down Professor Tokaji a bit more successfully on several of his key points, I will at least explain why I disagree with a few of his arguments. In doing so, I will try to limit my discussion to those parameters.

Professor Tokaji and I agree on the basics of current Supreme Court doctrine regarding the role of judges in election law but disagree on whether that doctrine is coherent. I am wrong, he says, to separate campaign finance and election administration. Professor Tokaji contends that courts should treat both domains similarly since both “involve[] elections.” That is, proponents of campaign finance regulation are concerned in part about the effects of financial resources on election results. But it cannot be the case that to determine the scope of election administration, one should look at whether a potential target of regulation can affect election results. There is no logical limit to such a classification. Anything and everything could potentially “affect” election results.

More fundamentally, I think Professor Tokaji and I simply disagree on what role the state should have in politics. He believes the state has a proper and salutary role in both campaign finance and election administration, whereas I see campaigns as requiring protection from state interference. Therefore, I think it is coherent to treat campaign regulation differently from election regulation. A campaign involves a debate among the public, candidates, political parties, the press, and others about who should govern. The election is the moment in which a subset of that group—the voters—makes a choice. While it may be desirable to have a traffic cop patrol the conduct of the vote, the same cannot be said about a censor who mucks up the debate leading to the vote.

Professor Tokaji also argues that both campaign finance regulation and election-administration regulation should further egalitarian values. I disagree with this proposition because I fail to see how laws can regulate campaign finance in a manner that serves “equality.” I do, however, understand how elections can be administered in ways that serve equality, and ultimately, democracy; regulators can set reasonable qualifications for voters, make registration and balloting accessible, and count the votes fairly.

Professor Tokaji seems to believe that the sheer sums of money spent in campaigns endanger elections. I am not sure if this notion is correct. One reason for my skepticism is that, empirically, there are just too many campaigns where the candidate that spends the most money loses. See, e.g., Anne Bauer, *Candidate Self-Financing: More Barrier Than Stepping Stone*, NAT'L INST. ON MONEY IN STATE POLITICS (Nov. 16, 2010), <http://www.followthemoney.org/press/ReportView.phtml?r=438> (identifying the 2010 California gubernatorial campaign as an example). I have observed on one occasion that Meg Whitman, who spent over \$140 million of her own money and yet lost the 2010 California gubernatorial race, flies commercial now.

Even assuming, arguendo, that the “vast inequalities in financial resources” that distort campaign spending endanger “democracy” or “equality,” a federal ban on corporate expenditures does not solve that problem. Many actors in society have wealth, but only some of those actors are corporations. Moreover, only a small minority of corporations spend money on campaigns; in the world before *Citizens United v. FEC*, 130 S. Ct. 876 (2010), incorporated groups still had other, less direct ways of participating in politics. For example, they could communicate internally with executives, fund tax-exempt groups, or run issue advertising. Thus, the corporate-expenditure ban was both overbroad and underinclusive. Again, the holding in *Citizens United* was clearly correct as an application of constitutional law, and I do not see anything in Professor Tokaji’s reply to the contrary.

Why isn’t more campaign spending better? I observe that “wealthy” interests are actually quite heterogeneous. Thus, isn’t it a service to democracy that private organizations want to battle it out among themselves for voters’ favor? Put another way, the restrictions on campaign spending seem to be inherently antidemocratic. I doubt whether restrictions that silence speakers preserve any “value” in campaigns. Limits on speakers seem to make as much sense as imposing earplugs (or blindfolds) on voters.