The Courts and Political Speech Rights: A Comparative Study

The Courts and Political Speech Rights:

A Comparative Study

BY

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A THESIS

SUBMITTED TO THE SCHOOL OF SOCIAL SCIENCES

AND THE SCHOOL OF GRADUATE STUDIES

OF MCMASTER UNIVERSITY

IN PARTIAL FULFILMENT OF THE REQUIREMENTS

FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

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Doctor of Philosophy (2022) McMaster University
(Political Science) Hamilton, Ontario, Canada

TITLE: The Courts and Political Speech Rights: A Comparative Study

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NUMBER OF PAGES: x, 285

Lay Abstract

This dissertation examines the sources and modes of gradual institutional change within the context of judicial campaign finance conflicts and related reforms. It argues that the scope of corporate constitutional rights, the commodification of political speech, and the distribution of electoral participatory power are best understood through an analysis that utilizes and modifies insights from historical institutionalism, power resources models, neopluralism, and dialogue theory literature. To demonstrate this, this thesis critically examines the complex, socio-legal, and interdependent actions, actors, discourse, laws, and ideas which have grown increasingly important within campaign finance judicial outcomes, as these impact political equality and democratic governance. Consequently, this thesis illustrates how the scope of corporate constitutional rights and freedoms, potential for money in politics, and the distribution of political equality in the context of elections in Canada and the United States have changed over time, and the reasons for which they have.

Abstract

This dissertation contends that to appropriately address the state of political equality and pursue democratic interest(s) in an increasingly commodified world, we must understand the more complex, socio-legal, and interdependent actions, actors, discourse, laws, and ideas which have grown increasingly important within campaign finance judicial outcomes, as these impact political equality and democratic governance. Consequently, this dissertation examines the largely underexplored factors that shape judicial outcomes and practical application of campaign finance policy which are explanatory of the distribution of electoral participatory power. This electoral participatory power is a key indicator of political equality in democratic nation states. The underexplored factors that I examine include corporate identity as an analytical concept and power resource, commodification of political speech, constitutional constraints, intergovernmental dialogue, regulatory actors, and varied judicial and legislative commitments to democracy. To do so, the thesis utilizes and modifies insights from historical institutionalism, power resources models, neopluralism, and dialogue theory literature, to contribute to knowledge about how and why campaign finance policies and electoral participatory power of individuals, groups, and corporations have changed over time through judicial outcomes, practical administration, and related reforms. Through this demonstration, the analysis of this thesis opens up space to explore and identify sources and modes of gradual institutional change within the context of campaign finance judicial outcomes. Specifically, this thesis documents and critically examines the actions, actors, discourse, laws, and ideas which have permeated judicial conflicts in Canada and the United States over several decades and illustrates how

they have determined the scope of corporate constitutional rights and freedoms, potential for money in politics, and the distribution of political equality in these two advanced democracies.

Acknowledgements

I would like to express my deepest gratitude to my supervisor, Dr. Tony Porter for being a constant source of knowledge, mentorship, and inspiration. I would also like to express my sincere appreciation to my supervisory committee members, Dr. Michelle Dion, and Dr. Stephen McBride. They have generously provided their expertise and support throughout my doctoral studies.

I am also grateful for the financial support from Dr. Tony Porter, and the Department of Political Science. I'm extremely grateful to family, and to my partner in life, Shervin, for his constant support and encouragement during all the years of this program.

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List of all Abbreviations

- The Supreme Court of Canada (SCC)
- The Supreme Court of the United States (USSC)
- Canada's Chief Electoral Officer (CEO)
- United States Federal Election Commission (FEC)
- Elections Expenses Act *(EEA*)
- Federal Election Campaign Act (*FECA*)
- Federal Election Campaign Act Ammendments (*FECA* Ammendments)
- The Charter of Rights and Freedoms (*Charter)*

Terms:

- Political speech: Any communication concerned with government, poltics, society, and or law. Money is generally a form / representation of political speech
- Third Party (princially discussed in the Canadian context - Most cases disucssed involve incorproated "third parties" / incorproated groups funded by corporations; sometimes simply refered to as "third party groups")
    - a corporation that is incorporated in Canada or carries on business in Canada
    - a group, if the person responsible for the group is a Canadian citizen or permanent resident, or lives in Canada
    - an individual who is a Canadian citizen or a permanent resident, or lives in Canada
- Express Advocacy: making expenditures for the purpose of directly calling for the election or defeat of a candidate. Example: "vote for X"
- Issue Advocacy: making expenditures for the purpose of gaining support for views on issues of public policy, but without directly calling for the election or defeat of a candidate
- Inpendent expendtures: expenditures, such as by advertising, for the purpose of gaining support for views on issues of public policy, but without directly calling for the election or defeat of a candidate (typically available to "third parties")

Declaration of Academic Achievement

This project is solely the work of the author, and the contents of this thesis are not the result of any collaboration. Any mistakes herein are solely those of the author.

Chapter 1: Introduction

The purpose of this thesis is to better understand an important, enduring, and timely issue – money in elections. As Christiano notes, “in part because of the necessity of money to politics and in part because of the distinctive features of political activity for a democratic society, the necessity of money to politics can cause problems, normatively speaking, for the political system” (2012, p. 241). Currently, the electoral process in Canada and in the United States is a costly marketplace, which in turn effects variation in the electoral participatory power of politically active individuals and corporations. Political equality in the electoral process can be assessed with regard for campaign finance policies as they determine electioneering rules, meaning the extent to which entities, groups, and individuals can participate in elections through various messaging avenues. This is an important topic for advanced democracies as political equality in the electoral process should be high in such government structures.

Seeing that the state of campaign finance is principally informed by the history of court battles surrounding it, the more specific purpose is to consider these occurrences, including the actors and the power dynamics involved. The idea then is to contribute to understanding the reasons for and potential ways in which electoral systems can proceed and change, especially because of judicial outcomes. To complete this, the ways in which governmental communications, ideas about democracy, and constitutional legal constraints impact judicial outcomes and electioneering policies need to be examined, and this thesis takes this up. To this end, I draw out and evaluate distinct insights about distributive-conflicts and institutional power, as shown by literature on power resources, neopluralism, and dialogue theory. More specifically, the focus on the distribution of power in Canadian and American democracy, as discussed under neo-pluralist line of thought, and power resource models alike, is shown limited in some senses while strong

in others. Additionally, because the outcomes of campaign finance conflicts have largely been driven by inter-governmental dialogue and action, including that of justices, legislators, and regulatory actors, the explanatory power of dialogue theory literature is also explored. Therefore, key judicial outcomes are analyzed through the lens of political science theory and research on policy change. I identify factors within campaign finance policy and judicial conflicts which influence kinds of change, why an actor may be likely to succeed in achieving change, and the policies surrounding money in elections. As a result, issues and considerations regarding electoral participatory power, and thus political equality, are also made discernible.

This analysis further works under the view of historical institutionalism, specifically the gradual institutional change line of thought, and contributes to it by surveying and utilizing key concepts from the literature. As Streeck and Thelen argue, “the underlying assumption, amply supported by the literature, is that there is a *wide but not infinite variety* of modes of institutional change that can be meaningfully distinguished and analytically compared” (2005, p.1). Situating the literature alongside campaign finance judicial cases is useful because this policy area has received relatively less attention in terms of applying the concepts, thereby adding to the literature by evaluating the theory in this specific area of policy and law. More specifically, the concepts of *conversion, layering, displacement,* and policy *drift* receive further empirical support through the presented analysis. By drawing out the attributes assigned by judicial actors to change pursuing-actors, and the outcomes thereof, this research analytically identifies and compares modes of institutional change. I further consider the literature’s conceptualization of actors, or veto players, specifically, *insurrectionaries, symbionts,* and *subversives.*

In turn, this thesis goes further to facilitate anticipating outcomes of conflicts concerning money in politics. This is so because as chapter 5 and 6 summarizes, it is certain governmental

processes and norms which give way to certain reforms. This is important because as Mahoney and Thelen state: “if theorizing is going to reach its potential, however, the institutional analyst must go beyond classification to develop causal propositions that locate the sources of institutional change – sources that are not simply exogenous shocks or environmental shifts.” (2010, p. 3)

The theoretical approach applied here thus shadows this framework developed under historical institutionalism, showing for instance that powerful veto players, such as justices, may be able to defend existing policies against outright *displacement*, but their veto powers could be insufficient to prevent *drift* as regulatory inaction or administrative procedures generally may give way to it. (Mahoney and Thelen 2010, pp 19-20, 6-14; Streeck and Thelen 2005, pp. 12-13). This explanatory power of gradual institutional change is further clarified by considering it within the context of campaign finance judicial conflicts, and via reference to insights from the literature on neopluralism, power resources, and dialogue theory. Relatedly, this analysis will also add on to, and in part problematize, the major concepts in the literature by showing the role of inter-governmental dialogue, regulatory bodies, constitutionalism, and democratic principles for judicial outcomes policy change by way of the modes of change analyzed.

It is important to assign actions to the categories of *conversion*, *displacement*, *layering* and *drift* because as Mahoney and Thelen (2010) explain, if theorizing about gradual institutional change is going to reach its potential, and explain change beyond exogenous shocks, scholars are to theorize the sources and varieties of endogenous institutional change, and these concepts work to do so. Applying these concepts help narrow in on the fact that there is a variety but not infinite number of modes for changes, and that “institutions inevitably raise resource considerations and invariably have distributional consequences” (2010, p. 8). By analyzing judicial conflicts, which

are fraught with resource considerations and distributional consequences, through engaging with these concepts, the implications for theories of policy change becomes clearer as their explanatory power, or lack thereof, is further developed. By way of this approach, this thesis develops causal propositions that locate the sources of institutional change and reasons for judicial outcomes.

The remainder of this chapter elaborates on the major themes and issues to be addressed, thereby presenting the motivation for my research. The contributions to knowledge are then further outlined, followed by a shift to the key literatures which will be drawn on to further identify and describe the contributions to knowledge made. Dialogue theory, gradual institutional change, neopluralism and literature on power resources are examined, since as noted, these are the main bodies of thought which contributed to the motivation and findings of this research. The chapter concludes with a statement on the organization of the thesis .

1.1 Background and Motivation

Robert Dahl articulates that a substantial degree of political equality is a central characteristic of democracy in stating that the continuing responsiveness of the government to the preferences of its citizens is due to the notion of political equals (Dahl 1973; Gilens 2012). While this formulation may be idealistic, it is the scope of public policies, judicial findings, statutory and constitutional law which characterizes political equality in a country's democracy. This is exemplified, and the most so, in the context of election campaign finance policy in which concentrated wealth may play an extraordinarily important role because government actors and prospective government officials often depend on, or elect to rely on, financial donations so to maximize the probability of success. This situation invites money into politics which in turn influences the distribution of political equality, as realized through the quantity and quality of one's

public discourse and participatory power. Yet there is no one way to organize ‘free and fair’ elections and democracies have developed substantially different ways to do so.

These themes and associated debates are sharp in Canada and the United States as despite proximity and cultural similarities, the trajectory of policies governing political speech rights / freedoms and campaign finance, has been notably distinct. Governance of the institutions of campaign finance in Canada have been relatively egalitarian, meaning that governmental actors have taken a comparatively active role in preventing affluent individuals and other entities from monopolizing the electoral process, and democratic principles have often been the cited reason for doing so. Meanwhile, a more competitive approach has been taken in the U.S., where deregulation of the types of actors allowed to participate in the political-process is far-reaching, that is despite concerns about power-dynamics. Overtime, a key question for the courts in both nations has been whether one’s resources is cause for limiting electoral participatory power, thus political power, be it a for-profit corporation, a not-for profit corporation, or particularly wealthy individuals or groups.

The concept of identity is important in this thesis . I emphasize that corporate identity is valuable for explaining how rules governing campaign finance are shaped by the dialogue between courts and legislatures. In my approach corporate identity is a power resource, but unlike other corporate resources such as financial wealth and modes of production, corporate identity is more directly shaped and modified by legislatures and courts. Corporate identity then is socially and discursively constructed rather than being an inherent and unchanging property of a firm that is independent of law, judicial discourse, and politics. In this thesis I discuss extensively the ways in which corporate identity is present in the interactions between courts and legislatures. This includes both my own references to corporate identity as an analytical concept, and

references to commentary on corporate identity by courts and other actors. In so doing, I use a few terms interchangeably when drawing attention to judicial characterizations which matter for institutional change in the context of campaign finance policy, namely identity, legal identity, political identity, corporate identity, wealthy actor, and the corporate form. The term corporate personhood already exists in American judicial thought and legal literature with two common understandings, and while it does appear in this research, this thesis does not attempt to resolve the debate about it; rather, the focus is on the characterization of its understanding by the courts to address the research questions.

There is clear motivation for analyzing money in politics as it is of clear significance for democratic governments, determining the most essential elements of democracy like who may be involved in the electoral processes, political power, timelines for voters to hear information, contribution and content restrictions, and transparency in the electoral process (Joslyn & Markel, 2000). These things are further important as the exchange of ideas and knowledge is inseparable from voter competence and electoral competition. At its full potential, political speech may be applied to a range of activities in support of or against a candidate, such as buying online ads, television and print advertisements, going door to door, running phone banks and contributing to other associated political organizations (Lee, Valde, Brickner, Keith, 2016). This motivates the following dilemma: unrestrained freedom of speech can undermine political equality (when there is commodification in the electoral process), while the pursuit of equality through the regulation of campaign finance will restrict freedom of speech to some degree, that is the bedrock of democratic self-governance (Ewing, 1992). Commodification here refers to a likeness with all commodities, that is goods and services allocated along lines of one's ability to pay, which is a function of one's income and other sources of capital such as credit (Kuhner, 2014, p. 59). As a

commodity then, and as Kuhner (2014, p. 59) explains, speech holds a "expressive value" where it is a function of how many people the speech is projected to reach, the persuasiveness of the packaging surrounding it, and the gains expected to flow from persuading listeners. Once speech is commodified in this way, freedom requires that the government refrain from regulating individual choices as to start buying and selling (Kuhner, 2014, p. 59). More generally then, "commodification" describes how a thing (like speech), or activity (like electioneering) is transformed from its inherent self into something which can by appreciated in economic terms, something recognisable within a relevant market (potentially like the electoral process) and exchanged for currency (specific sorts of messaging and or prospective legislative decisions) (Kuhner, 2014, pp. 296-197). In judicial language, this is often framed as a struggle and delicate balance between electoral integrity, political equality, and the notion of the marketplace of ideas.

The commodification of political speech and elections are common however within developed democratic nations, and so campaign finance policy – which influences elections and is informed by political speech rights / freedoms – invokes issues surrounding values such as political equality and electoral integrity. As one commentator has noted, "Elections are the backbone of our democratic system, so threats to their integrity strike at the legitimacy of the whole system" (Cole, 1991, pp. 236, 243). Yet key concepts and the scope of political speech have continued to give pause in the framing of public policies – in ideas, in jurisprudence, and in the legal responses of state-actors more broadly. In fact, the above noted dilemma presents an important trade off between freedom of speech and political equality, which governmental actors periodically confront. Accordingly, changes in campaign finance laws raise major questions at the empirical level at which philosophical choices are consequential for democratic governance, the role of money in it, and the distribution of political power via judicial outcomes. As noted by the

American constitutional law scholar, Ronald Dworkin, "money is the biggest threat to the democratic process" (1966, p. 19). Following this logic, campaign finance policy is not an end itself, rather it is a contingent means to an end, which is a healthy democratic process. This means understanding policy change in the context of campaign finance is significantly important. Sanford Levison (1985, p. 939) finds that:

"Few contemporary political issues pose more theoretical difficulties than that of the role of money in electoral politics. To what degree should individuals be free to spend their unequal resources within the political marketplace by, for example, running for office, supporting the candidacies of others, or simply communicating their views on issues of the day through such devices as paid advertising in newspapers or radio and television?" Levinson correctly highlights the role of federal legislation; however, the courts and constitutional law are equally important on that point. My research is therefore guided by a general search for reasons for different types of change in terms of campaign finance judicial outcomes and instances in which certain actors are likely to succeed; to this end, how have constitutionally protected freedom of speech rights / freedoms changed over time, and why does the answer to this matter differ in comparable nations states are questions to be addressed. In so doing, a main undercurrent is that corporate political speech rights / freedoms are not provided for in constitutional texts, hence the personification of corporations, or more exactly corporate money, for the purpose of constitutional rights / freedoms and democratic participation is principally a judicial construct engrained via jurisprudence. As constitutional law scholars Samuel Issacharoff and Richard Piles explain, "the constitution is silent on virtually all the important issues regarding elections…issues of how elections are to run and financed." (Politics as Markets, 1998, p.713), and that the constitutional text itself indicates

that its interpreters will have to make resolutions beyond the language provided for in it (Kuhner 2014, pp. 29-30).

Accordingly, the following more specific research questions motivates this thesis: What actions, actors, discourse, laws, and ideas have permeated judicial conflicts in Canada and the United States and how so? Under what conditions have the boundaries of political spending - by corporations directly or funneled through third-party groups - been impacted? And what can be gleaned from literature on historical institutionalism, dialogue theory, power resources models, and neopluralism literature in order to address these questions? In finding answers to these connected questions, logical inferences about political equality and money in politics can be established, contributing to knowledge accordingly. These questions are addressed by tracing various judicial, and legal conflicts which have influenced the development of political speech rights / freedoms and the rules governing election financing requirements over time.

1.2. Contribution to Knowledge and Introduction to Literature Review

This research is a historically grounded comparative study of the Canadian and American election campaign finance systems – looking to policy, courts, and law. This analysis contributes to understanding reasons for judicial outcomes and electioneering policy reforms and the above highlighted issue by assessing major judicial conflicts as regards campaign finance and political speech rights / freedoms in two mature democracies with federalism: Canada and the United States. Focusing on endogenously influenced change, I show that political speech rights / freedoms , money in politics, and the state of political equality are as much inter-institutional as they are social, political, and judicial. This analysis in turn advances knowledge on limits to political speech rights / freedoms , inter-governmental relations, political power, and policy change in the context of election campaign finance – and does so by assessing specific actors and institutions -

both formal and informal. The formal institutions include high courts, legislative bodies, and regulatory agencies, while the informal are the leading arguments and positions taken by the actors of the formal institutions of interest in times of political and judicial conflicts. In turn, I contribute analytical insights to build upon and further develop existing gradual institutional change theoretical frameworks, as well contribute insights to dialogue theory, neopluralism, and power resources. I focus on judicial discourse, inter-governmental dialogue, constitutional constraints, and the boundaries of political speech rights / freedoms . This study is not about the morality of money in politics nor about the 'proper' way in which 'corporate personhood' should be defined as a matter of law. Rather, it is an analysis of the institutional dynamics shaping judicial outcomes over campaign finance policy, and I accordingly examine regularized ideas and rules implied by constitutions, as well the role and power of the relevant state and non-state actors. Also, because there is research establishing a corollary relationship between campaign finance and policy outcomes, and that financing campaigns is one way in which power is wielded, the dynamics of campaign finance is hence not what this project is about (Hacker, J. S., & Pierson, P.2010; McMenamin, I. 2013; Gilens, M. 2012; Mayer, J. 2016; Reich, R. B. 2016; Bartels, L. M. 2016; Schlozman, K. L., Verba, S., & Brady, H. E. 2012), although, such research is useful in further establishing the significance of campaign finance policy. Instead, I focus on how and why some actors become situated politically and legally so that they have power to shape the electoral process as this has received much less attention. This study offers more knowledge about that because the comparative approach highlights why the composition of institutions, the performative nature of discourse, and the application of constitutions influence policy by which business or wealthy individuals may come highly influential during public discourse and in the context of elections.

I find that the political speech / expression freedoms and rights of various sorts of actors and entities, vis-à-vis ideas about democracy, have impacted judicial outcomes, constitutional rights / freedoms , and commitments to democracy differently, resulting in varying levels of electoral participatory power and potential for money in electoral systems. This means that corporate mobilization for political speech rights / freedoms only partially explains the development of campaign finance systems, particularly within the context of inter-governmental dialogue. This research shows how judicial institutions impact the boundaries of money in politics and the extent to which judicial and political actors can change the rules of campaign finance monetary limits. In the context of inter-governmental dialogue, democratic governance, and commodified elections, the mobilization of corporate and individual political speech and finances has been balanced by the power of regulatory agencies, the judiciary, and commitments to political equality, making these key determinants of campaign finance systems over the last few decades. This furthermore presents an improved understanding of political equality and democracy given that the assessments made are based on a close study of political speech rights / freedoms within the context of campaign finance systems and reforms– which are ultimately based on discrete theories of democracy themselves. Given the power dynamics among actors and institutions, the role of inter-governmental dialogue is also considered, thus adding on to empirical studies in the dialogue theory literature.

In sum, this thesis establishes an inter-disciplinary analysis of substantive questions tied to understanding potential political inequality via speech rights / freedoms and electoral policy reforms within the context of democratic governance. By theorizing from a gradual institutional change framework on the role of law and varying logics utilized by state and non-state actors upon other state and non-state actors, which have altered the state of political equality in Canada

and the United States, this research shows empirically informed findings about particular types of changes to campaign finance, and the power of actors for the electoral process. To this end, a mix of alternate literatures is drawn from, added to, and or challenged, and an introductory review of them now follows.

As Jeffrey Miyol explains, the literature on the financing of politics presents inadequate answers to theoretical questions on the origins of institutional change in this context. Hopkin (2004, p. 628) similarly finds that, ‘major comparative studies... have tended to lack a consistent theoretical framework’ and the field as a whole is ‘undertheorized’, and that because those operating in the campaign finance debate are relatively unfamiliar with the more general history of electoral reform or are largely uninterested in the practical details of political regulation, their proposals offer only a static analysis of a dynamic process. Yet it is the case that political scientists, historians, legal and jurist scholars have been studying money in elections for decades, and so there exists a vast body of inter-disciplinary literature which either deals directly with campaign finance policy/law or indirectly through research on power and policy change generally. This study integrates some of these insights and more to better understand the relationship between participation in elections, constitutionalism, courts, and changes in campaign finance policy and law, thus responding to gaps in current research.

The central part of this thesis will be developed with reference to concepts familiar to historical institutional but focusing on the gradual institutional change line of thought within it. While the historical institutionalism literature is vast, the approach of focusing on gradual institutional aims to describe policy change by looking to slow-moving, endogenous processes whereby actors work within existing conditions and general institutional ambiguities to affect change in a direction favorable to their interests via strategically engaging with formal and

informal institutions through concrete temporal steps. In this regard, researchers such as Hacker (2004), Thelen (2003, 2004), Streeck and Thelen (2005), and Mahoney and Thelen (2010) outline a systematic theory of policy change, which gives way to a major critique of the punctuated equilibrium models, characterized by types of gradual institutional change (*displacement, layering*, *drift*, *conversion*), and three actor types (*insurrectionaries, symbionts,* and *subversives*), are identified within the literature (Streeck & Thelen 2005, 2009). Because I am interested in endogenously led over-time policy change, I follow the logic of this framework and consider my findings according to it to evaluate and determine the ways in which powerful actors, again human and the more obstruse corporate actors, mobilize power resources to effect change in the context of campaign finance policy more completely. In this way, the theory will be shown to have more extensive application and explanatory power than currently thought, while also being in part problematized. The properties of institutions which permit endogenously driven change, the types of strategies which flourish in identifiable institutional environments, and which 'types' of actors are likely to succeed are made evident.

Dialogue-theory literature also contributes to this research as the theory has utility for realizing how politically, legally, and socially significant judicial and policy decisions are made within the context of federalism as relates to election policy. Dialogue theory recognizes that while any given policy originates in the legislative branch, it is often the case that it becomes a challenged piece of law before high courts, where it in turn ends end up back with legislators, and again back and forth – in other words, it is often pushed into dialogue. Emmett Macfarlane (2012, p. 40) argues that "little systematic empirical research has been conducted that evaluates the extent to which dialogue truly offers a middle road between legislative and judicial when it comes to rights / freedoms " – and to fill in this gap and more, I review and lean into the body of

thought. As chapter 4 and 5 develops, accounting for the formalities of judicial conflicts, that is where discourse filters through the structures of government, is aptly analyzed through dialogue theory; and indeed, there are formal inter-governmental interactions and dialogue which do affect campaign finance reforms and so we need to capture this dynamic to get the full context and development of the two electoral systems.

While dialogue theory is about understanding unities and tensions in constitutional systems of government where divisions of power exist, and dialogue must occur. However, the role of regulatory bodies is inadequately addressed in current accounts, which marks a meaningful oversight to the literature since it seeks to address who has the last word on policy. More specifically, as my case studies demonstrate, regulatory actors can serve as an influential intermediary in policy, meaning who has the final say may actually come down to practical administration as carried out but administration bodies, such as the Federal Election Commission (FEC) in the U.S. In this way, drawing attention to these actors is important as they are essential to the issues and topics discussed in the literature, again making for oversight. In this way, campaign finance reform shows that inter-governmental dialogue goes beyond what current theorizations suggests since the literature generally does not account for regulatory entities that administer and enforce rules. This creates analytical space to theorize about the distribution of power and performativity of the dialogue utilized by various levels of government actors. More particularly, it is during inter-governmental exchanges that the mechanisms of government are most tried and tested, such as through the application of section 1. of the Canadian *Charter of Rights and Freedoms*, and the record shows complexities of inter-governmental dialogue, beyond what the theory currently suggests. As Roach points out: “At an empirical level, we need a better understanding of when and why legislatures accept certain judicial decisions. This will increasingly take those interested

in dialogic judicial review into the realm of case studies of the interaction of the judicial and legislative processes (2004, p. 52). This research speaks to this debate by looking at the inter-governmental and civic-governmental dialogue which have been instructive in shaping the gradual institutional change of campaign finance policy, and so this case study contributes to an empirical understanding of dialogue theory accordingly.

The final thread comes from a critical assessment of the neo-pluralist line of reasoning, together with the application of the power resources model (Korpi 1983, 1985, 2000). Neopluralism shows that democratic society enables political participation among many competing groups, and as such the literature is concerned with explaining the distribution of, and reasons for, varying degrees of political power in geo-political spaces. It is argued that relative political equality is somewhat overarching, however business is said to have the most sway by essence of the broader-market oriented system which itself means that business has extraordinary power and influence over the whole of the economy (Lindblom, 1982: 326-327). Without rejecting these claims, an analysis of the consequences of political speech questions, that is as have been resolved by the judicial and legislative branches overtime, shows that it makes sense to revise or add to such existing explanations for political inequality (that is business's extraordinary level) – of influence particularly due to the inclusion and influence of certain politically and legally recognized identities in the context of campaign finance policy. In making this point, I draw on a revised view of the power resources model. The model identifies two main assets, or power resources, that actors bring into distributive conflicts to assert their interests and determine the distribution of things, namely, 1) capital and the control over the means of production, and 2) human capital – labor power, education and occupational skills (Korpi 2003). Without rejecting these, identity also fits-well within the framework's general approach because one's legal

identity is inherently brought to bear on distributive conflicts where constitutional speech rights / freedoms / interests are asserted.

This is the case as legal standing to claim speech rights / freedoms and or participate in the electoral process are based off competing inter-governmental conceptualizations concerning identity, and in particular the risks that some may pose to democracy in the context of market-ized elections and potentially commodified speech. Legal standing has come under question in terms of actors and entities seeking to engage in politics, hence making legal recognition for the purpose campaign finance pivotal for ones right to participate in the electoral process. While legal recognition may increase plurality, it can on the other hand undermine political equality precisely because of the inclusion of actors such as corporations or actions such as speech – as either may bring concentrations of money and or reduce transparency in politics. By challenging narrow conceptions of power resources accordingly, this research builds upon our existing knowledge about the ways in which money, may enter and influence political equality and the democratic process.

The question of political identity vis-a-vis electoral participation comes alongside principally judicial conceptualizations of democracy and whether speech is money, and so an analysis of judicial distributive conflict as advanced here draws out how the power resources of certain identities are conceptualized, regulated, and matter for the purpose of possessing constitutional speech rights / freedoms so to participate in the electoral process. This highlights that while some sources of power are widely acknowledged, such as political power via the right to vote and power over modes of production, political identity is an additional power source relevant to explaining policy change and the distribution of political equality as realized through monetary expenditures in campaign finance systems (Korpi, Pettigrew 1972, pp. 187-204.). This backdrop

will be shown to signify contexts that may offset meaningful political equality, or pluralism. This in turn demonstrates important actualities that problematize neo-pluralists' understanding of inequality in otherwise democratic societies, thus presenting reasons which extend past prominent explanations for the distribution of political power. In sum, this updated account of power resources problematizes traditional perspectives that assign businesses extraordinary power because of their economic-position in market-oriented societies, (Cobb, 1983; Smith, 1990; Lindblom, 1982; 2002, Presthus, 1973; Paltiel 1989; Dahl, 1961; 1973) and by further understanding the reasons for the relative power of actors and a way in which they can advance their interests, knowledge about the distribution of political equality in democratic society is progressed.

Overall, this thesis makes an original theoretical contribution by drawing together the above outlined insights and by suspending the idea that campaign finance policy is basically about the supremacy of courts, the will of legislators, corporate personhood, or relevant legislation, as common understandings emphasize. Through an analysis of inter-governmental dialogue, judicial discourse, and constitutional constraints, this thesis shows instead that, the campaign finance policy is propagated through judicial conflicts of political significance wherein state actors, such as judges, the Federal Elections Commission, or Canada's Chief Electoral Officer, engage in dialogue to reconsider and redefine policies that are essentially about political equality in a constitutional democracy and the political speech rights / freedoms of things and people. By analyzing the process of historical institutional change that happens through judicial conflicts about money in politics, and by being attentive to inter-governmental dialogue, I can furthermore show how key concepts related to change apply to campaign finance, and how these concepts need to be redefined.

1.3 Organization of Thesis

The balance of this thesis is organised as follows. Chapter 2 provides a comprehensive literature review characterized by a wide set of literature which either deal with campaign finance or which could be applied to it because of attention paid to large scale policy change. The literature review will significantly reveal the current state of understanding of campaign finance reforms, and it will demonstrate the short falls of the accounts, both collectively and when taken individually. This also includes literature review of research which deals with the topic of money in politics broadly, political speech rights / freedoms law, and issues with campaign finance policy and policy change. The entirety of this review will include comment on the short falls, oversights, and general limits to the respective literatures and note how the approach in this thesis fill in some of their gaps. Next chapter 3 which is broken down into two parts. The first part explains the research design, case selection criteria, and methodology. Next, the second part of the third chapter is comprised of the analytical approach, which outlines the original theoretical framework by presenting a review and critical analysis of four literatures which are integrated and illustrated to have novel application in the context of campaign finance judicial outcomes , namely, neopluralism, gradual institutional change, dialogue theory and power resources. Chapter 3 thus contributes to further outlining the original theoretical contribution, which is more fully illustrated in chapter 4, 5, and 6. The development of the two campaign finance systems is then charted in chapters 4 and 5 respectively through a close detailed analysis using process tracing and critical discourse analysis, focusing on major judicial conflicts in campaign finance policy. An analysis of the American cases (chapter 4) is followed by an alike review of the Canadian cases (chapter 5). The concepts developed under the gradual institutional change research are applied to the facts and circumstances of cases in turn, and conclusions are drawn as to their

fit in the context of the given campaign finance political speech conflict. Chapter 6 draws select comparisons, summarize main findings, and speaks to contributions to knowledge by providing updated insights and suggested modifications to gradual institutional change framework. The implications and significance of what has been shown regarding both the mix of theories used and regarding the consequences of the conflicts considered are also explained. This final chapter concludes with reflection on generalizability and future research.

Chapter 2: Literature Review

2.1 Introduction

The literature on campaign finance is extensive and does not come from one field or approach but rather many, such as constitutional law, public opinion research, political and democratic theory, institutionalist approaches, as well more general debates and points of justification about campaign finance reform, and more particularly about equating money with political speech. This chapter introduces the theoretical framework by way of reviewing and summarizing a handful of literatures, some of which deal directly with campaign finance policy and others which seek to understand large scale policy reform and distributive conflicts generally. While these literatures explain many aspects to campaign finance reform and electioneering, they answer questions different from those addressed here, as outlined respectively below. The chapter also further develops my theoretical approach.

2.2 Political Science Research: Explaining Distributive-Conflicts and Policy Change

2.2.1 Campaign Finance as a Matter of Public Opinion

The literature on public opinion addresses policy change in the context of election campaign finance. The contention that public opinion influences public policy is not a highly controversial one, and studying public opinion is useful because it informs theoretical and empirical knowledge on topics such as democracy and the currency of policy change. Findings in the public opinion literature are inconsistent. Some studies find public opinion to have a significant and enduring effect (Soroka, S. N., & Wlezien, 2010; Burnstein 2003; Wlezien 1996; Page and Shapiro, 1983), and others suggest an insignificant or declining impact, or inequality in terms of

which opinions receives greatest government responsiveness, especially for with a lack of public congruence on a saliant topic for instance (Monroe 1998; Gilens and Page, 2014; Page Bartels and Seawright, 2013; Primo 2002; Shapiro, 2011; Petry, 1999). In this way, there is a theme suggests that public opinion does not overall pervade policy choices and that the impact of public opinion is not equal among all participants but rather tends to be more influential when from economic elites with principally business-oriented interests. What is more, some studies show a tendency for average citizens to shadow the opinions of elite. (Page and Shapiro, 1983, Gilens, 2005; Gilens and Page, 2014; Bennett, W. L., & Iyengar, 2008; Page Bartels and Seawright 2013, Primo, 2002; Page, 1994; Shapiro, 2011, Pierson and Hacker, 2010, Pfau et. al. 2001; Manza and Cook, 2002; Gilens 2012; Ferguson, T. 1995; Petry 1999; Hartley and Russett, 1992).

Notably, understanding the significance of public opinion is methodologically challenging in part because of data availability and complexity given the context of such studies in which it is hard to control for alternative independent variables (Page 1994; Petry and Mendelson 2004; Burstein, 2003). Some key reasons for possibility discrepancies concern issues of causality and measurement both which make determining if public opinion is modus for government decision-making a challenging task. Likewise, it is difficult to parse the paradox which results from the reciprocal relationship were policy influence's opinion and vice versa. Accordingly, it is reasonable given these factors that our capacity to draw out causal inferences is not straightforward. As a result, realizing the extent of impact with other forms of influence is complicated, even while the steps to gather data on public opinion may be relatively straightforward for instance through polling. (Soroka, S. N., & Wlezien; 2010, Paige, 2004 Burnstein, 2003; Page, Shapiro and Dempsey, 1987; Edelman, 1964; Wise, 1973; McConnelln, 1970; Berinsky, 1999). However, it is important to note that to some extent, these concerns are mitigated or at least accounted for by

way of public opinion research which is characterized by mixed methods – quantitative with qualitative, longitudinal analyses, attention to context, and large sample sizes such that the internal and external validity of studies are strengthened. Those analyses which do find a strong relationship between government responsiveness point to the importance of subject matter (salience), issue persistence, and also that opinion is conditioned by factors more related to individual traits such as ones level of education, religion, ethnicity, social views, or level of wealth (Petry and Mendelson, 2004; Persily and Lammie, 2004; Monroe, 1998; Bernstein, 2003; Petry, 1999; Bennett and Iyengar, 2008, Ferguson, 1995; Block, 2007; Rogers and Ferguson, 1986; Shapiro and Dempsey, G. R. 1987; Page and Shapiro, 1983, 2004; Edelman, 1964; McConnelln 1970).

Studies have established that the public favors campaign finance reform, specifically as relates to reducing corruption, unequal influence, secrecy and improving overall legitimacy. A 2018 study by the Center for Public Integrity found that the public wanted lawmakers to limit contributions, to disregard *Citizens United*, and to improve transparency by amending disclosure requirements. Canadian studies also find similar trends but place less emphasis on corporate activity. (Primo, 2002; Persily and Lammie, 2004; Bowler and Donovan, 2016; Jorgensen, Song and Jones, 2018; Hacker and Pierson, 2010; Mayer, 2001; Block ,2007; Bartels, 2016; Page, Bartels and Seawright, 2014). Likewise, a 2018 study by the Pew Research Center similarly finds a negative correlation between public opinion and campaign finance reform, meaning as public opinion support reform because of the effects money has on the political system, reforms come - if at all - contra public opinion. The Center further highlights that despite peaks in fundraising, voter turnout remains low, and yet the presence of money in the system persists and at times expands, and indeed history shows that the rules of campaign finance institutions have at times diverged from such views.

While some discuss institutional design, including campaign finance, the ways in which settings may influence the transferring of opinions are relatively less understood. Rather, the accounts more straightforwardly acknowledge the significance of institutional avenues for public opinion as an approach consistent with democracy (Burstein, 2003; Soroka and Wlezien, 1995, 2004; McMenamin, 2013; Gilens, M. 2012, Mayer, J., 2016; Reich, R. B., 2016; Bartels, L. M. 2016; Schlozman, K. L., Verba, S., & Brady, H. E, 2012). However, there are factors not accounted for in the literature, which add on to understanding such topics of interest. As further unpacked below, two main omissions come from the structure and underpinnings of campaign finance system and constitutional law; in particular, this includes the following: that the wants of the public concerning campaign finance reforms may not be realized because such reforms will impinge on the constitutional speech rights / freedoms of others including corporations. Secondly, and related to the prior point, electioneering is a form of constitutionally protected speech, which is presumably a reflection of financers opinions/wants, meaning the dissemination of certain opinions may be more pervasive even though it may be the opinion of a relatively small pool of people or entities. These two arguments build upon existing explanations, such as descriptions about the relevance of institutional setting, as noted above, by showing that it is the case that institutional designs lead to situations where actors may be more inclined to respond to some, that officials may feel constrain or essentially be compelled to take money, and that constitutional rights / freedoms effect the boundaries of campaign finance reforms. Overall, this means that reasons for which public opinion is said to be influential are not entirely distinguishable; and that institutional context and the power of change agents are insufficiently brought to light, particularly as relates to constitutionalizing practices.

To fully appreciate the first point requires accounting for the effects of legal identity and the court as a veto point as these together can lead to decisions which effect the boundaries of change in the context of campaign finance policy. Where the consequence of a successful constitutional case means the expansion of political speech rights / freedoms , such as raising contribution limits or equating money with speech, then policymakers can become limited in the types of reforms they can pass in order to stay within the bounds of constitutional law. In this way, research may in turn better control for independent variables, such as messages from the media, salience, or timing. Examples of this include National Citizens' Coalition Inc. v. Canada A.G (1984) and First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1976). Related to this point is the fact the public opinion literature does not explicitly account for the codified opinion of justices who make such constitutional findings, and not evaluating the public opinion of these officials, that is who effect policy change through the bindingness of their opinions, is a weakness of the literature. Though objectivity is the goal on the part of Justices, these actors are nonetheless members of the public. For these reasons, the public opinion literature has important omissions, and it would have greater authority if it went further by accounting for the constitutional rights / freedoms of actors ,such as elites and corporations.

On the second point, it is notable that speech rights / freedoms (or the distribution of opinions) via campaign finance are known to pervade all policy areas given that the issues politicians run on need not be confined to any one issue and so the presence of money in politics could affect policy decisions in any area of policy. This literature would be strengthened by applying political speech in the context of electioneering as one of the literature's measurements of opinion – meaning to document and assess whose, how, and when political voices are ushered into political avenues, the effects thereof, and the ways in which different forms of speech – that is

opinions – influence policy. To recap, the literature currently takes a somewhat narrow approach to the study of public opinion and demonstrates a partially flawed approach to the concept or implications of public opinion, and so 'public opinion' could go beyond the ways it is regularly understood in the literature, such as by voting patterns, interviews, and surveys. Nevertheless, these oversights could be at least in part be resolved first, by expanding the conceptualization of public opinion as something which can be realized as political speech through monetary electioneering, realized through spending, which effects capacity to solicit responsiveness from policy makers or to sway the broader public; and second, by accounting for implications of successful political speech rights / freedoms court cases, as these have been shown to solidify freedoms of individuals and entities in a manner which limits campaign finance reforms.

2.2.2 Campaign Contributions and Policy Favors

The relationship between campaign contributions and policy favors is another area of research which deals with the topic of money in politics in terms of campaign finance policy. It includes looking for correlations between campaign finance and legislative change. Important methodological advances have been made in the empirical analysis of the consequences of campaign spending and eventual policy-outcomes. Political scientists are divided about exactly how much influence campaign contributions have, and while some such as Kalla and Broockman (2016) emphasize the difficulty of this inquiry, some point to relatively direct consequences while others do not, but most understand that campaign expenditures have some degree of influence (Powell and Wilcox; 2010). It is also often underscored that it is business with the most to gain from legislative or regulatory change, which often engages the most in political activity (Milyo, 1999; Hill, 2013; Campante, 2011; Schlozman, Verba and Brady, 2012; Bonica, 2013, Masters and Keim, 1985; Hill, Lockhart, and Van Ness, 2013). Moreover, several studies

indicate that businesses in highly regulated industries are the most likely to make contributions, and that it is such highly regulated industries that have the highest payoffs from distinct policy decisions (Powell and Wilcox, 2010; Hart, 2001; Hill, 2013; Masters and Keim, 1985).

The benefits targeted by contributors vary but several researchers have found that donations often coincide with donors winning government contracts, attaining lower tax rates, and advantageous trade outcomes and bank regulations (Stratmann, 2002, Baldwin and Magee 2000; Hill 2013; Chirink and Wilson 1908, Witko 2011, Tollison, 2012). For instance, one study finds that federal contracts were more likely to be awarded to firms that have given federal campaigns higher contributions, even after controlling for previous contracts awards (Witko, 2011). Research by Baldwin and Magee (2000) found evidence that contributions from the international trade sector influenced legislators' votes on the NAFTA and Uruguay Round bills; and that group contributions were associated with votes against freer trade while business contributions were associated with votes in favor of freer trade. Grossman, Gene and Helpman (1996) employ a game-theory analysis to parliamentary systems and show in part that special interests have success in tailoring their contributions schedules based on the stage of an election cycle and on the extent of voter awareness so to achieve eventual policy endorsement. Campante (2011) developed a quantitative model on US presidential elections and finds that, while respective contributions have a negligible impact, there is still an interaction between contributions and votes which leads to an endogenous wealth bias in the political process. Campante connects this finding to undermine the standard median-voter prediction – that more inequality produces redistribution – by showing that high inequality generally (demonstrated by scale of contributions) means advantage of wealthier individuals, who produce contributions which encourage parties to move their platforms closer to their preferred positions, thus shifting the political system further in

favor of the rich. Conversely, Ansolebehere, de Figueirdo, and Snyder's (2003) survey of the empirical literature on campaign finance and the legislators' decisions more generally finds that over 75% of empirical research is inconclusive or reaches opposite conclusions (exception see Stratmann, 2005).

These accounts are empirically significant because they bring attention to potential inequality, corruption, accountability, and the undermining of democracy. However, they address an area related to campaign finance separate from that which is addressed here. That research focuses on the consequences of campaigning and campaign finance systems from the perspective of democratic governance, and aims to gauge the extent of influence, but it is not concerned with explaining how the policies which provide (or not) for such consequences come about. I however take up explaining how factors that literature is interested in can come about, specifically by way of judicial outcomes. In so doing, I highlight the ideas and judicial principles and processes that exactly speak to political equality and notions about democracy, and thus signify and describe an institutional context whereby the ability for policy favors can be influenced; in other words, there is a relationship between judicial outcomes and relevant legislative reforms. In this way, my research builds upon understanding contexts which can facilitate policy favors, but also connects with the literature on policy favors they both underscore factors related to democratic governance and political equality, hence giving credence to the value of studying the how / why in terms of campaign finance policy.

2.2.3 Corruption and the Anti-Corruption Rationale

The corruption question has weighed heavily in public and scholarly debates over campaign finance policy, which comes as no surprise since elections are the basis of democracy and societal aspirations for electoral integrity. The issue of corruption in the context of election

campaign finance is simply about if money corrupts the electoral process, which is to ask, are electoral systems working improperly because there is opportunity for government or prospective government officials to receive funds from private individuals or corporations in exchange for policy favors? Will candidates face undue pressure because of this? These questions concern not only corruption from transpiring, but also if the appearance of corruption comes about.

The literature on corruption can be broken into two categories. The first involves a more technical question, that is whether campaign contributions are tantamount to or the functional equivalent to bribes; this is usually referred to by legal scholars as in legislative and judicial debate as the "quid pro quo" standard (Sustein, 1994; Sorauf, 1994 . Many adopt the view that contributions are, or at least have the strong potential to appear to be, the functional equivalent of bribes; the argument is normally framed in this way when arguing for stricter disclosure laws and reducing the amount of money permitted to flow through the electoral process (Lownstein, 1996; Milyo 1986). On the other hand, Jeffrey Milyo writing for the Library of Economics and Liberty explains the common reasons why campaign contributions are said not to be like bribes: (1) federal law limits contribution amounts to federal candidates which sets up conditions generally not alike a situation of bribery wherein a briber would have more flexibility to set terms; (2) bribery and influence hawking are illegal, whereas contributions are broadly speaking the opposite (3) policy-making is a collective activity which would seem to mean a large sum of individual legislators would need to be bribed in order to influence policy-outcomes, hence making the assertion illogical; (4) related to the prior complexity is the point that there is an existence of competing interests which can substantially raise the cost of trying to buy a legislative majority; (5) Bribes are unenforceable and so if a campaign is unsuccessful, there is no legal remedy for money spent (Kruger, 1974; Tullock,1967).

Research on corruption within the first category noted above has the starting point of positive law, meaning the literature interprets and applies jurisprudence, statutory and constitutional law to sort out and reveal if in fact contributions are tantamount to bribes. The literature showcases a substantial amount of research is based on American case studies, while there is relatively less such research / literature drawn from the Canada context. This is the case because of important differences in the respective constitutional orders, specifically First Amendment jurisprudence wherein in the U.S., there is a long history of equating constitutionally protected political speech with money which in turn creates comparatively grander opportunities for bribery since political speech, again, is a constitutional right. In Canada, by contrast, this dimension of corruption as bribery has taken a lesser role since spending money in the electoral process has overall received less constitutional protection. Also, state subsidized tax credits have a more prominent role, thus reducing opportunities wherein contributions can be exchanged for policy favors and less potential for bribery in its customary sense. The question of bribery is of special interest when deliberating rules around large donations as it is donations of significant scale which segues into concerns about policy favors or undue influence because of donations. The common conception is that keeping contribution limits relatively low will overall offset accusations of or actual bribery since the risk is high for candidates and parties while the return of small contributions is presumably low.

Because I am interested in who, to what extent, and how one may participate in the electoral process, the question of whether contributions are the functional equivalent of a bribe is of another matter. This analysis does not go so far as to aim to define corruption in law. Similarly, if a court were to conclude that contributions are bribes, then controversies over who, how, and to what extent one may donate would become immaterial since bribes are illegal – the

assumption being contributions would be out lawed alike thus removing the basis for my study. Clearly, if bribery were legal then this calculation would change, but for now this is obviously not the case. Consequently, this side of the literature address a topic generally outside the scope of this thesis .

The second category within the literature on corruption vis-à-vis campaign finance is somewhat wider – and like the above – it resonates more in the United States than Canada. Rather than trying to figure out if contributions are bribes and are therefore an act of unlawful corruption, this aspect is about the "anti-corruption rationale" which has been present in campaign finance conflicts – scholarly, judicial, and political. Simply put, the anti-corruption rationale or argument is usually framed as such. First, nation-states have an interest in preventing corruption or its appearance in order to maintain electoral integrity, the market place of ideas, and uphold trust and truth in the system (as well exposing contribution through campaign disclosure laws). Second, candidates and parties have an interest in avoiding the appearance of corruption since it can undermine their candidacy. Third, voters have a right to place a candidate on an ideological spectrum through subjective judgements, but arguably this could be compromised if corruption was ongoing (Kang, 2013; Spelliscy, 2011, Heerwig & Shaw, 2013; Briffault, 2010). The first of these three is frequently set against questions of government while the second and third reasons are talking about with democratic values, institutions, and elections (Smith, 1995; Shapiro, 1989, Marshall 1999; Kang, 2013; Spelliscy, 2011). Addressing and understanding the rationale by considering varying interests is important because it acknowledges the impact corruption can have on types of segments of the population and thus why the rationale matters, though the topics of why and for who the anti-corruption rationale pertains to is separate from the scope of this research.

However, it is also notable that the judicial branch has in their judgements leaned on the anti-corruption rationale (or its counter parts the 'equalization' and 'informed voted' rationales for instance) when arguing in favor of tightening campaign finance rules, specifically limiting the bounds of free speech once money is equated with speech and when calling for strong disclosure limits so that the electoral process can have transparency and accountability. This makes this literature on corruption important because it draws out major inter-subjective judgments which have indeed influenced the development of campaign finance reform and as such the literature is like issues, I am addressing in this way. While the anti-corruption rationale may sometimes have been relevant in judicial cases of interest, it was alongside other rationales and topics for the court to decide, as demonstrated in the Chapter 4 and 5 case studies. This includes issues related to equalization, defining political speech, judicial views on democracy, regulatory affairs, and legal standing to participate in a court claim related to campaign finance, for instance. Accordingly, the literature is partial as the studies do not address such dynamics like regulatory action contributing to campaign finance policy in practice. Thus, while not rejecting the substantial importance of such accounts, I argue that decisions about campaign finance starts with a discussion about the distribution of power in a democracy and that those discussions are fundamentally conditioned by democratic values, ideas about the distribution of economic resources, and constitutional restraints that effect judicial thought and governmental processes and dialogue. Accordingly, this research will expand on anti corruption literature, as well build on it by highlighting instances where the rationale strongly intersects with the variables that I underscore in the analysis of chapter 4 and 5. The ways in which the anti-corruption rationale has waxed and waned, and comparatively gained traction during different eras, further suggests that explanations about actual policy change as regards the electoral process is far more complex than just the anti-

corruption rationale question, contingent, and requires the inclusion of additional variables such as the judicial construction of identity and speech rights / freedoms .

2.2.4 Electoral Ambitions and Legislative Actions

Some scholars offer clarifications about campaign finance reform by evaluating the inevitable conflict of interest that exists as it is elected persons shaping the rules that can in time affect their incumbency from competitors (La Raja, 2008). Marshall (2000) identifies this in stating that the "campaign reform project" continues to struggle because it fails to come to grips with campaign finance reform's own limitations, and campaign finance reform therefore poses perplexing problems of public policy and constitutional law. For Zim Nwokora (2014), instead of lawmakers acting beyond the confines of law, lawmakers are incentivised to instead craft laws that prolong their incumbency, potentially through enacting competition-diminishing reforms. Michael Klarman (1996) similarly speaks to this with the concept of "legislative entrenchment"; that is the desire for one to maintain their hold on office such that rather than acting for the preferences of their constituencies, they instead make decisions to secure their own ambitions and electoral prospects. BeVier (1994) similarity explains that legislators who author and pass campaign regulations are the ones who must comply with those regulations in the next election, and this dynamic impedes meaningful reform. Based on this, BeVier argues there is an appropriate "premise of distrust" when considering campaign finance policy because of the inherent conflict that exists in this discrete area of policy. In discussing the highly influential *Federal Election Campaign Act* (*FECA*) of 1974, Sam Kazman comments that the amendments gave incumbents a competitive advantage, and that *FECA* amendments have contributed to a monopoly of political incumbency. From the perspective of public choice theorists, actors in the legislative arenas should be presumed to be acting to maintain their primary objective of being re-elected (Stearns

1992, p. 400). As Lisa Tharpe (1998) puts it, public choice theory teaches us that the players in the legislative arena should be presumed to be acting as "rational self-interest maximizers." The notion of electoral ambitions and legislative actions has also been connected to inter-party conflicts and interests, specifically in terms of legislators acting in concert when making decisions about campaign finance regulations even when the question at hand may undermine one's individual prospects. This is also said to be true on ideological and normative grounds. As Nwokora (2012) argues, a deeper ideological divide also decreases a party's ability to negotiate or move towards a balance in reforms, making parties more likely to maximize even short-term benefits by acting closely together. Conversely, others cast doubt on these positions in stating, but without fully understanding why, that law makers sometimes enact reforms that increase their electoral vulnerability because they enact reforms that make elections more competitive and intricate (Dennis 1998, pp. 641-649; La Raja 2008, p. 83; Scarrow 2004, p. 654). Those assessing electoral politics from this view this find that legislators may be inclined to support a regulation which undermines their own re-elections if they believe that the benefits to them of voting against the reform would be outweighed by damage made to their reputation should they oppose a measure (Williams 1999); thus from this view it is public opinion - which historically trends in support of campaign finance reform - that can be an important pull factor that leads elected officials to vote for reforms that may ultimately detract from future candidacy.

The insight of this research accomplishes the tasks of drawing attention to issues associated with conflicts of interest and speaks to the responsiveness, or lack thereof, on the part of elected officials. It is also important for understanding the rise of campaign finance policy within the context of one branch of government, though it does not go so far as to situate decisions made within the wider but relevant governmental structure. While this is not to say that the

literature is misleading, it is inadequate for understanding the development of campaign finance policy over time. In contrast to narrowing in on electoral ambitions as cause for legislative actions then, I address legislation from a slightly differently angle by focusing on campaign finance reforms as derived from judicial activities vis-a-vis existing legislation – that is those already made. This is an additional important layer for understanding policy change because even if personal ambitions do contribute to votes cast and thus reforms made, the legislative process and the trajectory of campaign finance policy overtime has been much more dynamic and is sometimes a product of inter-governmental conflicts. In this regard, and to get at the historical interchange which has been a significant determinant of campaign finance reforms, it is fair to assess a piece of legislation "as is" should one seek to understand how the power implications of institutions embedded in the whole of government may shape campaign finance reforms. This means that although insights of the literature may on one level impact factors I am considering, such as the contents of a law before a judicial or regulatory conflict over it, explaining individual votes cast is somewhat outside of understanding inter-branch conflicts and how corporate identity and the power of it over the electoral process is formulated over time.

The issue of courts and legislative action is not however completely overlooked in the literature. Klarman (1996) argues that in order to address the entrenchment problem, legislators would need to be compelled to action through judicial deliberation. Though he is careful to note that, at least under the American constitutional order, it is highly unlikely that courts will effectively address the entrenchment problem. The central point of this claim is that the vested interests of legislators are not palpably at the heart of campaign finance conflicts and so it is unlikely that a court would postulate accordingly while adjudicating over reforms, that is unlike discussion about say political equality, corporate personhood, or corruption. Given this, it useful to

evaluate the significance and role of concepts that courts do often reference, like political equality and corporate personhood, and to situate the relevance of them in the broader context in which policies are formed. This includes bringing in observations about constitutional mechanisms which generally enable courts to supersede legislative will, in which case identifying vested interests of elected officials would offer minimal explanation.

2.2.5 Public Versus Private Financing

Other political science research on the electoral process considers types of funding regimes, that is public funding systems as opposed to a private financing approach. Public funding is a large concept, but typically it is used to mean any use of public resources to funds or to reduce the campaign costs of, candidates and political parties (Briffault, 1999; Seidle, 1989; Young and Jansen, 2011). This could include "tax credits or tax deductions for campaign contributions, public assumption of some of the costs of campaigning….free use of public rooms or schools for campaign meetings, free billboards for the display of campaign messages, and free or reduced cost access to radio and television for campaign advertisements" (Briffault, 2013). Major public funding schemes in electoral politics exist in many emerging and established democracies, including both Canada and the United States. Major reforms were passed in 1974 and 1976 respectively which indeed both recognized the important merits of a public approach. However, despite this parallel, public financing has taken on a much more prominent role in the Canadian system. As set forth by the Ontario Commission on Election Expenses and developed by Adamnay and Agree (1980): public funding might be used to achieve equality of opportunity in a liberal democracy characterized by inequalities in the distribution of wealth and to make enough money available that competitive campaigns can exist. Thus, for some, public funding is described simply as a matter of fairness, equity, and to alter existing power relations. As Seidle (1991)

suggests, funding regimes arguably make a statement about shared understandings of power in a society and public funding is an avenue for the state to represent itself. Further, public financing would, it is argued, remove the allegedly corrupting influence of money, create tolerance for political pluralism, place candidates for office on equal footing, and relieve candidates of the need for constant fund-raising (Fisher, 2011; Smith 1995; Pal, 1993; Young, 2000; Carty and Eagles 2005; Eagles, 2004). Still, others argue that public funding would inappropriately involve government in the electoral process and that as a practical matter, public funding would inherently be drafted as pro-incumbent since it is such legislators who write the laws (Briffault, 1999; Malbin and Gains, 1998). Another familiar critique is that public systems reinforce the position of the major parties and treats less favorably new or smaller political parties and therefore raises the threshold for access to public money. While public funding is a important part of analyzing campaign finance, it is not the only type of policies relevant to understanding campaign finance or more broadly the participatory power of individuals and entities in the electoral process. More particularly, the public funding debate speaks to a distinct part of campaign finance - separate from the issue of campaign contributions and expenditures, that is which are the focus addressed here. Accordingly, the public funding dynamic to campaign finance is outside the scope of this study as it is the development of those policies, and how wealth factors into them, which is assessed instead. Also, studies suggest other issues with public funding, making it possibly a less important part of campaign finance policies and jurisprudence. For instance, it has been underscored that public funding made available is insufficient to run a modern campaign, that they rely on the will of taxpayers, and that reinforces pre-existing power positions of the major parties. And such concerns about public funding have been levied against the difference levels of government (Issacharoff and Karlan, 1999; Briffault, 1999; Feasby, 2007; Malbin and Gais 1998;

Pace, 1994; Briffault, 2013, Malbin, 1980, Mutch, 2016, Paltiel, 1981). For an example of reinforcing party power positions via public funding, one can detect that such policies have been based on schemes where funding is conditional on the registration of political parties, which requires a party to already hold a certain number of individuals to first be formed or that a party have a certain number of seats in the House of Commons (Elections Canada, 2020; Feasby, 2017; Briffault, 1999). Accordingly, the point that there are also distinct issues with public funding and notably that it is not something which is necessarily pursued or viewed by candidates as a promising opportunity, signifies space for an alternative focus on the development of expenditure and contribution rules in ways separate from the topic of public funding.

2.2.6 Campaign Finance in Legal Scholarship

Literature on campaign finance reform is predominantly election and campaign finance legal literature by those in the field of law, as well academic and juridical scholars, and the literature on the American campaign finance system is more extensive. Rather than investigating how the treatment of corporations for the purposes of electoral participation connects to judicial and legal commitments to democracy, or inter-governmental dialogue, legal scholarship centers on whether corporations possess, as a matter of constitutional law, freedom of speech / expression rights / freedoms . In addition, and proceeding from the analytical standpoint of legal positivism, it also addresses whether spending money in elections is akin to constitutionally protected speech and as such the legal literature is highly attentive to legally grounded (or a lack thereof) conceptualization of political speech (Hartman, 2004; Tucker, 2010). Legal (or election law) literature also analyzes the legal application of key rationales used by justices in their ruling; asking, for instance, if the anti-corruption rationale was properly interpreted and implemented (Sorauf, 1994; Alexander, 2003). This literature goes further by substantially assessing the legality to

changes in the law following a judicial decision or prospective legislative changes following one (Souraf 1994, Marshall 2000). Unlike my research, such literature is approached from the perspective of legal positivism, that is to make judgments and offer critical assessments based on adherence to a correct interpretation of the letter of the law. The overall objective then is to figure out what a correct interpretation of the law by the judiciary is, how it should be applied, and how legal amendments should proceed in order to be legally correct (Rubin, 2009; 2010; Greenfield, 2015; Haigh, 2005; Graver, 1999).

Additionally, and as introduced previously, a main focal point is to figure out corporate constitutional rights / freedoms . Specifically, within the American legal literature, identifying 'corporate personhood' from a constitutional perspective is what analysts grapple with in that regard (Blair, 2013; Winkler, 2006; Garrett 2014; *Citizens United* v. Federal Election Commission; Manne, 1979; Tucker, 2011; Rubin, 2009; Graver, 1999; Ripken, 2010; Pollman, 2011). Historically, corporate identity has been equated with "personhood" uniquely in American judicial and legislative outcomes, and this is a piece of the campaign finance policy puzzle, especially since personification means opportunities for constitutional level protections. It should come as no surprise then that the literature on the American system has paid so much attention to this variable, since proving standing in law, that is the legal right to bring suit to a court, has involved accepting that the corporate form has the same rights / freedoms and freedoms as people, thus sometimes framed as the notion of "corporate personhood". This is of importance as corporate personhood is a doctrine, meaning a creation of judicial discourse, jurisprudence, and litigants' actions – as it is not something enshrined in constitutional text. This reality is not unrelated to the confusion around the corporate form, as argued by Stepan (2013), although people know that corporations exist, that they have, and that occupies an important economic, social, and political role,

both nationally and internationally, folks still struggle to explain exactly what the corporation represents.

This uncertainty is manifested through two competing formulations of the corporate form, each with their own consequences for corporate standing in law, the state of campaign finance, electoral integrity, and the distribution of political power. The first view suggests an "artificial entity" perspective of corporations. This approach has some history in a major U.S. case of *Trustees of Dartmouth College v. Woodward* (1819) and later in *Santa Clara* (1886). In the first instance the court majority found that "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. "Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence" (Blair, 2013: 799) While there is precedence of denying corporate constitutional rights / freedoms by way of this framing, this view has essentially been eclipsed in recent decades by the second view which is described well by Tucker (2010), whom states that over time, the relatively rigid artificial entity theory evolved and softened to a "natural entity" or "aggregate theory" of corporations. Under this view, it is said that although corporations can be personified as an aggregation of shareholders rights / freedoms , they are nevertheless an entity distinct from any individual one person, hence a "natural entity" (Hessen, 1997, Winkler, 2006, Ripken, 2010, Garrett, 2014, Greenfield, 2015). Similarly, in *Santa Clara* (1886), the court held that a corporation was a person under the fourteenth amendment, and thus entitled to its protection, echoing the "natural entity" view as such. This outcome has informed some judicial theorization about corporate constitutional rights / freedoms thereafter in American campaign finance disputes; indeed, *Santa Clara* was referenced thereafter in judicial outcomes concerning corporate political speech / expression, as analyzed below, this is evidenced in landmark decisions

such as *Buckley v. Valeo* (1976) and *First National Bank of Boston v. Bellotti* (1978) (Horwitz 1985-1986).

The legal literature shows why the corporate form may matter for rules on campaigning and grapples with the fact that speech rights / freedoms are in part doctrines – based on long-standing yet not fully resolved conjectured theories of law. This scholarship is further valuable for it explains what some in the legal profession understand about the application of constitutions and for clarifying factual issues. Moreover, determining the legal standing of corporations and other actors is pivotal since doing so critically establishes those with legal electoral participatory power.

While the issue of standing in constitutional law is relevant to my research, the framework presented here deals with different issues and approaches campaign finance in a way that departs from the foregoing literature, specifically by engaging with other literatures such as historical institutionalism. More particularly, legal analyses are insufficient for explaining the development of campaign finance over time and for understanding the role of democratic governance for campaign finance judicial conflict outcomes, and makes for an over focus on say, whether courts simply interpreted and applied the law right. This also extends to the literature's goal of analyzing legal standing of corporate actors, especially since neither constitution explicitly provides for corporate constitutional speech rights / freedoms , meaning there are other factors which the literature does not intuitively aim to explain. Also, some legal scholarship examines the significance of legal standing, but some influential justice cases (such as AG v. *Big Drug Mart* Ltd. 1983 and 1985), show that judges explicitly decline to resolve this issue, yet move forward with reviewing an impugned law against constitutional rights / freedoms / freedoms, and so examining the signifignace of legal standing is limited in its application. This becomes clearer in

comparative cases discussed where change-seeking agents pursued constitutional speech rights / freedoms and framed similar issues in similar ways, but the judicial outcomes differed even in similar institutional settings. It is by investigating these disparities that insightful distinctions about the development of campaign finance systems in similar governmental structures can be found.

Related to this, there is generally also a gap in the literature about inter-governmental dialogue, which can be shown to affect the treatment of corporations for the purposes of elections. Thus, court deliberations, for instance, might be less about trying to locate corporate standing in law and more about inter-subjective ideas and vis-à-vis commitments to democracy and political equality. Despite the usefulness of the literature then, a comparative approach under the view and concepts of gradual institutional change and political science results in a more complete theorization because it underscores those corporate constitutional rights / freedoms are very important, but less important then theorized in the literature. Based on this, I suggest suspending but not rejecting this literature based on the simple point that this thesis is not about determining if, as a point of law, the artificial entity or natural entity view is a correct interpretation of constitutional and election-related law; whether constitutionally protected speech is analogous with spending money; and equally, whether corporations should legally be personified such to possess constitutional political speech rights / freedoms – and so these questions are beyond the scope of this inquiry. Rather, this research addresses ways in which institutions, ideas, policy, and inter-governmental affairs influence the political rights / freedoms of various actors. This gives way to gradual institutional change concepts used for explaining the most likely 'type' of change agent and mode of change likely to emerge and flourish in any specific institutional context, though these points of inquiry are not the impetus of legal analyses and as such they do not fully explain

electoral systems policy reforms or the distribution of political power. Likewise, the studies tend not to develop explanations attentive to the application of the logic of commodification of the electoral process and not therefore capture how such undertones shape determinations about corporate participatory power. This thesis also extends past the legal literature as it addresses not only corporate participatory power but also wealth in politics more broadly, thus going beyond the scope of that research. In this way, this study speaks to the commodification of elections and ideas about democracy in advanced democracies, however these issues are outside the focus of election law / legal scholarship research. Moreover, I am not situating analysis of corporate identity for the purposes of political rights / freedoms within the artificial or natural entity debate per se, nor am I trying to make judgments on the accuracy of legal standing.

2.2.7 Democracy and Electoral Systems

Most research on campaign finance speaks to, either directly or indirectly, principles of democratic society and theory. In common discourse, democracy has come to mean simply majority rule. Democratic theory, however, is more contested, convoluted, and has changed over time. As Held finds: “there are almost as many differences among thinkers within each of the major strands of political analysis as there are among the traditions themselves” (1996, p. 231). Part of this stems from the absence of a plainly unified conception of democracy. Some modern democratic theory relies on libertarian and egalitarian arguments to study the effect of limits on campaign contributions and expenditures, in this way grappling with liberty and equality as meta factors of democratic governance (Sunstein, 1995). On this point, Fiss (1996) argues that it is impossible to find a way to choose between liberty (that absence of restraint on freedom of speech) and equality (to participate on equal footing) and that the Constitution provides no guidance about how the conflict ought to be resolved – indeed a point which holds true for both Canada

and the United States. Fiss's solution to the unsolvable conflict between liberty and equality is to parse the concept liberty in two forms, one in which the freedom of speech is impeded by the regulation of campaign finance and one in which the freedom of speech is protected by the regulation of campaign finance. In the former, money and speech are viewed similarly, it is indeed consistent with democracy that one's wealth can correlate with the scope of and boundaries of political messaging; and in the latter scenario freedom of speech is equated with meaningful participation, and a relatively equal voice. From this view, limiting campaign finance is defendable because the alterative leads to undermining political equality (Sunstein; 1994, Ortiz,1998; Thompson, 2002; Dotan, 2004; Pasquale; 2008, Alexander; 2003; Foley; 1994, 1996). In other words, a libertarian frame of reference sees taking money out of politics, for instance by limiting contribution limits, as akin to reducing speech rights / freedoms and therefore undermining democracy. This view resonates with judicial doctrines that recognize that it is the message that matters, not the messenger. If the messenger has an extraordinary amount of wealth and the ability to severely dominant political debate, does not outweighs limiting private interests for the sake of public knowledge, content, and messenger diversity. Framed this way, the constitutional protection of free speech means that there is a presumption against the state's regulation of campaign contributions and expenditures (Baker, 2007; Prior, 2007). The egalitarian approach, by contrast, holds that the state regulation of speech is required in some instances to prevent the wealthy from monopolizing political discourse. This view focuses on concentrations of power because wealth-based differences which may translate into distortions in political discourse and in fact limited the marketplace of ideas. For Rawls (1999, pp. 197–98), the "liberties protected by the principle of participation loses much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate." Like

Rawls, Sustein (1992,1994) goes on to state such inequalities may enable the wealthy to exert greater influence on the development of legislation and informed public debate may therefore require that the government restrain certain voices to ensure that all points of view have a roughly equal opportunity of being heard (Sunstein 1992,1994). Other scholars find that the conflict between liberty and equality in a context of campaign finance is inevitable, so instead of trying to reconcile these values, it is preferable from a democratic standpoint to instantiate the conflict in law (Dawood, 2013). These accounts are useful as they can provide great theoretical and analytical insight about the normative and ontological roots of campaign finance systems and the rationales used to advance them; and as will become clearer, the aspects from the varying approaches have, in some instances, seriously guided campaign finance reform. As such, this thesis contributes to this literature by highlighting which philosophies align with which approaches to political speech rights / freedoms . However, the goal here is not to directly develop democratic theory or advance a claim of which approach is better. Likewise, understanding judgements and laws made in democratic theory helps us to describe the given system, though the literature does not go so far as to describe or explain the development of campaign finance systems, which do reflect theories of democracy, specifically as regards constitutional rights / freedoms , inter governmental dialogue, and identity as a power resource – each of which shape whether a libertarian or egalitarian approach will be applied. This means that the democratic theory literature helps to conceptualize key concepts and issues, though it does not go so far as to explain the realization of them in specifically judicial conflicts.

Chapter 3: Research Design and Analytical Approach

This chapter will provide an overview of the research design, including case selection methodology and criteria, and commentary on the analytical approach used overall and for the theoretical framework. The latter section future notes points on premises and scope.

3.1 Research Design

This is a small-N comparative study in which the cases will be researched by in-depth qualitative techniques. The sample of cases, which are bounded spatially and temporally, are western constitutional democracies, namely Canada and the United States. The population of cases (Canada and the United States) is aligned with the most-similar research design, and given the comparative factors, the findings can be more apparent accordingly. As Skocpol (1986, p.18) writes, it is the juxtaposition of nations' approaches to a given policy areas that allows relevant policy instruments to be tested. This lends well to analyzing why specific measures have been adopted and how those measures have shaped policies inherent to say, democratization. On a most basic level, both cases are Anglo-American nation states with mature and vibrant democracies; both codify many alike practices and principles such as speech and expression rights / freedoms . From an international perspective, they exercise integrity in their electoral and policy-making process. A comparative study of units across Canada and the U.S. is furthermore instructive because both have a strong tradition of judicial review whereby each branch of government ultimately works within the boundaries provided by the constitution. As Schwartz (1996, p. 17) argues, Canada and the U.S are primary comparators because of shared geography, democratic practices, and ethnic heterogeneity that often gives rise to similar problems. This choice further rests with the fact that both states are multiparty democracies, have first past-the-post electoral systems, and legislative power is vested in a bicameral structure of government (Boatright,

2009). Both countries also undertook significant changes to their campaign finance policy frameworks during the periods of study, especially in the 1970-1985 period, and in the 2000-2010 period (Dawood, 2006). While there have been recurring changes in terms of the party in charge in both cases, this is as a topic that is suspended for this research.

The units for analysis are national and sub-national level campaign finance judicial conflicts. The key criteria I applied in selecting the units include cases which include: 1) justices trying to resolve the extent to which money in politics / the commodification of elections distorts the electoral process 2) speak to if and how the identity of actors mattered for constitutional rights / freedoms ; 3) demonstrate gaps between judicial outcomes and practical administration 4) set judicial precedent for subsequent challenges in a consequential way or which relied on a case (unit) from the other cases I examine; 5) involve dialogue, about money in politics, in the context of judicial review. The cases demonstrate at least two of these criteria and the units may be drawn from federal, state, or provincial level judicial conflicts, as it is the foregoing 5 criteria which principally motivate the case selection. More broadly, the backdrop and nature of the cases involves matters such as: electioneering monetary policies, discourse on political equality and electoral integrity, as well the constitutional undercurrents of political speech rights / freedoms more generally. The approach taken here is in-line with Mill's method of most similar design as most of the independent variables have similar values between cases (countries) and the focus of this research is on explaining the differences in outcomes by the differences in select few independent random variables of interest. As a result, analyzing the units further underscores how some constitutional processes and principles, such as a section 1 analysis, contribute to the outcomes of campaign finance cases, and these can also be considered through the fourfold conceptual lens (*drift, layering, conversion, displacement*) of gradual institutional change. By

utilizing the above criteria then, I analyze and conceptually explain how money in politics, and the commodification of elections in the context of alike constitutional protections, is impacted in democratic nations for reasons beyond aspects of strict national comparative dimensions, such as tradition or culture. As addressed in section 5.1, this is analytically useful as difference in terms policy, whether it be a consequence of judicial or legislative decree, may rather straightforwardly be accounted for by pointing to different cultures amid the two based on their distinct histories – that is giving rise to Canada as a constitutional monarchy following British rule whereas the American revolution generated a Republic, presidential system (Issacharoff ,2009; Ewing, 1992; Mutch 1991 as cited in Seidle; Seifried, 2012). Accordingly, emphasis is directed to institutional constraints, dialogue between institutions, constructions about things related to money in politics by individuals in position of power like judges, and on how all these factors have affected, and continue to affect, political speech, campaign finance, and therefore democracy.

As such, I can show reasons for judicial outcomes in comparable democracies based on within case analysis, and comparative outcomes in Canada and the U.S. concerning judicial cases of money in politics and thereby distribution of electoral participatory power. Drawing on Bennet and George's contributions then, this analysis of reasons for judicial outcomes is drawn by looking at a broad spectrum of units than possible by examining one of these two comparable nation states. Rather than only comparing results overall in one country against the other, I look at how, cross-nationally, units individually dealing with akin issues generally liken with one another, and the reasons for which they do or do not – again in addition to overall trends in one country against another. This is analytically useful as it enables realizing the details as to reasons for differing twists in court conflicts, campaign finance regulation, and political speech rights / freedoms across units within the respective countries. This is done without necessarily rejecting

some culturally based differences such as the practice of deference, though while identifying judicial rationalizations and ideas about the distribution of political power which give way to practices like deference. This within case, comparative approach, is consistent with George and Bennett's discussion on integrating the two. As noted in their 2005 book: *Case Studies and Theory Development in the Social Sciences*, "the results of individual case studies, each of which employs within-case analysis, can be compared by drawing them together within a common theoretical framework without having to find two or more cases that are similar in every respect but one. (George and Bennett, 2005, p. 224). In this way, the comparison demonstrates the comparative nature and trends in judicial outcomes on campaign finance cases that deal with questions about money and participatory power in the electoral process, and practical implications thereof, as arose within comparable nation states

A further related analytical benefit of comparing many cases / judicial conflicts which deal with the same subjects in an overall fashion, instead of merely comparing cross-national outcomes, is to underscore the potential implications led by similar judicial systems as well regulatory actors. As a result, the significance of these actors, some who receive insufficient attention in institutional change and dialogue theory literature yet who are present in each nation with similar degrees of power, is shown seeing that variation in their decisions shape the practical administration of electioneering rules on the ground per unit. As George and Bennett state, "This combination of cross-case and within-case analysis greatly reduces the risks of inferential errors that can arise from using either method alone (2005, p. 292); thus, giving way to a fuller analysis, with less generalization, of the subject of money in politics in developed democratic nation states. As shown through discussions of the distinct views taken by powerful actors in Canada and the U.S. respectively in chapters 4 and 5, commonly only few independent variables of

interest, such as the absence of entrenched corporate constitutional rights / freedoms / freedoms and how political equality is characterized, are similar across Canada, similar across the U.S., but different between these nations. And differences on these independent variables are associated with different outcomes. It is important to note that in a select few court cases, the independent variables of interest take values similar to those common in the alternate nation, resulting in similar outcomes to the alternate state. This further supports the argument that changes in these variables of interest are associated with the changes in outcomes (judicial outcomes).

The utilization of many cases and within case analysis is thus also analytically valuable because as evidenced in chapter 4 and 5, there are, in addition to (at times) similar outcomes, contrasting outcomes within both nations respectively because of democratic philosophies and again the actions of regulatory actors. It is therefore useful to have both cases with many units, as the actions of the important actors, such as judges, and ideas varies within each case differing within units. As such, there are details to be realized concerning these actors and their ideas and practices that arise in each country and analyzing a larger series of cases is a useful reminder for the practical administration of campaign financing. Overall, analyzing more units based on two cases with many similarities reduces confusion about reasons for outcomes on a singular issue.

Methods of Analysis:

Well established methods, namely process-tracing and critical discourse analysis, are adopted such that the research questions are responded to from more than a single methodological stance. The advantage of proceeding in this way is that data is established and assessed from multiple angles such that a more complete picture can be drawn. This increases confidence in the appraisals made accordingly (Rahman and Yeasmi, 2012; Neuendorf, 2004). These qualitative tools are also of great utility for a comparative study such as this. As Roach explains, "The

comparative approach should be joined with a case study approach because the effects of judicial review are likely to be different in different areas" (2007, p. 186). The methodologies and theoretical framework applied here are observant to institutional context and judicial review and is suited to pick up on differences in language concerning similar topics, and how that can affect the electoral process. Process-tracing is therefore applied to gather evidence from within cases so that descriptive chains can be identified and closely observed (Bennett and Checkel, 1998). More particularly, its application is for isolating the focal ideas, debate, and events. Critical discourse analysis is thus a supplementary technique that adds more depth to analysis and in doing so clarifies the research questions further (Fairclough, 2013).

The study begins at the time of important and sweeping campaign finance turning points in the early 1970's. As the roots of the cases analyzed can be traced back to this time respectively – making this a logical starting point. Process-tracing is highly investigative, meaning the goal is to locate the issues in cases discussed, their outcomes, and the judicial conceptualizations utilized the conflicts. A example in this regard includes tracing how a court case arose, locating judicial findings and some main arguments that were made. In terms of critical discourse analysis, the role of vocabulary and discourse are examined, particularly through active expressing and legitimatizing say, corporate speech rights / freedoms which in turn validates say, electioneering marketing. More specifically, this aspect of the project will be led by questions such as: how are the discourses advanced being used to enact a practice or practices? How is political equality defined? What constitutional constraints discourse in particular ways? This approach picks up on the role of individual actors, institutional and legal dynamics. It is presumed that the insights gathered will imply things about democratic governance, given that the policy questions of interest are inherently about the electoral process, power, and political speech.

Taken together, these methods are useful for identifying and deciphering ideologies and beliefs of actor so that the consequences of their respective positions for the organization of knowledge and societal expectations can be analyzed (Gerring, 1994; Dijk, 1995). Attention is thus paid to renormalizing and/or delegitimating certain beliefs over others; and any resulting decisions that enhance opportunity for altering the balance of political equality. Notably here, the actors investigated in this study (corporations, third party donors, legislators, and judges) have access to, and control over, some of the most influential and important types of discourse and decrees, such as the language of constitutionalism and those put into laws – making their discourse apt 'sites' for critical analysis (Fairclough, 2001; Fairclough, 2014). Therefore, this has significant impact, or potential for it, from the discourse of those with important socio-political and legal functions and this relates to (re)producing power relations in society, especially forms of political inequality. As Dijk explains (1995) it, the powerful and institutionalized positions held by such actors makes their communications key to the sustainment or deconstruction of evidenced power relations; for instance, politicians have influence over governmental and parliamentary discourse, judges control what is said in the court and have special access to discourse for verdicts, and right-bearers have access to specific sorts of constitutionally determined language, which may for instance express the corporations' separation from the state, which in turn opens up opportunities that may be leveraged for institutional change (Fairclough, 2001, 2014). Considerations will be given to what is said, and for what is not said. This is approach is well-suited for the general comparative dynamic since the objective is in part to grasp and appraise the differing underlying logic and assumptions (of differing approaches to government society relations within the context of democratic society) which contribute to political speech rights / freedoms

and campaign finance debate. (Crawford N., 2004; Fairclough, 2014; Kress, 1990; Collier, 1991).

3.2 Analytical Approach

Theorizing Campaign Finance:

Turning to the third section of this chapter, my approach integrates in a novel way historical institutionalism and dialogue theory, while situating them relative to research on neopluralism and power resources research. Accordingly, this research works outside of a singular overarching theoretical orientation and instead combines different elements of diverse research programs to formulate new concepts and theoretical direction, as shown in chapter 4, 5, and 6. This is often the case with comparative analysis (Lichbach & Zuckerman, 1997). More specifically, reviewing and identifying the key element of these literatures, my original theoretical contribution demonstrates oversights in the respective literatures and accomplishes conceptual modifications which show why we need to look at some not or under-accounted for details consequential to campaign finance and the potential for money in politics. Hence the analytical approach presented here much better explains the important turns that corporate speech and campaign finance took through meaningful judicial conflicts. For instance, it is shown that, and how *drift* can be realized in the context of campaign finance policy and in doing so, dialogue-theory is drawn on, and in part clarified, through an analysis of *drift*. Accordingly, this theoretical contribution begins together historical institutionalism and dialogue-theory to understand judicial outcomes and the state of campaign finance policy at different points in time. Also, because identity as relates to one's wealth is analytically important for the judicial conflicts, the theoretical framework I provide adds to research on power resources yet also problematizes it, whilst also building on a

key question for neo pluralism perspectives, that is reasons for their which there is inequality in the dirstrubiton of political power.

Therefore, and as referenced in chapter I, this research draws from four literatures for their distinct analytical insights about distributive-conflicts and institutional reforms. Since this research is about relations between politically active groups and the state, the state and democracy, and the boundaries of political speech, it is consistent to engage with bodies-of-knowledge which: (1) Discuss the distribution of power in democratic societies (power resources model + neopluralism); (2) question how and by whom power is wielded for large-scale policy change (neo-pluralism); (3) that investigate inter-governmental dialogue and affairs (dialogue theory); (4) study the parameters of institutions in relation to gradual institutional change (historical institutionalism). The remark within each section reviews key tenets of the literature, underscoring strengths and weakness, and outlines ways in which they can be applied to theorize about institutional change within the context of campaign finance reform in at least these two liberal democratic states.

3.2.1 Neo-Pluralism, Constitutionalism, and Political Equality

The pluralist line of thought addresses the distribution of power in democratic systems and scholars assess conditions and outcomes of political conflicts like those seen in the institutions of campaign finance (Gilens and Page, 2014; Olson, 1965; Truman, 1951; Polsby, 2006). As such, neo-pluralists primarily advance arguments about competition between politically active groups and seek to determine if, how, and to what extent different groups are effective in influencing policy change. To investigate these things, the role of distribution of power, and so accounting for how and to what extent power is dispersed matters for research on pluralism. The research has evolved and for some, there is meaningful plurality, in other words equality, in

terms of group/individual influence and access to political leaders and the political process, for instance through countervailing powers, raising issue salience, and the notion that interest groups can form relatively easily (Galbrith, 2017; Vogel, 1987; Truman 1951; Mitchell and Munger, 1991; Olson, 1965; Dahl, 1961, 1967; Baumgartner and Leech, 1998).

By contrast, others working within under the umbrella of neo-pluralism emphasize inequality between groups and highlight the notion of market and economic power (Block, 1980; Lindblom, 1982; Gais, 1996). From this perspective, group multiplicity is said not to be equated with political equality since equal representation or influence of groups varies in a noticeably unequal fashion. Additionally, accounts generally converge on points such as it is “resources”, such as involvement in the economy and group size, which largely effect the extent of one’s power and thereby influence (Stigler, 1975; Gilens and Page, 2014; Peltzman, 1976; Mitchell, Hansen, and Jespen, 1997; Block, 1980; Domhoff, 2013). In fleshing out these resources, the capitalist economy is often highlighted, particularly for its relationship with inequality amongst groups due to capitalists’ strong involvement in the distribution of goods and services. Against this backdrop, an arguably small group of major corporations end up having meaningful control over the economy, which in turns leads to a scenario where government avoids taking to harsh legislative that would under major corporations (Smith, 1990; Mitchell, Hansen, and Jespen, 1997; Block 1980, Prezeworski and Wallerstein, 1988; Winters, 1996; Lindblom, 1980; Gais, 1996, Langbein, 1986; Peltzman, 1976; Kollman, 1998; Ansolabhere, Synder, and Trippathi, 2000; Manley, 1983). Additionally, others tie the above discussion explicitly to a problem for democracy (Domhoff 2013; Lowi, 1969)

From the foregoing perspective, Lindblom’s insights on structural power are particularly insightful and central to the above points too. He argues that big business is endowed with extra

resources by essence of their capacity over the whole of the economy: "the very fact that governments need a healthy economy requires them to adopt measures which are in the interest of business without business having to take any observable action" (1977, p. 178). Therefore, business that can seriously undermine market stability for instance through employment are described as having some "unobservable power" (p. 178). This claims rests on the fact that political discourse and the majority of goods and services are founded on a market-based logic, meaning that by design, major businesses retain an sort of automatic punishment mechanism by essence of their role in the economy and marketplaces, (Lindblom, pp. 324-328) wherein anti-market reforms run a high risk of negative aggregate results at the economic and thus social level, making for a kind of a sort-unobservable power and pro market ideology and the level of influence and structure (Lindblom, p. 1982; Martin, 1983; Smith, 1990; Isabella, 2000; Dahl 1960, p. 84). While this is not to suggest that all policy necessarily or always serve the interest of major corporations, thus negating the debate over plurality all together, but rather to suggest the balance is maintained such that government tends to avoid disrupting public policies that effect economic status quo. This is to say that there is a structural power provided to those making private investment as that is what capitalism requires (private enterprise and private commodification of goods and services), meaning governments depend on creating policies incentivised for investors (Lindblom 1977; Block 1980; Przeworski and Wallerstein, 1988)

By recalling the attention placed on "resources" for neo pluralism theory, as described above, campaign finance institutions and judicial conflicts pick up on the above themes – in some ways building on them, and in other ways problematizing the literature. As Macfaland explains, pluralists refer to items, such as market or military capability, as "resources" to be used in the pursuit of power. (2007, p. 47) – and it is in this regard, that is the identification of

"resources", that I address and advance neoplurlaism insights. By drawing attention to the role of judicial interpretations and arguments about money in politics in this thesis , it is evident that the judiciary is an important institution that sets boundaries for (constitutionally protected) electoral participatory power through political speech rights / freedoms , weather it be for wealthy individuals or corporations. Since constitutional rights / freedoms are thus a structural advantage connected to electoral participatory power, and treatment under campaign finance laws generally, they have implications for the distribution of political power, democratic governance, as well the reality in terms of monetary capacity to push one's interests as desirable to the public by various means. In this way, judicial conceptualizations about corporate wealth / wealth (otherwise phrased as corporate identity or corporate form) are a "resource", as picked up on in 2.3.4. In other words, corporate identity, or the corporate form, can serve as a "resource", or more specifically a "power resource", once it its conceptualized at the level of the judiciary in a way that indicates it should have electoral participatory power, access to a court, and constitutional rights / freedoms . Accordingly, judicial outcomes, constitutional constraints, and rationales matter significantly since it is through them that such a "resource" can be realized and regulated; meaning for example the right to spend money in elections.

In terms of evaluating pluralism then, applying neo-pluralism to campaign finance is apt as the theory is concerned with the distribution of political power, and the electoral process is a main context in which political equality is exercised and realizable. Such right to participate is in other words structured by campaign finance policies, which have been principally influenced by the outcomes of observable court cases that themselves are colored by issues of corporate identity, constitutional protections, and ideas about democracy. As to the relative capacity for individuals or other entities abilities to circulate views and make their ideas and policy preferences

public, it is judicial outcomes over issues associated with constitutional rights / freedoms which again implicates the extent to which individuals and other entities can participate in the electoral process, and therefore matters for understanding the aspects of political power and the shaping of public discourse – both matters relevant when considering plurality in democratic societies. Hence outcomes in judicial conflicts are potentially consequential for policy and law that involve political rights / freedoms , such as the right to speak out for or against a candidate for office. Along the same lines, legislators are also less likely to pass laws which infringe on constitutionally protected speech rights / freedoms ; so, for instance, when the Court in *First National Bank of Boston v. Bellotti* solidified the notion that corporations have constitutional standing (Rubin, 2009, p. 58), it is not unlikely that legislation will trend in a way which abides by the finding of the judicial branch.

In terms of why speech/electioneering related policy outcomes may better represent the interest of organised elites then (at least in certain policy areas) hence offsetting political plurality a topic for neopluralism, the factors I draw attention to such as distinguishable judicial rationales or commitments to democracy, constitutional constraints such as section 1 under the *Charter of Rights and Freedoms* in Canada, and regulatory practice as discussed in the following chapters, add on to the notion of a market-ordered society and unobservable power as the cause for inequality in policy outcomes, in this case as regards campaign finance policies as noted above. Relatedly, and as discussed under section 2.2.2., some qualitative and empirical literature suggests correlation between campaign contributions and policy favors or inferred political influence (e.g. Powell and Wilcox, 2010; Campante, 2011; Stratmann, 2002; Baldwin and Magee, 2000; Hacker and Pierson, 2010; McCarty et al. 2013), and so highly observable judicial outcomes over issues of political speech, again informed largely by factors I identify such as judicial

rationales about corporate identity and money, may hold further significance for understanding the distribution of policy favors, in other words equality of political power. This means that neo-pluralism theory in the context of campaign finance policy picks up on the importance of constitutionalism and judicial campaign finance conflicts, and so understanding which judicial principles stand out for which outcomes builds on the neoplurlaism line of thought. While this is not to say that the United States or Canada are not highly market oriented in their policies, or that economic implications don't affect discussion of power, but rather to indicate the literatures' insufficient attention to judicial autonomy in particular, that is how business depends on the branch, to safeguard rights / freedoms that provide them with avenues to exercise power. Demonstrating this in the context of campaign finance shows a weakness in Lindblom's model and supports other research which also indicates that arguments along the lines of government controlling structure under accounts for the power of the state (Vogel, 1987, p. 393).

This is not to suggest that structural power like Lindblom's speaks to doesn't exist, but more so to indicate another way in which it can be realized. In this way, the centrality of factors I discuss move away from the idea the macro economic structure inherently provides for a context in which power and influence are disproportionality held by big business to show instead that, factors such as constitutional rights / freedoms and freedoms and judicial commitments to democracy are also major reasons for current findings in the literature, and to highlight the role of the judiciary in this regard.

However, it also notable that often where corporations or other actors associated with extraordinary wealth were successful in attaining more rights / freedoms , thus loosening campaign finance policies, and strengthening participatory power, market-based economic logics and support for commodification were employed by judicial actors. As shown in chapter 4, the

marketplace of ideas rationale for instance is common in campaign finance questions, and sometimes it is framed that the greater circulation of money benefits the marketplace of ideas and therefore democracy (giving way to loosening policies), whereas other instances demonstrate the argument that equality in the dissemination of ideas supports the marketplace of ideas, and economic logics (associated with greater circulation of money) were rejected. In this way, some judicial discourse confirms neo-pluralist discussion on ideological barriers or the role of ideology more generally because of the market system and how there exists a material context wherein anti-market reforms run a high risk of negative aggregate results at the economic and thus social level. The comparison discussed here thus suggests that the judiciary can be, but is not necessarily, a further example of current findings in the literature. While neopluralism directs attention to governmental choice resulting is legislation that is unlikely to cause retreat by major corporations, campaign finance cases echo this point in the literature by showing how a general commitment to a free-market economy, in these cases (those discussed in this thesis) where speech is the commodity, results in pro business policies. In this way, such findings add on to and provides some consistency to neopluralism in that such cases (judicial conflicts) show how pro-market commitments amount to favorable policy for wealth individuals / corporations.

Accordingly, an application of neo-pluralism to an analysis of campaign finance reforms builds on the neo-pluralist line of thought, extending the idea that in various institutional like courts, where a particular policy which may undermine pluralist can be shaped. Additionally, the literature would be strengthened by expanding its attention to account for constrictions upon legislators in terms of not infringing rights / freedoms , such as speech rights / freedoms , of corporations, hence because of constitutional constraints and judicial commitments to contentious principles of democratic governance and money in politics. In other words, constitutionalism is

an important dynamic for keeping things off the policy agenda, As Bachrach and Baratz (1962) note, controlling the agenda is fundamental to debates about power and therefore the literature. Accordingly, under accounting for the factors discussed here are oversights in the literature, which can be remedied however by extending knowledge on how corporations or those with extraordinary wealth gain access to the democratic process through things like electoral participatory power.

On a separate note, as further discussed under 3.2.1, notions from neoplurlaism literature as discussed above demonstrate limitations when considering the administration of policies as administrative bodies can have a role in the practical administration of policies. Hence for instance, if there are policies that don't favor major corporations, but the relevant administrative bodies don't enforce them, then major corporations may still gain disproportionate benefit even while pro-capitalist ideological barriers not at hand. For instance, in Canada, there have been times when relevant regulatory bodies hesitated to enforced court rulings which limited money in politics, meaning the election was marketized to a greater extent then courts or legislators called for. By the same token, there may be policy that favorable for major corporations in terms of electioneering, but the relevant regulatory body may take issue with some particular conduct of a corporation or its right to participate and thus bring a suit to a court, again making the body a relevant actor in terms of bringing the wealthy's ability to benefit from otherwise favorable policies under question, which could at least temporarily suspend the ability to reap benefits from favorable policy. In this way, the notion of ideology which leans in a manner that favors marketization, for instance is to narrow if seeking to understand the reason for the distribution of political power or policy outcomes more broadly, again given the close ties between campaign finance / electioneering and plurality as discussed elsewhere. I don't aim to challenge that there is a lack of

plurality, but instead to indicate that inter-governmental dialogue occurs between courts, legislators, as well regulatory agency, and this shows an additional reason for or avenue that effects the dirstrubiton of power / pluralism in democracy. As such, attention to a modified eversion of dialogue theory adds on to understanding conditions under which power may be consolidated. Overall, as outlined above, this assessment adds insight to neoplurlaism literature, and shows major aspects to understanding the distribution of political access, influence, and power, which are key points of interest for the neo pluralist line of thought. By widening the reasons for plurality, or a lack thereof, topics central to neopluralism literature are advanced. This discussion is further illustrated with reference to gradual institutional change conceptual framework.

3.2.2 Gradual Institutional Change

As introduced in chapter I, chapter 4 and 5 applies and aligns with historical institutional, specifically the gradual institutional change approach, to evaluate discrepancies in this influential approach and or to establish ways in which it further holds true, in the context of campaign finance policy. Therefore, when talking about institutional change (judicial outcomes/policy reforms and or changes in law), I refer to the typology discussed in Streeck and Thelen (2005 and Mahoney and Thelen (2010). To this end, the three methods of change, type of change agents, process, and types of change to be discussed are outlined. In chapter 6, a statement on suggestions for overall modifications is also put forth.

What constitutes change:

From this view within historical institutionalism, theory of institutional change can be a theory of policy change, though they are not necessarily the same either. When they are the same an overlapping between the two occurs, that is when "policies stipulate rules that assign normatively backed rights / freedoms and responsibilities to actors and provide for their public, that is

third party enforcement" (Streeck and Thelen 2005, p. 12). Additionally, as referenced elsewhere, policies are institutions in the sense that "they constitute rules for actors other than for policy-makers themselves, rules that can and need to be implemented and that are legitimate in that they will if necessary be enforced by agents acting on behalf society as a whole" (Streeck and Thelen 2005, p. 12). Early retirement policies are a useful example of this. The policies of retirement create expectations among workers and employers with respect to when people become entitled to receive a pension from the state, making them legitimately able to go to a court to have their retirement interested defended (Streeck and Thelen 2005, p. 12). Additionally, institutions are inherently distributional instruments laden with power implications (Hall 1986; Skocpol 1995; Mahoney 2010; Hall 2010). This implies inevitable resource considerations, and here we can think of legal identity as a resource which has distributional consequences for political equality, and therefore the policies and institutions governing attributes assigned to one's identity are colored by tensions, matched with distributional consequences. Some institutions are by design, intended to distribute resources in a fashion; related to this is that any given set of rules or expectations, formal or informal, that pattern action will result in resource allocation with unequal applications. Therefore, there is a lack of self-perpetuation of institutional arrangements, they are not inherently self-reinforcing but rather dependent on dynamic interactions vulnerable to shifts, compromises, and contestation. In this way, change and stability are one and the same processes. Lastly, change of this formulation may occur by exogenous shocks or by contrast endogenously, though it is the latter which is of focus here.

To observe change then, which is often endogenous, a few basic questions should be answered. As explained by Mahoney and Thelen in seeking to analyze endogenous gradual institutional change, important questions include:"1) what properties of institutions permit change?

(e.g., court rulings within federalism generate policy / legislative change) 2) How and why do the change-permitting properties of institutions allow for actors to carry out behaviors that foster change? (e.g., through constitutional rights / freedoms) 3) How should we conceptualize these actors? (e.g., the identity of those bringing action, such as a court) 4) What types of strategies flourish in which kind of institutional environments? (e.g., which campaign finance judicial conflicts successfully?) 5) What features of the institutions themselves make them more or less vulnerable to particular kinds of strategies for change? (e.g., what if any constraints are placed upon the judiciary?) (2010, p. 3) As Mahoney and Thelen argue, looking at the questions is a critical step for theorize the sources and varieties of endogenous institutional change. By looking at campaign finance judicial conflicts, and the terms of them, answers to these questions are addressed. Following Streeck and Thelen, theories of institutional change can be a theory of policy change depending on the policy in question; this includes those that stipulate normatively backed rights / freedoms and responsibilities to actors and provide for their "public", that is third party enforcement (2005, pp. 11-13). This includes policies that create expectations among individuals and the state, such as access to political speech rights / freedoms and democratic participation, that are considered legitimate and are paired with enforcement mechanisms such as access to a court for vindication. An institution can also been a formalized organized body, such as courts or the legislative branch. As such, I similarly use the term institutions to reference the key body of interest – the judiciary – and when specifying policy change, such as one resulting from a campaign finance conflict.

Modes of Change:

The first mode of change is *displacement,* and it involves the removal of existing rules and the introduction of new one's. This change may be abrupt and entail radical shifts. However,

it can also be a slow-moving process when new institutions are introduced and directly compete with, instead of supplement, older institutions. If institutional supporters of an old system are unable to prevent defection to the new rules, then gradual *displacement* may occur. An example is when nations move to market-oriented institutions following a conflict within a previous state-controlled system (Thelen and Streeck 2005, pp. 20-22, Mahoney and Thelen 2010, pp. 16, 20-21; Hacker 2005).

Next comes *layering* which involves the introduction of new rules alongside or on top of existing ones, in turn restructuring behaviors associated with the old rules (Schickler 2001; Thelen 2003). In the context of campaign finance, the judicial outcomes affirming that political speech via electioneering is a form of constitutionally protected speech is consistent with *layering*, as examined in chapter 4 and 5. Similarly, and unlike *displacement*, *layering* occurs by way of amendment, revisions, or additions. In this regard, those responding to challengers may be able to preserve some elements of existing rules, such as to maintain some monetary caps on contributions, but are unable to avoid the enactment of some other provisions.

As Thelen and Mahoney (2010, p. 17) explain of this mode, though changes made may be small, they can accumulate and segue to substantial changes over time, such as giving way to more money in the political system. While *layering* is shown to occur when challengers lack the capacity to change original rules, and work within existing conditions to add to existing old rules (Thelen and Mahoney 2010, p. 17), campaign finance judicial conflicts indicate opportunities for *layering*-like consequences where challengers do not lack capacity, seeing as constitutional rights / freedoms mean legal capacity to challenge and potentially compel change to original rules. Additionally, a series of campaign finance judicial conflicts discussed below add on to existing research which show that even though *layering* is often found in low levels of discretion

environments (Mahoney and Thelen, 2010, pp. 19-20), which contrasts with the judicial branch as explained below, campaign finance cases indicate opportunities for *layering* in a high level of discretion context, challenging commonly understanding of the theoretical framework. In this way, legislative actors, who have considerable discretion, may become bound in terms of legislative capacity as judicial decisions at the level of constitutional law, such as the argument that money is a constitutionally protected form of speech, effects the amount of discretion (and potential for *layering*) legislative actors have when making or amending law in response to a court's finding. Accordingly, researching this interactive dynamic allows us to connect dialogue theories' core arguments about reasons for inter-governmental discourse and decision making to the gradual institutional typology of change which explains intricacies about how a change comes about, that which in turn gives way to or shapes dialogue (Hacker 2005; Clark and Whiteside, 2003).

Drift is the third mode. This concept suggests that if institutions do not adapt to changing political and economic environments, they may be subject to erosion or collapse. It also can occur because of gaps in rules or may be a matter of political cultivation (Streeck and Thelen 2005, p. 23). Overall, the rules remain formally the same but their impact changes because of shifts in external conditions (Hacker 2005). Their choice not to response to such changes may or may not be intentional. *Drift* is largely about change occurring when a gap between rules and application or enforcement are neglected, and the development of campaign finance in elections further confirms this concept as important campaign finance conflicts evidence strong potential for *drift* consistent with the gradual institutional change framework. In so doing, important actors and actions are underscored for their role in this mode of change, such as regulatory actions and their inter-actions with courts.

Next comes *conversion*. *Conversion* happens when rules remain formally the same but are interpreted and enacted in new ways, generally meaning that there is a disparity between rules and their application but (Thelen 2003, pp. 17-18) unlike *drift*, this is not a matter of neglect in the face of changed settings. The 'living tree doctrine' under Canadian constitutionalism, which informs court analyses, is a strong example of this logic. Accordingly, we see *conversion* when inherent ambiguities exist in an institution and actors actively pursue them for potential change.

In this way, actors are said to redeploy rules, converting their goals, functions, and purposes in a direction matching their interest (2010, pp. 17-18). This may occur if an actor lacks the capacity to overturn an institution but can challenge it so to redirect it for more favorable functions and effects. Documenting this mode of change, Thelen (2003, 2004) shows that redirection may come about when policy makers respond to new environmental challenges, or through changes in power relations. As Streeck and Thelen (2005, pp. 26-27) explain "actors who were not involved in the original design of an institutions and whose participation in it may have not been reckoned with, take it over and turn it to new ends". More specifically, *conversion* may occur through political contestation over what functions and purpose an existing institution should service, by unintended consequences of the institution's builders, through comprise and political negotiations, or though the interpretation of rules towards one's interests, and lastly due to timing (Streeck and Thelen, 2005, pp. 26-27). Through the redeployment of old institutions to new purposes *conversion* attaches new purposes to old structures. (Streeck and Thelen, 2005, p. 31)

Identifying the process of change:

The process of change can be either incremental or abrupt and the result is either consistent or discontinuity, meaning the distribution of power latent in an impugned policy shifted to some degree. For instance, the binding and immediate nature of a court ruling is an example of such abruptness, though the resulting change depends on the substance of the issue in question. However, given its presence-setting nature, judicial outcomes can build so to create incremental change, which may amount to major change overtime. In this way, and consistent with gradual institutional change literature, fundamental change may ensue gradually (Streeck and Thelen 2005, p. 18). For instance, if campaign finance policies permit more money in elections while the electoral process endures deepening marketization over time, then greater opportunity for political inequality within the electoral process is more likely, specifically in societies characterized by considerable economic inequality. Streeck and Thelen further explain that "rather than emanating on the outside, change is often endogenous and in some cases is produced by the very behavior an institution itself generates" (2005, p.19). As Streeck and Thelen (2005, pp. 5-8, 18-19), change under this framework moves away from exogenous shocks to show that an accumulation of endogenous change can have transformative results.

More specifically, the "characteristics of a political context" (Mahoney and Thelen 2010, p. 19) particularly matters for which of the five modes of change one should anticipate, and this is analyzed in the following chapters. To this end, the following characteristics are taken into consideration: strong veto possibilities paired with a low level of discretion in interpretation and enforcement suggests *layering*, strong veto possibilities with a high level of discretion in interpretation and enforcement suggests *drift,* weak veto possibilities and a low level of discretion in interpretation and enforcement suggests *displacement,* and lastly, weak veto possibilities and a

high level of discretion in interpretation and enforcement suggests *conversion* (Streeck and Thelen 2010, pp.18-19).

Agents of change:

Studies utilizing the gradual institutional framework, that is a type of historical institutionalism, often identify four types of change agents (Mahoney and Thelen, 2010, p. 23). Although I will engage with this formulation, for instance to consider how the role of judges echoes a change agent described in the literature, other agents of change outside of it will also inevitably be relevant, such as the regulatory actors tasked with enforcing policy and responding to changes sought by one or more of the four.

To characterize an agent, the following two questions can be addressed: “1) does the actor seek to preserve the existing institutional rules? 2) Does the actor abide by the institutional rules?” (Mahoney and Thelen 2010). Three agents as outlined in the literature are:

1) *Insurrectionaries* – they strategically mobilize against institutions; they aim to eliminate existing institutions or rules. They may connect their identity to overall positions within complexes of myriad institutions., which provides a basis for subjective identification of them. They reject the status quo and do not always follow its rules either. This agent type is prevalent in many institutionalist accounts when explaining abrupt patterns. When they prevail in conflicts, critical juncture may follow resulting in radically new rules and so *insurrectionaries* may be more associated with *displacement* (Mahoney and Thelen 2010, pp. 23-24).

2) *Subversives* are actors that do not break rules but still seek to displace an institution. They follow institutional expectations and work within the system; in doing so, they obscure the scope of their interests, perhaps appearing to be supportive of an institution. However, they pay attention and wait until the political, cultural, or socio-economic context seems promising for them to

pursue their goals. In the meantime, they may even promote ideas or new rules such that support for the existing rules are weakened. These agents may likely be associated with *layering*, *conversion* or *drift* depending on the political context (Mahoney and Thelen 2010, pp. 24-25).

3) Next actor type brought into this analysis is the *symbionts* which have two forms – *parasitic* and *mutualistic* – and both depend on and flourish in institutions not of their own making. The *parasitic symbionts* are those that exploit an institution for private gain, contradicting its 'spirit', even though they depend on it to achieve such gain. Examples are when the utilization of corporate personhood occurs for private gain, particularly by exploiting an ambiguity in American constitutionalism, even while it depends on its jurisprudence and established normative legitimacy to achieve its legal standing. Where institutional conformity expectations are high, but capacity to enforce expectations is limited, is a context in which *parasitic symbionts* may likely flourish. With the presence of gaps or cracks in the maintenance of rules and practices may lead to these agents achieve change through *drift* (Mahoney and Thelen 2010, p. 24). An example here can be seen in *Harper* where the appellant carried out actions which were determined to be not necessarily beyond clear boundaries, but which could be said to contradict the "spirit" of an institutions, hence in *Harper*, rejecting corporate money in the electoral process. In this way, we can see the power of justices as blockers of *parasitic symbionts.*

The *mutualistic* variant utilizes rules not of their own making, but which can be leveraged in novel ways to advance their interests. This does not mean, however, that they destroy the efficiency of the rules or the survival of the institutions. Unlike parasites who exploit the letter of a rule, mutualists break the rules of an institutions in order to preserve its "spirit"; as such, they are not likely to utilize *drift*. This formulation may be conducive to those who critique judicial review as a form of illegitimate activism. By contrast, those who support judicial review may also

reference these agents but in a positive light, that is to show how they (judges for example) contribute to the robustness of an institutions (Mahoney and Thelen 2010, pp. 24-25).

As outlined above, these change agents have been associated with one or more specific mode of change so we would expect to see context and strategies that align with agent type accordingly. As carried out in chapters 4 and 5, the analysis in this thesis further affirms that such associations underscored in the gradual institutional literature also exist in campaign finance policy, thus contributing to their explanatory power. However, as examined later, evaluations of judicial campaign finance case studies also in part problematize some of the literature's findings about these agents.

3.2.3 Inter-Governmental Dialogue and Policy Change

The next set of insights for my analytical and theoretical approach is drawn from literature on governmental dialogue, typically referred to as "constitutional dialogue" theory, "inter-branch dialogue", "institutional dialogue" or just "dialogue theory" (Roach, 2001, 2005, 2007; Hogg and Bushell 1999; Hogg and Thornton, 1997; Hogg et al. 2007; Tremblay 2005; Macfarlane, 2012; Manfredi and Kelly, 1999; Coenen, 2001; Bateup, 2005)

At a broad level, the literature on dialogue recognizes that there are formal and informal "remedial mechanisms" (Roach 2002, 2004, 2007; Hogg and Buhsell, 1997; Wright, 2007; Petter, 2017; Tushnet, 2007) or "doctrinal structures/tests" (Fallon, 2006) that facilitate dialogue between branches of government. Research by Roach (2001) for instance reveals that such "remedial measures" are key for the literature because it is with reference to them that one describes how dialogue may occur. Within this thesis , the types of measures identified by Roach and other researchers of governmental dialogue will also be referred to simply as a point of reference as constitutional levers, frameworks, or mechanisms, or more plainly as legal constraints. Most

notably, as further unpacked below, some such measures or constraints are obligatory, such as a section 1 analysis under the *Charter of Rights and Freedoms* (hereafter the "*Charter*"), as discussed below, within the context of judicial review. The meres presence of such mechanisms however operates on the premise that it is the courts who have expertise in and oversight of constitutional law, and therefore the interpretation and application of rights / freedoms and freedom is their proficiency, whereas legislative bodies observe the will of the people and realize it through legislation. However, and for many reasons, legislation passed may come up against constitutional scrutiny – that is the highest threshold of which all law is to abide. As such, governmental dialogue comes in, balancing tensions and errors in this regard, leading to a more legitimate system of democracy characterized by independent branches, checks and balances, and constitutionally guarded rights / freedoms and freedoms. Given this structure, the idea that some form of negotiation among the branches is arguably reasonable and legitimate.

Justices in Canada and the United States have also taken note of this structure and acknowledge constitutional dialogue in doing so. For instance, in *Motor Vehicle Act (B.C.),* a Canadian court maintained that:

"It ought not be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy" (Motor Vehicle Act, [1985] 2 S.C.R. at 486, 497).

Similarly, in *Vriend v. Alberta*, Justice Frank Iacobucci devoted several paragraphs of his judgment to defending the democratic character and the judicial review function under the

Canadian *Charter of Rights and Freedoms* as a product of a "deliberate choice of our provincial and federal legislatures" that "promotes democratic values." (*Vriend. Alberta* [1998] 1 S.C.R. 493, paras. 138–139).

The view of American courts in terms of their role is also notable in this regard. Consider this passage from a speech delivered in 1993 by the honourable Justice Ruth Bader Ginsburg: "[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine but... they participate in a dialogue with other organs of government, and with the people as well." (Ruth Bader Ginsburg, 1992 1185, 1198). In *City of Boerne v. Flores* (521 U.S. 507 1997), the court held that the meaning of the Constitution is supposed to be interpreted, but not enforced, by the USSC. Some courts have been even more forceful on this. In *Cooper v. Aaron* the Court insisted that consistency with the rule is tied to executive compliance with court decisions, and further than there is supremacy in Court interpretations of the constitution over competing legislative and executive interpretations (358 U.S. 1 (1958) [Cooper. Aaron). Chief Justice Warren took a somewhat softer tone in declaring that, since *Marbury v. Madison* (5 U.S. 137, 1803 Marbury), judicial supremacy had been "a permanent and indispensable feature of [the US' constitutional system" and that "no state legislator or executive or judicial officer can war again the Court's interpretation of the Constitution without violating his undertaking to support it" (Cooper at 18). The court has also echoed this view in relation to sticking with a lack of deference (as defined early, deference meaning the judicial branch yielding to the power and role of the legislative branch) and avoiding the public appearance of "surrounding to political pressure" (*Planned Parenthood of Pennsylvania v. Casey*: 867-869).

More narrowly on the literature dealing this topic of dialogue, it focuses on two main inquires. First, the merits of a dialogic system – largely related to the democratic nature, or lack

thereof, of the judicial review process; and second, the legal constraints, levers, or again sometimes called "remedial mechanisms" which give rise to and or shape dialogue (Manfredi, 1999; Huscroft 2009; Roach, 2001, 2005, 2007; Hogg and Bushell, 1997; Hogg and Thornton 1999; Hogg et al., 2007; Tremblay, 2005; Macfarlane, 2012; Manfredi and Kelly, 1999; Coenen, 2001; Bateup, 2006). I will review each of these lines of inquiry in turn. The normative analysis largely revolves around concerns about counter-majoritarian practices and democratic legitimacy in the face of political questions with the potential to be resolved through the non-political/elected branch. In other words, a guiding question is the ask: what is the proper role of the judiciary in relation to the executive and legislative branches of government? Thus, the notion of judicial review poses a "counter majoritarian difficulty" (Ackerman, 1989). As Bateup sees it, "most dialogue theorists emphasize that the judiciary does not (as an empirical matter) nor should not (as a normative matter) have a monopoly on constitutional interpretation" (2006, p 1009). Rather, he argues, "when exercising the power of judicial review, judges engage in an interactive, interconnected and dialectical conversation about constitutional meaning" (2006, p.1109). While for Bickel (1962), "judicial review is a counter-majoritarian force in a legal system".

Emmett Macfarlane (2012) picks on this angle of the normative dimensions of dialogue with reference to the commonwealth parliamentary tradition which indeed, has the greatest experience with judicially enforced rights / freedoms . Also picking up on distinctions between the parliamentarian way versus the American system comes a discussion of a 'strong' or 'final' form of judicial review (Stephen Gardbaum, 2001, pp. 709-10; Mark Tushnet, 2003, p. 814). Others build on this theme by pointing out that the power of the judiciary is not derived because it necessarily defers to the legislator, as it said to be the case with Canadian courts deferring to legislative bodies and nor is it because they decline to react, rather, it is more commonplace for them to

respond to USSC rulings by reinstating their statutory policies (J. Mitchell Pickerill, 2004, p.42). Larry D. Kramer (2004) argues that the U.S. judicial process is culturally and practically one of "popular constitutionalism" as it is the people who have "active and ongoing control over the interpterion and enforcement of constitutional law" (2004, p. 959). He sustains his view by underscoring that the power of Congress and the Executive is sufficient counterbalance, particularly as the USSC lacks the authority to bind (Kramer 2004, p.201). Kramer's viewpoint thus suggests that the system is one where judges have the finality on constitutional interpretation, and while their findings set the constitutional standard, they are not unfettered. Framed in this way, Kramer argues that "judicial supremacy" is the antithesis to popular constitutionalism and that we must confront a choice between the two (Kramer, 2004: 1011). While Kramer acknowledges that popular constitutionalism led the way throughout most of American history, he finds that there has been a shift post 1980's marked by an acceptance and trend of judicial supremacy has become commonplace, accounting for concerns by both the left and the right of the political spectrum (Kramer, 2008, pp. 963-964).

As Hogg and Bushell (1997) perceive judicial review, it is best understood as "part of a 'dialogue' between the judges and the legislature. The functional essence of this dialogue is the ability of legislatures to reverse, modify, or avoid judicial nullification through the enactment of alternative statutes" (1997, pp.1-2). In this way, as Claes and De Visser (2012) frame the topic, dialogue represents the middle way between judicial supremacy on the one hand, and legislative supremacy on the other. Kent Roach gets more specific in stating that rather than thinking about dialogue and the Canadian *Charter* as something novel, it makes more sense to situate dialogue in the common law constitutionalism tradition wherein the *Charter* merely adds more to the heritage of deference and rights / freedoms in the context of the rule of law (2007, pp.180-181).

Moreover, Roach clarifies that the Canadian system is not fundamentally inconsistent with the rule of law, that remedial measures such as the section 1 *reasonable limits* clause of the *Charter* (described below) which works to ensure societal reflections and democratic debate. (Roach 2007, pp. 181-182); thus, leading him to conclude that "The Court's *Charter* rulings, like its common law decisions and exercises in statutory interpretation, are best seen as starting points in a dialogue with legislatures and society" (Roach, 2001). Cameron (2001) and Roach (2001) also point out that the fusion of the executive and legislative branch under the parliamentary system, together with remedial mechanisms of the *Charter*, allow for a sound balance conducive to democratic debate. In this way, and as themed in the following chapters, inter branch exchanges in Canada may be positively coupled with egalitarian governance and consistent with the common law tradition. As Kent Roach further explains it, "by allowing ordinary legislation to place limits on rights / freedoms as interpreted by the courts and even override them, the *Charter* contemplates and invites dialogue between courts, legislators, and the society about the treatment of rights / freedoms in a free and democratic society (2008, p. 49). Somewhat conversely, K.D. Ewing argues that there is a normative dimension to the American court in that it is generally biased towards a theory of political liberty instead of political equality, unlike what's found in the Canadian court's affection for egalitarianism, and that this approach is tied to the US court's finding that corporations have the same rights / freedoms as people in the context of elections and more. Conversely, Bickel reasons in "*The Least Dangerous Branch*" that as for American courts, the "the judiciary is uniquely insulated from political pressures, enabling them with a special ability to preserve, protect, and defend principles provided to the people (Bickel, 1986, pp. 25-26, 188, 201). Morton and Knopf (2000) pick up on this theme, stating that should a decision be made by a left or right leaning "court party" then the competent legislative body can override

or modify any unduly results. Following such positions, some frame dialogue as “judicial advice giving”, an idea suggesting that judges present their views about constitutional meaning which in turn provides insight or possibly guidance, to the political branches which will assist them in drafting new legislation so that it will prevent or meet future constitutional challenges (Ronald J Krotoszynski 1998; Erik Luna 2000; Neal Kumar Katyl, 1998) As Hogg and Bushnell put it, it secures an avenue for individuals to express their rights / freedoms and seek remedies through an objective body, rather than trying to appeal to the general welfare and having to rely on politicians. In sum, the normative side of the literature centers on debate as to about whether judicial review is fundamentally undemocratic, who should and does have the “final say” on policy, if judicial review is counter majoritarian, and whether excessive power is provided to unaccountable justices, leading to judicial supremacy.

As for the second focus area then, introduced above, involves investigating the conditions under which dialogue occurs. This second line of inquiry under dialogue theory is concerned with identifying and evaluating constitutional constraints, doctrinal structures/tests, mechanisms, and remedial mechanisms alike, as well relevant actors, effecting or having the potential to effect dialogue, realized in judicial outcomes and or policy change. As Fallon acknowledges, explicit standards of review—what some might call doctrinal structures/tests or constitutional decision rules—pervade constitutional oral arguments, briefs, and opinions, and dominate practice at least in personal liberties cases” (2006, p.119). As such, identifying and describing these mechanisms are key for the literature because it is with reference to them that one describes how dialogue may occur and understanding them helps to conceptualize and theorize about dialectical exchanges. In so doing, some research suggests that structural or remedial mechanisms and constrains offset judicial rulings and prompt dialogue, avoiding judicial supremacy in turn, though

some characterize these as insufficient to curtail the implications of judicial review. In turn, this leads some to argue that there is illegitimacy on the part of the court as an institution while others find it consistent with federalism and democracy (Tremblay, 2005; Bickley; Kramer, 2004; Morton and Knopf, 2000; Waldron, 2005; Fallon, 2007). Within this debate, Morton (2001) for instances states that judicial review in Canada is better described as a "monologue" since in practice legislators routinely treat court decisions as the final say. Additionally, the research on dialogue doesn't only debate and describe dialogue, a limited number of studies situate it within empirical settings to evaluate the context and degree of dialogue (empirical examples that stand out: Hogg and Bushnell, 1997; Emmett Macfarlane, 2012). As noted below, however, there is a clear need for further case studies in this regard, particularly comparative ones.

The dialogic levers or constraints reviewed represent the practical or process side of inter-governmental relations, or dialogue. Notably, these remedies vary in scope and applications, though overall they are respectively conducive to some degree of dialogue. While a full examination of such available remedies is beyond the scope and purpose of this thesis , there is in fact a wide range of structural doctrines and constitutional and quasi-constitutional tools available which push and pull governmental branches into debate. For instance, in Canada "second-look cases" and suspended and delayed declarations of invalidity, which derive their force from section 52(1) of the Constitution Act, 1982 (Roach, 2002, 2007) are less common mechanisms which can foster or inhibit dialogue, and then there is the "notwithstanding clause" or override clause section 33, while in the U.S., there are remedies such as case or controversy" (The United States Constitution Art III s. 2) requirement and the "passive virtues" (Bickel, 1986: ch 4) which are not means for the US Court to avoid or limit the extent of adjudication. However, in terms of

judicial conflicts and outcomes dealing with money in politics, two remedial measures stand out. Therefore, these will be described below and highlighted in chapters 4, 5, and 6.

As for Canada, it is the "reasonable limits" clause (described below), otherwise known section 1 of the *Charter* which follows the "*Oakes* Test" (described below), which is the most significant and indeed an obligatory measure in cases of judicial review where an infringement of a right or freedom is found by a court. In other words, and in contrast to the prominent American measure described below, this section is not sparsely used, but rather is commonplace in judicial review as a section 1 analysis is triggered once a court determines that the constitution is being impinged upon by a standing law of which it has reviewed. As many scholars of dialogue theory observe, section 1 is the most robust instrument promoting not only inter-branch dialogue but also provides for a context in which judges are in dialogue with the body politic (Sorauf, 1993; Hogg and Bushell, 1999; Bateup, 2006; Roach, 2006, 2008; Tremblay, 2005; Petter, 2007). As explained by the Canadian government, the purpose of the reasonable limit's clause: "Section 1 effects a balance between the rights / freedoms of the individual and the interests of society by permitting limits to be placed on guaranteed rights / freedoms and freedoms. "Most modern constitutions recognize that rights / freedoms are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate." (Canada (Attorney General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610, at paragraph 36). Following this logic, judicial review of the *Charter* indicates that should the state be able to withstand a section 1 analysis by a court, then the infringement of the *Charter* right can stand, despite it being found otherwise unconstitutional.

In terms of the application of section 1 / reasonable limits clause then, it is applied through the application of the so-called "*Oakes's* test" *R. v. Oakes,* [1986] 1 S.C.R. 103). Again,

this analysis and legal threshold is used to judge if a law can be maintained as constitutional, meaning that a *Charter* right can legally be infringed by legislation. In terms of its application, the onus of proof under section 1 is on the person seeking to justify the limit, which is generally the government. The standard of proof is the civil standard or balance of probabilities, and it is not based on a reasonable doubt standard as is the case in Canadian criminal law. More specially, the clause's guiding preamble provides the following:

''The Canadian *Charter of Rights and Freedoms* guarantees the rights / freedoms and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'' (Canadian *Charter of Rights and Freedoms*, s 1, Part 1 of the Constitution Act, 1982). To apply this preamble, the Court has developed the "Oakes Test" (outlined below) as a way of formally assessing the validity of a government's justification of the infringement of rights and freedoms.

The first part is to check whether the legislative goal (of the impugned legislation) is sufficiently pressing/compelling and substantial? Put simply, this is to ask if the objective if sufficiently important to justify limiting a *Charter* right? If it is, then the next step requires evaluating if there is proportionality and rationality between the objective and the means used to achieve it. Another way this could be framed is whether the law is characterized by "over breath", which is to say, does the law "capture" activity beyond the intended goal, hence does it fail to "minimally impair" the right / freedom? (Bakvis and Smith, 2000)

Again, and in sum, should the state be able to answer these questions in the affirmative, the infringement can stand. Moving on to the remedial measure that has been consequential for money in politics judicial conflicts in U.S. courts, we turn to levels or thresholds of "scrutiny". The thresholds of scrutiny as developed by the USSC for judicial review of constitutional

manners comes in three levels, yet each respectively are not as expansive or democratically grounded as section 1 of the *Charter*. As Roach (2008) acknowledges, while there are a number of quasi constitutional mechanisms available in the United States to encourage dialogue, they are not geared for a full merit-based constitutional finding to be advanced by a court. Spece and Yokum (2015: 287) draw a similar finding, pointing out that Justices of the United States Supreme Court often articulate or employ standards in vague, inconsistent, and contradictory ways—sometimes within single opinions and contradictory ways—sometimes within single opinions. (2015, pp. 287-288). As such, the mechanisms available to U.S. courts are arguably not as rigid and coherent as provided for under the *Oakes* Test as in Canada., hence giving way to Roach's characterization of them as "quasi-constitutional". As Tushnet (2003) likewise notes, the difference is that American courts do not limit rights / freedoms pursuant to a single provision like section 1. Instead, the idea of limits is inherent in the rights / freedoms themselves" – as discussed below, it is the strict scrutiny threshold which has been inherent to the First Amendment itself, and thus has been the baseline for judicial review of it.

Though there are three levels of scrutiny as noted above (rational basis review, intermediatory scrutiny, and strict scrutiny), it is the strict scrutiny threshold which is of interest here. This is the level of scrutiny of interest because the USSC held and set the precedent / standard in the campaign finance *Buckley v. Valeo* ("Buckley") judicial case (424 U.S. 1, 1976), that First Amendment conflicts, specifically political speech cases, merit the highest standard of review, that is strict scrutiny. As shown in chapter 4, the *Buckley* case marks the first judicial conflict analyzed under this thesis , given the case selection criteria, and seeing that it follows the passage of the landmark legislation the *Federal Election Campaign Act Amendments* (1974) – which is described at the beginning of chapter 4. Notably, of the three levels or threshold of review, strict

security has been defined as the most rigid scrutiny; however, at the same time, as Spece and Yokum point out, strict scrutiny has been described in a number of ways without precise analysis of its distinct articulations, its constituent parts, what those elements might logically mean, and the purposes that would be served by competing interpretations of those constituent parts. (2015, pp. 288 - 289).

In terms of the threshold's substance then, that is the one used by Courts in the cases analyzed in the following chapters, the state must show its action is necessary to further a compelling state interest and that its action is narrowly tailored to further a compelling state interest. Like in Canada, the government bears the burden of proof on each. Necessity and narrow tailoring are not coterminous; the latter might include but not exhaust the former, but not vice versa – leading some to argue that the two formulations are disparate and confusing (Spece and Yokum, 2015, pp. 294 - 298). While there is the general idea that explicit weighing and balancing of individual and government interests should occur, as also made clear under *Oakes*, some argue that the court inconsistently articulates whether these strands of scrutiny involve or do not involve explicit balancing (Spece and Yokum 2015, p 296). Nevertheless, the idea is that the government action must be necessary in the respect that it addresses an actual problem, a problem that has not already been adequately dealt with, and a problem that cannot be addressed using a less or least restrictive alternative. While not as formalized or guided by a preamble as in the Canadian constitution as outlined above, there is notably some at least theoretical overlap, overlap in language between the two, that is likeness in the notion of narrowly tailored with the 'minimal impairment' dimensions under the *Charter*'s Oakes test as discussed above; while the notion of necessity pursuant to strict scrutiny seems to echo the 'pressing and substantial' and "prescribed by law" components under *Oakes*. And in either case, the application of the test / threshold

respectively is a matter of judicial interpretation, hence giving way to an analysis of how courts conceptualization controversial matters, such as whether campaign finance contribution limits represent a "compelling state interest". As Spece and Yokum similarly point out as to judicial review thresholds, they are of course, not capable of mechanical application, but are meant to allow the Court to provide guidance and further the rule of law by providing a bridge from individual cases to more general constitutional provisions and values (2015, p. 291).

To recap, the above two measures (strict scrutiny threshold used in judicial review of First Amendment challenges in the U.S. and section analysis 1 pursuant to the application of the *Charter* in section 2 challenges – the respective sections and Amendment pertaining to speech / expression) are explained above since as relates to the context of campaign finance policy, it is section 1. of the *Charter* in Canada and the strict scrutiny which have been consequential. Accordingly, it is these two "remedial measures" / doctrinal tests (again synonyms for constitutional measures, mechanisms, constraints) which are of most relevant to campaign finance judicial outcomes in terms of dialogue between the legislature, judiciary, as well other relevant actors – as introduced below and elaborated on in the following chapters.

Therefore, my contribution and engagement with dialogue theory is principally two-fold. First, little empirical research has been done within this body of thought which focuses on the remedial measures, or more generally constitutional constrains and levers, in a particular policy area, such as political speech / campaign finance, and virtually none has undertaken a close qualitative and comparative analysis of how certain variables, such as money, was conceptualized in dialogic exchanges about campaign finance and what they meant for policy change in its regard. However, as Roach explains, "the study of such [dialogue] interchanges between courts and legislators provides a rich vehicle for comparative studies. It enables researchers to compare judicial

review under the United States Bill of Rights with judicial review under the co-called weaker bill of rights / freedoms found in many other countries, such as Canada (2006, pp. 347-348). As such, the dialogue theory approach has not been tailored down within a specific policy area to understand how key variables, such as money, are conceptualized by the two branches and how that affects dialogue and ultimately policy change. As regards this, it is evident how the remedial mechanisms and measures currently considered in the research, such as section 1, have a prominent role in shaping policy outcomes when the issue concerns commitments to democracy in the context of the electoral process and campaign finance conflicts. By evaluating the role that the section 1 analysis has played in the Canadian judiciaries' ideas about legislative intent and political speech rights / freedoms , the significance of this legal mechanism for political equality and the boundaries of money in politics in particular is brought forward: thus, adding to the literatures pursuit of weighting the significance of mechanisms of dialogue. This relates to a gap in the literature, that is the point that the topic of dialogue can be better understood via analyzing a specific policy area through a comparative approach, which should be joined with a case study approach because the effects of judicial review are likely to be different in different areas (Roach, 2007, p.186). To this end, a comparative analysis judicially ascribed conceptualizations of under-considered power resources, such as politically and legally defined identity are further highlighted in this thesis , and why these have or have not been instrumental in the development of campaign finance systems in the context of dialogue are examined

Second, it is to contribute to the point of inquiry which seeks to examine who has the "final say", that is the first focus point of the literature, as outlined above. To recap, some of the research within this body of knowledge is concerned with which branch has the final say on policy making, framed sometimes a strong form versus weak form of judicial review. However, by not

accounting for the role of regulatory agencies, this topic is not being fully understood. For instance, the Canadian electoral system experienced several elections where campaign finance limits were not imposed, as explained in chapter 5, and through the lens of gradual institutional change theory. Notably, the lack of campaign finance enforcement in those Canadian elections for instance was not the consequences of the decisions of either of the two branches which the literature focuses on, but rather due to the actions of Canada's campaign finance administrator, the Chief Electoral Officer, following judicial assessment, or dialogue, on legislation. In this way, and when trying to figure out which branch has the last word, the literature is limited as inter-governmental dialogue between the judicial and legislative branch may not be last word in terms of practical application in a defined policy area, meaning it is not as complete as it could be if seeking to understand who the final affect over policy the objective has be. In this way, inter governmental dialogue, as currently understood, may be of less significance if regulatory agencies do not enforce determinations that may indeed follow dialogue. By the same token, the influential findings or arguments brought to courts by actors again like the Chief Electoral Officer or the Federal Exchange Commissioners alike, are principally discounted from dialogue theory even though, their findings sometimes shape the terms of and or give rise to judicial considerations over legislation. This suggests that inter-governmental dialogue has additional layers of complexity which the literature could account for, and which will be highlighted in this case study. This further provides insights into the conditions and actors which give rise to dialogue, something further discussed below.

Against this twofold backdrop, for the purposes of this thesis , the dialogue in question is referred to as "inter governmental dialogue." This usage is generally related to the fact that dialogue can be inter governmental, that is extending beyond only legislatures and courts to also

account for the important role of other governmental, particularly regulatory actors, who contribute to their dialogue – that being the Chief Electoral Officer and Federal Election Commissioners when discussing campaign finance policy. This can be the case through their pursuit of court challenges, through defence on campaign finance policies, or due to their administration of judicial outcomes or legislation passed. At the same time, however, the use of the phrase inter-governmental dialogue is not to reduce or eliminate the remedial measures typically discussed under constitutional dialogue theory, such as the section 1 Canadian *Charter* analysis, as the role of these lawful mechanisms do not become less important in the extended analysis of dialogue as discussed here. Additionally, in terms of what constitutes dialogue, it is worth noting that as Meuwese and Snel (2013, pp. 125-127) explain, a browsing of the literature reveals the absence of a clear and generally accepted definition of 'constitutional dialogue' and the alike phrase; and more, that "in a sense all constitutional review of legislation can be seen as a form of dialogue. The very fact that judicial decisions are open to repeal, modification, or even avoidance by the competent legislative body necessarily triggers a 'dialogue, even if it remains implicit (2013: 130). Drawing on this viewpoint, together with the idea that legislation itself (or the interpretation of section 1 of the *Charter* – a construction by the legislative branch) is in effect a starting point for dialogue seeing that judicial review of a legislation is in essence a contemplation of an already stated position and the outcome of a review is a response, I take the position that judicial review itself constitutes dialogue and define 'dialogue' accordingly.

In sum, dialogue theory will be kept in view when considering the gradual institutional change of campaign finance policy, and the fuller context which gives rise to and shapes dialogue theory as regards electioneering policies will be discussed. This approach picks up on the Justices' views noted above which see dialogue as occurring not only between the branches of

government, but with the other factions of society too. In turn, my research builds on and somewhat problematizes the theory by shifting attention to how the notion of money in elections, and its accompanying parts such as political equality, are expressed through legislative, regulatory, actions, as well as judicial discourse and legal thresholds. Additionally, it brings forward other actors which shape inter-governmental dialogue in a specific policy area to understand the effects thereof for policy change.

3.2.4 Power Resources Model and Policy Change

In systems characterized by plurality, it may be beneficial to push boundaries of institutions to test if one can realize their interests by shifting the balance of political power. This process is best understood by the power resources approach to distributive conflicts as it highlights the significance of assets - or power resources - those actors bring into conflicts to pursue their interests (Korpi 1983, 1985, 2006; Stephens, 1979). Within the context of institutions, the distribution of power resources affects the opportunities and constraints otherwise faced by actors (Korpi, 2003). The approach identifies two main categories of power resources, namely, capital and control over the means of production, and human capital which includes labor power, education, and occupational skills. These factors are considered to not only impact the results of conflicts but go further in that they shape the construction of social institutions, the sociological imagination, and patterns of social conflicts and class struggle (Korpi 1983, 2003, 2006). Studies show the distribution of these resources to be unequal in meaningful ways, so that actors with concentrated power resources or are enabled to exceedingly secure their interests (Zweig, 2000; Kiester and Moller, 2000; Hacker and Pierson, 2010)

Although the approach has mostly been used to study welfare state regimes (Korpi, 2006; Rothsetin, Samanni and Teorell, 2012; Hobson and Lindblom, 1997; Levesque and Murray,

2010; Stephens, 1979), it is also suitable for studies which deal with distributive conflicts like campaign finance, which too is largely shaped by the distribution of power resources, albeit a different form as introduced above. As such, the approach will be applied to the development of campaign finance, and various articulations of 'political speech', such that the logic and utility of the approach are in the end extended. To this end, I propose extending this logic to what can be described as an additional type of power resource, which is identity (principally judicially ascribed construct which can give way to political speech rights / freedoms). This power resource is different then those already captured under the literature, though it does serve as a major source of power given the importance of the electoral process, and it is not associated with tangible items such as say, machines, factories, or measurable by the scale of a work force.

Isolating instances of political identity as a power resource within the constraints of formal and informal foundations, such as courts and judicial perspectives, can be accomplished by noting where the mobilization of identity for the purposes of constitutional rights / freedoms , as has been the case with corporate personhood in the U.S., has resulted in policy change consistent with one's preference (utilizing freedom of speech rights / freedoms to gain greater participatory power). For instance, as discussed under *First National Bank of Boston v. Bellotti* (570 U.S. 1976*)* in chapter 4, the concept of corporate personhood has been successfully mobilized to gain an identity endowed with constitutional rights / freedoms and that money is akin to political speech, hence bring identity to be a key power resource for the purpose of participating in the democratic process. In this way, discourse surrounding identity, and there consequences thereof for the electoral system, represents a site of struggle of ideas that effects the distribution of power. In turn, this also means that identity may take on a form of "unobservable political power", or, by contrast, it may be a reason for denying the use of established power resources,

such as economic ones – given that for the purposes of campaign finance judicial conflicts, identity has been a principally inter-governmental/judicial construction which influences the distribution of political power. In sum, the aim is not to determine that corporations are more powerful than the state, or that corporations should have constitutional powers, but rather to locate reasons for which, as well the role of courts, whereby identity may serve as a power resource.

Conclusion of Analytical Approach:

As demonstrated in the empirical analysis across chapter 4 and 5, these four literatures or models, neopluralism, gradual institutional change, dialogue theory, and power resources, are taken together to aptly contribute to analyzing gradual and historical institutional change within the context of campaign finance, specifically for how political speech rights / freedoms , electoral politics, and institutional reforms occur vis-à-vis notions about governmental responsibility in sustaining democratic governance, political equality, and integrity in the electoral process. Rather than only a continuation of the foregoing literatures, the original conceptual contributions demonstrated below give analytical insight and explain the specific avenues, constitutional mechanisms, and the influential democratic principles, which have resulted in change in campaign finance judicial outcomes. This approach responds to some of the gaps discussed under chapter 2 and accomplishes an improved understanding of political speech – as regards electioneering – judicial outcomes, as well of the course of campaign finance debates; as such, it adds to literature on inter-governmental dialogue, expands on historical institutionalism, while clarifying neopluralism and power resources insights.

Premises and scope:

Assumptions in this thesis include basic premises concerning democracy and are homogenous within each case, and political power can be dispersed with or without substantive

equality. Additionally, policy is intrinsically mirrored in law and law realizes policy, and constitutional frameworks can bound these. This research also rests on the principle that democracy, realized through elections, is inherently a process – existing on a spectrum to which government plays an active role; it is never finished because it requires on-going attention. Constitutions set the parameters in which political and legal conflicts occur. As for the realization of interests, politics, laws, and constitutions are so inherently interconnected, and so they are relevant to one another when considering anyone. Additionally, unlike many studies that focus on parties in terms of who was the in-party power during a political/judicial conflict, this element is not applied here as issues separate from this are the focus, not the party dynamics that got political/conflicts to arise. Furthermore, the presence or absence of any actor's language is presumed to represent the outcome they aim to effect.

It is further presumed that the actors under study are relatively sovereign, and their findings are made relatively autonomously. Gee (2014) highlights that discourse analysis is itself an interpretation of the interpretive work people have done; in consequence, it is an interpretation of an interpretation and not just a mere reflection of reality. However, the interpretative and vague nature of dialogue and/or language generally does not render the validity of a study null since language is the way people connect to the world, rendering it meaningful in certain ways (Gee, 2014). In this way, a relationship is implied between language, or discourse, and the world – hence the construction of meaning and the attribution of things matters in terms of practical materialization of events; these assessments are not natural but rather intersubjective social constructs, often not related to power relations. Moreover, it is assumed that in general, corporate actors when given the opportunity to act as political-speech rights / freedoms bearers, will in fact engage those rights / freedoms and therefore their electoral activity in the area is presumed to

move in kind. Lastly, when speaking to "democracy", the premises of somewhat contested term is taken in general terms to include a system characterized by separate but co-equal branches of government, relative political equality, electoral participation, and freedom of speech.

Chapter 4: Campaign Finance Policy and Judicial Outcomes in the United States

As introduced in foregoing chapters, the interactions between regulatory actors, judicial review, and campaign finance institutions influence the policies around money in politics and democratic governance alike - as they impact electoral integrity. Studies that do clarify the development of campaign finance by reference to say, law on the books, electoral ambitions, or ineffective public opinion, can be improved by the explanation discussed here, including understanding election-related institutional change in the context of inter-governmental dialogue vis-a-vis power resources and the commodification of speech, ideas, and elections. Though many strong explanations of electoral reform and money in politics exists and are supported by evidence, there are other political processes which provide an improved analysis of the electoral process, the participatory power of individuals and corporations in it, and the role and reasons for institutions governing money in politics.

To clearly demarcate this, this chapter, and the chapter that follows, uses information drawn from judicial decisions, legislation, FEC and CEO positions. As introduced above, the analysis of these materials is applied and evaluated against the gradual institutional change theoretical framework. Because the judicialization of matters of public policy and the concept of free speech / expression are of key interest, the parts of these sources which mostly speak to those issues will be incorporated; this includes three things: 1) categorizing the importance of the judiciary and politically active actors 2) making discourse on the democratic value freedom of speech and political equality points of focus, and lastly 3) identifying the significance of identity for electoral participation (political rights / freedoms).

4.1 Campaign Finance Policy in the United States

Beginning in 1896, and following in 1900 and 1904, the Republican presidential campaigns were colored by concern over the discovery that insurance companies had secretly contributed large sums of money to the party and so in 1907 Congress passed the *Tilman Act* which banned corporations from donating funds to candidates in federal elections (Seidle, 2016, p. 59). Though this act remains in effect, there are a range of loopholes, such as weak disclosure provisions and issue advocacy spending that, and as Seidle argues, "for more than 30 years, Congress did little more than revise and recodify the laws enacted in this initial burst of legislative innovation" (2016, p. 59). As Gaughan explains it (2016, p. 788), from 1910 to 1974 federal campaign finance law experienced more breaches than it did observation of its policies, and no agency had responsibility for regulating federal campaign finance laws. This backdropped changed with the passing of the *Federal Election Campaign Act* in 1971, known as the *FECA*, the foundational legislation which has influenced the course of campaign finance policies at different levels. As Seidle (1991, p. 6) describes it, the historical pattern of campaign finance changed with the passing of the 1971 *FECA* Act. Unlike in the Canadian context, it was the investigative reports of lobbyist groups, such as Common Cause and studies of two private interest groups, that influenced the legislation, namely, "the Committee for Economic Development (a big business group) and The Twentieth Century Fund (a foundation) each addressed the problem in 1968 and 1969" (Seidle, 1992, p.59). As Marshall (2000, p. 338) notes, the 1971 legislation was meant to clean up federal campaigns and eliminate the corrosive effects of money on politics through provisions such as expenditure and contribution limitations.

Nonetheless, the Watergate Scandal, in which then President Nixon seriously circumvented electioneering policies and institutions, destabilized confidence in the 1971 changes. In

turn, the political climate was characterized by poor public trust due to the recent upheaval which revealed many flaws in the system (Mutch, 2016, pp. 59-60). As a result, and despite the depth of legislative shift realized in the 1971, campaign finance in the U.S. was furthermore regulated with the passage of the *Federal Election Campaign Act Amendments of* 1974. The changes made through these amendments in 1974 were so extensive that they mark the new beginning for campaign finance policy in the United Sates (Mutch, 2016, p. 59); and as others point out, the Amendments demonstrate "the most sweeping change imposed on the interaction between money and politics since the creation of the Republic almost 200 years ago" (Seidle 1991, p. 9). Different than Canada, third party groups were not outlawed under the Amendments, and neither were corporations (like Canada). As Mutch explains, "the defenders of the *FECA* 1974 argued that the limits strengthened democracy by reducing undue influence of wealth on elections and public policy. The opponents said the limits weakened democracy by violating First Amendment protections for political speech" (2006, p. 1). Likewise, as Gaughan states, "supporters of the *FECA* Amendments argued that they would reduce corruption and restore public confidence in government" (2016, p. 200), while critics in Congress and academia warned that the proposed amendments violated the First Amendment and would deny Congressional challengers' access to sufficient campaign funds (2016, p. 801).

Nonetheless, and after months of debate, the Amendments passed by Congress "re enacted contribution and spending limits, established a public financing program for presidential elections, and created an independent agency to enforce to law" (Mutch, 2016, p. 61). That agency, namely the Federal Election Commission (FEC), is akin to the Chief Electoral Officer in Canada (CEO) described below, and it is charged with the responsibility of administering and enforcing the *FECA* of 1971, and the Amendments of 1974, including overseeing and restricting

the size and sources of campaign finance contributions (Mutch, 2016, pp.46-47, Souarf 1994, p. 9). As Franz notes that the FEC's random audit power "should give all political committees some additional pause in seeking to skirt the law" (2009, p. 187). Hence After a empirical study of the FEC, Franz finds quantitative evidence which suggests that the FEC is more functional than many often claim (2009, 185- 187); as he shows, "the agency follows through most consistently on its own discoveries of wrong-doing, it secures large fines from corporations and national parties, and it almost never deadlocks" (2009, p. 187) The creation of the FEC therefor meant a new actor would be involved in campaign finance debate and administration, given this bodies regulatory power to enforce policies and bring suits against politically active actors to courts so to bring their activity in line with the law. As detailed in the next section of this chapter, shortly after the passage of the *FECA Amendments* (1974) and the newly formed regulatory body under it, came a challenge to the constitutionality of it in the landmark campaign finance law *Buckley v. Valeo* (1976). Therefore, the next section proceeds to analyze cases which came after the 1974 *FECA* amendments.

4.2 American Judicial Cases

4.2.1 Buckley v. Valeo (1976), 424 U.S. 1

The question in *Buckley v. Valeo,* 1976, 424 U.S. 1 (hereafter "*Buckley*") was whether core provisions of the *FECA* unjustifiably abridged one's constitutional speech rights / freedoms – indeed, challenging the fundamentals of the newly enacted bill, like contribution limits on individuals, corporations, and labor unions and the reporting and disclosure of campaign contributions. *Buckley* was a Senator who had led challenges against the legislation in 1974 in the Senate, and Valeo was the Secretary of the Senate, while the defendants were those who enforce the law,

that is the FEC, along with the Clerk of the House, and the U.S. attorney general (Mutch 2010, 16).

Thus, while the appellant was not a corporation, corporate spending and money in politics generally was the crux of the case. Furthermore, no review of campaign finance can overlook the *Buckley* decision as it is foundational to the course of campaign finance reforms and electioneering in the U.S. In particular, leading to the legal concept "soft money" which, as evidenced through future judicial conflicts, contributed to ambiguity in terms of types of electioneering activities and therefore policy change. Moreover, as Justice Potter Stewart stated during the judicial conflict that money is speech and speech is money - thereby setting firm precedent that electioneering is a constitutionally protected activity (Mutch, 2010, 2016, p. 23). Accordingly, this case merits analysis.

For the purposes here, the findings of this case include: (A) striking down the limit of $1000 on "independent expenditures" (IE); (B) making a lasting distinction between types of independent expenditures; (C) upholding the $1000 cap on contributions; and (D) conceptualizing "speech". Therefore, there are three dynamics to the case which are of theoretical relevance here: namely, the rationale protecting contribution limits (C), the outcome of the decision on independent expenditures (including their limits and what exactly these expenditures are – (A) and (B), and the notion of "speech" in the context of constitutional law (D). Each of these, and their respective connections with gradual institutional change theory, will be considered in turn through three parts. The ways in which active change agents echo existing typology of actors will also be referenced. As will be reviewed, the finding on (A) and (D) rest primarily with the anti-equalization or identity-based rationale, while the finding on (C) hinges on the anti-corruption rationale. As for (D), the rights / freedoms and disregard for unequal power of individuals

and entities underpins the transformation of money into speech, in the context of the electoral process.

The appellants sought to strike down all monetary limits, and their central argument was that the limits on campaign contributions and expenditures alike, that is as set out under the amendments discussed above, were limits on political speech, a personal right, followed by the sub-assertation that because essentially all types of electioneering require the spending of money, that "expenditures for political communications have the same stature as the communication itself" (*Buckley v. Valeo*, brief of the appellate 39, 47). This argument implies that contributions, and again expenditures, were on equal constitutional footing in terms of the degree of protection afforded to them under the constitution; and equally, that all individuals and entities with constitutional rights / freedoms can electioneer generally without infringing on the law. And indeed, as noted above with reference to Justice Potter Stewart's argument, the judicial analysis under the *Buckley* case proceeded from the standpoint that the issue was in fact a matter of First Amendment analysis, meaning contributions by individuals, groups, and entities, express constitutionally guarded political opinions by giving and spending in electoral campaigns. This last point will be more thoroughly unpacked below in Part II.

Because the appellants sought to strike down the limits on expenditures and contributions, they functioned as *insurrectionaries* by "consciously seeking to eliminate existing institutions or rules….by actively and visibly mobilizing against them" (Mahoney and Thelen, 2010, pp. 23-24). Seeing that the change agents attempted to remove the limits all together, they were aiming to achieve *displacement.* Although this method may be a slow-moving process, it can happen abruptly, such as through a court ruling, though this is not to say they were successfully attaining *displacement* in this case. Likewise, those seeking *displacement* are often "losers"

under the system of which they challenge, hence providing them motive for change. The opponents articulated this when they stated that the "Act's contribution and expenditures limitations impose first quantity restrictions on political communication and association by persons, groups, candidates and political parties" (Kuhner, 2014, p. 38). In this way, the *FECA* opponents linked their identities, or more accurately the identities of would-be donors such as corporate, labor, or members to a PAC, to overall positions about being doubly disadvantaged – first by the impugned *FECA* provisions and secondly at the level of constitutionalism. Therefore, they attempted to erase and supplement the rules by a new approach or set of rules, that is a more marketized and commodified logic aiming to attain *displacement* of existing campaign finance policy Hence, if the court decision did read in that contributions were not subject to a monetary limit, then the type of change associated with *displacement* would be evident here. Now this assessment turns more specifically to the changes sought, and how the characterization of *insurrectionaries* fits in.

Part I: Contribution Limits, Anti-Corruption, and Policy Stability:

In analyzing the contribution limits, the Court rejected the First Amendment claims advanced by *Buckley*, outlined the unjustifiable troubles with corruption, and made the case that suppressing public perception of corruption is a compelling and independent state interest for regulation by stating that: "of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." (*Buckley v. Valeo*, 1976, 424, 1 U.S 25-27). The Justices' findings applied to the funds of both individuals and the corporate form alike. It was, therefore, on the anti-corruption basis alone that policy stability occurred, specifically due to the Court's finding that it was not necessary to venture into

the other rationales when preventing the sought-after *displacement,* and indeed, it did not as it had already agreed with the constitutionality of Congress's intent (as shown below), and that the provision was narrowly defined (*Buckley v. Valeo*, 1976, 424 U.S. 1).

Strict scrutiny and inter-branch dialogue tilted the court's decision away from *displacement.* The court reasoned that campaign contribution limits "served the government's interest in safeguarding the integrity of elections", but most particularly the anti-corruption rationale. Notably, again, the Court underscored that for contribution limits preventing the appearance of and possibility actual corruption - meaning the one rationale alone which is not political equality based - was a "constitutionally sufficient justification" (*Buckley v. Valeo*, 1976, 424 U.S. 1, 26), as the "the transformation of contributions into political debate involves speech by someone other than the contributor" (*Buckley*, 424 U.S. at 20-21); and therefore only minimally burdens freedom of speech (U.S. 424 at 20-21).

Engaging in inter-branch dialogue as such, the judiciary also found that because "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical... if confidence in the system of representative Government is not to be eroded to a disastrous extent."" (*Buckley*, 424 U.S. at 27). Unlike studies then that argue judicial activism is the principal tenor of judicial conflicts, campaign finance policy in the context of judicial conflicts indicates some instances (like this case and others which follow) where deference to Congress occurs, thereby showing the opposite of judicial activism (deference as defined earlier meaning to yield to the power and role of the legislative branch).

Furthermore, and as other studies in different policy areas have shown, the *insurrectionary* variety of a change pursing agent was unsuccessful here in terms of overthrowing contribution limits as the political context did not afford them an adequate opening. In particularly, due to

the argument made in this thesis that courts are characterizable as a strong veto point given, they have the ability and expertise in the realm of interpreting and applying the law of the highest formulation, and therefore do so with a relatively high degree of discretion, making justices powerful veto players. Judges are not subject to elections in the same way that legislatures are, they are not subject to the same turn around process as FEC officials are. Therefore, the political context was colored by not only a strong veto player, but one who is in contact with the status quo player (namely the state), meaning that *displacement* was subject to an intervening agent, and the interactions of these two layers (inter governmental dialogue through an analysis on Congressional intent) – while also implicating a regulatory body, namely the FEC, given they were a party to the action.

Furthermore, Mahoney and Thelen (2010, 2014 p. 19) explain that strong veto contexts such as the judiciary make it difficult for would-be agents of change to organize the resources needed to shift the institutional framework. In the context of campaign finance contribution limits, this is evidenced through the appellants' inability to show that their resources, such as resources pinned to their identity, did not give way to concerns which would otherwise give way to major policy change.

An anti-corruption rationale cannot be separate from the power of individuals and entities as it is through their presence that the role of money politics is realized. The Court implied this by stating that the limits were focused on the problems of real and perceived corruption, "while leaving persons free to engage in independent political expression… and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources" (*Buckley v. Valeo*, 1976, U.S. 424, 1, 28). Thus, demonstrating furthermore that the strong veto power, high discretion environment, a lack of focus on political equality, and the relevance of

political identity, may provide for policy stability or at least a failure of *displacement* in the specific political context.

Different than the logics used for independent expenditures then, as discussed below, these specific conditions meant that unlike a political context characterized by a low level of discretion and weak veto possibilities, the context was not ripe for change along the lines of *displacement* (Mahoney and Thelen 2010, p. 28). Accordingly, *displacement* of contribution limits was unsuccessful as the results of *Buckley* do not generally show the outright overturning of said policy of interest. Therefore, this part of the analysis further confirms Mahoney and Thelen, and other studies which outline why *displacement* is not promising in political context with strong veto possibilities, that is the judicial process, with either level of discretion. In addition, and on the one hand, this analysis challenges existing assessments which find the insurrectionary variety is often successful in *displacement* (Mahoney and Thelen, 2010: 24). Yet on the other, it confirms the point that such actors are not likely to succeed in high veto, high discretion environments (Mahoney and Thelen, 2010, p. 19). In sum, it is where the anti-corruption rationale prevails, and dialogue is had, that institutional change as *displacement* may be blocked and policy stability may therefore be achieved

Part II: Money is Speech and Gradual Institutional Change Via Conversion:

In *Buckley*, the second main issue concerned the realization of 'money into speech', that is issue (D) referenced previously, through gradual institutional change as *conversion*. More specifically, a few traits of *conversion* are particularly relevant here. Recall that *conversion* occurs when rules remain formally the same but are enacted in new ways and where actors exploit ambiguity of an institution to achieve redeployment – hence converting a policy towards new goals, functions, or purposes (Mahoney and Thelen, 2010, pp. 17-18).

In this case, actors were able to fruitfully exploit ambiguity such that speech rights / freedoms could serve new purposes, that is the capacity to spend money in the context of electioneering as a form of speech. We see this where the Court maintained that money has a necessary enabling effect on speech, "that virtually every means of communicating ideas in today's mass society requires the expenditure of money", and so the right to expend money became applicable through a constitutional lens –giving credence to the influential legal concept "money is speech" (*Buckley* 424, at 13, 18-19). Similarly in this vein, the Court underscored the infringement on individuals and entities by arguing that the "Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and associations by persons, groups, candidates, and political parties" (*Buckley* 424 at 18)…and that the "limitations challenged here would….restrict the voices of people and interest groups who have money to spend" (*Buckley* 424 at 717). In this regard, it is clear how wealth disparities were a back issue at most, and that undue spending by "persons", which inherently includes entities based on *FECA* definitions, was not conceptualized as problematic for campaign financing. In fact, the Court found a positive relationship between money and democratic deliberations, as they wrote per curium that: "A restriction on the amount of money a person or group cap spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience research (*Buckley v. Valeo* 424 U.S. at 16,19).

Through pronunciations such as these, the transformation of money into speech was solidified by the *Buckley* Court in a manner consistent with institutional change through *conversion*. More specifically, actors thus successfully conceptualized about inherent questions within the notion that electioneering requires money, or more generally that money and politics

intertwine, and thereby affected change by leading a new way of interpreting what speech is. Meanwhile, no formal rule concerning money as speech was written into a law, though it was thereby normalized and has set the precedent for constitutional conflicts to date (Mutch 2016, Kuhner 2014; Wright, 1976). In this way, I argue that as is true of *conversion*, actors successfully exploited the notion of speech to affect change, whilst relevant institutions remained formally the same (Thelen, 2003). As a result, and consistent with *conversion*, constitutional First Amendment rights / freedoms have since been redeployed towards a new function or purpose, that is to safeguard the right of any entity with constitutional rights / freedoms such that corporations' and others degree of political participation can legitimately correlate with their monetary resources. The logic underlying these changes highlights the marketization and commodification of the electoral process in the U.S. from the early days of campaign finance reforms, and they rest on a clear theory of democracy based on economic concepts, concepts conducive to specific forms of policy change.

In sum, and like with independent expenditures discussed below limits, this instance of *conversion* runs counter to current models which expect the change type to occur in weak veto possibility, high discretion contexts (Mahoney and Thelen, 2010, p. 19). Accordingly, this judicial case in part confirms the typology (high discretion) and on other hand problematizes (weak veto possibility) to show how, for the purposes of campaign finance, *conversion* can occur when dialogue is involved, and identity-based policies provide power to individuals and entities based on judicial interpretations of positive speech rights / freedoms . As such, the *Buckley* case indicates change in a manner that somewhat departs from the expectations for change as set out under gradual institutional change theoretical framework. Additionally, then, the analysis of *Buckley* in this thesis adds on to existing studies by showing context (high discretion / strong veto

possibility) in which *insurrectionaries* may be successful, that is beyond *displacement* which current studies already show of them (Mahoney and Thelen, 2010, pp. 23-24).

Part III: Independent Expenditures, Anti-Equalization, and Policy Change:

The final topic considered in *Buckley* concerns independent expenditures, that is issue (A) and (B) referenced initially. Here, the Court found that governmental restrictions of independent expenditures in campaigns and total campaign expenditures did violate First Amendment rights / freedoms . In this way, the *insurrectionaries* in *Buckley* were rather uncharacteristically successful in attaining *displacement* – that is given the political context described in Part I – thereby attaining institutional or put differently policy change of independent expenditures. Notably, *layering* was also important to this effect.

The first part of their case challenged the provision which prohibited all persons from making total expenditures "relative to a clearly identified candidate" in excess of $1000 per year (18 U.S.C. s.608(e)(1)., *Buckley v. Valeo*, 1976, U.S. 424, 1). The Court determined that the *FECA*'s expenditure limit was unconstitutional thus influencing the *displacement* of them. This instance can be fairly characterized as such because the sudden impact or force of a judicial ruling is also consistent with change as *displacement* (namely the rule that independent expenditures are constitutionally problematic) since it is known to occur possibly abruptly (Mahoney and Thelen, 2010, p. 16).

In coming to its finding, the Court considered two state interests. The first was preventing corruption or its appearance while the second was equalizing the relative ability of individuals and groups to affect the outcome of elections. The corruption argument did not go very far as expenditures are inherently disconnected, or uncoordinated, with a candidate and so the idea of a corrupt motive could not be sustained. Therefore, it is the anti-equalization rationale, or the

rejection of de marketization, which guided the outcome. The rejection of the second state interest, and ultimately policy *displacement,* hinged largely on not only constitutionalizing money as speech through *conversion*, but also on the legitimization of political power of individuals, or as the Act suggests corporations, and either's right to participate in the electoral process.

To address its constitutionality the Court engaged in strict scrutiny dialogue with the terms of the legislation. Here, the Justices held that the asserted interest in equalizing the relative ability of individuals and groups to affect election outcomes could not justify the limit on independent expenditures; more particularly, the Court argued that "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." (*Buckley v. Valeo*, 424 U.S1. at 48-49). According to the court, expenditure limits "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech" (*Buckley v. Valeo*, 424 U.S. 1,119), and that "expenditure limitations is to restrict the quantity of campaign speech by individuals, groups and candidates" (*Buckley*, 424 U.S. at 48-49). The marketplace of ideas rationale is present here and this discussion underscores how political power may become disproportionally distributed to wealthy individuals and big business, thus challenging and adding on to existing studies from the neo-pluralists' perspectives which account business power to market-oriented societies and economic structures, as discussed in chapter 3. Put differently, it is evident that because of constitutional constraints that are placed upon both the legislative and judicial branch, the policy interests of big business may be protected not only because of the economic structure, but also because of constitutional rights / freedoms . Additionally, then, constitutional level judicial decisions such as *Buckley* and others discussed elsewhere further help to explain why public opinion on campaign reforms may diverge from actual reforms, again as discussed under section 2.2.1.

On arguments such as those above, the Court determined that the interest in equalizing candidates' resources was insufficient to override the candidate's interest in free speech. There presented a clear tension with premises of the *FECA*, such as capping the cost of politics and regulating money in politics, and the broader rights / freedoms and freedoms provided for. Accordingly, as further outlined below, it was by utilizing these logics and by privileging the rights / freedoms of political power of persons, groups, and entities, that *displacement* of part of the *FECA* was uncharacteristically likely in the context of a strong possibility, that involved dialogue, and even with a high level of discretion in interpretation and enforcement. As a result, we observe policy change concerning what 'expenditures' are.

The Court went on in its analysis to define expenditures, specifically in concurring that the phrase "relative to" did not clearly identify what candidate related expenditures were subject to the limit. Consequently, the vagueness claimed by the appellants was agreed to threaten to chill free expression guaranteed under the Constitution (*Buckley v. Valeo*, 1976, 424 U.S. 1). Here we can note that independent expenditures as a broad category was not eliminated but rather was revised and partially amended - as is seen with *layering*.

To this end and to resolve Congressional oversight, the Court rendered two concepts and a lasting distinction a between "express advocacy" and "issue advocacy" as two forms of independent expenditures (Moramarco, 1999, *Buckley v. Valeo*, 1976, 424 U.S. 1, 44). It determined that *FECA*'s expenditure limits covered only communications that in express terms advocate for the election or defeat of a clearly identified candidate for federal office, unlike "issue advocacy" ads which merely discuss issues or candidates without expressively advocating election or defeat through phrases such as "vote for/against" of a candidate – this is known as the "magic words" analysis). (Moramarco, 1999: 6-11). Consequently, issue ads resulted in what is known as 'soft

money' activities that affect federal elections but, due to the dialogue of this decision, technically falls outside *FECA*'s scope; in other words, the Court determined that *FECA*'s expenditure limits covered only communications that "in express terms advocated the election or defeat of a clearly identified candidate for federal office" (as opposed to those that merely discussed issues or candidates, without expressly advocating election or defeat of candidates). (*Buckley v. Valeo*, 1976, 424 U.S. 1, 44)

Here, the Court set up a framework wherein new institutions, or policies, came to run alongside existing ones. Hence, because they did not overturn the notion of expenditures altogether, but rather added elements to it, there was an attachment of new concepts and a shift in logic, leading to *layering* (Mahoney and Thelen, 2010, pp. 17-21; Schickler, 2001). Even though *layering* is often found in low discretion environments, which contrasts with the judicial branch, this instance shows us *layering* and policy change in a high level of discretion context, challenging current theoretical frameworks as such. As a result, the insurrectionary actor is further shown to prevail in a context in which existing studies do not expect them to, hence contributing to knowledge about the conditions under which we may find this change agent achieve advantageous institutional change.

Yet, the change agents lacked the capacity to spoil the policy altogether, given that express advocacy remained subject to the *FECA*, but they were able to exploit its inherent ambiguities such that requirements for some activities became more favorable for campaign financing. This twofold outcome is consistent with studies on *layering* which show that while powerful veto players can protect an old institution, for instance by upholding limits and notions that apply to express advocacy, they cannot necessarily prevent the addition of new elements such as issue advocacy, resulting in some change (Mahoney and Thelen, 2010: 20).The addition of new elements

likewise arises from their analysis of the legislation, and the terms within it which required deconstructing. So, while *layering* via the addition of elements is typically discussed in terms of a lack of capacity of powerful veto players to prevent the addition of new elements (Clark and Whiteside, 2003; Hacker, 2005), in this case it was through active pursuit of *displacement* of the litigants, dialogue, the anti-equalization rationale, and a distributive conflict that *layering* happened in the face of powerful veto players like justices in a direction with positive potential for the change agents of the insurrectionary variety.

Overall, as closely detailed above, the results of this case tell us that risks associated with corruption have enabled policy stability, while discourse more closely tied to political equalization and the monetary power of various identities were more susceptible to policy change via *layering*, albeit not the exact form which the appellants sought. Meanwhile, the commodification of speech can be observed via *conversion* as a mode of institutional change. These findings become particularly evident when the Court examined the issues through inter-branch dialogue, finding and challenging that equalization may have been Congress's illegitimate intent. In this way, election campaign finance policy under *Buckley* in part confirms and in part adds on to other studies which show how the character of institutional rules, and the political context are explanatory factors for policy change, and where change agents and resources, and in this case inter-governmental dialogue, "become the intervening step where institutional rules and political contexts do their causal work" (Mahoney and Thelen 2010: 29).

4.2.2 First National Bank of Boston v. Bellotti U.S. 435 (1978)

The *conversion* mode of change can also be documented in the landmark political speech rights / freedoms case *First National Bank of Boston v. Bellotti (*hereafter *"Bellotti")* which came before the courts not long after *Buckley*. As outlined elsewhere, *conversion* is different

from *layering* and *drift* in that policies as institutions are not so much amended or allowed to decay as they are redirected to new goals, functions or purposes (Then and Mahoney, 2012, pp. 19-22). Corporate personhood is a policy with century old roots in the United States (*Santa Clara*, 1886, U.S. 394), albeit not recognized in the constitution, and had found relevance by the time of this case in a range of policy areas from commerce, commercial speech, due process rights / freedoms , and more. However, *Bellotti* marks the first-time corporate personhood was utilized in the context of campaign finance policy, and in particular, political speech rights / freedoms (Fox, 1978; Schneider, 1985). The redirection of corporate personhood as such is underscored by the rise of three things as demonstrated in this case, namely: that the corporate form is not unprotected by the first amendment despite its special identity, the right to hear is just as important as the right to speak, and that money is, as too affirmed in *Buckley*, akin to first amendment protected speech or property rights / freedoms pursuant to the fourteenth amendment. Based on this, I argue that the *Bellotti* case is not only about a theory of the corporate form (specifically given that it is not something that is simply enshrined in the constitution), but relatedly pluralism, intergovernmental dialogue, the election marketplace, and political power. This is an important case illustrating policy change in the form of endogenously driven *conversion*, and an attempt at *displacement,* meaning an abrupt removal or change away from the potentially influential concept of corporate personhood, by the minority of the court and lower court alike.

The details of the case are as follows. In 1978, two national banking associations and three business corporations were *insurrectionary* change agents, out right opposing a referendum to enact a constitutional amendment levying a graduated individual income tax and sought to have section 8, a Massachusetts criminal statute, declared unconstitutional. Accordingly, and like the *NCPAC* discussed later, the conflict concerned an intersection between criminal law and

campaign finance policy. The Court overturned the section which forbade corporate expenditures "for the purpose of…influencing or affecting the vote on any question submitted to the voters" (435 U.S. 1978 at 768) in the context of referenda concerning issues not "materially affecting" the corporation's "property, business, or assets" (435 U.S. 1978, at 767). The ruling did not stop the corporations from speaking about any referendum subject, or from lobbying, and it did not prevent them from participating in all referenda, but only those without the material effect on its business. The referenda of interest would have allowed the state to implement a graduated tax income. The corporate appellants argued that the tax would have a direct negative economic effect on them and investors by creating an unfavorable business climate and discouraging investors from Massachusetts (Hastings, 1990, pp. 614-15). Therefore, the main question for the *Bellotti* court was essentially if a commitment to democratic government, which they recognized should be characterized by pluralist debate, would best be fulfilled through safeguarding political equality by way of limiting the commodification of speech, or conversely, if problematizing the notion that money is speech would better facilitate democracy, inclusive of individuals' and societies' rights / freedoms to speak as well as listen.

Just like in *Buckley*, the lower court – in this case the Massachusetts Supreme Judicial Court – upheld the statute 5-4, the lower Court had employed the artificial entity theory to hold that individuals enjoy broader first amendment protections than corporations, which can claim only fourteenth amendment property protection (435 U.S. 1978 n. 270). However, the Supreme Court of the United States by a vote of 5-4 reversed the lower court's decision. And like the majority on the lower court, the power derived from corporate identity was key for Justice White, Breman and Marshall, who wrote for the dissent. They found that the speech of business corporations does not serve "what some have considered to be the principal function of the First

Amendment, the use of communication as a means of self-expression, self-realization and self-fulfillment" (435 U.S. 1978, at 804). However, the dissent also found that while corporate speech may serve other first amendment functions such as "the interchange of ideas" (435 U.S. 1978, 806), such speech still lacks "the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech" (435 U.S. 1978, 807). Still, they argued that in any event, restrictions of such speech "impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech"(435 U.S. 1978, at 807). Justice White for instance recognized that corporations are profit-making entities and have a legal duty to maximize stockholders return through profit maximization, and not to promote public democratic deliberation.

These Justices went further in articulating concern for the trade-off that comes with corporate speech rights / freedoms . The first point they made in this regard is that the state had provided the corporation with advantages, which allow corporations to accumulate great sums of money, and it may be thought the state is providing corporations with an unfair advantage over other participants if it permits entities as such to compete freely in the political process (435 U.S. 1978, at 809). As Professor Polsby observes, the dissent relied on a communal premise for democratic governance through its recognition that communities need for their election not to be dominated by corporations (cited in Schneider, 1986, p. 27). The second reason by Justice White teeters on judicial deference to the legislature, as the dissent disagreed with the articulation of individual First Amendments interests vis-à-vis the state interests; for them, the first amendment ought to be conceptualized as containing a priority state interest in "assuring that shareholders are not compelled to support and financially further beliefs with which they disagree" (435 U.S. 1978, at 812). This is because the speech, or lack of speech, put out by business corporations

likely is by a small group of managers with narrower interests yet effecting a much larger and diverse group of individuals.

Justice Rehnquist's dissent spoke directly to the corporate form and a more limited scope of the First Amendment. Citing *Dartmouth College v. Ward,* the Justice maintained that: "Being the mere creature of law, [a corporation] possess only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. (435 U.S. 1978 at 823 quoting 17 U.S. (4 Wheat) 518, 636 (1819). As Schneider (1986) points out, Rehnquist was unable to rule out "that the right of political expression is…necessary to carry out the functions of a corporation organized for commercial purposes, especially where that political activity was directed at matters having no material effect on the corporation" (1231, 822). By further finding "that states might reasonable fear that the corporation would use its economic powers to obtain further benefits beyond those already bestowed" (435 U.S. 1978 at 826), Justice Rehnquist underscored its constitutionality. Justice Rehnquist, in his dissent, thus questioned the wisdom of extending corporations political rights / freedoms . Justice Wright's dissenting arguments similarly held that that "it has long been recognized…that the special status of corporation has placed them in a position to control vast amount of economic power which may, if not regulated, dominate not only the whole of the economy but also the very heart of our democratic process" (435 U.S. 1978 at 809).

Here, we can perceive concern for the notion of the marketization of elections and the commodification of political speech and how they can be viewed as a function of corporate identity. Put differently, corporate identity can serve as a power resource that shapes the electoral process and the integrity of elections. Based on their judgments, I argue that the dissents' positions, akin to that of the lower court, would have led to the *displacement* of the corporate form in

the context of campaign finance. Moreover, this is like the 'rediscovery' of oppressed historical alternatives (Moore 1979, 376), that is preceding judicial conversations about the artificial entity and natural entity debate; and through 'change emanating mostly from shifts in the societal balance of power (Collier and Collier, 1991; Skowronek, 1995; Huber and Stephens, 2001). Like Michael Piore and Charles Sabel, 1981, who showed that the success of the German political economy was due to the survival of organizational forms (such as corporation personhood in this case) that had been declared irrelevant in previous times, the *displacement* of the corporate form within campaign finance expenditure policy could have happened if the view of the minority, that is the artificial entity theory, which had been declared legally fallible in previous times was 'rediscovered' and applied by the majority as the determinative logic in the case. Therefore, the fact that support for the artificial entity view, albeit the minorities' assertion, in fact presented itself, problematizes and builds on Mahoney and Thelen's (2010, p. 19) finding that *displacement* as a mode of change is probable in a weak veto possibility and low level of discretion context, which is not an accurate characterization of the judicial branch and potential consequences thereof. In this way, we can observe that for the purpose of judicial outcomes, change such as *displacement* moves beyond just context to encompass collective rationales about political equality and corporate identity, as put forward via judicial discretion and the findings made by the relevant powerful veto players, such as judges.

In contrast to the minority, the majority of the bench barely discussed what a corporation is, whom it represents, who owns it, who runs it; instead, there was a general premise of its social, economic, and political role in corporate and First Amendment law. The decision relied on the original founding of corporate personhood in American jurisprudence, that is relying on the reading in *Santa Clara v. Southern Pacific Railway Company* (1886) when it stated that "[i]t has

been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment.” Hence in place of the minority’s theory of the case, the Court changed the terms of the debate by arguing that attention to the identity of a speaker led the lower court to err as it “framed the principal question in this case as whether and to what extent corporations have First Amendment rights / freedoms , and if so, whether they are coextensive with those of natural persons” (435 U.S. 1978 at 775-76). Accordingly, the lower Court had only to inquire “whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection” 435 U.S. 1978 (at 778), while as Justice Powell argued when writing for the majority, the “proper question” was whether the statute “abridges expression that the First Amendment was meant to protect” (435 U.S. 1978 at 776), Powell set forth that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source” (435 U.S. 1978 at 777) and that since the speech was obviously political, it was covered by the First Amendment. The Court noted that if the speakers had been individuals and not corporations, no one would have suggested that the Legislature could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual (435 U.S. 1978 at 777). Likewise, it was found that, “the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual” (98 S. Ct. at 1416). Here, the Court drew an implicit argument from commercial speech cases, as Schneider (1986, p. 1238) and the Court explain, “if advertisements, which contribute only to the flow of commercial information, are protected, so much be expenditures to affect referenda since they enhance the flow of political information, which is closer to the First Amendment’s core than commercial information.” In other words, it

is the message that matters and not the messenger's identity per se, as well the rights / freedoms of broader listeners. As a result, the Court set the precedent of treating speech, not the speaker, with constitutional protection.

The majority of the Justices overall abandoned the direct analysis over corporate First Amendment rights / freedoms in *Bellotti* in favor of an abstract and simple theory of free speech: the marketplace of ideas where the right to speak correlates with the quantity of information, which makes for a better-informed society and thereby greater democratic governance, which is to be sure a state interest. Accordingly, the *Bellotti* Court's theory was that that speech is protected because of its social value, even when the "speaker" is not a human being. On the one hand then, corporate identity was critical as it came with legal standing, though on the other I argue that the significance of the insignificance of the corporate form is strongly demonstrated in this judicial conflict (among others) as the majority did not exert effort to theorize in order to define its being. This means that there was a redirection of institutional resources, one's legal standing based on identity, which is associated with *conversion* as it has been shown to occur through political contestations over what functions and purposes an existing institution should serve. So, while the corporate actor's standing in law did not change, it was interpreted and enacted in new ways, for First Amendment rights / freedoms , and so we can document the resulting change as *conversion*, as further unpacked below (Thelen, 2010, p. 17).

The Court also clarified that the *Bellotti* case was just as much about the right of the identity of the speaker as it was the listener, meaning the right to speech as well the right to hear. Accordingly, the Court reasoned, "the First Amendment goes beyond protection….of the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." (435 U.S. 1978 at 783) Because the "information" in question

spoke to an electoral issue, it was therefore the core of the First Amendment's applicability. Therefore, these minority Justices also relied on a communal notion as they found that the public's right, that is a communal notion, to hear gives way to legitimizing expenditures by corporations in the context of referenda. However, the court did not clarify what exactly the information could entail when it stated that much "valuable information which a corporation might be able to provide would remain unpublished (435 U.S. 1978 at 785, n.21)", though the statute did not prevent the corporation from utilizing say, a press conference to disseminate opinions.

With regard to equalized access, the majority opinion noted that earlier statutory efforts to compel equality of access to media sources for public issues had failed, and that *Buckley* had specifically recognized 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... "(quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Preceding from this standpoint, the majority on the Court did not problematize the corporate form in regard to equalized access, and it avoided grappling any possible empirical difficulties, or potential benchmarks, that could exist in order to gauge the extent to which the scope of First Amendment protections translates into political inequality.

Like in *Buckley*, intergovernmental dialogue under the strict scrutiny threshold was an important aspect of the resulting policy change, specifically regarding the under and over inclusiveness of section 8 in terms of constitutionality – meaning it was necessary to contemplate if the statue was tailored in a constitutionally sound way. On the legislative side, allowing corporations to speak was understood to corrupt the electoral process and interfere with the purpose of the First Amendment precisely because the corporate identity is often characterized by wealth and power, potentially drowning out others' points of view. Yet the Court considered and

rejected this legislative attempt to govern the political and social power of the corporate form. In doing so, the Court addressed if there was a compelling state interests such that a constitutional infringement could be justified, though noting the burden was on the government to show that the test had been met and that the means used were narrowly drawn (at 786). The Court found insufficient evidence in records or legislative findings that the law was necessary to preserve "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government." (at 786). As such, the Court reasoned it wasn't demonstratable that the relative voices of corporations have been overwhelming or even significant in influencing referenda in Massachusetts. On the anti corruption rationale, the Court doubted that "corruption" was at all applicable to referenda, hence making the statute over inclusive because while you can bribe a politician with a large contribution, you cannot simply be said to bribe the public by advertising. Further, the fact that advocacy may persuade the electorate is hardly reason to suppress it (at 789-790). In fact, the Court in *Bellotti* stated: "The risk of corruption involved in cases involving candidate election…simply is not present in a popular vote on a public issue "(at 423). The Court maintained that "far from inviting greater restrictions of speech, the direct participation of the people in referendum, if anything, increases the need for the widest possible dissemination of information from diverse and antagonistic courses" (435 U.S. 1978 at 709 n. 29).

Massachusetts' second justification of the statute was that it prevented minority shareholders from being unwillingly affiliated with ideas they disliked or had not consented to being associated with. This means the state's argument was that legislation was necessary to protect the personal identity of shareholders by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree. The Court found lawmakers attempt to

protect minority stockholders or shareholders to be over inclusive in this regard as since "shareholders may decide, through the producers of corporate democracy, whether their corporation should engage in debate on public issues. Acting though their power to elect the board of directors…shareholders are normally presumed competent to protect their own interests" (at 794-5). Notably, the identity of corporations is the collective identity of the shareholders, and this gives rise to at least one major concern, namely, that corporate shareholders have a legal duty to maximize profits and so the messengers they send are likely to be tailored towards those ends, that contrasts with minority viewpoints and despite the notion of 'corporate democracy'. Moreover, the Court found the statute would be over inclusive even if there was consensus among all stockholders – minority included. This finding rested on a competing First Amendment issue, that is the right for others to hear, thus making the statute to over reach into the rights / freedoms of others to hear information, a constitutional issue beyond rights / freedoms said to be achieved through corporate governance, making the statute both over and under inclusive as it did not serve "the interest in protecting the rights / freedoms of shareholders whose views differ from those expressed by management on behalf of the corporation" (435 U.S. 1978, at 787). Justice White's dissent exactly picks up on what could have changed the trajectory of the dialogue and the results thereof. For White, because the Court failed to confront such theoretical issue of the corporate form, it couldn't adequately address the core issue in *Bellotti*, that is the conflict between first amendment rights / freedoms as exist to both speaker and listeners. In this way, the question posed by the court is marred by a failure to realize the state's policy interest in terms of balancing the two dynamics under the first (at 803-804). However, this series is consistent with *conversion*, specifically because while the change agents lacked the capacity to simply destroy the institution (such as campaign finance limits all together), they were able to exploit inherent

ambiguities, such as what is the corporate form is and how it matters for political speech rights / freedoms , in ways that allowed them to redirect it towards more favorable functions and effects.

Buckley also established some precedent utilized in *Bellotti*, particularly in three main ways. First, it affirmed the right to speak through political speech expenditures, which is an indispensable component to the *Bellotti* case. Second, as outlined, both cases relied on the right and importance of others being able to hear or receive information, though in *Buckley* it was highly about a voter's individual right to disseminate their views, whereas in *Bellotti* there was no "voter" speaker involved and so it was predominantly about others right to hear. However, they are distinguishable through a third point in that the reasoning of *Buckley* hinged largely on a rejection of the state's interest in equalizing or securing pluralism in political participation, while the majority in *Bellotti* came to the same finding but did so by barely engaging with this issue – particularly by not defining the corporate form and the power implications of it.

Like Palier's (1990, 2010) studies on economic liberalization in France show, highly ambiguous ideas about policy arrangements gives way to widely different understandings of what policy reforms could mean. For instance, following the minorities' judgement, the corporate form does not have the same rights / freedoms as individuals and poses serious risks to the electoral process, meaning that reform options are tailored accordingly. In this case, the de-marketization versus the marketization of elections were the reform options which were contingent on three core conceptual ambiguities and issues: corporate identity, corruption, and political equality.

Rather than a neglect of the institution, as one may expect with *drift*, the appellants actively modified their identity as a power resource and exploited legal ambiguities about corporate identity for instance by arguing that the tax would have a direct negative economic effect on

them and investors, leading judges on both sides in the case to (re)deploy the notion of corporate personhood to reconcile the claimants' position with constitutional doctrine. Thus, these would-be change agents worked with existing materials to pursue outcomes, that is overruling s.8, to what was a new problem, that is the prohibition against expenditures – hence overall acting in a way consistent with *conversion*.

In sum, the following two main findings can be drawn from the *Bellotti* judicial conflict. The anti-corruption rationale, plus an attempt to deflate marketization through relative political equality with reference to Congressional intent, coupled with a theory of the corporate form based on the artificial identity view gives way to *displacement* of the highly influential pro corporate form policy and blunts policy change in the form of *conversion*. Second, and following *Buckley*, indifference to the corporate form, a rejection of the corruption rationale and political equality via intergovernmental dialogue, gave way to campaign finance policy change by way of *conversion*.

4.2.3 FEC v. National Conservative Political Acton Committee, (1985)

The next case of interest is *FEC v. National Conservative PAC* (1985), 470 U.S. 480 ("hereafter "*NCPAC*"). As described next, the *NCPAC* case demonstrates a successful attempt at *displacement* of both the application of the anti corruption, as well of a policy at the intersection of campaign finance and criminal law, namely 26 U.S.C. section 9012(f), which was ruled unconstitutional. As a result, the success of defeating this institution can be attributed to endogenous *displacement*, by those who had interest in Section 9012(f)'s being found unconstitutional by a court. The *NCPAC* case shows a context which is conducive to *displacement*, that is a judicial conflict wherein: a corporate form is described as not economically motivated, and there is an absence of both the anti corruption and concern for equalization political speech, even when

intergovernmental dialogue and acknowledgment of a potentially powerful corporate form occurs. Additionally, and as described further below, this case furthermore illustrates *conversion*-like effects due to the attributes, assigned by the judiciary, to politically active actors such as *NCPAC*.

The *NCPAC* began with an action of September 1980, where the U.S. District Court for the District of Columbia ruled that Section 9012(f) was unconstitutional as applied to Americans for Change, Americans for an Effective Presidency and FCM, three multicandidate political committees, which were not affiliated with any parent organization. In this case, it was a matter of 9012(f) of the criminal law which imposed that if a presidential candidate accepts public financing, that is pursuant to the *Presidential Campaign Fund Act* and as under the *FECA*, it would be a criminal offense for such independent "political committees," to spend more than the $1000 limit on expenditures to independent organizations in support of candidates. Although the politically active groups who sought to overturn the law in their favor were successful in that the policy was ruled unconstitutional by the District of Columbia Court, thus enabling them to potentially access a wider base for funds, the FEC continued to bring suit in attempts to overturn the District Court's judgement. As well, the FEC continued to issue advisory opinions to actors involved in the electoral process that the policy would be enforced (July 1983 Record, p 2). Accordingly, I argue that the FEC as a governmental actor brought the judicial branch into dialogue with the legislative branch, given that the FEC gave rise to consequential judicial interpretation of legislative intent, and in turn a judicial reply to the legislators.

As for a key regulatory actor then, namely the FEC, there continued objective was to achieve a judicial declaration by the Supreme Court that 9012(f) was in fact constitutional, thus enabling it to use its powers under the *FECA* and enforce the policy. Accordingly, there

motivation was to maintain the letter of section 9012(f), in turn sustaining a narrowing of access to finances. Accordingly, and following the 1980 case, in 1982 the FEC pursued *NCPAC* and FCM, but because the Court ruling was a 4-4 split on the laws constitutionality due to the absence of Justice Susan O'Connor, its affirmance had no precedential value – creating need to restart the dialogue over 9012(f) through judicial conflict. Against this backdrop, the FEC pursed. a new suit in 1983 with the U.S. District Court for the Eastern District of Pennsylvania on June 14, 1983. (*FEC v. NCPAC* and FCM; Civil Action No. 83-2823), again asking for a declaration of validation of 9012(f). Disagreeing with the FEC, the Eastern District Court based its decision on *Buckley* and argued that the impugned provision was unconstitutional on its face.

This backdrop led to the 1985 *NCPAC* case wherein the National Conservative Political Action Committee refuted the FEC's power to enforce 9012(f) against them via maintaining that the policy should be determined unconstitutional. The continued efforts by groups such as Americans for Change, FCM, and ultimately The National Conservative Political Action Committee, resonates as an *insurrectionary* change agent, seeing they sought to maintain their interests via the breakdown of Section 9012(f). As empirically affirmed in other policy areas, this type of change agent is shown to be especially linked to patterns of *displacement* (Mahoney and Thelen, 2010, pp. 23-25), indeed as furthermore illustrated here. The final 1985 case, like its predecessors, occurred in light of the recognized notion that speech is a commodity, as observed in *Buckley*, and so the principal question in *NCPAC* was if the law violated its First Amendment rights / freedoms of free speech and association. The Supreme Court affirmed the lower court's decision by holding that the limit imposed by the Act concerned "the core of the First Amendment", namely free speech and association, and could not be restricted by the government, ruling it unconstitutional accordingly. Therefore, the ruling implied that "Section 9012(f)'s limitation on

independent expenditures by political committees was constitutionally infirm (unconstitutional), absent any indication that such expenditures tend to corrupt or to give the appearance of corruption. In this regard, the Court in its deliberations in *NCPAC* (1985) leaned into the anticorruption rationale, in part echoing *Buckley*, even deeming it the only legitimate and compelling government interests thus far identified for restricting campaign finances (470 U.S. 480, 497) (citing *Buckley*). In addition, the Court re called *Buckley* to underscore precedent that indicates there is a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on her campaign, when considering the anti corruption rationale; hence the direct contributions under question in the *Buckley* case were thought to be tainted by corruption given the close nature of them in terms of a direct relationship between donors and candidates. In turn, the Court reasoned those arguments made under *Buckley* should follow in kind. Picking up on this logic then, the Court found 9012(f)'s limitation on expenditures by political committees to be constitutionally weak, particularly given the absence of prearrangement and coordination said to undermine the value of the expenditure to the candidate in terms of constructing corruption, and thereby alleviated the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. For these reasons, the Court in its ruling found the anti corruption rationale, as argued under prevailing judicial thought, could not be utilized in a manner to maintain the FEC's position – in this way ruling against the FEC via stating differences in terms of actor's motivations or character (as discussed below) and the type of funding at issue. As such, the anti corruption rationale was used in *Buckley* to uphold contributions limits, and here it applied to strike expenditure limits down. In this way, I argue that past logics about corruption served as a 'suspended possibility', consistent with *displacement* (Streeck and Thelen, 2005, 21). Likewise,

the return to the Buckley articulation of corruption resulted in unintended consequences, that is undermining the public funding scheme. As a result, I argue that the success of defeating this institution, that is section 9012(f), can be attributed to endogenous *displacement*, by those who had interest in Section 9012(f)'s being found unconstitutional by a court. This is further evident given it was a highly political contemplation, and the existing institution experienced a sudden breakdown pursuant to the judicial outcome by the high court, thereby setting aside the FECs power once and for all on this matter.

As a result, it is further argued here that the outcome demonstrates consistency with the deepening commodification of the electoral process and against the scheme – public funding – opposite to those consequences. This instance moves beyond other closely related change varieties such as *layering* and the differential growth it produces such as by amendments and additions. Instead, this 1985 case was largely a matter of active cultivation of previous frameworks, namely the interpretation of the anti-corruption rationale as established previously and a shift in institutional arrangement at the 'system' level (Richard Deeg, 2005), that is the challenge to a public funding system or scheme. In fact, as Mutch (2016, ch 3) explains, the *FECA'*s Presidential Campaign Fund policies were designed by Congress to reduce the deleterious influence of large contributions on the political process (this view also cited by justices in *Buckley* (91-93), while the striking down of the $1000 limit under 9012(f) by the judiciary plainly runs counter to the goals of the Presidential Campaign Fund and represents the reverse of the marketization or commodification of elections. Despite these facts which reinforce some of the existing knowledge on *displacement,* this case does not confirm other studies which show *displacement* occurring in weak veto low discretion contexts, given that as outlined elsewhere, the judicial

branch represents a strong veto point which retains the expertise in their arena, thus providing them with a high level of discretion in interpretation.

In terms of dialogue and keeping in mind the balance Courts need to strike in terms of political equality and elections in the context of a free market society, the Court ruled that “even assuming that Congress could fairly conclude that large-scale political action committees have a sufficient tendency to corrupt, section 9012(f) is a fatally overbroad response to that evil” (470 U.S., 496-500). In so doing, the Court on the one hand underscored the special identity of the corporate form, noting a need to restrict "the influence of political war chests funneled through the corporate form,"(*NCPAC*, 470 U.S. at 470 U. S. 501). In fact, it was further contended that, because the PACs may by the breadth of their organizations spend larger amounts than individuals, making the potential for corruption is greater. However, the Court also highlighted in contrast that “9012(f) is not limited to multimillion dollar war chests but applies equally to informal discussion groups that solicit neighborhood contributions to publicize views about a particular Presidential candidate.” Moreover, the Court held that "section 9012(f) cannot be upheld as a prophylactic measure deemed necessary by Congress. The groups and associations in question here, designed expressly to participate in political debate, are quite different from the traditional organizations organized for economic gain [e.g., corporations and labor organizations] that may properly be prohibited from making contributions to political candidates." On a similar note, the Court maintained preceding views that the expenditures at issue constituted "speech" and, therefore, deserved protection so that various political views could be expressed (105 S. Ct. at 1467). This meant that the terms of 9012(f)'s prohibition applied equally to a variety of groups and entities such as the grass roots organizations, neighborhood groups, wealthy and professionally managed PACs, large and small, for profit and not for profit corporate donors. In this way, the Court

draws no distinction between corporate legal standing and other group forms and persons. Consequently, situating all such actors, such as corporations or wealthy persons, with access to a court via legal standing. What did matter, however, was the economic character of the actor under question. Hence as I argue, rather than hinging on legal debate over standing, as the legal literature contemplates, judicial conflicts such as those discussed here show to take corporate constitutional rights / freedoms as a given, though the analysis of the corporate form matters from the perspective of the distribution of political power and how justices think economic motivations and resources matter, or don't matter, in that regard. Accordingly, the extent to which policy change is associated with the corporate form echoes *conversion* as in this case, the rule around corporate personhood remained the same – that is the judicial conflict preceded from the premise that corporate identity is a constitutionally empowered thing – though it was conceptualized in a way adjusted for the fact its goals could be akin to many types of organizations, thereby leading the Court to reason that 9012(f) was colored by unconstitutionality. This meant that the corporate form was described broadly such that the FEC's concern over political speech by way of donations was sufficiently reduced by the court.

Overall, the debates concerning section 9012(f) occurred through a judicial contestation wherein change agents referenced their power resource, and lack of close connection to candidates which could be based on economic resources, in order to interpret rules in their own interest (Streeck and Thelen, 2005, p. 27), that is consistent with *conversion*. Unlike legal positivism which traces legal standing through theorizing the corporate form then, the *insurrectionaries* in this case utilized the corporate identity by actively exploiting and 'redeploying' (Mahoney and Thelen, 2010, p. 17) its identity as a power resource in a way which alleviated corruption concerns and thus supported commodification and policy change. As such, this approach to the

corporate form informed the Court's application of the anti-rationale as described above, and it therefore follows that this approach to corporate identity has contributed to *displacement* as well as *conversion* in this case. In sum, the case confirms that the absence of the corruption rationale, plus certain descriptions of the corporate form, are factors conducive to *displacement,* even with inter intergovernmental dialogue which recognizes Congressional attempts to structure money in politics, and despite an acknowledgment of a potentially powerful corporate form.

4.2.4 Federal Election Commission v. Massachusetts Citizens for Life 479 U.S. 238 (1986)

The next case with theoretical relevance *is Federal Election Commission v. Massachusetts Citizens for Life* (hereafter "*MCFL*"). In this judicial conflict, the judicially assigned corporate identity of the Massachusetts Citizens for Life had important implications, though not in terms of the Court trying to reconcile whether corporations ought to possess constitutional rights / freedoms generally, but rather how their economic motivations, or lack thereof, matter for political equality - as realized through speech - in the context of the electoral process. *MCFL* incorporated under the laws of Massachusetts as a non-stock, non-membership corporation in 1973. From that time, *MCFL* widely distributed newsletters and other flyers which made direct references to voting and candidate or issue preferences. More particularly, the publication contained the position of state and federal candidates on abortion-related issues. In doing so, the company spent from its general corporate treasury on flyers, that is flyers as a form of speech. This activity by *MCFL* came under question by the FEC as section 441(b) of the *FECA* proscribed a prohibition against utilizing corporate treasury funds for "expenditures" without using a Political Action Committee (PAC) to do so. Against this backdrop, the question in this judicial conflict was whether *MCFL*'s violated the *FECA* by distributing flyers asking voters to vote "for life" paid for with treasury funds; and further, if section 441(b) of the *FECA* violated the First Amendment

as applied in the case at hand. To address latter, the USSC was compelled to reconcile whether the "expenditures" made by *MCFL* were a constitutionally protected form of speech. To these questions, as discussed below, the Court answered in the affirmative.

In initiating the case, the FEC appellant pursued policy stability through its interpretative and enforcement powers. For the FEC, *MCFL* was utilizing funds that did fit under the *FECA*'s 'expenditure' restrictions to disseminate its flyers with the goal of furthering its preferred candidate, again while not using its PAC to do so. Framed in this way, *MCFL*'s actions and the content of the flyers meant *MCFL* was engaged in effectively express advocacy with corporate treasury funds, hence contravening the campaign finance policy section 441(b). Based on this, the FEC sought civil penalty and other relief through a complaint filed to courts, particularly since the conciliation efforts by the Commission proved unsuccessful, thereby commencing inter-governmental dialogue with an actor not typically considered in dialogue theory studies. In making its case, the FEC argued that justification for *FECA*'s section 441(b) expenditure restriction is provided by the Court's acknowledgment that "the special characteristics of the corporate structure require particularly careful regulation" (U.S. 479 U.S. 258). As also articulated elsewhere, this judicial conflict therefore shows the significance of an under considered category of agents relevant to gradual institutional change (the Commissioners) that demonstrably have an important and influential role in inter governmental dialogue, and which can pursue policy stability by way of interpretive and enforcement powers. At the same time, the *MCFL* case illustrates how the FEC can nevertheless be limited, just as the legislative branch can be pursuant to the judiciary, particularly in high veto, high discretion situations, like the judicial context.

On a separate note, while the FEC initiated a claim against *MCFL*, it was *MCFL*'s actions plus its legal defence that in the end meant change, making them a change making actor, albeit in

a responsive (to the FEC complaint) fashion. As an actor that led change by way of ultimately attaining a favorable judicial interpretation of section 441(b), the *MCFL* corporation is conceptualizable as *symbionts* in their *mutualistic* incarnation (Mahoney and Thelen, 2010: 24). By relying on rules not of their own making, *MCFL* consistent with *mutualistic* actors, used the rules in a novel way to advance their interests. Put differently, *MCFL* clearly did not write the rules, though they did emphasize the aspects of them which rest on concern for profit-seeking endeavors so to show that they do not fit neatly alongside that concern, thereby enabling them to continue to engage in actions that further their interest whilst not being in contravention of the campaign finance institution. Given this, I argue that the FEC's perspective indicates that the *MCFL*'s actions were consistent with *conversion* of the *FECA* since they were acting in a way where they didn't seek to change the rules per se, but rather sought to actively exploit inherent ambiguities about what constitutes 'expenditures', as well express advocacy verses issue advocacy, while also challenging the notion that its corporate identity was the type meant to be subject to the section 441(b) statue. Such redirecting of institutions towards more favorable functions and effects is consistent with *conversion* (Mahoney and Thelen, 2010: 17-18). In this way, and again consistent with *conversion*, they aimed to direct the institution toward more favorable functions and effects (Mahoney and Thelen, 2010, pp. 17- 18). In agreement with *MCFL*'s perspective, and as further unpacked below, the Court agreed with *MCFL* that their actions did not contradict the spirit of the *FECA* nor did it compromise the efficiency of the rules or the survival of the relevant institution, again a key trait of the *mutualistic* (unlike its symbiont counter part) change agent. Accordingly, *MCFL*'s actions were consistent with current characterizations of *mutualistic* incarnations (Mahoney and Thelen, 2010, pp. 24-25).

In terms of the ruling then, meaning in responding to the FEC's claim noted above, the Court engaged in twofold intergovernmental dialogue through consideration of both the FEC's view as well Congressional intent. In other words, I argue that the dialogue that occurred to remedy the judicial conflict particularly concerned not only addressing the FEC's standpoint, but also clarifying legislative intent as regards a trifold rationale which the FEC referenced for justification of its claim. The FEC's trifold rationale was: to restrict "the influence of political war chests funneled through the corporate form," (anti-corruption) (pointing to National Conservative political Action Committee, 470 U.S. at 470 U. S. 501); to "eliminate the effect of aggregated wealth on federal elections," (election integrity) (pointing to Pipefitters, 407 U.S. at 407 U. S. 416); to curb the political influence of "those who exercise control over large aggregations of capital," (anti-corruption / political equality) (pointing to Automobile Workers, 352 U.S. at 352 U. S. 585); and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," (election integrity / political equality). In response, the decision by the Court's majority was twofold, in part a response to a threefold rationale articulated by the FEC, as picked up on below, and in part relying on the Act's definition of 'expenditures' which included anything of value made for the purpose of influencing a federal election. In this regard then, the Courts' majority rejected part of *MCFL*'s argument that their flyers did not expressly advocate for a candidate, leading them to argue that the flyers did fall within the category; to this extent, their ruling moved in the direction of blunting *MCFL*'s pursuit of *conversion*. Likewise, and again engaging in dialogue by taking up established legislation, Justice Brennan found that Congress's view did not show intent to abandon its restrictions on expenditures to support candidates.

However, the judiciary further held in response to the trifold rationales stated above, that the *FECA* amounted to a substantial restriction on the entity's speech rights / freedoms insofar as to be unconstitutional - as applied to *MCFL*'s flyers – meaning within the context of the specific case details at issue. In this regard, the judiciary maintained that the state was without a compelling enough justification for such infringement (*MCFL*, 479 U.S. 238, 1986) Picking up on the issue of *MCFL* entities speech rights / freedoms then, the Court on the one hand recognized the vast power resource the corporate form poses in finding that the political advantage of corporations is unfair because: "[t]he resources in the treasury of a business corporation... are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas." (at 258). However, the Justices further reasoned that groups such as *MCFL*, do not pose "the potential for unfair deployment of wealth for political purposes." (Ante, at 259), specifically "because *MCFL* was formed to disseminate political ideas, we are told, the money it spends - at least in the form of independent expenditures - reflects the political ideas for which it stands without the threat or appearance of corruption" (Ante, at 258-260). Framed in this way, the Court ruled that underlying the regulation of corporate political activity - that organizations that amass great wealth in the economic marketplace does not gain unfair advantage in the political marketplace - is absent regarding *MCFL* because the appellee was formed to disseminate political ideas, not to amass capital (479 U. S. 256-265). Here, the Court made the case that *MCFL* did not contradict the spirit of the *FECA*. The Court set out three specific holdings to this effect in responding to why the prohibition on corporate spending did extend to the *MCFL* corporation, namely: 1) *MCFL* was formed for a exclusively political

purpose and had a policy against accepting contributions from business corporations; 2) it had no shareholders; and 3) it was not formed by a business corporation or labor union and so it could not "serve as a conduit for the type of direct spending that creates a threat to the political marketplace" (479 U.S., 264). This case thus gives way to recognizing instances wherein “the way that institutions confer power and authority on individuals and groups to make or break the rules” (Sheingate, 2009, p. 169).

On this basis, the Court held that the non-profit organization had "features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of [its] incorporated status" (479 U.S., 263). Accordingly, it was *MCFL*’s corporate form that was said to be potentially uniquely disadvantaged because of its identity in ways which could disincentivize a corporation from engaging in political speech, making section 441(b)unconstitutional as applied. This is consistent with neo-pluralists who see the state as not wanting to disrupt corporate power precisely because they have so much influence over markets or more specifically the whole of the economy, but in this context, it was the apprehension of disrupting the marketplace of ideas, rather than economic markets which contributed to *MCFL*’s successfully mobilizing its identity. Supporting Lindblom’s (1982) view as to the market as a prison then, for campaign finance policy the Court did not want to source a retreat of corporate participation in civil dialogue and electioneering, but it was the lack of a business-based identity that was crucial for policy change in the sense of successfully utilising the First Amendment when the *FECA* is being applied. This means that characterizing the corporate form in terms of economic motivations was a consequential aspect of the decision, even if the Court did not directly invoke the artificial verses natural entity debate. In this way, it is evident that the legal identity of corporations, for the purposes of free speech protections, goes

beyond what legal literature predominantly examines (see for example Ripken, 2010), to encompass a broader analysis which is concerned with the distribution of political equality, and how economic resources effect that distribution, in democratic societies.

The concern over the corrosive influence of concentrated corporate wealth, as recognized by the FEC as well the Court, reflects the view that it is important to protect the integrity of the marketplace of political ideas, and unlike other cases, we see how the inclusion of additional rationales (here we have more than just the anti-corruption rationale unlike past cases) can tangentially matter for disempowering the corporate form as s. 441(b) was nonetheless determined to be unconstitutional and so these rationales had only a peripheral effect. Therefore, the FEC's power in attaining policy stability was undercut in this case because of corporate free speech interests and because the corporation was said not to be involved in marketization or commodification. Put differently, the FEC is particularly weak when the judicial branch employs a de-marketized, non-commodity-based conception of the corporate form, even while accepting the premises of three rationales which other cases thus far have utilized as a sufficient source for change or stability such as *Buckley*. We can thus see that though the *FECA* provided for stable rules, there was still great room for diverse outcomes. As Schickler (2001) and Thelen (2003) explain of *layering*, it is because new rules may be attached to original cores that space for institutional change occurs, changing the ways in which the original rule's structure – in this case electioneering - behaviors. However, "processes of *layering* often take place when institutional challengers lack the capacity to actually change the original rules" (Mahoney and Thelen, 2010, p. 17), but this context is an example where that is not the case, given that the challengers have constitutional footing to challenge the original rules…..Here, we can the see that in the context of American campaign finance policy, the practical application of the *FECA*'s ban on corporate electoral spending

against a defined class of corporate entities leads to *layering*-like effects, that is in the *MCFL*'s pursuit of *conversion*, because of the conceptualization of the corporate form – clearly identified to be a potential power resource and something with can undermine plurality in political discourse. Like Peter Hall's work shows, (cited in Mahoney and Thelen 2010, p. 204) the relative power of various actors is drastically important in affecting their ability to assemble the coalition, such as with the Court, they need to defend (or change) existing institutional arrangements.

Overall, the *MCFL* judicial conflict gave way to the *FECA* not remaining exactly unchanged, even though the administrative capacities of the FEC - with its legal power to bring suit - certainly gave way to conditions in which the activities of businesses would come under question but ultimately prevail based on the resource mobilized, that is the non marketization and non commodification characterization of the corporate form. *MCFL*'s 'achievement' in this way shows how – consistent with *layering* - structural positioning of actors within political institutions influences their opportunities for rule creativity. The nature of the reformed or clarified definition of the corporate form is one where somewhat new characteristic of it was introduced alongside the relatively static and politically steady, established ones, that is the economically business motivated version. This openness to contending interpretations which effect the FEC's enforcement power is consistent with *layering*. While the FEC had some power to attempt to, and potentially, change *MCFL*'s behavior, *layering* recognizes that a distributional approach to institutions where the degree to which actors have discretion in implementing rules will vary from one institution to the next. Such discretion evident here since the complexity of the rules, the kinds of behaviors regulated by the rules, and the extent of the resources mobilized under the rules all matter, offsetting the power of the FEC based not wholly on the campaign finance policy rationales but more so other actors, namely Justices', view on corporate identity as this

enabled supplanting the power of the FEC which supported *layering* to occur. Despite this revised characterization of corporations possibly being viewed as minimal or incremental, it is noteworthy because the corporate form is such a powerful resource. Nevertheless, my analysis highlights feature to the *MCFL* conflict and the Court's approach in *MCFL* which affirmed and potentially amplified the extent to which corporations may participate in the electoral process as well the type of corporations permitted. As a result, *MCFL* was successful in displacing the disputed institution and strengthening corporate participation in the electoral process.

4.2.5 Austin v. Michigan Chamber of Commerce, 494 U.S. 652 1990

The next case, *Austin* v. *Michigan Chamber of Commerce*, was heard by the USSC. In its ruling, the judicial branch upheld state restrictions on corporations' which prohibited them from using general treasury funds on independent expenditures in support of, or in opposition to, candidates for state office (494 U.S. 652 1990, 1990, 654–655) - pursuant to *Michigan Campaign Finance Act* 1979 section 54(1). This section further provided that if a corporation set up an independent fund designated solely for political purposes, then it could make such expenditures. The issue was that the Michigan Chamber of Commerce (hereafter "Chamber of Commerce") wanted to support a candidate for the state House of Representatives by using general treasury funds for newspaper advertisements as independent expenditures, and to do so without setting up an independent fund, again as the *Act* stipulated was required in order to be exempt from section 54(1) (494 U.S. 652). Although the FEC does not function into this case analysis, the Chamber of Commerce – conceptualizable as *parasitic symbionts* as discussed below – filed for an injunctive relief to the Court against section 54(1)'s enforcement, arguing that the expenditure

restrictions were unconstitutional under the First and Fourteenth Amendment. For this analysis, it is the infringement of the former Amendment that is of interest.

Against the above backdrop, the ultimate question for the USSC was whether the *Michigan Campaign Finance Act* violated the First and Fourteenth Amendments. The USSC ruled that although the institution / policy (section 54.1) did limit the corporations (the Chamber of Commerce) speech rights / freedoms , but that the burden was constitutionally justified by the compelling state interest of Michigan. Engaging in dialogue-like considerations to this end, the ruling in part was grounded on the point that Congress had narrowly tailored the policy section 54(1) to achieve that interest, an interest that was legitimate in the context of the democratic process, as further described below. More particularly, writing for the majority, Justice Thurgood Marshall found through such reflective dialogue that the statute was in fact narrowly crafted, as noted above, and implemented to achieve the important goal of maintaining integrity in the political process. Framed in this way, the majority found it to be precisely targeted to eliminated distortion cause by corporate spending while also allowing corporations to express their political views by making expenditures through segregated funds (494 U.S. 652 1990, 660-661), recognizing that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form." (494 U.S. 652 1990, citing *NCPAC*, 500-501). Accordingly, the decision in this case did not contribute to past patters of *displacement*, as discussed elsewhere in this thesis.

As introduced above, the actions and interests of the Michigan Chamber of Commerce provides an illustration of the logic of the *parasitic* variety of symbiont actors and how judicial challenges by this actor type give way to potential institutional instability and change, but in this case stability as the policy section 54(1) was ultimately upheld, as indicated above. Like

symbionts generally, the Chamber of Commerce relied on and abided by institutions not of its own making, specifically the campaign finance system and constitutionalized freedom of speech rights / freedoms , for legal recognition and in order to make a claim in the courts against the state for injunctive relief. Since *parasitic symbionts* wish to not disrupt the formal institutional status quo, it is consistent that the Chamber of Commerce did not seek to challenge the provision altogether, but rather carve out an exception from the enforcement of it. While other research shows the *parasitic* variety succeeding in environments characterized by strong veto possibilities, meaning an institutional space where change could happen, and high enforcement discretion, this argument challenges them (Thelen and Mahoney 2010, pp. 28, 23) because the *parasitic* actors here did not thrive in such conditions, that is in a judicial conflict, as outlined below. Additionally, the Chamber – as an example of the symbiont variety of actor of change – would typically be accompanied by *drift*, meaning there would be some change due to erosion or atrophy of institutions on the ground, leading to 'slippage' between the rules and their instigation. Thus, unlike Hacker's analysis on health care policy in the U.S. which expresses *drift* by showing how despite social programs resisting major retrenchment, shifting exogenous conditions led to institutions actively decaying, campaign finance policy shows how *symbionts* can be unsuccessful at attaining *drift* even in favorable political climates, such as one with strong veto and enforcement avenues. Further, the exemption ineffectually sought seems more consistent with *conversion* since they were trying to redirect an existing institution in a way that would serve their interest, though again without having to entirely disrupt the status quo. In any event, this lack of conformity with other research is because of the Court's interpretative power wherein it was recognized that the corporate form is a risky power resource, as further described below, reflected in

a commitment to anti-corruption, and because of the dialogue it had wherein it established the government interest to be legitimate and precisely tailored as noted above.

On a separate note, regarding the substance of the judicial reasoning as introduced above, the judicially ascribed approach adopted in *Austin* can be observed through the central arguments made wherein the corporate identity was characterized as a power resource not conducive to a properly functioning democratic process. For instance, Justice Marshall found that the Chamber of Commerce was akin to a business group given certain characteristics, namely, its activities, linkages with community business leaders, and high degree of members (over seventy-five per-cent) which were business corporations (494 U. S. 661-665) .In this way, carving out a particular legal category for participating in the electoral process. From this view, the identity of the incor-porated Chamber of Commerce was the power resource emphasized by the Court, leading the majority of Justices to rule contrary to the Chamber of Commerce electoral interests. The Court accredited that the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form” (652, 655, 666, 684) justify government bans on non-media corporations’ independent spending on behalf of candidates.
However, the majority was also careful to note that their ruling was not a matter of equalizing political equality through campaign finance institutions, arguing that section 54(1) does not at-tempt "to equalize the relative influence of speakers on elections, rather, it ensures that expendi-tures reflect actual public support for the political ideas espoused by corporations. (494 U. S., 705).

In challenging the above positions, the argument made by the Michigan Chamber of Commerce in part stated that it should have been excluded from the Act's restrictions since the Chamber of Commerce was a "non-profit ideological corporation" which was more analogous to

a political association rather than a business firm which is subject to the campaign finance institutions. While the Michigan Chamber of Commerce tried to downplay these identity-based dynamics as such by stating that the bylaws of the firm set forth both political and non-political purposes, while also challenging the breadth of the legislation, the judicially ascribed characterization of the corporate form superseded these arguments. Hence the majority on the court challenged the view of the Chamber of Commerce, that is conceptualizing the corporate form as a thing which can amass "immense aggregations of wealth…that have little or no correlation to the public's support for the corporation's political ideas" (*Austin*, 494 U.S. at 660).

Additionally, the Court referenced the point that the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption. (Referencing FEC v. National Conservative Political Action Committee, 470 U.S. 480, 496 -497, 1985). As such, I argue that *Austin* demonstrates which judicially ascribed approaches to corporate power, corruption, and the commodification of elections and speech matter for reduction the commodification of the electoral process. Like in other cases with similar outcomes then, direct concern over political equality may not be a focal point in order to permit corporate political power, as has been the case in the Canadian context in particular, but avoidance of corruption or its appearance as does a lack of correlation to the public support for corporate political ideas (494 U.S., 705). In upholding the ban provided for under section 54(1) then, the court reiterated the corrosive and distorting effects that some voices can have on the electoral process, that is essentially silencing some voices and corrupting the process (494 U.S. 652-660 1990, Stein 2016). This point is further reinforced by the case's striking contrast to *MCFL* whom had a policy of not accepting contributions from business corporations and such political expenditures and contributions can constitutionally be regulated by the state.

Acknowledging this, the Court maintained that the Michigan Chamber of Commerce did not qualify for the non-profit exemption established in past judicial conflicts.

Looking to the reasoning of the dissent in *Austin* further underscores the logic of the Chamber of Commerce as well highlights ways in which economic resources can be said to alternatively matter for campaign finance institutions -as per the contrasting judicial opinions. The dissenting Justices charged that the majority of censorship and of being inconsistent with Buckley and *Bellotti* (684-686 Scalia). Following these reasonings, the dissent by comparison found that Michigan's campaign finance institution discriminated based on the speaker's identity, and argued that the precedents of the Supreme Court, such as *Bellotti*, condemn this type of censorship, and citing *Bellotti* in stating that that "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue" (494 U.S. 652 1990, 675-680). Based on this view, the dialogue that the dissent would have with the legislative branch would not be one of deference, but rather a rejection of the legislature's capacity to regulate the corporate form in the context of campaign finance policy. The dissent's view was more conducive to policy change, potentially of the *conversion* variety.

Conversely, and as suggested above, the ruling in the *Austin* case essentially implied conceptualizing the corporation along the lines of an artificial entity by distinguishing wealthy individuals from corporations on the ground that "state law grants corporations' special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."(494 U.S., 659). The above outline indicates that the privileges granted to politically active actors have potential for policy stability and a reduction in pluralism in political dialogue, particularly as regard the speech of corporations which has different types of consequences based on economic resource and motivations. Overall, I argue that this judicial

conflict demonstrates the Court clearly recognized the power resource which Michigan's Chamber of Commerce identity was, and while Michigan maneuvered to downplay it, the Court grounded the rejection of its political speech rights / freedoms and the de-marketization of speech through the arguments examined here. The courts ruling therefore drew a sharp distinction between corporation and individuals, which highlights that state-conferred corporate advantage can evidently try to serve as a catalyst for economic motivations. Yet at the same time, the legal standing of the corporate form, like in *Buckley* and *Bellotti*, was not fundamentally disputed by either side of the Court. Quoting *Bellotti*, this is evidenced through the argument made which agreed with precedence that set out that political speech did not lose First Amendment protection "merely because the speaker is a corporation." While the majority in the case did however recognize that the power of the corporate form is something that can undermine the electoral process, their view wasn't grounded in corporate power over the whole of the economy per se. Here, I argue that it is evident that unlike often indicated in neo-pluralism literature, corporate power can potentially be bolstered not because of their position over the whole of the economy, but rather because of their ability to access constitutional law, particularly through judicial conflicts, which in turn limits legislature's ability to rein in their interests.

4.2.6 McConnell v. FEC 540 U.S. 93, 2003

As introduced earlier, the *FECA* (1971), alongside its Amendments in 1974, served as the framework for regulating the financing of federal elections without major modification until passage of the *Bipartisan Campaign Reform Act* (*BCRA*) in 2002. The *BCRA* was therefore the only major reform to the *FECA* in the course of campaign finance as discussed here, and it greatly altered the range for the judiciary to measure challenges, issues, and its findings. Briffault points out the *BCRA* was "The culmination of a protracted six-year legislative and political struggle,

BCRA is the most significant change in federal campaign finance law since the early 1970's when the *Federal Election Campaign Act* (*FECA*) of 1971 and *FECA* Amendments of 1974 were adopted" (2002, at 1180) As articulated by the Supreme Court of Canada in *McConnell V. FEC* (discussed below), *The Bipartisan Campaign Reform Act* of 2002 (*BCRA*), which amended the prevailing campaign finance institutional framework of the 1974 Amendments is the most recent of nearly a century of federal enactments designed to purge national politics of what is conceived to be the pernicious influence of big money in campaign contributions (*McConnell v. FEC* U.S. 540, 93 2003 at 1).

Malbin (2006, pp. 6-7) likewise explains that "*BCRA*'s overriding purpose was to restore what had once been in effect under *FECA*". The law had two major overriding goals. The first was to reintroduce corporate and labour spending restrictions. To this end the "electioneering" definition was revised with the goal of creating a 'bright line test' while satisfying concerns about vagueness. Prior to this "bright line" standard, it wasn't clear whether speech was directly advocating for a candidate's election or defeat, and so to remedy this, the bright line standard imposed that "express advocacy" electioneering would include clear phrases such as "vote against," "vote for", or the equivalent (Malbin 2006, p. 5). The goal here was thus to enable justices to differentiate issue advocacy more easily from express advocacy, that is those that speak to a issue (issue advocacy) versus, as just noted, those that expressly call for the election or defeat of a candidate, principally because of their position on a issue. This legislative move as well included the policy change of the "electioneering communication" (hereafter "ECs") provisions (which required disclosure of and prohibited the use of corporate and union treasury funds to pay for or broadcast cable and satellite ads clearly identifying a federal candidate targeted to the candidate's electorate within 30 days of a primary or 60 days of a general election) (Malbin, 2006, p. 7). The

second legislative goal was to restore meaningful contribution limits by restoring a soft money ban, hence remedying the loophole created by the *Buckley* decision (Malbin, 2006, pp. 6-7).

In sum, the *BCRA* was overall aimed at restoring some of the 1974 *FECA* Amendments and at addressing political inequality as relates to ongoing concerns about money in politics, for instance as governed through expenditure and contribution policies. More generally, the objective of these refinements was to demarcate some activities and to flesh out the difference between express advocacy and issue advocacy as was roughly laid out in *Buckley*, as explained above regarding the bright line test Additionally, by writing into law new legal concepts and principles, it was geared to reset the terms of subsequent inter-governmental dialogue and would inevitably influence judicial reflection. It was, therefore, a significant legislative act which aimed to clarify identifiable issues of preceding decades within the letter of the law. Nevertheless, as evidenced, Congress in cases generally does not have the last word about a law's meaning, and like *Buckley* challenged the *FECA* of 1974, *BCRA*'s (2002) constitutionality was challenged on First Amendment grounds by dozens of litigants close after the *BCRA* became law in a case consolidated under the name of *McConnell v. FEC* (U.S. 540, 93 2002). As further examined below, the appellant McConnell in this case was unsuccessful, and the *BCRA* was therefore upheld.

McConnell v. FEC 540 U.S. 93, 2003:

The *McConnell v. FEC case* (hereafter "McConnell) is a significant but ultimately not majorly influential case in terms of subsequent stability in the logic applied, seeing that the major campaign finance cases which followed it did not hold up campaign finance provisions created under the *BCRA*. Likewise, subsequent cases cited *McConnell* in their rejection of *BCRA* limitations to campaign finance, and electoral participation more particularly. It is also a relatively theoretically relevant one because it relied on past logics where identity as a power resource was a

consequential factor, even while there was a relative absence of corporate dynamics per se. McConnell also mirrors some important Canadian cases, such as *Libman* discussed later, as each highlights commitment to maintaining political equality and de-commodification in the context of the electoral process and more of the campaign finance system. A succinct review of the case is thus contributory.

The appellant – Republican Senate majority leader Mitch McConnell – pressed the constitutionality of a range of the Act's policies, but most relevantly against the federal ban on corporate treasury funding (spent as soft money), the Act's refined "electioneering communication" definition (bright line), and the requirement that donors disclose their spending on electioneering communication to the FEC, and the prohibition on the national parties' raising or spending soft money (Malbin, 2006, pp. 251-252). The plaintiffs asserted that the increases in limits enacted under *BCRA* deprived them of an equal ability to participate in the election process based on their economic status. (McConnell, 540 U. S. 2003: 5). However, on December 10, 2003, the Supreme Court issued a ruling upholding the two principal features of the 2002 Act, namely, the control of soft money and the regulation of electioneering communications. In this context, the Court emphasized the dangers of large contributions to political parties, and of corporate and labor funding of campaign ads. There are two main streams of the Court's rationale relevant here: its identification of identity as a risky power resource (following *Austin* and *MCFL*), and deference with inter-governmental dialogue, as more commonly seen in Parliamentary systems.

On identity, the Court pointed to precedence to highlight that legislation, such as section 441(a) of the *FECA* as amended in 1974, aimed at counteracting the corrosive and distorting effects of immense aggregations of wealth, that are accumulated with the help of corporate forms, have been previously sustained (Page 540 U.S., 99; citing *Austin* at 660). Moreover, relying on

Austin, the Court indicated that the confidence of the electoral system could be undermined, that with the state-created advantages, corporations could drown out other points of view with arguments that don't necessarily correlate to the public's support for the corporation's political ideas (McConnell, 540 U. S. 2003: 42). As such, the decision reaffirmed the constitutionally valid interest that Congress has in limiting access to the electoral process, that is through limiting one's speech rights / freedoms , based on the point that some speakers pose unique risks to the electoral process, as per the *Austin* case decision (494, U.S. 652). In this way, the Court rejected the appellants (McConnell) argument that their economic status could not be grounds for applying limitations. Concurrently, the appellant pointed to precedence, such as the *Bellotti* case, to argue that limitations cannot be justified based on the corporate identity of the speaker, but the Court rejected this point and underscored the pre-established point that the willing adoption of the corporate form by corporations and unions justifies regulating them differently from individuals. The decision further reasoned that "their ability to give candidates quid's may be subject not only to limits but also to outright bans; their electoral speech may likewise be curtailed" (at 7, citing *Austin* at 659-660).

Intergovernmental dialogue was an important part of this case, and to this end it was deference to Congress that characterized the Court's ruling. Like in the Canadian case *Libman v. Quebec* discussed in the next chapter, the Court reasoned in favor of Congress's power as the justices argued that there was a compelling state interest, and they had respect for legislative judgement as to the special characteristics of the corporate structure and how it should be particularly regulated (540 U. S. 2003: 98). More particularly, on the issue of soft money, the Court found that the relevant provision did not violate the Constitution because the governmental interest in "preventing the actual or apparent corruption of federal candidates and officeholders" was

sufficiently important to justify contribution limits (540 U.S., 32–45). The Court likewise noted that the "record is replete with examples of national party committees' peddling access to federal candidates and officeholders in exchange for large soft-money donations." (McConnell, 540 U. S. 2003: at 41). By contrast, appellant McConnell maintained that even if the policies serve a legislative interest, the restrictions are so unjustifiably burdensome and overbroad that they cannot be considered closely drawn to match the government's objectives. Rejecting this, the justices found the policies to not be overbroad, and that whole they may capture some extra activities, the government's strong interests in preventing corruption, and particularly its appearance, are thus sufficient to justify subjecting all donations to national parties to *FECA*'s source, amount, and disclosure limitations (McConnell, 540 U. S. 2003: 45-47). In a deference like step (as noted previously, that is giving way to the power and role of the legislative branch), the Court also reasoned that the less rigorous (non strict scrutiny) review standard, outlined in chapter 4 shows proper conceding to Congress's ability to weigh competing constitutional interests in an area in which it enjoys expertise and provides it with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the political process's integrity (McConnell 540 U. S. 2003, 24-32).

Therefore, inter-governmental dialogue also meant questions about whether the law was too broad and unnecessarily regulated conduct that had not been shown to cause corruption (such as advertisements paid for by corporations or unions). The Court found that such governmental choice was necessary to prevent groups from circumventing the law. In majority opinions, Justices O'Connor and Stevens wrote that "money, like water, will always find an outlet" McConnell, 540 U. S. 2003: 118) and that the government was therefore justified in taking steps to prevent schemes developed to get around the contribution limits. The Court found that the

components of the definition of electioneering communication were objective and easily understood, that is without vagueness which the *Buckley* Court found when limiting the *FECA*'s reach to express advocacy. In fact, the judiciary also noted the Government's compelling state interest and that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." (540 U. S. 2003, p. 98).

The McConnell judicial conflict therefore builds on others that show how conceptualizations of the corporate form which suggest wealth poses harm to the electoral process result in upholding contribution and expenditure policies geared for limiting money in politics and that bring transparency to it. This draws lines from certain democratic commitments to policy change or stability. This connection is reinforced by the fact that the *McConnell v. FEC* judicial conflict sought to undermine the *BCRA*, which was new and sweeping legislation specifically designed to limit money in politics and bring greater equality to the electoral process. Notably, the Court's approach was not grounded in a search for corporate personhood, or how that finding would affect the ability to claim such rights / freedoms . In this regard, I argue that it is again evident that the constitutionalization of corporate identity is less important than judicial philosophies about the democratic process, taken considering legislative will. Moreover, this case also affirms the significant power of the courts in terms of blocking change-seeking strategies, together with the importance of regulatory bodies for bringing potential violations to the forefront, either by initiating a claim or by causing others to do so because of its effective oversight.

4.2.7 FEC v. Wisconsin Right to Life, Inc. 551 U.S. 449. 2007

In this next judicial conflict, a non-profit political advocacy corporation Wisconsin Right to Life, Inc. (hereafter "*WRTL*"), registered as a 501(c)(4), utilized its corporate legal identity

and standing to challenge the FEC's enforcement of section 203 *BCRA* which banned using corporate funds for ECs (electioneering communications) 60 days prior to an election. This was illegal under ECs provisions, which required such ads to be financed with hard money, meaning that which goes directly to candidate in support or defeat of an electoral candidate, unlike an "issue ad." *WRTL* made the case that the proposed ass did not expressly advocate for the defeat of a candidate but instead spoke to a current issue. *WRTL* planned to run its ads throughout August for the 2004 election, recognizing, however, that as of August 15, it would be just 30 days before the Wisconsin primary which crossed into the "blackout period" for such advertising, pursuant to the *BCRA* policy.

However, trusting that it (*WRTL*) nonetheless had a First Amendment right to broadcast their ads, *WRTL* challenged the Federal Election Commission attempt at enforcing the policy against their ads, seeking declaratory and injunctive relief, while further arguing more broadly that the campaign finance institution pursuant to the *BCRA* prohibition was unconstitutional as applied to the ads in question. As applied, as indicated previously, is to say the institution under question is claimed to be unconstitutional in the context of ("as applied") the expressive activities as per the case details at issue. In this regard, the corporation sought an exception to the law for that election cycle. In terms of the "as applied" layer, *WRTL* was not trying to establish the provision unconstitutional on its face, but rather on the grounds that their specific ads were "issue ads," and not subject to *BCRA* limitations. Following this view, they asserted that their First Amendment rights / freedoms protected their speech, in this case realized through issue ads.

The *WRTL* is hence conceptualizable as an instigating actor, meaning the FEC was more a responsive one, that is responding to the advertising of *WRTL*. While the FEC did initially file suit against *WRTL*, the FEC was an intervening actor in that it endorsed policy stability through

its interpretative and enforcement powers. The corporate identity was relevant in this judicial conflict in that the initiating actor grounded its pursuit on the premise that their identity was paired with constitutional level protections. In this way, I argue that the power resource of the corporate form is again underscored, though not because the Court had to decide if corporation did in fact have constitutional rights / freedoms , as often addressed under legal scholarship, but rather whether presumed constitutional rights / freedoms were abridged, as discussed below. In terms of their interest in injunctive relief in particular, these change-seeking actors did not seek *displacement*, *layering*, *conversion*, or *drift*, as currently recognized change strategies in a singularly strong way, as disced below, but rather the straightforward suspension of the provision based on the argument that the ads in question were not as the FEC had described them, meaning express advocacy to be paid for with hard money, and again that the power said enshrined in its corporate identity would protect their speech via the ads they were utilizing. To a degree then, *WRTL* sought change without fundamentally challenging BCRAs general stability, that is to the extent they only sought an applied exemption through injunctive relief. While challenging even on an as applied basis does get-at the stability of the *BCRA*, it does so in a weaker sense since it is applied to a narrow set of circumstances which may not be replicated in the future.

At the initial level, the District Court of the county of Columbia in Wisconsin ruled against *WRTL* (denying their motion for injunctive relief and dismissing *WRTL*'s complaints), the District Court did however refuse the FEC's request to inquire about the intent and probable effects of the ads in question, arguing it was an impractical request that would have a chilling effect. Accordingly, we can see how the FEC's role in inter-governmental dialogue can be superseded by a Court's view – that which of course reflects a courts interpretation and evaluation of Congress's directives and intentions, vis-à-vis constitutional constrains on the legislative branch. In this

case, because the conflict involved *BCRA* limitations, those directives and intentions include those discussed in the previous case above. At the same time then, we can see how the FEC can function regarding inter-governmental dialogue since Justices typically engage with their arguments given their administrative and enforcement powers under the *FECA*, and even be pulled in based on the interests and actions of other actors, such as corporations involved in the electoral process of. Therefore, the FEC's regulatory role speaks to the practical administration of policy, that is a key topic for dialogue theory, and it shows how the constitution as a catalyst for a two-way exchange between the judiciary and the legislature, as further described below, is also strongly influenced, and complicated by other potential change agents (Hogg and Bushell, 1999: 2-3).

As the case moved through the courts, and the District County of Columbia refuted the arguments made by *WRTL*, *WRTL* appealed to the USSC in 2007 to resolve the case once and for all. The two questions for the USSC were: whether the ads were in fact express advocacy (or their functional question), and second, whether *WRTL* had First Amendment protections. As discussed below, the USSC ruled in *WRTL*'s favor (551 U.S., 2007, 449); and as introduced above, this case particularly underscores issues with dialogue theory, highlights limits to current gradual institutional change concepts, and identifies actions of the symbiont's *parasitic* actor type (Mahoney and Thelen, 2010: 28).

Once the issue was before the USSC, the Court needed to determine whether the ads in question were in fact express advocacy, meaning ads that expressly advocated for the election or defeat of a candidate as per the "bright line test" discussed previously under the McConnell case, or at least their 'functional equivalent', and thus not issue ads subject to the campaign finance institution; and second, whether *WRTL* has First Amendment protections of such ads. In finding

that the ads did not relate to an election or candidate per se, but merely expressed an opinion on a current legislative issue regarding filibusters and judicial nominations, they found the ads not to be the functional equivalent of express advocacy. Therefore, the USSC Court ruled against Congressional legislation by affirming an exemption in a 5-4 vote that *BCRA*'s limitations on political advertising were unconstitutional as applied to the ads in question (Mutch ,2016, p. 159). The Court equally observed no sufficiently compelling governmental interest to justify burdening *WRTL*'s corporate speech interests, and to this end, the Court adopted the test that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. In so doing, the Court held that the compelling state interests invoked by the government to regulate advocacy did not apply with equal force, that is as compared to how much it can legitimately regulate express advocacy, in contrast to genuine issue ads that pass the express advocacy / issue advocacy evaluation, as set out forth under the *BCRA* discussed previously (551 U.S., 2007, 449, 551, 204–205, 206).

Before the USSC, the Commission continued to argue that although the ads do not explicitly endorse a candidate, they were intended to affect an election and were not properly classified as issues ads. From this view, the FEC again conceptualized the ads as "sham issue ads" which while refraining from explicitly aligning with a candidate, had the capacity to affect elections in a way contra to the *BCRA* (2002) (540 U. S., at 185, Torres-Spelliscy, 2010; Briffault, 2011).

When engaging in dialogue via considering and replying to Congressional intent, the USSC Court argued that the EC policy burdened political speech and are subject to strict scrutiny analysis under the judicial review, meaning the government must prove that applying the EC

provisions to *WRTL*'s ads furthers a compelling governmental interest and is narrowly tailored to achieve that interest. A contributing factor was that in the McConnell case (that which preceded *WRTL*), the court ruled that *BCRA* survives strict scrutiny (McConnell v. FEC 2007, 206), meaning the provision could survive such a review. The anti corruption rationale was equally a matter under consideration by the high court. As found by the Court in regard to the rationale, and consistent with the history of some campaign finance policy, it was the potential for "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" (494 U. S. 652, 660). However, rather than finding that restrictions were needed because of potential corruption, the rationale was deemed to have no basis in this conflict because the majority decision rule that there was in fact no express advocacy by *WRTL*, making the government's interests of avoiding corruption relatively inapplicable. Some of *WRTL*'s amici also contended this point in arguing that corruption is not implicated here because of *WRTL*'s status as a non-profit advocacy organization. They assert that "speech by non-profit advocacy groups on behalf of their members does not 'corrupt' candidates or 'distort' the political marketplace," and that "non-profit advocacy groups funded by individuals are readily distinguished from for-profit corporations funded by general treasuries." (Brief for Family Research Council et al. as Amici Curiae 3, 4. Cf. *MCFL*, 479 U. S., at 264). The Court in agreement, these conceptualizations heavily shaped the inter-governmental dialogue since they set some range for the debate, resulting in the majority decision finding that neither the interest in preventing corruption nor the goal of limiting corporate wealth was sufficient to override the right of a corporation to speak through ads on public issues. Likewise, the Court built on this point by noting that based on past holdings, the corporate identity of a speaker does not strip corporations of all free speech

rights / freedoms (*Bellotti* 435 U. S., 1979: 778) As Justice Roberts underscores, this distinction means that the First Amendment requires us to err on the side of protecting political speech rather than suppressing it (at 654–655). As I argue, this judicial approach underscores that (as equally indicated above), understanding the outcomes of campaign finance conflicts is not best done through analyzing whether corporations do have constitutional rights / freedoms , as election law and legal scholarship often aims to do, but rather to shift attention to judicially ascribed notions about issues of democratic governance, such as electoral integrity (or corruption) and political equality (potentially undermined by wealth), contextualized with inter governmental dialogue, and the outcomes thereof. Moreover, as I argue, the presumption of the corporate form as something with constitutional rights / freedoms , and as a judicially recognized power resource, does not inherently pose any meaningful risks to the electoral process from a judicial perspective, particularly when it is expressing speech without directly calling for the election or defeat of an individual or party. This power resource can therefore be robust in instances where other factors are conceptualized as offsetting corruption or its appearance, such as paying for issue ads instead of expressly advocating.

Notably, these positions were in part contextualized with concern or reference to democratic governance. As the USSC in *WRTL* explained: The principle that such advocacy is at the heart of the First Amendment’s protection and is indispensable to decision making in a democracy is no less true because the speech comes from a corporation rather than an individual. (Referencing *Bellotti* 435 U. S., 776-777). In addition, and along the same line of thought, the Court in *WRTL* rejected the arguments that corporate participation would exert an undue influence on the outcome of a referendum vote and that corporations would drown out other points of view and destroy the confidence of the people in the democratic process (citing Buckley 494 U. S.

789). Accordingly, I argue that this view, that is of an American court, echo's a commitment to a libertarian view of democracy, which is to say, an approach to democratic governance which favors the marketplace of ideas in a way highly connected to the economic marketplace. Similarly, this view underscores the rights / freedoms of listeners, whilst demonstrating interest in protecting corporate speech rights / freedoms . Policy change has thus been in a direction consistent with such favorable outcomes. The dissenting Justices, Souter joined by Stevens and Ginsberg, challenged the majority by arguing that the ruling overruled important principles established under the McConnell case (previously analyzed) exerted much more attention and analysis to the substance of the ads in question, making the point in turn that the ads in question were in fact the functional equivalent to express advocacy. Additionally. Souter was of the view that corporate spending of this kind seriously jeopardizes the integrity of the electoral process as the power and money of major contributors contributed to a cynical electorate, and that this posed a threat to democratic integrity because of the concentrations of wealth associated with corporate treasuries (551 U.S., 969-970). In contrast to the majority then, I argue that this approach is more consistent with an egalitarian view of campaign finance institutions, and it calls for a much stronger and restrictive response to corporate identity.

Besides all this, the FEC's role in the inter-governmental dialogue was further suppressed by the Courts approach to "mootness" (meaning no longer have relevance or merit at the time). That is, the FEC had also argued that the cases involving *WRTL*'s ads were moot because the 2004 election has passed and *WRTL* has no continuing interest in running its ads. The Court rejected this argument, noting that the case fits within the established exception to mootness for actions "capable of repetition, yet evading review." This reinforces the pattern in American campaign finance where though the FEC can potentially be a change maker, as seen elsewhere, its

power to maintain its standing in dialogue is less assured than two-way dialogue, highly subject to judicial attributions and the constitutional constraints they adjudicate within. In other words, the type of inter-governmental dialogue that dialogue theory is interested can extend to include regulatory actors, but the consequences of their role in the dialogue, particularly as regards bringing an action, is comparatively (to the branches of government) more contingent.

As for methods of change, the initial interests advanced by the *WRTL*, that is seeking an injunctive relief whilst making the argument that their ads were effectively constitutional because of First Amendment protections, do not clearly fit neatly or notably strongly within particular historical institutional concepts. This is for a number of reasons. For instance, as regards *layering*, new rules, revisions, or amendments were not attached to existing ones (changing the way original rule's structure behavior) via this judicial conflict, and so the case does not indicate *layering* in any strong sense. However, since *layering* can be a matter involving revisions to existing policies determined by something like a corporation's business involvement, *layering* in the sense of building ideas and precedent on what constitutes a "issue ad" occurred. Additionally, *WRTL*'s pursuit did not involve the type of institutional neglect and nondecisions evidenced with *drift* and no active neglect of any slippage in the enactment of a policy happened either (Mahoney and Thelen, 2010: 25). Additionally, and particularly as regards seeking injunctive relief, the case does not strongly pair with *conversion* as it wasn't about rules remaining formally the same by being interpreted and enacted in new ways, such as has been the case elsewhere (Mahoney and Thelen 2010: 15-18), but rather involves through time-bounded exceptions and exemptions. However, the clarification of what constitutes an issue ad, as per the USSC ruling, arguably runs along the lines of *conversion* since as per *WRTL*'s argument, the definition of EC was ambiguous such that, from their view, an interpretation contrastingly different than the

FEC's view of their ads was possible, hence motivating them to challenge the constitutionality of the campaign finance institution. (Mahoney and Thelen, 2010: 21). Also, the activities of *WRTL* differ from *displacement* in that the exception did not involve the radical shifts we usually see with that mode of change, including no slow or rapid breakdown of institutions and their replacement with new ones. If anything, *WRTL* was indeed a "loser" under the old system (Mahoney and Thelen, 2010: 16) and a "winner" with the exemption provided, making the change achieved somewhat in the realm of *displacement*, though not in a strong sense. Therefore, this case study shows how change through time-bounded exceptions and exemptions again does not fit neatly into the historical institutional change concepts and literature. Should the FEC's request for inquiry into the probable causes of the ads (as noted above) had been granted, however, it is likely that a mode of change could have occurred, likely *layering* or *conversion*.

Despite this case not strongly aligning with the distinguished change strategies of historical institutional change, these activities echo mostly those of the *symbionts parasitic* change-agent categorization. *Symbionts parasitic* change actor, like its *mutualistic* incarnation counterpart, rely and thrive on institutions not of their own making. Clearly, the *BCRA* is an act made by actors other than themselves, though they do rely on it for legal standing – meaning they need their corporate personhood to be established and accepted through the institutional framework of which they ultimately lean in to and benefit from. Furthermore, parasites have been shown to exploit institutions for private gain, which we can see here through trying to electioneer during a critical time, again even as they depend on the general success of the court system and legal standing within it. It is also argued that in the *parasitic* variety, *symbionts* carry out actions that contradict the spirit or purpose of the constitution (Mahoney and Thelen, 2010: 24). This seems not to be the case though since judicial review yielded the notion that *WRTL*'s ads were not

expressly advocating. However, if the "spirit" or purpose of the institution is to prevent corporate money and promote political equality through actively maintaining relative equal political participation, as the dissent suggested (see Souter J dissent for instance, 5494 U. S.2007, 51), that then the activities of *WRTL* can be said to contradict the spirit of the *BCRA*, thus undermining it over the long run as past studies have shown of *parasitic* actions (Mahoney and Thelen, 2010, p. 24). The notion of undermining the spirit in the long run could be further sustained by referencing the point that such ads were found constitutional, meaning that form of direct electioneering was enabled (precedent set) for future donors which over time and from some perspectives, can contribute to a loss of electoral integrity. These actors further match up with these change strategies because parasites can flourish in settings where expectations about institutional compliance is high, such as campaign finance law. Likewise, as Mahoney and Thelen explain (2010, p. 28), *symbionts* of the *parasitic* variety thrive in environments characterized by strong veto points and players – such as judges in the court system. Since these change-agents wish to retain the institutional foundations for its own recognition, these strong veto players help to secure this outcome. Scholars also state that these actors largely need high discretion in enforcement so they can alter meaning of institutionalized policies, which is like the case here as the judges had power to grant an exemption, exhibiting some discretion in their enforcement powers.

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

In January 2008, *Citizens United* released a documentary critical of then-Senator and candidate for Democratic Presidential nomination Hillary Clinton. *Citizens United* is a vast Political Action Committee known for its support of conservatives in politics and media production. Anticipating that ads for it would air within 30 days of primary elections on video-on-demand, it ran them on broadcast and cable television. Out of concern of civil and criminal penalties for

violating section campaign finance laws, it sought declaratory and injunctive relief, arguing that section 441b of the *FECA* was unconstitutional as applied to Hillary Clinton. The *BCRA*'s disclosure and disclaimer reporting requirements, *BCRA*'s s. 203 and 311, were also ruled to be unconstitutional as applied to the ads in question in this judicial conflict. These provisions applied to non-profit corporations like Planned Parenthood and the National Rifle Association, as well as for-profit corporations like General Motors and Microsoft.

While the District Court for the District of Columbia denied their claim and granted the FEC summary judgment, the USSC reversed this decision as to s. 441b, s. 203 and affirmed s. 311. Thus, largely splitting with history, for instance overturning the *Austin* case discussed previously, the judicial branch ruled that freedom of speech rights / freedoms nullified the policy limiting corporate speech, meaning thereafter the corporate form became emancipated to spend freely in the marketplace of ideas with corporate treasuries (Stein, 2016; Kerr 2010). This has unleashed a significant level of popular criticism and a flurry of proposed corrective legislation in Congress, that is dialogue in addition to the dialogue that occurred through judicial review.

The outcome of *Citizens United* under the USSC is best explained as representing a conquest of the libertarian over the egalitarian vision of free speech cumulating into campaign finance institutional change, meaning a judicial ruling replying to Congress and overturning an array of campaign finance laws (Ritter, 2012). It shows us that "there is a wide but not infinite variety of modes of institutional change that can be meaningfully distinguished and analytically compared," as Thelen and Streeck explain of policy change (2005, p. 1). Although Citizen United sought injunctive relief like the actors in cases such as *WRTL*, this 2010 cases differs from cases again like *WRTL*, that did not clearly situate within historical institutional change concepts, I argue that key issues within the *Citizens United* outcome does fit more strongly with

the concepts. As discussed below, how Citizen United invoked and pulled together contentious arguments about corporate participatory power and money in politics and regarded fundamental questions beyond what qualified for an "issue ad" (unlike in *WRTL*), it is a relatively strong example of endogenous institutional change concepts, particularly with respect to specific issues within the case.

The Citizen United case also speaks to and generally confirms the role of *insurrectionaries* in their expected context of *displacement,* and provides evidence which sustains existing characterizations of *insurrectionaries*, but also which challenges some notions about the political contexts in which they are projected to thrive, as further described below. As Mahoney and Thelen explain of *insurrectionaries* actors (2010:28), they can emerge in any setting, but they are most likely to flourish in environments characterized by low discretion and weak veto possibilities. However, the judicial process is one where Justices have, as powerful experts, high discretion and judicial review presents a strong veto possibility because it may resolve questions of the highest order, that is constitutional law. Although the idea of judicial discretion may seem contradictory because of the constraining nature of judicial precedence, this argument over emphasis the fact that courts do sometimes overturn precedence, for a range of reasons such as a contrasting interpretation, as is in fact the case in Citizen United. This is consistent with existing accounts of *displacement* which find that in the political science literature on it, the stress is typically more on political than cognitive or normative factors (the constitution is fundamentally a political document), with change emanating mostly from shifts in the societal balance of power for instance through enhanced corporate political power (Collier and Collier, 1991; Skowronek 1995; Huber and Stephens, 2001). Judicial conflicts are thus a consequential source of political conflicts, and it is useful to know which types of actors, which intervening policy variables such

as corporate personhood, and what modes of change take place through the judicial review process.

There are two main and one sub-mode of institutional change within or caused by the *Citizens United* decision, and they are shown through the three major strands of the case details and decision (namely, anti corruption rationale, overturning of provisions, the application of corporate personhood). The first strand rests with the Justices analyzing the anti corruption rationale in a manner which exhibits change through *layering*, ultimately contributing to *displacement.* As described elsewhere, agents can act within existing systems, such as within the campaign finance system and among the governmental division of powers, by adding new rules on top of or alongside existing ones; this could occur by amendments, revisions, or additions. For instance, introducing a new approach to corruption via judicial review (as occurred in this case) to an existing campaign finance system while maintaining other factors, such as the regularization of corporate personhood, is likely to set in motion changes that contribute to destabilization of the trajectory of campaign finance, the anti corruption rationale has been used in limiting corporate participation from politics. I argue that the opportunity for a new approach to important rationale in turn means the stable reproduction of individual and group participatory power in the electoral process less sure. Although the Court historically maintained that corporate treasuries pursuant to the anti corruption rationale were discouraged from the electoral process, the majority in Citizen United did argue that there was essentially no risk of quid pro quo corruption existed so long as a group does not directly align itself with a candidate or its party (Kang, 2013, Garrett, 2016). Framed in this way, the majority of Justices on the Court, as articulated by Justice Anthony Kennedy, reasoned that the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content

(Kang, 2013; Garrett, 2016). Furthermore, it was by engaging in inter-governmental dialogue, through reference to Congressional intent, that the majority opinion in Citizen United reasoned that the only interest which might be a legitimate (non redistributive, non paternalistic discussed below) grounds for limiting corporate treasury-funded political ads is the prevention of the narrow quid pro quo corruption of candidates that the Court recognized in *Buckley*. However, because the Court found that no quid pro quo existed absent coordination, at that even commodified political speech is indecomposable to a democracy, the Court implied a largely revised understanding of money in politics since the opposite views presented more toleration to limits on money in politics, especially treasury funds.

By contrast, Justice Stevens writing for the dissent argued that source limitations on corporate independent expenditures easily justified by a government interest in preventing "corruption" of the political process, with "corruption" broadly defined to cover not mere quid pro quo exchanges but something much broader called "undue influence."'(558 U.S. 310, 962-963). Based on this observation, Justice Stevens defended a version of the anti distortion rationale under which campaign finance regulations protect officeholders from improper influences that undermine the democratic process. Therefore, the result is consistent with *displacement* as institutional configurations are vulnerable to change as traditional arrangements may be discredited or pushed aside in favor of new policies and associated behavioral logics” (Streeck and Thelen, 2005, p. 20) – such as the understanding that donors will not engage in corrupt acts. As stated by Justice Kennedy: "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" as a categorical matter (558 U.S. 310, 909). As a result, the Court’s response to Congressional policy was the finding that: "Here Congress has created categorical bans on speech that are asymmetrical to preventing

quid pro quo corruption (558 U.S. 310, 905), and that "The Government may not... deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." (558 U.S. 310, 899); and that speaker may have influence over or access to elected officials does not mean that those officials are corrupt; and the appearance of influence or access will not cause the electorate to lose faith in democracy (citing *Caperton v. A. T. Massey Coal Co.,* 556 U. S., 40–45, 6).

The second major dynamic is *displacement* , which is present "when existing rules are replaced by new ones." (Mahoney and Thelen, 2010, p. 16). We can also see how *displacement* occurred by replacing existing precedence with a new jurisprudential approach and rationality. Indeed, to completely resolve the question of corporate identity, the USSC had to confront the *Austin* decision, ultimately overturning it. This is key because pre-*Austin* is a line of thought forbidding restrictions based on the speaker's corporate identity – that is contrastingly to the *Austin* line of thought permitting them. The *Citizens United* dissenters would have followed the approach of the majority of the Court in *Austin v. Michigan State Chamber of Commerce* (at 652). which allowed the government to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas "(citing *Austin* 494 U.S., 652). As common to *insurrectionaries*, it is likely that *displacement* may not happen as agents want, thus contributing to what may be a gradual process. The majority on the Court argued that *Austin*'s anti-distortion rationale would permit the Government to ban political speech because the speaker is an association with a corporate form (558 U.S. 32-47. Citing *Austin*, the USSC ruled that such protection is inconsistent with *Austin*'s rationale, which is meant to prevent corporations from obtaining "an unfair advantage in the political marketplace by using resources

amassed in the economic marketplace." (*Austin* 494 U. S., 659) First Amendment protections do not depend on the speaker's "financial ability to engage in public discussion." (*Buckley*, 49) and that distinguishing wealthy individuals from corporations based on the latter's special advantages of limited liability, does not suffice to allow laws prohibiting speech. In sum, the Court found it irrelevant for First Amendment purposes that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." (*Austin* 494 U.S 660) and that neither *Austin*'s anti-distortion (equalization based) rationale nor the Government's other justifications support s. 441b's restrictions (558 U.S. 32-47). In addition to supplanting case law, as Briffault (2011) highlights, this decision invalidated a sixty-year-old federal law (section 441(b) *FECA*), overturned comparable laws in two dozen states, and reverted from the anti-distortion and corruption rationale assumed in *Austin*. Some alternate measures though failed proposed corrective legislation in Congress aimed at trying to respond to this *displacement* include Corporate and Labor Electioneering Advertisement Reform; Save Our Democracy from Foreign Influence Act of 2010, H.R. 4523, iiith Cong. (2010)); Freedom from Foreign-Based Manipulation in American Elections Act of 2010, H.R. 4517, iiith Cong. (20I0); and Pick Your Poison Act of 2010, H.R. 4511, inth Cong, 2000 (Sullivan, 2010: 2, fn. 3). Yet nevertheless, as for s. 441(b) of the *FECA* and s. 203 of the *BCRA*, *displacement* was the outcome.

The role of corporate personhood in this case also tells us about lock-in effects how *drift*-like consequences may take hold; hence marking the third major strand in the case. Indeed, the crux of *Citizens United* involved a constitutional power dynamic, that is corporate personhood, and this made for a context where its difficult to prevent change because of such constitutional imperatives. This is particularly relevant when considering that the key question in the first instance in any campaign finance conflict would be if political speech rights / freedoms are

invoked, which means an identifiable speaker is required, making corporate personhood central to the case in this way. This further aligns with *displacement* in that with *displacement,* if institutional supporters are unable to prevent defection to new rules, then gradual *displacement* may take place. The government interests, as represented through the impugned legislation, are the institutional supporters in this case who are unable to prevent change because of the power of the corporate form, meaning constitutional law. Taken together with other piecemeal changes to the anti-corruption and anti-equalization/paternalistic rationales, it is evident how all these variables contributed to in some ways gradual endogenous institutional change. Here, we can see the processes of *layering* and *displacement* coming together to create a change in logic and policies.

To be sure, corporate personhood was a cardinal aspect to the conflict, and there is a limited number of instances in the Citizen United decision where the majority Justices specifically addressed corporate personhood. One instance of this involved dialogue informed thought about the identity of the speaker, and that it could not be grounds for governmental whims; stating for instance that: "The Government may not... deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." (899) This position was also an expansion of the *Bellotti* ruling in which the identity of the speaker was said irrelevant; as found by the Court, political speech is “indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation” (citing *Bellotti* 494, 777). Thus, upholding the notion of corporate personhood in this important decision, and indeed paying much more attention to it as compared to some cases since the *Bellotti* decision. It is important to note therefore that there are some lock-in effects here (taken with past instances of *conversion* and *layering* discussed elsewhere) given that corporate personhood was again essentially taken as a given as history has suggested, and so this influential power resource was brought into the

conflict with relative simplicity. However, by contrast, there was a juncture at *Austin* where the deleterious effects of the corporate form were the effective intervening variable, and so the proposition of lock-in was also affected by other specific factors. As Peter Hall (2010) outlines, the relative power of various actors is instrumental in one's capacity to assemble the coalition they need to change (or defend) existing arrangements. The identification of corporate personhood in this way inherently puts *Citizens United* in a position of standing with constitutional law, which of course informed the judicial review, and so key questions to the case are necessarily on its side once such recognition is affirmed. This also speaks to why not, as some neo-pluralists have suggested, the market-oriented society alone is a sufficient reason for explaining favorable policy outcomes for business. This decision, like others, confirms that the marketplace of ideas and the marketization of elections are additional factors in the context of campaign finance reforms driving policy outcomes, or fostering undue influence, in a manner favorable to big business. Likewise, the dialogue involved in deliberating about these ideas is not accounted for in such theorizations, making it furthermore a somewhat vague analysis. As the Justices uttered in citing *Buckley*, "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," *Citizens United*, 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48-49).

Dissenting justices however seemed to recognize the power of corporations as justification for limiting their participatory power. For instance, the dissent explains that, in its view, the "categorical or institutional" features of corporations that justify Congress's different treatment of corporations and "natural persons" include their limited liability, perpetual life, separate ownership and control, and ability to accumulate "resources... [that] 'are not an indication of popular support for the corporation's political ideas.'" These features compel corporations to "engage the

political process in instrumental terms" in order "to maximize shareholder value," the dissent argues, rather than in terms that advance "any broader notion of the public good."" (Citing *Austin*, 494, at 660). Here we can see a sub-mode of change, namely *drift* like consequences at play. For instance, this status-quo approach to corporate personhood exists in a environment vulnerable to *drift* since although the case meant the rule or policy known as corporate personhood remained formally the same, the impact of it, together with this decision on treasuries, can change given changing external contextual conditions such as fluctuations associated with the concentration of economic wealth of actors such as corporate financers – for instance. On the one hand, this is consistent with existing literature which shows *drift* to occur in strong veto, high discretion contexts, like this one, but it is however inconsistent with the insurrectionary variety of agents who while are known to be associated with *displacement,* are less likely associated with *drift* or *conversion* alike as they are known to prevail in the opposite context, that is weak veto possibilities and low level of discretion.

The Court's implicit commitment to corporate personhood also comes from the majority's view of free speech as liberty, and it starts from a textual interpretation of the Free Speech Clause as "written in terms of 'speech,' not speakers." (*Citizens United*, 130 S. Ct. at 929 Scalia, concurring). Unlike clauses that aim to protect "persons" from government deprivations or coercion, the Free Speech Clause states that "Congress shall make no law... abridging the freedom of speech," without mentioning "persons" or denominating any ontological prerequisites for who or what may invoke its protection. The clause thus suggests that its core concern is negative rather than affirmative – to restrain government from "abridging... speech" rather than to protect "rights / freedoms " that require the antecedent step of identifying appropriate rights / freedoms holders (U.S. Constitutional amend. V (Due Process and Self-Incrimination Clauses). On this reading,

the clause is indifferent to a speaker's identity or qualities - whether animate or inanimate, corporate, or non-profit, collective, or individual. (904). Hence, in coming to the resolution of this case, Justice Kennedy's opinion, again writing for the majority on the Court, articulated a robust vision of free speech as serving political liberty, while the dissenting opinion by Justice Stevens, sets forth in depth the countervailing egalitarian view. It was the Free Speech Clause and an anti paternalistic view which underpinned the majority's rationale. The notion of it is to serve liberty, checking the government overreaching into private order. The majority found that the government regulation is suspect not only when it discriminates among viewpoints, as in the free-speech-as-equality view, but also when it discriminates among speakers or seeks to equalize their speaking power. Rather, the audience of listeners is best situated to evaluate political speech without government intervention aimed at reshaping that dialogue (899). As Sullivan (2010, p. 158) explains, Justice Kennedy's majority opinion reflects a vision of free speech already embedded in a well-developed strand of the Court's First Amendment jurisprudence.

This libertarian strand, unlike the egalitarian strand from which Justice Stevens draws support discussed below, views free speech as a system involving the free flow of information rather than as a set of rights / freedoms possessed by individual speakers. And it rejects governmental efforts to alter the relative balance of speaking power in the private order, treating redistributive limits on speech and paternalistic protection of listeners as counter to the First Amendment. For Kennedy, trying to achieve pluralism was a form of redistributive limits on speech and a negative paternalistic protection of listeners. Although Justice Stevens avoided the language of equalization, his arguments were ultimately based on principles of political equality (Hasen, 2011). The Court's rejection of the anti distortion rationale has weighted the scales definitively in favor of liberty. Scholars have criticized the rejection of anti distortion because this has

effectively barred the consideration of political equality within campaign finance regulation (Alexander, 2011; Briffault, 2011; Gardner, 2011, Hasen, 2011;Tokaji, 2011, Dawood, 2013). As demonstrated in the following pages, the equalization rationale is a major differentiating factor to the Canadian context, and it has played an important role in shaping the trajectory of campaign finance institutions and outcomes of judicial review.

Chapter 5: Campaign Finance Policy and Judicial Outcomes in Canada

The history of the Canadian political finance system is modeled after the British Corrupt Practices Act of 1854, and this was first realized through the passage of the Dominion Elections Act (S.C. 1874, c) in 1874. This means that Canada established a campaign finance institutional approach, with disclosure requirements, more than 30 years before America's first federal legislation in this policy area (Seidle, 1991, p. 77). As Feasby (2007, pp. 519-521) and Seidle (1991, pp. 86-87) explain, the focus was entirely on expenditures and not contributions and was amended in 1908 (An Act to amend the Dominion Elections Act., S.C. 1908, c. 26) to prohibit contributions to candidates by corporations other than those incorporated solely for political purposes. This followed what is known as the Pacific Scandal in 1906-1907, leading Parliament to pass its first law in response to revelations about business contributions to the governing party's re-election campaign (Seidle, 1991, pp. 77-78). This prohibition was expanded to all corporations in addition to enhancing disclosure provisions in 1920. For various reasons the prohibition was largely unenforceable, for instance due to a relatively weak regulatory agency to undertake such tasks, and the prohibitions were repealed in 1930 (An Act to amend the Dominion Elections Act, S.C. 1930, c 16).

For 50 years after the 1920's laws, Parliament took no major action on the campaign finance system until legislative reform of the *Canada Elections Act* 1960 (hereafter "*CEA*") which principally removed barriers to voting, followed additional Amendments to the *CEA* titled the *Election Expenses Act* 1973 – 1974 (Seidle, 1991, p. 97). The rise of this *EEA* was informed by an interchange between two special Advisory Committees created by Parliament – first came the Barbeau Committee report in 1966, followed by the creation of Parliament's Chappell Committee in 1970. The reports delivered by each recommended major reforms, though they differed in

other respects (Seidle 1992, pp. 79-82). There were three themes that were consistent in each, notably the need for political actors to have money as elections cost money and candidates need to be able to explain to the electorate what Canada's international and national problems are, that the electorate needs to remain adequately informed by hearing proposed solutions via free speech rights / freedoms , and third that disclosure of campaign finance was to somehow be achieved (Seidle 1992, ch 2)

Importantly, the two committees agreed on a broad base of sources of funding, including a mix of public and private, but they differed on how to incentivize donations. Enforcement of rules and how to monitor and punish those who evade rules was also of major disagreement (this was ultimately resolved with the creation of the Chief Electoral Officer (CEO) role, akin to the FEC in the U.S., - the CEO is responsible "for the arrangements, the management, and control of the official election machinery and procedure" (Ewing, 1998, p. 58), meaning monitoring, interpreting, administering, and enforcing the Act, though their powers were also in dispute. As for disclosure and transparency, Barbeau wanted full disclosure of donors to the CEO, while the Chappell committee recommended reporting donor information only to the Minister of National Revenue and not to be made public (Barbeau, p 37). The first legislative attempt following the two reports amounted to a failed piece of federal legislation, (Bill C-211 1972), but ultimately the successful passing of the *Election Expenses Act* (hereafter "*EEA*") as further discussed below. This occurred in the context of a minority status liberal government around election time and the Trudeau government, (1971/1972) had campaigned on the themes of "participatory democracy" and a "just society" (Clarkson, 1975, p. 74). So many of the recommendations by the Barbeau and Chappell committee – and each of them came to be understood as apt and prudent.

While the legislative branch was not bound by either report, their recommendations were conversationally influential as lawmakers did adopt a selection of recommendations into the 1974 *EEA* Amendments. As noted above, those changes amended the *CEA*, in turn introducing a comprehensive set of controls over election expenses, disclosure, and financing. Rather than outlawing corporate donations altogether at that time, the 1974 Amendments entrenched CEO enforcement powers, increased access to free broadcasting while also regulating it, imposed spending limits, and introduced a system of partial public financing scheme and tax credit and an incentive for political parties to solicit individual donations, and restricted third-party groups. As Stanbury (1986) explains it, the *EEA* 1974 legislative was designed with the objective of putting limits on election expenses and thereby to reduce the actual or potential influence of money on politicians (1986: 4).

Against this backdrop, there has been moderately less judicial review of specifically campaign finance policies in Canada, and the judicial outcomes that did occur are comparatively more stringent in terms of promoting institutions that limit money in politics. The stringency is evident in terms of either: the final outcome/ruling; or, or in terms of the notions advocated for by judicial actors even though the final outcome may not have amounted to being able to limit commodifying the electoral process because of technicalities they are subject to, such as the section 1 analysis. In terms of a lack of cases dealing narrowly with campaign finance institutions (as explained below, two cases – sections 5.2.1 and 5.2.3 - meet the case criteria but are not strictly about campaign finance) is in fact notable and informative – a finding conducive to further research, as explained under 6.7. Furthermore, several outcomes that have came about demonstrate the role of differing constitutional constraints and judicial perspectives than frequented in the judicial review in American courts, as previously analyzed. I argue that this also

shows that inter-governmental dialogue, particularly because of the role of section 1. obligations, has been strongly influential in kind. In addition. the anti-corruption rationale which is prevalent in the US jurisprudence is complemented and overshadowed by the egalitarian or political equality-based justification in Canada, and it is reasonable to infer that the egalitarianism in Canada's political finance law makes a difference for the de-commodification of the electoral process.

Before reviewing the judicial cases, it is important to note three points. First, that the 1974 *EEA* Amendments did not meet any serious challenge until a series of cases involving the incorporated National Citizen Coalition (hereafter "*NCC*") third-party group beginning in 1984. As discussed in the following chapter, incorporated third-party groups have been most prominent as appellants / respondents in judicial challenges to speech (spending/participatory power) restrictions, making them a group of interest from the perspective of understanding endogenous gradual institutional change via judicial outcomes. As Seidle (1991, pp. 97-98) notes, in Canada the issue of third-party spending still came about notwithstanding Parliament's laws pursuant to the *EEA* Act, particularly concerning limits on parties and candidates' contributions and spending in. Accordingly, the analysis in the following chapter largely surrounds conflicts dealing with politically active third-party groups – which notably serve as an important catalyst for corporate political spending in the Canadian context as they function as a legal category wherein corporate money can be funneled through; in other words, these groups collect corporate funds, to in turn fund the electoral process. In fact, as introduced above, the series of cases which stand out in the trajectory of Canadian campaign finance judicial conflicts involved the NCC third-party group – which is documented as having a market-oriented demeanor, colored by business donations. Just like in the American context then where it is issues associated with money in politics which is

central for the judiciary when corporate entities are involved, the same matters present themselves in the Canadian judicial context where an interested party is a third-party group.

The second point to note, as expanded on below, is the role of a judicial outcome which merits analysis for this thesis – namely R. v. Big M. Drug Mart, 1983 ABCA 268 and R v. Big M Drug Mart Ltd. 1985 1 S.C.R. 295. While not a campaign finance case series, it is unique and relevant because for one, it deals with section of 2 of the *Charter* (freedom of expression albeit not political speech) significantly the corporate identity for the purpose of constitutional rights / freedoms and freedoms, and also, because it was subsequently cited in the first of cases in the series which directly deal with money in politics and electoral participatory power, as noted above, which did impact the trajectory of campaign finance judicial review in Canada, that is *National Citizen Coalition Inc. v. Attorney General* 1984 (AB QB). Further discussion on the justification of reviewing this case is also provided below in section 5.2.2. The third important point to note is that the Canadian *Charter of Rights and Freedom, Part I of the Constitution Act,* 1982 (hereafter "*Charter*") was enacted, prior to the string of cases examined below and not long after the passage of the *EEA* Amendments – indeed, making for the strongest legal basis of its kind in terms of ones' ability and power to make constitutionally grounded claims for freedom of political speech / expression. The *Charter* was passed by the federal government in 1982, binding all lower law in turn, and it remains a landmark legislation. In this, I argue that the *Charter* fundamentally altered the relationship between people, entities, and the state, again constitutionalizing freedom of association, opinion, and expression (speech) rights / freedoms under section 2 of the *Charter* – paralleling to the First Amendment under the American Bill of Rights. Within the text of the *Charter,* some provisions apply to "citizens", others to "everyone". As for section 2, the *Charter* proclaims that "everyone" has the access to the freedoms under section 2, and the

freedoms contained therein also include freedom of the press and other media forms of communication, for instance advertising as often occurs during electoral processes. Also, and just like under the American Bill of Rights, there is no express reference to corporate constitutional rights / freedoms , corporate identity, or the corporate form more broadly, hence leaving the role and participatory power of the corporate form open to ambiguity, conflict, and judicial review. Thus, "everyone" is not defined under the *Charter*. In this way and recalling the discussion in chapter 3, section 3.2.3., the freedoms and rights / freedoms discussed here, like all others, may only be restricted on the basis (as stated in section 1 of the *Charter*) of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". As outlined below, this principle has notably impacted course of judicial review and campaign finance institutional change in the Canadian context. More particularly, the *Charter* presents space *conversion* since interpreting it is a pivotal aspect to its application and due to inherent ambiguity within the interpretative process. More broadly, as unpacked below, the election system has experienced vulnerability to *drift* and demonstrates certain conditions which are conducive to *displacement.*

5.2 Canadian Judicial Cases:

5.5.1 R. v. Big M. Drug Mart Ltd., 1983 ABCA 268

The first case study analyzed is *R. v. Big M. Drug Mart Ltd., 1983 ABCA 268 (hereafter "Big M. Drug Mart")* This case was eventually appealed to the SCC, though the two outcomes are consistent with one another in that the SCC affirmed the lower courts finding. The lower courts decision will be analyzed in this section, and the SCC level outcome will be analyzed after in section 5.2.3). The matter at issue in *R. v. Big M. Drug Mart Ltd., 1983 ABCA 268* was whether section 4 of the *Alberta Lord's Day Act,* which required businesses to close on Sundays, violated *Big M. Drug Mart* freedoms under section 2 of the *Charter*. In other words, whether

section 4. inconsistent with the *Charter*, thereby making it in no force of effect, was at issue. Big M Drug Mart, notably a corporation, was charged under the impugned legislation (section 4. *Alberta's Lord Day Act*) with unlawfully carrying on the sale of goods on a Sunday.

The view of the corporation Big M. Drug Mart Ltd. was for one, a presumption of possessing legal "standing" (described below) , enabling it to make a claim for a remedy under the *Charter* (pursuant to section 24(1) of the *Charter*); that section 4 of the Alberta Lord's Day Act was unconstitutional – infringing on section 2 of its *Charter* freedoms. In response to these arguments, two Attorney Generals for Alberta, on behalf of the state, sought to defend the *Lords Day Act*. In defending the law, the two Attorney General's (hereafter "AG's"), foremost challenged the *standing* of Big M. Drug Mart. If Big M. Drug Mart was deemed not to have this legal right of standing, as the Attorney General's for Alberta argued it did not, then it would not have the legal capacity to have a court review whether constitutional freedoms were infringed. For clarity, the question of "standing" is to resolve whether one has the legal right to bring a matter to a court; standing is thus a first step, in this case, standing determines whether one can claim constitutional protection under section 2 of the *Charter*. As such, the AG's challenged the premise that Big B. Drug Mart could even access *Charter* guarantees in the first place, specifically indicating its corporate form in doing so, as further discussed below.

Therefore, the Court had to resolve: 1) the issue of standing; 2) whether section 2(a) was infringed by section 4 of *The Lord's Day Act* (of course contingent on first resolving the standing question); and 3) if the former was answered in the affirmative, whether the *Act* was a justifiable limitation on a fundamental freedom – that is the judicial threshold required to be analyzed pursuant to section 1 as being "demonstrably justified in a free and democratic society" (that is the Oakes test as detailed in section 3.3.3). Notably, this case did not involve elections, electoral

participatory power, and or money in politics. However, this case was subsequently cited in other judicial cases of review, cases which as analyzed and indicated in the case studies below (for example: *National Citizens Coalition Inc v. Attorney-General of Canada*, [1984] *citing Big M. Drug Mart* [1983]; *Somerville v. Canada (Attorney General)* [1996]), did involve elections, electoral participatory power, and or money in politics. Moreover, this case is pivotal in terms of the trajectory of the corporate form in Canadian jurisprudence involving elections, electoral participatory power, or money in politics. Additionally on case criteria, it did involve section 2 of the *Charter* (albeit freedom of conscious and religious beliefs). Although the claim made by Big M. Drug Mart under section 2 was therefore not pursued for constitutional protection of political expression / speech freedoms, but rather religious expression, it did have the result of affirming corporate section 2 freedoms, as regards political expression / speech, for subsequent cases of judicial review of political expression / speech freedoms, again as indicated above.

Moving forward with the analysis, and as introduced above, the decision by the lower court and higher court (SCC 1985) were consistent; following the Alberta Court of Appeal judgment, the judicial outcome of this twofold case sequence court was: (1) corporations do possess standing; (2) corporate freedoms under section 2 of the *Charter* was infringed; and (3) the section 4 Lords Day Act legislative infringement of the *Charter* was not savable under section 1 of the *Charter*, thus it was not "demonstrably justified in a free and democratic society". Accordingly, the law, section 4, was struck down and corporate constitutional rights / freedoms were affirmed, ultimately serving as judicial precedence as such. Again, the SCC upheld these findings, though slightly elaborated in doing so, specially in terms of the corporate identity. As such, and again, the SCC judicial outcome will be analyzed later in this thesis undersection 5.2.3. In addressing both the 1983 and 1985 Big M. Drug Mart outcomes, my analysis will in part be viewed

from the perspective of gradual institutional change theory, specifically the concept *conversion*. I will also address how these judicial outcomes implicates neo-pluralism literature together with power resources and literature on public opinion; and it will briefly reflect on institutional dialogue particularly by addressing the Courts section 1 analysis as that analysis, as described in chapter 3, requires the Court to engage in implicit dialogue, that is contemplation of legislative will, articulation, and intent, followed by a reply in turn by way of judicial decree.

Turning now to the corporate identity in particular, this judicial outcome in part turned on conceptualizing the corporate form, that is to determine what the Big M. Drug Mart's identity meant in terms of legal recognition for standing at the level of constitutionalism in the first place. In fact, the preliminary argument made by the two Attorneys General was an urging that: "A corporation does not have rights / freedoms under the *Charter* and in particular it is not given the fundamental freedom of conscience and religion under Section 2 or any right to apply to a Court under Section 24." (Paragraph 13). As such, the AGs were trying to dispose of the conflict as a preliminary issue, thereby altogether squashing the need to resolve the potential infringement of section 2 of the *Charter*. However, rejecting this claim, the Justices found that its the nature of the law and not the character of the accused which is in issue for the Court. The Court affirmed that its duty was not to resolve the nature of the corporation such as whether such an entity can even possess a conscience or feelings, but rather more narrowly to answer the question if the law is consistent with the *Charter* (paragraph 23). In reaching this conclusion, the Court made some findings regarding how to define "everyone" , though it only put forward a few short paragraphs to do so, and minimal weighing the 'personhood' debate, that is artificial versus natural entity contemplation, as emphasized under legal literature and in some American jurisprudence (e.g.

Rubin 2009; Pollman 2011; Feasby 2007. For instance, Justice Laycraft wrote for the majority that:

> "Everyone" is a word of wide import. Both the Shorter Oxford Dictionary and the Random House Dictionary give meanings for "everyone" and "everybody" which show the words are synonymous. They are of wider import than the word "person" but include it. Similarly, "anyone" is shown to be synonymous with "any person" (paragraph 20).

And going slightly further as to personhood in pointing out that:

> "The words used in the French language version of the Canadian *Charter* of Rights and Freedoms assist this interpretation. "Chacun" is used where "everyone" appears in the English version. In addition "chacun" appears in Section 19 where "any person" is used in English. In Section 24 where the English word is "anyone", "toute personne" is used in French. The meaning of "personne" as found in the Dictionnaire Juridigue Francais-Anglais (6th edition) is "person or artificial person, body corporate deemed fictitiously a natural person and permitted to go to law". (Paragraph 22)

However, at the same time, the Court did indicate that corporations can essentially hold beliefs, moving away from the "artificial entity view", and towards the "aggregate" or "natural entity" theory, as outlined in 2.2.6 As Judge Laycraft noted and reasoned:

> "It is argued that "freedom of conscience and religion" in Section 2 of the *Charter* cannot apply to a corporation because a body corporate can have neither conscience nor religion. But it has long been held that a corporation can have the mens rea for a criminal offence; it is that of its officers. If it can have a bad conscience it does not strain language to hold that in the same manner it can have the good conscience or even the religion of its officers. In any event, in my opinion, this argument is irrelevant. The task of the Court is to see whether all or part of The Lord's Day Act is inconsistent with freedom of con science and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feelings of conscience. It is the na ture of the law which must be considered and not the attributes of the person charged. In this context that which infringes the rights / freedoms of one Canadian, thereby in fringes the rights / freedoms of all. The corporation can, at the very least, plead that it can raise the infringement of the rights / freedoms of its officers, employees and customers" (para graph 23).

In sum, and as seen above, the Court basically left it at that, ultimately taking the position that revealing corporate constitutional rights / freedoms was of less or even no importance as com- pared to resolving whether the application of the *Charter* to the impugned section 4 of the Lord's

Day Act. This argument stands in contrast to the AG's view who effectively asked the Court to determine if the corporate form is a thing without constitutional rights / freedoms . This suggests moving somewhat beyond what some, like legal scholarship, aims to do, that is to resolve a correct textual interpretation of the corporate form (e.g., Rubin, 2009; Pollman, 2011; Feasby, 2007; Wolfe 2017; Hagger 1988; Machen 1911; Hager 1989). Likewise, the court did not delve into parsing the "artificial entity" "natural entity" and aggregate theories for understanding corporations place in constitutional law, again as a notable amount of scholarship on campaign finance outcomes does(e.g., Garrett, 2014; Padfield, 2012; Berger, 2006; Schneider, 2006). I argue that while courts view on constitutional rights / freedoms clearly matters, this case and others indicate that resolving corporate constitutional rights / freedoms in the context of judicial review can be simpler, and more implicit, than thought even if there is a gap in law as to corporate standing. Hence as Justice Dickson made clear, corporate standing was not its primary task, instead, the court's role was to apply the law to the case. Similarly, and as like cases such as these as well others demonstrate, judicial outcomes are often about their (corporations) place in the context of commodified elections and issues associated with money in politics, resolving the legality of their constitutional rights / freedoms is often an afterthought or less, hence the judicial review process often happens without needing to resolve corporations' position in constitutional text (*National Citizen Coalition Ltd. v. AG, Libman v. Quebec*, *Austin v. Michigan Chamber of Commerce, Buckley v. Valeo*)

A documenting of these two outcomes, the 1983 lower court and 1985 (section 5.2.3) high court decisions, is, as indicated at the outset of this section, apt for analysis through the lens of gradual institutional change theory – the *conversion* mode of change. It has been stated (Thelen 2002, 2004; Streeck and Thelen, 2005, Mahoney and Thelen, 2010) that different from

layering and *drift*, *conversion* occurs which institutions / policies are ambiguous enough to be redirected to serve distinct purposes and effects. Such redirection can come about in different ways, one way being through changes in power relations. This conceptualization of change is exemplified in this case. The *Charter of Rights and Freedoms* represents a clear re-organization in power relations, transferring the power to constitutional rights / freedoms and freedoms bearers to challenge legislators. Access to the rights / freedoms and freedoms therein, through such shifted power relations, provided the basis for which in turn enabled exploiting ambiguities in the *Charter* and Lord's Day Act alike, as regards the former to assert something not stated with certainty, that is the absence of corporate constitutional rights / freedoms in the constitutional text. Indeed, a point conceded to by the Court in stating that "This Court has not previously been required to consider whether the position of a corporation is different under the *Charter* of Rights than that of any other person" (paragraph 18). Big M. Drug Mart harnessed this gap, and leveraged it to serve a distinct purpose, namely to exercise freedoms with the effect of overturning section 4 of the Lords Day Act so to maintain its interests. A further layer to *conversion* is that "actors who were not involved in the original design of an institution what whose participation in it may have not been reckoned with, take it over and turn it to new ends" (Streeck and Thelen, 2005: 26). Big M. Drug Mart was not involved in the design of the *Charter* nor the Lord's Day Act, and their participation under the *Charter* had not been reckoned yet – hence why there was cause for the Court to resolve corporate actors, such as *Big M. Drug Mart*., potential to participate in *Charter* challenges, in other words, their standing.

This point overlaps with another way in which the Big M. Drug Mart case exemplifies elements of *conversion*. That is, as explained by Streeck and Thelen (2005, p. 26) redirection of a institution may occur where there is uncertainty as to what functions or purposes an existing

institution should serve, a question which can arise within a contestation between an institution (the *Charter*) and its enactment (who it applies to). The AG's disrupted assertion that that it was not Parliament's intent to provide corporations with constitutional right underscores that there was uncertainty in this regard, that is it was left up to judicial contemplation to resource what and who the *Charter* was intended to serve, was it to serve corporations and persons alike? How was "everyone" to be interpreted? This fact is made evidenced through the Justice perplexity, stating for instance that A complication in interpreting the *Charter* is the different terminology used in it to specify to whom it applies. "Everyone" is the term used in Sections 2, 7, 8, 9, 10, 12" (paragraph 19). In this way, documenting and scrutinizing this decision (alike the 1985 decision discussed later) largely supports gradual institutional change theorization, extending it though to the realm of corporate identity and corporate constitutional freedoms, hence building on others work who show, indeed sometimes with reference to constitutional ambiguities, change as *conversion* in other instances (Elster, 1995, Pierson, 2004).

However, despite the above discussed affirmation of the gradual institutional change body of research, that is within historical institutionalism literature, my analysis of the Big M. Drug Mart cases, like other discussed elsewhere, also problematizes premises about it as expressed in Thelen and Mahoney (2010). That research shows that as for the characteristics of the political context, *conversion* is most expectable in weak veto possibility, high level of discretion in interpretation / enforcement contexts. However, and as has been made clear previously in this thesis , the judicial branch is in fact a strong veto possibility, as is the outcome of judicial review of constitutional law. The binding nature of the judicial branch, the immediate impact of a court declaring a law of no force and effect, together with the supremacy of the constitution (entrenched in section 52(1) of the *Charter*), means that the court is avenue is a strong veto possible,

not a weak one. However, by the same token, the Court is a venue characterized by a high level of discretion in interpretation and enforcement; as explained elsewhere, this is due to the expertise possessed by the judicial branch, their independent nature to interpret and apply the supreme law. In fact, judges articulate the fundamental values of society in their role and set their order of priority alike. Accordingly, this case of corporate identity shows demonstrates on the one hand, the strong explanatory power of the *conversion* mode of change, whilst also underlining that it can also take hold in contexts beyond what accounts of it indicate (Thelen and Mahoney, 2010).

Turning briefly to the outcome of inter governmental dialogue, and then turns to situate the 1983 judicial decision vis-à-vis neo pluralism, power resources, and public opinion literature. The section 1 analysis in this case centered around the Court debating Parliament's approach in terms of the reasonableness and proportionality of the statute's infringement of the *Charter* Right. To this end, the Court pointed to the fact that the section 1 analysis was in its infancy, and that the Court would be henceforth in the challenging position of weighing social values and governmental burdens. Nevertheless, it concluded that the imposition of Sunday was essentially not reasonable and that it privileged Christian Sunday. Further, it discussed the social value of religion, leading it to conclude that restricting other freedoms so to protect a Christian day of rest did not have a rational basis, that it privileged Christianity as such. Moreover, the Court found, the legislative body proved little in the way of compromise, making for an unreasonable expectation (paragraph 59-61). The debate over judicial versus parliamentary supremacy could be considered considering this contemplation, however, to make the case of judicial supremacy arguably downplays the fact that dialogue through *Charter* review did occur, and that the judicial branch is, pursuant to legislation, the branch of government empowered to strike down legislation.

Lastly, this analysis address what this 1983 Big M Drug Mart judicial decision means for neo pluralism, power resources, and public opinion literature. First, it is noteworthy that the outcome of this decision is consequential in terms of access to the highest form of law, constitutional law. Clearly, constitutional rights / freedoms and freedoms occupy a special place in terms of not only the social fabric of a society, but also in terms of policymaking (Hirschl 2008, 2009). The legitimization of constitutional rights / freedoms and freedoms, by the judicial branch, to a notable extent binds policymakers, or at least binds them insofar that policies made will be vulnerable if done so without regard to constitutional implications. In this way, constitutionalism is a reason for which policy can "favor" some groups or issues over others. This is of course evident across a range of policy areas, for instance legislators in both nations face restrictions in policy making impacting marriage, free speech, to reproductive rights / freedoms . The constitutional law is thus explanatory of distributing power in a society as pertains to societies governed by independent branches of government and a constitution.

Accordingly, and as introduced above, this fact of judicial review problematizes a prominent line of thought under neo-pluralism literature, that is it shows reason for which businesses power goes beyond what neo-pluralists' argue - through reference to the "marketplace as a prison". This framing is extended to various policy areas, again an argument said explanatory of policy outcomes in which the position of business is privileged. While my point is not to reject that claim altogether, but instead to show its limitations and partial premises. The notion that there are risks with undermining the macro economic system, that which big businesses largely do sway, making for the notion "market as a prison", is limited since a review of judicial review demonstrates that judicial outcomes and judicial thought about the corporate identity, specially as regards constitutional rights / freedoms , is a venue by which power of business may become

amplified, even despite public opinion (as explained below) and consequences for the economy. Furthermore, my argument here also responds to gaps in public opinion literature, as explained under section 2.2.1 which states that there are trends where public opinion indicates a desire for campaign finance reform, though it is often not responded to. The constitutionalization of corporate political speech / expression rights / freedoms fills in this apparent paradox, meaning it shows why legislatures may be less inclined, or able, to respond to public opinion as they are, by essence of judicial review and the corporate form, effectively constrained in terms of legislative capacity. This finding is particularly sharp in the cases addressed above under chapter 4 which show a majority of instance wherein legislators were effectively overturned, unable to make policy in way which could be consistent with public opinion because judicial outcomes effectively refrained them from doing so. It is in this context that the power resources model also stands out, but the modified version as I articulated it under 3.2.1. As noted above, the question of the corporations possessing constitutional rights / freedoms mattered, meaning without the judicial legitimization of the corporate identity vis-à-vis constitutional rights / freedoms (in this case through *implicit* acceptance of it / without exploring the notion of an artificial entity), corporate actors would not be able to reap advantages which follow from constitutional claims. As such, "identity", as judicially realized, plainly serves as a power resource. Moreover, if we presume that big businesses' elevated level of contributory power, through campaign financing, corresponds with favorable policy outcomes, this also speaks to how corporate participation in the electoral process can undermine the realization of public opinion of the masses (not the wealthy few), that is to explain why policymaking, in a range of areas, has been shown to disproportionally benefit the wealthy.

5.2.2 National Citizens' Coalition Inc. v. Canada (AG), 1984 (AB QB)

It was in 1984 when the first major judicial case implicating money in politics came about. My analysis of this case will show below that it overlaps with historical institutionalism, affirming gradual institutional change theory because of the *drift* which occurred as a impact of this judicial outcome, together with the (in)action of the CEO regulatory actor; in turn speaking to dialogue theory as well. Finally, the role of the *conversion* that occurred in Big M. Drug Mart will also be reflected on, as will the importance of the egalitarian line of thought. Turning to the details of the case then, as Smith and Bakvis (2000, p. 16-17) explain, the backdrop to this case was that the National Citizens Coalition Inc. (hereafter "*NCC*") was outraged by the enactment of section 70.1(1) (pursuant to Parliament's enactment of bill C-169 in 1983 (described below), entitled "*An Act to amend the Canada Elections Act*"), and so it brought a claim against the state at the Alberta Queen's Bench. Bill C-169 aimed to block third parties (inclusive of corporations) from taking a political position, via advertising election related content, directed at supporting or opposing a candidate (like express advocacy advocacy) during an election campaign, without monetary limitations (Smith and Bakvis, 2000, pp. 16-17; Haigh, 2005, pp. 306-308; Dobbin 2003, pp. 202-203). In this way, section 70.1(1) amounted to a ban on third party expenditures – a limit on money in the political process. The *NCC* is third party think tank, an incorporated body, with a constitution, and organised by a board of directors (Ewing 1992: 137). As Doobin explains, bill C-169 amounted to the "the first breakthrough case in July 1984" (2003: 202). Indeed, this 1984 case can be characterized as a "breakthrough" (Doobin 2002: 202), or as the start of a "series of legal considerations court after court" (Bakvis and Smith 2000: 16), because as Haigh argues, the *NCC* began systematically challenging campaign finance legislation through

strategic use of the courts and the *Charter of Rights and Freedoms*, particularly section 2, as further referenced below (2005, p. 307).

Notably, this series of "breakthrough" cases, analyzed below, proceeded either under the *NCC* corporate name or the names of those in charge of it, most notably former Conservative Prime Minister Stephen *Harper*, and Mr. David Sommerville. In addition, consistent with this disposition to money in politics, and as indicated on their website, *NCC* is a pro-business, right-wing think tank, that promotes free enterprise and supports a "big business" agenda (Haigh, 2005,p. 7). Doobin further describes *NCC*'s corporate ties, pointing out for instance that *NCC* was established by billionaire businessman Colin M. Brown, that it has advocated for "privatization of everything", it campaigns to allow the wealthy to exert a disproportionate influence on Canadian political life, and that part of its activities includes charging fees to business to become members and providing prizes to politicians who to contribute to the mission for "freedom" it advances (1998, pp. 198-205). As a third-party actor under the election financing regime, it is open to donations from corporations and individuals from all socio-economic backgrounds alike. As regards *NCC*'s leadership, former Prime Minister Stephen *Harper* was president of the *NCC* during the judicial outcomes analyzed below, he was instrumental in launching legal campaigns against campaign finance monetary and electoral participatory power limits and restrictions and represents the leader of the only party to oppose the idea of reforming election finance laws to limit donations in some way. (Haigh, 2005, pp. 6-8). Besides Mr. *Harper*, Mr. David Sommerville was President of the *NCC* during 1993 – 1996, and in this role of President of the *NCC* corporation, Mr. Sommerville appeared as change-seekers under the *Somerville v. Canada* (1993, 1996) judicial case, also analyzed below in section 5.2.4.

Turning more particularly to the challenge in 1984 then, the *NCC* corporation took the position that the very idea of spending limits is anathema to a free and liberal society, and as such, an unjustifiable infringement of their section 2 *Charter* protections (Haigh, 2005: 306-307). Remarkably, although the challenged policies did block third party spending during an election, it wasn't even all that restriction as it provided for the caveat that allowed for third party spending so long as it was approved and account for by the party that stood to gain from the spending (Doobin, 2003, p. 202) - nevertheless challenging the policy via judicial review. Accordingly, *NCC* sought a judicial outcome that third-party monetary restrictions be found unconstitutional, as indicated above. From the government's perspective, that is in defence of the recent Parliamentary actions and in response to *NCC*'s complaint against its policies, "spending limits on candidate and political parties were necessary to ensure a level of equality amongst all participants" (Ewing, 1992, p.138). Accordingly, I argue that the state was essentially of the view that de-commodification of the electoral process correlates with electoral integrity, realized via a relatively fair distribution of political power amongst different identity types / actors.

Therefore, the question that arose in this 1984 judicial conflict was whether this so-called (from the *NCC*'s view) blanket prohibition, articulated under bill C-169 against partisan money in politics, violated *NCC*'s *Charter* freedoms in an unjustifiable way. As discussed below, these restrictions to money in politics, and therefore limit to corporate electoral participatory, was struck down during this instance of judicial review as unconstitutional, despite intergovernmental dialogue using section 1 *Charter* analysis. Notably, what was not at issue for the Court was whether the incorporated body – *NCC* – even had constitutional rights / freedoms . Similarly, this was not raised as an issue from the governments view. In this way, and just like in the majority of U.S. jurisprudence, there was not a legal contemplation as to corporate constitutional standing

per se, even given the formal absence of corporations / corporate identity in either the text of the *Charter* or the American Bill of Rights, but rather what's its identity means for electoral participatory power. As such, it is evident that the realization of corporate constitutional rights / freedoms has been less significant as compared to judicial premises about corporate access to political speech / expression, and the effects of money in politics more broadly, in the context of the democratic process (elections). Similarly, to this point, the Court in this *NCC* case instead cited *R v. Big Drug Mart* (1983), analyzed above, in pointing to where Laycraft J.A. determined that the position of a corporation under the *Charter* is no different than that of any other person. As such, I argue that the Court in this way drew and built on the *conversion* that occurred as discussed above in section 5.2.1, and as furthermore described below section 5.2.3. Preceding as such, it was necessary from the Alberta Queens Bench view to contemplate the case in terms of the government needing to show that third-party spending was somehow harmful, posing harm for instance to political equality. In making its reasoning, as Doobin explains, Judge Donald Medhurst writing for the bench, took the positing that "there had to be proof that such spending undermined democracy before any government could impose limits on the freedom of expression guarantee in the *Charter of Rights and Freedoms* (2003: 202)" In discussing such potential harm to democracy, the Alberta Queen's bench could find no compelling evidence that third-party spending was an abuse of the spending regime that needed to be thwarted (*National Citizens Coalition v. Canada* (AG) 1984 ABQB, 249). As the Justice Medhurst argued, "There should be actual demonstration of harm or a real likelihood of harm to a social value before a limitation can be said to be justified" (National Citizens' Coalition, Inc. v. Canada (AG), 1984, ABQB, 496).

In making its judgement, and pursuant to the steps in a *Charter* challenge, the Court undertook a section 1 analysis (chapter 3 section 3.2.2). Through this inter governmental dialogue,

that is on reflection to legislative intent and in reply to the legislative branch, the court pointed to the fact that the onus is on the government justify an infringement of a *Charter* right or freedom. Given the absence of evidence noted above, the Court found that the policy could not be saved under section 1 of the *Charter* as lawful, that is it was found not to be a “reasonable limit demonstrably justified in a free and democratic society”. Hence the action turned on the effort of the government to persuade the court that the branch is justified (Bakvis and Smith, 2000, p. 16), though in response the Court could not agree. Looking at the rationalizations and outcome of this case, I argue that different commitment and thresholds (like harm) about how to govern money in politics are primary over questions about access to constitutional rights / freedoms / freedoms, even though the latter is theoretically pivotal since it is the first instance which provides one with access to a court. Thus, an implicit assumption by a court that a corporation can claim political rights / freedoms and freedoms matters, but in terms of defining what as a matter of constitutional law they are for the purposes of possessing rights / freedoms or freedoms stands out to a lesser degree. These commitments are echoed in the rationalizations and discourse of the branches of government, though the judicial branch is pivotal in solidifying them.

As indicated above, egalitarianism, that which stands in general contrast to libertarian values, also stands out in this case. As argued on behalf on the AG’s, the ban was reasonable because it protected the “equality and fairness” that were the goals of the spending limits imposed on parties and candidates, and that the statutory goals or equalizing electoral opportunity with the provisions changed in the case ((National Citizens Coalition v. Canada (AG) 1984 ABQB, 34). Notably, the Court in *NCC* 1984 did not reject the governments interest in maintaining egalitarianism, meaning a high degree of political equality through institutional invention so to avoid large discrepancies in electoral participatory power. Rather, the Court stressed that the onus was

on the government to prove that harm, for instance undermining political equality, was occurring or likely to occur (Seidle, 1991, pp. 98-99). In this way, the equality rationale, that which has been less consequential in American judicial outcomes, was not discounted – like the view similarly found articulated by *dissenting* judges in cases where money in politics *was* liberated. It was through the burden of proof placed upon the government under section 1. of the *Charter*, and not a rejection of their argument per se, that was primary in the majority ruling. As such, I argue that a comparative and within case examination of campaign finance judicial outcomes identifies those differing commitments to democracy matter significantly for campaign finance judicial outcomes as this is reflected in positions taken and not rejected by state actors, namely the AGs and judicial branch respectively. Similarly, the judgment was not grounded in the rejection of the anti corruption rationale, a common issue in the American context as disused in chapter 4. In conclusion, as noted above, the policy was ruled unconstitutional.

The impact of the above outlined outcome not only explains the legitimization of corporate participatory power, but also are informative in terms of affirming gradual institutional change theory. From the standpoint of gradual institutional change, the effects of this *NCC* decision were to leave a state of inconsistency, as further explained below, across federal and provincial law, which is to say, *drift* occurred as theorized under the historical institutionalism, specifically gradual institutional literature.

This is an occasion of *drift* because although the judgement technically only had binding authority in Alberta, the federal government did not appeal the Court's decision. What's more, a general election was due in 1984 (as further noted below), and instead of having different electoral rules applying in different provinces, the CEO effectively deregulated third party spending by applying the Alberta's court ruling across all of Canada. As a result, the CEO opted not to

prosecute interest groups that defied spending restrictions on independent expenditures during federal elections thereafter in the 1984, 1988, 1993, and 1997 federal election electoral process (Geddes, 1984, p. 400; Hiebert, 1990, pp.73, 90; Smith and Bakvis, 1997, p. 165; Haigh, 2005, p. 307; Ewing, 1988, pp. 594-604). As research on *drift* tells us, failing to update policies or institutions in the face of changing circumstances, the judicial outcome, can have profound consequences as *drift* occurs when a gap opens up between rules and enforcement (Mahoney and Thelen 2010: 21).

While Daniel Béland (2010) and Béland and Waddan (2012) state that it is not always clear whether concepts such as *conversion* and policy *drift* explain policy change, or if they more often describe empirical episodes of gradual and possible fundamental change, without really explaining them, and that much work is still needed to explain why and when different patterns of social policy change occur or fail to materialize, I argue that the lack of enforcement on the part of the CEO does explain the why and when of change via *drift*. As a result, I argue that that this case models gradual institutional change theory, again specifically the concept *drift*. It is evident that an endogenously led gap between rules and enforcement happened, whereby such electorally active incorporated actors, the *NCC*, were moreover (beyond the provincial de-regulation of limits) successful because this *drift* occurred (Mahoney and Thelen, 2010, p. 16). Furthermore, finding *drift* in this context of campaign finance policy also reaffirms the contextual framework developed by Mahoney and Thelen (2010) where *drift* is said likely to occur in high level of discretion environments, like discretion held by the CEO given its sole power to enforce, characterized by strong veto possibilities, which again is the case when dealing with political speech rights / freedoms under judicial *Charter* review and within the context of campaign finance administration.

This case is to also underscore the scope of practical implications of intergovernmental dialogue, or more specially who has the “final say” in policy as overview in chapter 3, section 3.2.3. Accordingly, this research on campaign finance policy change underscores a limit, or contribution, to the line of inquiry under research on dialogue which contemplates whether judicial supremacy is, in terms of practical application of policy, occurring. In other words, regulatory actors can be shown to encroach on judicial outcomes, outcomes that may otherwise be characterized as usurping legislative prerogatives. Again, the result of this regulatory move (or more precisely failure to move/enforce rules at the federal level), as Geddes (1998, p. 441) highlights, became clear in the 1988 general election campaign when the issue of whether Canada should join the North American Free Trade Agreement was a pressing issue. Given this, this unregulated election attracted an unprecedent amount of third-party spending as a result (Hiebert, 1991: 20; Dobbin 2003: 202). As such, not only did the *NCC*’s pursuit of breaking down a campaign finance institution (section 70.1(1) under bill C-169), but also, and arguably more so significantly, was that in effect the outcome of judicial review in an Alberta (provincial) had national implications, and within this context, the above noted subsequent federal election were characterized by massive third-party spending by Canadian standards (Smith and Bakvis, 2000, pp.16- 17). As Murray underscores, “The *NCC*’s court victory opened the door to virtually unlimited corporate spending in the 1988 federal election, arguably the most important election in Canada in decades” (2003, pp. 202-203). As Geddes likewise finds, “This experience of unrestrained interest group participation led to a widespread public feeling that allowing the open slather purchase of publicity conferred an unfair electoral advantage on those groups with the wealth to take advantage of this liberty” (2004, p. 441). According to an analysis by Stanbury, the data for the period between 1974 and 1993, he finds that small contributions from individuals generated about

half the funds raised by the Liberals and Conservatives, three-quarters for the NDP and 90 percent for the Reform Party (1996, p. 379). This expansion of money is a result of *drift* – therefore not only adding explanatory weight to gradual institutional change theory, that is by showing its application in a novel policy area, but also articulates the potential scope or implications of this mode of change. As such, a core of democratic society is evidently vulnerable to this mode of change. Thus, while *drift* has been shown to occur in range of policy areas such as healthcare, labor, and property rights / freedoms (Galvin and Hacke,r 2020; Onoma, 2009), it hasn't been situated in the context of campaign finance policy as examined here. The change pursuant to the *NCC* case, or lack thereof given the non-enforcement of the election-related policy, is consistent with previous analysis such as that developed by Hacker which shows an important difference between *layering* and *drift* in terms of the mechanism of change, even while the two are alike in that modes can be promoted by political cultivation. Hacker's work on US health policies shows that "in the case of pensions where change took place through *layering*, active political sponsorship put new programs in place that could then be upgraded to attract more clients. In the case of health, by contrast, where the mode of change was *drift*, change was above all about the results of nondecisions as conservative policy makers deliberately declined to close emerging gaps in coverage" (Streeck and Thelen, 2005, p. 25).

This action then, or more precisely inaction, on the part of regulators and legislators relate to Galvain and Hacker's argument that, "Failing to update policies or institutions when they cease to function as intended is a powerful way of altering their impact" (2020, pp. 22-23). This argument of Galvain and Hacker's position rings demonstrably true in this case analysis, even while the CEO did however urge the federal government to appeal the lower courts decision made in 1984, arguing that the matter was "sufficiently important to have a superior court

including the Supreme Court of Canada, rule on the matter" (Ewing, 1992, p. 141). However, this did not take place. In this way, as Galvain and Hacker (2020, p. 2) explain, "*Drift* occurs when a policy or institution is not updated to reflect changing external circumstances, and this lack of updating causes the outcomes of the policy or institution to shift—sometimes dramatically." This furthermore shows how institutions require active maintenance for stable reproduction or 'tending to' in Hacker's analysis of health care policy shows. Otherwise, policies or institutions can be subject to erosion and atrophy through *drift*. This case of *drift* again also shows us how governmental dialogue theory is underdeveloped. That is, the focus of dialogue theory on policy / legal change as relates to exchanges between the legislative and judicial branch should account for intermediaries, particularly as is the case here, because such bodies such as the CEO have the power to interrupt, contribute to, and even interrupt their dialogue. As Bakvis and Smith explain, the decision to not enforce spending limits during the three federal election cycles noted above, that is given the removal of limits was presumably to apply just at the Alberta provincial levels given the judicial outcome in this *NCC* case was at the jurisdiction of the Alberta Queens bench only, meant that advocacy groups, corporations, and individuals were free to spend as much money as they liked to support or oppose candidates (1997, pp. 167-168). Hence as mentioned above, this further meant that dialogue between the judiciary and legislators was, for some time, superseded by the implicit relationship which occurred between the CEO, the judiciary, and the *NCC* as well any other electorally active actors who benefited from the lack of enforcement on the part of the CEO. Therefore, campaign finance reform shows that inter-governmental dialogue goes beyond what current theorizations about such important interchanges suggests, as further demonstrated below, since theorists often do not account for the power and or role of regulatory entities that administer and enforce rules, meaning that research about judiciary activism and

legislative supremacy is not all-inclusive since regulators influence the steadiness of legislation, terms of intergovernmental debate, and the activities of courts.

5.2.3 Regina v. Big M Drug Mart Ltd. 1985 1 S.C.R. 295

This SCC case analysis (*Regina v. Big M Drug Mart Ltd*. 1985) is the continuation of above under section 5.2.1, and therefore the primary case details have already been provided. Like in the 1983 decision, the SCC held in the 1985 subsequent judicial outcome invalid a criminal law (section 4 of the *Lord's Day Act*). It did so by finding that the law infringed Big M. Drug Mart's section 2 constitutional freedom in an unjustifiable way. However, and as introduced in section 5.2.1, although the decision between the lower court and higher court were consistent, the justices at the SCC advanced a small discussion elaborating on the corporate form. A documenting of this aspect of the SCC judicial outcome builds on my analysis of the Big M. Drug Mart [1983] judicial outcome, as was reviewed in section 5.2.1, through the lens of gradual institutional change. Accordingly, this section on the 1985 SCC outcome further develops that argument, evoking further the explanatory power of gradual institutional change concepts, namely *conversion.* As well, some reasoning on the part of Attorney General's (those who maintained the law was valid and corporations cannot possess constitutional rights / freedoms and freedoms by essence of the corporate form) suggest overlap with alike certain conceptualizations of the corporate form that have amounted to constraining money in politics in American campaign finance jurisprudence; this layer to the case will also be briefly examined.

As outlined in the 1983 Big M. Drug. Mart judicial outcome analysis, the Attorney Generals ("AG") acting on behalf of the state were of the view that Big M. Drug Mart lacked legal standing - because of its corporate identity. The Judges made this point clear in affirming their understanding of the AG's position, highlighting that:

> "As best I understand the first submission, the assertion is that Big M is not entitled to any relief pursuant to s. 24(1) of the *Charter*. It is urged that freedom of religion is a per sonal freedom and that a corporation, being a statutory creation, cannot be said to have a conscience or hold a religious belief. It cannot, therefore, be protected by s. 2(a) of the *Charter*, nor can its rights / freedoms and freedoms have been infringed or denied under s. 24(1); Big M's application under that section must consequently fail." (paragraph 34).

This view demonstrates historical uncertainty on the part of state actors about the corporate form, uncertainty evidenced in both the Canadian and American contexts. Likewise, and as overviewed in section 2.2.6, there are competing formulations of the corporate form, each with their own consequences for corporate standing in law, the state of campaign finance, electoral integrity, and the distribution of political power. One view, the "artificial entity" perspective of corporations, is echoed in this case by the AG's. This approach has some history in a major U.S. case, namely *Trustees of Dartmouth College v. Woodward* (1819), where the Court held that "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. "Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence" (Blair, 2013, p. 799). Approaching corporate constitutional rights / freedoms in this way, within a case study of judicial outcomes in Canada and the U.S. demonstrates potential for cross-national similarity. For instance, in more recent judicial outcomes, the position of the AGs in Big M. Drug Mart reverberates the artificial identity approach taken in a limited amount of American jurisprudence, such as was demonstrated under the *Austin v. Michigan Chamber of Commerce* (discussed previously), wherein money in politics was limited on the grounds of the artificial entity. In this way, and as argued in chapter 1 and 3, a within case comparative analysis of relevant variables, such as the corporate form, is useful because it shows that though there may be different trajectories from case to case (country to country), they show potential for similarity when variables take on similar values to that of the other case / nation.

In terms of the question of corporate constitutional rights / freedoms (or "corporate personhood"), I argue that corporate identity is shaped and modified by legislatures and courts. Corporate identity is socially and discursively constructed rather than being an inherent and unchanging property of a firm that is independent of law, judicial discourse, and politics. The fact that the Court in Canada deemed it not necessary to resolve the corporate form's identity also indicates that evaluating whether a court got an interpretation of corporate constitutional protections right, as some legal scholarship focuses on in order to judge judicial outcomes, in fact provides only a limited accounting of the outcomes (e.g. Rubin, 2009; Pollman, 2011; Feasby, 2007; Wolfe, 2017; Stephens, 2013) . Despite the AG's pursuit of delving into the standing of corporations, the majority of the court in the 1985 Big M. Drug Mart SCC affirmed the Alberta Court of Appeal (1983) in a more basic way as noted above, that is by rejecting a need to thoroughly contemplate the nature of the corporation, presuming instead that there is no reason to assume that Big M. Drug Mart can't hold religious belief, and thereby focused on the legality of the section 4 *Lords Day Act* generally. One the one hand then, the corporate form did serve as a power resource, and it did depend on how the judicial branch conceptualized it, but not so far in terms of needing to resolve its extent of "personhood" as a matter of law. The result, as further described below, was policy stability in terms of proving for corporate constitutional rights / freedoms . This is evident since as was reasoned by Justice Dickinson on behalf of the majority of the SCC:

> "Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the *Charter* and by reason of s. 52 of the Constitution Act, 1982, it is of no force or effect. Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The re spondent is arguing that the legislation is constitutionally invalid because it impairs free dom of religion--if the law impairs."freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to re sist a charge under the Act. The only way this question might be relevant would be if s. 2(a) were interpreted as limited to protecting only those persons who could prove a genu

> inely held religious belief. I can see no basis to so limit the breadth of s. 2(a) in this case" (paragraph 39-40)

As a result, writing for the majority, Dickson concluded that:

> "The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights / freedoms under s. 2(a) of the *Charter*, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue" (paragraph 41)

In this way, the Court looked past the question of a corporation's capacity for religious belief and focused exclusively on the unconstitutional effect of the law, while the AG's view which leaned on the artificial entity conceptualization would have limited corporate constitutional power, just like the lower courts view in *First National Bank v. Bellotti* – where corporations were unsuccessful. The ultimate insignificance of resolving the identity of the corporate form was further highlighted by Judge Dickson citing the lower court's decision written for by Judge Laycraft at pg. 636 for the majority in that court:

> "The task of the court is to see whether all or part of the Lord's Day Act is inconsistent with freedom of conscience and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feelings of conscience" (paragraph 41)

The above explained precedent nature further supports the fact that this case is exemplary of *conversion*. As explained in "*Beyond Continuity: Institutional Change in Advanced Political Economies*", the mode of change *conversion* can have lasting effects, indeed proving for elements of stability and even lock-in (Streeck and Thelen, 2005, pp. 26-27). In this way, and constant with *conversion*, it is clear that though the corporate person is not entrenched in the textual side of the Canadian Constitution, or its amendment the *Charter of Rights and Freedoms* (1982), it can still find its way into constitutional judicial review and as a thing possessing constitutional rights / freedoms in a lasting, stable manner (cases citing Big Drug indicated above).

In this regard, however, it is necessary that judicial actors lean into to the notion that the electoral process is made better through enhancing political speech / expression freedoms of a wide range of actors, not withstanding their economic resources. These insights problematize lines of thought under neoplurlaism, particularly those which emphasize a lack of plurality because of the market economy, instead of focusing on how legal standing pushes some policy outcomes, like campaign finance which arguably has wide reaching implications, in the direction favorable to business interests. Likewise, the fact of precedence is thus something that supports this potential for lock in within the context of *conversion*. Notably then, it (the *Charter*), together with the structure in which it is interrupted under, presents an opportunity for actors to engage in *conversion* like techniques. Accordingly, the role of the judicial branch, or more particularly judicial attributions of corporate identity, stand out in terms of gradual institutional change, or a lack thereof, and also stand to show to support realizations about this mode of change.

5.2.4 Somerville v. Canada (AG.) (1996), 136 D.LR. (4"') 205 (Alta. CA)

The judicial outcome analyzed next is *Somerville v. Attorney General for Canada* (hereafter “*Somerville*”), which was heard in 1996 at the Alberta Court of Appeal, is a significant decision under the *Charter of Rights and Freedoms*, particularly when considering that the highest court the Supreme Court of Canada (SCC) has since, in an unrelated decision in October 1997 discussed next in (chapter 5, section 5.2.5), disapproved the *Somerville* decision. When analyzing the *Somerville* case from the standpoint of gradual institutional change theory, reference will be made to the concepts of *displacement* and *drift*, and how they can connect to one another in a previously not considered way. As regards the latter, the continued importance of regulatory actors in terms of the application of post-dialogue realization of decisions made, as well in terms of corporate / third party participatory power in elections more broadly, is highlighted. Moreover,

the mode of change *displacement* evident in the *Somerville* cases can be understood from the view of dialogue theory, showing in turn the robustness of dialogue in the Canadian context, particularly due to the *Charter*, and how differing commitment to democracy and views about Parliamentary intent can impact judicial reasoning, and possibly outcome, of campaign finance conflicts. In this way, a within case and comparative analysis is illustrative of various factors that contribute to the development of campaign finance judicial outcomes which result, or do not result, into the *displacement* of policies determinative of the potential for money in politics. Lastly, this analysis will draw succinct attention to how legislation is a method for the mode of change *layering*.

Turning to the facts of the case. In this case, Mr. David *Somerville* , again as introduced earlier in this chapter was President of the *NCC* corporation at the time, took the view that recently passed amendments amounted to an unjustifiable infringement of section 2. of the *Charter*. As further analyzed below, the Court agreed with *Somerville* ; hence he was successful in that the policies were stricken down as unconstitutional. As stated in the case, David *Somerville* commenced this action on behalf of the National Citizens Coalition, as well as on his own behalf as a citizen (*ABCA* 217, para 3). The disputed amendments followed the result of a Parliamentary response to the judicial outcome in *National Citizens' Coalition Inc. v. Canada* (A.G.) (1984), analyzed above (section 5.2.2). It is here that we can see how *layering* can follow from judicial review, hence the legislative response to the outcome of the *NCC* is utilized here as an instance to succinctly point to how *layering* can one, be impacted by judicial review; two, occur through legislation; and 3) how those involved in campaign finance can potentially face some challenges in the context of electioneering (advertising / the expression of political speech) because of *layering*. This argument can also be applied to the description discussed previously regarding the

Bipartisan Campaign Reform Act, as described under (chapter 4, section 4.2.6). As explained under historical institutional literature, a primary part of this mode of change is that "with *layering*, institutional change grows out of the attachment of new institutions or rules onto or alongside existing ones." As discussed above, the *NCC* 1984 case resulted in the court striking down new policies, though this is not to say that the whole of the *EEA* fell as a result of the decision, or that no gains were made. Rather, new rules were brought about shortly thereafter through a Parliamentary response (informed by a committee it formed as outlined below). Hence new rules, or policies, were realized under bill C-114, which amended the *Canada Elections Act* (to recap "*CEA*"), that is adding on sections 259.1(1), 259.2(2) and 213 of the *CEA*, R.S.C. 1985 to the existing *CEA* framework (A History of the Right to Vote in Canada, 2020: Ch. 4; Bakvis and Smith 1997). These new policies are further explained below.

To this end, and again in seeking to remedy the outcome of the 1984 judicial outcome, a Commission was convened by Parliament and Chaired by Pierre Lortie, titled the Royal Commission on Electoral Reform and Party Financing ("Lortie Commission" 1989-1991; hereafter "the Commission"/"Lortie Commission"+), further discussed below. In citing Royal Commission on Electoral Reform and Party Financing, vol. I (Ottawa: Minister of Supply & Services Canada, I 991) at 6-18. 322 (Chair: Pierre Lortie) (Canada, Lortie Repor1*),* Geddes (1998) notes that "The Lortie Commission's final report largely reaffirmed the original egalitarian aims of the *Canada Elections Act"* (1998, p. 441); as stated in the report: "Restrictions on the election expenditures of individuals of group other than candidates and parties were central to attempt to ensure the financial capacities of some did not unduly distort the electoral process by unfairly disadvantage others." (at 327).

However, on the issue of third-party spending, and considering the findings made under prior judicial review, the Commission argued that an outright prohibition on partisan advertising was both unnecessary as well a unconstitutional denial of freedom of expression (Bakvis and Smith, 2000, p. 17). In this way, and again consistent with *layering*, though powerful veto players can protect the old institution, for instance campaign finance donors with powerful constitutional rights / freedoms (hence powerful veto players) did not outright loose the gains made under the *NCC* 1984 judicial conflict, they can't necessarily prevent the addition of new elements – like those realized through the amendments made under bill C-114 (Mahoney and Thelen, 2010, pp. 20-21; A History of the Right to Vote in Canada, 2020: Ch. 4). As such, the Lortie Commission did, in addition to the legislative branch alongside its Lortie Commission, contribute to limiting electoral participation by suggesting new elements, and that broad-based spending limits represented the best way to ensure that all voters received an equal amount of information and would allow the election process itself to be conducted on as level a playing field as possible. In fact, the Commission undertook a review of many aspects of the electoral system, including an extensive review of political finance issues. (Feasby, 2007). In this way, it is evident that policy change aimed to reduce money in politics and promote democracy and electoral integrity can be said, from some governmental perspectives, pair will with a plan to de-commodify the electoral process.

In sum, and in consideration of the Lortie Commission recommendations, Parliament passed the above noted challenged policies, namely sections 259.1(1), 259.2(2) and 213 under the *CEA*. As such, these new measures meant third-party spending limits of $1,000, though this was only with respect to partisan advocacy, an advertising blackout periods during a start-up period after a writ is issued and in the final two days of an election campaign, and a prohibition on

pooling resources – which effectively denied participants from in engaging in national advertising because it prohibited coordination or pooling money (Haigh, 2005, p.307; Hiebert, 1998, p. 99). Overall, then, it is demonstrable that *layering* can, 1) be impacted by judicial review; 2) occur through legislation; and 3) impact those involved in campaign finance can potentially face some challenges in the context of electioneering (advertising / the expression of political speech) because of *layering*. As such, the amendments did further for some time regulate the amount of money that individuals, interest groups, corporations, or unions could spend as independent expenditures during elections (Hiebert, 1998, pp. 91-92).

As a result of the above and turning more particularly to the facts of the case, Mr. *Somerville* took the position that the limits of $1,000 on partisan advocacy, the blackout periods, and the prohibition on pooling resource (as referenced above), unjustifiably abridged freedom of political speech / expression – a clear protection undersection 2 of the *Charter*. By contrast, the Attorney General took the position that:

> "The legislation is necessary to preserve balance and ensure that the spending limits on parties and candidates are not undermined. The Act is aimed generally at curbing election campaign spending to ensure a "fair" and "equitable" electoral system. Equity in cam paigns is sought by established low economic thresholds for electoral participation and reimbursement of some costs of seeking office. The electoral scheme provided for in the Act is said to be aimed at creating a level playing field (paragraph 11)."

I argue that the submission noted above, taken in the interest of the *NCC* corporate form, models *displacement* in that, *Somerville* obviously was of the position that the potential for participatory power of incorporated third parties was at odds with the prevailing institution, that is the policies which were lawful at the time; this backdrop is illustrative as a most prominent facet that gives rise to actors pursing endogenous institutional change in the change mode *displacement* (Streeck and Thelen, 2005, pp. 20-22). Therefore, it was clear that his interests would be better served through "active cultivation" (Deeg, 1998) of a new arrangement, one where

freedom of speech / expression is conceptualized as better realized through paving the way for more money in politics. Justice Conrad J.A., writing for the majority, agreed with *Somerville* and struck the policies down. To this end, and in order to promote a new scheme, namely, to further de regulate campaign finance requires, *Somerville* engaged with techniques which strongly overlap with episodes of *displacement*, such as the exercise of power or the expenditure of resources, which is observable through exercising constitutional rights / freedoms / freedoms as well the legal monetary costs required to do so.

While the policies which were endogenously sought to be overturned may not represent whole-scale fundamental shifts, as is often seen with *displacement*, they were nonetheless significant enough given such that a characterization of *displacement* is fitting, particularly given the importance of such policies as laid out by the federal government and in the Lortie Commission report. The prominence of the decision in *Somerville* is also notable in other ways. For one, the *Somerville* case has major symbolic importance given it was resulting from a landmark court case – *NCC* 1984 – and likewise the arguments in favor of them leaned heavily on to “supressed historical alternatives” (such as those cited in *NCC* 1984) as acts of *displacement* have been shown to do (Streeck and Thelen, 2005, pp. 20-21. e.g., Moore, 1976, 276). Additionally, the judicial logic which prevailed in this case also functioned heavily in the debate in the *Libman* case, discussed next. As well, *Somerville* continued to influence the trajectory of judicial reasoning thereafter. Furthermore, as articulated elsewhere, *displacement* is a matter of replacing existing rules / policies and is often an abrupt occurrence. Unlike the type of *displacement* that can be a slow a moving process, the *displacement* of sections 259.1(1), 259.2(2) and 213 of the *CEA,* represent the abrupt form of *displacement*, that is the kind of abruptness congruent with the immediate impact of a judicial ruling. Thus, the new rules being that third-party spending limits of

$1,000 on partisan advocacy, advertising blackout periods during certain time frames, a prohibition on pooling resources, were unconstitutional, and therefore of no force and effect.

To even more fully understand how *displacement* occurred in this case, the intergovernmental dialogue that occurred can also be kept in view. As introduced above, the federal government took the position that the policies were constitutional and very important so to sustain the general objective, as determined by Parliament, of maintaining some measure of financial equity in the electoral competition between candidates and parties, hence echoing egalitarianism commitments and an interest in preventing *displacement* of sections 259.1(1), 259.2(2) and 213 of the *Canada Elections Act*. On the courts finding that there was an abridgement of section 2, however, the federal government went on to argue that the policies were nonetheless a justifiable infringement on section 2 of the *Charter*. In this respect a few points were raised. For one, they reasoned that the policies would ensure public confidence in the system, that prohibitions against pooling resource enabled preventing the circumvention of spending restrictions by using third parties to advertise on their behalf, and most prominently, as indicated above, they were justifiable because they ensure that the regulation of spending during elections by political parties and candidates is not rendered ineffective by unparalleled third party spending and were therefore "demonstrably justified in a free and democratic society" (as section 1 of the *Charter* obliges). In this way, the federal government positioned the policies as rationally connected, minimally impairing, and proportional, hence they were of the view that the policies were constitutional, even subject to thresholds set out under section 1of the *Charter*.

The Alberta Court of Appeal rejected these propositions, as noted above. In so doing, a few points stand out. For one, the Court argued that the rights / freedoms of voters were being undermined by not being able to hear information from third parties, meaning groups /

individuals / corporations other than partis and candidates. In this regard, the Court of Appeal concluded: "before third party expenditures could be justifiably restricted, this evidence had to reach a level that showed such spending could "buy" some participant an election result.(para 65). As a result, the Court concluded that absent such a demonstration, it was the court's role when conducting a

Charter review to protect the democratic process by ensuring that the legislature did not reduce the participatory power of third parties, as they see fit.

On a separate and more central note as to the federal government's main position on political equality, Justice Conrad J, for the majority reasoned that:

> "the very aim or purpose of this legislation is to ensure that third parties cannot be heard in any effective way and that political parties are entitled to preferential protection. Its objective strikes at the core of these fundamental rights / freedoms and freedoms, and is arguably legislation which has as its very purpose the restriction of these rights / free doms and freedom, which can never be justified." (para. 77)."

As a result, The Alberta Court of Appeal's viewed the legislature as "ironically purporting to the democratic process, by means of infringing he very rights / freedoms which are fundamental to democracy." (para 65). Hence as Feasby (1999) explains, Conrad J.A.'s characterization of the purpose of the legislation is not a deferential or generous interpretation of the motive of Parliament. Along the same lines, Geddes (2004: 438) finds that "It is not surprising, given the strength of this commitment to the liberty interests of individual electoral participants, that the Alberta Court of Appeal's decision approvingly cited the U.S. Supreme Court's ruling in *Buckley*, (para 48-49) and suggested that the system of contribution limits and disclosure requirements adopted in the United States could provide a "less intrusive means of fostering the purported objectives of this legislation."(para 62, 83). Feasby explains, Conrad J.A.'s analysis is predicated on the view that unfettered free speech is inherently good. Though not explicit, Conrad J.A. is

clearly working from an assumption that the libertarian model of election regulation is the regulative ideal. She makes it clear that any tampering with expression in the electoral context must be treated with suspicion" (1999, pp. 25-26).

Against the above-described backdrop, I argue that it is such judicial logics and constitutional boundaries, and specific understandings about commitments to democracy as outlined above, which show that, for the purposes of understanding gradual institutional change of campaign finance policy, *displacement* can occur in a strong veto possibility and high discretion environments. Hence this case study stands in contrast to established literature on *displacement* which shows the change mode in the opposite context (Mahoney and Thelen, 2010, pp.15-20). However, and as addressed under other cases (e.g., *Harper* 2004), *displacement* can also be thwarted in an akin context / environment when the opposite logics are dominant. Thus, for the purposes of gradual institutional change of campaign finance policy via *displacement*, I argue that *displacement* can occur, but it is contingent on judicial reasonings which are inherently conditioned by intergovernmental exchanges and constitutional thresholds (a review of legislation followed by a reply). Indeed, the *Somerville* versus *Harper* (2000, 2008) or *Austin* (1990) cases for instance reinforce a finding as to which dispositions are conducive to *displacement* in free speech / expression judicial conflicts. This argument is further reinforced by the Courts cross-national comparison made with reference to the *Buckley* case, as noted above; in turn, this underscores the analytical insight of a within case comparative approach. In sum, a review of intergovernmental dialogue contextualizes *displacement* of campaign finance policy and shows how such change can potentially occur in a strong veto possibility and high discretion environments, which is to show, this case study stands in contrast to established literature on *displacement* which

shows *displacement* prevailing the opposite environments. (Mahoney and Thelen, 2010, pp. 15-20).

Lastly, the outcome in this *Somerville* case is furthermore illustrative of the continuation of the change mode *drift.* This is the case because, once again, the striking down of the provisions had implications further than the provincial level. While the revised rules remained formally the same for Alberta (no $1000 limit, no black out period, and no prohibition on pooling resources), the impact of them was different due to shifts in external conditions, namely the pending 36th General Election held in 1997, vis-à-vis actors (namely the CEO) opting for inaction by failing to enforce those policies throughout the rest of Canada. Perhaps paradoxically, in the Chief Electoral Officer's own reports to Parliament following the 1993, 1997 (and 2000 discussed later) general elections, Mr. Kingsley strongly supported measures to curb the influence of corporate and union donors. These reports proposed, in effect, that the control of money was a value that must be managed to some degree, setting "reasonable limits" that balanced the *Charter* right to liberty against the Canada Elections Act 's fundamental need to establish equality and transparency (A History of the Vote in Canada, 2020: ch. 4). Yet, as Geddes observes, “In the absence of any further appeal, the Chief Electoral Officer again deregulated third party spending on election campaigns by applying the Alberta Court of Appeal's ruling to all of Canada” (Geddes, 2004, p. 443). In sum then, the outcome of the dialogue discussed above demonstrates effects beyond those anticipated by either of the branches (legislative / judicial) would presumably have anticipated, and this is because of the power of the relevant regulatory body, as discussed above. Overall, it is evident that *displacement* and *drift* can be related / connect to one another, meaning one (*displacement*) can give way to a scenario (*displacement*) that facilitates the other (*drift*).

5.2.5 Libman v. Quebec (Attorney General), (1997) 3 S.C.R. 569

In 1977, the Supreme Court considered the constitutional validity of Quebec's prohibition upon almost all forms of third-party expenditure under the case name *Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569*. The policies in question, namely ss. 402, 403, 404, 406 para. 3, 413, 414, 416 and 417 of Appendix 2 of the *Referendum Act* R.S.Q., c. C-64.1, prohibited expenditures made in support of or in opposition to a referendum question, unless that spending was authorized by the national committee of an officially recognized campaign. Because of this need to be authorized as such, *Libman* took the position that if he wishes to conduct a referendum campaign independently of the national committees, his freedom of political expression will be limited to unregulated expenses; and conversely, if he wishes to be able to incur regulated expenses, he will have to join or affiliate himself with one of the national committees (*Quebec (Attorney General), [1997] 3 S.C.R. 569*). The Attorney General was of the threefold view that the restrictions are justified as a reasonable limit in a free and democratic society under s. 1 of the *Charter* so to one, ensure the equality of each citizen in elections; two, prevent the voices of the wealthy from drowning out those of others; and three, preserve confidence in the electoral system. Therefore, the question for the SCC was whether the above noted provisions infringed *Libman*'s *Charter* Freedoms, including section 2 freedom of (political) expression / speech.

The case of *Libman v Quebec* is an important case, illustrative of Canada's highest courts affirming of the "laudable goal" of maintaining political equality in the context of the electoral process, and more specially through the campaign finance system. Although *Libman* represents an individual, the logic and discussion can be precisely mapped on to the issue of money in polices (electoral regulation) – particularly third-party spending as they themselves simply be

corporations or funded by them. Moreover, it presents a direct challenge to the decision previously passed regarding third party spending in *Somerville* 1996. As well this decision was subsequently applied in other campaign finance cases, such as *Harper* 2004 a landmark SCC ruling. Also, it again highlights the judicial branch serious contemplation as to whether deference to the legislative branch was in order, principally through *Charter* dialogue reflection, and an analysis of their doing so contributes to dialogue theory. This case us furthermore significant because for the first time, Canada's highest court, the Supreme Court of Canada, addressed the constitutionality of campaign spending limits. Also, while the conflict concerned a referendum, the Court established that the analysis and debate was the same if as were it the broader election legislation, stating that "the same principles underlying election legislation should in general be applicable to referendum legislation…there are enough points of similarity between the two systems to draw such a parallel" (paragraph 46).

Ultimately, the SCC found that the impugned law did restrict freedom of political expression (1997) 3 S.C.R. 569, 151 D.L.R. (4th) 385, para 116. As analyzed below, while the Court on the one hand bluntly agreed with Parliament's objectives and intent in terms of leveling the playing field in the electoral process by constraining money in politics, on the other hand however, when turning to the obligatory section 1 Oakes test analysis, the Court found that the infringement was not justifiable in a free and democratic society. More specifically, it failed the "minimal impairment" dimension of the Oakes test. As a result, the law was ultimately struck down as unconstitutional. As such, Supreme Court of Canada found that limiting third-party spending was justifiable under the *Charter* in as much as a means of promoting equality of participation, but that such limiting could not be sustained under s. 1 of the *Charter* because it did not do so in way which minimally impaired section 2 freedoms; hence the law was insufficiently tailored. Against

this backdrop, the court declared the impugned provisions unconstitutional, meaning to be of no force or effect (pursuant to section. 52 of the Constitution Act, 1982).

This case is analyzable from the perspective of gradual institutional change. A within case analysis of this SCC decision shows a successful move at *displacement*, hence policy instability, as *Libman* achieved the change he was after. I argue that the courts arguments stand out in that they clearly indicate which logics would have amounted to a failed attempt at *displacement*, should the law have been shown not to overly impair *Libman*'s section 2 freedom. In other words, if it wasn't for the failure on the part of Parliament to minimally impairment freedom of speech / expression, the law would have been upheld (no *displacement*) on the basis of egalitarian aims and agreeance with the concept that some identities pose a excessive harm to the system because of their resources.

Geddes also alludes to this finding in agreeing that "the specific outcome of the *Libman* case is of less interest than the Court's approach to weighing the general reasons for restricting third party election spending against the *Charter's* right to free expression" (2004, p. 444). In this way, this case analysis underscores an argument made throughout this thesis , that is that corporate participatory power is essentially recognized by judicial actors as a power resource. Without rejecting this point, some cases of judicial review broach said power resource as consistent with a libertarian approach to the electoral process wherein corporate identity / wealth does not pose harm to electoral integrity and therefore policies should not limit money in politics. For others, and typically framed as an egalitarian position, wealth and corporate resources are inconsistent with commitments to democratic governance. At the same time, making a finding either way in this respect does not necessarily or even frequently require a court to resolve constitutional standing or debate about it. Along these lines, it is once more evident that certain types of

commitments to democratic governance and notions about commodifying elections are a catalyst for policies which disproportionality benefit the affluent, rather than a legislative / judicial deference to market pressures, as neopluralism literature has largely come to conclude. As maintained by the Court in *Libman*: "Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard (para 47). Thus, while this judicial conflict was a "win" for the interests of wealth / potentially politically active corporations (as third parties / donors to third parties), market pressures was not the reason for their win, as further explained below.

Additionally, when analyzing the topic of democratic governance, the Court (as indicated below) also referenced the rights / freedoms of listeners of information, and this parallels with the Courts reasoning in the *First National Bank of Boston vs. Bellotti* (chapter 4, section 4.2.2) which also loosened campaign finance policies and again also in the context of a referendum; hence a within case, comparative analytical method draws out which judicial reasoning result in which types of policy change (or stability as the case may be). As stated by the Court in *Libman*, spending limits are also about ensuring the constitutional rights / freedoms of electors, such as the right to vote under 3 of the *Charter*, so to enable them to have a free and informed vote, that is be adequately informed of all the political positions (para 61, 67).

Given the above (and below) remarks as to why *displacement* did occur, and as introduced above, this case is also a strong empirical case contribution to studies which seek to evaluate and characterize deference within inter branch dialogue (e.g., Macfarlane 2018). This issue or topic of deference and dialogue is shown in the robust nature of the court's reflection in this case, as well with its clear reference to it, hence providing a strong contextualized example relevant to

dialogue theory. Moreover, it draws attention to the role of Committees in this regard, that is the process side of dialogue, seeing that the Court relied heavily on the Lortie Commission Report (described previously) in its judgements (e.g., para 116, 108, 100, 94, 61, 40-41). As Macfarlane equally observes, the court approving cited the Lortie Commission Report on Electoral Reform and Party Financing, which re call suggested election expenses of third parties be limited to $1000, in its judgments (2018: 213-214).

Returning to gradual institutional change as *displacement* then, several paragraphs by the Court stand out in terms of demonstrating their affirmation of egalitarian values and how money in politics is not consistent with them. As suggested above, such judicial arguments suggest which judicial logics indicate likeliness for an outcome whereby *displacement* of campaign finance spending restrictions would be prevented. For instance, paragraph 42 sums the central justifications for the finding that the limits were (again despite the section 1 breech discussed next) lawful Parliamentary aims for imposing such limits on money in politics through electoral regulation and underscoring the power of some identities was crucial in this respect. This is evidenced in the Courts affirmation of the position that:

> “The basic objective of the Act at issue is to guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting. In its egalitarian aspect, the Act is in tended to prevent the referendum debate being dominated by the most affluent members of society. At the same time, the Act promotes an informed vote by ensuring that some points of view are not buried by others. This highly laudable objective, intended to ensure the fairness of a referendum on a question of public interest, is of pressing and substantial importance in a democratic society”.

To further express this finding, as Geddes explains, “In the course of this exercise, the Court expressly stated its disapproval of the Alberta Court of Appeal's decision in the *Somerville* case and instead described the objective of limiting third party election spending as "highly laudable" (2004, p. 444). Feasby (1999) likewise describes the courts reasoning and judgement in this

regard as squarely falling within an egalitarian conception of democracy, informed by the idea of Rawls and other liberal theorists; hence as Feasby argues: "in *Libman* v. Quebec (A.G.), the Supreme Court of Canada rejected the libertarian reasoning of the Alberta courts in National Citizens' Coalition and *Somerville* in favour of an egalitarian theory of electoral regulation. The egalitarian model adopted by the Court provides a justification for spending and expression limits that mitigate the disproportionate effects of wealth in the election process" (1999:1).

Accordingly, the SCC decision in *Libman* is indicative of the type of constitutional and political issues, as well judicial reasoning, which could prevent *displacement*. However, and again because of the obligatory nature of the section 1 *Charter* analysis examined below, the Court was compelled to strike down the policies even while explicitly declaring that deference to Parliament should be afforded. For instance, the Court argued that " while the impugned provisions do in a way restrict one of the most basic forms of expression, namely political expression, the legislature must be accorded a certain deference to enable it to arbitrate between the democratic values of freedom of expression and referendum fairness" (para 61)….and reiterated that: "The role of the Court is to determine whether the means chosen by the legislature to attain this highly laudable objective are reasonable, while according it a considerable degree of deference since the latter is in the best position to make such choices"(para 61). In sum, I argue that the Courts judgements demonstrates its thorough contemplation as to whether judicial deference to Parliament was the right thing to do, and challenges arguments as to judicial activism in turn (e.g. Morton, F. L., & Knopff, R. ,1992, 2019), notwithstanding the fact that the Court did ultimately rule, as stated above, the law of no force and effect on the basis that it could not fulfill the minimal impairment threshold.

Turning to the minimal impairment point then, the bench drew out several reasonings as to this dimension to the Oakes test, and indeed, it was the sole issue of minimal impairment which caused the policies to be declared of no force and effect. Hence besides the minimal impairment part of its section 1 analysis, the Court drew findings which affirmed lawful egalitarian democratic commitments, as well deference to Parliament towards those ends. For instance, on the rational connection threshold with the section 1 (Oakes test) analysis, the bench found that:

> "There is clearly a rational connection between limits on independent spending and the legislature's objective. Limits on such spending are essential to maintain an equilibrium in financial resources and to guarantee the fairness of the referendum. The evidence shows that without such controls, any system for limiting the spending of the national committees would become futile."

In agreeance with the Attorney General's argument as stated above, the Court indeed maintained that the objective of the act, again which was characterized as an egalitarian one, was constitutionally valid as passed within the purview of the legislative branch. Stating at paragraph 41:

> "Thus, the objective of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominat ing the referendum debate through access to greater resources. What is sought is in a sense an equality of participation and influence between the proponents of each option. Second, from the voters' point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a dem ocratic process that it knows will not be dominated by the power of money."

Yet, as indicated above the decision then turned on the "minimal impairment" dimension to the Oakes test. On this dimension, the SCC maintained that the provisions ultimately fail the minimal impairment threshold, thereby making the impugned sections (noted at the outset) of no force and effect. Specially, the Court reflected and in turn reasoned that:

> "With respect to the minimal impairment test, while the impugned provisions do in a way restrict one of the most basic forms of expression, namely political expression, the legis lature must be accorded a certain deference to enable it to reconcile the democratic val ues of freedom of expression and referendum fairness.… The impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to pro

> mote political expression by ensuring an equal dissemination of points of view purely out of respect for democratic traditions…. However, the limits imposed under s. 404 cannot meet the minimal impairment test in the case of individuals and groups who can neither join nor affiliate themselves with the national committees and can therefore express their views only by means of unregulated expenses. The forms of expression provided for in that section are so restrictive that they come close to being a total ban" (para 58-63).

From the perspective of gradual institutional change, the case is particularly telling because it demonstrates a sharp contrast to the libertarian, or pro commodification, view to electoral regulations from a de commodifying approach. This means it is a strong example of how different commitments to democracy result in differing judicial outcomes. Indeed, the Court frequently referred to the legislature's intent as a "laudable objective" (at 84 15, 42, 56, 62). In sum, an analysis of this case suggests that if it were not for the minimal impairment threshold, that which is judged through intergovernmental dialogue, the impugned provisions would have indeed fallen as unconstitutional. I argue that the positions taken by the Court in this case challenge the notion of judicial activism or a lack of dialogue; and that therefore, it is these judicial attributes which show that, for the purposes of understanding gradual institutional change of campaign finance policy, *displacement* within a strong veto possibility and high discretion environments shouldn't be necessarily ruled out (Mahoney and Thelen, 2010: 15-20). In this way, the *Somerville* versus *Libman* case for instance reinforce the finding as to which dispositions are conducive to *displacement* in free speech / expression judicial conflicts. Moreover then, this analysis has also highlighted the consequential role of justices in potential gradual institutional change in the form of *displacement*.

5.2.6 Harper v. Canada (Attorney General), (2000) 2 S.C.R. 764
+ Harper v. Canada, (2001) 9 W.W.R. 650 (Harper (Alta. Q.B.)
+ Harper v. Canada (A.G.) (2002), 320 A.R. I (Harper (Alta. C.A.)

The next case study for analysis is part of a series of cases. For clarity, the historical backdrop is as follows. In the year 2000, Mr. Stephen *Harper* filed for judicial review (the details of the matter discussed below). Before the Alberta Queens Bench trial judge issued its ruling on this filing, *Harper* filed for injunctive relief to stay the outcome (meaning to pause/delay ruling on the constitutionality of the challenged policies) due to a fast-approaching general election. The issue of the stay, which is analyzed below, came under the case name *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764.

Once the election passed, the issue re commenced at the Alberta Queens Bench trial level under the case name *Harper v. Canada,* (2001) 9 W.W.R. 650 *[Harper* (Alta. Q.B.). *Harper* was successful in this outcome, but the Attorney General filed for an appeal shortly thereafter at the Alberta Court of Appeal under the case name *Harper v. Canada (A.G.)* (2002), 320 A.R. I *(Harper* (Alta. C.A.). *Harper* was again successful in the appeal. The findings made by the trial and appeals decision parallel; as noted, the higher (appeals) court affirmed the lower courts judgments and ultimate outcome, and it set the groundwork for the next case analyzed - that is the final ruling on this matter as delivered by the SCC, which is analyzed separately in the next case study under (section 5.2.7). As such, the analysis within this section is confined to the higher (Appeals Court) decision. Apart from this, the outcome of the *Harper* v. Attorney General), [2000] 2 S.C.R. 764 case, wherein an injunctive relief / stay was issued, models gradual institutional change theory and therefore (as indicated above) it will also be analyzed below in its own regard to that end.

In sum, the analysis below begins with the facts of the case, then analyzes the *Harper* v. Attorney General, [2000] 2 S.C.R. 764 case, specifically through the lens of *drift*, and then moves on to the outcome of the Appeal's Court, that is case *Harper v. Canada (A.G.)* (2002),

320 A.R. I *(Harper* (Alta. C.A.). As will be explained henceforth, taken together, these cases build upon and contribute to gradual institutional change, dialogue, power resources, and neo-plurlaism literature, integrating the concepts of *conversion*, *drift*, and *displacement*, as well the *parasitic symbionts* in particular.

The facts of the case are as follows. In the year 2002, the Alberta Court of Appeal ruled on a case brought by Mr. Stephen *Harper*. Harpers motivation for the case came from a dissatisfaction with recent amendments made to the *Canada Elections Act* under Bill C-2. While the statement of claim was made in his name, *Harper* was at the time the President of the National Citizens Coalition (*NCC*) corporation, and as Haigh (2005) argues, it was no secret that he represented the view of the *NCC*. Describing Bill C-2, Haigh writes that "This latest reform initiative received royal assent on May 31, 2000, and reflects an evolving trend towards further tightening of the purse strings. It is wide ranging, covering a number of grounds related to election and campaign financing" (Haigh, 2005: 308). In view of this, *Harper* felt that Parliament had went to far in restricting money in politics, that is money as speech, thus leading him to argue that an infringement of section 2 *Charter* right of expression / speech was being abridged by the policies within Bill C-2, such as monetary spending limits for third-party entities/groups. As Haigh (2005: 1) argues in regards to *Harper*'s filing suit in this case: "Previous attempts by him and his organization, the National Citizen's Coalition (*NCC*), challenging earlier federal gag laws on election spending, had proven successful", and indeed, the same pattern contributed within the judicial outcome in 2002 where the Alberta Court of Appeal ruled in *Harper*'s favor – that is the impugned sections under Bill C-2 were found to be an unjustifiable infringement of section 2 *Charter* freedoms. Central to this analysis is *Harper*'s argument against the constitutionality of the restriction of third-party spending which imposed that during an election campaign, only

$3,000 per riding to a maximum of $150,000 could be spent nationally by a third party (section 350 *Canada Elections Act 2000*). As noted above, *Harper* was successful in this case by having the policies declared unconstitutional and of no force and effect. Before analyzing the judicial outcome that came about within this context, that is the Alberta Court of Appeal's outcome, this analysis now turns to the injunctive relief hearing, as explained above, this relief paused the initial ruling of the case, and it is a strong conformity example / case study of gradual institutional change research, specifically the concept *drift*.

Harper v. Canada (Attorney General), 2000 SCC 57 (2000) 2 SCR 764:

As introduced above, the initial case which was commenced in 2000 was suspended because the timing as it coincided with the running of that year's federal election. In view of this, the Alberta Court of Queen's Bench issued an injunction preventing Elections Canadas administrator the CEO from enforcing the challenged third-party spending provisions in Alberta while their constitutionality remained before the court. So, while trial judge had yet to make a ruling on the case filed with the Alberta Queens Bench, the conclusion was reached by the Court that the matter would be stayed until after the election, and more significantly, as described below, that the impugned policies would be in no force and effect within the province of Alberta in the interim.

It is against this backdrop that the concept of *drift*, as well the role of CEOs in terms of interpreting inter-branch dialogue (hence forming intergovernmental dialogue) fits within this case-series analysis as at that time (2000), the Chief Electoral Officer applied the ruling, meaning the injunctive relief / stay, nationwide. Here, we see a similar pattern as outlined in the previous time blocks analyzed in this thesis . However, this case is slightly different in that rather than having a ruling from the Court which outlawed a provision in a province, namely Alberta, and

the CEO opting to applying the ruling across all of Canada, this case is slightly different in that rather than having a ruling at hand, the CEO was faced with an injunction to not enforce the policies in Alberta. In this way, there was a gap in terms of what the rule was in Alberta, thus frustrating the enforcement of it, but this was a unique circumstance is the gap was produced by the Court in its finding that the constitutionality of the rule was unclear, thus a gap in what the rule meant in terms of constitutional law and therefore what should happen as to enforcement of it. Nevertheless, this occurrence goes further in that it was the discretionary power of the CEO which extended this rule/enforcement gap beyond the province; in so doing, the CEO defended his choice in stating that it is "in the public interest that the law be applied uniformly in a federal general election." (A History of the Right to Vote in Canada, 2020: ch 4, page 28). Moreover then, this is a clear example of the CEO's (lawful) intrusion into governmental dialogue; the Court made explicit that its contemplation on federal decree was yet resolved, but the CEO acted independently in terms of who had the "final say" on the policy matter during that very important time block, namely a federal election.

Accordingly, the 2000 case of judicial review does demonstrate that the CEO's administrative capacities, that is his (in)action, may be especially important for *drift* because weaknesses on these fronts provide strategic openings for those who wish to oppose the rules on the books. In this case, not enforcing campaign finance policies provided a strategic opening for *Harper* (and the *NCC* third party among others) given that it enabled them to pour money into promoting the candidate suitable to their interest, and this is consistent with institutional change in the form of *drift* (Mahoney and Thelen, 2010, pp. 21-22). As such, this case underscores my argument that campaign finance policy is exemplary of the concept *drift* being realized, and that therefore regulatory actors have a significant role in the pace of policy change and on the state of the electoral

process more broadly. As such, it is reasonable to articulate the point that the CEO occupies an instrumental role in causing *drift* to occur, just as it has the power to stop *drift* from occurring in various instances (e.g. *Harper* 2000), and lastly that the Court can contribute to *drift* in particular circumstances such as this one where a province wide injunction was issued.

Harper v. Canada (A.G.) (2002), 320 A.R. I (Harper (Alta. C.A.):

As introduced at the outset of this section, the remainder of this analysis is confined to an analysis of the judgments and outcome passed by the Alberta Court of Appeal, and this is now assessed below. As will be explained below, I argue that this case reaffirms a trajectory seen from a within case and comparative perspective, that is that libertarian-like commitments to democracy coincide with looser electoral regulation, specially as regards electoral regulation government the commodification of elections. I argue that these arguments and generally consistent with the mode of change *displacement* in Canada. In addition, this case study further contributes to gradual institutional change theory as it shows how electorally active individuals/entities can engage in '*conversion* techniques', how the *Charter* and like constitutions such as the American Bill of Rights, have in presenting space for such techniques, and the role those judicial actors have in either preventing or giving way to such techniques or maneuvers such that electoral participatory power is impacted. Further, this case contributes to knowledge on the *parasitic symbionts* type of change agent.

Scholarship on the mode of change *conversion* finds that "*conversion* normally occurs when rules are ambiguous enough to permit different (often starkly contrasting) interpretations. (Mahoney ad Thelen, 2010, p. 21). In analyzing this mode of change in the context of German's codetermination policies, Jackson shows of *conversion* that continuous reinterpretation in the context of discretion and rules colored by ambiguity made way through change via *conversion*

(Jackson, 2005). This framework, that is a discretionary framework wherein a level of ambiguity and thus a need for discretionary and progressive interpretation is required, is not unlike *Charter* centered conflicts. Indeed, as described elsewhere, the *Charter* is in its essence open to interpretation – the very nature of judicial review is an interpretative endeavor that is conditioned by discretionary power which is transferred in law to actors working within the judicial branch. The "living tree doctrine" (Miller, 2009) is a strong proof to this effect, that which the Supreme Court created and frequently references during its activities in order to underscore the fact that the *Charter* is often to different interpretations, interpretations that may even with time result in starkly contrasting outcomes depending on the socio-political time (e.g., *R. v. Big M Drug Mart Ltd.*, 1985). In fact, the notion of progressive interpretation under the "living tree doctrine" was later applied to the interpretation of the Canadian *Charter of Rights and Freedoms* and has also been affirmed relevant within the context of freedom of expression (Miller, 2009). Therefore, I argue that the *Charter of Rights and Freedoms* presents vast space for *conversion*, or '*conversion* techniques' to be tried and tested. As such, I furthermore argue that judicial actors are hence pivotal in preventing, or permitting, *conversion* techniques, meaning policy change as *conversion*. As indicated earlier, this point is made evident through an analysis of this case study, and more particularly when focusing on the tactics and arguments made by *Harper*. While there are a few techniques as a means to *conversion* (Streeck and Thelen, 2005, pp. 26-28), one is where actors who were not involved in the design of an institution, just as *Harper* wasn't involved in the crafting of the *Charter of Rights and Freedoms* in the 1980's, do everything in their power, such as leverage constitutional freedoms, to interpret the rules in their own interest such as to argue that section 2 provides the necessary protection to overthrow the impugned policies under Bill C-2. This is similarly evident when considering that *conversion* is further explained as a mode of

change where "institutions are not so much amended or allowed to decay as they are redirected to new goals, functions, or purposes" (Streeck and Thelen, 2005, p. 26). Hence when accounting for the fact that *Harper* wasn't of course arguing against the *Charter*, but rather that its purpose and function "should" be such that it would serve the goal of freedom of speech – realized through de regulating third party spending – illustrates *Harper*'s judicial action as one which models the *conversion* mode of change, that is engaging with the discretion in the interpretation of what the ends section 2 of the *Charter* should serve in an attempt to direct it in a manner which would achieve his third-party spending interests. In sum then, the judiciary alongside the *Charter* is an important institutional prospect where this mode of change can be exercised, judicial actors have a consequential role in terms of the outcome of *conversion* techniques being tried, hence in policy stability or change, and in this case, *conversion* techniques were successful given that *Harper* was successful in that the *Charter* was interpreted in a manner which allowed change in the direction of his and the NCCs interests, change being the striking down of the policies which he challenged.

The parasitic symbionts type of change agent:

Turning to conceptualizing the *parasitic symbionts* type of change agent in this case, re call that from the Attorney General viewpoint, arguing on behalf of the federal government, "Parliament's rationale for passing these new rules was to re-establish the basic conditions for a fair electoral process, in which participants can engage in a relatively equal fashion" (Geddis, 2004, p. 453). Further, the government urged the claim that the expenditure limits were intended to ensure that elections remained "fair" as meaning they prevented the primary electoral contestants from using third party expenditures to evade the spending caps on their campaigns (*Harper (Alta. C.A.),* para 109); hence the government made the assertion that third-party spending limits,

if not controlled, may (and this is notional only) impact adversely on the fairness of elections. Taking a complete opposite view, *Harper* argued that meaningfully participation in the election process was curtailed because of said attempts at political equality. Based on this framing, specifically that of the government noted above and below, the change-seeking actor in this case (that is *Harper*, though this point can apply equally to other occasions where the government takes an akin view against them (*NCC*/*Harper*/or others) and where those such actors are seeking to overturn electoral regulations) are consistent with current descriptions of *parasitic symbionts* and also reaffirm this type of change agents' empirical connection with *drift*. This is the case because the view and arguments made by the federal government (as outlined above as well below), which were made to the Alberta Court of Appeal in defense of the law, implicitly identifies uniformity between *Harper*'s actions and the behavior of *parasitic symbionts* change agents – as these agents are known to "carry out actions that contradict the "spirit" or purpose of the institution, thus undermining it over the longer run" (Mahoney and Thelen, 2010: 24). Hence to the extent that this governmental framing is accurate, *Harper* parallels with the *parasitic symbionts* change agent. As articulated by the government, allowing the plaintiffs to have their way would thwart political equality and stifle political public debate. Indeed, these are key qualities which the Election Expenses Act, was designed to promote, and so undermining them is coherent with undermining the purpose of the institution; and over the long run, this could destabilize or weaken the system. As Geddis observes, "Parliament's rationale for passing these new rules was to re-establish the basic conditions for a fair electoral process, in which participants can engage in a relatively equal fashion (2004, p. 453). In this way, it was clear to the government that the change-seeking actions (specially seeking *displacement* as examined below) pursued by these change-agents posed risks to the electoral process and future elections. Moreover, ands as seen in

American judicial conflicts, actors of the *parasitic symbionts*' variety depend on institutions such as the Bill of Rights or a *Charter* to recognize their legal existence, hence enabling some degree of socio-legal power. This means they may, in turn, challenge institutions for private gain even as they depend on the law recognizing rights / freedoms associated with their identity thus legal standing (as defined previously) so to be able to pursue judicial review (Mahoney and Thelen, 2010: 24). In these ways, this case study is a further conformity example of gradual institutional change theory, and as such further shows this line of thoughts accuracy and further applicability in this – campaign finance – policy area.

Moreover, *parasitic symbionts* are shown in research to flourish in settings where expectations about institutional conformity are high (Mahoney and Thelen, 2010, p. 24), such as the case with campaign finance law and judicial rulings generally, but the actual capacity to enforce those expectations is limited. While the enforcement layer in this case may not be a matter of capacity per se, enforcement and overall responsive in terms of enforcement of campaign finance law has by design opportunities for gaps in enforcement to open up, as detailed here and elsewhere, given this role is overall isolated to the Chief Electoral Officer. As Mahoney and Thelen argue, *parasitic symbionts* are especially associated with "the neglect of institutional maintenance in the face of slippage between rules and practices on the ground" (2010, p. 24); and we can see this in the institutional context of the Canadian campaign finance system, for instance given the power allocated the Chief Electoral Officer, and the *drift* that happened in this case as outlined above. Accordingly, this analysis complements existing accounts which show connections between *parasitic symbionts* and change as *drift*, particularly in political contexts with a high level of discretion in enforcement environments with strong veto possibilities – again, as courts as well the CEO both are (Mahoney and Thelen, 2010, pp. 23, 28-29). This analysis

furthermore contributes to showing how, and which types of, additional modes of change are associated with these change agents, namely *displacement*. As explained below, the judicial outcome in this case of judicial review is paradigmatic of change as *displacement*, and as such, it shows – for the purpose of campaign finance conflicts – which judicial reasoning are conducive to *parasitic symbionts* flourishing. Hence when judicial actors move away from an egalitarian model and agree with notions which indicate money in politics is consistent with lawful commitments to democratic governance, then *parasitic symbionts* are more likely to achieve change as *displacement*, whilst at the same time (or on a separate level/alternatively) possibly experiencing success in the form of *drift*.

Displacement:

The consequence of the foregoing discussion is characterizable as a successful maneuver for *displacement*. As articled in previous case studies, an analysis of campaign finance judicial outcomes reveals which judicial logics or rationalizations, types of commitments to democratic governance, and constitutional constraints, matter for policy change as viewed through a lens of historical institutionalism. Before unpacking this argument further, an additional argument can be made. Namely, the role of judicial actors, alongside the power of constitutional rights / freedoms and freedoms, challenges the notion that it is the economic market which dominates in terms of business interests achieving successful policy outcomes, hence challenges influential accounts under neoplurlaism scholarship (e.g., Lindblom). In other words, constitutional level protections, which are conditioned by the (typically implicitly accepted in terms of legal standing) identity power resources, I argue deserves akin recognition in terms of understanding why business interests may be shielded in policy as such protections often rule out legislating in a way that can undermine their interests. At a deeper level along the same lines, should we assume

that campaign financing amounts to elected leaders subsequently returning with 'policy favors', then further explanatory power is brought forth as to favorable policy outcomes in potentially various policy areas.

In terms of a successful maneuver for *displacement*, it is the contrasting views taken by the dissent versus the majority at the Alberta Court of Appeal in the 2-1 decision demonstrate the high stakes in this case, that is from the view of the Court as well the parties to the action, it was a matter of the functioning of democracy at stake. To this end, Justice Berger J writing for the dissent emphasized deference to Parliament as well the need for the electoral process to allow each and every participant to take part in a fair and equal manner, stating that:

> "The marketplace of political ideas must afford to all a reasonable opportunity to present their case to voters. Spending limits in an election campaign have as their purpose the promotion of fairness as a primary value or objective of the democratic process." (*Har per, Alta. C.A.,* para 252)

And furthermore that:

> "The provisions at issue are part of the overall objective of Parliament to ensure a fair electoral system. The "harm" posed by unregulated third-party spending is the damage done to the regime of fairness and equity created and maintained by party and candidate spending limits. Limiting third party spending is essential to preserving the integ rity of the existing scheme of electoral finance controls" (*Harper (Alta. C.A),* para 261).

The starkly contrasting interpretation taken by majority is evidenced in their finding that: "third party election spending limits have a valid and theoretical objective; ... lofty and symbolic goals, while unassailable as concepts, do not translate here into pressing and substantial concerns" (*Harper (Alta. C.A.*), para 108.) They couched this view in, as past courts have done, a failure on the part of government in terms of actually demonstrating that and how unimpeded third-party spending posed some actual or potential "harm" to some aspect of the election

process and that the election process would become skewed or tilted in favour of those carrying out such spending (that is, money as speech) (Geddis, 2004, pp. 454-454). Operating from this view, the majority of the court found that the government fell at the very first hurdle of the section 1 of the *Charter* balancing test, failing to establish the existence of any pressing and substantial concern that could justify limiting the expressive rights / freedoms of those wanting to engage in such communicative expenditures (*Harper* (Alta. C.A.). In this way, the majority to indicated acceptance of the point that commitments to political equality are consistent with limiting money in politics, indeed a point accepted by the majority in finding that spending limits had a "rational connection" to the aim of ensuring political equality, yet the Court still reasoned that challenged policies could also not meet the “minimal impairment" threshold under the section 1 Oakes test analysis, hence making the law fall overall, as the $3000 limit on third party spending "renders even minimally effective third party advertising nugatory," (*Harper* (Alta. C.A.), para 176), effectively amounting to a total ban on third party spending. (*Harper* (Alta. C.A.), para 180). As a result, the majority ruled concluded that the third-party expenditure limits imposed by the *Elections Act, 2000* breached the *Charter's* guarantee of freedom of expression in a manner that could not be demonstrably justified under s. I.

This in turn shows that at least for this area of policy, *displacement* can be successful in strong veto possibility context (like courts) and in environments where there is a high degree of discretion in interpretation (like courts) – challenging research on *displacement* which shows actors flourishing in *displacement* in the alternate scenario (weak veto/low discretion in interpretation) (Mahoney and Thelen, 2010, p. 19). In sum then, the finding in this case analysis underscores a central argument made in this thesis from a within case and comparative perspective, that is that constitutional constraints, such as strict scrutiny and section 1 analysis, taken together

with judicially ascribed notions and how to commit to democracy explain the outcome of judicial conflicts over money and wealth in elections. Not only is this primarily realizable through the lens of gradual institutional change theory, but it also shows how the concepts can fit together in underconsiderd ways, such as *conversion* techniques amounting to *displacement*, as well the contexts characteristics in which they, as well specific actor types, are likely to flourish.

5.2.7 Harper v. Canada (Attorney General), 2004 SCC 33

The next case analysis is of the landmark Supreme Court decision passed in 2004, in a case titled *Harper v. Canada (Attorney General), 2004 SCC 33*. This case is the last part of the series following from the previous case study analysis wherein *Harper* received a win from the Alberta Court of Appeal – a ruling which declared freedom of expression / speech under section 2 of the *Charter* was unjustifiably abridged by policies under Bill C-2, decidedly section 350 limits on third parties, and as such the law was declared unconstitutional by the Court in that case (*Harper* v. Canada, (2001) 9 W.W.R. 650 [*Harper* (Alta. Q.B.). Further to an appeal by the government of that decision, the Supreme Court of Canada ruled on May 18, 2004 in a 6-3 decision that, while the limits on third parties do violate section 2 of the *Charter*, the impairment was minimal, and justified / lawful because of the capacity of these limits to promote equality, ensure voter confidence and protect the integrity of the overall regulation of political finance in Canada (*Harper v. Canada (Attorney General), 2004 SCC 33)*. It is this judicial outcome which is analysed below. Based on the foregoing noted reasoning, the policy noted above that limits third-party electoral participatory power via spending were therefore upheld, thus effectively unravelling the *displacement* previously achieved by *Harper* in 2001. Indeed, as Macfarlane emphasizes in analyzing this SCC judicial outcome, “the federal government history in *Harper* means that

the last five federal elections (2004 to 2015) have operated with these third parties spending limits in place" (2018, p. 216)

Against this backdrop, I argue that this case further establishes and wraps up an empirically demonstrated theme in this thesis , that is the Charters role in *conversion* and that *displacement can* occur by way of judicial outcomes which involve resolving commitments to democracy in terms of the proper boundaries for money in the political process. In this landmark SCC case, the flip side of this point is made clear, that is how *displacement* can be stopped or reversed because of judicial outcomes which involve (re)resolving the proper boundaries for money in the political process, and in the face of actors strategically using the *Charter* in a way consistent with *conversion*, as explained in 5.2.7.

This means that the federal government also, also meaning like *Harper* did previously at the Alberta Court of Appeal, engaged in *conversion* like techniques by having the SCC address the Alberta Court of Appeal's judgments as part of its interpretive endeavor of the *Charter*. Thus, the government argued that the *Charter* could be enacted differently such that the policies previously passed under bill c-2 could be reinstated. The federal government sought institutional change (that is to making section 350 lawful) via having the Court reconsider the judicial outcome of 2001 when *Harper* strategically used the *Charter*, and its *conversion* like opportunities, to achieve a favorable ruling. Accordingly, this backdrop again illustrated how the *Charter* serves as a robust template for *conversion* like techniques to be tried and tested.

It is within this scenario that in this 2004 SCC *Harper* case, *Harper* was unsuccessful at *maintaining displacement*, and I argue that this demonstrates ways in which gradual institutional change as conceptualized within historical institutionalism is highly contingent. More specifically, an examination of campaign finance policy shows such contingency which matter for

policy change in under explored ways. For instance, on the one hand, attempts at *displacement* can occur and potentially be successful in high veto possibility strong interpretation and discretionary environments (as discussed under 5.2.7 and contrary to what is typical to *displacement*) however it can also be tried yet stopped in high veto possibility strong interpretation and discretionary environments, as demonstrated in this case analysis. This means that change as *displacement* via judicial outcomes within the context of this policy area is less about strict lines in terms of whether it is a high veto / weak discretionary / interpretation environment, and more about the legal structures and normative dispositions taken by consequential actors, such as those bringing suit before a court, those defending laws before the court (for instance Attorney Generals on behalf of the federal government), judges, and possibly regulatory actors as the case may be. In this case, the Court was not inclined to affirm *displacement*. As stated by the majority, "Surely, political parties, candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective" (2004 SCC 33, para 106). Additionally, this reinforces the point that identity, for the purpose of campaign finance, is a power resource - a pointed conceded to by the court in finding that: In the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse (2004 SCC 33, para 72*).* As a reminder, the notion of 'groups' is to indicate third party groups and thus prospectively the corporate form. In this respect, it is evident that corporate identity, in this case like most in Canada wherein the corporate form is represented through the third-party entity form, is discursively constructed in the interactions between courts and legislatures. The ways in which this is done in turn conditions the extent of one's electoral participatory power. Here, it is additionally evident that business interests (as well their potential to achieve change) such as those encapsulated by third parties as represent

National Citizen Coalition Inc. for instance, are highly dependant on judicial outcomes that resolve questions about freedom of speech / expression (as electoral spending) constitutional freedoms. This means that to understand and explain disproportionality in terms of policies factoring business, more attention is arguably needed in terms of constitutional rights / freedoms and freedoms of corporate forms, and how they are realized.

In this case scenario, all the members of the Court rejected the majority of the Court of Appeal's finding that the government had failed to establish a pressing and substantial objective for the restrictions contained in the *Elections Act* and accepted that the theoretical objective of "promoting electoral fairness" itself provided a legitimate governmental end. For the minority, by contrast, the issue chiefly turned on the question of "harm" that is whether harm could be established, harm being that wealth via third party spending would distort the electoral process and undermine its integrity. As argued by the dissent: "Although the objective of electoral "fairness" could *in theory* provide such a justification, because the government presented no evidence to show *in/act* that wealthy interests will (in the absence of spending limits) "dominate" or "hijack" the Canadian electoral process, the restrictions imposed by Parliament were "an overreaction to a non-existent problem."(2004, SCC 33, para. 34). Framed in this way, the limits on third party election spending imposed by the *Elections Act, 2000* failed to minimally impair (per the Oakes test) the *Charter* rights / freedoms of both third parties and the general voting public.

However, with Justice Bastarache J citing Feasby (1999) in writing for the majority, it was argued that the issue of limiting third party election spending was expressly characterized as requiring a choice between an "egalitarian" and a "libertarian" model of elections (2004, SCC 33, para 62). In so doing, the majority underlined that the majority of the Alberta Court of Appeal wrongfully failed to follow the *Libman* decision in respecting Parliament's choice of electoral

model. 2004, SCC 33, para 64). As Feasby (1999) explains of this occurrence, the Court's conception of electoral fairness is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society, and that this model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process – a point agreed to by the Court. Under this model, wealth is the main obstacle to equal participation. Because the foregoing judicial comments were said to sit properly within the boundaries of the *Charter of Rights and Freedoms*, this argument shifts attention to the role of Right of Rights and Freedoms, and the dialogue that it implies, in limiting money in the political process and electoral participatory power alike.

As a result, this case study also draws attention to the importance of high courts, namely the SCC and its counterpart USSC, regarding *layering* via legislation, as outlined previously suggested (section 5.2.4). Recall that it was shown that the process of legislating and the results thereof are consistent with *layering*, meaning they model this form of institutional change. In this way, an argument made previously (for instance in *Somerville* 1996), that powerful veto players such as those with constitutional rights / freedoms / freedoms may not be able to prevent *layering*, is again shown to hold true. However, in this case, rather the *layering* coming about because of a win for electoral regulation in the direction of commodification, *layering* in this case is effectively through the reversal of such findings. The federal governments achievement of attaining a ruling the policies under bill C-2 are in fact constitutional meant that the initial *layering* via the impugned legislation stands, or that *layering* with the same effect would be lawful so long as it is within the bounds of the most recent judicial outcome. This reinforces the finding outlined through previous within case analysis, namely, that *layering* can be: 1) impacted by judicial review; 2) occur through legislation; and 3) impact those involved in campaign finance can

potentially face some challenges in the context of electioneering (advertising / the expression of political speech) because of *layering*. This furthermore means that *layering* can be very much related to governmental dialogue. For instance, the majority reasoned that defence to Parliament was the right choice, and that its Parliament's judgement as to Canada's electoral model and its implementation; as such, the majority accepted that the limits favoured by that body were proportionate to the end sought, and thus found that the entire regulatory regime imposed on third parties by the Elections Act, 2000 was lawful (2004 SCC 33, para 87). Furthermore, the Court also recognized its own role in the back-and-forth dialogue between courts and legislatures which amounted to the policies under question in this *Harper* 2004 case. In fact, the Court recognized its part in the formation of the challenged legislation by noting in its analysis that the current third-party spending regime is Parliament's response to this Courts decision in *Libman*. (2004, SCC 33). As such, while the amendments in this *Harper* / third party spending series (2000 – 2004) were effectively for some time stricken down, the federal governments appeal of the lower Appeals court reinstated space for *layering*, that is to reintroduce the original policies, such as section 350 *CEA*, or to pass ones within the similar scope. To sum up this finding, the Courts reiteration at paragraph 61 of the Court in *Libman*'s discussion on political equality and committing to democracy is telling; as reasoned by the majority: "To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights / freedoms and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard [equal dissemination of points of view]" (2004, SCC, 33, para. 61).

Similarly, and drawing on the Courts interpretation in *Libman* insofar as the political equality question went, Justice Bastarche writing for the majority in this SCC found that the challenged policy "meets the basic principles for spending limits set out in *Libman*: to preserve equality of democratic rights / freedoms by preventing the most affluent from monopolizing political discourse; to guarantee electors adequacy of information; and to apply universally to all individuals and groups, particularly to third-parties because of their ubiquity (2004 SCC 33, para 61)" Hence, I argue that the campaign finance context reveals that the influence and policy success (attainment of favorable policies) of big business goes through periods of importance and contingency, namely the electoral process and judicial review respectively, wherein they (corporate interests) can be notably limited insofar as to be essentially forced to operate on the same playing field as the less affluent. In this regard, it is important that governmental actors lean into to the notion that the electoral process is made better through limiting the freedoms of certain actors, limiting the utilization of money as a form of speech, and hence limiting the application of their resources to elections alike. Equally then, this is to remind the point made elsewhere which is that the interests of business are primarily realized through state intervention (or lack thereof), and other rights / freedoms such as legal standing which ties back to the acceptance of their identity. These insights problematize lines of thought under neoplurlaism, particularly those which emphasize a lack of plurality.

In light of the foregoing discussion, I further argue that this analysis, like others especially within the Canadian context, contribute a modification to the gradual institutional change framework, while affirming key parts of it as currently understood. In particular, it is empirically evident that change seeking actors can engage in "*conversion* like techniques" and in turn potentially achieve *displacement*. In this way, this analysis draws attention to how the gradual

institutional change concepts can be taken together and complement each other; *conversion*, as a mode of change, may not be the end itself, but rather a method for achieving change of a broader form. However, this is not to say that *conversion* via strategic mobilization of the *Charter* leads to change; rather, it is to show how to *Charter* overlaps with the steps to *conversion* - as its described in existing scholarship, and furthermore shows how change can be blocked because of judicial interpretations about the electoral process, and their different views about commitments to democracy. As a result, there can, depending on the judicial approach / philosophy, hindrance to *conversion* and potential outcomes such as *displacement* in the context of judicial review and outcomes thereof. By the same token, both *conversion* and *displacement* can be achieved, however again this depends on the judicial approach taken, which is inherently conditioned by inter governmental dialogue because of the nature of *Charter* interpretation, as I've set out elsewhere. The characterization of the concepts as such is particularly evident through the within case and comparative nature analysis.

Moreover, and on a separate note, this analysis further indicates contributions to current typology of the *parasitic symbiont* type of change agent. Notably, an important feature of this type of change agent is that *parasitic symbionts change agents* "carry out actions that contradict the "spirit" or purpose of the institution, thus undermining it over the longer run" (Mahoney and Thelen, 2010, p. 24). Given this, it is clear that if one accepts that money in politics is a risk to electoral integrity, then actors who seek to unravel limits to commodifying the electoral process can be conceptualized as this actor type. What's more, previous case studies (section 5.2.6) confirmed that not only do *parasitic symbionts* change agents depend on institutions not of their own making in order to realize their interests, as is the case here, but also which judicial reasoning are conducive to *parasitic symbionts* flourishing, especially in terms of attaining *displacement*.

Hence just as shown under section 5.2.6, when judicial actors move away from an egalitarian model and agree with notions which indicate money in politics is consistent with democratic commitments, then *parasitic symbionts* are more likely to achieve change as *displacement*; thus, this case further confirms that point by showing where the opposite views are endorsed by powerful actors (governmental representatives + the SCC in this case), then these agents are unlikely to achieve *displacement* of policies that are contrary to their interests. For the purpose of characterizing actors within the context of campaign finance judicial conflicts then, this analysis shows in which scenarios actors take on this formation of change or would be agents of change in a way largely confirmatory to research which details these types of actors in other policy areas.

Chapter 6: Conclusions and Future Research

This final chapter will outline in detail the findings indicated by the preceding analysis of cases as regards each of the types of change respectively, as well regarding change-agent typology. The concepts of *conversion*, *layering*, *displacement,* and policy *drift* receive further empirical support through the presented analysis, and this is followed by an overall contribution and modification to the framework established by Streeck and Thelen, 2005 and Mahoney and Thelen 2010 - specifically by highlighting weaknesses and general additions to it, while also educing the effectiveness of integrating literature on dialogue, neopluralism, and power resources in identifying processes of gradual institutional change, as the framework aims to do. Finally, this chapter concludes with a discussion on future research and generalizability.

6.1 Overall Findings

Drawing on both broad comparisons and detailed case studies of a string of the most influential campaign finance cases in Canada and the United States, my aim has been to develop broad propositions, through the lens of gradual institutional change concepts, about the conditions under which particular types of change agents are likely to emerge as dominant in judicial conflicts; and thus, to identify which different forms of change, or some variation of them, are likely to occur or have relevance in the context of campaign finance policy. Therefore, this thesis has shown some additional ways in which – within a defined policy area – gradual institutional change theory offers explanatory power. In so doing, this study has responded to scholarly acknowledgements (like others noted previously) that more work on concepts such as *conversion, layering*, *displacement,* and policy *drift* is needed to further substantiate their explanatory power (Béland 2010 and Waddan, 2012; Beland and Powell, 2016). Moreover, the conditions, concepts, and actors that influence campaign finance reforms have been highlighted, and the

foregoing cases make possible generalizing about the affinity between kinds of actors, democratic principles, and modes of change which affect the electoral process. As a result, it is possible to generalize about how different democratic-based theories tend to yield policy outcomes of a particular direction, greater regulation versus de regulation. At the broadest level, the approaches taken to democratic governance and to money in politics by powerful veto players, like judges or the corporate person, have mattered significantly in the judicial context for electioneering policies.

More specifically, the stream of thought that is overall libertarian, that which embraces commodification of the election process in terms of both the limits of electioneering and how it may be exercised (namely through one's speech), has permitted the loosening of rules and the overall gradual empowerment of already more powerful individual and groups. However, when considering the issue of campaign finance, it is evident that despite these contrasting dispositions or streams of thought, sometimes campaign finance judicial conflicts have resulted in the U.S. being titled towards governmental oversight, and where the practical outcomes of judicial conflicts in Canada resulted in more libertarian potentialities, less governmental rule in the context of campaign finance regulation – as well vice versa. Notably, this is the case notwithstanding – as discussed in chapter 3 section 3.1 – different cultural origins whereby Canada is characteristically viewed as more open to government and egalitarianism because of its connection with the ways of the British Empire colored by parliamentary deference, while the Revolution backdrop tilts the U.S. away from accepting governmental, legislative reach. Indeed, it is empirically provided that the trajectory of cases sometimes shows overlap in outcomes, meaning similarities cross-nationally in the face of distinct cultures, which implies that there is more at hand in campaign finance than some comparisons suggest. Thus at least for judicial conflicts over campaign

financing, there are nuanced details that can not only be explained by the original theoretical approach I have taken, but more particularly by looking at a breadth of cases on akin issues as analyzed in this thesis . Accordingly, as referenced in 3.1, when considering the issue of campaign finance, it is evident that this finding is not wholly a nationally-based on as there were times in Canada where political equality didn't entirely win out, and in the U.S. when the libertarian didn't win out, despite Canada being more disposed towards the presence of government, for instance by inserting itself more strongly into campaign finance oversight, and likewise instances in the U.S. where governmental oversight and egalitarianism did win out, despite its disposition towards libertarianism. It is through an analysis of a wide range cases as I have put forth that it is understandable why this is the case.

Accordingly, from a case-study comparative angle, wherever identity-based power is framed as a negative due to its connections with money and political equality, there is a showing of concern for, and an aim to correct, inequities in speech capacities that skew electoral outcomes and undermine electoral integrity. When restrictive campaign finance reforms are challenged in this context, policy stability is more likely. By contrast, policy change is more likely in contexts where political equality is viewed as potentially realized – not undermined - through money and identity-based power. The trade-off between varying levels of commitment to political equalization and corporate/wealth participatory power has been evidenced through shedding light on the outcomes of judicial conflicts, which includes considering regulatory or enforcement dimensions. As a result, it is fair to conclude that in either case, there is an consequential role for enforcement agencies for campaign finance, as actors in these roles can potentially offset the prior mentioned framing. In this way, some of the practical implications of contrasting,

institutionalized, principles as regards speech rights / freedoms , democracy, and the electoral system have also been brought forward in the analysis.

Overall, the development of election campaign finance policy and judicial outcomes has been shown to in part confirm and in part add on to other studies which show how the character of institutional rules, and the political context are explanatory factors for change or stability and where change agents and resources, and in this case inter-governmental dialogue, "become the intervening step where institutional rules and political contexts do their causal work" (Mahoney and Thelen, 2010, p. 29). In turn, the foregoing discussion has contributed to the gradual institutional change theory, as well dialogue theory, by further surveying and utilizing key concepts from the former's literature. A review of these cases has revealed the following findings for the purposes of campaign finance policy.

6.2 Conceptual Analysis and Contribution to Knowledge

Displacement:

Displacement was most prevalent in the *Buckley, Bellotti, Austin, WRTL, Big Drug Mart, Somerville , Libman, Harper (2001), National Citizen Coalition*, and *McConnell* judicial outcomes. Differing commitments to political equality have been key in the development, or lack thereof, of *displacement* in campaign finance judicial outcomes and results thereof. The following main findings may be drawn. The sudden impact or force of a judicial ruling is consistent with change as *displacement,* since the outcome of its conclusion is an abrupt one (Mahoney and Thelen, 2010, p. 16), and so this analysis has drawn attention to one institution, and certain traits of it, which create creates space for change through *displacement* namely the judicial branch. *Displacement* is also associated with challenges which shake fundamental aspects of the *FECA,*

and *EEA / CEA* respectively, as described at the end of chapters 4 and 5. Here, we can think of *Harper*'s and the *NCC*'s position which were essentially to influence political equality, increase money in politics by deepening commodification of the process, and to reduce transparency. This is echoed in *McConnell's* direct challenge to key provisions of the landmark *BCRA* such as prohibitions against using corporate treasuries for campaign finance. Likewise, the appellants in *Buckley* wanted to remove expenditure and contribution limits – key provisions which were implemented for important reasons into the *FECA*. This may be contrasted with less aggressive goals such as seeking to attain temporary suspension of a provision or an injunctive relief, as seen with some American cases, like *WRTL.* Here we can also recall that the activities of *WRTL* differ from *displacement* in that the exception sought in that case did not involve the radical shifts we usually see with it, including rapid breakdown and overturning of institutions. In this way, case studies exemplify degrees of change and contribute to understanding about distinctions among types or degrees of change; and our knowledge about policy change through *displacement* and more has been furthered.

More specifically recalling *Buckley,* that would be change-agents were unable to outright eliminate policies surrounding expenditures and contributions altogether, we can identify which philosophies and how the impact of intergovernmental dialogue contributed to fostering this mode of change in such contexts. For instance, the Court in *Buckley* determined that the interest in equalizing candidates' resources was insufficient to override the candidate's interest in free speech – and this presented a clear tension with premises of the *FECA* such as capping money in politics. Equally then, it has been shown -in *Austin* for instance - that upholding the anti-corruption rationale while embracing the artificial entity view of the corporate form, that which should have less freedoms / rights / freedoms and which is more often associated with political

inequality, can give way to preventing *displacement* of campaign finance limits. Indeed, applying these logics have also been shown to block actors of the *parasitic symbionts* variety from attaining *displacement,* though these actors are normally associated with it (see for example *Harper* 2004).

Moreover, and consistent with *displacement, Harper* endogenously 'actively cultivated' trying for change, and *Harper*'s view was based on strong potentially long- or short-term links between corporations and political actors (such as the *NCC*'s relationship with firms and politicians, as discussed under section 5.2.2, whereas the other view, is associated more with distant relations both among firms and those in politics. Framed in another way, implementing a libertarian, rather than an egalitarian view of electoral participation is more consistent with *displacement* of those policies which facilitate de-commodification. This was also evident in *Bellotti* case, remarked on below, when support for the artificial entity view of the corporate form was the position of the minority, not the majority (hence discretionary rationales are key). Similarly, additional observations also challenge existing studies on the *displacement* because some show how even in the face of powerful veto players, actors pursuing this mode of change may still by at least partially successful in attaining other types of policy change, such as *conversion* (e.g. *Buckley*, *Bellotti*). Also, I've demonstrated that the pursuit of *conversion* can amount to *displacement*, though this is contingent on the reasoning within a judicial outcome. Likewise, judicial outcomes which amounted to *displacement* may be unravelled by a higher courts decision on the same set of policies, as seen in *Harper* 2004, and therefore this is a contingent nature to *displacement* which is related to intergovernmental dialogue and judicial attributions about the distribution of electoral participatory power and commitments to democracy. This means we can see not only how modes of changes may feed or build off each other, but also how the course of

campaign finance policies has been especially vulnerable to *displacement* when certain logics were dominant, and the same trend is evident in Canada when *displacement* fails, and alternate logics are applied. Overall, these points deepen knowledge about policy change, enabling projection about when certain actors are likely to emerge and succeed in particular contexts.

This research also adds on to or affirms Thelen's and other findings that powerful veto players such as justices may theoretically be able to defend existing institutions against outright *displacement,* but their veto powers are often insufficient to prevent *drift* since weakness on the administrative capacities may occur (Mahoney and Thelen, 2010, pp. 19-20) – therefore implicitly indicating how *displacement* may be conversely blunted in the context of campaign finance. This was most evident in the Canadian context. The fact that the appellants were (sometimes apart from administrative impacts e.g., *Harper* 2000) unsuccessful in such cases is thus consistent with existing understandings of it which shows *displacement* to be successful in the opposite scenario, namely weak veto possibilities contexts (unlike Courts) and in environments where there is a low level of discretion and interpretation (again unlike courts) (Mahoney and Thelen, 2010, p. 19). On the other hand, this also suggests that change-seeking actors may still be in part successful in strong veto / high discretion environments, should a third body such as the administrations of campaign finance, act in particular fashions such as by not shoring up gaps in enforcement - thus contributing to knowledge about the conditions under which we may expect this mode of change to occur.

Another point is made relevant then in relation to the above. The fact that change in the direction of the interests of the change seekers did come about in the end (via *drift*), means that, even in the face of powerful veto players and high discretion environments (courts), change-agents can still be successful in attaining *displacement* like consequences, that is their immediate

goals, albeit another way (*drift*). While this is implicitly recognized in the literature, this overall scenario somewhat problematizes Mahoney and Thelen's (2010, p. 19) characterization of *displacement* as a mode of change is probable in a weak veto possibility and low level of discretion context, which is not an accurate characterization of the judicial branch, given that again it effectively did come about contingent on the administration of things. In this way, the line of thought which suggests when *displacement* 'occurs' somewhat falls short in considering this overlap and, as more discussed below, important interconnectedness among change types in ultimately creating some change. Findings to this effect especially underscore the role and power of regulatory bodies in campaign finance, their dialogue with the broader system, and shows how they may contribute to policy outcomes.

The concept of *displacement* was, as referenced above, also evaluated under *Bellotti*, but on a separate note with specific reference to the highly influential notion of corporate personhood (which is essentially an approach to the corporate form) as exists in the United States. The potential removal or breakdown of corporate personhood would result in ideal type *displacement,* making it analytically insightful to apply, as it would mean an abrupt breakdown of a major institution, or policy, (corporate personhood) and a radical shift to campaign finance overall in the U.S. context. Distinctly, in that case, no *displacement* of corporate freedoms / rights / freedoms occurred as it was, but the minorities view which adopted the artificial entity and pro-equalization view –which would have overturned it; hence in this regard, *Bellotti* echoes other cases which regard *displacement* and show that the pro-equalization view, like the anti-corruption rationale, supports policies which de-commodify the electoral process – just as dissembling corporate electoral participatory would have. (i.e., this logic came about under *Bellotti* albeit by the nonconsequential side of the Court, making commodification and commodification of the

electoral process prevail). This also rings true the notion that the disproportionate power of big businesses in various policy areas is about more than their role in the economy, contra to neo-pluralist approach to political inequality, as its also about their role in the marketplace of ideas and how they are defined judicially. Relatedly, the non-*displacement* of the corporate constitutional freedoms / rights / freedoms has also been shown to be influenced by *conversion,* markedly in terms of constitutionalizing money as speech through it. Furthermore, and as existing research shows, those seeking *displacement* are often "losers" under the system of which they challenge, hence providing them motive for change. Actors in the cases often exemplify this point; opponents articulated this when they stated that the "Act's contribution and expenditures limitations impose first quantity restrictions on political communication and association by persons, groups, candidates and political parties" (Kuhner, 2014, p. 38). Hence, we can infer that what has been shown of *displacement* in this regard, in other policy areas, also holds true in the context of campaign finance reforms.

Conversion:

Conversion was prevalent in the *Buckley, Bellotti, MCFL, Austin, Harper (2002, 2004)*, *McConnell*, *WRTL*, and *Big Drug Mart,* cases, and strongly considered with regard to the *Charter.* Differing commitments to political equality, mostly as seen through judicial discourse and applications thereof, have been key in the development, or lack thereof, of *conversion* in campaign finance judicial conflicts. The following main findings may be drawn.

As outlined elsewhere, *conversion* is different from *layering* and *drift* in that policies as institutions are not so much amended or allowed to decay as they are redirected to new goals, functions or purposes; the commodification of speech and the notion of corporate personhood are key examples here and have been shown to be both variables to campaign finance policy and

realized through *conversion*. For instance, the *insurrectionary* change-agents in *Buckley* were able to fruitfully exploit ambiguity such that speech rights / freedoms could serve new purposes, that is the capacity to spend money in the context of electioneering as a form of speech. Thus, this finding also outlines how said actor type may be successful in achieving change. Here, it was the construction of what speech is and what sort-of functions it should serve.

In this way, and as is true of *conversion*, actors successfully exploited the notion of speech to affect change, whilst relevant institutions remained formally the same as this point was not codified but rather subsequently recognized based off judicial reasoning (Thelen, 2003). This sort of development also resonated to an extent in the *WRTL* case. As a result, and consistent with *conversion,* constitutional First Amendment rights / freedoms have since been redeployed towards a new function or purpose, that is to safeguard the right of any entity with constitutional rights / freedoms such that corporations and others' degree of political participation can legitimately correlate with their monetary resources. Hence *MCFL*'s actions likewise resemble an attempt at *conversion,* particularly since they were aiming to redirect the terms of the policy in a manner favorable to their electioneering activities. Since *MCFL* can be paired with the *mutualistic symbiont* variety of change agents, it is thus further suggested that these agents will not experience success in high discretion strong veto possibilities contexts – and where the corporate form is not poised as a threat to election integrity. The *Charter of Rights and Freedoms* has also been shown to create opportunities for *conversion* to occur.

The logic underlying these changes highlights the marketization or otherwise put as the commodification of the electoral process in the U.S. These findings become particularly evidenced when the courts examined the issues through inter-branch dialogue, finding and challenging say that equalization may have been Congress's illegitimate intent. Indeed, *conversion* has

been shown to be particularly likely in the context of inter-governmental dialogue. Additionally, the *Bellotti* case also demonstrated vulnerability to the personification of corporations via *conversion* when interpretative indifference to the corporate form, together with a rejection of political equality through monetary equalization, occurs and fosters policy change. Cases such as *Bellotti* are also consistent with existing accounts of *conversion* which outline that while the change agents may lack the capacity to simply destroy an institution, they may productively exploit inherent ambiguities, such as what the corporate form is and how it matters for political speech rights / freedoms , in ways that allowed them to redirect it towards more favorable functions and effects – hence reflective of this mode of change. Equally then, it is rather than a neglect of the rule, as one may expect with *drift*, the appellants actively brought their identity as a power resource in and exploited ambiguities in a manner echoing *conversion. Conversion* has likewise been shown to possibly have more potential when the corporate form is personified as something not associated with corruption or political equality, as seen in *Austin* - when it was only the *minorities* view in *Austin* which echoed such sentiments. Indeed, these logics were also prevalent in *Buckley* and *Bellotti*.

In Canada, such judicial interpretation surrounding wealth in politics has also been pivotal, but some cases their indicate Courts adopting or at least to a greater degree endorsing comparatively egalitarian view of elections and rejection of money in politics. This has been done through steps which model the techniques of *conversion*. This means that, in Canada for instance, some attempts at political equality via de-commodification has been shown to prevent attempts at *conversion* of the *Charter* and or campaign finance policy. The outcome of trying and testing *conversion*, specifically through arguments about the objective of the *Charter*, amounts to policy stability or change, depending on how the inter-governmental dialogue at hand unfolds

and the judgments made by the judicial branch. For instance, in the *Harper* (2004) case, the federal government challenged Harpers prior (2002), successful utilizing of the *Charter* in terms of exercising *conversion* like techniques. This strategic utilizing of the *Charter*, in a manner consistent with *conversion* like techniques, indeed displaced campaign finance policies that were limiting third party (inclusive of corporate) spending. In the prior 2002 scenario then, *Harper* successfully articulated that limit to third party spending was contrary to the *Charter*, in turn the *Charter* was deemed in a direction consistent with his interest and the commodification of elections alike (Streeck and Thelen, 2005, pp. 26-27). However, the government's commitment to democratic values such as equalization of political power, together with inter governmental dialogue pursuant to section 1. *Charter* analysis, subsequently lead the SCC to reverse the lower courts decision in *Harper* 2002. More specifically, it was the judge's capacity to introduce different interpretations than those of *Harper* and the lower court in 2002 and given it did so without attaching on new rules, that is considering its assertion that legislature got it right and that section 1. prevails, meant that the ambiguity of the *Charter* provided space to restabilize the policy. In this way, the hierarchy of courts was also shown important in terms of the limits to *conversion* like techniques. These issues and similar outcomes are seen in the American context under the *McConnell* court. Overall, we can see that the judiciary is a space in which *conversion* or *conversion-like* techniques could be tried, and so it underscores the power of judicial actors in preventing or influencing policy change through it, and *displacement,* alike.

Some demonstrations of *conversion* run contrary to current models which expect this form of change type to occur in weak veto possibility, high discretion contexts (Mahoney and Thelen 2010, 19), and so it in part confirms the typology (high discretion – like courts) and on other hand problematizes or modifies it (weak veto possibility – unlike courts) to show how, for

the purposes of campaign finance, *conversion* can occur when dialogue is involved and identity-based policies provide power to individuals and entities based on judicial interpretations of electoral participatory power protected by the constitution. The American cases principally demonstrate this through change-seekers' successful redeployment of rules, thus influencing change towards their interest by *conversion*. However, at the same time, the Canadian cases outline that in this same context (high discretion/strong veto), *conversion* can ultimately be unsuccessful, causing policy stability. Given these occurrences, this analysis adds on to existing studies by showing context characterized by commitments to political equality by way of de marketization/commodification prevents attempts at *conversion*, while the alternate view increases the likeness of it (Mahoney and Thelen, 2010, pp. 23-24).

Drift

Drift has played a notable role in the context of campaign finance practical administration in terms of spending limits, and it is evident that attention should be paid to the significance of the FEC and CEO in preventing or enabling change via *drift*. These akin regulatory bodies not only influence the electoral process, but also play an important role in both (as the case may be) initiating dialogue between the branches who are normally the only actors considered in dialogue theory, and also for having the final "say" following a dialogue, that is given their role in the practical administration following judicial contemplations of legislative intent. In this way, electoral systems demonstrate vulnerability to *drift*. As such, this thesis as underscored the influential role of the administrative side of things for campaign finance policy and highlighted a notable gap in dialogue theory accordingly. On this, it is also point worthy that these regulatory bodies have also been shown to be pulled into inter-governmental dialogue, thus adding on to the dynamics discussed by Hogg, Bushell, and others (1999). *Drift* has also been shown in existing

research to be associated with the s*ymbiont* variety (Mahoney and Thelen, 2010, p. 28), and in *Austin and Harper* this notion is explored. Because the findings in this respect further understanding of these change-agents, how they relate to *drift* will be considered when discussing them below.

The cases add on to existing studies which expect *drift* to occur in high veto possibility / high discretion contexts by showing another policy area where this is present – considering the *Harper* 2000 case for instance where in a judicial conflict, where justices could have prevented *displacement,* but essentially couldn't prevent *drift*. As argued by Mahoney and Thelen in speaking to *drift* (2010, p.20), powerful veto players like judges may be able to defend an institution against outright *displacement,* but their power may be insufficient absent the support of other actors. This point, as referenced in Chapter 5 for instance, is to equally show how *drift* may be blocked (such as by enforcement by the FEC or CEO) in the same context, in sum adding to knowledge about when such change is probable. Put differently, when administrative responsibilities are fulfilled, it is likely that *drift* will also be impeded as a result. In addition, *drift* has also been shown to strongly connect with *displacement.* This was particularly clear in the Canadian context in instances where a certain judicial outcome meant policy *displacement* – though at the provincial level – yet the CEO through various federal elections applied such judicial provincial level judicial outcomes to the whole of Canada. In these scenarios, *drift* occurred because of the *displacement* of policies at the provincial level and because of the actions on the administrative / regulatory side. The examination of regulatory agents in this thesis shows an important oversight to literature on dialogue, particularly as relates to policy implementation. Generally, policy stability when opportunity for *drift* exists has largely depended on the decisions or non decisions of administrators and the outcome of inter-governmental dialogue. In this regard, existing

studies which show *drift* to be likely in high veto possibility/ high discretion environments are reaffirmed by an analysis of this policy area, but it also shows/reaffirms this is not necessarily to be the case.

Layering:

Layering was most prevalent or analyzed in in *MCFL*, *Buckley*, *Citizens United* and *Somerville, Harper*, and was explored with reference to some legislative reforms, such as Bill C-2 in Canada and the passage of the *BCRA* in the U.S. Differing views on corruption, corporate identity, as well the framework that guides a judiciary, have been key in the development, or lack thereof, of *layering* in campaign finance. As outlined below, the results of *layering* are more mixed, though the following main findings may be drawn.

First, current concretizations of *layering* are problematized or challenged by this analysis because it is generally characterized as if: "processes of *layering* often take place when institutional challengers lack the capacity to actually change the original rules" (Mahoney and Thelen, 2010, p. 17), yet various cases reveal that this may not be the case, given that the challengers have consistently leveraged constitutional footing to challenge original rules in a manner consistent with *layering*, meaning they do not lack the capacity. For this to occur, however, judicially applied access to constitutional speech rights / freedoms is of course essentially necessary, for the corporate form and humans alike, hence once again underscoring the ability of the judiciary branch for gradual institutional change.

A series of instances further add on to existing research which show that even though *layering* is often found in low levels of discretion environments, which contrasts with the judicial branch, campaign finance policy cases show us *layering* in a high level of discretion context,

challenging current theoretical frameworks as such. This means that not only is *layering* now shown to occur in low discretion / strong veto contexts (Mahoney and Thelen, 2010, p.19), but also in high discretion / strong veto contexts. As a result, and as unpacked further below, the *in-surrectionary* variety has further been shown to flourish in a context in which existing studies do not expect them to, hence contributing to knowledge about the conditions under which we may find this change agent achieve advantageous institutional change. For instance, in *Buckley*, the Court set up a framework wherein new institutions, or policies, came to run alongside existing ones in the context of independent expenditures not being overturned but rather modified with the attachment of new element, that is issue advocacy, leading to *layering* (Mahoney and Thelen, 2010, pp. 17-21 Schickler, 2001). This furthermore reinforces the literatures finding that while a new element such as the modification of issue advocacy may seem a small change in itself, it can accumulate leading to a big change over the long run; indeed, as highlighted with the passage of the *BCRA*, the soft money / issue advocacy loophole created under *Buckley* weighed heavily on the campaign finance system over time (Mahoney and Thelen, 2010, p. 17). Similarly, in *Citi-zens United*, the corporate appellant was able to amend the anti-corruption notion such that a re-vised notion came to prevail over an existing one, creating change in terms of structuring behav-ior (Mahoney and Thelen, 2010, p. 16).

Expanding on the above, a review of cases further reveals then that though powerful veto players can protect an old institution, for instance by upholding limits and notions that apply to express advocacy, they cannot necessarily prevent the addition of new elements such as issue ad-vocacy, resulting in some change (Mahoney and Thelen, 2010, p. 20). The results in *MCFL* like-wise ring true here. Therefore, while *layering* via the addition of elements is typically discussed in terms of a lack of capacity of powerful veto players to prevent the addition of new elements

(Clark and Whiteside, 2003; Hacker, 2005), such cases show *layering* in the face of powerful veto players plus with discretionary power, in a direction with positive potential for the change agents of the *insurrectionary* variety. Like Peter Hall's work shows, (cited in Mahoney and Thelen 2010, 204) the relative power of various actors is drastically important in affecting their ability to assemble the coalition, such as with the Court, they need to defend (or change) existing institutional arrangements. In other words, structural positioning of actors within political institutions influences their opportunities for rule creativity and policy change. *Layering* has also been demonstrated as a possible means to preventing *displacement* and *drift.* By comparison then, this shows how powerful veto players, judges, can protect old institutions, as while preventing the addition of new elements – contrary to what previous studies suggest (Clarke and Whiteside, 2003; Hacker, 2005). To be sure, however, this contrasts with the outcome in the American *Buckley* case which demonstrated the opposite effect in the context of independent expenditures – hence leaving judicial commitments to democracy and electoral integrity as key consequential variables.

Legislation has also been examined in terms of modeling *layering* (Mahoney and Thelen, 2010, p. 20). In this regard, this demonstrated how legislative reforms in response to judicial outcomes reflect current conceptualizations of what *layering* entails. Specifically, this thesis has shown that *layering* can: 1) impacted by judicial review; 2) occur through legislation; and 3) impact those involved in campaign finance can potentially face some challenges in the context of electioneering (advertising / the expression of political speech) because of *layering*. This furthermore means that *layering* can be very much related to governmental dialogue, given it can follow from the outcome of such dialogue. In sum on this point, this thesis has isolated and examined a type of *layering*, that is legislating.

Overall, *layering* has been shown as an important vector for change – the direction highly dependant on judicial as well legislative philosophies (discussed under *Harper* 2000 and *Somerville* 1996 for instance). Outcomes of judicial review under the *Charter of Rights and Freedoms* is also indicative of how opportunities for *layering* can occur. When the corporate form or third parties are not viewed as something to be expunged from the electoral process, when money in politics is viewed as non-problematic, and when fears over corrupt or political inequality are negligible, then *layering* by the deregulation of campaign finance and or the enhancement of some's participatory power is expectable. Recall under *MCFL* the *FECA's* ban on corporate electoral spending was said to go against a defined class of corporate entities – leading to *layering-like* effects – (especially in the pursuit of *conversion*), because of the somewhat reformed institutionalization of the corporate form which led to the de-regulation of it. Thus, *MCFL* exemplifies this point as corporate participation was enhanced on the basis that the company's identity was not an economically driven one. Conversely, de-commodification of the electoral process has led to *layering* in a manner which results in tighter restrictions, or attempts at policy stability following judicial review, as seen in the Canadian context for instance.

6.3 Actor Typology and Contribution to Knowledge

This section now shifts to recap the advancements articulated in chapter 4 as relates to typologies of actors. First, the *insurrectionary* variety was typologized in the *Buckley* case – in turn shown to be in part uncharacteristically successful in attaining *displacement* and in part characteristically successful depending on the issue at hand and the rationales utilized by the judicial branch. As relates to positions taken on contribution limits, the *Buckley* case also confirmed the point that such actors are not likely to succeed in high veto, high discretion environments. The *Buckley* case also revealed that for the purpose of corporate participatory power,

insurrectionaries can be successful in (re)affirming rights / freedoms and achieve change besides *displacement* (which existing studies already show of them (Mahoney and Thelen, 2010, pp. 23-24), namely *layering*. Like below, this finding adds on to existing studies by showing context (high discretion / strong veto possibility) in which *insurrectionaries* may be successful.

The case of *Citizens United* also confirms the role of *insurrectionaries* in their expected context of *displacement,* and provides evidence which sustains existing characterizations of them, but also which expands some notions about the political contexts in which they are projected to thrive, as pointed to below. As Mahoney and Thelen explain of *insurrectionaries* (2010, p. 28), they can emerge in any setting, but they are most likely to flourish in environments characterized by low discretion and weak veto possibilities – yet, as noted previously, the judicial process is one where Justices have, as powerful experts, high discretion and judicial review presents a strong veto possibility because it may, with immediacy, resolve questions of the highest order, that is of constitutional law.

In *MCFL*, *WRTL*, *Harper* 2000, and *Austin,* the notion of *symbionts* change agents were also explored, in both the *mutualistic* and *parasitic* variety. Like its *parasitic* incarnation counterpart, *mutualistic symbionts* rely and thrive on institutions not of their own making, but a key distinction is that in pursuit of their change, they are said not to contradict the spirit, comprise the efficiency of the rules, or undermine the survival of relevant policies. This was observed in *MCFL*, where said change-seekers relied on rules not of their own making and used the rules in a novel way to advance their interests – consistent with the existing actor typology (Mahoney and Thelen, 2010, pp. 24-25). This is the case as outlined in Chapter 4, as the Court agreed with *MCFL* that their actions did not contradict the spirit of the *FECA,* nor did it compromise the functioning or purpose of it. More particularly, existing research also suggests that these agents

are not associated with *drift*; and indeed, that finding also holds true in this campaign finance conflict. This further contributes to knowledge of these agents by showing their potential power in a particular strong veto possibility / high discretion environment.

The *parasitic* actor type was also discussed in cases such as *WRTL, Austin,* and *Harper.* In these cases, it was generally the cases that the change seekers aligned with key traits of these change seekers. For instance, the Chamber of Commerce in *Austin* needed to rely on the institution not of its own making, and clearly, the *FECA* as well the Bill of Rights are laws made by actors other than themselves, though they do rely on them for legal standing – such as for corporate political speech rights / freedoms . In most cases, the change agents did not wish to overall disrupt the status quo, that is consistent with existing characterizations of them. In *WRTL* and *Austin* for instance, the actors did not wish to disrupt the status quo, for instance by not challenging a provision altogether but rather seeking exemptions through injunctive relief. While other research shows the *parasitic* variety succeeding in environments characterized by strong veto possibilities and high enforcement discretion, some cases challenge them (Thelen and Mahoney 2010, pp. 28, 23) Recall, for example, *Austin* revealed the opposite effect than *WRTL*, that is *parasitic* actors not thriving in conditions of strong veto possibilities, with high enforcement discretion. Here, we can see how for the purposes of campaign finance, judicial review which enforces non-market-based principles for campaign finance, such as through the regulation of wealth, can hinder these would be change-agents. In doing so, the anti-corruption rationale as well as concern for electoral integrity is also brought forth. Notably, the dissents' view in *WRTL* also confirms this reasoning, and would have also blocked the *parasitic* variety from thriving accordingly – like in *Austin*. The extent to which such review confirms congressional/parliamentary intent is further outlined through their dialogue, and the ways in which it reinforces the outcomes has also

been discussed. On the other hand, then, *WRTL* did succeed in the same political context, confirming existing accounts accordingly. Notably, however, they succeeded on the basis that the Court regarded the actions of the corporate form in that case as not compromising political equality or adversely deepening commodification of the electoral process. In this way, the logics for allowing / not allowing *symbionts parasitic* to thrive show commonality.

Drift has also been shown in existing research to be associated with the *symbiont* variety (Mahoney and Thelen, 2010, p. 28). Research projects that these agents are accompanied by *drift,* meaning there would be some change due to erosion or atrophy of institutions on the ground, leading to a kind of slippage between the rules and their initiation. Hacker's analysis on health care policy in the U.S. expresses this by showing how despite social programs resisting major entrenchment, shifting exogenous conditions led to institutions actively decaying. However, campaign finance policy implies how these *symbionts* can be unsuccessful at attaining *drift* even in favorable political climates such as one with strong veto and enforcement avenues. In this regard, it is the power of the FEC and CEO that have also been shown to block these would be change-agents from attaining *drift*, thereby building on to existing findings. Thus, while *drift* can occur because of explicit political maneuvering, it can also – as is more the case in these reviews "be caused by gaps in rules allowing actors to abdicate responsibilities resulting in slippage between policies and institutional practice on the ground where rules remain unchanged" (Streeck and Thelen, 2005, p. 31). Yet because the respective administrative bodies shored up such gaps, these agents were unsuccessful in attaining change through *drift*. The analysis in *Harper/NCC* also complements the point that the role of campaign finance administrators affects the finding that there are positive connections between *parasitic symbiotic* and change as *drift*. Finally, concerns about the corporate form and money in politics were key variables leading such

regulatory bodies to initiate the actions which prevented *drift* from occurring. In sum, these cases also reveal the significance of preventing *drift* in the face of the *parasitic* variety which have been shown to be accompanied by *drift.*

6.4 Findings: The Corporate Form and Corporate and Constitutional Rights and Freedoms

As outlined in Chapter3, this thesis also adds on to a handful of other research areas which do focus on various dynamics of campaign finance, but which do not aim to address the gradual institutional development of outcomes effecting campaign finance, and which are outside of or beyond the scope of this study, such as those on campaign contributions and electoral outcomes, campaign contributions and policy favors, and electoral ambitions and legislative actions. As such, this project has added to existing research on the broad topic of campaign finance, adding more analysis to better understand it in its entirety – particularly as relates to judicial outcomes, participatory power, inter-governmental exchanges, and campaign finance policy. The preceding similarly contributes to analyses which track the development of corporate constitutional rights / freedoms , and which seek to evaluating the role of them. Primary examples include *NCC, Big Drug Mart, Buckley, Bellotti, WRTL, MCFL, Austin, and Citizens United.* As reflected in cases such as these, it is important to note that over the time period discussed, and to date, the Courts in each nation state have not uniformly settled on a clear definition of the nature of a corporation, codified it at the constitutional or statutory level, nor adopted a full scale test to determine which constitutional provisions apply to corporations; for instance, in *Citizens United,* the Court settled on the point that corporations are complex, textured, multidimensional entities, without going so far as to fully define or realize measures for when corporate constitutional rights / freedoms apply – similar to the Court in *Big Drug Mart* – each state setting precedent

accordingly. In any event, it is evident corporate participatory power exists in the context of election campaign finance and differing views on the corporate form have been identified and analyzed, particularly regarding dissent versus majority views, and disagreements about the implications of judicial views of corporate nature and corporate personhood.

Following this, the role of corporate personhood, or corporate constitutional rights / freedoms generally, are shown to matter, though not necessarily in the sense of the Court needing to realize or legalize them one way or another in law, as literature seeks to resolve, but rather because they have been assumed to have access to judicial review, and power for change as seen in *Buckley* for instance. Situating corporate personhood vis-à-vis pursued change has also been presented additional facets to *layering* as conceptualizations of this change mode suggests that it occurs in contexts where actors lack the capacity to actually change original rules (Mahoney and Thelen, 2010, p. 17), yet where there is uncontested access to constitutional rights / freedoms , change can happen via *layering* notwithstanding the absence of that dynamic as ordinarily associated with it. In terms of the legal literature then, this study underscores the significance of the absence of formal constitutional rights / freedoms by showing how ideas about democracy affect whether they are realized. Without updating this, the corporate form is implicitly permitted to pursue judicial, political, conflicts, and thus the resources of the corporate form may in this way enter the democratic process. In this regard, as outlined in the foregoing chapters, corporate constitutional rights / freedoms are primarily a matter of judicial philosophy, constitutional constraints such as section 1. analysis, and democratic principles, and less about trying to locate corporate personhood as a matter of law. This means that more emphasis should be placed on how corporate, or wealth is framed in the context of inter-governmental dialogue in order to understand corporate constitutional rights / freedoms .

The issue of corporate constitutionally protected political speech can also be considered from the view of other relevant literature outlined in chapter 2. In terms of neopluralism, a main demonstration here is to show a major way in which business gains a disproportionate amount of political power, beyond market-oriented drivers, namely through a-priori constitutional stature. Likewise, it shows an important and highly influential institutions to this effect, namely the judicial branch, where findings are instrumental for propping up business within the democratic process; hence judicially and inter-branch constructed constitutional rights / freedoms are also important for the distribution of power, that is the key point of interest for studies from the view of neopluralism. These points are further complemented by existing research which shows correlation between campaign contributions and subsequent policy favors. Likewise, the scope on one's ultimate political participatory power are largely defined by economic resources, and so where there are strong rights / freedoms for money in politics you are likely to find distortions in political equality, and as some argue in policy outcomes.

The above points give way to the issue of legal standing, which is inherently based on one's identity, in terms of acting as a power resource, and it is clear that corporate identity can serve as a major power resource when conceptualized in manner characterized by the absence of the anti-corruption and anti-equalization rationales. The Court in *Austin* and *Libman* are strong examples of this. As addressed elsewhere, this power resource is more likely to be limited where market-based apprehensions are fashioned by the judiciary, and thus policy stability where caps exist; where the marketplace of ideas is said to be enhanced by the deepening of commodification and marketization, judicial outcomes that support policy change is likely where electioneering caps exist.

6.5 Gradual Institutional Change Framework and Contribution to Knowledge

Against this backdrop, taken with the analyses of chapter 4 and 5, means that some overall modifications, as well findings of generalizability discussed next, can be made to the framework established by Streeck and Thelen (2005) and Mahoney and Thelen (2010) et al., with empirical support. Put differently, the explanatory power of the gradual institutional framework can be expanded with the contribution of some updates to it. Notably, these points of modification stand separate and in addition to the other contributions made here, such as analysis on neopluralism literature, and those which transfer further empirical support to the established framework through the presented review of concepts of *conversion*, *layering*, *displacement,* and policy *drift*, in addition to those regarding actor type, as detailed above per concept. A first point of modification then regards more comprehensively connecting how the individual concepts can connect to one another so to foster particular judicial outcomes. For instance, Mahoney and Thelen (2010, pp. 19-20) identify that “powerful veto players may be able to defend existing institutions against outright *displacement,* but their veto powers are often insufficient to prevent *drift* since doing so typically requires supporters to take active steps to shore up support for an institution as the social, economic, or political context shifts. They underscore the importance of neglect of an institution by way of a failure “to adapt and update an institution so as to maintain its traditional impact in a changed environment” (2010, p. 19).

On the one hand, and consistent with the above, cases affirm that power powerful veto players (as are judges) may be able to defend existing institutions against outright *displacement,* but their veto powers are often insufficient to prevent *drift*, as the literature suggests (Mahoney and Thelen (2010, p. 20). However, on the other hand, the actors in campaign finance which were instrumental in causing or preventing such *drift*, namely the FEC/CEO, shows how it may

not be so much about *drift* occurring and *displacement* being prevented because of a changed environment, but more so straightforwardly because of the inner workings of the delivery of campaign finance policies, as seen following the *NCC* (1984) Canadian case for instance, and the effect thereof on the 1984, 1988, 1993, and 1977 general elections (Hiebert, 1998, p.94). As well, the actors of interest are neither supporter nor rejectors of the institution/policy, but rather more simply regulatory bodies cast with the on-going responsibility to enforce the relevant legislation. In this way, these two concepts may also connect to each other, despite any requirement for "supporters to shore" (19) with *drift* still occurring, following a failed attempt at *displacement.* Similarly, they are under no obligation or scenario where such shoring up is relevant; while at the same time, the sort of change via slippage between policies and their enforcement as is seen with *drift* is strongly resembled in the structure of the campaign finance systems. Hence one overall modification involves identifying *drift* in a context where it is not about supporters failing to keep up sufficient support and match the politics, economic, or political context, nor is it to reject the point that the concepts may connect in ways discussed so to maintain stability or create change, but rather to further explain conditions under which they can.

In a similar vein, and as noted previously, existing accounts recognize that attempts at *displacement* may lead to *drift* taking hold, but the analysis here shows how attempts at *displacement* may also be matched with an inability to prevent *conversion*, as is seen with *Bellotti* case for instance. Hence by bringing a matter before judicial actors, in attempting to overturn fundamentals of the *FECA* (or *displacement*), *conversion* may transpire – indeed, in a way which alters the course of judicial deliberations thereafter; here, we can recall the rise of the notion that money is speech and that corporations possess speech rights / freedoms (albeit if a competing judicial interpretation, not formalized into statutes or the constitution). In these ways,

understandings about the connections among the concepts should be modified to account for these additional interactions and possibilities thereof; and as such, scholars of gradual institutional change can benefit from the insights of judicial inquiry, that is by coupling the role and insights on the judiciary, with those realizations from gradual/historical institutional change.

Other modifications involve realizing alterative political contexts, contrary to what is observed, wherein certain change is in fact likely to occur – that is, high veto / weak veto possibilities, high discretion and enforcement / low discretion and enforcement. For instance, change along the lines of *displacement* has been shown to occur in the general direction of the interests of change seekers (albeit via *drift*), even in the face of powerful veto players and high discretion environments (courts) – meaning that change-agents can still be successful in attaining *displacement* like consequences, that is their immediate goals, albeit another way (*drift*). Similarly, examples of *conversion* partially problematize current models because they expect this form of change type to occur in weak veto possibility, high discretion contexts (Mahoney and Thelen, 2010, p.19), though for the purposes of at least the structure of this policy area, *conversion* can in fact happen in high direction – (like courts) – and high discretion enforcement (like courts), especially when dialogue is involved and when the judiciary adopts the view that one's identity is a exercisable power resource which enables constitutionally guarded electoral participatory power. Correspondingly, other examples demonstrate that even though *layering* is often found in low levels of discretion environments, which contrasts with the judicial branch, campaign finance policy cases show us *layering* in a high level of discretion context, challenging current theoretical frameworks as such. This means that not only is *layering* now shown to occur in low discretion / strong veto contexts (Mahoney and Thelen, 2010, p. 19), but also in high discretion / strong veto contexts

An additional modification resolves around *layering*, particularly in terms of why *layering* is said to be intended. Notably, this change is said to be attempted by those who lack the capacity to actually change the original rules, but the realization of corporate constitutional rights / freedoms implies that even in the face of capacity, *layering* can successfully take place; hence unlike the claim that "processes of *layering* often take place when institutional challengers lack the capacity to actually change the original rules" (Mahoney and Thelen, 2010, p. 17), it can be when they have the very power the challenge the original rules that *layering* is intended and potentially achievable. In other words, structural positioning of actors within political institutions influences their opportunities for rule creativity and policy change, even in the context of *layering*. What's more, and tying back to relationships among concepts, *layering* can be a possible means to preventing *displacement* and *drift* alike, depending on the judicial philosophy vis-à-vis inter-governmental dialogue at hand. This is evidenced through an assessment of the *Buckley* case for instance where powerful veto players, namely judges, either served to protect old institutions, as while preventing the addition of new elements – contrary to what previous studies suggest – or can produce the opposite effect, making judicial commitments to democracy and electoral integrity as key consequential variables for the boundaries of *layering*.

Other brief modifications derived from this research involve actor-type characterization and probability for success. For instance, some cases show that – like existing research – the insurrectionary variety tends to be successful in achieving *displacement,* but cases analyzed here also show them to also be successful in other modes of change, such as *layering*, which is not originally associated with them. Not only does this add an additional change opportunity for these actors then, but it also adds an additional context of which they may thrive, namely high discretion enforcement / strong veto possibility – contrary to how they are currently most likely

projected to prevail (Mahoney and Thelen, 2010, p. 28). In cases such as *MCFL*, *WRTL*, *Harper* 2000, and *Austin*, the notion of *symbionts* change agents were also explored, in both the *mutualistic* and *parasitic* variety. As regards the latter, *Austin* for example proved that contrary to current expectations, that is *parasitic* actors failing to thrive in conditions of strong veto possibilities, with high enforcement discretion. Here, we can see how for the purposes of campaign finance, judicial review which enforces non-market-based principles for campaign finance, such as through the regulation of wealth, can hinder these would be change-agents. Notably, the dissent's view in *WRTL* also confirms this modification, and would have accordingly and likewise blocked the *parasitic* variety from thriving. An additional modification surrounding these actors and the type of change associated with them is that *symbionts* in campaign finance judicial conflicts can be unsuccessful in attaining *drift* – despite their usual success with it – hence showing a lack of promising change despite operating in a favorable political climate such as one with strong veto and enforcement avenues. In this regard, it is the power of the FEC and CEO that have also been shown to block these would be change-agents from attaining *drift*, thereby adding adjustments to existing observations.

6.6 Generalizability

The generalizability of this research is strong for the several reasons discussed below. The first relates to its extrapolative value, which is to say, while the modifications and issues discussed have been shown to apply in the context of campaign finance cases, they too apply to other policy areas given they have demonstrated fixed institutions, like the strong veto possibility of courts, constitutional provisions, and the power of constitutional rights / freedoms (inherently identity based) which show potential for *conversion, layering, drift,* and *displacement.* This means that this approach and the findings contribute to more general / other applications beyond

only campaign finance cases because access to a court, for instance, applies for the review and enforcement of essentially all policy areas, and the constitutional environment is also often a constant; thus, the role and significance of these factors, as clarified elsewhere, are underscored for the purposes of researching gradual institutional change within the context of judicial conflicts/review – whatever the policy area may be. In this way, it is fair to generalize the court as veto context vulnerable to *displacement* - and it has in fact been argued that the judicial context should be analytically viewed as such given the likely effect of a judicial ruling, that is an abrupt change which can be characterized by a situation where existing rules are struck down in favor of a potentially wide-reaching, novel, or contrary policy approach. By the same token, the judicial veto point is an important space for preventing *displacement*, meaning they have great capacity in terms of *displacement* – among other forms of change – taking hold. Likewise, we can generalize about the role of the *Charter,* as well as claims under the Bill of Rights, in terms of showcasing particularly apt veto points for potential *displacement* and *conversion* to occur, as well to generate outcomes which in turn give way to *layering*. As outlined in various cases, the somewhat ambitious and ambiguous nature of these texts provide suitable footing for these modes of change to occur.

Similarly, the importance of administrative bodies has been made evident - especially as regards *drift* – and there are other sectors such as workplace safety where such agencies can cause slippage between policies and their enforcement, hence *drift*. The role of these agents shows the next path to generalizability because it illuminates an important oversight to literature on dialogue, particularly as relates to policy implementation, and so findings about these actors should be generalized into that body of thought so that the notion of ‘dialogue’, in terms of who has the final say over policy, can be more evaluated in arguably a more accurate way. As such,

the realization about gradual institutional change as regards these third-party regulatory actors enables broader theorization as regards questions of which dialogue scholars inquire into.

Next, and echoing some of the above points, there are alternative policy areas which have developed through the court which likewise hinge closely on speech rights / freedoms and the distribution of power, hence like campaign finance. More specifically on this, there is significant overlap with political speech and commercial speech in both Canada and the U.S., especially as regards their respective interest in rules governing the dissemination of ideas and the ability for the public to make informed choice (hence akin to electioneering communications and public choice). Commercial speech research and related policy also relates to the power of actors, such as corporations or wealthy individuals, to engage in commercial messaging via constitutionalized speech rights / freedoms , potentially in a manner more favorable to private rather than the public interest. The extent to which one can invest in commercial speech is contentious and contested in the context of judicial review in both nation states over the dissemination of ideas and the issue of informed choice, in part because the boundaries of constitutional speech rights / freedoms , and thus the right to engage in commercial advertising for instance, is in flux as courts again in both Canada and the U.S. have not absolutely settled on a clear definition of the nature of the corporation or adopted a test to determine which constitutional provisions apply to corporations. Two cases stand out as strong empirical examples for research, namely *Canada (Attorney General) v. JTI-Macdonald Corp* as well *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*. In these cases, the activities of the corporate form came under question for how they may fit into the marketplace of ideas, adversely influence individual choice, and or mislead the public in the context of selling public goods. Accordingly, this analysis maps on to the area of commercial speech rights / freedoms as many of the same issues present them self as does in

political speech rights / freedoms and commercial speech rights / freedoms questions, and judicial conflicts, most notably as regards inequality in speech as well the power to refrain from speaking (a derivative of a constitutional right to speech – that is negative speech rights / freedoms). Hence analyzing which judicial philosophies shape the boundaries of speech rights / freedoms could be utilized to generalize about judicial outcomes in these two countries as regards at least some issues relevant to commercial speech right conflicts. These cases could likewise be assessed in regard to the role of inter-governmental dialogue and from the lens of gradual institutional change, given that the judicial conflicts occur in the space which is colored by dialogue, and which merit explanation in terms of gradual change. Notably, as referenced above, the corporate speech rights / freedoms invoked in the commercial speech context (in part) invokes issues related to negative speech rights / freedoms – that is the right to not have to disclose information – and the theoretical framework developed here also could be used to consider those rights / freedoms and associated policy change. Additionally, commercial speech rights / freedoms in the United States are typically afforded the lesser protection of intermediary speech as compared to political speech strict scrutiny (Langvardt, 2014), and so it would be interesting to see how this weaker Congressional threshold effects inter-governmental dialogue and changes in degrees of deference.

On a separate note, this research is also generalizable in terms of understanding the wider issue of the corporate form. For legal scholars, it is often questioned if corporate constitutional speech is indeed latent within the constitutional text, while this thesis underscores the socio-judicial construction of corporate speech rights / freedoms , and how they are chiefly a matter of inter-governmental politics, conditioned by constitutional mechanisms and constraints such as the *Charter*, over the distribution of political power in a democratic society. In this way, the finding

that commitments to political equality influence the boundaries of campaigning, enables generalizing about the role of corporate personhood in law, and shifts attention to judicial resolutions over the corporate form vis-à-vis democratic principles – again while putting the question as to latent constitutional rights / freedoms aside.

As for those studying campaign finance, the contribution to knowledge advanced here also offers practical knowledge for those working on campaign finance issues. For instance, political parties are often concerned with mobilization efforts in terms of understanding how to shape policies that will facilitate their electioneering capacity, and by shifting attention to say, the consequential role of the judicial branch, is useful for understanding avenues by which certain types of changes they may be interested in achieving are likely, or not, in turn providing them with knowledge on likely productive courses of action. Similarly, others such as activists express great interest and concern in understanding the *Citizens United* decision, and they often turn to the role of corporate personhood in doing so. However, from a practical knowledge standpoint, it is evident that this attention may be misplaced to the extent that is focuses on the constitutionality of corporate personhood in terms of constitutionalism – instead of thinking about how it may be more a consequence of democratic norms and constitutional mechanisms – which permit or block (such as s. 1 of the *Charter*) – corporate constitutional rights / freedoms ; in other words, there is practical benefit in thoroughly appreciating the fact that corporate constitutional rights / freedoms are not in fact enshrined, and so associated issues are more about understanding the promotion or retrenchment of democratic principles, as well how such decisions are implemented by regulatory actors.

Finally, the findings as relates to judicial conceptualizations of political equality, as conditioned by constitutional constrains, also presents generalizability beyond court cases within the

Canada and U.S. context – as the topic of money in politics raises akin issues in other developed as well developing nations. As Treisman points out, in Latin America, Asia, and eastern Europe democratizing regimes have been adversely affected because of money in campaigns (1998, p. 1); and like Norris et. al find, “long-established democracies such as the United States, Italy, and Japan are not immune from major scandals and controversies over the role of money in politics.” (2016, p. 2). The commitment to certain democratic principles as well the realization of constitutional constrains discussed in chapter 5 for instance and above have been shown to influence policy outcomes so to determine the boundaries for money in elections and recognizing the impact of these variables and mechanisms can be useful for other constitutional democracies when implementing preambles and guiding provisions such as those found in section 1 of the Canadian *Charter.* The consequences of egalitarian versus non egalitarian ideas of democracy have also been unpacked, and these findings can be generalized to have similar consequences in other European democratic nations for instance.

6.7 Future Research

Further theoretical and empirical work can expand and further apply this approach to policy change, to the process of money in politics, and more. This research could be built on by pairing it with data on the levels of money in the respective electoral systems, thus, to further look at the impacts of the judicial outcomes in terms of electioneering activities. While the consequential impact of judicial outcomes is clear, for instance given its precedent setting nature and judicial equality vis-vis the legislator, such potential pairing speaks to another layer to the outcomes analyzed, that is the outcome in terms of donor and candidate decisions. In turn, the value of understanding how campaign finance policy has been enabled to change may become more relevant and or pressing. Also, and as noted in the beginning of chapter 5, the relative lack of

judicial review of campaign finance policies in Canada is suggestive of various themes which could be further explored. The reasons why there have been far fewer cases in Canada can be more extensively examined, for instance to further research whether the lack of court conflicts is due American society being known as comparatively more litigious or adversarial (and if so, why?) (Kagan ,1991), are actors more prone to pursue constitutional rights / freedoms , is it because the costs of elections are just less costly generally, or do the views of those participating in the electoral process reveal a active opting to mobilize in a way less depend on high level funding (Boatright, 2009)? Examining these potential dynamics to the prominence of campaign finance judicial conflicts is useful for understanding the extent and substance of changes in campaign finance policy.

Additionally, there is a wide body of research on the concept of deliberative democracy. Dryzek (2003) frames deliberative democracy is a quest for authenticity, especially by tolerating reflection and uncoerced preferences. This analysis has relevancy for such research as it outlines institutional factors that can constrain or facilitate the aims of deliberative democracy, such as a robust exchange of many ideas, thus enabling the research to approach the issues discussed with a reflection to consequential structural factors in constitutional democracies, such as those analyzed here, which shape how deliberative the democratic process can be, or not be, in the context of the electoral process.

The comparative angle could also be extended to similar types of judicial conflicts in other liberal, developed democratic states in order to examine the extent to which similar judicial philosophies result in similar campaign finance policies as well up-take in activities by donors and candidates. Other extensions to this research include that on dark money, meaning disclosure policies and laws. Disclosure laws have adapted in important ways – in fact alongside the cases

discussed, and they have also been impacted by the corporate form along the way. As such, future research can continue with understanding how commitments to democratic principles, such as individual liberty, have determined judicial outcomes influencing issue area within the broader topic of campaign finance. Lastly, this research gives way to future research on the development of cases post-the time frame reviewed as these also merit study, and the gradual institutional framework can be further mapped and evaluated accordingly. Such studies could also encourage more layered analysis and field work on Justices' views, both personal and as a matter of law, on elections and democracy in Canadian and the United States. Investigating their personal views, and comparing those with their judicial decrees, could also enable analyzing judicial impartially.

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