



## **Private funding of political campaigns: comparative analysis of the law in the United States and in Brazil**

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## Abstract

The topic of the present paper involves the law of private campaign finance, the regulation of the amount of money that individuals, legal entities or private groups can devote to support a preferred candidate or political party. The US Supreme Court has been showing a trend of abolishing limits on election spending. On the other hand, the Brazilian *Supremo Tribunal Federal* issued a partial decision on April 2nd, 2014 striking down the Brazilian framework of campaign financing by individuals and legal entities. In this article I engage in a comparative study of both jurisdictions to try to understand if and how each of them differs in the understanding of subjects that are relevant for the resolution of the issue of private campaign funding.

**Keywords:** election, campaign contribution, expenditure, donation

## Resumo

O tópico do presente artigo envolve a legislação de financiamento privado de campanhas, a regulação da quantidade de dinheiro que indivíduos, entidades legais ou grupos privados pode destinar para o apoio de algum candidato ou partido de sua predileção. A corte Suprema Corte dos Estados Unidos tem apresentado uma tendência de abolir limites a gastos em eleições. Por outro lado, O Supremo Tribunal Federal, proferiu uma decisão parcial no dia 2 de Abril de 2014 atacando o quadro legislativo do financiamento de campanha por indivíduos e entidades legais. Neste artigo, empreenderei um estudo comparativo das duas jurisdições para buscar compreender se e como cada uma delas diverge no entendimento de matérias relevantes à solução da questão do financiamento privado de campanhas.

**Palavras-chave:** eleição, contribuição de campanha, doação, despesas

# 1. Introduction

## 1.1. What is the topic and why is it important?

The topic of the present paper involves the law of private campaign finance; in other words, the regulation of the amount of money that individuals, legal entities or private groups can devote to support a preferred candidate or political party.<sup>1</sup>

On April 2<sup>nd</sup>, 2014, the Supreme Court of the United States (“US Supreme Court”) continued its abolition of limits on election spending, striking down the aggregate limits on the amount an individual can contribute to federal candidates and noncandidate committees during each two-year election cycle<sup>2</sup>. This decision echoed *Citizens United* 2010 decision<sup>3</sup>, where a 5-4 court struck down the prohibition of corporations and unions from using their general treasury funds to make independent campaign expenditures. It is fair to say that these decisions reflect a recent trend of the US Supreme Court of abolishing limits on election spending.

On the other hand, the Brazilian *Supremo Tribunal Federal* (“Brazilian Constitutional Court”) issued a partial decision on April 2<sup>nd</sup>, 2014<sup>4</sup> striking down the Brazilian framework of campaign financing by individuals and legal entities<sup>5</sup>. In particular, this decision invalidated any possibility of legal entities directly contributing to candidates or political parties.

The decisions mentioned above portray two major jurisdictions in the Americas adopting totally opposite positions in a critical issue to the law of a democratic regime, the financing of the electoral process. Any decent democracy requires that members of society have some degree of influence on political issues, both when it is time to elect new representatives and during their terms in public functions. The theme of campaign finance relates to the

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1. This paper does not discuss public funding of campaigns. Public funding is allowed both in the US and in Brazil under certain conditions, but it is not the object of the work.

2. *McCutcheon v. Federal Election Commission*, 572 U.S. 71 (2014).

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

4. STF, ADI 4650/DF, rel. Min. Luiz Fux (Braz.).

5. The Brazilian Constitutional Court has eleven justices and cases are decided by majority of at least six. They way judicial courts decide cases in Brazil allows courts to take several sessions to analyze and finally decide the same case. The case ADI 4650/DF was brought by the Reporting Justice Luiz Fux on December 11, 2013, who voted for the unconstitutionality of the federal law's financing scheme. He was followed by Justices Joaquim Barbosa, Dias Toffoli and Luis Roberto Barroso. On that occasion Justice Teori Zavascki asked to further review the records before rendering his vote. He brought his dissenting vote on the session of April 2<sup>nd</sup> 2014, supporting the constitutionality of the law. On the same session, Justices Marco Aurélio and Ricardo Lewandowski joined the opinion of the Reporting Justice Luiz Fux. On that occasion Justice Gilmar Mendes asked to further review the records before rendering his vote. So far he has not brought his vote to the collegiate. However, considering that six Justices have already voted to strike down the possibility of legal entities making direct contributions to candidates and political parties, the issued is already resolved, but its efficacy is dependent on the conclusion of the judgment of the case by the court. There is a theoretical possibility that one of more of the justices who already voted change their position after the opinion by Justice Gilmar Mendes is brought, but this scenario is practically highly unlikely. On the issue of contributions made by individuals, the Reporting Justice voted for the unconstitutionality of the existing framework, but without striking down the effectiveness of the pertinent provisions. His vote has given Congress a term of twenty-four months to pass a new law regarding contributions by individuals. This issue is yet to be decided by the majority of the Brazilian Constitutional Court.

possibility of individuals acting in the public sphere to influence the outcome of a popular election, which is legitimate. The governmental regulation of the matter, however, starts to make sense when the money element comes to light disproportionately, putting in danger the legitimacy of the process and deteriorating the expression of public will.

In the lines that follow I will engage in a comparative study of both jurisdictions to try to understand if and how each of them differs in the understanding of subjects that are relevant for the resolution of the issue of private campaign funding. These subjects involve, among others, constitutional concepts of equality, freedom of speech, corruption, and political rights of corporations.

Before starting the analysis, it should be stressed that it is not possible to engage in a perfect comparison between the two jurisdictions, because the legal frameworks in both countries regarding campaign finance are different. As will be better explained below, the law at issue in the Brazilian case allowed direct contributions of corporations to candidates, a situation that has been for long statutorily forbidden in the US. Also, the schemes for contributions by individuals follow different models in both jurisdictions. Not only that, but the very model of federal elections have disparities in both countries, which of course has impacts on how the financing is designed.

Apart from the legal discrepancies, the United States and Brazil have different histories, traditions and social realities – related or not to elections – elements that always affect judicial decisions, directly or indirectly.

Considering the above, it is not my goal to compare the decisions to try to establish which jurisdiction has the best approach. What may work in Brazil may not make legal or factual sense in the US and vice versa. My objective is to engage in an analytical comparison to verify how the jurisdictions differ in the assessment of subjects that are relevant for the resolution of the issue of private campaign funding. To the extent possible, I will speculate about possible alternatives to the understanding being followed in each jurisdiction, in light of the current doctrine.

In the section below, I will analyze the most relevant US decisions that set the law for campaign finance in the country, specially *Buckley v. Valeo* (1976), *Citizens United v. FEC* (2010) and *McCutcheon v. FEC* (2014). In the following section, I will describe the Brazilian legal framework and the recent constitutional decision. Finally, I will outline some conclusive remarks.

## 2. The law in the United States

### 2.1 *Buckley v. Valeo*

*Buckley v. Valeo*<sup>6</sup> can be considered the seminal decision that sets most of what is still the current law regarding campaign finance in the country.

In 1974, Congress implemented a reform of the Federal Election Campaign Act of 1971 (“FECA”), with the ambition of limiting the perceived deleterious impact of money on elections. The amendments limited the size of contributions that could be given in federal elections by individuals, political parties, or Political Action Committees (“PACs”).

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6. *Buckley v. Valeo*, 425 U.S. 1 (1976).

The amendments also placed ceilings on total spending by candidates in federal elections and limited personal spending by candidates. Finally, the amendments created reporting and disclosure requirements for candidates to federal office. The entire regulatory structure was to be overseen by the Federal Elections Commission ("FEC")<sup>7</sup>.

The US Supreme Court upheld only part of the new scheme. In summary, the Court held that the First Amendment would allow Congress to regulate the size of the direct contributions, but not independent expenditures. Below I describe how the *Buckley* court understood some of the key issues to resolve any campaign finance dispute in the US.

a) Equality argument v. anticorruption argument

In a very important passage, the Court held that the Constitution forbids Government from regulating campaign finance with the purpose of trying to equalize voices: "It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat candidates imposed by [the FECA's] expenditure ceiling. But 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."<sup>8</sup> So the equality argument could not be used as a valid Government interest to limit speech in an election setting.

On the other hand, the Court held that "corruption or the appearance of corruption" would be a justification that permits state regulation of the matter. In *Buckley*, the Court did not go into details of what constitutes the model of corruption that could allow state regulation. The court did use the language of *quid pro quo* ("something for something" in Latin, meaning an exchange of goods or services, where one transfer is contingent upon the other) but does not really answer the question of whether corruption could go beyond this limited zone of explicit exchanges. The question of what precisely constitutes corruption remains controverted and would divide the Court in later cases.

b) Money spent in elections is speech protected by the First Amendment

A second crucial aspect of *Buckley* was the idea that "money spent on elections, in the form of either contributions or spending, was First Amendment protected activity because it directly facilitated speech."<sup>9</sup> This view was challenged by members of the Court in later cases, especially Justice White, who was against the view that money spent in elections should receive First Amendment protection. In *FEC v. National Conservative Political Action Comm.*<sup>10</sup>, he said "the First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the same as restrictions on speaking. I agree with the majority that the expenditures in this case "produce" core First Amendment speech. But that is precisely the point: they produce such speech; they are not speech itself." Both in the aftermath of *Buckley* and still today, the *Buckley* view has also been challenged in

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7. Samuel Issacharoff et al., *The Law of Democracy: Legal Structure of the Political Process* 340 (Foundation Press, 4th ed. 2012).

8. *Buckley*, 425 U.S. at 48-49.

9. Issacharoff et al. *supra*. at 347.

10. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 508-09 (1985) (White, J., dissenting).

academic commentary<sup>11</sup>. However, as shown below, the prevailing understanding in *Buckley* is still the law of the land today.

c) Direct contributions v. independent expenditures

After asserting that private campaign financing operates in a land protected by the First Amendment, the *Buckley* Court established a distinction between independent expenditures – money spent by a candidate to promote his campaign or by a group to communicate opinions on a given public issue – and direct contributions – money given by supporters of a candidate or position to help the candidate to win the election.

In light of this distinction and considering the Court's view that only corruption or the appearance of corruption could justify limitations of campaign financing, it becomes easier to understand why the Court decided to uphold the Act's limits on direct contributions. In the words of the Court, "[i]t is unnecessary to look beyond the Act's primary purpose – to limit the actuality and appearance of corruption resulting from large individual financial contributions – in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation...".

On the other hand, the Court conferred a broad constitutional protection to expenditures by candidates and supporters. Since expenditures did not take the form of a direct provision of money to a candidate, the argument of avoiding corruption was impaired, allowing the Court to strike down the expenditure limits of the 1974 Act. As recognized by Frank Sorauf, after *Buckley* candidates and campaigns started to seek and raise more money and the system encouraged the development of PACs<sup>12</sup>.

In light of the above, it is possible to outline four key aspects set out by *Buckley* regarding the law of campaign finance that are still relevant today:

- 1 – The equality rationale is not a valid Government interest to justify the regulation of campaign finance;
- 2 – Only corruption and the appearance of corruption are valid Government interests to justify the regulation of campaign finance;
- 3 – Money spent in elections is protected by First Amendment speech rights.
- 4 – Direct contributions are different from independent expenditures and can be treated differently by state regulation.

## 2.2. Notes on *Austin v. Michigan State Chamber of Commerce* and *McConnell v. FEC*

I make here quick reference to the core holdings of these two cases, which represented a step forward towards limiting the amount of private money used in elections. These cases, however, were later overruled by *Citizens United*, to the disappointment of many who currently share a discontent with the US Supreme Court's position of eliminating barriers to campaign financing.

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11. See J. Skelly Wright, *Is Money Speech?*, in *POLITICS AND THE CONSTITUTION: IS MONEY SPEECH?*, 85 Yale L.J. 1001 (1976) And Deborah Hellman, *Money and Rights*, in *MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED* 57 (Monica Youn, ed. Brennan Center for Justice 2011).

12. Frank J. Sorauf, *Inside Campaign Finance* 238 (New Haven, Conn.: Yale University Press, 1992).

In 1990, in *Austin v. Michigan State Chamber of Commerce*<sup>13</sup>, the US Supreme Court upheld the Michigan Campaign Finance Act that prohibited corporations from making independent expenditures in connection with state candidate elections. Although the case does not refer to federal law, its study is of relevance to identify how the understanding of the US Supreme Court developed in critical matters.

The Chamber, a nonprofit Michigan cooperation, had established a separate political fund, but sought to use its general treasury funds to place in a local newspaper an advertisement supporting a specific candidate. The government used the rhetoric of avoidance of corruption or its appearance to justify the limitation, which was accepted by the Court in line with *Buckley*. However, *Austin* described corruption in different and broader terms, stating that “regardless of whether this danger of ‘financial quid pro quo’ corruption may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at a different type of corruption in the political arena: 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.”<sup>14</sup>

The Court thus concluded that the state had articulated a sufficiently compelling rationale to support the restriction of independent expenditures by corporations. When evaluating whether the Act was narrowly tailored to achieve its goal, the Court’s answer was again positive. The Act did not impose an absolute ban on all forms of corporate political spending once it still permitted corporations to make independent political expenditures through separate segregated funds.

So in *Austin* the Court not only adopted an expanded concept of corruption (going beyond the *quid pro quo* rhetoric), but also upheld a limitation of independent expenditures – in the case, made by corporations.

*McConnell v. FEC*<sup>15</sup> was decided in 2003 and happened in the context of the Bipartisan Campaign Reform Act (“BCRA”) of 2002. The main objective of the statute was to address the two main loopholes in the federal regulatory scheme of campaign finance and established (a) restrictions on political party use of the so-called soft money<sup>16</sup>; and (b) prohibition of use of corporate funds for electioneering communications<sup>17</sup>.

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13. *Austin v. Michigan State Chamber of Commerce* 494 U.S. 652 (1990).

14. *Austin*, 494 U.S. at 654.

15. *McConnell v. FEC*, 540 U.S. 93 (2003).

16. The various provisions of the Act eliminated the ability of national parties to raise and use soft money. Soft money is money given to political parties for purposes other than supporting candidates for the federal office and before the BCRA there were no limits. This money could be used for “party building” activities, but the matter became controversial given the difficulty in distinguishing these activities from party support for federal candidates.

17. The BCRA prohibited the use of corporate funds for “electioneering communications”, a new name for issue advocacy. The BCRA tried to avoid First Amendment problems by limiting the restrictions to the electoral period (30 days before primaries and 60 days before general elections) and by covering only communications with reference to a candidate for federal office. This approach was distinct from the understanding that followed *Buckley*, under which express advocacy of candidates could be limited, but not issue advocacy. The identification of express advocacy rested at the time on the existence of “magic words” (like “vote for”, “elect”, etc), which made the issue controverted.



When examining the provisions regarding soft money, the Court once again ratified that corruption or appearance of corruption was a valid argument to regulate the matter. However, the Court expressly stated that corruption goes beyond *quid pro quo*, holding that “our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence’”<sup>18</sup>.

When examining the provisions regarding electioneering communications, the Court embraced a definition broader than the “express advocacy” understanding that had followed *Buckley*. The Court held that the regulation would not represent a complete ban on expression – and therefore there would not be a First Amendment problem – since corporations could still use PACs to pay for ads and spend outside of the “backout” periods. Once again, the US Supreme Court was stamping a Congressional limitation of independent expenditures. This trend, however, would be reversed in *Citizens United*, which reverberated a few years later in *McCutcheon*.

### 2.3. *Citizens United v. FEC*

*Citizens United v. FEC*<sup>19</sup> is certainly the most notorious US Supreme Court decision on campaign finance after *Buckley* and was followed by intense public debate, which remains until today. In this case, the Court struck down the prohibition of use of corporate funds to finance independent expenditures during the blackout period set by the BCRA (30 days before primaries and 60 days before general elections).

*Citizens United* was a non-profit corporation that produced a documentary extremely critical of Hillary Clinton, called *Hillary: The Movie*. Hillary Clinton was at the time a candidate for the Democratic presidential nomination. *Citizens United* wanted to use its general treasury funds to pay cable stations to offer access to the movie through video on demand services. Because this video appeared to meet BCRA’s definition of “electioneering communication” for which general funds could not be used during blackout periods, *Citizens United* brought the lawsuit against FEC to argue that the BCRA was unconstitutional.<sup>20</sup> A 5-4 divided court held that the law was an outright ban on speech, since it limited the money a person could use for political communications during campaigns, restricting the number of ideas that circulate in this crucial moment of the democracy. In that sense, *Austin* and *McConnell* were reconsidered and overruled.

The Court maintained basically all the key holdings set in *Buckley*, reason why it is not necessary to further elaborate on them: (i) money spent in political communications is protected under the First Amendment; (ii) independent expenditures are different from direct contributions; (iii) the equality rationale is not a valid Government interest in this area; (iv) corruption or the appearance of corruption is a valid Government interest to justify limitations in campaign finance.

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18. *McConnell*, 550 U.S. at 103.

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

20. Issacharoff et al. *supra*. at 450.



The two key aspects that *Citizens United* brought to the discussion were (i) the conclusion that corporations have political speech protected by the First Amendment as much as individuals and (ii) the express limitation of the concept of corruption to *quid pro quo* exchanges. I provide comments on both aspects below.

a) Corporations have protected political speech just like individuals

The Court held that political speech does not lose protection only because of the identity of the speaker. In order to defend this position and set the reasons why to overrule *Austin*, the Court stated the following: “Political speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because speech comes from a corporation rather than an individual.’ *Bellotti*, 435 U.S., at 777. This protection for speech is inconsistent with *Austin*’s antidistortion rationale. *Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining ‘an unfair advantage in the political marketplace’ by using ‘resources amassed in the economic marketplace.’ 494 U.S. at 659 (quoting *MCFL*). But *Buckley* rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’ 424 U.S. at 48 ... The rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”<sup>21</sup>

Justice Stevens, the main dissenting opinion, strongly disagreed with this position, specially due to corporations’ inability to vote or run for office. According to him, “the conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court’s disposition of this case. In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office.”<sup>22</sup> Despite the criticism, the prevailing position in the Court was that corporations have protected political speech just like individuals.

b) Corruption means *quid pro quo*

The Court confirmed its long-standing position that only corruption or the appearance thereof would justify a law limiting campaign contributions. However, in *Citizens United* the majority seemed determined to set that only *quid pro quo* exchanges would be covered by the concept of corruption, settling the uncertainty that existed in cases that proceeded. As I showed above, *Buckley* used the *quid pro quo* language, but did not answer whether *quid pro quo* was the one and only meaning for corruption. *Austin* and *McConnell*, on the other hand, adopted a broader concept of corruption, not limited to cash-for-vote arrangements, leaning more towards a removal of temptations rationale. Considering the *Citizens United* Court’s understanding that corruption would only mean *quid pro quo*, independent expenditures could not be limited, because they are not coordinated with candidates and would not give rise to strong suspicions of cash-for-votes arrangements.

Here follows a very instructive passage: “the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance ... With regard to large direct contributions, *Buckley* reasoned that they could be given ‘to secure a political *quid pro quo*,’ and that ‘the scope of such practices can never be reliably ascertained

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21. *Citizens United*, 558 U.S. at 340.

22. *Citizens United*, 558 U.S. at 398.

ned,' 24 at 26, 27. The practices Buckley noted would be covered by bribery laws ... if a quid pro quo arrangement were proved. The Court, in consequence, has noted that restrictions on direct contributions are preventive, because few if any contributions to candidates will involve quid pro quo arrangements ... Limits on independent expenditures, such as 441b, have a chilling effect extending well beyond the Government's interest in preventing quid pro quo corruption. The anticorruption interest is not sufficient to displace the speech here in question."<sup>23</sup>

Writing the dissent, Justice Stevens once again opposed, stating that the "difference between selling vote and selling access is a matter of degree, not kind"<sup>24</sup>. Corruption for him operates along a spectrum, and the belief that *quid pro quo* could be neatly demarcated from other forms of improper influence does no accord with the theory and reality of politics.

Perhaps the most significant development of *Citizens United* was the rise of the so-called Super PACs, political action committees legally entitled to raise donations in unlimited amounts. In 2010, in *SpeechNow.org v. FEC*<sup>25</sup>, the D.C. Circuit held that contributions to independent expenditure-only groups could not be restricted, relying on *Citizens United*. PACs had previously been limited to accepting contributions of \$5,000 or less and could contribute money directly to candidates. As long as Super PACs do not coordinate with or contribute to candidates or political parties, they can raise and spend unlimited sums and engage in express advocacy for or against candidates.

Writing about the emergence of Super PACs and the potential threats that they pose to the electoral system, Richard Briffault said that "[t]he rise of Super PACs indicates that the real impact of *Citizens United* may be the re-validation of the unlimited use of private wealth in elections, not just spending by corporations and unions ... In their brief life span, Super PACs have already begun to evolve from general ideological or partisan committees to vehicles for advancing or opposing the fortunes of specific candidates. This threatens to obliterate the significance of the limits on contributions to candidates that have been a centerpiece of federal campaign finance regulation since the post-Watergate reforms enacted in 1974."<sup>26</sup>

## 2.4. *McCutcheon v. FEC*

In terms of law, *McCutcheon v. FEC*<sup>27</sup> struck down BCRA's aggregate limits of direct contributions to federal candidates in a two-year election cycle. In terms of doctrine, the decision did not bring much novelty, since it basically followed the path already paved by Buckley and *Citizens United*. However, *McCutcheon* deserves a very important note in the discussion about the extent of the meaning of corruption. It stated with an explicitness never seen before – not even in *Citizens United* – that quid pro quo is the only pernicious type of corruption

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23. *Citizens United*, 558 U.S. at 359.

24. *Citizens United*, 558 U.S. at 403.

25. *SpeechNow.org v. FEC*, 599 F.3d 686, (D.C. Circ. 2010).

26. Briffault, Richard, *Super PACS* (April 16, 2012). Columbia Public Law Research Paper No. WP 12-298.

27. *McCutcheon v. Federal Election Commission*, 572 U.S. 71 (2014).

that Government regulation may seek to prevent in the land of campaign finance. In that sense, the Government may not seek to limit the appearance of mere influence or access.

The BCRA had two limits on campaign direct contributions: (a) base limits – how much money a donor may contribute to a particular candidate or committee; and (b) aggregate limits – how much money a donor may contribute in total to all candidates and committees. The effect of aggregate limits was to restrict how many candidates or committees a donor could support. This second limit was the one stuck down by the Court.

Following the understanding that money is protected under the First Amendment, the Court held that the limitation of number of candidates you can contribute to is a serious limitation to speech rights.

In its turn, following the understanding that only *quid pro quo* corruption is a valid Government interest to regulate campaign financing, the Court stated that aggregated values do not raise issues of corruption. The Court felt it hard to accept why giving X amount of money to nine candidates would be acceptable while giving the same or less to the tenth would be a corruption problem. The Court added that it is obvious that candidates would feel grateful for donations to other candidates of the same party or PACs, but there would be a clear difference between money given to the candidate and money given to the party as a whole, from which all members benefit.

As I mentioned, perhaps the most crucial element of *McCutcheon* was the clarity with which it limited corruption to *quid pro quo* arrangements, excluding the removal of temptations rhetoric from the discourse of corruption in the context of campaign finance. In the most striking passage the majority said that “[s]pending large amounts of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties ... the Government may not seek to limit the appearance of mere influence or access.”<sup>28</sup>

After *McCutcheon* and the decisions that preceded, it is fair to say that the law of private campaign financing in the US is based on the following notions:

- 1 – The equality rationale is not a valid Government interest to justify the regulation of campaign finance;
- 2 – Only *quid pro quo* corruption and the appearance of *quid pro quo* corruption are valid Government interests to justify the regulation of campaign finance;
- 3 – Money spent in elections is protected by First Amendment speech rights.
- 4 – Direct contributions are different from independent expenditures and can be treated differently by state regulation.
- 5 – Corporations have protected political speech, just like individuals.

## 2.5. The issue of (anti)corruption

One of the most controversial issues that followed the decisions in *Citizens United* and *McCutcheon* relates to how strictly the US Supreme Court defined corruption. Echoing the dissents

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28. *McCutcheon*, 572 U.S. at 76-77.

in both cases, many commentators wrote about the matter, defending a broader approach to corruption, more linked to the removal of the inherent temptations of the political process and less to the *quid pro quo* element.

One of the most notable efforts in that sense is the recent book by Zephyr Teachout, *Corruption in America*<sup>29</sup>. In that book, the author examines the history of corruption in the United States, starting with how the framers saw the matter of corruption and ending with the recent Citizens United and McCutcheon decisions, which are highly criticized by her. The author describes how the concept is fluid and varied in meanings throughout the American history. During the American Constitutional Convention, the framers valued bright-line rules, aimed at removing temptations to build a society different from what they perceived as being intrinsically corrupted societies in France and England. In different moments of the American society, this was the view that prevailed. In other moments, however, says the author, courts preferred a narrower approach to corruption, opting to seek penalties only when it was clear that an exchange of something of value for an undue advantage existed.

Identifying how difficult it can be for courts to manage anticorruption rules that focus on the intent of the wrongdoer or in the existence or not of an unethical exchange of favors, Teachout clearly favors structural laws designed to dissuade corruption, like the campaign contribution limits, since they are clear, intelligible, and less prone to inconsistent administration. On the other hand, the *quid pro quo* position of the current US Supreme Court is subject to her intense criticism.

In a very instructive passage, Teachout says that “[a]t the Constitutional Convention the anticorruption principle led to many bright-line rules, which have fared pretty well, and a few unclear rules (the terms of impeachment, the takings clause), which have led to confusion. Part of reviving the principle will be an emphasis on bright-line rules, even those that infringe on genuinely innocent behavior. Once corruption is understood as a description of emotional orientation, rather than a description of a contract-like exchange, the idea of criminalizing it seems either comical or fascist. Instead, bright-line rules that discourage temptation and encourage civic virtue are fundamental, essential American goals. Bright-line rules, in other words, are part of the best of our country’s past and not merely aggregate a squirrely, annoyed response to contemporary scandals. Strict aggregate limits on spending and contributions are the descendants of strict residency rules, strict veto laws, strict gifts rules, the Pendleton Act, and the secret ballot, as well as the Tillman Act ... Criminal law is poorly designed to capture corrupt acts. It is, however, well designed to deter them. If one sees corruption as a motivating concept instead of a statutory term, then the law can successfully police – or at least shape – the likelihood of politicians putting private interests before the public good.”<sup>30</sup>

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29. Zephyr Teachout, *Corruption in America* (Harvard University Press, 2014).

30. Teachout *supra*, at 284-285. See also Laura S. Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (Yale University Press, 2013) and Lawrence Lessing, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* (Twelve, 2011).

### 3. The law in Brazil and the Constitutional decision

#### 3.1. Laws governing the matter in Brazil

Before addressing the decision of the Brazilian Constitutional Court, it is worth providing a description of the legal framework regarding private election funding in Brazil, precisely the body of rules under examination by the Constitutional Court.

The issue of private campaign financing is regulated in Brazil basically by two laws: Law No. 9.504/1997 (the “Elections Law”) and Law No. 9.096/1995 (the “Organic Law of Political Parties”).

##### a) Legal entities

Under article 81 of the Elections Law, legal entities are allowed to contribute to political campaigns an amount up to 2% of their gross revenues in the year prior to the election year. However, under article 24 of the same law, some types of legal entities are not allowed to make any donations of money or anything of value, including unions, religious entities and sports entities. Corporations, on the other hand, are allowed to make direct contributions to campaigns and political parties.

##### b) Individuals (natural persons)

Under article 23 of the Elections Law, individuals are allowed to contribute to political campaigns an amount up to 10% of their gross income in the year prior to the election year.

##### c) Candidates

Candidates are also allowed to use their own resources to fund their campaigns. Under article 23 of the Elections Law, the limits in that regard are set by each political party for each election.

The legal framework described above was challenged before the Constitutional Court in the context of the lawsuit ADI 4650/DF<sup>31</sup>. The lawsuit was filed by the Federal Section Brazilian Bar Association<sup>32</sup> in the form of a Direct Action for Declaration of Unconstitutionality<sup>33</sup> and heard directly by the Brazilian Constitutional Court.

#### 3.2. Some relevant facts and numbers

As I mentioned above, there is no way of carrying on a perfect comparison between the legal understanding in both jurisdictions on the matter, because the two countries have different legal frameworks, histories and factual backgrounds informing the work of the courts. Judicial decisions are not issued in a vacuum and the analysis of the circumstances existent in

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31. STF, ADI 4650/DF, rel. Min. Luiz Fux (Braz.).

32. Under article 103 of the Brazilian Constitution, the Federal Section Brazilian Bar Association is one of the entities with standing to file Direct Actions for Declaration of Unconstitutionality of laws.

33. Under article 103 of the Brazilian Constitution, the legitimated individuals and entities can file Direct Actions for Declaration of Unconstitutionality of laws. These lawsuits involve an abstract evaluation of the law by the Constitutional Court, in order to verify if it is in accordance with the Brazilian Constitution.

the country when such important decisions are issued are of crucial relevance to have some context and better understand them.

Although a decision by the Brazilian Constitutional Court in a Direct Action for Declaration of Unconstitutionality is supposed to be of abstract nature, it is evident that the Court will not blind up and pretend that its decision will have no practical impact on important aspects of the political reality of the country. In that sense, before issuing his vote<sup>34</sup>, the Reporting Justice provided a summary of some relevant facts and numbers regarding the situation of campaign finance in Brazil, data that he collected in public hearings with representatives of the society prior to the decision. These facts and numbers, summarized below, are of critical importance to have some context of the Brazilian situation and understand some of the reasons that informed the conviction of the Court:

- Elections in Brazil are extremely expensive and their costs have been growing. In the 2002 elections, the total cost was around BRL 1 billion. In the 2012 elections, the total cost was around BRL 4 billions.
- The costs with elections in Brazil represent BRL 10.93 per capita; while in France, BRL 0.45; in the UK, BRL 0.77; and in Germany, BRL 2.21. In relation to the Gross Domestic Product ("GDP"), 0.89% of all wealth of the country is spent in elections, while in the US the amount corresponds to 0.38%.
- In 2012, 97% of the money used in campaigns came from corporations.
- In 2012, a little more than 1 thousand corporations donated almost 100% of the contributions in that year. This represents less than 0.5% of the corporations in the country, showing that a very limited number of corporations command the electoral process.

### **3.3. The decision of the Brazilian Constitutional Court**

The Brazilian Constitution has no explicit rules concerning campaign finance. In view of that, in order to decide the issue in light of the Constitution, the Constitutional Court had to base its understanding on other rules and principles of the Constitution, such as equality, democracy, the republican principle, among others.

The first issue analyzed by the Court was direct contributions made by legal entities (including corporations) to campaigns and political parties, in the context of which the Court outlined almost all the doctrine that supports the decision.

#### **a) Direct contributions made by legal entities**

As explained above, the decision of the Brazilian Constitutional Court is not formally finished yet due to a request for further review of the records made by Justice Gilmar Mender, and there is no written version of the decision available. However, the understanding for the

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34. As mentioned above, the judgment by the Brazilian Constitutional Court is not formally over yet and there is not final written version of the decision. All comments made in this paper regarding the decision are based on the video of judgment session during which the case was heard, available at <https://www.youtube.com/watch?v=joMGQft9xXY>, <https://www.youtube.com/watch?v=OyAoLLM01UI>, <https://www.youtube.com/watch?v=rNjbpTLxCFI>, [https://www.youtube.com/watch?v=1ePQ\\_HhijYA](https://www.youtube.com/watch?v=1ePQ_HhijYA), and <https://www.youtube.com/watch?v=aoEpbvo7REw>.



unconstitutionality of direct contributions made by legal entities already has a majority of six votes in the Court.

It is worth noting that the doctrinal scheme for assessing the constitutionality of Governmental regulations in Brazil is different from the US. In the United States, when the Government somehow limits a fundamental right (such as the right of political free speech), the Court first identifies whether there is a compelling Government interest that justifies the limitation and, secondly, whether the measure adopted is narrowly tailored to achieve that purpose.<sup>35</sup> In Brazil, where the constitutional doctrine is more European influenced, the method of assessment follows a different rationale. The Court first identifies the constitutional interests in each side of the dispute and then engages in a balancing evaluation, informed by the principle of proportionality.<sup>36</sup>

In view of that, the Brazilian decision does not follow the same structure of the US Supreme Court decision. However, it does touch upon the same issues addressed in the American decision. In the subsections that follow, I will analyze how the Brazilian Court addressed each of the points deemed essential by the US Supreme Court to resolve the matter, pointing out the extent to which the understanding in Brazil differs or is aligned with the understanding in the US.

#### The equality argument:

According to the majority, empirical data shows that legal entities make the electoral process expensive and there is a huge concentration of the money donated in very few private corporations (less than 0,5% of the Brazilian corporations, as shown above). In view of this, the Court understood that there would be a legitimate interest in equalizing the voice of everyone in the political arena. In addition, the majority stressed that the argument that there will be no money to finance campaigns if corporations are not allowed to do so is incorrect, because in Brazil there is public funding, donations by individuals and free access to television time.

In this area it is possible to note a disagreement between the Brazilian Constitutional Court and the US Supreme Court. While the first understands that equality is one of the constitutional values that weight in favor of limiting campaign contributions, the second says that equality is not a valid Government interest for that purpose.

#### Democracy and legal entities' right to political speech:

The majority expressed the opinion that donations by corporations do not belong to the core of the principle of democracy in general and citizenship in particular. The Court held that citizenship involves right to vote, right to be voted, and right to have influence on the formation of the political opinion. These activities would be inherent to natural persons and it would not be logical to extend the same to legal entities. According to the Court, these entities are allowed support political or social causes but not to donate to political campaigns. In that sense, legal entities, being a legal fiction, would not have the same level of voice and vote as the natural persons.

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35. William Burnham, *Introduction to the Law and Legal System of the United States* 349 (West, 5th ed. 2011).

36. See Luis Roberto Barroso, *O Controle de Constitucionalidade No Direito Brasileiro* (Saraiva, 6th Ed. 2012).



Here again, one can identify a clear inconsistency between the Brazilian Court and the US Supreme Court. Contrary to the prevailing understanding in the United States, the Brazilian Constitutional Court sees the political speech rights of legal entities as more limited than the political speech rights of individuals.

Free speech rights as a countervailing constitutional interest:

The Court identified a theoretical right in the other side of the scale, which is the right of free speech held by the corporations. However, the Reporting Justice disagreed with the view that this right would have a deciding importance here. According to him, the free speech right has an instrumental dimension in the political arena, in order to help the public debate and allow electors to choose the candidates who are more aligned with their ideas.

But the intense participation of economic power in elections, stated the Court, compromises this circulation of ideas and benefits only a few candidates. It makes the dispute unfair and unbalanced. A very interesting fact highlighted by the Court was that five out of the ten companies with the highest contributions in 2010 donated to the two main candidates, even if the candidates had totally opposite opinions on crucial issues. In that sense, the matter could not be framed in terms of corporations using their money to support candidates with ideas that are aligned with their own. Rather, what the empirical data shows is that corporations see donations as a way to stay in good terms with the elected candidate, regardless of who he/she will be.

Once again, there is a clear difference between the two Courts here, since while the Brazilian Court did not place too much importance to the free speech rights of corporations, the US Supreme Court sees it as the decisive constitutional element that prohibits much of the Government limitation of corporations' engagement in campaign financing.

Expenditures v. direct contributions

In Brazil, differently from the US, independent expenditures are not a practice. It is very difficult to speculate in the context of this paper the reasons for that. One possible explanation is that Brazilian corporations do not want to deal with the exposure of publicly supporting a given candidate, especially considering that apparently what they really want is to donate to all candidates with chances of winning. A second possible explanation is that Brazilian parties have access to free television time under the Organic Law of Political Parties and the Elections Law. In that sense, they would not need to rely on sponsors to appear on television. A third possible reason may be just that the United States has an older and more mature democracy than Brazil, and because of that more developed and sophisticated methods of participation of the public in the political process arose, including the use of independent expenditures to support candidates.

Regardless of what the real reasons may be, the point is that, when commenting on the *Citizens United* decision, the Reporting Justice mentioned in dicta and without much elaboration that if expenditures were a practice in Brazil, his opinion would be the same; i.e. legal entities would be prohibited from using funds to support their preferred candidates, just like in the case of direct contributions. Needless to say, the Brazilian Court once again disagrees with the US Supreme Court in this area.

### Corruption:

The corruption rhetoric has not had a central role in the Brazilian decision. As mentioned before, the constitutional analysis in Brazil does not require the identification of a compelling Government interest to justify the restriction of the fundamental right. So the Brazilian Constitutional Court did not frame the discussion in terms of whether or not corruption – and which type of corruption – would be enough of an argument to justify the campaign finance legislation.

However, in different moments of the decision, the Reporting Justice and other Justices who issued concurring opinions stated that the Brazilian legislation as it is gives rise to the risk of corruption or the exchange of money for access or influence. In that sense, the decision would be important to remove the temptation of corruption.

The Reporting Justice said that the donations denote a strategic behavior and a form access to the political sphere, where corporations act to avoid losing benefits in the future. Justice Dias Toffoli mentioned that the donations by corporations generate a favors debt between the elected candidate and the corporation, causing a risk of corruption in the future. Justices Luis Roberto Barroso and Marco Aurelio presented arguments that go in the same direction.

Based on the above, although the Brazilian Court did not elaborate in great detail about the concept of corruption, it is clear that it understands that corruption goes beyond *quid pro quo*, potentially embracing things like the exchange of money for access or mere influence. This view is in contradiction with the US Supreme Court current understanding.

There is a recent decision by the Brazilian Constitutional Court in another notorious case that confirms how the Court is willing to grant an extended meaning to corruption violations. The case is known as the *Mensalão* scandal<sup>37</sup> and involved a vote-buying case that almost brought down the government of Luiz Inácio Lula da Silva in 2005. *Mensalão* is a neologism and variant of the word for “big monthly payment”. The scandal broke on June 6, 2005 when Brazilian Congressional Deputy Roberto Jefferson told the Brazilian newspaper *Folha de São Paulo* that the *Partido dos Trabalhadores* (Workers Party - PT) had paid a number of Congressional deputies thousands of reais every month in order to vote for legislation favored by PT. The funds were said to originate from state-owned companies’ advertising budgets.<sup>38</sup>

Many politicians were indicted and convicted in the context of the Criminal Lawsuit No. 470 for the crime of passive corruption. According to article 317 of the Brazilian Criminal Code, the crime of passive corruption means to “*solicit or receive, for themselves or others, directly or indirectly, even outside the function or before you take it, but because of the function, undue advantage, or accept the promise of such advantage.*”

According to commentators of criminal law, the traditional case law of the Brazilian Constitutional Court was that, for a conviction for passive corruption to be possible, it needed to be shown in the indictment that the public servant practiced a specific official act in exchange of the undue advantage offered by the corruptor. However, in the judgment of the *Mensalão* Scandal, certainly to a great extent due to the popular pressure for convictions, the Brazilian Constitutional Court adopted a different and more flexible understanding. Under this new approach, “the precise indication of the official act is not part of the legal type of

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37. *Lula's scandal-hit ally impeached*, BBC News (1 December 2005), available at <http://news.bbc.co.uk/2/hi/americas/4487266.stm>.

38. *Mensalão scandal*, Wikipedia, available at [http://en.wikipedia.org/wiki/Mensalão\\_scandal](http://en.wikipedia.org/wiki/Mensalão_scandal)

passive corruption”, “it is enough that the public official has the power to perform the official acts for the characterization of the crime” and “is not necessary that the official act be, from the outset, certain, precise and determined.”<sup>39</sup>

The prevailing understanding of the Brazilian Constitutional Court about corruption both in the *Mensalão* Scandal and in the decision about campaign finance is clearly different from what the US Supreme Court calls *quid pro quo*. Under the *quid pro quo* rationale, it is necessary to identify a clear exchange of something of value for an official act. The Brazilian understanding is broader and seems satisfied with the demonstration that money or something of value is being given to a public official with a reasonable amount of expectation that an official act will be practiced in return. This approach makes even more sense in the context of campaign finance, where the goal of the law is not to detect and punish cash-for-vote schemes, but to function structurally, removing temptations for potential acts of corruption.

#### A source of concern: entrenchment of the governing party in the power

Although the Brazilian Constitutional Court identified the free speech rights of legal entities as a potential countervailing right, the possibility of limiting speech was not the major concern exposed by the Court in the case. The Court was more worried about the possibility of entrenchment of the governing party in the power.

The dissenting opinion issued by Justice Teori Zavascki and other manifestations of Justices during the judgment pointed out that the political party in power has access to the resources of public administration and better conditions to stay in power. With the prohibition of donations from corporations, potentially the opposing parties would have more difficulties to raise money, put out a decent campaign and reach the Government offices. This situation could be worsened because the Elections Law allows the Government to do institutional advertisement for free. In times of elections, many say that the Government uses this possibility to do campaign – instead of institutional – advertisement.

Although recognizing the above as a potential problem, the Court seemed convinced that the Brazilian legal framework provide enough safeguards against the risk of entrenchment of the governing party in the power. First, said the majority, the argument that there will be no money to finance campaigns of opposing parties is not correct because in Brazil parties also have public funding, individuals can still make donations to parties and candidates, and the candidates have free access to television time. Finally, the Court said that the argument that the Government could pervert the law that allows for institutional advertisement is not a valid one. The remedy to that would be to increase the oversight of this sort of ads, and not simply to allow corporations to make donations.

#### b) Direct contributions made by individuals and use by candidates of their own money

As mentioned above, under article 23 of the Elections Law, individuals are allowed to contribute to political campaigns an amount up 10% of their gross income in the year prior to the election year. In relation to the money spent by candidates in their own campaigns, the limits are to be set by each political party for each election.

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39. Professor Ribas, *Nova Jurisprudência no STF*, Supremo Tribunal Federal em Debate (October 5, 2012), available at <http://supremoemdebate.blogspot.com/2012/10/nova-jurisprudencia-no-stf.html>.

The Reporting Justice considered both provisions unconstitutional because they violate equality. In relation to non-candidates, since the limit is not an absolute amount, but linked to the income, wealthy individuals would have more opportunities to participate in the political process than the poor. The same logic applies to candidates, since with limits set by political parties every election, the richest candidates would have an advantage, what violates equality. This is a very straightforward argument. However, since the judgment in relation to these two issues is still ongoing and there is not yet a majority in the Court, I am not providing more detailed comments on the matter.

## 5. Conclusion

Based on the comparative analysis carried out above, it is possible to outline the following conclusions:

1 – In the US, the equality rationale is not a valid Government interest to justify the regulation of campaign finance. On the other hand, the Brazilian Constitutional Court understands that equality is one of the constitutional values that weight in favor of limiting campaign contributions.

2 – In the US, only *quid pro quo* corruption and the appearance of *quid pro quo* corruption are valid Government interests to justify the regulation of campaign finance. In Brazil, the Constitutional Court understands that corruption goes beyond *quid pro quo*, potentially embracing things like the exchange of money for access or mere influence.

3 – In the US, money spent in elections is protected by First Amendment speech rights. In Brazil, although the Court recognized the weight of the free speech rights, it did not give them the same importance, stating that speech rights have an instrumental dimension in the political arena.

4 – In the US, direct contributions are different from independent expenditures and can be treated differently by state regulation. In Brazil expenditures are not a practice. However, the Court mentioned in dicta that if expenditures were a practice in Brazil, legal entities would be prohibited from using funds to support their preferred candidates, just like in the case of direct contributions.

5 – The US Supreme Court understands that corporations have protected political speech, just like individuals. In Brazil, the Constitutional Court is of the understanding that the political speech rights of legal entities are more limited than the political speech rights of individuals.

In light of the above, it is possible to conclude that the Brazilian Constitutional Court has expressed a view inconsistent with the understanding of the US Supreme Court in all of the five key elements on which the US Supreme Court relies to decide cases of campaign finance.

It is not the object of this paper to speculate on the reasons for that disparity, something that would require a separate study, considering the roots and histories of both countries and courts. What is perhaps possible to say is that the Brazilian Court adopted an understanding that can be considered – at least in theory – more liberal and progressive, in the sense that it is more committed to an equality rationale and tries to avoid the influence of the economic power (specially of corporations) on the electoral process.

It is not uncommon to see in more recent and still evolving democracies the Judiciary taking more progressive positions towards to protection of rights of the poor and more fragile layers

of the population, a characteristic that one may encounter in countries like South Africa, India and Brazil. In the specific case of Brazil, the more progressive stake of the Constitutional Court in many issues may also result from a discredit of the general population in relation to the Executive and Legislative representatives, in many cases involved in corruption scandals. As I mentioned above, the *Mensalão* Scandal was a huge case involving basically members of Congress and some politicians linked to the Executive. The case still today compromises the trust of the population in these two branches. On the other hand, the Judiciary remained more or less immune and, in the view of many, emerged from the case as a hero, given the strong position that the Constitutional Court took in seeking the conviction of the corrupt politicians.

Of course that I am not suggesting that the US Supreme Court is necessarily seen by the population as a conservative force in the American democracy. It has been actually adopting progressive views on key matters recently, such as same-sex marriage. And historically, many of the American most celebrated social advancements came from courts, not from the President or Congress. However, it is perhaps right to say that the US Supreme Court is not perceived as the most progressive force in the US society today. As I already mentioned, this may be only because the democracy in the US is more mature, and there is no need for an overly active Judiciary in the pursuit of social goals. It may be that in view of the way the American system was historically construed, the population is more used to rely on the Executive or Legislative with respect to social claims. Or it may be only that the majority of the US Supreme Court today is slightly more conservative, and that if one or two Justices were replaced, the outcomes could be totally different.

Regardless of these comments, as I already mentioned, it is not my goal to study the reasons for the discrepancy between Brazil and the United States in the campaign finance area. My objective was limited to showing how differently both Courts understand key issues related to private campaign finance. Hopefully, the two courts can learn a little bit more from each other's experiences and issue more informed and well thought decisions in the future.

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