2011

On Dejudicializing American Campaign Finance Law

Richard Briffault
Columbia Law School, brfflt@law.columbia.edu

ON DEJUDICIALIZING AMERICAN CAMPAIGN FINANCE LAW

Richard Briffault

INTRODUCTION

The Supreme Court dominates American campaign finance law. *Citizens United v. Federal Election Commission*[1] dramatically illustrates this basic truth, but *Citizens United* is nothing new. The Court has been the preeminent force in shaping and constraining our campaign finance laws since *Buckley v. Valeo*,[2] and the Court's role as arbiter of what regulations may or may not be enforced only continues to grow. The President of the United States can wag his finger at the Court during the State of the Union Address and denounce its *Citizens United* ruling to the Justices' faces on national television,[3] but even he does not propose to challenge the Court's decision. Instead, the President proposes only to regulate in those areas where the Court indicated some regulation is still permissible. According to public opinion polls, as much as two-thirds[4] of the population opposes the Court's holding that corporations and unions have an unlimited right to spend money in elections. But the public is, in practice, powerless to have the law changed.

The central features of American campaign finance law are the product of the Court's actions and opinions. Unlike many other Western democracies, which impose monetary limits on campaign

1. Citizens United v. FEC, 130 S. Ct. 876 (2010).

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

3. 2010 State of the Union Address, http://stateoftheunionaddress.org/2010-barack-obama ("Last week, the Supreme Court reversed a century of law to open the floodgates for special interests – including foreign corporations – to spend without limit in our elections. Well I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people, and that's why I'm urging Democrats and Republicans to pass a bill that helps to right this wrong.").

4. *See, e.g.*, The Pew Research Center, "Obama's Ratings Are Flat, Wall Street's Are Abysmal: Midterm Election Challenges for Both Parties" (Feb. 12, 2010) at 5, 30–31 (finding that 17% of those surveyed approved of the decision versus 68% disapproved); Greenberg Quinlan Rosner Research, Strong Campaign Finance Reform: Good Policy, Good Politics (Feb. 8, 2010) (finding 27% supported the decision versus 64% opposed, with 47% strongly opposed).

spending, the United States does not do so because the Court has said that is unconstitutional. In so doing, the Court has sustained the ability of wealthy candidates to convert their personal resources to campaign uses without constraint and has also upheld the ability of independent organizations and groups to spend without limit to influence election outcomes. Similarly, the Court has decided what political activity can be deemed election-related, and thus regulated by campaign finance law, and what political activity must be treated as beyond the scope of campaign regulation, even if that activity plainly has direct implications for political campaigns. So, too, the Court has defined—narrowly—the permissible purposes of campaign finance regulation. In so doing, it has rejected as a legitimate regulatory purpose—accepted by many other Western democracies—the promotion of political equality. To be sure, the campaign finance laws that we have are the ones that are adopted by our elected representatives in Congress or state and local legislatures, or by the people, or acting through state or local voter initiatives. But the Court has consistently—and, particularly in the last few years, aggressively—had the last word in deciding which laws may be allowed to take effect.

Court determination of campaign finance law might not be a bad thing if the Court's campaign finance jurisprudence were stable, coherent, workable, and closely tied to the text and values of the Constitution. Unfortunately, our Court-determined campaign finance law is none of these things. As *Citizens United*'s overturning of *Austin v. Michigan Chamber of Commerce*[5] and the electioneering communication portion of *McConnell v. Federal Election Commission*[6] demonstrates, the Court's jurisprudence has hardly been a model of stability. Nor are the results particularly coherent. For the two decades between *Austin* and *Citizens United*, the jurisprudence governing corporate and union election spending barred restrictions on spending in ballot proposition elections but, oddly, permitted spending prohibitions in candidate elections. *Citizens United*

5. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).
6. McConnell v. FEC, 540 U.S. 93 (2003).

eliminated that anomalous distinction by rejecting the idea that the corporate form poses any special dangers that justify special restrictions. But *Citizens United* left in place—at least for now—laws completely barring corporations and unions from making contributions to candidates and parties. Banning corporate contributions seems at odds with *Citizens United*'s view that corporations do not present special dangers justifying especially restrictive regulation, while the radical difference in the treatment of corporate contributions and expenditures seems doctrinally inconsistent.[7]

The two central doctrinal distinctions in the Court's campaign finance law—between contributions and expenditures and between express advocacy and issue advocacy—have been especially problematic. The very sharp difference in the treatment of contribution and expenditure restrictions has been fundamental to campaign finance doctrine since *Buckley v. Valeo*, yet that distinction has proven difficult to justify in theory or apply in practice. Although there is greater theoretical justification for some distinction to mark the boundaries of campaign finance regulation, the specific line drawn by the Court is, as the Court has itself acknowledged, "functionally meaningless."[8] For a few brief years the Court accepted Congress's more workable definition of "electioneering communication," but then in *Federal Election Commission v.*

7. As this article was going to press, two federal courts issued conflicting decisions concerning the impact of *Citizens United* on the longstanding federal and state laws prohibiting corporate contributions to candidates. In *Minnesota Citizens Concerned for Life, Inc. v Swanson*, ___ F.3d ___, 2011 WL 18331236 (8th Cir., May 16, 2011), the United States Court of Appeals for the Eighth Circuit held that *Citizens United* did not call into question the constitutionality of a Minnesota law prohibiting corporate contributions to candidates and political parties in state elections. In *United States v. Danielczyk*, however, the federal district court for the Eastern District of Virginia held that the federal ban on corporate contributions is unconstitutional. __ F. Supp.2d ___ , 1:11-cr-00085-JCC (E.D. Va., May 26, 2011). While the Eighth Circuit emphasized *Citizens United*'s invocation of the contribution/expenditure distinction, the district court found the "logic" of *Citizens United* to be "inescapable. . . . [F]or better or for worse, *Citizens United* held that there is no distinction between an individual and a corporation with respect to political speech. Thus, if an individual can make direct contributions . . . a corporation cannot be banned from doing the same thing." *Id.* at 44–46. However, five days later, on May 31, 2011, the district court invited the parties to brief whether the court should reconsider its May 26th order in light of the pre-*Citizens United* Supreme Court precedent specifically upholding the ban on corporate contributions. As a result, as of this writing, the ultimate decision in *Danielczyk* is uncertain. More generally, whatever clarity *Citizens United* brought to the constitutionality of corporate spending, the constitutionality of the regulation of corporate contributions remains unresolved.

8. *McConnell*, 540 U.S. at 193.

Wisconsin Right to Life, Inc.,[9] it limited Congress's new measure to the "functional equivalent of express advocacy" which is both vaguer than the old "express advocacy" standard yet still functionally meaningless. The combination of instability, internal inconsistency, and practical unworkability might be acceptable if the Court's doctrine were rooted in the text or values of the Constitution. But it is not. It is too late in the day to deny that campaign finance laws implicate the First Amendment freedom of speech and association, and the broader constitutional interest in political participation. Money may not be speech, but raising and spending money is essential to the dissemination of campaign communications, bringing facts and arguments to the electorate, and informing the voters. The central constitutional question in campaign finance law is what public interests justify restrictions, requirements, or prohibitions affecting the use of campaign money. The Court has taken a very narrow approach to the justifications for regulation, limiting campaign finance law to the prevention of corruption and the appearance of corruption, and voter information. Any concern for political equality—for limiting the ability of the wealthy to deploy their financial advantage in the political arena—has been ruled out. Not only may equality not be pursued by limits on spending, but, in *Davis v. Federal Election Commission*,[10] the Court held it is unconstitutional for Congress to try to make it easier for non-wealthy candidates to raise money to campaign against wealthy self-funded opponents, even though the law in question imposed no limits on the ability of the wealthy to use their money. Moreover, in *Citizens United* the Court shifted away from *McConnell*'s willingness to find that "corruption" may include the efforts of individuals and interest groups to use campaign money to obtain special access to government decision-makers,[11] and instead embraced the more crabbed view, specifically rejected in *McConnell*, that only campaign practices that resemble bribery—and not the broader use of campaign

9. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).
10. Davis v. FEC, 554 U.S. 724 (2008).
11. *McConnell*, 540 U.S. at 143–54.

money to influence government behavior—can be treated as corruption.[12]

Nothing in the Constitution dictates either *Davis*'s exclusion of equality concerns or *Citizens United*'s narrow definition of corruption. Indeed, the Court has recognized in other settings that political equality is a central value in election law, with strong consequences for both the scope of the right to vote and legislative representation, and recent scholarship has demonstrated a broad concern with corruption, not limited to bribes and near-bribes, immanent throughout the Constitution.[13] The Court's limited definition of the values justifying campaign finance restrictions reflect the values of its members—values that can shift with changes in the composition of the Court, much as the tenor of the Court's campaign finance rulings changed with the replacement of Justice O'Connor by Justice Alito—not anything specific in the text or values of the Constitution.

In this Article, I will suggest that campaign finance law ought to be, to a considerable degree, dejudicialized. That is, the Court should take a reduced role and be more deferential to the decisions of elected representatives or of the people themselves. This does not mean judicial abandonment of the field. The Court still needs to play a role in policing against laws that would discriminate against minorities and political outsiders or that would entrench incumbent officeholders or parties. But short of these extreme cases, the Court should let the democratic process play the leading role in determining how democratic elections ought to be financed, and what campaign finance practices ought to be regulated or restricted. The case for this change is based on the failure of the Court to develop a coherent and workable body of doctrine, the lack of a clear constitutional basis for the aggressive and constraining role the Court has taken, and the democratic legitimacy that would result if these decisions were taken primarily by politically accountable decision-makers.

12. Citizens United v. FEC, 130 S. Ct. 876, 909–11 (2010).

13. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

In Part I, I will review some of the "internal" problems with the Court's campaign finance doctrine—its inconsistencies and theoretical and practical difficulties. This Part will address specifically the Court's treatment of corporations, the contribution/expenditure distinction, and the scope of election-related activity that may be subject to campaign finance regulation. In Part II, I will consider how the Court has constrained the justifications for campaign finance regulation by rejecting or ignoring many of the legitimate political concerns underlying the laws enacted by elected representatives or adopted by popular initiative. Campaign finance implicates multiple constitutional values, but the Court has chosen to recognize just a few. That narrowing action, however, is not rooted in the Constitution itself but reflects the decision of the members of the Court to prefer certain values to others. This is ultimately a political judgment that certain values matter more than others in the financing of campaigns, but in making such a political judgment, not clearly rooted in the Constitution, the Court ought to give greater weight to the enactments of politically accountable elected representatives and of the voters who adopt ballot measures. Finally, in Part III, I will indicate that aggressive judicial policing of campaign finance law is not justified by the concern that incumbents will use campaign finance regulation to entrench themselves in office. I will then sketch out, with reference to some of the Court's other election law doctrines, how a more dejudicialized campaign finance law with a Court more deferential to the decisions of elected representatives and to the electorate might work.

I. THE COURT'S DOCTRINAL DIFFICULTIES

A. Corporations

Among the key goals of legal doctrine are internal consistency and temporal stability. By that measure, the Court's campaign finance doctrine has long been a failure. For many years, the Court's approach to the law governing corporate participation in financing election campaigns was the poster child for the anomalies and doctrinal zigzags that are the hallmarks of the Court's campaign

finance jurisprudence. In *First National Bank of Boston v. Bellotti*[14] in 1978, the Court struck down a Massachusetts law forbidding corporations from spending to influence the vote in ballot proposition elections. *Bellotti* emphasized the "inherent worth of the [corporate] speech in terms of its capacity for informing the public,"[15] and denied that "the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."[16] *Bellotti* was closely in tune with *Buckley* and seemed to foreshadow judicial rejection of the special restrictions governing corporate electoral activity that have long been a central feature of American campaign finance law and that antedated *Buckley*'s reformulation of campaign finance doctrine by decades.

Yet, applying *Buckley* to corporations proved to be far from a simple matter. Just four years after *Bellotti*, in *Federal Election Commission v. National Right to Work Committee* (*NRWC*),[17] the Court upheld a federal law that tightly restricted the ability of a nonprofit ideological corporation to solicit donations to its political action committee (PAC). The Court found that the government's interest in "ensur[ing] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests'" justified the restriction.[18] In other words, despite *Bellotti*'s "speech is speech" approach, in *NRWC* the corporate form mattered, even when the corporation in question was not a business corporation but a nonprofit. Four years after that, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*MCFL*),[19] the Court expanded on *NWRC*'s finding that the corporate form provides a special justification for regulation—that "concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political

14. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
15. *Id.* at 777.
16. *Id.* at 778.
17. FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).
18. *Id.* at 207.
19. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

ideas."[20] But this time, unlike in *NRWC*, the Court determined that the nonprofit nature of the corporation mattered. With campaign spending by a nonprofit, the "prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace"[21] did not arise. As a result, limitations on corporate spending could not constitutionally be applied to a nonprofit even though it was organized in the corporate form.

Four years after that, in *Austin v. Michigan Chamber of Commerce*,[22] the Court upheld a Michigan law prohibiting corporations from spending money to support or oppose candidates in state elections. Again, the Court emphasized the special nature of the corporate form—"the unique state-conferred corporate structure that facilitates the amassing of large treasuries."[23] The Court distinguished *Bellotti* as a ballot propositions case, implying that corporate status mattered in candidate elections even if it did not matter in voter initiative elections. In 2003, the Court twice upheld special restrictions on corporations: In *Federal Election Commission v. Beaumont*, it sustained the application of the federal ban on corporate campaign contributions to nonprofit corporations,[24] and in *McConnell v. Federal Election Commission*, it rejected a facial challenge to the provision of the Bipartisan Campaign Reform Act ("BCRA") of 2002 extending the prohibition of corporate independent spending to corporate electioneering communications.[25]

Of course, in 2010, in *Citizens United* the Court returned to *Bellotti*'s position that "speech is speech" and that the corporate form is irrelevant to the constitutionality of limits on corporate spending. *Citizens United* invalidated bans on corporate campaign expenditures, and overturned both *Austin* and the relevant portion of *McConnell*.[26] *Citizens United* has the benefit of simplifying the law by eliminating the arbitrary and unpersuasive candidate election/ballot proposition

20. *Id.* at 257.
21. *Id.*
22. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).
23. *Id.* at 660.
24. FEC v. Beaumont, 539 U.S. 146 (2003).
25. McConnell v. FEC, 540 U.S. 93, 203–09 (2003).
26. Citizens United v. FEC, 130 S. Ct. 876, 913 (2010).

election distinction. So, too, by going directly to the question of whether corporate campaign spending may be barred, the Court also eliminated *MCFL*'s special carve-out for nonprofit corporations from the campaign spending ban and with it the difficulty of drawing the line between business and nonprofit corporations in cases, such as *Citizens United* itself, in which a nonprofit organization accepted some business corporation contributions.

Yet even after three decades of doctrinal zigzag, the question of whether corporations present special problems justifying specially restrictive campaign finance laws is still not fully laid to rest. Although *Citizens United* overruled *Austin* and the relevant portion of *McConnell*, it left alone *NRWC* and *Beaumont*. Indeed, the Court specifically distinguished *NRWC* as a contributions case that was of "little relevance" to the question of limits on corporate spending.[27] Federal law flatly bans corporate contributions to federal candidates, parties and political committees, and many states similarly bar corporate contributions. Yet given that contributions enjoy some constitutional protections—albeit less than expenditures—it is difficult to see how a complete ban on corporate donations can be sustained without some judicial endorsement of the view emphatically disavowed in *Citizens United* that corporate campaign participation presents no special dangers of corruption. It is not clear if the absolute federal ban on corporate campaign contributions—which is our oldest federal campaign finance law, dating back to 1907—will ultimately survive *Citizens United*. But if it does, then the fundamental uncertainty at the heart of the Court's treatment of campaign finance restrictions on corporations for the last third of a century will remain.[28]

Still, *Citizens United* did eliminate the *Bellotti/Austin* anomaly, and if it stands—an uncertain proposition for an issue that has been marked by a thirty-two year sequence of 5–4 (*Bellotti*), 3–6 (*Austin*), 4–5 (*McConnell*), and 5–4 (*Citizens United*) votes—it will clarify and simplify the law governing corporate and union spending, and

27. *Id.* at 909.

28. *See supra* note 7 and accompanying text.

produce doctrine that is more internally coherent even if in greater tension with the public's political preferences. But *Citizens United*'s resolution of the corporate spending issue only casts in sharper relief the two central doctrinal difficulties that have beset campaign finance law since the Court's seminal decision in *Buckley v. Valeo*—the contribution/expenditure distinction and the express advocacy/issue advocacy distinction.

B. The Contribution/Expenditure Distinction

The contribution/expenditure distinction has been at the heart of American campaign finance jurisprudence since *Buckley v. Valeo*. *Buckley* distinguished between expenditures—that is, spending by candidates, parties, political committees and other organizations, groups or individuals on communications to the voters (including expenses preparing for such communications)—and contributions—that is, payments made to a candidate, party, political committee or other campaign actor that are then used to fund communications to the voters (or to make a contribution to another campaign actor). The Court found the two forms of campaign money differed in two ways: the constitutional value of each activity, and the problem justifying regulation that each activity may be said to generate.

Buckley treated expenditures as the highest form of campaign speech and, consequently, gave them the greatest degree of constitutional protection. The Court held that restrictions on expenditures constitute "direct and substantial restraints on the quantity of political speech,"[29] and would thus be subject to strict judicial scrutiny. Contributions, by contrast, were treated as a lower order of speech. Unlike an expenditure, a contribution does not entail an expression of political views: it "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[30] Limiting the size of a contribution places little burden on expression as "the quantity of communication by the contributor does not increase perceptibly with

29. Buckley v. Valeo, 424 U.S. 1, 39 (1976).
30. *Id.* at 21.

the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."[31] As a result, contribution restrictions would be subject to less strict review, and would be upheld if "closely drawn" to advance "sufficiently important" government interests.[32]

Turning to the interests justifying regulation, *Buckley* found that the government interest in preventing corruption and the appearance of corruption justified contribution limits but not spending limits. With contributions, particularly the prospect that "large contributions are given to secure a potential *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."[33]

But a concern about corruption could not justify expenditure limits, either on candidates or on expenditures by non-candidate individuals or organizations supporting or opposing candidates for office—spending that has come to be known as "independent expenditures." A concern about corruption clearly failed to justify limits on a candidate's use of his or her personal wealth: "[T]he use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse" from potentially corrupting contributions.[34] Nor could corruption justify limits on a candidate's total spending. Although the absence of a spending limit increases the pressure on a candidate to raise potentially corrupting contributions, including efforts to circumvent contribution limitations, *Buckley* held that the contribution restrictions adequately addressed that concern. More controversially, *Buckley* also held the anti-corruption goal could not justify limits on independent expenditures. Although large independent spending supporting a candidate or advocating the defeat of her opponent could, like a contribution, be helpful to a candidate and thus serve as a source of "coercive influence,"[35] *Buckley* simply

31. *Id.*
32. *Id.* at 25; *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000).
33. Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).
34. *Id.* at 53.
35. *Id.* at 25.

declared that such expenditures, as long as they were undertaken without "prearrangement" or "coordination" with a candidate, posed no corruption danger: "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[36]

The only conceivable government interest that could justify limits on spending was political equality. Capping candidate expenditures would reduce the inequality between the best- and worst-funded candidates, and limits on independent spending would limit the ability of the wealthy to have more influence over the election debate than others. But the Court flatly declared that equality could not justify spending limits: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others" was famously dismissed as "wholly foreign to the First Amendment."[37] Equality could not be used to justify limits on a candidate's use of his personal wealth, his total campaign spending, or expenditures by independent individuals and organizations promoting or opposing candidates.

For more than three decades the contribution/expenditure distinction has been central to the Court's campaign finance jurisprudence, but it has proven highly problematic. The sharp distinction between the two categories of campaign money makes little sense in either theory or practice. On the one hand, the Court has surely undervalued the constitutional significance of campaign contributions. With the exception of personally wealthy candidates, campaign contributions are a necessary prerequisite if a candidate is to be able to undertake campaign expenditures. In the absence of public funding or the provision of significant in-kind benefits like free broadcast time to candidates, contributions are essential if candidates are to obtain the money to be used for expenditures. Contribution limits simply make it more difficult for candidates to raise the money that will be converted into campaign expenditures. Moreover, by permitting candidates to spend unlimited amounts but

36. *Id.* at 47.
37. *Id.* at 48–49.

requiring them to collect campaign funds in only limited sums, the *Buckley* regime pushes candidates to devote enormous amounts of time and effort to fund-raising. Indeed, fundraising ability itself becomes a prerequisite to candidacy. The contribution/expenditure distinction has also provided an enormous opening to political intermediaries like political action committees (PACs) and bundlers who can enable candidates to address the fundraising problem inherent in a system based on unlimited spending and limited donations. Where candidates need to spend large sums of money but can raise contributions only in small amounts, the assistance provided by PACs and bundlers can be vital, and a source of influence with the candidates they aid.

So, too, campaign contributions are an important form of campaign participation for many politically active people. Limiting contributions limits this form of participation. Although *Buckley* determined that from a constitutional perspective it is the fact of a contribution, not its amount, that matters, as "the expression rests solely on the undifferentiated, symbolic act of contributing,"[38] that is unpersuasive. A larger contribution says more—that the donor is *more* supportive of a candidate—than a smaller donation by the same donor to the same candidate. The intensity of a donor's support may be of expressive significance. By the same token, not all expenditures involve a direct communication from candidates or other political organizations to voters. Expenditures can include office rent, staff salaries, equipment purchases, and other administrative overhead, as well as opposition research, opinion polling, and focus groups. These may be crucial to a campaign, but are not the direct expression of arguments or information captured by the Court's description of campaign expenditures as pure speech.

Nor is it always easy to distinguish a contribution from an expenditure. The majority in *Buckley* determined that a candidate's use of his personal wealth in his own campaign ought to be treated as an expenditure even though formally the candidate is contributing money to the campaign. Justice Marshall, who joined all the other

38. *Id.* at 21.

aspects of *Buckley*, dissented on this point.[39] Several decades later, Justice Breyer suggested that candidates' expenditures from personal funds "might be considered contributions to their own campaigns."[40]

The more difficult line-drawing question has involved independent expenditures. This also directly implicates the uncertainties built into the one substantive justification for regulation the Court has recognized: the prevention of corruption and the appearance of corruption. The Court has recognized that expenditures coordinated with a candidate's campaign present the same dangers of corruption and the appearance of corruption as contributions and, accordingly, has held they may be regulated like contributions.[41] However, the Court has rejected the idea that independent expenditures that aid a candidate and are just as likely to cause a candidate to feel obligated to the spender as to the donor of a comparable amount of money to the candidate's campaign can be limited. This has led to some bizarre results. In *Colorado Republican Federal Campaign Committee v. FEC*, the Court held that spending by a political party in support of its own senate candidate can be treated as independent—and thus not subject to restriction.[42] The lack of any formal coordination with the candidate the party intended to aid was treated as of greater constitutional significance than the ongoing relationship between a party's candidates and the party. Political parties exist in large measure to elect candidates who are party members, bear the party label, and appear under the party's name on the ballot. But *Buckley*'s theory of independent expenditures led the Court to conclude that the lack of party-candidate coordination of a specific ad meant that the party had to be treated as an organization totally independent of its candidates.

In *McConnell v. FEC*—a case in which the Court generally took a pro-regulatory approach—the Court went even further in upholding the concept that party spending undertaken independent of the party's

39. *Id.* at 286–87 (Marshall, J., dissenting).

40. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 405 (2000) (Breyer, J., concurring).

41. *Buckley*, 424 U.S. at 46–47; *accord* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 442–43 (2001).

42. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 608 (1996).

own candidates is independent spending in the *Buckley* sense and, thus, protected from limitation. *McConnell* struck down a federal law requiring that a party choose between coordinated and independent expenditures once it has nominated a candidate.[43] Whatever the possibility of party independent spending in unusual circumstances—and in *Colorado Republican* the party's spending had occurred before a nominee had been selected and consisted of criticism of the candidate of the opposing party—surely it makes sense to conclude that once a party has nominated a candidate and is coordinating its general election activities with that candidate, it can no longer claim to also be spending independently in support of the same candidate.[44] But the *Buckley* definition of independence, which focuses on the coordination or prearrangement of the specific expenditure, led the Court to come out the other way, thus confirming the politically bizarre idea that a party can simultaneously coordinate with its own candidate and spend independently of the same candidate.

Perhaps the most problematic aspect of the contribution/expenditure distinction is the Court's increasingly categorical determination that expenditures simply do not raise the corruption and appearance of corruption concerns that justify contribution regulation. In *Buckley*, the Court's holding that corruption cannot justify restrictions on independent expenditures was at least quasi-empirical in nature. The Court found only that independent expenditures "*may* well provide little assistance to the candidate's campaign and indeed *may* prove counterproductive."[45] In *Bellotti*, even as it struck down a state ban on corporate spending in ballot proposition elections, the Court acknowledged that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[46] Similarly, when it struck down limits on independent expenditures in support of or opposition to presidential candidates who had accepted public funding in *FEC v.*

43. McConnell v. FEC, 540 U.S. 93, 213–19 (2003).
44. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. at 613–14.
45. *Buckley*, 424 U.S. at 37 (emphasis added).
46. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978).

National Conservative PAC, the Court acknowledged that it is "hypothetically possible . . . that candidates may take notice of and reward those responsible for PAC [independent] expenditures by giving official favors to the latter in exchange for the supporting messages," but concluded that on the record in the case "such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more."[47]

In *Caperton v. A.T. Massey Coal Co., Inc.*,[48] the Court actually recognized that independent spending could be the functional equivalent of a contribution, and just as corrupting as a contribution of comparable size, when it held that a judge elected after an election campaign in which he had been the beneficiary of millions of dollars of independent expenditures was required by the constitution to recuse himself from a case involving the independent spender. The Court determined that given the amount of campaign assistance the independent spending had provided, "there is a serious risk of actual bias—based on objective and reasonable perceptions," in favor of the independent spender in such a case.[49] Stunningly, *Caperton* completely blurred the contribution/expenditure distinction that the Court had spent thirty-three years developing and sustaining when it repeatedly referred to the large independent expenditures in the case as "contributions,"[50] not independent expenditures. In *Caperton*, functional reality finally overwhelmed the legal categories.

But in *Citizens United*, barely six months after *Caperton*, the Court not only returned to the contribution/expenditure distinction but also made it absolute. The Court acknowledged that "elected officials [may] succumb to improper influences from independent expenditures" and that if officials "surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern."[51] But even that concern could not support limits on independent expenditures. *Citizens United* declared independent

47. FEC v. Nat'l Conservative PAC, 470 U.S. 480, 498 (1985).
48. Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009).
49. *Id.* at 2257, 2263.
50. *Id.* at 2263–65.
51. Citizens United v. FEC, 130 S. Ct. 876, 911 (2010).

spending limits unconstitutional under all circumstances, regardless of the empirical evidence of their effects on the elected officials who benefit from them.

Akin to the treatment of independent expenditures, the Court has also experienced difficulty in determining what kinds of donative transactions have sufficiently corruptive potential to be subject to limitation. In *Buckley*, the Court stressed that corruption is not limited to the kinds of quid pro quo deals already addressed by bribery laws. Bribes, the Court observed, are only "the most blatant and specific attempts of those with money to influence government action."[52] In *Nixon v. Shrink Missouri Gov't PAC*, the Court reemphasized that the corruption concern is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors."[53] In other cases, however, the Court has stated that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors."[54]

The issue came to a head in *McConnell v. FEC*, when the Court addressed Congress's restrictions on soft money contributions; that is, donations by wealthy individuals, corporations, and unions that were dramatically greater than the dollar limitations ordinarily applicable to individual donations or that flatly violated the ban on corporate and union donations to federal candidates and parties. The conceptual basis for soft money's evasion of federal contribution restrictions was that the donations did not go to specific candidates or to parties for direct support of specific candidates, but were given to the parties to finance party activities generally or to pay party activities that aided candidates across the board, like voter registration and get-out-the-vote drives and generic party advertising, not specific candidates. In the absence of a direct relationship between the donor and a specific candidate, defenders of the practice contended that soft money did not raise an issue of corruption that would justify restriction. A divided Court, however, found there was

52. Buckley v. Valeo, 424 U.S. 1, 28 (1976).
53. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000).
54. FEC v. Nat'l Conservative PAC, 470 U.S. 480, 497 (1985).

substantial evidence that federal officeholders and candidates avidly sought soft money and that major donors provided it "for the express purpose of securing influence over federal officials."[55] Although there was little proof of specific situations in which donations directly affected officeholder decisions, the Court emphasized that was not necessary for a campaign practice to pose a corruption danger. Congress could decide that the preferential access that large soft money donations enabled special interest donors to obtain from legislators was itself corruption.[56]

But in *Citizens United* the Court directly challenged its own prior broad reading of corruption. Justice Kennedy, citing and quoting extensively from his *McConnell* dissent which he cited as an opinion and not a dissenting opinion, emphasized that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt"[57] and that concern about undue influence cannot, consistent with the First Amendment, be a basis for limiting a campaign finance practice "because it is unbounded and susceptible to no limiting principle."[58] Although a consistent theme in *Citizens United* is that contributions are categorically different from expenditures, the Court cited and quoted language that would lead to a much more restrictive approach to contribution limitations as well.

The contribution/expenditure distinction is thus both fundamental and riddled with line-drawing issues and inconsistent treatment. Many of the justices have realized this and in recent cases perhaps a majority of the Court has hinted at a willingness to break with *Buckley*'s central holding. In 2006, in *Randall v. Sorrell*,[59] Justices Thomas and Scalia indicated in a concurring opinion that they would subject contribution restrictions to strict judicial scrutiny, just like

55. McConnell v. FEC, 540 U.S. 93, 147 (2003).
56. *Id.* at 142–54.
57. Citizens United v. FEC, 130 S. Ct. 876, 910 (2010).
58. *Id.* (quoting *McConnell*, 540 U.S. at 296 (Kennedy, J., dissenting)).
59. Randall v. Sorrell, 548 U.S. 230 (2006).

expenditure limits.[60] Justice Kennedy also voiced his "skepticism regarding that system and its operation."[61] As Justice Kennedy's concurring opinion also concluded that the application of exacting scrutiny to expenditure restrictions is "appropriate,"[62] one can only surmise that he would support closer review of contribution restrictions, a position he had gestured at previously.[63] On the other hand, Justices Stevens,[64] Souter,[65] and Ginsburg[66] in *Randall* indicated they were willing to reconsider *Buckley*'s ban on limits on candidate spending. Justice Breyer, joined by Justice Ginsburg, had previously written to suggest that "it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience . . . making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates."[67] And in *Citizens United*, Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, contended that "even technically independent expenditures can be corrupting in much the same way as direct contributions" and so could be regulated.[68]

The contribution/expenditure distinction is not irrational. Indeed, it can be seen as a plausible compromise that recognizes the First Amendment value of campaign money while still enabling governments to address some of the most problematic features of the private-money-based campaign finance system. But it has proven difficult to operate; has led to anomalous results, particularly the concept of party independent spending; and has resulted in an unrealistic, highly rigid distinction between contributions and independent spending that fails to acknowledge that in reality the two practices can have similar consequences. The distinction also relies

60. *Id.* at 266–67 (Thomas, J., concurring). Justice Thomas had taken that position in several other cases. *See id.* (noting cases in which Justice Thomas argued for applying strict scrutiny to contribution restrictions).

61. *Id.* at 265 (Kennedy, J., concurring).

62. *Id.* at 264.

63. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 405–10 (1999).

64. *Randall*, 548 U.S. at 273–81 (Stevens, J., dissenting).

65. *Id.* at 281–84 (Souter, J., dissenting).

66. Justice Ginsburg joined Justice Souter in his dissenting opinion. *Id.*

67. *Nixon*, 528 U.S. at 405.

68. Citizens United v. FEC, 130 S. Ct. 876, 967 (2010).

heavily on a concept of "corruption" that is indeterminate in meaning and has been marked by sharp swings in judicial interpretation. As a result, the doctrinal development in this area has produced a body of campaign finance law that even most members of the Court, as individual justices, reject.

C. Express Advocacy and Issue Advocacy

The regulation of campaign money requires some means of determining what constitutes campaign money, as opposed to non-election-related political activity. This is less of a problem for contributions to and spending by candidates, as candidate activity can be treated as presumptively campaign-related (although there may be some question as to whether or when a particular individual has become a candidate for office). This is a much bigger issue for the host of individuals, political committees, special interest organizations, corporations, labor unions, and other groups that engage in some mix of election-related activity, non-election-related political activity, and even non-political activity. The application of campaign disclosure laws requires some determination of which contributions and expenditures are sufficiently election-related as to be subject to disclosure. So, too, the application of contribution limits requires some determination of whether a particular contribution is given to election-related activity or other, non-election-related political activity.

To be sure, drawing a line between elections and politics is, in some sense, impossible. Elections are about political issues and ideas, and political debate frequently is focused on and culminates in an election. Election-related speech will typically refer to political issues, and political speech will frequently refer to elected officials or candidates for office. As *Buckley* put it, "[t]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[69] Yet some distinction must be drawn between the two for campaign

69. Buckley v. Valeo, 424 U.S. 1, 42 (1976).

finance law to work. In fact, Congress and state and local governments regularly make that distinction when they define the scope of their campaign finance regulations.

The Supreme Court, however, has deemed this, too, to be a matter for judicial determination, and through the standard it initially adopted in *Buckley* the Court has sharply narrowed the field of constitutionally permissible campaign finance regulation. *Buckley* held that only the express advocacy of "the election or defeat of a clearly identified candidate for federal office" may be subject to federal campaign finance regulation.[70] In a footnote, the Court indicated that this would "restrict" the scope of campaign finance law to communications that included phrases like "'vote for,' 'elect,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[71] These became known as the "magic words" of express advocacy. All other activity came to be known as "issue advocacy," even though it need not involve the discussion of issues. The Court justified its standard as necessary to avoid both vagueness and overbreadth,[72] but in practice the standard proved extremely narrow, effectively exempting a host of campaign messages from coverage. The key concept in the Court's test was that the message include literal words of express electoral advocacy. An advertisement could warmly praise or sharply criticize a candidate for office, but so long as it avoided literally calling on voters to elect or defeat that candidate it would be treated as issue advocacy, not express advocacy. Even discussion of a candidate's character, personality, or private life was issue advocacy so long as there was no call to vote for or against that candidate. To guarantee that an ad would be treated as issue advocacy and not express advocacy, a political committee could include a tag line urging the viewer or listener to call the sponsor for more information, or to call the candidate depicted in the ad and tell him or her what the caller thinks of the candidate's actions or positions. As such advocacy was not electoral, the ad would not be

70. *Id.* at 44.
71. *Id.* at 44 n.52.
72. *Id.* at 44, 78–80.

considered express advocacy. As a result, the express advocacy standard proved extremely easy to evade. With most campaign professionals recognizing that even many of the most successful election ads by candidates relied on more subtle pitches than literally calling on voters to vote a certain way, the express advocacy standard assured that the vast majority of election ads placed by campaign participants other than candidates would be exempt from campaign finance regulation.[73]

In *McConnell v. FEC*, the Court acknowledged the inadequacy of the express advocacy test and upheld BCRA's provision extending certain federal campaign laws—the prohibition on corporate and union campaign expenditures and disclosure requirements—to a newly defined category of "electioneering communications," which consists of broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office, are targeted on that candidate's constituency, and are aired within thirty days before a primary or sixty days before a general election in which that candidate is running.[74] The Court agreed that based on the evidence before Congress and the record developed in the district court during the litigation challenging the new law, "*Buckley*'s magic-words requirement is functionally meaningless," and that as a result, "*Buckley*'s express advocacy line . . . has not aided the legislative effort to combat real or apparent corruption."[75] The Court agreed that the new standard avoided vagueness and was sufficiently narrowly tailored to satisfy the overbreadth concern. Although the Court acknowledged that some advertisements that met the statutory standard might be true issue ads, it found that the "vast majority of ads" covered by the statute had an "electioneering purpose" and were thus the "functional equivalent of express advocacy" and could, constitutionally, be subject to regulation.[76]

---

73. *See generally* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999).

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

75. *Id.* at 193–94.

76. *Id.* at 206.

To be sure, the Court did not actually scrap the express advocacy standard. Rather, all *McConnell* held was that the electioneering communication provision was constitutional. Express advocacy continued to be required as a prerequisite for regulation of electioneering messages not falling within the electioneering communications provisions, e.g., non-broadcast ads, or ads not aired within the defined statutory pre-election period. Potentially, other extensions of regulation might be permissible provided, like "electioneering communication," they satisfied the Court's vagueness and overbreadth concerns. But in the immediate aftermath of *McConnell* there were two standards for defining election-relatedness: "magic words" express advocacy as the general rule, and electioneering communications for messages that met BCRA's technology and timing requirements.

However, much of *McConnell*'s incorporation of the reality of campaign practices into the standard for defining election-relatedness was undone four years later in *FEC v. Wisconsin Right to Life, Inc. ("WRTL").*[77] In *WRTL,* a closely divided and fragmented Court, acting without a majority opinion, effectively eviscerated *McConnell.* Although the case began as an attempt to create an as-applied exception to the "electioneering communication" standard for an ad that could be read as either electioneering or grass-roots lobbying over a legislative issue, the Court effectively invalidated the statutory standard. The Court found that although, consistent with *McConnell,* the First Amendment does not require the literal "magic words" express advocacy standard adopted in *Buckley,* it does forbid the regulation of any campaign activity that is not the "functional equivalent" of *Buckley*-style express advocacy.[78] In one stroke, the Court, in Chief Justice Roberts's lead opinion, sharply narrowed the scope of constitutionally permissible campaign finance regulation while adopting a new standard that lacked the "magic words" express advocacy standard's only virtue—clarity. The Chief Justice provided two possible readings of the "functional equivalent" standard. On the

77. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).
78. *Id.*

one hand, he explained 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"[79]—which would expand the scope of coverage only a little beyond the "magic words" express advocacy test. But then he noted that the ads at issue in the case—which were held to be entitled to a constitutional exemption from the electioneering communication statute even though they referred to a candidate and were broadcast in the defined pre-election period—"focus on a legislative issue, take a position on the issue, . . . do not mention an election, candidacy, political party, or challenger; and . . . do not take a position on a candidate's character, qualifications, or fitness for office"[80]—leaving open the possibility that more "electoral" ads might be considered the functional equivalent of express advocacy even if electioneering was not the only "reasonable interpretation" that could be applied to the ads.

Beyond the vagueness and uncertainty created by the *WRTL* standard, the lead opinion also broke with *McConnell*'s willingness to give great weight to the proven impact of campaign practices in the determination of legal standards. *McConnell* looked to the statements of officeholders, candidates, interest group advocates, corporate executives, campaign strategists, and political scientists in determining that the intent, effect, and context of these ads mattered, so that those factors ought to be included in determining how to distinguish between electioneering and other political advertising.[81] Chief Justice Roberts, however, dismissed these factors and focused instead exclusively on the wording of the ad—on whether the ad used the unmistakable language of electoral advocacy.[82]

WRTL simultaneously complicated and narrowed the scope of constitutionally permissible campaign finance regulation. The "functional equivalent of express advocacy" test is vague, and must coexist with the ordinary "magic words" express advocacy test that

79. *Id.* at 469–70.
80. *Id.* at 470.
81. McConnell v. FEC, 540 U.S. 93, 205–6 (2003).
82. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 466–67, 469–70 (2007).

continues to apply to non-broadcast ads and to ads aired outside the pre-election period. Like the "magic words" test, the standard will exempt many ads that—if intent, effect, or context were considered—would likely be treated as electioneering. Strikingly, *WRTL* did not find that to be a problem. Indeed, foreshadowing *Citizens United*'s categorical protection of independent spending even if it could be shown that such spending influences officeholders, the *WRTL* lead opinion makes a point of stressing that it is based on constitutional norms, not campaign realities. Moreover, the sharp shift from *McConnell* to *WRTL* less than four years later underscores both the marked instability of the Court's campaign finance doctrine and the variability of its constitutional norms.

II. THE COURT'S NARROWING OF THE PERMISSIBLE PURPOSES OF CAMPAIGN FINANCE REGULATION

The Supreme Court's campaign finance jurisprudence is a mess. It has been marked by sharp doctrinal swings—from *Bellotti* to *Austin* to *Citizens United* on the regulation of corporations, and from *Buckley* to *McConnell* to *WRTL* on the permissible scope of regulation. It has led to odd results, such as the finding that parties are capable of spending independent of their own candidates and that such spending is constitutionally protected, but that parties can be restricted when they cooperate with their own candidates. The Court repeatedly tells us that the proper response to high levels of spending is not limits but more spending. But then in *Davis*, when faced with a law that would make it easier for a candidate facing a wealthy, high-spending self-funded candidate to do just that by raising money in larger amounts, the Court held that law unconstitutional.[83] And, perhaps most strikingly, the Court has insisted on the adoption and enforcement of certain rules that fly in the face of campaign realities—that independent spending is categorically different in its lack of corruption danger from contributions, and that whether a

83. Davis v. FEC, 554 U.S. 724 (2008).

statement ought to be treated as electioneering can be determined entirely from its words without reference to its context.

To some extent, these problems in the Court's doctrine are not surprising. Although the Court has assumed for itself the primary role in articulating the constitutional constraints on campaign finance law, the Constitution actually gives the Court relatively little guidance as to how to resolve campaign finance issues. The Constitution gives Congress the power to regulate the time, place, and manner of federal elections; to guarantee a republican form of government to the states; to prevent the states from denying their citizens the equal protection of the laws; and, of course, it prohibits Congress and, through nearly a century of interpretation, the states, from abridging the freedom of speech. But none of these provisions clearly addresses whether and to what extent Congress or a state or local legislature can regulate campaign contributions and expenditures.

More fundamentally, campaign finance law implicates multiple constitutional concerns including freedom of speech and association, voter information, political equality, the integrity of the electoral process, and the consequences of the campaign finance system for the effectiveness and integrity of government. These constitutional concerns often come into conflict, but the Constitution does not indicate how they are to be weighed and balanced against each other. The conflicts are often deeply normative, such as the trade-off between equality and free speech raised by the imposition of limits on campaign money, or that between political participation and voter information posed by disclosure rules. They also involve the resolution of empirical questions, such as whether independent spending has the same potential to influence government officials as contributions of a comparable size, on whether—or at what monetary level—limits on contributions and expenditures help or hinder incumbents.

The Court has, to a considerable degree, assumed the authority to resolve these questions. But it has done so largely by dismissing outright certain values such as equality, or by narrowly defining the role that other values, such as competitive elections and addressing the impact of the campaign finance on governance, may play. In so

doing it has not only sharply narrowed the goals campaign finance law may be allowed to advance, but it has rejected the judgments of elected officials or voters approving ballot propositions that those other values matter and ought to be taken into account in the rules that govern campaign contributions and spending. And it has done so without a clear constitutional mandate that the Court's values are the only ones that matter or that the political values rejected by the Court do not.

The most important constitutional value the Court has rejected is, of course, voter equality, which is a central premise of our democratic system. Over the course of our history, the electorate has been expanded from a relatively narrow set of white male property owners or taxpayers to virtually all adult citizens. Modern constitutional developments like the one person, one vote doctrine[84] and the anti-vote-dilution doctrine[85] have sought to ensure not simply that every adult citizen enjoys the right to vote but that each voter has an equally weighted vote, and thus an equal opportunity to influence the outcome of an election. Moreover, modern constitutional law emphatically denies a special place for wealth in voting and elections. Most states long ago scrapped wealth or tax-payment requirements for voting, and the Court made the elimination of such wealth or tax-payment tests constitutionally mandatory. Wealth may not be a criterion for the right to cast a ballot,[86] or to be a candidate,[87] nor may the wealth of a voter be a factor in deciding how much weight a particular vote may be given.[88]

The role of voter equality in our electoral system has implications beyond the actual casting and counting of ballots. For the election to serve as a mechanism of democratic decision-making, there must be a considerable amount of election-related activity before balloting can occur. Candidates, parties, interest groups, and interested individuals need to be able to attempt to persuade voters as to how to cast their

84. Reynolds v. Sims, 377 U.S. 533 (1964).
85. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973).
86. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).
87. Bullock v. Carter, 405 U.S. 134 (1972).
88. Hill v. Stone, 421 U.S. 289 (1975).

ballots. The election campaign is an integral part of the process of structured choice and democratic deliberation that constitutes an election. The political equality norm that governs the right to vote, the aggregation of votes into election districts, and the right to be a candidate is relevant to the right of voters to present their choices to the general electorate and to attempt to persuade the electorate to support certain candidates or particular positions on ballot propositions. Political equality is undermined when some individuals or interest groups with greater private wealth than others can draw on those resources to make more extensive appeals to the electorate than can those with fewer resources. Indeed, a concern about the tension between greatly unequal private wealth and political equality has long been one of the driving forces behind campaign finance regulation. It is, as Judge Guido Calabresi once put it, "the huge elephant—and donkey—in the living room on all discussions of campaign finance reform."[89]

To be sure, the inequality resulting from the use of unequal private wealth to pay for campaign activity is different from the inequality resulting from wealth tests for voting or candidacy. In the voting and candidacy situations, state laws used the lack of private wealth to limit electoral participation, whereas in the campaign finance context the unequal resources for participation are more broadly attributable to the private economy, including its underlying social, political, and legal framework, than to specific government decisions. So, too, participation in and influence over an election campaign are not the same as voting or becoming a candidate for office. It is relatively easy to measure votes and to ensure that no person casts more votes than any other. Participation and influence take many different forms, vary widely in intensity, and are difficult to measure. It is virtually impossible to quantify the impact of a particular dollar in a particular race, much as it is also difficult to quantify other non-monetary modes of participation and influence—endorsements by celebrities or opinion leaders, the intensity of commitment of volunteers, the

89. Landell v. Sorrell, 406 F.3d 159, 162 (2d Cir. 2005) (Calabresi, J., concurring) (denial of petition for rehearing en banc).

superior organizational ability of certain interest groups—that can affect a campaign. We can have universal adult citizen suffrage and give each eligible voter an equally weighted vote, but it is not possible to assure that each voter has the same opportunity to influence the election debate. Or, put alternatively, the only way to assure that each voter has an equal influence would be to prevent all private campaign spending, which would surely be the case of the "remedy that is worse than the disease."[90]

Government did not cause private resource inequality, and government cannot completely achieve campaign finance equality either. But the constitutional value of political equality embodied in the idea of equal protection of the laws and advanced in the political realm by the notion of one person, one vote, surely provides support for government efforts to ameliorate the electoral consequences of economic inequality. *Buckley* famously and emphatically rejected the idea that the advancement of political equality can justify spending limits, declaring 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," but the Court provided absolutely no support for this position other than by citing cases attesting to the value of political speech.[91] The Court observed that "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion"[92]—which seems at best orthogonal to the political equality goal of limiting the possibility that a "person's financial ability" will dominate "public discussion."

The only cases the Court discussed to support its claim that the promotion of equality cannot justify spending limits were *Mills v. Alabama*[93] and *Miami Herald Publishing Co. v. Tornillo*.[94] *Tornillo*, which struck down a Florida law that had sought to require a

90. THE FEDERALIST NO. 10 at 49 (Alexander Hamilton) (Hackett Publishing ed., 2005).
91. Buckley v. Valeo, 424 U.S. 1, at 48–49 (1976).
92. *Id.* at 49.
93. Mills v. Alabama, 384 U.S. 214 (1966).
94. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

newspaper to make space available for a political candidate to reply to its criticism, seems completely inapposite as campaign finance laws have never sought to require one candidate to make resources available to an opponent, which is, in effect, what the Florida law sought to do. *Mills*, which addressed a state law that barred a newspaper from publishing an editorial on election day urging the voters to vote a particular way on a ballot proposition, seems marginally closer to the campaign spending limits issue, but even the relevance of *Mills* seems stretched. The law in that case reflected only a modest effort to prevent "confusive last-minute charges and countercharges . . . when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over."[95] The Court quickly concluded that the law was likely to be "wholly ineffective" in assuring adequate replies to campaign charges as people remained "free to hurl their campaign charges up to the last minute of the day before [the] election,"[96] and thus did not provide a reasonable basis for curtailing newspaper editorials. The broader question of whether voter equality can justify limitations on the use of private resources in campaigning was not raised or addressed in either *Mills* or *Tornillo*.

As Justice Breyer has pointed out, *Buckley*'s flat declaration that "'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others' . . . cannot be taken literally."[97] As he explained, "[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many——in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of

95. *Mills*, 384 U.S. at 219–20 (quoting the opinion of the Alabama Supreme Court upholding the law).

96. *Id.* at 220.

97. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (quoting *Buckley* at 48–49).

some so as to make effective the political rights of the entire electorate."[98]

Indeed, prior to *Buckley*, spending limits were a long-established part of American campaign finance law. As early as 1910, federal law imposed limits on spending by candidates in federal elections; these limits were carried forward by the Federal Corrupt Practices Act of 1925, and supplemented by limits imposed on spending by multistate political committees, labor unions, and corporations in the 1940s.[99] Although typically evaded in practice, these limits remained on the books until the overhaul of federal campaign finance in the Federal Election Campaign Act of 1971.[100] Starting in the late nineteenth century, the states also sought to limit campaign expenditures. By 1932, thirty-nine states had laws limiting the size of campaign expenditures.[101] Again, the effectiveness of these laws was uncertain. But the principle that states could limit expenditures was well-established for more than a half-century before *Buckley*.

Moreover, the political equality concern certainly played a significant role in the post-*Buckley* Court's endorsement of limits on the use of corporate and union treasury funds in elections, most prominently in *Austin*. In *Austin*'s view, the unfairness of corporate campaign spending was that a corporation's election funds "have little or no correlation to the public's support for [its] ideas."[102] Prohibiting corporations from using their treasury funds and limiting them instead to the use of individual donations to corporate PACs "ensures that expenditures reflect actual public support for the political ideas espoused by corporations."[103] In other words, spending that reflects the corporation's wealth rather than the extent of popular support for its message gave the corporation an undue influence on the electoral outcome. That is the voter equality concern in a nutshell. Although *Citizens United* has disavowed *Austin*, the persistence of

98. *Id.* (citing Storer v. Brown, 415 U.S. 724, 736 (1974)).
99. 2 U.S.C. § 241 (1925), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, 86 Stat. 20.
100. Federal Election Campaign Act of 1972, Pub. L. No. 92-225, 86 Stat. 11.
101. LOUISE OVERACKER, MONEY IN ELECTIONS 303 (Charles E. Merriam ed., 1932).
102. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).
103. *Id.*

the corporate and union spending limits for decades even after *Buckley* demonstrates the underlying constitutional power of the voter equality norm.

Political equality, in the sense of equality of voter influence, can be invoked to support limits on the ability of wealthy individuals to deploy significant financial resources in election campaigns. This could support limits on independent spending and on the ability of wealthy candidates to take advantage of their personal fortunes. But political equality would not support limits on campaign spending where the difference in candidate resources reflects differences in the extent, and intensity, of support for the candidates. In other words, voter equality is not affronted if one candidate has more resources than her opponent simply because she has more, or more enthusiastic, supporters.

There are, however, other constitutional values that could support limits on candidate campaign expenditures. Professor Vincent Blasi has pointed out that in the world without spending limits elected officials are forced to devote enormous amounts of time to fund-raising, thereby cutting into their ability to devote the necessary time and attention to their public duties—"information gathering, political and policy analysis, debating and compromising with [their] fellow representatives, and the public dissemination of views."[104] In his view, concern about the quality of the representation impaired by endless fund-raising is a matter of constitutional magnitude, derived from the norms of popular election and governance by elected representatives embodied in Article I, the Seventeenth Amendment, and the Republican Form of Government Clause.[105] In a sense, the time-protection concern is akin to the anti-corruption concern that the Court has endorsed. Both reflect a well-founded recognition that a campaign finance process that entails the raising of large sums of money in private contributions can have adverse consequences for government decision-making, either by skewing it in the direction of

104. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282–83 (1994).

105. *See id.* at 1283.

major donors, or by denying elected officials the time they need to analyze, understand, debate, and resolve critical public issues.

A number of lower-court judges have embraced this officeholder time-protection concern as a possible justification for limits on candidate spending.[106] The Supreme Court, however, in *Randall v. Sorrell*,[107] summarily dismissed this concern. The plurality opinion did not actually address the merits of the argument that the constitutional interest in representative government could support spending limits in order to protect representatives' time. Instead, the opinion simply found that the argument had been implicitly rejected in *Buckley* and was thus precluded by *stare decisis*.[108] However, the only discussion of the burdens of fund-raising in *Buckley* occurred in the context of its affirmation of the presidential public funding program, which ameliorated those burdens. *Buckley* never discussed the time burdens of fund-raising or the constitutional value of officeholder time protection in its analysis of spending limits. The Court took the argument off the table without ever fully discussing it.

An additional concern implicated by campaign finance law that has been given relatively short shrift by the Court is the value of financially fair and competitive elections. Elections are about giving voters choices. If one candidate has significantly more resources than his or her opponents, that candidate can have an advantage in campaigning and in getting his or her message to the voters. This can affect campaign outcomes and, if the election campaign is seen as financially unfair, it can undermine the legitimacy of the election in the eyes of the voters. Indeed, it is commonplace to say that a candidate who greatly outspends the opposition is attempting to "buy" the election even if there is no evidence of literal vote-buying.

The concern about fair competition is particularly focused on the willingness of political newcomers to enter the fray, on the ability of challengers to effectively take on incumbents, and on the capacity of

106. *See, e.g.*, Homans v. City of Albuquerque, 366 F.3d 900 (10th Cir. 2004); Landell v. Sorrell, 382 F.3d 91, 122 (2d Cir. 2004); *cf.* Kruse v. City of Cincinnati, 142 F.3d 907, 919–20 (6th Cir. 1998) (Cohn, J., concurring).

107. Randall v. Sorrell, 548 U.S. 230, 245–46 (2006).

108. *Id.*

non-wealthy candidates to compete against wealthy candidates who self-fund their campaigns. In each of these situations, both the appearance and the reality of fair election competition is promoted when the difference in resources available to different candidates is moderated. This is particularly important in contests between challengers and incumbents. At the least, our system of representative government is based on the requirement that elected officials be required to defend their posts periodically, and that the people exercise the ultimate control over their government by being able to vote out current officeholders. As a practical matter, however, that requires challengers who are able to run financially competitive races. Yet incumbents typically enjoy many built-in electoral advantages, ranging from the free media attention they get while in office, to the opportunity to use the office to provide constituency service, to the superior ability to raise campaign money, particularly from individuals, organizations, and interests groups that have a material stake in government action. While sometimes a candidate's financial edge will reflect his or her popularity going into the campaign season, the danger is that a substantial early advantage will prevent a truly competitive race from ever getting started. One goal of campaign finance regulation is to promote fair elections by controlling the financial advantages that some candidates, particularly incumbents, enjoy.

The concern to provide adequate resources to political newcomers, challengers, and candidates of personally modest means is one of the goals underlying public funding programs. It might also be an appropriate basis for limits on candidate spending and on a candidate's use of personal resources. Limits alone cannot accomplish equality of campaign resources, as limits do nothing to provide candidates with resources. So, too, public funding alone may not accomplish equality either as long as candidates with substantial private resources are free to spend above the level of public funds provided. But even the mitigation of candidate resource inequality may promote the constitutional value of fair and competitive elections. Absolute funding parity is not essential for fair elections, and a challenger can do well when he or she musters a critical mass

of funds even if the incumbent spends more. Moreover, limits on just how much money a candidate can spend may prompt new entrants, relieved of the concern that the better-funded candidate will wildly outpace them financially. Spending limits could, thus, advance the goal of fair and competitive elections both by expanding the number of candidates, and by limiting the financial advantage enjoyed by the best funded.

The Court has given some attention to the concern about competitive elections in the context of campaign contributions. In upholding contribution limits, the Court has cautioned that the limits may not be so low that they prevent challengers from raising enough money to effectively challenge incumbents.[109] Indeed, in *Randall*, the plurality opinion struck down a set of state limits that it found to be so low as to present "constitutional risks to the democratic electoral process . . . by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."[110] However, the Court has never considered the implications of this "constitutional concern for electoral accountability" for unlimited spending that may enable incumbents to radically outspend their challengers.

Indeed, in *Davis* the Court struck down the federal law intended to make it easier for candidates to raise money when running against wealthy self-funding opponents.[111] The so-called Millionaires' Amendment did not limit the amount of money wealthy candidates could spend. Rather, all it did was make it easier for the non-wealthy opponent to raise money, albeit only up to the point where she achieved resource parity with the self-funding candidate. Rather than recognize that the law sought to promote competitive elections without limiting the right to spend, the Court struck the law down because it found the measure aimed at the forbidden goal of equalizing electoral opportunities. *Davis* has since been relied on by lower courts to strike down provisions of state public funding laws

109. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000).
110. *Randall*, 548 U.S. at 248–49.
111. Davis v. FEC, 554 U.S. 724 (2008).

that provide additional "fair fight" funds to publicly funded candidates campaigning against opponents who are spending more than the public funding ceiling.[112] Thus, apart from *Randall*, the value of financially fair and competitive elections has had little traction in the Court and even in *Randall* it was relied on to strike down a popularly supported regulation, not to support it.

Finally, as the discussion of the definition of corruption in Part II indicates, even when the Court recognizes that a constitutional value may be the basis for regulating campaign finance, the Court has at times narrowed the role that value is allowed to play. Allowing Congress or the states to legislate based on a broader notion of corruption that recognizes the indirect influence that campaign contributions and independent spending can have on officeholder decisions will permit more regulation, while the Court's embrace of a narrower definition focused on quid pro quo relationships between particular donors and particular candidates will narrow the scope of regulation. The Court has gone back and forth in its thinking about corruption, although *Citizens United* strongly embraced the narrow approach.

Strikingly, the Court has in one way or another recognized the power of each of the campaign finance norms that it ultimately rejected or dismissed. *Austin* was rooted in concern to protect the political equality of voters from corporate war chests; *Buckley* cited the value of "free[ing] candidates from the rigors of fundraising"[113] when it upheld the constitutionality of the presidential public funding system; the *Randall* plurality opinion, as just noted, relied heavily on a concern about the impact of campaign finance law on electoral competitiveness; *McConnell* embraced a broad definition of corruption; and *Caperton* was premised on a concern about the corrupting effects of independent expenditures. These norms are

112. *See, e.g.*, Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2011); Green Party of Connecticut v. Garfield, 616 F.3d 213 (2d Cir. 2010); *contra* McComish v. Brewer, 611 F.3d 510 (9th Cir. 2010), *rev'g McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2010 WL 2292213 (D.Ariz. Jan. 20, 2010). The Supreme Court granted certiorari in *McComish* sub nom, *Arizona Free Enterprise Club's Freedom Club Pac v. Bennett*,and *McComish v. Bennett*, 131 S.Ct. 644 (2010). The Court heard oral argument on this question on March 28, 2011; the case is *sub judice* as of the time of this writing.

113. Buckley v. Valeo, 424 U.S. 1, 91 (1976).

sufficiently central to thinking about the financing of elections in a democratic society that they can be repressed but they cannot be entirely denied. Nonetheless, for the most part the Court has narrowed the field of constitutionally permissible bases for campaign finance regulation, and it has done so without either a clear constitutional directive or a fully reasoned analysis of why free speech concerns ought to so utterly dominate the field and displace all other values.

My argument here is not that the Court has necessarily struck the "wrong" balance among these competing values as a matter of campaign finance policy. Concepts like "voter equality," "competitive elections," and "corruption" are inevitably indeterminate. Complete equality of voter influence on elections is impossible to attain short of denying all voters any influence at all. Elections can be considered competitive so long as minimal restraints are placed on any one's ability to become a candidate and campaign; the fact that one candidate has greater resources does not mean there is no competition. The decisions of officeholders to favor certain interests may simply reflect those officials' ideological views or the views of their constituents or supporters, not corruption.

Moreover, pursuing any of these goals through limits on raising and spending money is fraught with difficulty. Limiting campaign money does ultimately limit campaign communication and, potentially, voter information. A limits-based strategy can breed a culture of evasion, and may in turn lead to further regulations designed to prevent circumvention of the original limits. Limits generate multiple complex practical questions such as whether and how to price the value of Internet blog posts, or the nonmonetary assistance provided by supporters. Moreover, because of the tensions among these goals, limits can have perverse consequences. Limiting campaign contributions to advance the goals of equality and anti-corruption actually worsens the time burdens of fund-raising, while capping contributions or spending at too low a level can impair electoral competitiveness and voter information.

My point rather is that the Constitution provides the Court with no clear directive for determining which values to prefer, how to define

the scope of these values, or how to resolve the inevitable conflicts among these values. The Court is making political judgments about which values ought to count and what they ought to mean. These are political judgments in the highest sense in that they involve a determination of how competing concerns for free speech, political equality, fair and competitive elections, and honest and effective government ought to be balanced out and reflected in the laws that define the structure of our democratic system. But they are also political in the sense that the Court is not so much interpreting the Constitution as imposing the value judgments of the justices in the current majority. These may be reasonable judgments—they may even be the "right" judgments—but it is not clear why these are the Court's judgments to make. It has no greater constitutional authority and no greater political legitimacy than Congress or state or local legislatures in making the trade-offs and weighing and balancing the respective roles of free speech, political participation, voter information, competitive elections, voter equality, government integrity, and elected official time-protection in determining campaign finance law.

Moreover, the Court certainly lacks the deep understanding of how campaign finance operates in practice—how money affects elections and how the raising and spending of campaign money affect the behavior of government and its ability to represent and respond to the interest of the entire electorate—that is hard-wired into the consciousness of elected officials. Today we have a Court in which not a single justice ever ran for or held elective office. It is perhaps not surprising that some of the justices most deferential to campaign finance laws were either justices who had once held elective office themselves, like Justice O'Connor, a co-author of *McConnell*, or who had been involved in managing an election campaign, like Justice White, the only dissenter from *Buckley*'s invalidation of spending limits. Campaign finance jurisprudence entails practical empirical judgments that elected officials are clearly better equipped to make.

The Supreme Court dominates campaign finance law, but its jurisprudence has failed both the more technical, craft-like rule of law norms of coherence, consistency, and workability, as I have shown in

Part I, as well as the more fundamental requirement that it provide a sustained reasoned justification for its picking and choosing among constitutional norms in a manner that sharply narrows the ability of the people, acting through their elected representatives or by voter initiative, to set policies that reflect the full range of concerns that legitimately go into the design of a system for the financing of democratic elections. The time has come to dejudicialize our campaign finance law, that is, for the Court to reduce its own role by giving greater deference to the value choices of politically accountable decision-makers. The next Part will address one final argument against judicial deference and then suggest how a dejudicialized campaign finance doctrine might work.

III. DEJUDICIALIZING CAMPAIGN FINANCE LAW

A. Judicial Review and Legislative Entrenchment

It could be argued that aggressive judicial policing of campaign finance law is appropriate because of the danger that elected officials will adopt laws that are self-serving, incumbent-protective, and ruling-party entrenching. After all, campaign finance laws are adopted by elected officials who have a stake in their own re-election and who are certainly unlikely to have any interest in being fair to potential challengers, the party out of power, political newcomers, or other threats to the political status quo. Even if it is true that only politicians can understand campaign finance well enough in practice to produce workable campaign finance laws, it can also be argued that campaign finance is too political to be left to the politicians. Much as the Court's intervention in the political thicket of legislative apportionment was justified by the ongoing unwillingness of elected officials to change the rules under which they had been elected, the Court's extensive intervention into campaign finance law can be justified by a well-founded fear that incumbents will manipulate campaign finance laws in their own interest—that campaign finance regulation can be used as a kind of gerrymandering.

There are four problems with this argument. First, historically relatively little campaign finance regulation reflects the efforts by the

party in power to entrench itself. Raymond LaRaja's history of federal campaign finance regulation[114] demonstrates that campaign finance laws are usually enacted by cross-party coalitions, often consisting of a minority faction of the party in power acting in alliance with the party out-of-power. Thus, the first federal campaign finance laws enacted in the period between 1907 and 1925—an era of clear Republican dominance—were pushed through by the Progressive minority within the Republican Party working with the Democratic minority in Congress. These reforms were intended to weaken, not strengthen, the leading party, and according to LaRaja they succeeded.[115] Similarly, the campaign laws adopted in the period between 1939 and 1947 were pushed through by a combination of the conservative minority within the Democratic Party and Republicans and were aimed in large part at weakening the financial role of key groups in the Democratic Party—public employees and unions. In this largely Democratic era, Congress elected "Republican reforms."[116] More recently, BCRA's soft money limits were pushed through by a minority of ideological activists in the Democratic Party, notwithstanding the Democrats' greater dependence on soft money, joined by a reform remnant in the Republican Party clearly out of sync with the majority of the party.[117] BCRA clearly was not an effort by a dominant party to entrench itself as there was no truly dominant party in Congress when BCRA was enacted in 2001–02. Democrats held the narrowest possible majority in the Senate, while Republicans controlled the House and the Presidency. Only the Federal Election Campaign Act of 1971 and the FECA Amendments of 1974 can be seen as the product of a clear one-party (Democratic) Congressional majority, but even then that majority was not veto-proof and so had to accommodate the concerns of a Republican

114. RAYMOND J. LARAJA, SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM (2008).

115. *Id.* at 45–56.

116. *Id.* at 56–65.

117. *Id.* at 106–18.

president,[118] and both measures received considerable Republican support.[119]

Second, it is not at all clear that restrictive campaign finance laws will operate to entrench parties in power. Other countries that have enacted spending limits have witnessed major swings in political control. Canada, for example, limits party campaign spending, independent spending, and spending on broadcast advertising in elections for its federal Parliament. Yet, in the 1993 parliamentary election the dominant Progressive Conservative Party, which entered the election with 169 seats (out of 295), came out of it with just 2 seats, while the previously out-of-power Liberals went from 83 seats to 177 and the brand new Reform Party won 52 seats. Reform eventually merged with the Progressive Conservatives to become the Conservative Party, which garnered 99 seats (out of 308) in 2000, and 124 and control of the government in 2006, while the seats held by the Liberals, who governed from 1993 through 2006, shrank from 172 (in 2000) to 135 (in 2004) to 103 (in 2006) to 77 (in 2008).[120] Spending limits did not lock the Progressive Conservatives into power in 1993, nor did it lock them out of power even after they had fallen to just two seats, much as the limits did not prevent the Liberals from winning in 1993 or prevent them from falling out of power in 2006.

Third, it is far from clear that campaign finance laws are more advantageous to incumbents than no laws at all. Incumbents have built-in advantages in raising money. They can provide benefits to individuals and interests who have a stake in government action. Moreover, given the likelihood that most incumbents will be reelected, those who do business with government have an incentive to donate to incumbents. In the absence of contribution and expenditure limits, incumbents would most likely raise more money and spend more money than their challengers in most elections. Financially, incumbents as a group would almost surely be better off

118. *Id.* at 72–75.

119. *Id.* at 104.

120. Wikepdia.org, *List of Canadian Federal General Elections*, http://en.wikipedia.org/wiki/List_of_Canadian_federal_general_elections (last visited Mar. 8, 2011).

with less rather than more regulation—although, to be sure, regulations can also serve to help incumbents.

Finally, it does not seem that concern about incumbency protection explains the Court's campaign finance decisions. The Court has never provided different constitutional treatment to laws adopted by voter initiative as opposed to those enacted by legislatures, yet surely the former measures are very unlikely to be intended to entrench incumbents. The campaign finance regime that the Court's decisions have produced seems particularly likely to benefit incumbents, since incumbents are best positioned to utilize the PACs, bundlers, and other political intermediaries necessary to collect the large number of dollar-limited contributions needed to finance the unlimited spending the Court permits and many candidates think that the imperatives of politics require. Indeed, PACs have consistently favored incumbents, as well as the party in power or the party thought likely to win the next election, in their campaign donations. Finally, although members of the Court have occasionally criticized certain regulations as likely to be incumbent-protective, the only case where the incumbent-protection concern played a role in a decision was in the three-justice plurality opinion in *Randall*.[121]

Incumbency-entrenchment is a plausible justification for aggressive judicial review of campaign finance law in theory, but it does not hold up that well in practice. At the state and local levels, many campaign finance laws have been adopted by voter initiative, and even federal laws have often been the result of complex coalitions rather than self-serving efforts by the party in power. Electoral results from other countries indicate that restrictive campaign finance laws do not bar dramatic political turnarounds. Nor is there any reason to believe that incumbents are better off with campaign laws than without them.

Most importantly, concern about incumbency protection does not require the rigid, categorical approach the Court has taken to certain campaign finance laws, such as spending limits for candidates or independent committees or special attention to the needs of the

121. Randall v. Sorrell, 548 U.S. 230, 249 (2006).

opponents of wealthy self-funding candidates. Challenger interests can be vindicated by a close review of the details of particular laws in the relevant political context, rather than by per se rules. That, in fact, has been the approach the Court has taken to the potentially incumbent-protective effects of contribution limits. Such limits are generally constitutional, but will be struck down if so low as to preclude effective competition. The Court has taken a similar stance in considering reporting and disclosure requirements. Disclosure is generally constitutional, but may be invalidated in circumstances where public disclosure of contributions or expenditures exposes vulnerable individuals or groups to threats, harassment, or reprisal.[122] As I will indicate in the next section, this combination of general support for regulations aimed at advancing a broad range of legitimate campaign finance goals—including political equality, competitive elections, and government integrity and effectiveness—with closer consideration of the consequences for challengers or minorities in discrete cases, ought to be the approach the Court takes to campaign finance law generally.

B. A New Model for Judicial Review of Campaign Finance Law

Campaign finance law ought to be dejudicialized. By that I do not mean that it ought to be deconstitutionalized. Campaign finance law has broad implications for a host of constitutional concerns—freedom of expression and association, the right to vote, fair electoral competition, honest government—so that constitutional review is entirely appropriate, indeed, necessary. But it ought to be dejudicialized to the extent that courts play a lesser role in determining both the permissible goals of campaign finance law and the proper regulatory techniques. The determination of the values that ought to go into the financing of democratic elections; the weighing and balancing of competing concerns; the fitting of campaign finance rules to particular political needs, settings, and practices—these are

122. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); *see also* Doe v. Reed, 130 S. Ct. 2811, 2821 (2010); Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 197–200 (1999).

primarily political decisions that ought to be left to the politically accountable branches of government. The courts should continue to review specific laws in context to see if they are intended to, or likely to, benefit incumbent officeholders or parties, and they should also strike down laws that are aimed at or unduly burden particular political viewpoints, minority political groups, or adherents to unpopular causes. Courts would, in effect, police the outer bounds of regulation, but they would have to stick to the outer bounds.

There are models for this approach in our election law jurisprudence. A good example is the Court's treatment of the state rules that limit the ability of third parties and independents to win places on the ballot. In *Williams v. Rhodes*,[123] the Court held that such laws burden two different, but overlapping, constitutional rights: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[124] The Court then invalidated laws that raised such high hurdles to ballot access that new parties and independents were effectively barred from competing and the two major parties were given "a permanent monopoly on the right to have people vote for or against them."[125] However, in subsequent decades the Court upheld a host of restrictive ballot access rules, including significant signature requirements,[126] anti-sore-loser rules precluding primary election losers from running as independents in a general election,[127] laws barring the counting of write-in ballots,[128] and anti-fusion laws that have the effect of barring minor parties from nominating the candidates of a major party.[129] In so doing, the Court has emphasized the positive value of state laws that regulate elections, including those that limit electoral choices:

123. Williams v. Rhodes, 393 U.S. 23 (1968).

124. *Id.* at 30.

125. *Id.* at 32.

126. Jenness v. Fortson, 403 U.S. 431, 442 (1971).

127. Storer v. Brown, 415 U.S. 724, 728 (1974); *see also* Am. Party of Tx. v. White, 415 U.S. 767, 772 (1974) (upholding a law disqualifying a voter who had voted in a primary from signing a petition qualifying an independent to run in the general election).

128. Burdick v. Takushi, 504 U.S. 428, 430 (1992).

129. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 354 (1997).

> Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.[130]

Strikingly, the Court has held that states "have a strong interest in the stability of their political systems"[131] and may adopt rules that control against "party splintering and excessive factionalism" and promote "a healthy two-party system."[132]

In effect the Court has concluded that a wide range of political choices go into the design of an electoral system, including representation of minority viewpoints, flexibility and openness to political change, the rights of voters to offer and receive a range of electoral options, *but also* political stability based on protecting the existing party structure and favoring a two-party over a multi-party system. Weighing and balancing these competing political values is a matter for state political decisions, with the balance struck differently in different states. The Court's rules prevent total entrenchment of the two major parties but otherwise let the state political processes work out varying combinations of openness and stability, which are inevitably political. The Court has limited its own role largely to policing only against "unreasonably exclusionary restrictions,"[133] not exclusionary restrictions per se. Indeed, the only per se rule that the Court appears to be applying in the ballot access context is a ban on filing fees,[134] which the Court has treated as a wealth test inconsistent with the constitutional norm of political equality.

A second instance of the Court letting states balance competing political considerations in the framing of election laws, subject to a judicially-enforceable outer bound, may be partisan gerrymandering.

---

130. *Burdick*, 504 U.S. at 433 (quoting *Storer*, 415 U.S. at 730).
131. *Timmons*, 520 U.S. at 366.
132. *Id.* at 367.
133. *Id.*
134. Lubin v. Panish, 415 U.S. 709, 718 (1974); Bullock v. Carter, 405 U.S. 134, 149(1972).

In *Davis v. Bandemer*,[135] the Supreme Court held that partisan gerrymandering presents a justiciable constitutional question. Gerrymandering, the Court indicated, can deny an identifiable political group "the same chance to elect representatives of its choice as any other political group."[136] The *Bandemer* majority, however, fragmented over the question of how to determine what constitutes unconstitutional partisan gerrymandering, with the plurality opinion setting a very high bar for proving that a particular apportionment scheme amounted to unconstitutional partisan gerrymandering. Indeed, in the two decades after the decision, nearly all assertions that particular districting plans imposed unconstitutional partisan gerrymanders were rejected.[137] In *Vieth v. Jubelirer*, the Court came close to disavowing the justiciability of claims of unconstitutional gerrymandering, but Justice Kennedy provided the fifth vote to keep the possibility of judicial oversight of partisan districting schemes alive. Acknowledging that due to the lack of a single set of "agreed upon substantive principles of fairness in districting,"[138] the Court was unable to define "clear, manageable, and politically neutral standards"[139] for resolving gerrymandering claims. Given the multiple, legitimate competing criteria that could be taken into account in developing a districting plan, it was difficult for the Court to determine whether particular plans are unconstitutional. Nevertheless, Justice Kennedy—and ultimately the Court as a whole—left open the possibility of judicial review to protect "rights of fair and effective representation"[140] in the most egregious cases. *Vieth*, like *Bandemer* before it, leaves the role of partisan concerns in legislative districting largely to the political process, but with a hint of a constitutional big stick in reserve in case of extreme partisan abuse.

135. Davis v. Bandemer, 478 U.S. 109, 109 (1986).
136. *Id.* at 124.
137. *See* Vieth v. Jubelirer, 541 U.S. 267, 279–80 & nn.5–6 (2004).
138. *Id.* at 307.
139. *Id.* at 307–08.
140. *Id.* at 312.

As I previously indicated, the Court's treatment of contribution restrictions and disclosure requirements already follows this model of giving political decision-makers considerable discretion to determine regulatory goals and techniques in general while reviewing specific claims that under certain circumstances ordinarily acceptable rules have unduly burdensome consequences for challengers or political minorities. This model should be expanded to deal with campaign finance regulation as a whole.

CONCLUSION

The Supreme Court should step back from the dominant role it has undertaken in overseeing American campaign finance law. At bottom, this is because there is no one, clear constitutional norm driving campaign finance regulation. Rather, the law in this area involves the reconciliation of multiple, and at times conflicting, constitutional values. There is no reason to believe that the Court is any better at weighing and balancing these values than politically accountable decision-makers, and the record over the last thirty-five years demonstrates the Court's failure to develop a consistent, coherent, and workable jurisprudence that respects all the political values at stake in the regulation of the financing of democratic elections. There are no obvious right answers in campaign finance—no one clearly correct way of combining freedom of speech and association, voter information, political equality, competitive elections, government integrity and effectiveness, and political administrability. Dejudicializing campaign finance law would, at the very least, facilitate the kind of variation, according to local preferences and circumstances, and experimentation at the local and state levels that could enhance our understanding of how campaign finance law works in practice. So, too, it would reflect the inevitably political nature of campaign finance decision-making while still providing an outer bound of protection of constitutional rights.