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Defining Democracy: The Supreme Court’s Campaign Finance Dilemma

LORI RINGHAND*

INTRODUCTION

On December 10, 2003 the United States Supreme Court issued its decision in McConnell v. FEC. In McConnell, the Court was asked to determine the constitutionality of the Bipartisan Campaign Reform Act (“BCRA”). A divided Court, in a deeply fractured decision in which six justices wrote individual opinions, upheld the major provisions of the legislation. Yet despite the almost 300 pages of reasoning provided by the Court, and a voluminous record developed by the district court, the Justices could not agree on what purportedly is the central issue in campaign finance law: whether the challenged regulations were necessary to combat political corruption or the appearance of such corruption. Why is this question so hard for courts to resolve? The answer, I believe, rests in what I have called the judiciary’s “democracy-defining dilemma.”

Democratic self-government can be defined and structured in many different ways. Consequently, in a democratic system of government, there are actually two types of political questions that must be answered. There are the day-to-day questions of policy preferences: Do I support tougher environmental regulations or do I believe such regulations would result in an unacceptable loss of jobs? Should my school district

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2. Id.
3. Id. at 98–102. Likewise, the district court, in an opinion supported by a voluminous record, did not make a single finding of fact regarding whether the behavior evidenced by the record constituted corruption. See McConnell v. Fed. Elections Comm’n, 251 F. Supp. 2d 176 (D.D.C. 2003).
raise local taxes to increase teacher salaries? Who do I want to be my Senator? But antecedent to those questions is a group of more fundamental questions, questions about what kind of democracy we live in. These questions involve regulation of the political process through which the day-to-day policy questions are decided: Should political party primaries be open to all voters or only registered party members? Should corporations be able to make donations to political campaigns? Do hanging chads count?

These "political process" questions have substantive consequences. Opening political party primaries may give more voters an earlier voice in elections, but it also may reduce the power of political parties. Allowing corporations to make campaign contributions may increase the quantity of political speech available to voters, but could decrease the ability of individuals to influence election outcomes. And of course, deciding how to count hanging chads can determine the outcome of a presidential election. These questions also, however, raise deep and important questions about how we view democracy itself. For example, is democracy better served by a strong two-party system, or by a system in which minor parties and individuals have greater influence? By a system of unregulated political spending, or by one that attempts to equalize the influence of a variety of speakers? These types of questions routinely lurk just beneath the surface of the courts' political process cases.

In recent years, the courts have been asked to resolve an increasing number of these cases, and the cases themselves have raised increasingly important issues. This has led to a lively debate within legal scholarship: when presented with a challenge to the way the government has regulated the political process, what posture should a court assume? Should it be deferential to the political choices made by elected officials, or should it vigorously intercede to protect the rights asserted by those

8. See, e.g., Austin, 494 U.S. at 652; McConnell, 540 U.S. at 93.
10. See, e.g., Bush, 531 U.S. at 98.
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who claim they are injured by those choices? Who, in other words, should have primary authority over determining what the ground-rules of democracy are?

A commonly heard answer is that these democracy-defining tasks should be left to the political branches, constrained only by the limitations on legislative choices imposed by the Constitution itself. This division of duties—legislative structuring of democratic procedures, constrained by judicial protection of rights—is consistent with the formal division of labor between courts and legislatures that our legal system rests on. But, it is inherently unworkable in campaign finance cases.

It is of course hardly extraordinary to assert that where the boundary between these duties is—where policy options end and rights protection begins—is difficult to ascertain and frequently contested. I am claiming more than that here. I argue here that, at least in campaign finance cases, the rights the judiciary is charged with protecting cannot themselves be defined (and thereby protected) without judicial reliance on some underlying vision of what democracy itself should look like. Consequently, it is not the Constitution that is restraining legislative experimentation in these cases, but the judges' own, usually unchallenged and undefended, ideas about what they think democratic

12. For a discussion of this issue, see Schauer, supra note 11. Schauer poses the question as one of how courts should approach the fundamental questions of self-governance raised when legislatures attempt to regulate the ground rules of democracy itself. The conflict, as Schauer sees it, is between a democratically inspired and a constitutionally inspired view of self-government. Id. at 1337-38. Under the "democratically-inspired" view, making decisions about what democracy is is an essential part of self-government. Id. at 1337. Therefore, the judiciary must refrain from defining democracy because self-government must entail decisions about self-government. Id. Under the opposing "constitutionally-inspired view," judges must strictly review legislation regulating the political process to ensure that self-interested political actors are not insulating or entrenching their own power. Id. Schauer's paradigm, of course, invokes the broader dispute about the proper role of judicial review in a democratic system. Id. at 1340. For a sampling of this debate, see JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing that the judiciary must intervene to protect the integrity of the political process); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, LAW AND DISAGREEMENT (1996) (arguing that self-government loses much of its value when citizens are prevented from making decisions about how to shape democracy itself).

13. See generally Lillian R. BeVier, Where is the Center of Democracy? A Reply to Professor Neuborne, 93 NW. U. L. Rev. 1075, 1079 (1999); Cain, Garrett's Temptation, supra note 4; Kathleen M. Sullivan, Political Money and Freedom of Speech, 30 U.C. Davis L. Rev. 663, 672-73 (1997) [hereinafter Sullivan, Political Money]. Justice Thomas and Justice Stevens have made the same point in relation to voting rights cases. See Holder v. Hall, 512 U.S. 874, 891-946 (1994) (arguing that the Court's vote dilution cases require the federal courts to "dabble" in political theory and inappropriately forces the courts to choose among competing bases of representation and competing theories of political philosophy) (Thomas, J., concurring); Cal. Democratic Party v. Jones, 530 U.S. 567, 598 ("It is not this Court's constitutional function to choose between the competing visions of what makes democracy work . . .") (Stevens, J., dissenting).

self-government should look like. This is what I will call the judiciary's "democracy-defining dilemma": courts deciding campaign finance cases cannot protect rights in those cases without also defining democracy.

Unfortunately, judges have not confronted this problem. The corruption-based analytical methodology developed by the Supreme Court in *Buckley v. Valeo*\(^\text{15}\), and still used to decide campaign finance cases today, hides the democracy-defining dilemma in the superficially democracy-neutral language of rights protection. This methodology has allowed judges deciding campaign finance cases to deny their democracy-defining role.

The judiciary's failure to recognize and address the democracy-defining dilemma has had at least three important consequences. First, judges deciding campaign finance cases have been able to rest important decisions on unchallenged definitions of democracy that in fact are deeply contested and controversial. Moreover, they have been able to do this without persuasively demonstrating, or often even arguing, that their preferred definition of democracy is in any way constitutionally compelled. Second, judicial reliance on unstated, disputed and often shifting assumptions about democracy has resulted in a body of campaign finance case law that lacks both clarity and coherence. Finally, the judicial failure to confront the democracy-defining dilemma has deflected debate from what should be the primary question in campaign finance cases: Is the definition of democracy the Court is relying on in defining the constitutional right at issue mandated by the Constitution? If not, then there is unlikely to be any independently ascertainable rights-based rationale for striking down the legislation.

This article has five parts. In Part I, I explain the analytical methodology developed by the Supreme Court in *Buckley v. Valeo*, and discuss how that methodology embodies the judiciary's democracy-defining dilemma. In Part II, I discuss how the Court's post-*Buckley*, pre-*McConnell* cases have perpetrated the problem by shifting the focus of campaign finance cases to the meaning of "corruption." In Part III, I discuss the *McConnell* decision itself, and show how the deferential posture adopted by the Court in that case does not resolve the democracy-defining dilemma. In Part IV, I examine the role of the defining democracy dilemma in other political process cases. Finally, in Part V, I outline a new judicial decision-making methodology, one that is conscious of and attempts to manage the democracy-defining dilemma. I conclude that, while the democracy-defining dilemma is unavoidable in our legal system, a different methodology can help manage the most undesirable consequences of the dilemma, and can thereby create a genuine "space" for non-judicial participation in defining the democracy.

\(^{15}\) 424 U.S. 1 (1976).
in which we live.

I. THE PROBLEMATIC BUCKLEY PARADIGM

A. THE BUCKLEY DECISION

Any discussion of the Supreme Court's campaign finance jurisprudence must begin with an understanding of the problematic paradigm developed by the Court in Buckley v. Valeo. But examining Buckley at this juncture also is useful for two additional reasons. First, Buckley illustrates just how much of the debate over campaign finance regulation actually rests on an underlying debate about what an ideal democracy should look like. Second, Buckley begins to illuminate the Court's democracy-defining dilemma by showing how those underlying ideas about democracy are interwoven with the Court's decisions about rights.

Buckley involved a First Amendment challenge to the Federal Election Campaign Act ("FECA"). FECA required public disclosure of campaign contributions of more than $100 and disclosure of campaign expenditures greater than $1000. In 1974, Congress amended FECA, broadly defining the term "contributions" and imposing new expenditure and contribution limits on candidates, committees, and "unassociated" (independent) individuals and entities. The 1974 amendments also included new disclosure requirements, and provided public funding to Democratic and Republican presidential candidates.

The Buckley plaintiffs challenged each of these provisions. The Court upheld the limits on campaign contributions, but struck down the overall expenditure limits and the limits on independent expenditures. The analytical method used by the Court to evaluate both the expenditure and the contribution limits was the standard First Amendment methodology of balancing the asserted free speech interests against the government's claimed need to regulate the speech at issue. The individual free speech interests asserted in Buckley included the ability to make a political statement by contributing to a campaign on the

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16. Id. at 1.
17. Id. at 62-63.
18. Id. at 62-64, 87-90.
19. As many Buckley commentators have noted, money is not speech. It therefore is not self-evident that the Buckley court needed to treat the spending of money on speech as deserving of much First Amendment protection at all. See Frederick Schauer & Richard H. Pildes, Electoral Exceptionalism and the First Amendment, 77 Tex. L. Rev. 1803, 1820-21 (1999). For an argument that the Court was right to do so, see Sullivan, Political Money, supra note 13, at 678. For the classic statement of the opposite view, see J. Skelly Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001 (1976).
21. Id. at 64-75.
contribution side, and, on the expenditure side, the ability to influence elections by engaging in political speech. The asserted government interests, offered in support of both the contribution and the expenditure limits, were to equalize political influence among citizens and to prevent "corruption or the appearance of corruption" of the political process.

The Buckley Court held that preventing corruption or the appearance of corruption was a compelling government interest justifying restrictions on speech, but equalizing the relative ability of all citizens to affect electoral outcomes was not. The Court then upheld the restrictions on campaign contributions, reasoning that those limits helped prevent quid pro quo corruption or the appearance of such corruption. The Court, however, struck down the restrictions on campaign expenditures. Expenditure restrictions, the Court said, were not sufficiently related to the government’s interest in controlling quid pro quo corruption or the appearance of such corruption, nor could they be justified by the equalization interest the Court had found insufficiently compelling.

The Buckley Court therefore attached different constitutional significance to the two government interests asserted in that case—preventing political corruption and promoting political equality. The Court’s disparate treatment of these two interests helps illustrate the first lesson to be culled from Buckley: just how much the campaign finance debate rests on a deeper conflict between competing visions of democracy itself. This conflict can be shown most starkly by examining two of the most prominent visions of democracy, pluralism and civic republicanism. These competing visions of democracy present quite

22. Id. at 24, 75.
23. Id. at 26, 45.
24. Id. at 29, 39.
25. Id. at 26–27.
26. Id. at 39.
27. Id. at 45, 47.
28. There are many viable definitions of democracy other than pluralism and civic republicanism. In the United States, however, these two visions—the self-interested bartering of pluralism and the informed, good-faith search for a common good of civic republicanism (and its cousin, deliberative democracy)—have together shaped the parameters of much of our public debate about the meaning of democracy. It therefore is useful to consider the Court’s democracy-defining dilemma within the framework of these two broadly sketched, paradigmatic definitions. There also are many different strands within both pluralist and civic republican thought. I do not attempt to distinguish or identify these strands here. For a general introduction to pluralism, see Robert Dahl, A Preface to Democratic Theory (1956). For a general introduction to civic republicanism, see Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1547–58, 1564–76 (1988) [hereinafter Sunstein, Beyond the Republican Revival]; Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985) [hereinafter Sunstein, Interest Groups]. For a discussion of how both pluralist and civic republican thinking has influenced law, see Morton J. Horwitz, Forward The Constitution of Change Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 58–65 (1993); Frank I. Michelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 17–60 (1986); Kathleen M.
different ideas about what ideal democracy should look like. Those differences, in turn, frame some of the most important and difficult issues raised in the campaign finance debate.

B. BUCKLEY, PLURALISM, AND CIVIC REPUBLICANISM

To a pluralist, democracy is a battle between interest groups. Interest groups compete, barter, and bargain in the political marketplace in order to obtain for themselves the best possible package of goods and services. The role of elected officials in a democracy, pluralists argue, is to capture the underlying citizen preferences evidenced in these interest group bargains and enact them into public policy. "Fair" policy, therefore, is policy that accurately reflects the interests and trade-offs made by competing, self-interested groups. Consequently, under the pluralist view, campaign finance regulations must be measured by their effectiveness (or ineffectiveness) in facilitating this. Thus, to the extent that interest group activity in political campaigns reflects or informs citizen preferences, campaign finance regulations attempting to hamper that activity are, to a pluralist, fundamentally misguided.

Civic republicans reject the pluralist view of democracy as ideally comprised of battles and bargains among self-interested groups. To the civic republican, civic virtue, not just individual or group self-interest, should play a role in democratic self-government. Thus, civic republicans believe that the purpose of politics is not to aggregate private preferences or to facilitate interest-group bargaining, but to create public consensus through deliberative discussion. Ideal democracy, to the civic republican, consists of deliberative debate about public issues, conducted in the context of political equality and respect. To civic republicans, the type of interest group bargaining applauded by pluralists distorts democracy by discouraging open-minded, good-faith deliberation, and


29. See Sullivan, Rainbow Republicanism, supra note 28, at 1542; Sunstein, Interest Groups, supra note 28, at 32–33.


32. See Sunstein, Beyond the Republican Revival, supra note 28, at 1549–50.

33. Id. at 1550.

34. Id. at 1548–49.

35. Id. at 1548. For a critique of the civic republican approach to campaign finance regulation, see Daniel R. Ortiz, The Democratic Paradox of Campaign Finance Reform, 50 STAN. L. REV. 893, 898–901 (1998) [hereinafter Ortiz, Democratic Paradox].
reducing incentives for dialogue and consensus building.\textsuperscript{36} Civic republicans, therefore, support campaign finance regulations that reduce the effectiveness of interest groups, raise the quality of political debate, and promote political equality.\textsuperscript{37}

This conflict between the pluralist and the civic republican views of democracy does not explain all of the important issues raised in debates about campaign financing. There is, for example, an important dispute among pluralists themselves about the appropriate role of money in interest group politics.\textsuperscript{38} However, many of the issues raised in the campaign finance debate relate to underlying questions about the nature of democracy itself.\textsuperscript{39} Some of the most vexing questions raised in that debate—for example, whether the responsiveness of elected officials to interests groups is a good or a bad thing, whether extensive spending on political advertising enhances or distorts political debate, and whether political equality is violated when different people can spend different amounts of money promoting their political agendas—are vexing at least in part because they force us to confront the unresolved tensions in these two very different views of what democracy itself should be—of how

\textsuperscript{36} Sunstein, Beyond the Republican Revival, supra note 28, at 1543-48.


\textsuperscript{38} The difficulty in defining political equality has caused a split in pluralist thinking itself. Pluralists differ on whether the unequal ability of citizens to spend money in the pluralist political marketplace corrupts the outcome of that market. See Sunstein, \textit{Interest Groups}, supra note 28. "Pro-reform" pluralists believe than an unequal ability to spend money on politics (1) exists and (2) matters; "anti-reform" pluralists disagree. The former group of pluralist thinkers will favor some campaign finance regulations, but only those that attempt to enable more people to play the interest-group game. The latter group, who believe either that the ability to raise or spend money in politics is not an unreliable way of measuring citizen preferences, or that the role of money in determining interest group preferences is ultimately not important, will not favor any reform attempting to reduce the impact of money on the political process, and in fact will probably favor rolling back existing regulations that do nothing more than target actual \textit{quid pro quo} corruption. Neither type of pluralist, however, will support regulation aimed at reducing the influence of interest group competition on political decisions. See also Daniel H. Lowenstein, \textit{On Campaign Finance Reform: The Root Of All Evil Is Deeply Rooted}, 18 Hofstra L. Rev. 301, 340-42 (1989) (discussing the campaign finance debate as a “reflection of two competing visions of the government’s rights and obligations regarding the political process . . . .”) [hereinafter Lowenstein, \textit{The Root of All Evil}]; Daniel R. Ortiz, \textit{The Engaged and the Inert: Theorizing Political Personality Under the First Amendment}, 81 Va. L. Rev. 1, 18-26 (1995) (discussing the academic debate over campaign finance reform) [hereinafter Ortiz, \textit{The Engaged and the Inert}].

\textsuperscript{39} See Frank J. Sorauf, \textit{Politics, Experience, and the First Amendment: The Case of American Campaign Finance}, 94 COLUM. L. Rev. 1348, 1351 (1994); see also Lowenstein, \textit{Political Bribery}, supra note 30, at 827 (noting that opponents of campaign finance regulation often identify with the pluralist school of thought); Lowenstein, \textit{The Root Of All Evil}, supra note 38, at 340-42.
The influence of this unresolved tension between pluralism and civic republicanism is evident in *Buckley*. In *Buckley*, the Court found that prohibiting the appearance or actuality of *quid pro quo*-type corruption was a sufficiently compelling governmental interest to justify restrictions on political speech. Equalizing the ability of groups or individuals to participate in the public debate by limiting campaign expenditures, however, was not. By accepting the government's corruption rationale while denying the government's equalization rationale, the *Buckley* Court implicitly endorsed a pluralist-inspired view of democracy. To the Court, protecting a pluralistic political process by regulating things like *quid pro quo* bribery, which potentially interfere with an elected official's duty to vote in accordance with pluralist preferences, is constitutionally acceptable. But regulating overall political expenditures in order to promote the civic republican ideals of political equality and public deliberation is constitutionally unacceptable. The *Buckley* Court's choice to validate the government's claimed anti-corruption interest while rejecting its political equalization interest was, therefore, a choice with deep (albeit perhaps unexamined) roots in the debate between pluralism and civic republicanism, and the related judicial assumptions about what a "good" or properly functioning democracy requires. By incorporating these assumptions into constitutional law, the Court effectively substituted its preferred view of democracy for that preferred by Congress when it enacted the FECA amendments.

40. For an interpretation that mandates a reading of the First Amendment that protects civic republican-type equality, participation, and deliberation, see for example, Owen M. Fiss, The Irony of Free Speech (1996).


42. Id. at 54.

43. I am not arguing that the Supreme Court has consistently embraced any particular vision of democracy. For a discussion of how the Court has not done so, see Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in *The U.S. Supreme Court and the Electoral Process* 245 (David K. Ryden ed., 2000). I am instead arguing that courts cannot define rights in these cases without relying on some vision of democracy. In *Buckley*, that vision happened to be quite pluralistic.

44. For a broader discussion of this issue, see J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 631-42 (1982). I do not argue that the Supreme Court justices make a particularly thought-out or intentional choice to constitutionalize their particular views of democracy as such. The Court, in fact, has indicated an aversion to doing precisely that. See Holder v. Hall, 512 U.S. 874, 901-02 (1994) (Thomas, J., concurring). I do, however, argue that the effect of judicial reasoning in these cases is just such a constitutionalization. As I discuss in Part V, below, the ad hoc, unexamined nature of the justices' adoption of their preferred vision of democracy further aggravates the democracy-defining dilemma.

45. The lower court that heard the *Buckley* case shared Congress's view and cast the FECA legislation as an effort to protect the integrity of the political process:

By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office. This broadens the choice
The Court, however, did not justify its decision in those terms. Instead, it said that the Constitution itself—the First Amendment—dictated the Buckley outcome. If that is so, then the democracy-defining dilemma is not really a dilemma for the Court at all: if the Constitution compels the outcome reached by the Buckley Court, then the Court is not inappropriately substituting its preferred vision of democracy for that preferred by the legislature, but rather is merely engaging in its appropriate and proper rights-protection role. This raises our second question: what does Buckley tell us about the relationship between constitutional rights and judicial decisions about democracy?

C. Buckley and the Democracy-Defining Dilemma

I asserted earlier in this Article that in campaign finance cases, the dual tasks of protecting rights and defining democracy are inextricably interwoven, and that a judge therefore cannot define the scope of the First Amendment right at issue without first relying on a baseline definition of democracy. Thus, I claimed that it is the judge's definition of democracy that determines the scope of the right at issue, not the right itself that acts as an independently ascertainable constraint on the legislature's democracy-defining choices.

Buckley illustrates this point. The First Amendment balancing test used by the Court in Buckley asks whether the claimed government interest in regulating the speech at issue is sufficiently compelling to justify overriding the free speech interests claimed by the individual challenging the law. Applying this test requires the Court to evaluate

of candidates and the opportunity to hear a variety of views.

... The corrosive influence of money blights our democratic processes. We have not been sufficiently vigilant; we have failed to remind ourselves, as we moved from the town halls to today's quadrennial Romanesque political extravagances, that politics is neither an end in itself nor a means for subverting the will of the people. ... the present situation cannot be tolerated by a government that professes to be a democracy.

Buckley v. Valeo, 519 F.2d 821, 841-42, 897 (D.C. Cir. 1975). The lower court thus saw democracy as an arena in which all citizens can gather to discuss and influence politics. Money "blights" democracy and deprives citizens of their equal opportunity to "affect electoral outcomes." While these are not exclusively civic republican terms, the district court's vision of democracy is decidedly less pluralistic—less a battle of interest groups and more a deliberation among equals—than the Supreme Court's. Judge J. Skelly Wright, who sat on the lower court that decided Buckley and who is presumed to be the author of that court's per curiam opinion, has noted and disagreed with the pluralist underpinnings of the Supreme Court opinion. See J. Skelly Wright, Politics and the Constitution: Is Money Speech?, supra note 19, at 1013–19.


47. Id. at 15–16. Frederick Schauer and Richard Pildes have argued that there really is not any "standard" First Amendment analytical methodology, and that the Court actually applies somewhat different tests depending on the type of speech being regulated. See generally Schauer & Pildes, supra note 19. Schauer and Pildes develop this argument in the context of advocating for their position that the First Amendment should be read in light of the structural goals embedded in it. Id. at 1814; see also infra Part III. Judicial balancing of individual and state interest is, nonetheless, the methodology the
the legitimacy and strength of the government's asserted interest and then weigh (balance) that interest against the alleged intrusion on the challenger's First Amendment speech rights. In many areas, the Court can do this without reference to any underlying principles about how democracy should be structured. But in campaign finance cases it cannot. In these cases, the government's asserted interest is its perceived need to shape the political process itself. Evaluating the importance of such an interest necessarily requires judges to resort to some background theory of democracy: a judge cannot determine what weight to give the government's asserted interest in protecting or enhancing the political process without some background vision of what that process should ideally look like—without some baseline vision of democracy from which to evaluate whether the government's reason for acting is "good enough." Thus, a judge deciding a campaign finance case cannot define the scope of the claimed First Amendment right he or she is charged with protecting without first embracing a particular vision of democracy.

This interdependent relationship between the dual tasks of defining the substantive scope of rights and evaluating the government's reasons for regulating conduct implicating those rights has been noted in other contexts. The problem is perhaps particularly acute when courts are asked to give substantive content to highly generalized rights (e.g. the right to free speech). The more abstractly worded a right is, the more

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48. For example, the balancing of interests done by courts in pornography cases probably does not require judicial reference to competing visions of democracy itself (except perhaps in the macro sense that any invocation of judicial review raises questions of self-government).

49. For a brief discussion of this point, see Schauer & Pildes, supra note 19 (observing that promoting a "fairer" mode of representation, enhancing political deliberation, and improving voter decision-making are among the more common rationales offered for various campaign finance regulations). Frank Sorauf also has noted that applying the compelling interest test in campaign finance cases raises basic questions about the nature of democracy. Sorauf, supra note 39, at 1351.

50. See, e.g., Fallon, supra note 14; Jeremy Waldron, A Right-Based Critique of Constitutional Rights, 13 Oxford J. Legal Stud. 18 (1993). Pamela Karlan has demonstrated the presence of a baseline problem in some political process cases. In her work, she examines how the Court often has unquestioningly used the status quo as a de facto constitutional baseline from which it measures legislative efforts. See generally Pamela S. Karlan, Just Politics? Five Not So Easy Pieces of the 1995 Term, 34 Hous. L. Rev. 289 (1997). She also has noted that the Court's "racial gerrymandering" can be explained only in reference to the Court's underlying vision of what our democracy should look like. See Pamela S. Karlan, Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket, 82 B.U. L. Rev. 667, 671–72 (2002); Pamela S. Karlan, Nothing Personal: The Evolution of the Newest Equal Protection From Shaw v. Reno to Bush v. Gore, 79 N.C. L. Rev. 1345, 1352–54 (2001).
difficult it is to judicially determine the concrete scope of the right in actual cases. It is, for example, much easier to interpret and apply the constitutional provision requiring the president to be a natural-born resident at least 35 years of age than it is to determine whether a criminal defendant’s "due process" rights have been violated. Consequently, breathing substantive content into abstracted rights inevitably requires judges to rely on factors external to the textual foundation of the right itself.

Judicial balancing tests illustrate this phenomenon particularly well. When judges engage in balancing tests, they necessarily define the substantive content of a right in relation to the government's asserted interest in constraining the scope of that right. That is, in fact, precisely what a balancing test does: it defines the scope of the applicable right as extending only to the point where it intersects with the government's legitimate need to restrict it. It is simply untenable in such a case to maintain that the substantive content of the right itself can be defined without reference to the strength of the government's asserted interest. In campaign finance cases, that interest, as noted above, is the interest in pursuing a particular vision of good government—a particular definition of democracy. Thus, when the Court rejects that interest as insufficiently compelling, it has necessarily judged the legislature's preferred definition of democracy and found it lacking.

This interdependency of rights and government reasons is to some extent relatively uncontroversial. Despite this, as Richard Fallon, Jr. has noted, we nonetheless are often unable to quell the desire to speak of rights as things—as objects that have independent, ascertainable,  

51. Richard Fallon, Jr., citing balancing tests as an obvious, "banal" example, has argued that we have no clear way of thinking about constitutional rights independent of governmental powers. Fallon, supra note 14, at 344. Moreover, Fallon notes that "balancing" is not easily avoided in constitutional law. Fallon notes that even as "self-consciously" rights-based a thinker as Ronald Dworkin must ultimately acknowledge that the notions of individual rights and governmental powers are conceptually interdependent in our constitutional scheme. Id. at 345. For a partial critique of Fallon's approach, see Frederick Schauer, A Comment on the Structure of Rights, 27 GA. L REV. 415, 415-16 (1993) (arguing that Fallon may be correct about the interdependency of rights and governmental powers within the sphere of constitutional law, but that the concepts may nonetheless be severable in the realm of general philosophical inquiry).

52. Fallon, supra note 14, at 360. The use of "tiered scrutiny" in some areas of First Amendment law does not resolve this problem. A judicial determination that, for example, commercial or pornographic speech should be subject to a lower level of scrutiny than political speech is merely an a priori determination by the Court that the balancing scale should be tipped against the speech in these cases. In other words, the categories invoked in tiered scrutiny merely represent a prior judicial decision that certain categories of speech are of such little value, or that the government's interest in restricting such speech is relatively high, that the balancing test should be weighted against protecting the speech. The fact that this determination is enshrined in doctrinal language does not, however, alter the nature of the underlying judicial decision itself.

53. Id. at 344.

54. Id.
meaning that judges either protect or not—rather than as tools judges use to balance competing values. This unquelled desire was apparent in Buckley. The Court defined the scope of the First Amendment as permitting legislative efforts to combat corruption, but prohibiting legislative efforts to promote political equality. Consequently, the scope of the First Amendment itself was dictated by the Justices' own views about what democracy should look like. But the Court in Buckley did not acknowledge this. Instead, the Court couched its decision solely in the language of rights protection. While the Court seemed tangentially aware of the democracy-defining implications of its holding, it presented its view of democracy as part of the right being defined ("limiting the liberty of some to enhance the equality of others is completely foreign to the First Amendment") rather than what it clearly was: a separate but necessarily antecedent justification for defining the First Amendment right that way in the first place.

D. Academic Support for Buckley

Academic supporters of Buckley, and opponents of campaign finance regulation more generally, have taken this same approach. Opponents of regulation routinely argue, following the Court's reasoning in Buckley, that it is "the Constitution itself," not an underlying judicial view of democracy, which renders (or should render) most campaign finance regulations unconstitutional. In fact, it is a recurring theme among opponents of campaign finance regulation that it is the proponents of regulation who are inappropriately asking judges to constitutionalize a preferred definition of democracy. According to these critics, judges who refuse to do so, and therefore reject as insufficiently compelling legislative efforts to promote a particular view of democracy, are not themselves relying on any preferred vision of democracy. They are merely enforcing the constraints on legislative

55. Id. at 372-74. Bruce Ackerman has categorized this approach to the Constitution and constitutional rights as "rights foundationalism." Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453, 465-67 (1989). Rights foundationalists maintain that the Constitution permits (in fact requires) judges to use constitutional rights to "trump" contrary legislation. Id. at 467. But rights foundationalists disagree on exactly what the substantive content of those rights are. Id. They therefore must turn to political philosophy to define and cabin the scope of the rights that are to trump ordinary legislation. Id. In campaign finance cases, as I argue here, that requires judges to define the scope of First Amendment rights in reference to the judge's preferred political philosophy: his or her definition of ideal democracy.


57. See, e.g., Lillian R. BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Cal. L. Rev. 1045, 1067 (1985) [hereinafter BeVier, Money and Politics]; Cain, Garrett's Temptation, supra note 4; Sullivan, Political Money, supra note 13.

58. See, e.g., supra note 57.

59. See, e.g., supra note 57.
discretion found in the Constitution itself.60

Katherine Sullivan, a strong opponent of much campaign finance regulation, has repeatedly made this argument.61 Sullivan argues that the problem with most campaign finance laws is that upholding them requires judges to endorse a "particular view of good government." Bruce Cain and Lillian BeVier have made similar arguments.63 Cain accuses reform advocates of attempting to inappropriately "constitutionalize" their view of democracy,64 and BeVier argues that upholding campaign finance regulations requires judges to endorse a particular substantive vision of an "ideal political process."65 This is inappropriate, these scholars argue, because questions about what "good" democracy is must be left to legislatures, subject only to constitutional restrictions.66

It is the "subject only to constitutional restrictions" part of this analysis that is, as we have seen, problematic. This analysis, like the analysis the Court used in Buckley, assumes that the judicial task of protecting First Amendment rights is severable in campaign finance cases from the non-judicial task of defining democracy. It assumes, in other words, that the scope of the relevant right can be ascertained without reliance on an underlying definition of democracy. But the democracy-defining dilemma demonstrates that this is false: a court cannot weigh the strength of the government's asserted interest in these cases, and thereby cannot determine the scope of the First Amendment right itself, without at least tacitly relying on some underlying definition of democracy.

Jeremy Waldron has discussed this problem in his work. Waldron, arguing against adoption of a fundamental rights document in Great Britain, points out that disputes about democracy and political disagreement often take the following form: "If people in society disagree about anything, then a decision should be taken by majority voting, provided individual rights are not violated thereby."67 Waldron then points out the fallacy of this approach. When the substantive scope of a right itself is the subject of disagreement, then structuring the disagreement as one of majoritarianism versus rights does nothing to resolve the dispute.68 People who disagree about the scope of the relevant

60. See, e.g., supra note 57.
61. See, e.g., Sullivan, Political Money, supra note 13, at 680–81.
62. Id.
63. See supra note 57.
64. Cain, Garrett's Temptation, supra note 4, at 1602.
65. BeVier, Money and Politics, supra note 57, at 1067.
66. See supra note 57.
67. Waldron, supra note 50, at 32.
68. Id.
right will disagree about what this rights-based restriction requires. As noted above, this problem is particularly unavoidable when the rights involved are stated at a high level of generality, such as “the freedom of speech.”

The persistence of this problem in campaign finance cases is in fact evident within the position taken by scholars like Sullivan, Cain and BeVier. Like most opponents of campaign finance regulation, these writers accept the Court’s finding that preventing corruption or the appearance of corruption, narrowly defined as \textit{quid pro quo} type exchanges, is constitutionally valid. But why is this restriction justified while others—such as those found in BCRA—are not? Certainly nothing in the text of the First Amendment itself dictates such a distinction. Nor does a generalized assertion that the logic of the First Amendment requires that as little speech as possible be restricted. As we have seen, the distinction being drawn here between the government’s interest in preventing \textit{quid pro quo}-type corruption and the government’s interest in preventing other possible distortions of the political process can only be driven by an underlying judicial belief that the vision of democracy furthered by preventing \textit{quid pro quo} corruption is valid while the vision of democracy furthered by other (“unconstitutional”) regulations is not.

This result would be supportable—it would not indicate an inappropriate \textit{judicial} choice between competing visions of democracy—if the Constitution itself somehow “chooses” a substantive vision of democracy. Opponents of campaign finance regulation, however, do not

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69. \textit{Id.} For example, those who believe that the Fourteenth Amendment protects abortion rights will argue that Congress should be able to regulate abortion, but only to the point where the protected rights are violated, while those who disagree will argue that the majoritarian branches of government should be able to regulate abortion as extensively as they wish. Thus, arguing that societal disagreements should be resolved by majoritarian means “as longs as individual rights are protected” does not in fact help resolve such disagreements at all.

70. \textit{See} BeVier, \textit{Money and Politics, supra} note 57, at 1082–89; Cain, \textit{Garrett’s Temptation, supra} note 4, at 1603; Sullivan, \textit{Political Money, supra} note 13, at 678–79.

71. The full text of the First Amendment is: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

72. BeVier disagrees, and has most forcefully articulated this position. She has argued that \textit{Buckley} was correctly decided because the First Amendment requires that as little political speech as possible be restricted. BeVier, \textit{Money and Politics, supra} note 57, at 1053–54. This does not solve the democracy-defining dilemma. As long as some political speech is to be restricted, then someone must decide what speech will be restricted, and for what reasons. When those reasons are dependent on a definition of democracy, as we have seen that they are in campaign finance cases, then this argument amounts to nothing but an assertion that judges, not legislatures, should define democracy. But this is a result that BeVier and other opponents of regulation vehemently reject. \textit{Id.} at 1089; \textit{see also} Holder \textit{v. Hall}, 512 U.S. 874, 901–02 (1994) (Thomas, J., concurring) (arguing that the Court’s vote dilution cases require the federal courts to “dabble” in political theory and inappropriately force the Court to choose among competing bases of representation and competing theories of political philosophy).
rest their arguments on that assertion, and for good reason. The question of whether the Constitution embodies a pluralist or civic republican (or any other) definition of democracy has been exhaustively debated in the academic literature. That debate has been inconclusive. Neither civic republicans nor pluralists are able to claim absolute constitutional authority for their particular view of American democracy.

I do not rehash the substance of that debate here because it is, in a way that is important to understand, ultimately beside my point. It is not my goal to argue that one definition of democracy should or must prevail. My goal is to illustrate that defining democracy is what the entire debate is about. Simply asserting that regulating political speech to further one view of democracy is constitutionally acceptable but regulating political speech to further a different view of democracy is unacceptable is not sufficient. Such an approach denies the democracy-defining dilemma underlying these cases, and perpetuates the illusion that it is an independently ascertainable definition of the relevant right that is driving the result.

II. FROM BUCKLEY TO BCRA: THE BATTLE FOR "CORRUPTION"

The preceding section, using Buckley v. Valeo to illustrate the point, demonstrated that the Supreme Court has been unable to define the scope of First Amendment rights in campaign finance cases without relying on a baseline definition of democracy. This is because the scope of the First Amendment right in these cases will depend on the perceived strength of the government's asserted need to regulate the speech at issue. Judges cannot evaluate this need, and therefore cannot determine the appropriate scope of the right, without having some baseline vision of what democracy itself should look like.

In Buckley, we saw that the Court rejected the civic republican vision of democracy endorsed by Congress and instead adopted and used

73. See, e.g., Dahl, supra note 28 (arguing that the Constitution embraces pluralism); David B. Truman, The Governmental Process: Political Interests and Public Opinion (1951) (arguing that the Constitution embraces pluralism); Garry Wills, Explaining America: The Federalist, 179-247 (1981) (arguing that the Constitution embraces republicanism); Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013 (1984) (arguing that pluralism is not the sole political philosophy underlying the Constitution); Larry D. Kramer, Madison's Audience, 112 Harv. L. Rev. 611, 613-16, 637-39, 665-68 (1999) (arguing that neither the pluralist nor the republican aspects of Madison's Federalist were fully understood or accepted by his contemporaries and that Madison's work therefore is an unreliable indicator of original intent); Frank I. Michelman, Traces of Self Government, 100 Harv. L. Rev. 4 (1986) (arguing that the Constitution has republican underpinnings); Sunstein, Beyond the Republican Revival, supra note 28 (using the writings of James Madison and others to argue that the Constitution has substantial republican elements); Sunstein, Interest Groups, supra note 28. For a historical analysis of the mixed political theories of the founding generation, see David F. Epstein, The Political Theory of the Federalist (1984); Gordon S. Wood, The Creation of the American Republic 1776-1787 (1972).
as a baseline its own more pluralistic vision. In doing so, the Buckley Court held that combating political corruption or the appearance of such corruption was an important enough government interest to justify restrictions on political speech, but that attempting to equalize the political influence of citizens was not. Because of this holding, the constitutionality of campaign finance regulations today turns on a judicial determination of what "corrupts" the political process. This focus on corruption, however, has not alleviated the Court's democracy-defining dilemma; it has merely shifted the terms of the debate.

Corruption is hardly self-defining. As Daniel Lowenstein has noted, determining whether something constitutes "corruption" requires a baseline from which to evaluate the effect of the allegedly corrupting behavior. Consequently, in campaign finance cases, judges cannot determine what corrupts the political process without a baseline understanding of what an uncorrupted or "good" political process should look like. Buckley's determination—that preventing corruption or the appearance thereof is the only sufficiently compelling government interest justifying restrictions on campaign financing—therefore merely forces the democracy-defining dilemma into a new, corruption-based terminology.

In this section, I illustrate how the post-Buckley task of defining corruption has failed to disengage the Court from its democracy-defining dilemma. I examine three of the Court's post-Buckley, pre-BCRA decisions: Federal Election Commission v. National Conservative Political

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74. See discussion of Buckley, supra Part I.
77. There is a great deal of literature addressing what constitutes "corruption" of the political process. For a sampling of several different perspectives, see Lillian R. BeVier, Campaign Finance Reform: Specious Arguments, Intractable Dilemmas, 94 COLUM. L. REV. 1258 (1994), Lowenstein, The Root of All Evil, supra note 38; Michelman, supra note 73, at 40–41 (noting that to a civic republican, corruption occurs when a citizen's commitment to the good faith pursuit of the common good is broken or subverted); David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 COLUM. L. REV. 1369 (1994). See also Bruce E. Cain, Moralism and Realism in Campaign Finance Reform, 1995 U. Chi. LEGAL F. 111 (arguing that the term "corruption" acts as a proxy for a more foundational dispute about how political power should be distributed and to what extent equity considerations can or should influence that question).
78. See Lowenstein, Political Bribery, supra note 30, at 798–99 (discussing political bribery and how the word "corruption" cannot be defined without reference to a normative standard). Lowenstein demonstrates that the descriptive aspect of the word "corruption" cannot be separated from a normative concept of some type of good. Id. at 802–03. In the political realm, that good is usually a concept of the public interest. Id. Thus, the notion of "corruption" is used in the campaign finance debate to indicate things that are contrary to the public interest, either because they are themselves contrary to the public interest or because they lead to policy decisions contrary to the public interest. Id. at 804. Lowenstein concludes that it is therefore necessary to turn to political theory and different concepts of the public good to give content to the notion of political corruption. Id. at 805.
These cases are among the Court's most important campaign finance decisions. They reach substantively different results (NCPAC and MCFL strike down campaign finance regulations, while Austin upholds a regulation), and they each include strong dissents. Combined, they provide a good opportunity to examine how Buckley's corruption-based paradigm has not resolved, and may have more deeply disguised, the Court's democracy-defining dilemma.

A. FEDERAL ELECTION COMMISSION v. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE

In Federal Election Commission v. National Conservative Political Action Committee, the Court, in an opinion authored by Justice Rehnquist, struck down a federal statute that limited independent expenditures in support of a presidential candidate who had accepted public financing. In doing so, the Court reaffirmed that preventing corruption and the appearance of corruption was the only sufficiently compelling government interest justifying campaign-financing regulations. The Court also attempted in NCPAC to clarify the definition of corruption set out in Buckley. Corruption, the Court said, is a "subversion of the political process." This subversion occurs when "elected officials are influenced to act contrary to the obligations of their office by the prospect of financial gain to themselves or infusions of money into their campaigns." Consequently, according to the Court, the hallmark of political corruption is the classic political quid pro quo: the exchange of dollars for legislative votes.

Supporters of the law challenged in NCPAC argued that independent expenditures made by political action committees (like NCPAC) posed an even greater threat of corruption than the quid pro quo-type of exchange of campaign contributions for legislative favors that concerned the Court in Buckley. Their reasoning was that political advertising by PACs can be so influential in elections that candidates and elected officials will feel compelled to curry favor with PAC leaders by

82. Justice Rehnquist is the author of NCPAC. Justice Brennan authored MCFL, with Justice Rehnquist in dissent. Austin was written by Justice Marshall, with Justice Scalia in dissent.
83. 470 U.S. at 497.
84. Id. at 496-97.
85. Id.
86. Id.
87. Id.
88. Id. at 497-98.
voting in accordance with their wishes instead of the wishes of the
official's constituents. The Court rejected this argument. It cannot be a
corruption of the political process, the Court said, when elected officials
change their positions on issues in response to political messages paid for
by others. Quite to the contrary, the Court viewed this as exemplary
democratic conduct.

Consider the view of democracy required to reach this result. To the
NCPAC Court, democracy is about ensuring that elected officials are
responsive to the aggregate preferences of the public, as measured by the
level of electoral pressure an interest group can generate through its
political spending. Interfering with an elected official's incentives to
vote in accordance with those expressed preferences (quid pro quo-type
bribery) corrupts democracy, but wealth-based disparities in the ability
to shape those preferences in the first place, by making independent
expenditures, does not. This is a fairly pluralistic vision of how
democracy should work. But the Court, as in Buckley, does not
acknowledge that it is relying on a vision of democracy in reaching its
decision. Instead, it couches its decision purely in First Amendment
terms. The Court, balancing the challenger's claimed free speech
interests against the government's claimed interest in preventing
corruption, simply asserts that there is no significant risk of corruption in
PAC spending and that restricting the spending therefore is not
constitutionally justified.

Justice White, dissenting, argues that the Court should use a more
derential approach when determining the constitutionality of campaign
finance laws. He disagrees with the majority's empirical assumption that
a candidate would feel a greater temptation to exchange her legislative
votes for a large campaign contribution than for the promise (or threat)
of a large independent expenditure, but believes that such "close calls"
should be left to Congress. The Court, he says, should give substantial
derence to congressional determinations about what poses a significant
threat to the "integrity and fairness" of the electoral process and what
does not.

Judicial deference of this sort can avoid one of the negative
consequences of the democracy-defining dilemma. Namely, in any given

89. Id. at 498.
90. Id.
91. Id.
92. See id.
93. Id. at 497.
94. See supra text accompanying notes 28–45.
96. Id. at 509–11 (White, J., dissenting).
97. Id. (White, J., dissenting).
98. Id. at 509 (White, J., dissenting).
case, deference reduces the likelihood that courts will substitute their own preferred visions of democracy for those preferred by the legislature. Deference alone, however, does not resolve the democracy-defining dilemma. Justice White’s opinion illustrates this. Justice White does not question the Court’s basic approach to these cases; he just disagrees with the majority’s result in this case. Consequently, he conducts his own type of balancing test. In doing so, he finds that Congress’s asserted interest—in ensuring that elections be held between equally well-financed candidates in order to prevent election results from turning on spending disparities between candidates—is reasonable, and therefore is sufficiently compelling to override the plaintiffs’ speech interests.99 Presumably, however, there is some point at which Justice White would decide that the legislature’s goals are no longer reasonable and therefore no longer deserving of judicial deference.100 But because Justice White continues to rely on the same rights-based, balancing methodology used by the Court, his approach provides no guidance on where that point is, or should be. Thus, deference alone cannot fully manage the democracy-defining dilemma.

Justice Marshall also dissents in NCPAC, arguing that the asserted congressional interest in promoting “equal access” to the political arena is sufficiently compelling to uphold limits on independent expenditures.102 To Justice Marshall, democracy requires some degree of “equal access” to the political process.103 While Justice Marshall did not elaborate on precisely what he meant by this, he clearly envisioned a more republican, participatory democracy than did Justice Rehnquist's majority opinion, or even Justice White's dissent. Justice Marshall’s opinion, therefore, is as dependent as the majority’s on an underlying vision of democracy, and Justice Marshall simply agrees with the vision endorsed by Congress in this case.

99. Id. at 517–18 (White, J., dissenting).
100. Justice White provides more information on where his baseline view of democracy is in his opinion in First National Bank of Boston v. Bellotti. 435 U.S. 765, 809 (1978) (White, J., dissenting). Writing in dissent, Justice White said that the state (Massachusetts, in that case) had a compelling interest in preventing corporations, which have acquired their wealth through the corporate form, from obtaining an “unfair” advantage in the political process (“The State need not allow its own creation to consume it”). Id. Any such advantage would be unfair, he says, because it is disconnected from support for the ideas expressed. Id. This reasoning is obviously similar to that used by Justice Brennan in Fed. Elections Comm’n v. Mass. Citizens for Life discussed infra at text accompanying notes 104–126.
101. In Part IV of this article, I sketch a new decision-making methodology that attempts to address this problem.
103. Id. at 521 (Marshall, J., dissenting).
B. Federal Elections Commission v. Massachusetts Citizens for Life

In Federal Elections Commission v. Massachusetts Citizens for Life (MCFL), the Court was asked whether a non-profit, ideological corporation could be prohibited from making political expenditures from unsegregated corporate funds. Earlier cases had implied that such restrictions might be constitutional when applied to regular commercial corporations. The Court, in an opinion authored by Justice Brennan, struck down the restrictions as applied to MCFL.

Working within the Court's corruption-based paradigm, the government defended its statute by arguing that restrictions on corporate political spending were necessary to protect the "integrity of the market-place of political ideas" from "corruption" by corporate wealth. The Court had accepted this reasoning in earlier cases. For example, in Federal Election Commission v. National Right to Work Committee, the Court had upheld a statute prohibiting corporations from making direct contributions to electoral candidates. In that case, the Court accepted the government's argument that there was a special need to regulate the electoral impact of the "substantial aggregations" of wealth that corporations can generate because of their "special advantages." The logic underlying these cases, accepted by Justice Brennan in MCFL, was that incorporation is a state-granted privilege that allows corporations to accumulate wealth they otherwise would not be able to acquire. Consequently, this wealth, if left unregulated in the electoral realm, could be "unfairly" translated into political power.

This transference of corporate wealth into political power is "unfair," Justice Brennan said, because the ability to earn (and therefore spend) money through the corporate form does not in any way reflect the degree of public support for the corporation's political agenda. The ability of candidates and interest groups to engage in political spending, the MCFL Court said, usually is a "rough barometer" of public support.

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105. In First National Bank v. Bellotti, the Court struck down a Massachusetts law prohibiting corporations from spending corporate funds to support or object to public referendums. 435 U.S. 765, 795 (1978). In referendums, the Court held, there is no candidate to "corrupt" and corporate funds therefore were merely contributing to the overall political debate. Id. at 790. Because political speech has the capacity for informing the public regardless of what the source of that speech is, there was therefore no compelling state interest in prohibiting corporate speech involving referendums. Id. at 790-92.
107. Id. at 257.
109. Id. at 207-08.
111. Id.
112. Id. at 258.
for the political agenda pursued by the candidate or group spending the money. But this is not the case with corporate wealth. With few exceptions, people buy french fries because they like french fries, not because they approve of (or are even aware of) McDonald’s political agenda. Consequently, the Court said, political spending by corporations is different than political spending by candidates or political parties. Unlike non-corporate entities, there is no logical link between the ability of corporations to spend money and the level of public support for a corporation’s political platform. Corporate political spending therefore could “corrupt” the political process by “distorting” public debate: by decoupling the ability to engage in that debate from the level of public support for the positions taken in it.

Applying this reasoning to the ideological, non-profit corporate defendant in *MCFL*, however, the Court found no such possibility of corruption-by-distortion. Ideological corporations like *MCFL*, Justice Brennan said, are formed for the very purpose of disseminating their political ideas, and their supporters contribute to the ideological corporation precisely because they support its political agenda. Thus, the Court said, the ability of ideological non-profit corporations to engage in political spending, unlike the ability of regular commercial corporations to do so, does reflect popular support for the ideological corporation’s political agenda and therefore cannot unfairly distort political debate.

Justice Rehnquist dissented. The threat to the democratic process presented by corporate spending will vary, Justice Rehnquist agreed,
depending on the particular characteristics of a given corporation. Thus, "large and successful" corporations with vast resources to build a "political war chest" will constitute a more potent threat to the political process than less successful corporations or non-profit corporations. But drawing such distinctions, Justice Rehnquist argued, is a legislative task, not a judicial one. Consequently, in his opinion, the Court should not interfere with the judgment of the Massachusetts legislature that allowing MCFL to make political expenditures from unsegregated corporate funds posed a significant risk of corruption to the political process.

As in NCPAC, we see two different judicial approaches to the question of what constitutes corruption of the political process. Justice Brennan's majority opinion imposes a vigorous standard of review, while Justice Rehnquist's dissent calls for judicial deference. But ultimately, both decisions again rely on underlying visions of democracy. Justice Brennan's opinion, using the devices of strict scrutiny and balancing, finds that while corporate wealth usually can corrupt the political process, the wealth amassed by an ideological group like MCFL cannot. Corruption, to Justice Brennan, is defined here as not just things that look like quid pro quo bribery, but also things that insert money into the political process in a way that is unrelated to the level of public support for the ideas the money is purchasing. This definition of corruption depends on a view of democracy in which political spending can corrupt not just the legislative process (where legislative votes are cast) but also the electoral process (where voter deliberation and decision-making occurs). Restrictions on corporate spending, to Justice Brennan, are usually justified by the government's compelling interest in protecting the electoral realm by ensuring that competition among political actors in that realm is "truly competition among ideas." But because there was no such risk of distorting that process here, the rule applicable to regular corporations could not be applied to MCFL. Thus, while regular corporate spending can corrupt the political process by distorting

119. Id. at 268 (Rehnquist, J., dissenting).
120. Id. (Rehnquist, J., dissenting). Justice Rehnquist appears to have changed his mind on this point. See McConnell v. FEC, 540 U.S. 93, 147-49 (2003) (opinion of Justice Kennedy, joined by Justice Rehnquist, criticizing this reasoning).
122. Id. (Rehnquist, J., dissenting).
123. Id. at 258.
124. Id. at 259-60. See also Ortiz, The Engaged and the Inert, supra note 38, at 26 n.91. For a thorough discussion of this shift in the definition of corruption, see Marlene Arnold Nicholson, Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance, 38 Case W. Res. L. Rev. 589, 596-606 (1988).
126. Id.
electoral debate, spending by MCFL cannot because MCFL's ability to make political expenditures, unlike that of commercial corporations, is logically linked to public support for its political ideas. Both the general rule and the exception here rely on the same underlying democratic baseline: in an uncorrupted democratic system, political spending must at least roughly correlate with popular support for the political ideas purchased by that spending.

To see how embedded in democratic theory this holding is, contrast this opinion with *Buckley*. Under the Court's reasoning in *MCFL*, the desire to level the political playing field, at least to the extent that ideas with equal public support receive equal public exposure, is a compelling government interest justifying campaign finance regulations. Yet *Buckley* had seemed to hold that democracy did not require, and in fact prohibited, the state from pursuing such equalitarian goals. The *MCFL* Court also rejects a vision of democracy, discussed below in regard to Justice Scalia's dissent in *Austin v. Michigan Chamber of Commerce*, as an unregulated political marketplace in which citizens sort through a barrage of political information and cull from it what they see fit. In contrast to this vision, the *MCFL* Court held that the government has a valid and compelling role in regulating that market to ensure that political spending has some correlation to popular support for the ideas purchased by that spending. In defining corruption this way, and exempting *MCFL*'s conduct from that definition, Justice Brennan's majority opinion necessarily rejects both of these alternative views—*Buckley*'s and Justice Scalia's—of what constitutes a properly functioning democracy.

Justice Rehnquist's dissent, like Justice White's dissent in *NCPAC*, calls for judicial deference to legislative decision-making in this area. Like Justice White's opinion, however, it nonetheless ultimately rests on underlying ideas about what types of political processes democracy requires or permits. In earlier decisions, Justice Rehnquist had found that limitations on corporate spending of unsegregated corporate funds were constitutional. Yet, as the author of *NCPAC* and dissenter in *MCFL*, he draws a constitutionally significant distinction between the regulation of non-corporate spending (which should be subject to judicial scrutiny) and the regulation of corporate spending (which should be left

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127. *Id.* at 256-63.
131. *Id.* at 266, 268-69, 271 (Rehnquist, J., dissenting).
What drives this distinction? It seems to be Justice Rehnquist’s then-existing belief that corporate spending presents a risk to the political process but that non-corporate spending does not. He grounded this belief in the legal advantages of the corporate form that allows corporations to accumulate wealth. Consequently, Justice Rehnquist’s distinction necessarily rested on a vision of democracy that finds some inequalities in political power—those derived from differences in the way wealth is acquired—unacceptable. Justice Rehnquist’s opinion here, like the MCFL majority’s, therefore necessarily relies on his preferred (albeit shifting) vision of democracy.

C. AUSTIN V. MICHIGAN CHAMBER OF COMMERCE

The dispute over the definition of corruption underlying the Court’s reasoning in MCFL resurfaced in Austin v. Michigan Chamber of Commerce. In Austin, the Court was asked to decide directly the issue raised indirectly in MCFL: does the Constitution permit a state to regulate the independent expenditures of corporations in general election campaigns? Justice Marshall, speaking for the Court, over a lively dissent by Justice Scalia, said yes.

Austin involved a Michigan statute prohibiting corporations from making any independent political expenditures from unsegregated corporate funds. Michigan defended its statute on the grounds discussed so favorably by the Court in MCFL: the wealth of a corporation is not connected to the level of public support for the corporation’s political ideas, so permitting that wealth to “unduly” influence political debate would corrupt the political process. The Court agreed. Applying its familiar balancing test, the majority held that the government’s asserted interest in preventing this type of “undue influence” over the political process was sufficiently compelling to overcome the plaintiff’s asserted free speech interests. Thus, the Court held that restrictions on the independent expenditures of corporations

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135. Id. at 267, 270 (Rehnquist, J., dissenting).

136. Id. at 266-71 (Rehnquist, J., dissenting).


138. Id. at 654–55. Unsegregated funds are corporate funds that have not been raised or kept separately from the general corporate treasury. Id.

139. Id. at 658–59.

140. Id. 659–60. For a discussion of the opposing notions of the citizen-voter evident in these cases, see Ortiz’s discussion of “civic smarties” and “civic slobs” in Ortiz, The Engaged and the Inert, supra note 38.
were constitutionally justified.\textsuperscript{141}

The underlying democratic theory necessary to support this decision is identical to that discussed above in relation to \textit{MCFL}. What is new in \textit{Austin}, for our purposes, is Justice Scalia's dissent. Justice Scalia, in a bristling dissent, criticized his colleagues for endorsing the principle that "too much speech is an evil" subject to "correction" by the government.\textsuperscript{142} The absolutely central principle of the First Amendment, according to Justice Scalia, is that the government cannot be trusted to ensure the "fairness" of political debate.\textsuperscript{143} The majority opinion, he maintained, violated that principle by holding that speech financed by money generated in a particular way (through the corporate form) could uniquely corrupt the political process.\textsuperscript{144}

Justice Scalia's criticism of the majority's reasoning is two-fold. First, he says, the majority opinion proves too much.\textsuperscript{145} If money spent on political speech must roughly correlate with levels of public support for the message contained in that speech, then not only corporate spending but spending by any individual of above average wealth should be prohibited. The majority's emphasis on the legal privileges granted by the corporate form does not avoid this result, Justice Scalia argues, because the law is instrumental in all aggregations of wealth, not just wealth acquired by corporations.\textsuperscript{146} Second, and more pertinently, he argues that what the majority views as excess corporate spending disproportionate to public support for the corporation's ideas simply cannot corrupt the political process.\textsuperscript{147} Political corruption, to Justice Scalia, entails \textit{quid pro quo}-type exchanges of political favors for campaign contributions, and nothing more. A regulatory system that requires voters to find their own truth amidst uninhibited, unrestricted political spending is not only not corrupt, it is the ideal system in a free and democratic society.\textsuperscript{148}

Justice Scalia couches his opinion entirely in the language of First Amendment rights. It is the majority, not he, that is inappropriately attempting to judicially define democracy.\textsuperscript{149} But Justice Scalia is of course doing exactly the same thing: he simply has a different view of democracy than the majority. Justice Scalia engages in his own balancing test. He weighs the government's asserted interest in prohibiting

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\item[A\textsuperscript{141}.] \textit{Austin}, 494 U.S. at 659–60.
\item[A\textsuperscript{142}.] \textit{Id.} at 679 (Scalia, J., dissenting).
\item[A\textsuperscript{143}.] \textit{Id.} at 679–80 (Scalia, J., dissenting).
\item[A\textsuperscript{144}.] \textit{Id.} at 680–81 (Scalia, J., dissenting).
\item[A\textsuperscript{145}.] \textit{Id.} at 679–82 (Scalia, J., dissenting).
\item[A\textsuperscript{146}.] \textit{Id.} at 680–83 (Scalia, J., dissenting).
\item[A\textsuperscript{147}.] \textit{Id.} at 682–85 (Scalia, J., dissenting).
\item[A\textsuperscript{148}.] \textit{Id.} at 695 (Scalia, J., dissenting).
\item[A\textsuperscript{149}.] \textit{Id.} at 686 (Scalia, J., dissenting).
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corporate domination of political debate against the corporation's speech interests, and finds the government's interest lacking. In doing so, he uses his preferred vision of democracy (as an unrestrained political marketplace) to ascertain the scope of the First Amendment, and then uses the First Amendment, so defined, to argue that his view of democracy is constitutionally compelled. Thus, Justice Scalia, like the majority, cannot define the scope of the First Amendment without first referencing his preferred vision of what is good for democratic self-government. Justice Scalia simply disagrees with the Michigan State Legislature about what that is.

III. Mcconnell v. Federal Elections Commission Revisited

Having identified and examined the Court's democracy-defining dilemma, we can consider the Court's *McConnell v. Federal Elections Commission* decision in light of that dilemma. *McConnell* involved a challenge to the Bipartisan Campaign Finance Reform Act ("BCRA"). BCRA includes two main provisions. The first of these provisions prohibits political parties from raising or spending so-called "soft" (unregulated) money. The second requires paid political advertising that refers to a candidate for a federal election and is broadcast within 120 days of a general election or 60 days of a primary election to be paid for with "hard" (regulated) money. The *McConnell* majority, in an opinion jointly authored by Justices Stevens and O'Connor, upheld both of these provisions. In doing so, the majority showed substantial deference to congressional judgments regarding what types of political spending can "corrupt" the political process.

The majority opinion began by acknowledging the definition of

150. *Id.* at 686 (Scalia, J., dissenting).
151. Justice Scalia attempts to bolster the legitimacy of his preferred view of democracy by invoking original intent. *Id.* at 693 (Scalia, J., dissenting). The Founding Fathers, he says, would be appalled by the majority's opinion. *Id.* This argument is similar to that posed by academic opponents of campaign finance, discussed *supra* at text accompanying notes 66–71, and suffers from the same failing. On its face, Justice Scalia's assertion that original intent requires the Court to adopt his vision of democracy and not the legislature's is not an argument, it is just that: an assertion. It is not supported by a single reference or footnote, other than a rather grandiloquent quote from Alexis de Tocqueville. *Id.* at 693–94 (Scalia, J., dissenting). This failure to support his assertion is not surprising, given the substantial and unresolved disagreement about what, if any, vision of democracy the founding generation preferred, or intended to enshrine in the Constitution. *See supra* note 73.
153. *Id.* at 114.
154. *Id.* at 122–26. "Soft money" is money generally not subject to federal regulation. *Id.* Prior to BCRA, federal law permitted unions, corporations, individuals, and groups who had already donated the maximum amount of money permitted to federal candidates to make "soft money" donations to state and local political parties. *Id.*
155. *Id.* at 161–62.
156. *Id.* at 188–89.
157. *Id.* at 154–58.
corruption that Congress had endorsed in enacting BCRA.\textsuperscript{158} The statute, the Court said, was designed to "purge national politics of what was conceived to be the pernicious influence of big money campaign contributions."\textsuperscript{159} The Court then summarized the corruption-driven \textit{Buckley} paradigm, noting that the \textit{Buckley} Court had upheld contribution limits as sufficiently justified by Congress' interest in preventing real or apparent corruption, but struck down expenditure limits as not adequately supported by that interest.\textsuperscript{160}

Next, the majority opinion articulated three "important developments" in the campaign finance realm since \textit{Buckley}: the increased use of soft money contributions to gain access to federal candidates;\textsuperscript{161} the increased reliance on unregulated "issue advertising" that was substantially identical to regulated express advocacy advertising;\textsuperscript{162} and a congressional determination that the use of soft money and issue advertising had led to a "meltdown" of the entire campaign regulatory scheme.\textsuperscript{163}

The majority opinion then discussed the applicable standard of review. The Court noted that limits on campaign contributions are subject only to "closely drawn" (not strict) scrutiny.\textsuperscript{164} Citing \textit{Buckley}, the Court said that this reduced level of scrutiny is appropriate because contribution limits, unlike expenditure limits, impose only marginal restrictions on speech and are grounded in the important governmental interest of preventing the corruption and the appearance of corruption threatened by large financial contributions to political campaigns.\textsuperscript{165}

Having set out these preliminary matters, Justices Stevens and O'Connor then tackle the problem of defining "corruption." They reject the dissenters' view that corruption can only encompass \textit{quid pro quo}-type exchanges of dollars for votes.\textsuperscript{166} The majority opinion notes that the Court repeatedly has held that corruption includes not just \textit{quid pro quo}-type arrangements, but also reaches the "improper influence" and "opportunities for abuse" possible when public officials are "too compliant" with the wishes of large contributors.\textsuperscript{167} The majority opinion

\textsuperscript{158} \textit{Id.} at 115–16.
\textsuperscript{159} \textit{Id.} (quoting United States v. Auto. Workers, 352 U.S. 567, 572 (1957)).
\textsuperscript{160} \textit{Id.} at 120–22.
\textsuperscript{161} \textit{Id.} at 122–26.
\textsuperscript{162} \textit{Id.} at 126–29. The different treatment of these two types of ads stems from a footnote in \textit{Buckley}. In \textit{Buckley} footnote 52, the Court, in narrowly construing the statute before it to avoid vagueness problems, limited the statute to "express" advocacy, which it identified as communications containing words such as "vote for," "elect," and "support." 424 U.S. 1, 44 n.52 (1976).
\textsuperscript{163} \textit{McConnell}, 540 U.S. at 129–32.
\textsuperscript{164} \textit{Id.} at 134–42.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 143.
\textsuperscript{167} \textit{Id.}
describes that danger as the risk that elected officials might decide issues based not on the “merits” of an issue itself or on the wishes of the elected official’s constituents, but “according to the wishes of those who have made large financial contributions.”\(^{168}\) This possibility, the Court said, is “just as troubling to a democracy” as *quid pro quo* arrangements.\(^{169}\) The Court noted that the government has a compelling interest in preventing the erosion of public confidence in the political system itself—what the majority opinion called the “cynical assumption that large donors call the tune.”\(^{170}\) Having so defined the scope of corruption, the majority held that it was reasonable for Congress to decide that the type of conduct regulated by BCRA held as much of a risk of corruption (so-defined) as the types of conduct that the Court had in its earlier cases permitted Congress to regulate or prohibit.\(^{171}\)

The majority opinion seems correct in its argument that BCRA itself does little more than embody a congressional determination that certain legal distinctions—between the corrupting effect of large “soft” money donations and the corrupting effect of large “hard” money donations; and between advertisements that include the words “Vote for Smith” and those that include the words “Call Smith and tell him how you feel about this”—had become practically insupportable. If one accepts (as the Court did in *Buckley*) that a $100,000 donation solicited by a federal candidate and distributed into her campaign account poses a risk of political corruption, it is difficult to argue that Congress cannot reasonably conclude that a $100,000 donation solicited by a federal candidate and distributed to her political party does also.

Thus, the vigorous dispute between the majority and the dissenters in *McConnell* is perhaps driven less by the actual significance the Justices attach to these particular distinctions than by the continuing disagreement among the Justices about the meaning of political corruption. As we have seen, however, that dispute is merely a proxy for a deeper dispute about the best way to structure democracy itself. In *McConnell*, as in the earlier cases we have examined, the Justices could not agree on what corrupts the political process because they share no common vision of what an uncorrupted process would look like. Thus, the *McConnell* majority, in accepting the congressional determination that the political system can be corrupted when elected officials give “undue influence” to large financial donors—that is, when they decide issues based on the wishes of financial backers instead of on “the
merits"— signaled that its baseline definition of democracy was not inconsistent with that embraced by Congress when it enacted BCRA.that definition, however, was inconsistent with Justice Scalia’s preferred vision of democracy. Given the “premises of democracy,” Justice Scalia said in dissent, “there is no such thing as too much speech.” As we have seen, this defines the First Amendment’s protection of speech at such a high level of abstraction that it provides no independent guidance on how to decide actual cases. That difficulty is readily apparent in Justice Scalia’s dissent here. Despite the (apparently self-evident) premise that in a democracy there is no such thing as too much speech, Justice Scalia readily concedes that political speech can be regulated, as it was in *Buckley*, to combat *quid pro quo*-type corruption. To Justice Scalia, the regulations in BCRA are distinguishable from those in *Buckley* because the increased access and influence of political donors to elected officials targeted by BCRA simply cannot be evidence of political corruption. These things are instead just “the nature of politics.” Therefore, Justice Scalia said, they cannot “properly be considered corruption of the political process.”

Thus, Justice Scalia, echoing his *Austin* dissent, argues that the very premise of the First Amendment is that citizens are “neither sheep nor fools” and that government therefore can have little legitimate interest in

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172. The dissenting Justices, particularly Justice Kennedy, accuse the majority of expanding the Court’s prior definition of corruption by including within that definition this notion of “undue influence.” *Id.* at 293–98 (Kennedy, J., concurring and dissenting in part). It is difficult to see how. *Buckley* held that preventing corruption or the appearance of corruption was a compelling government interest justifying campaign contribution limits. In other words, *Buckley* held that allowing elected officials to collect large amounts of money from financial backers created the appearance or reality of political corruption. That holding makes little sense unless the *Buckley* Court believed that large political contributions could inappropriately influence legislative behavior by slanting that behavior in favor of the contributor. Thus, the *Buckley* rationale seems to be the same rationale that underlies the *McConnell* majority’s “undue influence” analysis.

173. Where the *McConnell* majority’s baseline is may be signaled by the fact that, when discussing how the Court previously has held that political corruption encapsulates more than *quid pro quo*-type exchanges, the *McConnell* majority notably did not cite either *MCFL* or *Austin*. See *id.* at 143–44.

174. See *id.* at 257–59 (Scalia, J., concurring and dissenting in part).

175. *Id.* at 259 (Scalia, J., concurring and dissenting in part).

176. See text accompanying notes 67–69; see also Schauer & Fides, *supra* note 19, at 1819.


178. *Id.* (Scalia, J., concurring and dissenting in part).

179. *Id.* (Scalia, J., concurring and dissenting in part). Throughout his opinion, Justice Scalia questions congressional motives in enacting BCRA. His way of doing so is notably disrespectful to that body. This is, unfortunately, consistent with what some scholars have identified as an increasing tendency of this Court to show little regard for or courtesy to Congress as a coordinate branch of government. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240–41, 303, 310 (2002); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Pamela S. Karlan, *supra* note 50, at 1366.
regulating political speech. But at no point does Justice Scalia explain how that premise explains the constitutionally significant distinction he draws between the campaign finance restrictions imposed by BCRA and the campaign finance restrictions upheld in *Buckley.* As in his *Austin* dissent, he simply uses his baseline assumptions about the nature of democracy to define the scope of the First Amendment, and then argues that the First Amendment itself therefore requires his definition of democracy. At no point does he explain why his preferred definition of democracy is constitutionally compelled but other visions—including the vision preferred by Congress in enacting BCRA—are constitutionally prohibited.

IV. BEYOND CAMPAIGN FINANCE REGULATION

I have thus far focused my discussion of the democracy-defining dilemma on the Supreme Court’s campaign finance cases. The dilemma, however, extends beyond campaign finance cases into at least some other election law cases. Two of the Court’s most controversial election law cases, *California Democratic Party v. Jones* and *Timmons v. Twin Cities Area New Party* illustrate this.

A. *CALIFORNIA DEMOCRATIC PARTY V. JONES*

In *California Democratic Party v. Jones,* the Court struck down California’s “blanket primary” law. A blanket primary allows eligible voters to vote in any party’s primary and to vote in different party primaries for different offices up for election at the same time (for example, a voter could, on the same ballot, vote in the Democratic Party gubernatorial primary and the Republican Attorney General primary). The blanket primary law was enacted by referendum in California. Public support for the law appeared to be driven in large part by a desire to ensure that more moderate candidates emerged from the party primaries. The law was challenged by the Republican and Democratic Parties, along with the Libertarian Party and the Peace and Freedom Party, as a violation of their First Amendment associational rights.

The lower court held that although the parties’ associational

181. Id. at 258–59 (Scalia, J., concurring and dissenting in part).
182. Id.
184. Id. at 570.
185. Id.
186. Id.
interests were burdened, the burden was sufficiently justified by the
government’s asserted interest in “enhanc[ing] the democratic nature of
the election process.” California had claimed that its statute enhanced
the electoral process in two ways: by giving more voters (voters
unaffiliated with a political party) the ability to elect candidates of their
choice; and by ensuring an “effective” vote (defined as a vote that
contributes to the election of their preferred candidate) to citizens who
are in the minority party in a “safe district.” California also asserted
additional interests in promoting electoral fairness and increasing voter
participation in elections. The lower court accepted these interests as
sufficiently compelling. In doing so, that court cited the testimony of
several political scientists predicting that the blanket primary would
increase voter participation, make elected officials responsive to greater
numbers of people, and reduce partisanship.

The Supreme Court reversed. Justice Scalia, writing for a 7-2
majority, rejected each of California’s asserted interests as too
insufficient to justify the restrictions the statute imposed on the parties’
associational interests. The Court held that California’s interests in
giving more voters an opportunity to vote for a candidate of their choice,
and in increasing governmental responsiveness to citizens, were “simply
circumlocution” for an interest the Court found unacceptable: producing
different general election candidates than the parties themselves would
have chosen. Giving minority voters in safe districts an increased
opportunity to cast a vote likely to result in the election of the candidate
of their choice was rejected on identical
grounds.

The majority opinion also rejected out of hand California’s other asserted interests. According
to the Court, promoting “fairness” was not a sufficiently compelling state

188. Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1290 (E.D. Cal. 1997), aff’d, 169 F.3d 646 (9th Cir. 1999), rev’d, 530 U.S. 567 (2000). The Court of Appeals adopted the district court opinion in full and attached the decision as an appendix to its opinion. Throughout this discussion I cite to the district court opinion as adopted by the 9th Circuit.
189. Jones, 169 F.3d at 660-61. The state argued that other ways of conducting primary elections resulted in extremist candidates being promoted to the general election, thereby restricting the unaffiliated public at large to a choice between two candidates both of whom it found undesirable. Id.
190. A “safe district” in this context is an electoral district in which one party routinely wins by a comfortable margin. Id. at 661; Thornburg v. Gingles, 478 U.S. 30, 48-49 (1986). Minority party voters, therefore, have little chance to elect candidates from their preferred party.
191. Jones, 169 F.3d at 662.
192. Id.
193. Id. at 661-62.
195. Id. at 582. The blanket primary referendum passed by a margin of 60% to 40%, and was supported by 61% of Democrats, 57% of Republicans, and 69% of Independents. Jones, 169 F.3d at 649. This reasoning raises the interesting question of just who (or what) “the party” is. For a discussion of this issue, see Richard L. Hasen, Do the People or the Parties Own the Electoral Process, 149 U. Pa. L. Rev. 815, 818-19 (2001).
196. Jones, 530 U.S. at 582-83.
interest because political fairness is generally promoted by majority rule, and enhancing voter choice was an insufficiently compelling government interest because voter choice is reduced, not enhanced, by a system that produces the type of centrist candidates favored by a majority of voters.

These are extraordinarily sweeping statements, containing broad claims about what democracy should be. Reading the district court and the Supreme Court opinions side by side, it is strikingly apparent that the disagreement between the two courts rests on judicial disagreement about exactly these claims—whether political fairness is protected by majority rule, and whether voter choice is enhanced or reduced by blanket primaries—and not on any independently ascertainable notion of rights. Because the district court accepted the view that democratic self-government should be something "greater than competition between political parties," the court accepted as compelling California's interest in pursuing policies that furthered that view of democracy. The Supreme Court, in rejecting California's asserted interests, also rejected its vision of democracy. In doing so, it substituted its own preferred vision of democracy, as requiring strict adherence to majority rule, interest group based battles, and strong political parties, for the less partisan-driven and less divisive vision preferred by the people of California.

B. TIMMONS V. TWIN CITIES AREA NEW PARTY

Timmons v. Twin Cities Area New Party involved a First Amendment challenge to Minnesota's "anti-fusion" law. Anti-fusion laws prohibit so-called multi-party nominations—they prohibit the same person from being listed on a ballot as a candidate for more than one party. In Timmons, a Minnesota State Representative wanted to appear on the ballot as the candidate for both the Democratic Farmer-

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197. Id. at 584.
198. Id. at 584–85.
199. Jones, 169 F.3d at 660 (quoting Lightfoot v. Eu, 964 F.2d 865, 872 (9th Cir. 1992)).
200. Justice Stevens, writing in dissent, recognized (and rejected) the democracy-defining underpinnings of the majority's decision: "It is not this Court's constitutional function to choose between the competing visions of what makes democracy work—party autonomy and discipline versus progressive inclusion of the entire electorate in the process of selecting their public officials—that are held by the litigants in this case. That choice belongs to the people." Jones, 530 U.S. at 598–99 (Stevens, J., dissenting). For a thorough discussion of the vision of democracy underlying the Supreme Court's opinion, see Richard H. Pildes, Democracy and Disorder, 68 U. Chi. L. Rev. 695 (2001) [hereinafter Pildes, Democracy and Disorder].
201. 520 U.S. 351 (1997).
202. Id. at 353–54. Supporters of fusion candidates argue that they strengthen minor parties by allowing voters to support minor party candidates without "wasting" their vote on a candidate unlikely to win.
Labor Party and the New Party. Both parties agreed to accept the joint nomination, but, citing Minnesota's anti-fusion law, local election officials refused to permit it.

The New Party sued, posing its First Amendment association claim in language very similar to that used by the Court in *California Democratic Party v. Jones*. Anti-fusion laws, the New Party argued, interfere with minor parties' association rights by preventing party members from selecting the candidate of their choice. The New Party also argued that allowing fusion candidates enhances democracy by increasing the responsiveness of elected officials (by giving them more information about why voters selected them), and by strengthening minor parties (by allowing voters to support minor party candidates without "wasting" their vote on a candidate unlikely to win). The Eighth Circuit Court of Appeals agreed, and struck down the anti-fusion statute. The court relied on a vision of democracy that portrayed fusion candidates in a positive, democracy-enhancing light: multiple party nominations, the court said, invigorate self-government by "fostering more competition, participation, and representation in American politics."

Again, the Supreme Court disagreed. In this case, the Court found that the fusion ban was only minimally intrusive on the First Amendment rights of political parties, and that Minnesota's asserted interest in protecting the political process was compelling. Justice Rehnquist, writing for the majority, agreed with the plaintiffs that their First Amendment associational interests were at issue, but held that the burden imposed on those rights by the anti-fusion law was not significant. The state's interests, however, were considered quite important. Those interests—avoiding voter confusion, overcrowded ballots, party splintering and disruptions of the two-party system—were sufficiently compelling to the Court to justify restricting the plaintiffs' First Amendment associational rights. States, the Court held, have a *bona fide* interest in enacting election regulations that favor the traditional two-party system and "temper the destabilizing effects of party splintering and excessive factionalism."

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203. *Id.* at 354.
204. *Id.*
205. *Id.* at 355; *Jones*, 530 U.S. at 571.
207. *Id.* at 355.
209. *Id.* at 199; *see also Pildes, Democracy and Disorder*, supra note 200.
211. *Id.* at 363.
212. *Id.* at 364-70.
213. *Id.* at 367.
Compare this decision with Jones. In Jones, California’s asserted interest in increasing voter participation and making elected officials more responsive to more people was insufficient to overcome the political party plaintiffs’ First Amendment associational interest in selecting their own candidates.\textsuperscript{214} But in Timmons, Minnesota’s interests in avoiding voter confusion and protecting the two-party system were sufficiently compelling to justify intruding on that exact same interest.\textsuperscript{215}

I propose that many people would consider increasing voter participation and governmental responsiveness to be as, or more important state goals than avoiding whatever voter confusion is caused by fusion candidacies. Troublingly, the disconnect between these two cases is understandable only in light of the Court’s reliance on an unstated but necessary underlying vision of democracy. The Court simply did not accept California’s view of democracy, as less partisan and more participatory, as legitimate. Minnesota’s view of democracy, however, which promoted rigorous competition between the two major parties, was acceptable to the Court. Thus, in the judicial balancing act necessary to resolve these cases, Minnesota’s intrusion into party autonomy was sufficiently compelling, but California’s was not.

V. MANAGING THE DEMOCRACY-DEFINING DILEMMA IN JUDICIAL DECISION-MAKING

We have seen that the dual tasks of defining rights and defining democracy are, in campaign finance cases and perhaps in political process cases more generally, inextricably interwoven. Thus, as I have shown, judges charged with protecting rights in those cases cannot do so without relying on underlying, judicially preferred definitions of democracy. I have called this the courts’ democracy-defining dilemma. The judiciary’s failure to recognize and manage this dilemma has had several negative consequences. It has allowed important decisions to rest on unstated and undefended assumptions about what democracy requires, it has led to inconsistent and opaque judicial reasoning, and it has deflected attention from what should be the important issue in these cases: what, if any, visions of democratic self-government are constitutionally compelled or constitutionally prohibited?

In this Part, I attempt to alleviate these negative consequences by discussing how a court aware of the democracy-defining dilemma would evaluate a campaign finance case. I propose a new decision-making methodology, one designed to bring the democracy-defining dilemma into the open, and to force judges to recognize and justify the democratic preferences underlying their opinions. If they cannot do so, the new

\textsuperscript{215} Timmons, 520 U.S. at 369–70.
methodology insists that judges respect the democracy-defining preferences of legislatures. Forcing the democracy-defining underpinnings of judicial reasoning in these cases into the forefront, where they can be challenged and debated, will bring greater transparency, clarity, and consistency to this body of law. Forcing judges to stop substituting their visions of good government for those of legislative bodies will create something most participants in the campaign finance debate claim to want: more “room” for non-judicial participation in defining democracy.

A. NEW DECISION-MAKING METHODOLOGY

Under the current approach to campaign finance cases, judges balance the legislature’s asserted interest in regulating the speech at issue against the speaker’s claimed First Amendment rights. In most cases, as we have seen, they do this without any explicit examination of either the vision of democracy pursued by the legislature in enacting the challenged law, or of the (often different) vision of democracy underlying the judges’ decision regarding how much weight to give the state’s asserted interest. This methodology is doubly flawed: it both hides the democracy-defining implications of any judicial evaluation of the government’s asserted interest in these cases, and wrongly presumes that the scope of the speaker’s rights can be ascertained independently of that government interest.

The first step of the new methodology, therefore, is to direct the court’s attention to the foundational issue in these cases: what definition of democracy—what vision of good government—was the challenged statute enacted to enhance or protect, and is that vision constitutionally permissible? Whether a particular vision of democracy is constitutionally prohibited or protected, will, of course, be a deeply contested question. The purpose of the first part of the analysis therefore is simply to ensure that this question is addressed openly and directly, rather than in the ad hoc manner seen in the Court’s existing cases. To accomplish this, the analysis at this point must remain focused on the constitutional permissibility of the legislatively preferred vision of democracy, without regard to the purported substantive scope of the First Amendment.

216. See, e.g., McConnell v. FEC, 540 U.S. 93, 93 (2003); Jones, 530 U.S. at 567; Timmons, 520 U.S. at 351.

217. How a court should go about interpreting a statute is of course a contested issue. See, e.g., Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593 (1995). This problem of statutory interpretation is not unique to my methodology and I, therefore, do not address the issue here.

218. For a general discussion of methods of legal reasoning and constitutional interpretation, see Akhil Reed Amar, The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26 (2000). As with the question of statutory interpretation, the debate regarding which of these modes of legal reasoning is “correct” is beyond the scope of this article.
Requiring a judge to identify and evaluate the validity of the legislature’s preferred vision of democracy before turning to the task of balancing the respective interests of the state and the speaker will ensure that a judge will not lightly or without justification substitute his or her own preferred vision of democracy for that preferred by the legislature. Only by requiring the court to consider the legislature’s vision of democracy first, before determining the weight to give to the state’s interest in pursuing that vision, can a court break out of the circular reasoning underlying the traditional rights-based methodology. This step, therefore forces judges to acknowledge their democracy-defining role—to call it by its proper name—rather than allowing them to disguise that role in rights-based rhetoric.

If, having undertaken this explicitly democracy-focused analysis, the court determines that the view of democracy pursued by the legislature is not itself constitutionally prohibited, the court should then accept that pursuing the legislatively-preferred vision of democracy is a valid state interest, and should evaluate the statute using that vision as the relevant democracy-defining baseline. In doing so, the court should ask whether the challenged legislation was sufficiently related to the legislature’s goal of enhancing or protecting its constitutionally acceptable definition of democracy. The court also can at this point properly engage in its traditional balancing of state and individual interests. The importance of the state’s interest in pursuing its preferred vision of democracy, however, should not itself be questioned. The cognizant point here is that the legitimacy of the legislative goal—to pursue a particular vision of democracy—is confirmed once the court determines, under the first step of the analysis, that the definition of democracy pursued by the legislature is not constitutionally prohibited.  

This new methodology will, without question, reduce rights-based judicial intervention in legislative regulation of the political process. Recognition of the democracy-defining dilemma—that courts cannot define or protect First Amendment rights in campaign finance cases without relying on some baseline vision of what democracy itself should be—forces a choice between granting judges or legislatures the power to determine what that baseline is. Except in the presumably few cases where independently definable constitutional constraints prohibit or require a particular democratic vision, the new methodology elects to leave that task with legislatures.

219. Legislatures enacting political process regulations will of course rarely have articulated—or even contemplated—a comprehensive democratic vision underlying the regulations they enact. Such regulations do, however, represent a legislative endorsement of a particular view of what constitutes good self-government.

220. It is an over-generalization to respond to this point by arguing that the rights-based constitutionalism of the United States legal system has already made this choice in favor of the
B. CRITICISMS OF THE NEW METHODOLOGY

There are at least two potential criticisms of this approach both of which I will address only briefly here. The first is that this analytical methodology inappropriately forsakes the Constitution as a source of democratic norms and ideals. The Constitution, this argument asserts, has important things to say about the meaning of democracy. Restraining judicial power to use the Constitution as a tool to define democracy therefore diminishes the Constitution's role in this important debate. This criticism certainly has merit: my new methodology will reduce the court's influence, vis a vis the legislature, in defining our democracy. I believe, however, that thinking of this as a criticism of the new methodology evidences a misunderstanding of the lessons learned from exposing the democracy-defining dilemma. The important question is not whether the Constitution tells us anything more interesting about democracy than, for example, that the president must be at least 35 years old before he or she takes office. Of course it does: the Constitution enshrines many values—liberty, freedom and equality—that help to define our democratic values. But it tells us very little about how to reduce these great abstractions into an operating system of government, or, perhaps more importantly, how to integrate them when their many possible interpretations collide. The relevant question therefore is not whether the Constitution has anything to teach us about democracy, but how aggressively judges should use their power of judicial review to give substance to these abstractions in the face of legislative disagreement about what democracy requires. If the values of liberty, freedom and equality enshrined in the Constitution can be manifested through a variety of political processes, none of which are clearly prohibited by the Constitution, then perhaps judges should exercise their awesome power of judicial review modestly, and without assuming, especially without overt analysis, that their particular views of democracy are constitutionally compelled.

The second potential argument against the new methodology is that it simply makes the wrong choice in shifting most democracy-defining decisions from judges to legislatures. Legislators, according to the likely advocates of this position, are inherently self-interested and cannot be trusted to define democracy because they will do so in ways that perpetuate, or "lock-in," their own power. This argument is based in the so-called "structuralist" approach to constitutional interpretation.221
Structuralism is a process-based theory that purports to eliminate rights-based judicial balancing by moving the courts’ focus away from individual rights and toward the protection of so-called “structural” values. Under structuralist reasoning, constitutional rights are not “trumps” individuals hold against majoritarian power; they are instead tools used by judges to ensure that government acts only for structurally permissible reasons.

Pildes and Issacharoff have developed a particularized application of the structuralist approach that they argue should be used in political process cases. That approach is the political competition model. Under this view, “appropriate” democracy is, like a private market, robustly competitive. As long as the political system is appropriately competitive, judges should not use constitutional rights to unsettle the decisions made in that system. But, like a private market, the political market is vulnerable to anti-competitive behavior. In the political market, this anti-competitive behavior manifests itself in legislative or executive efforts to raise entry barriers against potential competitors. It is this monopolistic (or dualopolistic) behavior that constitutional principles prohibit. In political process cases, therefore, structuralists argue that courts should shift their focus away from individual rights to the competitive health of the underlying political market, and should use their power to ensure that legislative bodies do not manipulate the ground rules for their own benefit.

The difficulty with using structuralist reasoning as a response to the democracy-defining dilemma is that structuralism does not—and does not purport to—eliminate the need for judges to define democracy. At a minimum, structuralism requires judges to define “good” democracy as democracy that is appropriately competitive. More pertinently, determining whether a political system is appropriately competitive


223. \textit{Id.}

224. Issacharoff & Pildes, \textit{supra} note 221.

225. \textit{Id.} at 646.

226. \textit{Id.}

227. \textit{Id.}

228. \textit{Id.}

229. \textit{Id.}


231. Structuralism also is subject to the first criticism rendered against my proposed methodology: it largely removes the Constitution from the task of substantively defining democratic values. See \textit{generally, Hasen, The Supreme Court, supra} note 9, at 143.

232. Cain, \textit{Garrett’s Temptation, supra} note 4, at 1602–03.
requires judges to measure challenged legislation against some ideal standard of what an electoral system should look like. But if, as posited above, there are numerous visions of democracy that are constitutionally acceptable, there is simply no way for a judge to do this without engaging in the circular, democracy-defining reasoning discussed above. Every act required or permitted in the political sphere that is not optimally competitive restraints competition to some degree. It is not enough, therefore, for a structuralist judge to determine if an act restraints competition. He must decide if it restraints competition too much. But how much is too much will inevitably depend on the judge's understanding of what an optimally competitive system looks like. Without such a baseline understanding, the judiciary cannot determine, as Pildes says it must, if the challenged act is an impermissible "extreme manifestation" of uncompetitiveness, or a less extreme, permissible one. For example, to a republican-influenced supporter of campaign finance regulation, a financing system that permits wealthy interests to dominate political debate will look extremely uncompetitive; to a pluralist opponent of regulation, it will not. Ultimately therefore, the structuralist approach, like the Court's rights-based approach, requires a baseline understanding of how democracy should be defined—an understanding that I argue should be left, within the broad constitutional limits discussed above—to the legislature.

**CONCLUSION**

In our legal system, the judiciary has been assigned the role of defining and protecting the rights enumerated in the Constitution. But the democracy-defining dilemma demonstrates that in some cases that task cannot be separated from the deeper task of defining democracy. Consequently, when engaging in their rights-protection role in these cases, judges must make decisions about democracy. Courts have not, however, acknowledged this. This failure to recognize and manage the democracy-defining dilemma has resulted in a body of law that lacks both transparency and doctrinal consistency. Moreover, it has embroiled judges in the very task that many of them have expressly disavowed: defining democracy.

The purpose of this Article has been to illuminate the democracy-defining dilemma, and to begin constructing a way of managing it. The new methodology I propose will reduce the power of judges to define democracy, thereby permitting greater and more varied experimentation with democratic schemes and creating more space for "we the people" to participate in defining the democracy in which we live.

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233. *Id.*