

finance laws—those that cap the amount of a person’s direct contributions to candidates—as a somewhat “lesser restraint on political speech.”³⁷ Accordingly, contribution limits face “a lesser but still ‘rigorous standard of review.’”³⁸ They “may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”³⁹ In *McCutcheon*, the petitioner asked the Court to abandon its longstanding distinction between expenditures and contributions and to subject regulations on both to strict scrutiny.⁴⁰ While the Court declined that invitation, the plurality’s opinion arguably did blur the line between the applicable levels of scrutiny by suggesting that both standards require reviewing courts to “assess the fit between the stated governmental objective and the means selected to achieve that objective.”⁴¹ Meanwhile, the Court has held that laws such as disclosure requirements impose lesser First Amendment burdens and thus are allowable as long as they bear a “substantial relation” to a “‘sufficiently important’ governmental interest.”⁴² Taken together, these varying levels of scrutiny amount to a balancing inquiry in the campaign finance context that is analogous in structure to the inquiry undertaken in the voting context.

The Sections that follow delve more deeply into how the Court in voting and spending cases proceeds from these comparable starting points. Is the Court applying a shared set of sensibilities and reaching similar

(1986) (“We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.”).

³⁷ *McCutcheon*, 134 S. Ct. at 1444 (plurality opinion).

³⁸ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (per curiam)).

³⁹ *Id.* (quoting *Buckley*, 424 U.S. at 25).

⁴⁰ *Id.* at 1445. The contribution–expenditure distinction originated in *Buckley*. See *Buckley*, 424 U.S. at 44–45.

⁴¹ *McCutcheon*, 134 S. Ct. at 1445 (plurality opinion); cf. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (“Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with like-minded persons. A contribution is simply an indirect expenditure . . .”). The Court arguably blurred the lines still further in its most recent campaign finance ruling, which upheld a Florida rule barring judicial candidates from personally soliciting campaign contributions. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015). The Court purported to apply strict scrutiny, but it performed an unusually forgiving narrow-tailoring analysis, prompting Justice Scalia to object in dissent that the Court had applied only “the appearance of strict scrutiny.” *Id.* at 1677 (Scalia, J., dissenting); see also *id.* at 1678 (“This is not strict scrutiny; it is sleight of hand.”). Concurring in the Court’s opinion, Justice Breyer expressed the view that “tiers of scrutiny” are merely “guidelines informing our approach to the case at hand, not tests to be mechanically applied.” *Id.* at 1673 (Breyer, J., concurring).

⁴² *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010) (quoting *Buckley*, 424 U.S. at 64, 66). Somewhat confusingly, the Court has sometimes referred to this lesser level of scrutiny as “exacting.” See, e.g., *id.* at 366 (quoting *Buckley*, 424 U.S. at 64).

conclusions, or is it following two separate scripts? How, for instance, does the Court analyze the burdens that voting and spending regulations impose on affected parties? What does it make of the countervailing interests that the government asserts? By examining these particulars and others, the remainder of this Part identifies a number of notable—and sometimes striking—points of doctrinal divergence.

B. *Regulatory Burdens*

In both voting and spending cases, assessing regulatory burdens is a prominent element of the judicial inquiry. But those assessments appear to have diverged in at least two ways. First, recent voting decisions have arguably downplayed the severity of regulatory burdens, while recent spending decisions have done the opposite. Second, recent voting decisions have tended to focus on a regulation's aggregate consequences rather than its impact on particular individuals; recent spending decisions are the reverse.

1. *Severity of Burdens.*—*Crawford*, in which the Supreme Court made its most extensive effort in recent years to grapple with the right to cast a vote, illustrates well the Court's minimization of regulatory burdens. The plurality stressed that Indiana's voter ID law imposed modest costs on the typical voter. Even for individuals without valid identification, the plurality's view was that, by and large, "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."⁴³ The plurality acknowledged that the law might place a "special" and "somewhat heavier burden" on "a limited number of persons," including "elderly persons born out of State," "homeless persons," and others who might have difficulty obtaining their birth certificates.⁴⁴ But the plurality discounted the "severity of that burden" by observing that the law provided a safety valve, allowing individuals without identification to cast provisional ballots that would be counted if the voter later traveled to the local clerk's office and executed an affidavit.⁴⁵

Notably, the plurality and the concurring Justices refrained from invoking canonical statements from earlier cases stressing the fundamental

⁴³ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality opinion); *see also* *Frank v. Walker*, 768 F.3d 744, 749 (7th Cir. 2014) (applying *Crawford* and expressing skepticism that Wisconsin's voter ID law "is an obstacle to a significant number of persons who otherwise would cast ballots").

⁴⁴ *Crawford*, 553 U.S. at 199 (plurality opinion).

⁴⁵ *Id.*

nature of the right to vote and decrying burdens on its exercise. They made no mention, for instance, of the Court’s declaration in *Reynolds v. Sims* that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized” since “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.”⁴⁶ And the plurality discounted the relevance of *Harper v. Virginia State Board of Elections*,⁴⁷ which had invalidated Virginia’s \$1.50 poll tax on the ground that “the right to vote is too precious, too fundamental to be so burdened or conditioned.”⁴⁸ The *Crawford* plurality did not suggest that Indiana’s voter ID law was, practically speaking, less burdensome than Virginia’s poll tax. Instead, it reasoned that the laws differed in kind: Virginia’s tax “invidiously discriminate[d]” based on wealth—a characteristic “unrelated to voter qualifications.”⁴⁹ Indiana’s law, in contrast, was at least arguably directed at “protect[ing] the integrity and reliability of the electoral process,” which made its burdens potentially more tolerable.⁵⁰

In recent campaign finance cases, the Court’s depiction of burdens has been strikingly different. The Court has not hesitated to characterize a regulation’s burdens as severe. In *McCutcheon*, for instance, the plurality maintained that the Federal Election Campaign Act’s annual aggregate contribution limit, which left donors free to contribute more than \$100,000 per election cycle to candidates and political committees before hitting the cap, “seriously restrict[ed] participation in the democratic process.”⁵¹ Along similar lines, the Court in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* concluded that Arizona “substantially burden[ed] protected political speech” by providing public matching funds to candidates whose

⁴⁶ 377 U.S. 533, 562 (1964); *see also id.* at 555 (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (“‘The right . . . to choose’ that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.” (quoting *United States v. Classic*, 313 U.S. 299, 314 (1941))); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing voting as “a fundamental political right, because preservative of all rights”).

⁴⁷ 383 U.S. 663 (1966).

⁴⁸ *Id.* at 670.

⁴⁹ *Crawford*, 553 U.S. at 189 (plurality opinion) (quoting *Harper*, 383 U.S. at 666).

⁵⁰ *Id.* at 189–90 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

⁵¹ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014) (plurality opinion). This has not always been the Court’s approach. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 396 (2000), the Court noted that the overwhelming majority of donors—nearly 98%—made contributions of less than the maximum amount allowed by the challenged state contribution limits, and it explained that, even assuming that the cap affected the “ability [of the candidate who was challenging the limits] to wage a competitive campaign . . . a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*.”

privately financed opponents and their supporters exceeded certain spending thresholds.⁵² While the matching-funds scheme did not “actually prevent anyone from speaking in the first place or cap campaign expenditures,”⁵³ and might have even increased the overall level of election-related speech, the Court nevertheless viewed it as “an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s].”⁵⁴

The Court likewise played up the burdens of the corporate expenditure regulations at issue in *Citizens United*, characterizing them as “an outright ban” on speech.⁵⁵ According to the Court, the fact that the regulations applied only during a limited pre-election window, and that corporations could still spend money through political action committees (PACs) within that window, did not meaningfully diminish their severity.⁵⁶ The Court described PACs as “burdensome alternatives,” which “are expensive to administer and subject to extensive regulations” of their own.⁵⁷ By way of contrast, in *Crawford*, the Court easily could have portrayed the provisional ballot option that Indiana offered to voters without valid identification as a “burdensome alternative.”⁵⁸ Yet the *Crawford* plurality described the option as one that “mitigated” the “severity” of the law’s burdens.⁵⁹

2. *Individual Versus Aggregate Burdens.*—Discussions of burdens in recent voting and spending cases have also differed with respect to the

⁵² 564 U.S. 721, 728 (2011).

⁵³ *Id.* at 733 (quoting *McComish v. Bennett*, 611 F.3d 510, 525 (9th Cir. 2010)).

⁵⁴ *Id.* at 736 (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)); *see also Davis*, 554 U.S. at 739 (discussing the “special and potentially significant burden” imposed on candidates who spent more than \$350,000 of their own money by a law that relaxed the contribution limits applicable to such candidates’ opponents).

⁵⁵ *Citizens United v. FEC*, 558 U.S. 310, 337 (2010).

⁵⁶ *Id.* at 337–38.

⁵⁷ *Id.* at 337. *Compare id.* (“Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b.”), with *McConnell v. FEC*, 540 U.S. 93, 204 (2003) (“Because corporations can still fund electioneering communications with PAC money, it is ‘simply wrong’ to view the provision as a ‘complete ban’ on expression rather than a regulation.” (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003))). The Court has also held that “[d]isclaimer and disclosure requirements may burden the ability to speak,” but it has viewed those burdens as less severe than the burdens associated with expenditure and contribution limits. *Citizens United*, 558 U.S. at 366.

⁵⁸ The dissenters made this point, calling provisional-ballot rules “onerous”—a “high hurdle” that did “not obviate the burdens” of the state’s voter ID requirement. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 216–17 (2008) (Souter, J., dissenting); *cf. Karlan, supra* note 25, at 41 (“[W]e might ask why the Justices downplay the burdens poor people face from having to negotiate a bureaucratic maze to obtain sufficient identification . . . while being so solicitous of the First Amendment burdens placed on wealthy speakers.”).

⁵⁹ *Crawford*, 553 U.S. at 199 (plurality opinion).

relevant unit of analysis. In *Crawford*, the plurality acknowledged the “special” burden that Indiana’s voter ID requirement imposed on some voters, but stressed that they were “limited [in] number.”⁶⁰ The plurality’s view was that, at least in the context of a facial challenge to Indiana’s law, the burden assessment should focus on “the statute’s broad application to all Indiana voters.”⁶¹ The three Justices who concurred in the judgment went further and maintained that the only relevant burden was “the single burden that the law uniformly impose[d] on all voters.”⁶² As they saw it, because the law was nondiscriminatory, its “individual impacts” on certain “vulnerable voters” were simply not a matter of constitutional concern.⁶³

In contrast, the Court’s recent campaign finance cases have emphasized individual burdens rather than assessing burdens in the aggregate. Even though these cases have presented facial challenges, the Court has not suggested that burdens must be widespread to be of concern. *McCutcheon*, for instance, contained no mention of how many individuals might actually be encumbered by the Federal Election Campaign Act’s \$100,000-plus annual aggregate contribution limit.⁶⁴ Presumably the number was far smaller than the number of voters encumbered by Indiana’s voter ID law. But, according to the *McCutcheon* plurality, it was problematic to require even “one person to contribute at lower levels than others because he wants to support more candidates or causes.”⁶⁵ “It is no answer,” the plurality maintained, “to say that the individual can simply contribute less money to more people.”⁶⁶ For that individual, the law “impose[d] a special burden on broader participation in the democratic process.”⁶⁷

C. Governmental Interests

In both voting and spending cases, the Court also considers the interests that the government may assert in an effort to justify a law’s burdens. And again, the Court’s analysis differs from one context to the next. On the voting side, the Court’s recent decisions discuss the

⁶⁰ *Id.*

⁶¹ *Id.* at 202–03.

⁶² *Id.* at 205 (Scalia, J., concurring in the judgment).

⁶³ *Id.* at 205, 207; *see also id.* at 208 (expressing concern that “an individual-focused approach” would require “detailed judicial supervision of the election process”).

⁶⁴ The aggregate limits at issue in *McCutcheon* are codified at 52 U.S.C.A. § 30116(a)(3) (West 2014). *See id.* § 30116(c) (providing for adjustments based on inflation).

⁶⁵ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1449 (2014) (plurality opinion).

⁶⁶ *Id.*

⁶⁷ *Id.*

government's interests in expansive and deferential terms. On the spending side, the Court has taken a narrower and more skeptical view.

In *Crawford* and elsewhere, the Court has referred to “the State’s broad interests in protecting election integrity” and in “protecting public confidence in the integrity and legitimacy of representative government.”⁶⁸ It has described these interests as “indisputably . . . compelling” and called public confidence in the electoral system “essential to the functioning of our participatory democracy.”⁶⁹ These were the interests that the *Crawford* plurality ultimately relied upon as justifications for upholding Indiana’s voter ID law.⁷⁰ In so doing, the plurality made clear that the state was entitled to assert and pursue more than just a narrow “interest in deterring and detecting voter fraud.”⁷¹

In campaign finance cases, the Court at one time described the government’s interests in similar terms. For example, in *McConnell v. FEC*, which upheld most of the Bipartisan Campaign Reform Act of 2002 (BCRA), the Court wrote that the government’s regulatory interests were “not confined” to rooting out quid pro quo corruption.⁷² Instead, they included minimizing “‘improper influence’ and ‘opportunities for abuse,’” “combating the appearance or perception of corruption engendered by large campaign contributions,” and preserving “the willingness of voters to take part in democratic governance.”⁷³ This characterization of the government’s regulatory interests accords with statements the Court made decades earlier in upholding the Tillman Act’s restrictions on corporate and union political contributions. According to the Court, the Tillman Act aimed “not merely to prevent the subversion of the integrity of the electoral process,” but also “to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.”⁷⁴

⁶⁸ *Crawford*, 553 U.S. at 197, 200 (plurality opinion) (citation and internal quotation marks omitted); see also *id.* at 191 (noting “the State’s interest in protecting the integrity and reliability of the electoral process”); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

⁶⁹ *Purcell*, 549 U.S. at 4 (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)); see also *Crawford*, 553 U.S. at 197 (plurality opinion) (explaining that public confidence “encourages citizen participation in the democratic process”).

⁷⁰ *Crawford*, 553 U.S. at 191 (plurality opinion).

⁷¹ *Id.*

⁷² 540 U.S. 93, 143 (2003). Quid pro quo corruption, the Court has explained, “captures the notion of a direct exchange of an official act for money.” *McCutcheon*, 134 S. Ct. at 1441 (plurality opinion).

⁷³ *McConnell*, 540 U.S. at 143–44 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389–90 (2000)); see also *Nixon*, 528 U.S. at 389 (“[W]e [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”).

⁷⁴ *United States v. UAW*, 352 U.S. 567, 575 (1957).

The Court's recent campaign finance decisions, in contrast, have articulated a much more circumscribed conception of the government's interests, and the sort of sentiments expressed above have been relegated to dissents.⁷⁵ As the *McCutcheon* plurality put it, the sole interest now recognized as a valid rationale for limiting campaign contributions or expenditures is "preventing corruption or the appearance of corruption."⁷⁶ And the government may target "only a specific type of corruption—'quid pro quo' corruption."⁷⁷ The Court's current position is that the government has no valid interest in seeking to reduce the appearance of special influence or access.⁷⁸ Beyond the anticorruption interest, the only other governmental interest that the Court has blessed is an "interest in 'provid[ing] the electorate with information' about the sources of election-related spending"—an interest that has been held to justify laws that require the disclosure of contributions or expenditures.⁷⁹

D. Factual Determinations and Regulatory Fit

Once the Court identifies the relevant burdens and interests in voting and spending cases, its next task is to determine whether the interests advanced justify the burdens imposed. In the voting context, the Court has placed the onus on plaintiffs to come forward with specific evidence to establish that a regulation's burdens outweigh its benefits. Meanwhile, it has required little from the government before crediting its regulatory justifications. In campaign finance cases, the situation is nearly the reverse.

⁷⁵ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 470–71 (2010) (Stevens, J., concurring in part and dissenting in part) ("When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. . . . The predictable result is cynicism and disenchantment: an increased perception that large spenders 'call the tune' and a reduced 'willingness of voters to take part in democratic governance.'" (quoting *McConnell*, 540 U.S. at 144)).

⁷⁶ 134 S. Ct. at 1450 (plurality opinion).

⁷⁷ *Id.* In *Citizens United*, the Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had recognized "a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Citizens United*, 558 U.S. at 348 (quoting *Austin*, 494 U.S. at 660). *Citizens United* took the position that *Austin*'s broad conception of corruption was at odds with the Court's prior decision in *Buckley*. See *id.* at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); see also *McCutcheon*, 134 S. Ct. at 1450 (plurality opinion) ("No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.'" (citations omitted)).

⁷⁸ *McCutcheon*, 134 S. Ct. at 1451 (plurality opinion).

⁷⁹ *Citizens United*, 558 U.S. at 367 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam)); see also *McCutcheon*, 134 S. Ct. at 1459–60 (plurality opinion).

The Court has asked little of plaintiffs while viewing the government's attempts to justify its regulations with a skeptical eye.

In *Crawford*, the plurality stated that the challengers to Indiana's voter ID law bore "a heavy burden of persuasion" to sustain their "broad" facial attack on the law.⁸⁰ The plurality faulted the challengers for failing to offer "concrete evidence" to "quantify" the burden on the voters most directly affected by the law and the extent to which that burden was unjustified by the state's interests.⁸¹ Dissenting, Justice Souter responded that the Court had never before insisted upon "empirical precision . . . for raising a voting-rights claim."⁸²

At the same time, the *Crawford* plurality demanded little from the state before crediting its justifications for its voter ID law. The plurality gave substantial weight to the state's asserted interest in preventing fraud even though "[t]he record contain[ed] no evidence of any [in-person voter impersonation] fraud actually occurring in Indiana at any time in its history."⁸³ As for the state's contention that its law would advance its interest in protecting "public confidence in the integrity of the electoral process," the plurality saw no need for empirical substantiation.⁸⁴ It apparently took it as self-evident that instituting safeguards against fraud would "inspire public confidence."⁸⁵

Given the fractured nature of the Court's decision, it is difficult to predict just how much more the Justices would have required of the state

⁸⁰ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (plurality opinion).

⁸¹ *Id.* at 200–01; *see also id.* at 201 ("From this limited evidence we do not know the magnitude of the impact [the voter ID law] will have on indigent voters in Indiana."); *id.* at 202 ("In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974))). In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), perhaps the highest profile appellate court application of *Crawford*, the Seventh Circuit engaged in similar evidentiary scrutiny. It noted the absence of trial-level findings "that substantial numbers of persons eligible to vote have tried to get a voter ID but been unable to do so" or that photo-ID laws depressed voter turnout. *Id.* at 746–47.

⁸² *Crawford*, 553 U.S. at 221 (Souter, J., dissenting).

⁸³ *Id.* at 194 (plurality opinion).

⁸⁴ *Id.* at 197. Justice Souter, in contrast, contended in dissent that the state should not prevail without "a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed." *Id.* at 209 (Souter, J., dissenting). He criticized the plurality for failing to "insist enough on the hard facts that our standard of review demands." *Id.* at 211.

⁸⁵ *Id.* at 197 (plurality opinion) (internal quotation marks omitted). The Seventh Circuit in *Frank* treated *Crawford* as establishing the public confidence benefits of voter ID laws as a "legislative fact" that it was bound to accept as true even if presented with evidence to the contrary. *Frank*, 768 F.3d at 750. Dissenting from the denial of rehearing en banc, Judge Posner insisted that "there is no evidence that [voter ID] laws promote confidence in the electoral system," and he criticized the panel for "conjur[ing] up a fact-free cocoon" to avoid reckoning with that evidentiary gap. *Frank v. Walker*, 773 F.3d 783, 794–95 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

had the challengers better documented the law's burdens on particular voters. The plurality's conclusion that the challengers had not adequately established the law's burdens no doubt contributed to its decision not to scrutinize the state's asserted interests more carefully.⁸⁶ Thus, the plurality might have insisted upon additional proof from the state. The three Justices who concurred in the judgment, however, likely would have been unmoved. In their view, "[i]t is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class."⁸⁷

In contrast, in the campaign finance context, the Court in *Citizens United* entertained a similarly broad facial challenge without requiring the plaintiffs to make any heightened evidentiary showings. The Court did not insist that the challenger offer any particular empirical substantiation of the breadth and severity of the burden imposed by the corporate expenditure restriction. It did not, for instance, demand any formal proof concerning the inadequacy of PACs as a means for corporations to make lawful election-related expenditures. It simply dismissed PACs as "burdensome alternatives."⁸⁸ By way of explanation, the Court maintained that it "must give the benefit of any doubt to protecting rather than stifling speech."⁸⁹

The Court in *Arizona Free Enterprise* asked equally little of the challengers to Arizona's public financing scheme. The state had faulted the challengers for "fail[ing] to 'cite specific instances in which they decided not to raise or spend funds' and . . . 'fail[ing] to present any reliable evidence that Arizona's triggered matching funds deter[red] their speech.'"⁹⁰ Rejecting those arguments, the Court first pointed to a few examples in the record of specific candidates and groups who were said to

⁸⁶ See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (noting that courts must consider the "asserted injury to the right[] . . . that the plaintiff seeks to vindicate" before "identify[ing] and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed by its rule"). Compare *Crawford*, 553 U.S. at 225–30 (Souter, J., dissenting) (scrutinizing the state's asserted interests more carefully and concluding that they were too tenuously connected to the voter ID law to justify the law's burdens), with *id.*, 553 U.S. at 208 (Scalia, J., concurring in the judgment) (concluding that, absent "a severe and unjustified overall burden," the legislature's "judgment must prevail").

⁸⁷ *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment).

⁸⁸ *Citizens United v. FEC*, 558 U.S. 310, 337 (2010). Compare *id.* (holding that the "option to form PACs does not alleviate the First Amendment problems"), with *McConnell v. FEC*, 540 U.S. 93, 203 (2003) ("The ability to form and administer separate segregated funds [i.e., PACs] . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy.").

⁸⁹ *Citizens United*, 558 U.S. at 327 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.)).

⁹⁰ 564 U.S. 721, 744 (2011) (citations omitted).

have changed their behavior in response to the law.⁹¹ But the Court then declared that, in any event, “we do not need empirical evidence to determine that the law at issue is burdensome” because “the burden . . . is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups.”⁹²

Meanwhile, on the other side of the ledger, the Court’s recent campaign finance cases have set a high bar for the government. *McCutcheon* and *Citizens United* are both illustrative. In *McCutcheon*, the government contended that BCRA’s aggregate contribution limits served to prevent the limits on contributions to individual candidates from being circumvented.⁹³ Deeming the likelihood of circumvention “far too speculative,” the plurality concluded that the government had failed to carry its burden.⁹⁴ Additionally, the plurality faulted the law for being “poorly tailored” to the government’s asserted interest.⁹⁵ In the plurality’s view, whatever salutary anti-circumvention benefits the aggregate contribution limits may have had, they likely thwarted many contributions that posed no circumvention concerns.⁹⁶ The plurality’s animating principle was that, “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”⁹⁷ By way of analogy and contrast, the *Crawford* plurality did not suggest any tailoring problem with Indiana’s voter ID law even though many of the people

⁹¹ *Id.*

⁹² *Id.* at 745–46.

⁹³ 134 S. Ct. 1434, 1452 (2014) (plurality opinion). More specifically, the claim was that, without an aggregate limit, a donor who wanted to give a particular candidate more than was allowable would be able to contribute to an unlimited number of other candidates or political committees, and they could then reroute that money to (or otherwise support) the donor’s preferred candidate.

⁹⁴ *Id.* at 1452–53; *see also id.* at 1456 (describing the circumvention scenarios offered by the government as “divorced from reality”).

⁹⁵ *Id.* at 1456–57 (stating that “[e]ven when the Court is not applying strict scrutiny,” it still requires “a means narrowly tailored to achieve the desired objective” (quoting *Bd. of Trs. of S.U.N.Y. v. Fox*, 492 U.S. 469, 480 (1989))).

⁹⁶ *Id.* at 1457; *see also id.* at 1458 (“Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government’s interest in preventing circumvention.”). The Court also noted that Congress had “multiple alternatives available . . . that would serve the Government’s anticircumvention interest, while avoiding ‘unnecessary abridgement’ of First Amendment rights.” *Id.* at 1458 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)). In *Arizona Free Enterprise*, the Court wrote that even if the state’s law was “more efficient than other alternatives,” the state’s desire “to ‘find[] the sweet spot’ and ‘fine-tun[e]’ its public funding system to achieve its desired level of participation without an undue drain on public resources, is not a sufficient justification for the burden.” 564 U.S. at 747, 753 (quoting *id.* at 779 (Kagan, J., dissenting)).

⁹⁷ *McCutcheon*, 134 S. Ct. at 1452 (plurality opinion) (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000)).

encumbered by the law plainly sought to cast legitimate votes, not fraudulent ones.

Similarly, in *Citizens United*, the Court cast aside several of the government's asserted regulatory rationales essentially by fiat. Rather than meaningfully engage with the extensive record that Congress had compiled when it enacted BCRA, the Court simply proclaimed that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy" and "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."⁹⁸ The Court confirmed the categorical nature of these pronouncements two years after *Citizens United* when it summarily reversed a Montana Supreme Court decision upholding Montana's ban on corporate electoral expenditures.⁹⁹ The Montana Supreme Court had reasoned that *Citizens United* was not controlling because the state had adduced Montana-specific evidence "that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."¹⁰⁰ Without engaging with that evidence, the U.S. Supreme Court declared that "Montana's arguments . . . were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."¹⁰¹

⁹⁸ *Citizens United v. FEC*, 558 U.S. 310, 357, 360 (2010); *see also* *Ariz. Free Enter.*, 564 U.S. at 751 ("The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned."); Karlan, *supra* note 25, at 34 ("The juxtaposition of Justice Kennedy's breezy confidence in *Citizens United* that no amount of money in the form of independent expenditures sloshing through the system will 'cause the electorate to lose faith in our democracy' is hard to square with *Purcell*'s concern that even the specter of voter impersonation 'drives honest citizens out of the democratic process and breeds distrust of our government.'" (first quoting *Citizens United*, 558 U.S. at 360; and then quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam))).

⁹⁹ *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam); *see also* Karlan, *supra* note 25, at 35 (agreeing that *American Tradition Partnership* "dr[o]ve[] home" the point that "*Citizens United* reflected a philosophical, rather than an empirical, position on money's effect on politics").

¹⁰⁰ *Am. Tradition P'ship*, 132 S. Ct. at 2491 (Breyer, J., dissenting).

¹⁰¹ *Id.* (majority opinion). The Court's campaign finance decisions have not always approached evidentiary requirements and tailoring in quite this way. At least some earlier rulings asked more of challengers and required less of the government. In *Nixon v. Shrink Missouri Government PAC*, which addressed Missouri's state contribution limits, the challengers criticized the state for failing to offer "empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence." 528 U.S. 377, 390–91 (2000). Rejecting that argument and upholding the law, the Court wrote that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. According to the Court, "*Buckley* demonstrate[d] that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Id.* Thus, while acknowledging that "mere conjecture" is not "adequate to carry a First Amendment burden," the Court treated the "State's evidentiary obligation" as modest. *Id.* at 392–93. It indicated that it would demand "more extensive

E. Legislative Motives

The differing demands that the Court has placed on the government in its recent voting and spending cases may relate in part to the Court's divergent sensibilities about regulatory incentives and lawmakers' motivations. On the voting side, the Court has expressed respect for lawmakers' judgment and expertise while downplaying their possible ulterior motives. On the spending side, it is the reverse.

In *Crawford*, the plurality spoke of its disinclination when reviewing a voting regulation to "frustrate[] the intent of the elected representatives of the people."¹⁰² The plurality acknowledged that it was "fair to infer that partisan considerations may have played a significant role in the [Indiana legislature's] decision to enact [its voter ID law]."¹⁰³ Nonetheless, it reasoned that, as long as the law was "supported by valid neutral justifications," the fact that "partisan interests may have provided one motivation for the votes of individual legislators" was not enough to invalidate it.¹⁰⁴

At one time, the Court's campaign finance rulings were similarly deferential to the lawmaking process. In *Nixon v. Shrink Missouri Government PAC*, Justice Breyer's concurring opinion described legislators as having "significantly greater institutional expertise . . . in the field of election regulation" than courts.¹⁰⁵ Justice Breyer remarked that, as a consequence, the Court's practice was to "defer[] to empirical legislative judgments—at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective

evidentiary documentation" only if a law's challengers first come forward with evidence of their own sufficient to "cast doubt" on the plausibility of the State's regulatory rationale. *Id.* at 394. The challengers to Missouri's law had offered a few "academic studies said to indicate that large contributions to public officials or candidates do not actually result in changes in candidates' position." *Id.* But the Court viewed these as inadequate given that "[o]ther studies . . . point[ed] the other way," and that the cited studies did not question the "public perception" that large contributions are corrupting. *Id.* at 394–95; *see also* *McConnell v. FEC*, 540 U.S. 93, 144–45 (2003) (applying a similar approach); Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 43 (2004) (describing *Nixon* as a case that "lowered the evidentiary burden for proving corruption or its appearance").

¹⁰² *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (plurality opinion) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006)).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 204.

¹⁰⁵ 528 U.S. at 402 (Breyer, J., concurring).

electoral challenge.”¹⁰⁶ The Court repeated and amplified this point a few years later in *McConnell*.¹⁰⁷

The Court’s more recent campaign finance decisions contain no such sentiments. To the contrary, the *McCutcheon* plurality expressed in stark terms its distrust of legislators’ motives and unwillingness to defer to legislative judgments: “[T]hose who govern should be the *last* people to help decide who *should* govern.”¹⁰⁸ In *Citizens United*, the dissent pointed to similar statements made by members of the majority in prior writings as one explanation for the majority’s readiness “to run roughshod over Congress’ handiwork.”¹⁰⁹ The dissent recounted these Justices’ suggestions that portions of BCRA “may be little more than ‘an incumbency protection plan,’ a disreputable attempt at legislative self-dealing rather than an earnest effort to facilitate First Amendment values and safeguard the legitimacy of our political system.”¹¹⁰ Despite following almost immediately on the heels of *Crawford*, neither *Citizens United* nor other recent campaign finance decisions recognize or try to reconcile these seemingly dissonant lines of authority.

II. A JUSTIFIED DIVERGENCE?

Is there a good reason for the strikingly different positions that the Supreme Court has taken in its recent voting and spending cases? The Court itself has not articulated one. Indeed, given that voting and spending cases rarely mention one another, it is not apparent that the Court has fully grasped the extent of the disparities identified in Part I. Commentators

¹⁰⁶ *Id.*

¹⁰⁷ 540 U.S. 93, 117, 137, 165–66, 171 (2003); see also Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 531 (2004) (describing the Court in *McConnell* as granting “considerable” and “quite remarkable” “deference to Congress’s judgments”).

¹⁰⁸ 134 S. Ct. 1434, 1441–42 (2014) (plurality opinion); see also Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 75 (critiquing the *McCutcheon* plurality’s “premise that the Court stands outside of, and indeed above, the structures and processes of governance”). The Court expressed a similar view in *Davis v. FEC*, which invalidated a provision of BCRA that relaxed contribution limits and other regulations for candidates challenging self-financed opponents. See 554 U.S. 724, 742 (2008) (“The Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and it is a dangerous business for Congress to use the election laws to influence the voters’ choices.” (citation omitted)).

¹⁰⁹ 558 U.S. 310, 461 (2010) (Stevens, J., concurring in part and dissenting in part).

¹¹⁰ *Id.* at 460–61 (citation omitted) (quoting *McConnell*, 540 U.S. at 306 (Kennedy, J., concurring in the judgment in part and dissenting in part)); see also *McConnell*, 540 U.S. at 263 (Scalia, J., concurring in part and dissenting in part) (“The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”).

likewise have devoted little attention to the issue.¹¹¹ The question, however, is a significant one. Knowing whether the Court's divergent approaches can be satisfactorily explained sheds light on the Court's recent rulings and on existing scholarly critiques of that body of law. On one hand, if those decisions are in sync (or at least not in tension), then changing course in one context or the other—something the Court's critics frequently call for—might result in unintended discordance. On the other hand, if the Court's decisions are not readily reconcilable, then perhaps the Court has veered off course in one or both sets of cases. Thinking about voting and spending more holistically could help get the law back on track.

This Part considers several potential explanations for the current state of the Court's voting and spending jurisprudence and finds them all wanting. One possibility is that the Court's analysis looks the way it does because regulations on voting and spending implicate distinct lines of constitutional doctrine. But, as Section II.A explains, such doctrinal explanations are largely question begging. Another possibility is to seek to justify the current legal landscape by pointing to differences in the nature of voting and spending themselves. Voting and spending are no doubt distinct activities and need not be subject to identical regulations. But, as Section II.B explains, their differences are not closely linked to the Court's particular doctrinal moves.

A. Explanations Rooted in Constitutional Text and Doctrine

This Section considers two variants of the argument that the Court's recent voting and spending rulings properly reflect differences in the underlying constitutional provisions and principles that apply in each context.

1. Equal Protection Versus the First Amendment.—First, one might contend that challenges to voting regulations implicate the Fourteenth Amendment's Equal Protection Clause, while challenges to campaign finance regulations raise separate First Amendment issues. According to this line of reasoning, because the Equal Protection Clause is principally concerned with laws that differentiate between groups of people,¹¹² courts should indeed emphasize collective burdens rather than individual ones in voting cases. And because established equal protection doctrine generally calls for deferential judicial review unless a law draws suspect lines (for

¹¹¹ See *supra* note 24 and accompanying text.

¹¹² See, e.g., *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008) (“Our equal protection jurisprudence has typically been concerned with governmental classifications that ‘affect some groups of citizens differently than others.’” (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961))).

example, based on race or gender),¹¹³ courts in voting cases should be reluctant to second-guess the government's broadly stated interests. These are among the basic doctrinal moves of the *Crawford* plurality.¹¹⁴ In contrast, the First Amendment is principally concerned with the rights of individual speakers and places a premium on unfettered discourse.¹¹⁵ Accordingly, courts should approach campaign finance restrictions with skepticism toward the government's interests and motives. These are essentially the animating principles of cases like *Citizens United* and *McCutcheon*.¹¹⁶

While this doctrinal account may have some superficial appeal, its explanatory power is limited. As a descriptive matter, it oversimplifies the current state of voting law in particular. As a conceptual matter, it rests on the highly dubious premise that the Equal Protection Clause compels the specific analytical features of the Court's recent voting cases and that the First Amendment compels the distinct features of the Court's recent spending cases. These open-ended constitutional guarantees of equality and of expressive and associational liberty are not so rigidly deterministic. Indeed, given that neither provision expressly refers to voting or spending, it is not axiomatic that they are even the right constitutional starting points.

a. Voting.—On the voting side, the Court's decisions are not now, and have never been, exemplars of conventional equal protection analysis. While the Court grounded its canonical 1960s-era voting rights rulings in “the Fourteenth Amendment's command that no State shall deny persons equal protection of the laws,”¹¹⁷ those decisions did not look to the presence or absence of suspect classifications and then ratchet the level of judicial scrutiny up or down accordingly. Instead, those decisions applied what courts and commentators term “the ‘fundamental rights’ strand of equal protection analysis.”¹¹⁸ The notion was that, because the right to vote

¹¹³ See, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

¹¹⁴ See *supra* Sections I.B–C.

¹¹⁵ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

¹¹⁶ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448–49 (2014) (plurality opinion); *Citizens United v. FEC*, 558 U.S. 310, 327, 339–40 (2010).

¹¹⁷ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

¹¹⁸ *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1983); see also Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA. J. CONST. L. 457, 464 (2007) (noting that the right to vote “has come to be commonly understood . . . as part of the fundamental rights branch of equal protection”). The Court turned to the Equal Protection Clause because the Constitution does not affirmatively “confer the right of suffrage upon any one.” *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874). But once a state confers the franchise, the Court has held that the Equal Protection Clause gives the state's citizens “a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); see also *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9–10 (1982) (similar).

is fundamental, a law that precludes people from “exercis[ing] the franchise in a free and unimpaired manner” must be “carefully and meticulously scrutinized,” whether or not the law involves suspect classifications.¹¹⁹ As others have observed, this sort of approach has as much in common with First Amendment and substantive due process analyses as it does with conventional equal protection analysis.¹²⁰

Although the *Crawford* plurality refrained from invoking the sweeping rights-oriented language of earlier voting cases, it likewise declined to follow the standard equal protection script.¹²¹ The plurality derived its balancing approach not from the Court’s general body of equal protection jurisprudence, but instead from a line of ballot access cases that applied an amalgam of equal protection and First Amendment principles. The two principal authorities that the *Crawford* plurality relied upon make this clear.

First, in *Anderson v. Celebrezze*, which involved a constitutional challenge to restrictive Ohio ballot access rules, the Court stressed that it was not relying solely on “prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment.”¹²² Instead, because ballot access restrictions impact the ability of voters (and candidates) to associate for political ends, the Court invoked the First Amendment as well.¹²³ Second and similarly, in *Burdick v. Takushi*, the Court treated “the

¹¹⁹ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *see also Kramer*, 395 U.S. at 626 (“This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”). Indeed, if a law denies or abridges the right to vote based on race or sex, the Fifteenth and Nineteenth Amendments, rather than the Equal Protection Clause, offer the most straightforward path for relief. U.S. CONST. amends. XV, XIX.

¹²⁰ *See, e.g.,* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 268 (1994) (“Both laws which directly restrict constitutionally privileged conduct such as free speech and laws which restrict fundamental rights such as the right to vote must be narrowly tailored to serve a compelling state interest.”); Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 491 (2002) (“Government action that interferes with a fundamental right may be analyzed under the fundamental rights branch of equal protection, or under a substantive due process analysis.”); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2467 (2003) (observing that the Court has departed from its conventional equal protection analysis when “government activities . . . bear critically upon political participation”).

¹²¹ *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring in the judgment).

¹²² 460 U.S. at 786 n.7.

¹²³ *See id.* at 787–89; *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (explaining that ballot access restrictions “place burdens on two different, although overlapping, kinds of rights—the rights of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of political persuasion, to cast their votes effectively”).

individual's right to vote and his right to associate with others for political ends" as inextricably intertwined.¹²⁴ The *Burdick* Court rejected a challenge to Hawaii's prohibition on write-in voting only after concluding that the law did not unduly encumber "voters' rights to make free choices and to associate politically through the vote."¹²⁵ This doctrinal pedigree confirms that the plurality's controlling opinion in *Crawford* cannot be understood as the unavoidable result of conventional equal protection analysis.¹²⁶

Going a step further, several scholars have elaborated upon First Amendment implications of voting regulations and have urged courts to give the First Amendment a more central role in their analysis.¹²⁷ Some suggest that, because voting "is the quintessential act of political participation," restrictions on the franchise necessarily hamper the ability to speak and associate.¹²⁸ Others stress that vote suppression can operate as a form of viewpoint discrimination.¹²⁹

¹²⁴ 504 U.S. 428, 433 (1992) (quoting *Anderson*, 460 U.S. at 788).

¹²⁵ *Id.* at 438–39.

¹²⁶ Concurring in the judgment, Justice Scalia seemed to favor shifting voting rights discourse into a more conventional equal protection box. He took the position that

[a] voter complaining about [a nondiscriminatory] law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected.

Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 207 (2008) (Scalia, J. concurring in the judgment) (citation omitted). In his view, "weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence." *Id.* Only two other Justices, however, joined Justice Scalia's opinion. *Id.* at 204. The fact that a majority of the Court—both the plurality and dissenters—declined to endorse these sentiments is further evidence that conventional equal protection principles were not driving the controlling analysis.

¹²⁷ See, e.g., Tokaji, *supra* note 120, at 2498 ("[T]here is a common constitutional value underlying rights of speech and rights of political participation.").

¹²⁸ *Id.* at 2509; see also Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1250 (2003) ("[A]n electoral law, rule, structure, or device that significantly burdens the individual's right to make free choices and associate effectively through the ballot impairs the individual's right of association."); cf. Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 335 (1993) (urging greater consideration of the expressive value of voting but recommending against "us[ing] the first amendment as the textual basis for the constitutional right to vote").

¹²⁹ See, e.g., Janai S. Nelson, *The First Amendment, Equal Protection and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013) (examining felon disenfranchisement through the lens of First Amendment viewpoint discrimination analysis); Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288, 293 (2014) ("[T]he First Amendment path provides a doctrinally tested and theoretically sound mechanism through which to disentangle the *Anderson-Burdick* focus on

Members of the Court have signaled interest in such First Amendment analysis. Justice Kennedy, for instance, has written in the context of partisan gerrymandering that “First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.”¹³⁰ More recently, the *McCutcheon* plurality referred to a “First Amendment right of citizens to choose who shall govern them.”¹³¹ Whether or not courts ultimately head down this path, this active discourse about the constitutional underpinnings of the right to vote underscores that the specific analytic content of the Court’s voting decisions is the product of judgment and inertia rather than equal protection imperatives.

b. Spending.—On the spending side, the story is somewhat different, but the bottom line is the same: The doctrine does not reflect constitutional imperatives. The Court has long grounded its campaign finance analysis in the First Amendment. Its recent decisions in particular speak in lofty and emphatic terms about the threat that campaign finance regulations pose to core First Amendment-protected activities.¹³² But despite the Court’s recent efforts to cast these cases as ones that raise quintessential First Amendment issues, campaign finance law remains a fairly distinctive and self-contained area of First Amendment doctrine. The Court largely avoids analyzing challenged regulations with reference to concepts like content and viewpoint neutrality or time, place, and manner restrictions—standard fare elsewhere in First Amendment law.¹³³ Instead, the Court continues to reference the lines *Buckley* drew between contribution limits, expenditure limits, and disclosure regulations.¹³⁴ And it continues to refine its account of the anticorruption interests that can justify campaign finance regulation.¹³⁵ As with the details of the Court’s voting

burdensomeness from the separate constitutional harm imposed by intentional voter viewpoint discrimination.”).

¹³⁰ *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

¹³¹ 134 S. Ct. 1434, 1462 (2014) (plurality opinion).

¹³² *Citizens United v. FEC*, 558 U.S. 310, 329 (2010); *see also id.* at 339 (“The First Amendment ‘has its fullest and most urgent application to speech uttered during a campaign for political office.’” (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989))); *McCutcheon*, 134 S. Ct. at 1448 (plurality opinion) (“As relevant here, the First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights” (citation omitted)); Bertrall L. Ross II, *Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917, 917 (2015) (“In the campaign finance realm, we are in the age of the imperial First Amendment.”).

¹³³ *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

¹³⁴ *See, e.g., McCutcheon*, 134 S. Ct. at 1444–45 (plurality opinion).

¹³⁵ *See, e.g., id.* at 1450–51.

analysis, it is thus difficult to attribute the Court's specific choices on these issues to unequivocal constitutional commands. This point is hammered home by the fact that, in several prior cases, a majority of the Court had made different analytical judgments and evinced a greater willingness to uphold regulations.¹³⁶ The Court's most recent rulings invalidating various campaign finance measures remain hotly contested among the Justices themselves, as well as among scholars and the broader public.¹³⁷

2. *Article I's Election Provisions.*—A second potential doctrinal explanation for the Court's divergent voting and spending analysis involves two election-related provisions in Article I of the Constitution. One addresses elector qualifications. It essentially provides that individuals are qualified to vote in federal congressional elections if their state has deemed them eligible to vote in state legislative elections.¹³⁸ The other, the so-called Elections Clause, directs states to handle the logistics of congressional elections, subject to congressional oversight.¹³⁹ These provisions, the Court has observed, recognize the reality "that government must play an active role in structuring elections."¹⁴⁰ Because regulation of the election process is constitutionally approved, one might contend that governments need flexibility to set voting-related rules, even though such rules will inevitably burden particular voters in one way or another. Along these lines, Justice Scalia's *Crawford* concurrence cited the Elections Clause to support his

¹³⁶ See *supra* notes 70–73, 102, 106–07 and accompanying text.

¹³⁷ See, e.g., *Citizens United*, 558 U.S. at 393–94 (Stevens, J., concurring in part and dissenting in part) ("The notion that the First Amendment dictates [a ruling in favor of Citizens United] is, in my judgment, profoundly misguided."); *id.* at 425 ("It is today's holding that is the radical departure from what had been settled First Amendment law."). There are debates not just about how the First Amendment should apply, but also about whether and to what extent First Amendment analysis should even govern challenges to campaign finance regulations. Justice Stevens at one time suggested that, because campaign finance regulations affect a person's ability to "mak[e] decisions about the use of his or her property," due process might provide a more apt source for the Court's rules of decision. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398–99 (2000) (Stevens, J., concurring). A few scholars have developed this position further. See, e.g., Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1236–37 (2000) (proposing "that courts consider both constitutional speech doctrines and constitutional property doctrines in developing a new approach to judicial review of campaign finance restrictions").

¹³⁸ U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.")

¹³⁹ *Id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.")

¹⁴⁰ *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); see also *id.* at 441 ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.")

view that “detailed judicial supervision of the [voting] process would flout the Constitution’s express commitment of the task to the States.”¹⁴¹ Meanwhile, campaign finance regulation could be cast as less central to electoral superintendence and thus subject to greater judicial skepticism—or, at the federal level, perhaps held to exceed Congress’s powers entirely.¹⁴²

Again, whatever initial plausibility this argument might have, it collapses upon closer inspection. For starters, the Court has never endorsed the view that the Elections Clause differentiates between voting and spending, authorizing regulation of the former but not the latter. To the contrary, the Court in *McConnell* specifically rejected an argument “that Congress . . . overstepped its Elections Clause power in enacting BCRA.”¹⁴³ *Buckley* likewise viewed it as “well established” that Congress had power to regulate elections writ large, including their financing.¹⁴⁴ Since that decision, the Court has consistently accepted that the “critical constitutional questions” in campaign finance cases “go not to the basic power of Congress to legislate in this area, but to whether the specific legislation that Congress has enacted interferes with First Amendment freedoms” or violates other constitutional constraints.¹⁴⁵ Consistent with this understanding, the Court recently reiterated in a non-campaign finance case that “[t]he [Elections] Clause’s substantive scope is broad[,] . . . ‘embrac[ing] authority to provide a complete code for congressional elections.’”¹⁴⁶

Moreover, even if Article I conferred broader authority to regulate voting than spending, that would not necessarily justify differential judicial treatment of voting and spending regulations, much less the specific kind of differential treatment reflected in the Court’s recent opinions. There are at least two reasons.

First, powers granted in Article I cannot be understood in isolation from the various constraints that the Constitution elsewhere imposes on the exercise of governmental authority. As the Court has put it, “the Constitution is filled with provisions that grant Congress or the States

¹⁴¹ 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment).

¹⁴² See, e.g., Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 43–46 (2010) (contending that the Elections Clause does not authorize federal campaign finance laws); Bradley A. Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038, 2056–57 (2013) (same).

¹⁴³ 540 U.S. 93, 187 (2003).

¹⁴⁴ 424 U.S. 1, 13–14 (1976) (per curiam).

¹⁴⁵ *Id.*

¹⁴⁶ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.”¹⁴⁷ Thus, notwithstanding the scope of the authority initially conferred in Article I, other constitutional provisions could ultimately justify subjecting voting regulations to equal or greater judicial scrutiny than spending regulations. For instance, while Article I grants states broad power to set elector qualifications, a host of constitutional amendments and judicial precedents significantly constrain states’ ability to limit the electorate.¹⁴⁸

Second, just because the Constitution broadly authorizes Congress and the states to establish ground rules for voting does not necessarily mean that it countenances burdensome rules. Indeed, given the fundamental nature of the vote, the Elections Clause could conceivably be viewed as conferring authority to regulate federal elections primarily in ways that facilitate the exercise of the franchise by qualified electors. Under this view, regulations that operate to make the voting process less open and accessible would be presumptively invalid.

In short, to the extent there is discordance in voting and spending jurisprudence, “the Constitution is not to blame.”¹⁴⁹ Instead, as other scholars have suggested, the doctrine reflects the “distinct perspective” that the Court in recent years has brought to bear on election law questions.¹⁵⁰ To determine whether the Court’s perspective is justifiable, it is therefore necessary to consider the nature of voting and spending.

¹⁴⁷ *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

¹⁴⁸ *See, e.g.*, U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.”); *id.* amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex.”); *id.* amend. XXIV (“The right of citizens of the United States to vote [in federal elections] shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.”); *id.* amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age.”); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (holding that strict scrutiny applies when a “state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others”); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that voting eligibility cannot be conditioned on the payment of a poll tax even in the context of state and local elections).

¹⁴⁹ Ellen D. Katz, *Election Law’s Lochnerian Turn*, 94 B.U. L. REV. 697, 709 (2014).

¹⁵⁰ *Id.*; *cf.* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57, 150 (1997) (discussing “[t]he Court’s role in implementing the Constitution through doctrine” and concluding that, “[m]uch more often than is commonly recognized, a gap exists between constitutional norms and the doctrine crafted by courts to implement those norms”).

B. Explanations Rooted in the Nature of Voting and Spending

If the Court's divergent voting and spending analysis is not the product of doctrinal necessity, perhaps it nevertheless sensibly accounts for distinctions between the two activities. This Section considers the possibility that the jurisprudence of voting and spending differs because voting and spending differ.

Voting and spending are no doubt distinct activities that need not be governed by identical rules. Perhaps most significantly, voting has immediate legal ramifications that spending lacks. It is a direct exercise of political authority. As Jeremy Waldron has put it, "[t]o vote is . . . to perform an action which (if enough others also perform it) alters the assignment of rights and duties in the community."¹⁵¹ For this reason, voting is a singularly foundational aspect of democratic governance,¹⁵² and the ability to vote is synonymous with "full membership in society" in a way that the ability to spend is not.¹⁵³ To put a finer point on it, imagine two political systems: one in which most members of the populace can and do vote in elections, but cannot or do not spend money on elections, and another in which most members of the populace can and do spend money on elections, but cannot or do not vote in elections. We would surely consider the first system to be more democratic, whatever objections we might have to its spending restrictions.

¹⁵¹ Jeremy Waldron, *Participation: The Right of Rights*, 98 PROC. ARISTOTELIAN SOC'Y 307, 309 (1998).

¹⁵² See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))); Carole Pateman, *Participatory Democracy Revisited*, 10 PERSP. ON POL. 7, 15 (2012) (describing "universal suffrage" as "that very minimal but emblematic requirement for democracy"); Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1327 (2009) ("The vote is the most basic exercise of self-determination, the only guarantee that the people remain sovereign over their government, the principle distinction between democracy and autocracy, and the principal (if not the only) means for individuals in an unequal society to have an objectively equal say in their collective government."); Tokaji, *supra* note 120, at 2509 (referring to voting as "the quintessential act of political participation").

¹⁵³ JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 2 (1991); see also *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen."); 1 BRUCE ACKERMAN, *WE THE PEOPLE* 239 (1991) ("[V]oting is the paradigmatic form of *universal* citizenship participation."); SHKLAR, *supra*, at 17 (suggesting that one who lacks the vote is "less than a full citizen"); Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 4 (1987) (explaining that, through the vote, "[t]he community confirms an individual person's membership, as a free and equal citizen"); James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 906 (1997) ("To seek the vote is to seek formal recognition as a full member of society; to be denied the vote is to be either excluded altogether from membership in the community or consigned to some kind of second-class citizenship.").

At the same time, precisely because voting serves to allocate governmental power, it is necessarily part of a formalized system. The franchise is a legal construct. It requires rules governing voter eligibility, the vote-casting process, and the aggregation of votes to determine winners.¹⁵⁴ Again, Waldron's description is apt:

The right to vote is not a matter of negative freedom to express a preference for one's favourite politician, and it is not secured by the individual's simply being left alone by the state to do this when he pleases. One has the right to vote only if one's vote is counted and given effect in a system of collective decision that determines policy, leadership and authority.¹⁵⁵

The rules of voting need not be elaborate, but there must be rules.

Spending, in contrast, does not require the same sort of structure. It can occur more organically, although it may be an exaggeration to describe electoral spending as a pure negative liberty. For one thing, one's decisions about whether, when, and how to spend on elections are inevitably shaped by the rules of the voting process. It would make little sense, for instance, to contribute to or make expenditures on behalf of putative candidates who are left off the ballot or to spend money seeking to sway the votes of people who are ineligible to cast ballots. For another, background rules concerning property rights, tax liability, and the like can impact one's ability to engage in electoral spending, whether or not the drafters of such rules so intend.¹⁵⁶ In addition, the line between voting regulations and spending regulations is not always bright: Are laws that prohibit the buying and selling of votes voting regulations or spending regulations? Yet even with these caveats, an electoral system with minimal spending regulations may be easier to imagine than one with minimal voting regulations.

These conceptual differences between voting and spending matter. They may help to account for some deeply ingrained divergences in the law and practice of voting and spending. For instance, voting jurisprudence has long been concerned with ensuring equality in the exercise of the franchise.

¹⁵⁴ See, e.g., U.S. CONST. art. I, § 2, cl. 1; *id.* § 4, cl. 1.

¹⁵⁵ Waldron, *supra* note 151, at 309; see also Dorf, *supra* note 120, at 265–66 (identifying the right to vote as a “right that can be exercised only in a government-created forum,” distinct from rights to engage in primary conduct).

¹⁵⁶ Cf. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1384 (1994) (“It might be objected that a vote is purely an artificial creation, while a contribution consists of the contributor’s own money. The government may distribute its own artificial creations in a way designed to bring about equality, but it may not go so far in limiting how people use their own property in expressive activities. As stated, this objection overlooks the basic insight that property rights too are a creation of the state. . . . There is no necessary reason that they cannot be limited further to promote political equality. It would not be ‘wholly foreign,’ or even mildly questionable, to argue for a progressive income tax on the ground that disparities of wealth can undermine democracy.”).

The “one person, one vote” principle is exhibit A.¹⁵⁷ Because votes directly underwrite democratic self-governance, it strikes most people as self-evident that votes should be allocated equally, and one person’s vote should count no more than another’s.¹⁵⁸ In contrast, despite calls from some reformers to import equality principles from the voting context into the campaign finance context,¹⁵⁹ the law has long been more accepting of inequalities when it comes to campaign finance. The Supreme Court has gone so far as to disavow categorically the notion that the government has a valid interest in equalizing election spending.¹⁶⁰ Whatever one’s views on the propriety of that disavowal, the fact that election-related spending is a step removed from the legally decisive act of voting does seem to render the case for strict equality less compelling. As troubled as many are by the prospect that vastly unequal spending power may give some people an outsized influence in the electoral process, they would no doubt be more troubled still by a system that unequally allocated votes.

The conceptual differences between voting and spending also may be relevant to understanding our longstanding practice of protecting the secrecy of the vote while requiring at least some disclosure of electoral spending.¹⁶¹ The adoption of the secret ballot in the late nineteenth and

¹⁵⁷ See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016) (describing “the principle of representational equality” as central to the Constitution’s design); *Reynolds*, 377 U.S. at 560–61 (“[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.”); *id.* at 561 (referring to “the basic standard of equality among voters in the apportionment of seats in state legislatures”); *id.* at 565 (“Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.”).

¹⁵⁸ See, e.g., Briffault, *supra* note 18, at 68–69 (“The expansion of the franchise towards universal adult citizen suffrage, the invalidation of poll taxes and wealth tests for voting and candidacy, and the adoption of the one person, one vote rule for legislative apportionment reflect a commitment to providing all members of the community with an equal opportunity to participate in the electoral process and, to that extent, a relatively equal opportunity to influence government decision-making.”).

¹⁵⁹ See, e.g., Foley, *supra* note 21, at 1206 (“The principle of equal-dollars-per-voter means that each eligible voter should receive the same amount of financial resources for the purpose of participating in electoral politics.”); cf. Briffault, *supra* note 18, at 68–69 (“Analogizing campaign money to voting, reformers would extend the political equality norm at the heart of our theory of democratic self-government to the financing of campaigns by curbing the role of unequal private wealth in fueling the campaign finance system.”).

¹⁶⁰ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 350 (2010) (“*Buckley* rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam))).

¹⁶¹ See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 294 (2010) (“Campaign finance has diverged from the balloting process over the last century. Although Americans are strongly committed to the confidentiality of the vote, campaign finance transparency has ‘become a hallmark of democratic representation.’” (quoting Stephen Ansolabehere, *The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure*, 6 ELECTION L.J. 163, 174 (2007))).

early twentieth century helped to guard against voter coercion and vote buying, which threatened the integrity of election results.¹⁶² The idea was to make it easier for people to vote their conscience. In the spending context, the prevailing view has been that secrecy poses a bigger threat to electoral integrity, and that disclosure helps voters make better judgments.¹⁶³

Some challenge these conclusions. John Stuart Mill long ago defended public voting as a way to induce voters to act responsibly.¹⁶⁴ And a few scholars have recently suggested that having electoral spending occur behind a “veil of ignorance” might alleviate the pathologies of corruption and coercion.¹⁶⁵ The objective here, however, is not to establish that our existing secrecy–transparency judgments are necessarily the right ones. Instead, it is merely to suggest that such judgments do seem reasonably connected to concerns that separately arise in the voting and spending contexts, respectively.

Conceptual differences between voting and spending may thus account for and perhaps justify treating the activities differently in certain respects. The more pertinent question, however, is whether those conceptual differences provide a convincing rationale for the particular doctrinal moves that the Court has made in its recent voting and spending cases. They do not. To the contrary, full consideration of the nature of voting and spending suggests flaws in the Court’s approach.

Consider the Court’s assessment of regulatory burdens. This may be where the conceptual differences between voting and spending come closest to explaining the Court’s divergent approach, but the explanation is partial at best. Specifically, the fact that the right to vote can only be exercised in a structured setting could counsel in favor of a relatively uncritical attitude toward burdens, at least if they are not glaringly severe or widespread; some such burdens may be inevitable. Meanwhile, because spending can occur with minimal regulation, any burdens on the right to

¹⁶² See, e.g., James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 943 (2011) (“The principle justification for introducing the secret ballot . . . was to break the control that parties were thought to exercise over voters by depriving them of the ability to enforce discipline at the polls.”).

¹⁶³ *Citizens United*, 558 U.S. at 371 (“[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”).

¹⁶⁴ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 203–08 (Gateway ed., Henry Regnery Co. 1962).

¹⁶⁵ See, e.g., Bruce Ackerman & Ian Ayres, *The Secret Refund Booth*, 73 U. CHI. L. REV. 1107, 1108 (2006) (“Once politicians cannot know who gave them how much, they cannot reward big givers with political favors. The veil of ignorance serves the cause of good government better than superficial transparency, liberating politicians to elaborate a conception of the public good that will appeal to the broad majority of their constituents.”).

spend might seem inherently suspect. But such an account ignores the centrality of voting to maintaining the democratic order. Voting's unique democracy-facilitating function, and the status of the right to vote as a special marker of inclusion, suggests a need for burdens to be carefully and individually scrutinized—perhaps more so than burdens on the right to spend.

The other analytical features of the Court's recent voting and spending cases are even more difficult to justify. Perhaps the formal status of the vote gives the government's interest in ensuring electoral integrity special urgency when it comes to setting voting rules. But it is difficult to see why that interest should be disregarded entirely in the spending context in favor of exclusive reliance on a narrowly framed anticorruption interest.

Similarly, it is not apparent why the sufficiency of government's regulatory rationales should be more readily accepted in the voting context than the spending context. Again, the foundational nature of franchise suggests that the judiciary should carefully consider whether voting regulations actually advance the government's interests in a manner commensurate with the burdens they impose. As for the government's regulatory motives, the conceptual differences between voting and spending offer no clear support for the Court's assumption that legislators are more trustworthy when they enact voting regulations rather than spending regulations. If anything, the fact that voting has a more direct and immediate impact on the distribution of political power would seem to suggest that we should be more concerned that legislators will have strong incentives to try to advantage themselves and their allies through voting rules as opposed to spending rules.

Moreover, while this Section has focused thus far on the *differences* between voting and spending, their important similarities cast further doubt on the Court's divergent analytical moves in recent voting and spending cases. As *McCutcheon*'s opening paragraph suggests, voting in elections and spending on elections are both methods of democratic engagement.¹⁶⁶ As an instrumental matter, voting and spending both shape the political order by affecting how the government conducts its business.¹⁶⁷ By casting votes and spending dollars, people endeavor to give power to leaders who

¹⁶⁶ 134 S. Ct. 1434, 1440–41 (2014) (plurality opinion).

¹⁶⁷ Strauss, *supra* note 156, at 1383 (“A campaign contribution or expenditure, like a vote, is in part an effort to influence the outcome of an election.”); *see also* Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (“Political contributions and express-advocacy expenditures are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices.”); Yasmin Dawood, *Campaign Finance and American Democracy*, 18 ANN. REV. POL. SCI. 329, 340 (2015) (“It has long been acknowledged that campaign finance regulation has implications for both electoral and legislative outcomes.”).

111:655 (2017)

Right to Participate

share their values and will respond to their concerns. Relatedly, people can use their votes and their dollars—or the threat of withholding votes and dollars—to try to mold their leaders’ values and priorities.¹⁶⁸ Meanwhile, from a less instrumental and more dignity-oriented perspective, spending and voting are both ways for people to partake in the project of self-governance,¹⁶⁹ although enfranchisement may have special status as a badge of social inclusion.¹⁷⁰ Voting and spending are also both vehicles for association among like-minded compatriots and for the expression of political views.¹⁷¹

These shared attributes of voting and spending not only bolster the conclusion that the doctrinal divergences identified in Part I are unjustified; they also suggest that it is indeed time to begin thinking about voting and spending more holistically. Part III takes up that task.

III. THE RIGHT TO PARTICIPATE AS A WAY FORWARD

Given that voting and spending share a common participatory core, one might expect voting jurisprudence and spending jurisprudence to be more closely connected. Instead, inertia has long carried them down separate tracks, which helps explain why the law has been able to diverge in some seemingly unjustifiable ways. With a number of high-profile voting and spending controversies still fresh in mind, and the prospect of more in the near future,¹⁷² this is an especially opportune time to ask

¹⁶⁸ *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“[A] substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”).

¹⁶⁹ *See, e.g.*, Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989) (“[I]n a constitutive understanding, the point of engagement in politics lies not in any ulterior end but in the ends-affecting—the dialogic—experience of the engagement itself.”).

¹⁷⁰ *See, e.g.*, Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1343 (2012) (“Voting is understood to be emblematic of ‘social standing’ and ‘civic dignity.’” (quoting SHKLAR, *supra* note 153, at 2–3)).

¹⁷¹ In both cases, however, the communicative content of the message is limited. Votes and contributions convey support for a candidate, but without nuance; independent expenditures may be used to finance the dissemination of more detailed messages, but even then the spender may not have chosen the content. *See, e.g.*, Strauss, *supra* note 156, at 1383 (“[V]oting is not exactly the same thing as speech. But campaign contributions and expenditures are also not exactly the same thing as speech, and voting has much in common with campaign contributions.”); Laurence H. Tribe, *Erog .v Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 242 (2001) (“A voter does not express any particularized view about a given candidate when she casts a ballot, other than her endorsement of that candidate, or slate of candidates, for public office.”).

¹⁷² *See supra* note 15.

NORTHWESTERN UNIVERSITY LAW REVIEW

whether a more unified approach might help to reconcile the law's current incongruities.

Specifically, this Part explores *McCutcheon*'s insight that voting and spending are two manifestations of a broader right to participate in elections. It begins by considering the theoretical and constitutional foundations of such a right and then offers some thoughts on how the right might be operationalized. The objective is not to provide definitive accounts of the right and its potential applications. Those tasks would require articles of their own. Instead, these are initial reflections on the nature, source, and utility of the right in an effort to assess whether it indeed offers a promising path forward. This Part concludes that it does.

A. Foundations of the Right

Popular participation is the lifeblood of democracy. Political theorists and election law scholars offer varying accounts of participation's precise value and function, but they all proceed from the same basic premise that democratic governance is and must be a participatory affair.¹⁷³ Democracy is, after all, a system of popular sovereignty.¹⁷⁴ Its animating principle is that the people ultimately control the government and not the other way around. That is where elections come in. Elections are, in Samuel Issacharoff's words, "the ultimate—albeit imperfect—mechanism for ensuring accountability to the governed and legitimacy in the exercise of power by the governors."¹⁷⁵ Elections foster legitimacy—in colloquial terms, government of and by the people—by assuring that those who exercise public authority do so with the people's imprimatur. Elections foster accountability—government for the people—by giving the people an

¹⁷³ See, e.g., ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 103 (1970) (noting the "central role of participation in the theory of democracy"); Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 151 (2007) ("Courts do not need to develop a well-worked out theory of democracy in order to say that participation is essential to democracy.").

¹⁷⁴ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."); THE FEDERALIST NO. 39, at 182 (James Madison) (Terence Ball ed., 2003) ("[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . .").

¹⁷⁵ Samuel Issacharoff, *Surreply, Why Elections?*, 116 HARV. L. REV. 684, 694–95 (2002); see also Stephanopoulos, *supra* note 26, at 287 (describing elections as "the key instrument for producing . . . alignment" between the preferences of voters and their representatives).

111:655 (2017)

Right to Participate

opportunity to revoke the authority of representatives whose performance disappoints.

By participating in the electoral process, individuals assert themselves as members of a self-governing community and help to ensure “the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”¹⁷⁶ While voting is a quintessential, indispensable mode of electoral participation, it is not the only one. As a descriptive matter, *McCutcheon* was surely right to recognize that there are additional ways to participate—by running for office, volunteering to work on campaigns, making financial contributions, and more.¹⁷⁷

These observations about democracy and electoral participation are not idle musings; they are central to our constitutional tradition.¹⁷⁸ While the Constitution does not explicitly refer to a “right to participate” in the electoral process, it is not difficult to glean such a right from the document’s very design. This may be one reason why *McCutcheon*’s conspicuous reference to the “right to participate” generated no apparent controversy within the Court, including among those Justices who tend to be most skeptical of judicially inferred rights.¹⁷⁹ Past references to the right have likewise provoked little fuss.¹⁸⁰ *McCutcheon* marked the first time that a controlling opinion featured the right to participate so prominently, but an ideologically diverse group of Justices has alluded to the concept in recent years. Justice Thomas, for instance, has described “citizen *participation* in

¹⁷⁶ DAHL, *supra* note 173, at 1 (describing such responsiveness as “a key characteristic of a democracy”); *see also* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1710 (1993) (describing the “civic inclusion” aspect of participating through voting).

¹⁷⁷ 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

¹⁷⁸ *See, e.g.*, POST, *supra* note 24, at 165 (“[T]he ideal of self-government . . . deserves secure recognition in our constitutional doctrine.”); Overton, *supra* note 20, at 1274 (“A principle of participation has animated American constitutional discussion since the founding of the nation.”).

¹⁷⁹ Justice Scalia joined the Chief Justice’s plurality opinion. 134 S. Ct. at 1440 (plurality opinion). Justice Thomas concurred separately, but expressed no disagreement with the Chief Justice’s opening remarks. *Id.* at 1462–65 (Thomas, J., concurring in the judgment).

¹⁸⁰ The phrase “right to participate,” or a close variant, has appeared in several majority opinions. The Court sometimes has used the phrase “right to participate” simply as a synonym for the right to vote. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”). In other instances, it has used the language of participation to convey something broader, though usually still with special emphasis on voting. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (“The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.”); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.”).

NORTHWESTERN UNIVERSITY LAW REVIEW

[our electoral] processes” as “essential to the functioning of our participatory democracy.”¹⁸¹ And in a case decided within a month of *McCutcheon*, Justice Sotomayor referred to “the right to participate meaningfully and equally in self-government” as “the bedrock of our democracy.”¹⁸² These Justices may differ in the details of what they have in mind, but at least at a high level of generality, they seem to agree that a right to participate naturally follows from our constitutional commitment to representative government. And perhaps it is no exaggeration to say that it is part and parcel of *any* system of representative government.¹⁸³

Of course, from a contemporary perspective, it is easy to criticize the Framers for what they did *not* do with respect to electoral participation. The Constitution includes no express affirmative guarantee of the right to vote; it offers limited guidance about how elections should be structured; it establishes no independent institutions to superintend the electoral process; as originally written, it provided for only one portion of one branch of the

¹⁸¹ *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Thomas, J., dissenting) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)). *Doe* involved whether a state may publicly disclose the identities of individuals who sign ballot initiative petitions. *Id.* at 229. Justice Thomas expressed concern that the state’s disclosure practice needlessly “chill[ed] citizen participation in the referendum process.” *Id.* at 228–29.

¹⁸² *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1651 (2014) (Sotomayor, J., dissenting); *see also id.* at 1667 (“Few rights are as fundamental as the right to participate meaningfully and equally in the process of government.”). Justice Sotomayor would have held that a state constitution’s prohibition on affirmative action improperly reconfigured the state’s political processes to the detriment of minority groups. *Id.* at 1651–54. Justice Scalia, too, has invoked the right to participate. Dissenting in *Edwards v. Aguillard*, he insisted that it “would deprive religious men and women of their right to participate in the political process” if a law were invalidated on Establishment Clause grounds “merely because it was supported strongly by organized religions or by adherents of particular faiths.” 482 U.S. 578, 615 (1987) (Scalia, J., dissenting).

¹⁸³ Several foundational international law documents recognize a right to participate as fundamental to any form of representative government. *See, e.g.*, African Charter on Human and Peoples’ Rights, art. 13, June 27, 1981, 1520 U.N.T.S. 217, 248 (“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”); American Convention on Human Rights: “Pact of San Jose, Costa Rica,” art. 23, Nov. 22, 1969, 1144 U.N.T.S. 123, 151 (“Every citizen shall enjoy the following rights and opportunities: *a.* To take part in the conduct of public affairs, directly or through freely chosen representatives; *b.* To vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters”); International Covenant on Civil and Political Rights, art. 25, Dec. 19, 1966, 999 U.N.T.S. 171, 179 (“Every citizen shall have the right and the opportunity . . . without unreasonable restrictions: (*a*) To take part in the conduct of public affairs, directly or through freely chosen representatives; (*b*) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”); G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 21 (Dec. 10, 1948) (“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”).

111:655 (2017)

Right to Participate

federal government to be popularly elected.¹⁸⁴ In addition, the Framers' views and assumptions about matters of race, gender, and the like undeniably limited their participatory vision.¹⁸⁵ Nevertheless, given the document's vintage, what is remarkable is not that the Constitution says so little about participation, but that it says so much. By the standards of the time, it reflected a bold commitment to popular sovereignty and gave the people tremendous say in selecting their leaders.

Indeed, the building blocks of the right to participate are scattered across the Constitution and its amendments, beginning with the Preamble's recognition of the paramount authority of "We the People."¹⁸⁶ The original document gave "the People of the several States" direct responsibility for choosing members of the House of Representatives through periodic elections, and the Seventeenth Amendment provided for senators to be popularly chosen as well.¹⁸⁷ To ensure that elections would indeed be held, Article I's Elections Clause requires states to prescribe their "Times, Places, and Manner," and, in an effort to mitigate the risk that a state might fail to act or might act inappropriately, the Clause further authorizes Congress to "make or alter" election-related regulations "at any time."¹⁸⁸ Article I also provides that, when congressional vacancies arise, "the Executive Authority [of the relevant state] shall issue Writs of Election to fill [them]."¹⁸⁹ Significantly, the election-related provisions of Articles I and II are among the only instances in which the Constitution affirmatively mandates state action, which underscores the significance of elections to the constitutional order.¹⁹⁰

While Article I's Elections Clause does give the states a measure of control over who may exercise the franchise in federal elections,¹⁹¹ its

¹⁸⁴ See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 3–6, 15 (5th ed. 2016).

¹⁸⁵ See, e.g., Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

¹⁸⁶ U.S. CONST. pmb. l.

¹⁸⁷ *Id.* art. I, § 2, cl. 1; *id.* amend. XVII.

¹⁸⁸ *Id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

¹⁸⁹ *Id.* art. I, § 2, cl. 4.

¹⁹⁰ Article II, § 1, cl. 2 provides that "[e]ach State shall appoint [Presidential electors], in such Manner as the Legislature thereof may direct." *Id.* art. II, § 1, cl. 2. The only other constitutional provision that is arguably phrased as a requirement of state action is the Full Faith and Credit Clause of Article IV, § 1. It declares that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." *Id.* art. IV, § 1. But that requirement is more narrowly ministerial than the Constitution's election-related directives.

¹⁹¹ See *id.* art. I, § 2, cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

NORTHWESTERN UNIVERSITY LAW REVIEW

language should not be read as a broad license to limit electoral participation. This is particularly true in light of later amendments that protect the right to vote against abridgement on various grounds.¹⁹² Instead, what may be more notable about the Elections Clause is its implicit recognition of the need for states to have popularly elected legislatures of their own. That inference is bolstered by the Guarantee Clause of Article IV, which instructs that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”¹⁹³

Consistent with this understanding, the Framers repeatedly stressed the Constitution’s commitment to widespread public participation in the selection of government officials. Madison was especially vocal and eloquent in this regard. In Federalist No. 39, he described the Constitution as being premised on “the capacity of mankind for self-government.”¹⁹⁴ He continued: “It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it”¹⁹⁵ Along similar lines, he declared in Federalist No. 57 that the “electors are to be the great body of the people of the United States,” “[n]ot the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.”¹⁹⁶ Madison envisioned not just an expansively defined electorate, but also a diverse array of potential candidates for office: “No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people.”¹⁹⁷ Similar views were expressed during state ratifying conventions.¹⁹⁸

Over time, constitutional amendments, judicial rulings, and legislation have combined to address at least some of the original Constitution’s

¹⁹² See *id.* amends. XV, XIX, XXIV, XXVI.

¹⁹³ *Id.* art. IV, § 4.

¹⁹⁴ THE FEDERALIST NO. 39, *supra* note 174, at 182 (James Madison).

¹⁹⁵ *Id.*; see also THE FEDERALIST NO. 37, *supra* note 174, at 170 (James Madison) (“The genius of Republican liberty, seems to demand . . . not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people . . .”).

¹⁹⁶ THE FEDERALIST NO. 57, *supra* note 174, at 278 (James Madison). The quoted language refers specifically to the selection of members of the House of Representatives, as they were the only federal officials who were originally directly elected.

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., 1 THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 40 (Vassar Brothers Institute 1905) (1788) (reporting Hamilton’s statement at the New York convention that “the true principle of a republic is, that the people should choose whom they please to govern them” and that “[t]his great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed”); see also Powell v. McCormack, 395 U.S. 486, 540–41 (1969) (recounting Hamilton’s statement).

111:655 (2017)

Right to Participate

shortcomings and to reaffirm and strengthen its participatory underpinnings. Consider first the Bill of Rights. As Akhil Amar has astutely observed, the first ten amendments were ratified not merely to protect various personal liberties from political majorities, but also to facilitate popular sovereignty and make government a more faithful agent of the people.¹⁹⁹ True, none of these amendments are election-specific, but some unquestionably bear on electoral participation, and an implicit commitment to representative government suffuses the Bill of Rights as a whole.

The First Amendment's role is especially prominent. By safeguarding the freedom to speak, publish, assemble, and petition,²⁰⁰ the First Amendment serves, in the Supreme Court's words, "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."²⁰¹ Meanwhile, the grand and petit jury requirements of the Fifth, Sixth, and Seventh Amendments provide the people with additional participatory avenues to guard against governmental overreach while also helping "to create an educated and virtuous electorate."²⁰² And, at least on Amar's telling, the Ninth and Tenth Amendments, like the Constitution's Preamble, "are at their core about popular sovereignty."²⁰³

Later amendments have been vital as well. The Fourteenth Amendment's guarantee of equal protection has long been understood to "confer[] a substantive right to participate in elections on an equal basis with other qualified voters."²⁰⁴ And the Fifteenth, Nineteenth, Twenty-

¹⁹⁹ AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 124–29 (1998); *see also id.* at 133 ("I hope it has not escaped our notice that no phrase appears in more of the first ten amendments than 'the people.'"). The joint congressional resolution proposing these amendments described them as "extending the ground of public confidence in the government" to "best ensure the beneficent ends of its institution." J. Res. 1, 1st Cong. 1 Stat. 97, 97 (1789).

²⁰⁰ U.S. CONST. amend. I.

²⁰¹ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *see also* AMAR, *supra* note 199, at 20–21 ("[T]he First Amendment reaffirms the structural role of free speech and a free press in a working democracy."). Amar describes the First Amendment's speech protections as following a "deep popular-sovereignty logic" by extending the speech protections previously afforded to legislative discourse (including the Speech and Debate Clause of Article I, § 6) "to the people" as a whole. *Id.* at 25–26.

²⁰² AMAR, *supra* note 199, at xii; *see also* 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283 (Phillips Bradley ed., Vintage Books 1990) ("The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.").

²⁰³ AMAR, *supra* note 199, at 121.

²⁰⁴ *City of Mobile v. Bolden*, 446 U.S. 55, 77 (1980) (plurality opinion); *see also* *Harris v. McRae*, 448 U.S. 297, 322 n.25 (1980) ("[I]f a State adopts an electoral system, the Equal Protection Clause of

NORTHWESTERN UNIVERSITY LAW REVIEW

Fourth, and Twenty-Sixth Amendments all serve to broaden electoral participation by prohibiting “the United States or . . . any State” from denying or abridging the right to vote “on account of race, color, or previous condition of servitude,”²⁰⁵ “on account of sex,”²⁰⁶ “by reason of failure to pay any poll tax or other tax,”²⁰⁷ and “on account of age” (for citizens “who are eighteen years of age or older”).²⁰⁸

Given all this, it is not a stretch to regard electoral participation as one of the Constitution’s structural pillars, alongside federalism and the separation of powers. All three are mechanisms for constraining governmental authority. Taken together, they establish a system in which states can check the national government (and vice versa), the branches of the national government can check one another, and the people can check government officials at all levels.²⁰⁹ All three structural pillars, moreover, serve to connect the people with government. This is most obvious with respect to electoral participation, but it is true of federalism and the separation of powers as well. Dividing governmental authority vertically and horizontally gives the people multiple points of entry into the system and thus multiple paths for trying to convert their preferences into policy.²¹⁰ In this sense, federalism and the separation of powers might themselves be said to reflect the centrality of participation to our constitutional system.²¹¹

the Fourteenth Amendment confers upon a qualified voter a substantive right to participate in the electoral process equally with other qualified voters.”).

²⁰⁵ U.S. CONST. amend. XV, § 1.

²⁰⁶ *Id.* amend. XIX.

²⁰⁷ *Id.* amend. XXIV, § 1. By its terms this provision applies only in federal elections, but the Supreme Court has also construed the Fourteenth Amendment to provide a similar protection in state and local elections. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

²⁰⁸ U.S. CONST. amend. XXVI, § 1.

²⁰⁹ *Cf. Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (observing that, at least when judicial recourse is unavailable, “the only way” for people to protect their rights is “by their power, immediate or remote, over those who make the rule”).

²¹⁰ *See, e.g., Bond v. United States*, 564 U.S. 211, 221 (2011) (“The federal structure . . . enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive by putting the States in competition for a mobile citizenry.’ Federalism . . . allows States to respond . . . to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.” (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

²¹¹ *Cf. Levinson, supra* note 170, at 1293 (“[S]eparating structure from rights misses the point that the original design of the Constitution relied primarily on structural arrangements to protect rights. Convinced that direct protection of constitutionally enumerated rights would be futile, the Federalist Framers, led by James Madison, attempted to secure rights *indirectly*, by creating a structure of government that would empower vulnerable groups to protect their interests through the political process.” (internal quotation marks omitted)); *Overton, supra* note 20, at 1275 (“The structural checks and balances of the document also rely on participation for their efficacy. By forcing the branches to

111:655 (2017)

*Right to Participate**B. Scope of the Right*

While the evidence seems quite strong that the Constitution confers *some* right to participate, one might question whether the right should be understood to have the sort of scope *McCutcheon* suggested—namely, a right to participate “in electing our political leaders” through voting, spending, and other avenues.²¹² On one hand, perhaps *McCutcheon*’s election-oriented framing of the right is too narrow. Elections are a vital part of democratic self-governance, but so are nonelectoral modes of participation, such as lobbying, protesting, attending public meetings, and simply speaking out on issues of public concern. Should the right encompass these activities as well? On the other hand, perhaps *McCutcheon*’s framing is too broad. If the allocation of political power ultimately depends on the casting and counting of ballots, perhaps the right should apply only to electoral mechanics and not to activities like spending that occur in the run-up to elections. This Section briefly considers each of these suggestions. Though the arguments in favor of broadening or narrowing the right are by no means frivolous, there are good reasons for *McCutcheon* to have described the right as it did.

First, electoral participation and participation in civil society and governance outside the electoral context are interconnected but conceptually distinct. Both are essential to democracy and should be vigorously protected; nothing in this Article is meant to suggest otherwise. Robert Post has been especially eloquent in describing the importance of such nonelectoral participation.²¹³ In particular, he identifies “participation in the ongoing formation of public opinion”—what he calls “discursive democracy”—“as a foundation for democratic self-government.”²¹⁴ He posits that discursive democracy and elections are mutually reinforcing: An active public discourse allows elections to serve their democratic function.²¹⁵ It is difficult, after all, for government to be responsive unless individuals and associations are able to develop and share their views on an ongoing basis between elections. Meanwhile, “[e]lections underwrite

agree, the Constitution slows the governing process, allowing participation—through public debate, voting, or litigation—to take its effect in resolving disputes.”).

²¹² 134 S. Ct. 1434, 1440–41 (2014) (plurality opinion).

²¹³ See POST, *supra* note 24.

²¹⁴ *Id.* at 37; see also *id.* at 5 (“[T]he value of self-determination is realized when the people actively participate in the formation of public opinion.”).

²¹⁵ See Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1523–28 (1997); see also *id.* at 1528 (“I do not mean to deny, of course, that voting is an important means of participation in a democratic polity. I only claim that voting is not by itself sufficient to realize the value of democratic self-governance.”).

NORTHWESTERN UNIVERSITY LAW REVIEW

discursive democracy” by giving people faith that their views will be taken seriously by those in power.²¹⁶

But Post himself appreciates that elections play a special role in mediating “the relationship between the people and their representatives” and thus require their own dedicated set of legal principles.²¹⁷ “The purpose of elections,” Post writes, “is to transform public opinion into legitimate public will.”²¹⁸ Other scholars have made similar points. One, for instance, describes elections as “the paradigmatic method of turning opinion communicatively developed within the public sphere into political power.”²¹⁹ To serve this channeling function appropriately—in other words, to facilitate the selection of representatives who are and will remain attentive to public opinion—elections are necessarily structured affairs.²²⁰ The virtue of an election-oriented right to participate is that it is able to take account of the unique features of the electoral setting. In contrast, issues involving non-electoral participation tend to be ones that fall within the heartland of conventional First Amendment analysis.

Second, limiting the right to participate to voting conceives of elections too narrowly. Elections no doubt culminate in the casting and counting of votes, and those activities are absolutely central to a properly functioning electoral process. But if, as just described, elections are an instrument for connecting the people to those who govern in their name, then the process necessarily involves more than just the mechanics of voting. Whether elections ultimately produce accountable and legitimate government depends not only on voting rules but also on factors such as how campaigns are conducted and financed. As noted earlier,²²¹ voting and spending are both directed at influencing electoral outcomes, which is presumably why the Court has long accepted that the Constitution’s Elections Clause covers both activities. In *Bluman v. FEC*, a decision summarily affirmed by the Supreme Court, the three-judge district court noted that “[p]olitical contributions and express-advocacy expenditures are

²¹⁶ POST, *supra* note 24, at 59; *see also id.* at 60 (“Elections are essential to discursive democracy because they inspire public trust that representatives will be responsive to public opinion.”).

²¹⁷ *Id.* at 6, 81.

²¹⁸ *Id.* at 81.

²¹⁹ C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 43 (1998).

²²⁰ *See, e.g.*, Pildes, *supra* note 22, at 51 (describing elections as “pervasively regulated (far more so than the general realm of public debate)”); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1816 (1999) (referring to elections as “highly structured spheres [with] regulations that would be impermissible in the general domain of public discourse”).

²²¹ *See supra* Section II.B.

111:655 (2017)

Right to Participate

an integral aspect of the process by which Americans elect officials to federal, state, and local government.”²²² It thus makes sense for the right to participate in elections to encompass them as well.

The rationales for narrowly defining the electoral process to exclude election-related spending are not compelling. Proponents of such an approach express concern about the government becoming “directly involved in the dialogue that determines if the current government or its party retains power.”²²³ But a similar concern equally applies when the government is involved in setting voting rules, an activity that all would agree is part of the electoral process.²²⁴ Furthermore, this is an argument against regulation, not one against conceptualizing spending as part of a right to participate. Proponents of a narrow definition also suggest that a broader definition creates line-drawing problems at the intersection of election-related spending and the general public discourse.²²⁵ The challenge of demarcating the electoral sphere is real, and it has long plagued efforts at regulating campaign finance.²²⁶ But line drawing is inevitable. A narrow definition of the electoral process would almost certainly raise difficulties of its own—for instance, where would regulations on election day campaigning near polling places fall? Ultimately, if democratic and constitutional theory counsel in favor of a right to participate that encompasses election-related spending, then we should be reluctant to define the right otherwise.

C. Operationalizing the Right

This Section offers initial thoughts on how the Supreme Court might use the right to participate to reconcile the incongruities in the jurisprudence of voting and spending identified in Part I. As a practical matter, the easiest path forward would be to build on *McCutcheon*’s foundation, invoking the right to participate in order to inform and supplement existing approaches. Lower courts acting within the confines of the Court’s precedents could also use the right to participate in this way. If the right proved useful in harmonizing the law, then existing doctrinal boundaries should gradually give way. Alternatively, if the Court grows

²²² 800 F. Supp. 2d 281, 288–89 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012).

²²³ Bradley A. Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038, 2056–57 (2013).

²²⁴ See discussion *supra* Section II.B.

²²⁵ See Smith, *supra* note 223, at 2075.

²²⁶ See POST, *supra* note 24, at 92 (“The ‘crucial issue’ is to establish a ‘boundary between [an] institutionalized electoral realm and general civil or public life.’” (quoting Baker, *supra* note 219, at 25)).

NORTHWESTERN UNIVERSITY LAW REVIEW

sufficiently frustrated with the level of disharmony in voting and spending law, it could more assertively cast off accumulated doctrinal baggage and turn to the right to participate for a fresh start. Either way, the effort would draw upon similar animating principles.

As a preliminary matter, the Court could adopt a shared vocabulary to describe the analysis that it undertakes in voting and spending cases. As noted above, the Court is already conducting a similar overarching inquiry in both contexts.²²⁷ One option might be to abandon the tiered scrutiny language that has long been used on the campaign finance side—language that already seems to be falling out of favor in the Court’s most recent cases.²²⁸ The balancing approach used in *Crawford* and the ballot access cases that preceded it is probably the more straightforward formulation.²²⁹ And the Court could further develop that approach by referencing some Rehnquist-era campaign finance rulings that, for a time, seemed to be moving toward “a species of sliding scale scrutiny, under which ‘[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.’”²³⁰ In his widely cited concurrence in *Nixon v. Shrink Missouri Government PAC*, Justice Breyer was explicit about the need to “balance[] interests” in the campaign finance cases and elsewhere “in the field of election regulation.”²³¹ Drawing upon such precedents might go some way toward addressing the concerns of those who reasonably criticize *Crawford*-type balancing as indeterminate, giving courts too much leeway to make decisions that reflect their own preconceptions.²³²

The answer to the indeterminacy problem, however, is more likely to come not at the step of articulating the general framework, but at the

²²⁷ See discussion *supra* Section I.A.

²²⁸ Compare *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015) (upholding a regulation of judicial campaign solicitations under a seemingly watered-down version of strict scrutiny), with *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (plurality opinion) (invalidating a contribution cap under a seemingly heightened version of the intermediate scrutiny usually given to such laws).

²²⁹ See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality opinion); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983).

²³⁰ *Elmendorf*, *supra* note 23, at 357–58 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000)).

²³¹ *Nixon*, 528 U.S. at 402 (Breyer, J., concurring).

²³² See, e.g., Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1859 (2013) (“*Anderson-Burdick* balancing is such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another. A test this indeterminate is arguably no test at all, and thus the federal constitutional law that is supposed to supervise the operation of a state’s electoral process has little objectivity or predictability.”).

111:655 (2017)

Right to Participate

subsequent step of applying it. That is where judicial discretion can be channeled and constrained, and where the real work of reconciling voting and spending law needs to be done. Toward that end, the primary value of the right to participate should be in fostering more consistent treatment of burdens, interests, facts, fit, and regulatory motive in voting and spending cases.

1. *Regulatory Burdens.*—In terms of burdens, a shift in the voting context toward the more individual-oriented assessments made in campaign finance cases may be in order. After all, the right to participate—whether by voting or spending—is a right that is “individual and personal in nature.”²³³ Judge Diane Wood hammered home this point when *Crawford* was in the Seventh Circuit. Dissenting from the denial of rehearing en banc, she observed that “[e]ven if only a single citizen is deprived completely of her right to vote—perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification—this is still a ‘severe’ injury for that particular individual.”²³⁴ When a regulation substantially interferes with any individual’s opportunity to participate through either voting or spending, judicial skepticism is warranted. Justice Scalia expressed concern that “an individual-focused approach” to voting cases would result in “detailed judicial supervision of the election process [which] would flout the Constitution’s express commitment of [electoral oversight] to the States.”²³⁵ But the purpose of state oversight is to facilitate participation, not stymie it, and it is entirely appropriate for courts to ensure that a state is doing the former and not the latter.²³⁶

Endeavoring to calibrate burdens across contexts would be useful as well. For instance, should a corporation’s option of using a PAC to make election-related expenditures be discounted as a mitigating factor when assessing BCRA’s burdens, while a convoluted provisional vote

²³³ *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (referring to the right to vote); see also Fishkin, *supra* note 24, at 1293 (“Each individual voter . . . has an independent interest in her status as a full, equal citizen.”); Flanders, *supra* note 173, at 145 (“[A]nalyzing voter fraud cases simply as matters of individual rights (specifically, the individual right to cast a ballot) should be the preferred way for courts to approach voter fraud.”).

²³⁴ 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting from denial of rehearing en banc). A Seventh Circuit panel recently took a similar position in a renewed challenge to Wisconsin’s voter ID law, declaring that, because “[t]he right to vote is personal,” “if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort,” he or she may be entitled to relief. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016).

²³⁵ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment).

²³⁶ See *supra* Section III.A.

NORTHWESTERN UNIVERSITY LAW REVIEW

mechanism is lauded for mitigating the burdens of Indiana’s voter ID law? Perhaps an argument could be made that the inevitability of some regulation of voting means that the acceptable baseline burden is higher in that context, but the foundational nature of the franchise counsels in favor of keeping the baseline modest. In any event, simply by being cognizant of such voting–spending comparisons, the Court may be able to avoid the most egregious inconsistencies.

2. *Governmental Interests.*—When it comes to governmental interests, it may be appropriate to give consideration in campaign finance cases to some of the regulatory rationales that have been accepted in recent voting cases. By focusing exclusively on a narrow interest in preventing quid pro quo corruption, the Court’s recent campaign finance decisions have shown insufficient regard for the underlying values at stake in elections. Because elections exist to foster democratic legitimacy and accountability,²³⁷ society has a fundamental interest in ensuring that the process is set up to advance those objectives.²³⁸ Preventing quid pro quo corruption is certainly important in this regard, but it is only one piece of the puzzle—something the Court already seems to appreciate in its voting and ballot cases. Those cases recognize the government’s “broad interests in protecting election integrity” and connect it to the closely related interest in “protecting public confidence in the integrity and legitimacy of representative government.”²³⁹ Along similar lines, members of the Court have occasionally noted the government’s interest in promoting broad electoral participation. In Justice Kennedy’s words, “[e]ncouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process.”²⁴⁰ Participation, in other words, may sometimes appear on both sides of the judicial ledger, with plaintiffs asserting that a law has burdened

²³⁷ See *supra* Section III.A.

²³⁸ Interestingly, though it reaffirmed that quid pro quo corruption is the only potential interest the government may offer to justify a contribution limit, the *McCutcheon* plurality acknowledged that “responsiveness [of representatives to constituents] is key to the very concept of self-governance through elected officials.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (plurality opinion).

²³⁹ *Crawford*, 553 U.S. at 197, 200 (plurality opinion) (citation and internal quotation marks omitted); see also *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”).

²⁴⁰ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring); see also *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Thomas, J., dissenting) (describing “citizen participation in [our electoral] processes” as “essential to the functioning of our participatory democracy” (quoting *Purcell*, 549 U.S. at 4)); *Overton*, *supra* note 20, at 1275 (identifying instances in which Supreme Court Justices have nodded to a “participation principle”).

111:655 (2017)

Right to Participate

their right to participate and the government seeking to defend the law as a justifiable participation-facilitating measure.

It is difficult to fathom why interests in electoral integrity and democratic participation that are rightly accepted as vital in the voting context are dismissed out of hand in the spending context. It was not always this way. Describing the Tillman Act, a foundational piece of campaign finance legislation, Justice Frankfurter wrote that “its aim was not merely to prevent the subversion of the integrity of electoral process.”²⁴¹ Instead, “[i]ts underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.”²⁴² The explanation implicitly offered in *Citizens United* for its narrow corruption-centered approach seems to be that restrictions on electoral spending are simply incapable of ever enhancing electoral integrity.²⁴³ But that is an empirical question, which makes such a categorical rule misplaced. If a legislature generates an impressive record indicating that a particular spending practice “cause[s] the electorate to lose faith in our democracy,”²⁴⁴ a court should at least be willing to consider it. Numerous scholars have criticized the narrowness of the Court’s corruption-centered campaign finance analysis and offered alternatives, but thus far to no avail.²⁴⁵ The virtue of the right-to-participate framework is that it offers a principled way for the Court to draw upon an alternative approach to governmental interests that it already approves when reviewing voting regulations.

3. *Factual Determinations and Regulatory Fit.*—As for assessing evidentiary requirements and regulatory fit, something of a middle ground

²⁴¹ *United States v. UAW*, 352 U.S. 567, 575 (1957).

²⁴² *Id.*; see also *McConnell v. FEC*, 540 U.S. 93, 144 (2003) (“Take away Congress’ authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’” (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000))). Dissenters in recent campaign finance decisions have made similar points in support of the regulations being challenged. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 472 (2010) (Stevens, J., concurring in part and dissenting in part); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 507 (2007) (Souter, J., dissenting).

²⁴³ See *Citizens United*, 558 U.S. at 357.

²⁴⁴ *Id.* at 360.

²⁴⁵ Post, for instance, endorses a version of the “electoral integrity” interest, which he says “consists of public confidence that elected officials attend to public opinion.” POST, *supra* note 24, at 87. Justice Breyer has also sought to push campaign finance law in this direction. He has said that the goal should be “to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate’s meaningful financial support, and encouraging greater public participation.” Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002); see also *Nixon*, 528 U.S. at 401 (Breyer, J., concurring) (similar).

NORTHWESTERN UNIVERSITY LAW REVIEW

between the current voting and spending approaches is probably warranted. When a regulation is alleged to encumber an individual's ability to participate—whether by voting or spending—it seems reasonable for courts to insist upon some formal showing of the existence and the extent of the burden. And when the government seeks to justify such a regulation, courts should exercise independent judgment about whether it serves its purported ends in a properly tailored way. As *McCutcheon* rightly observed, “[e]ven when the Court is not applying strict scrutiny,” “fit matters”²⁴⁶—and it should matter just as much with respect to voting regulations as spending regulations. If the government can reasonably achieve its objectives with fewer participatory burdens, courts should look skeptically upon its use of a more burdensome alternative.²⁴⁷

4. *Legislative Motives.*—In both spending and voting cases, courts should be mindful of legislators' expertise.²⁴⁸ They should perhaps be especially mindful of that expertise in the spending context. After all, virtually every legislator will be intimately familiar with realities of campaign financing. In contrast, legislators may very well have more limited experience with the mechanics of voting, since that work tends to be delegated to state and local administrators.²⁴⁹

At the same time, courts should remain alert to the possibility that those in power will seek to entrench themselves and their allies by reducing the participatory opportunities of their adversaries. In this regard, the right to participate gives the Court an opening to reconcile its oddly divergent sensibilities about legislative motives in voting and spending cases.²⁵⁰ In both contexts, those in power have the incentive and the opportunity to seek partisan and incumbent entrenchment. I am aware of no empirical evidence suggesting that this danger is greater for spending regulations than for voting regulations. If anything, the incentive to manipulate voting rules might be stronger since votes have a more direct impact on electoral

²⁴⁶ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014) (plurality opinion).

²⁴⁷ See *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (declaring that, “if there are other, reasonable ways to achieve [the government’s] goals with a lesser burden on constitutionally protected activity,” courts must reject “the way of greater interference”); see also *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) (explaining that it does not suffice for the government to point to “some remote administrative benefit”).

²⁴⁸ See, e.g., *Nixon*, 528 U.S. at 402 (Breyer, J., concurring) (advocating deference to “empirical legislative judgments” given the legislature’s “significantly greater institutional expertise”).

²⁴⁹ See Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752 (2016) (“The Constitution initiates decentralization by placing the primary responsibility for holding elections with states. States have further decentralized election administration by delegating most election administration responsibilities to local governments.” (footnote omitted)).

²⁵⁰ See *supra* Section I.E.

111:655 (2017)

Right to Participate

outcomes than dollars. In any event, one practical option is for courts to ratchet up their scrutiny as suspicions of improper motives mount.²⁵¹

IV. A BROADER VIEW

Beyond its potential usefulness in resolving tensions in the existing law of voting and spending, the right to participate in the electoral process also suggests new avenues of inquiry in election law jurisprudence and scholarship. This Part identifies three ways in which a more comprehensive, participation-centered approach to voting and spending might advance election law discourse.

A. *Who Participates?*

Reorienting voting and spending law around the right to participate in the electoral process will inevitably raise questions about whom the right protects, and when. Existing law makes somewhat different populations of individuals (and entities) eligible to engage in particular participatory activities. Minors, permanent resident aliens, felons, and corporations are allowed to spend money on elections but cannot vote in elections.²⁵² On the flipside, at least some eligible voters—including federal civil servants, federal judges and their employees, and individual federal government contractors—are barred from contributing to campaigns.²⁵³ Moreover, those who wish to spend are generally free to do so in multiple jurisdictions, while those who wish to vote may do so only in the one jurisdiction where they are deemed to reside. This was an issue in *McCutcheon* itself; Shaun McCutcheon wanted to contribute money in a host of races around the

²⁵¹ Cf. *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (plurality opinion) (suggesting that courts should look for “danger signs” that justify closer scrutiny of campaign contribution limits); Ringhand, *supra* note 129, at 307 (suggesting that, if a voting restriction seems likely “to benefit one party at the expense of the other,” courts should treat that as a “red flag”); Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2077 (2014) (suggesting that close review of a legislative record may be warranted if the democratic process that produced the record malfunctioned).

²⁵² See *McConnell v. FEC*, 540 U.S. 93, 231–32 (2003) (addressing minors); Note, *The Meaning(s) of “the People” in the Constitution*, 126 HARV. L. REV. 1078, 1087 (2013) (noting that “minors, felons, and noncitizens like foreign students . . . cannot vote”).

²⁵³ See *Citizens United v. FEC*, 558 U.S. 310, 423 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing restrictions on civil servants); *Wagner v. FEC*, 793 F.3d 1, 3 (D.C. Cir. 2015) (en banc) (upholding a federal law banning contributions by government contractors); CODE OF CONDUCT FOR U.S. JUDGES Canon 5(A)(3) (2014), http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf [<https://perma.cc/ZQ7Y-UKB8>] (“A judge should not . . . make a contribution to a political organization or candidate.”); CODE OF CONDUCT FOR JUDICIAL EMPLOYEES Canon 5(A) (2013), http://www.uscourts.gov/sites/default/files/vol02a-ch03_0.pdf [<https://perma.cc/6VB9-J2VY>] (“A judicial employee . . . should not . . . contribute to a partisan political organization, candidate, or event.”).

NORTHWESTERN UNIVERSITY LAW REVIEW

country.²⁵⁴ Other participatory activities come with their own eligibility rules. Eligibility to vote or spend does not always translate into eligibility to run for office, sign or circulate a ballot petition, and more.²⁵⁵ Have we drawn the right lines? How do we evaluate our choices?

The upshot of placing voting, spending, and other electoral activities within a broader participatory framework is not necessarily that the same eligibility rules must apply across the board. Instead, the value of the right to participate is to encourage more comprehensive thinking about the extent to which differences in the nature of voting and spending might justify different eligibility criteria. Because voting has direct legal consequences that spending does not, perhaps it is sensible to limit the franchise to those who have reached the age of majority and formally aligned themselves with the political community through their citizenship status, while allowing a broader collection of interested parties to have input in the electoral process through spending.²⁵⁶ Then again, minors, permanent residents, and felons do have a substantial stake in their communities, which may counsel in favor of giving them a direct voice in community affairs. A few localities have in fact lowered the voting age in municipal elections,²⁵⁷ and historical examples of states and localities that extended the franchise to resident aliens abound.²⁵⁸ Meanwhile, despite its attraction as a participation-enhancing device, nonresident spending could potentially interfere with the connection between representatives and their core resident constituents. Partly because of this perceived danger, Justice

²⁵⁴ Briffault, *supra* note 18, at 30 (“[T]he very essence of the *McCutcheon* decision is the facilitation of out-of-district and out-of-state donations.”); *see also* Sullivan, *supra* note 21, at 683 (observing that “political money facilitates metaphysical carpetbagging”).

²⁵⁵ *See, e.g.*, Briffault, *supra* note 18, at 52–53.

²⁵⁶ *See, e.g.*, *Landell v. Sorrell*, 118 F. Supp. 2d 459, 483–84 (D. Vt. 2000), *aff’d in part, vacated in part*, 382 F.3d 91 (2d Cir. 2004), *rev’d and remanded sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down limit on out-of-state contributions and noting that out-of-state residents had a right to participate in the state’s political process); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1135–42 (2014) (offering a qualified endorsement of cross-state political spending).

²⁵⁷ For example, Takoma Park, Maryland, and Hyattsville, Maryland have lowered the voting age to sixteen in municipal elections. *See* Arelis R. Hernández, *Hyattsville Becomes Second U.S. Municipality to Lower Voting Age to 16*, WASH. POST (Jan. 14, 2015), https://www.washingtonpost.com/local/md-politics/hyattsville-becomes-second-city-in-the-us-to-lower-voting-age-to-16/2015/01/07/24a7c8be-95c7-11e4-aabd-d0b93ff613d5_story.html [<https://perma.cc/TQW2-UPM4>].

²⁵⁸ *See, e.g.*, Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1393 (1993).

111:655 (2017)

Right to Participate

Stevens has suggested that individuals should be allowed to participate by spending only in the jurisdictions where they can vote.²⁵⁹

While the right to participate is unlikely to provide easy answers, it may highlight the competing values at stake and suggest potential accommodations. For instance, the fact that individuals can have interests outside the jurisdiction in which they can vote may counsel in favor of at least some nonresident spending, though perhaps certain constraints might be warranted to avoid diluting the participatory rights of residents. Perhaps more quixotically, the practice of spending by nonresidents arguably bolsters the case for creating electoral mechanisms that enable individuals to cast votes outside their home jurisdictions, as a few scholars have proposed.²⁶⁰

At the very least, the right to participate calls into question the Court's declaration in *Citizens United* that the First Amendment does not permit the government to make identity-based distinctions among those who wish to make election-related expenditures, including corporations.²⁶¹ Despite that broad pronouncement, campaign finance law continues to tolerate some such distinctions. Although corporations can now make independent expenditures, they continue to be banned from making direct contributions to political candidates.²⁶² And within two years of its *Citizens United* decision, the Supreme Court summarily affirmed a lower court decision upholding the federal ban on political contributions by foreign nationals who are not permanent U.S. residents.²⁶³ Rejecting an argument that *Citizens United* had called the ban into doubt, the lower court declared it "fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus

²⁵⁹ See Justice John Paul Stevens, Address at the Administrative Law Section of the D.C. Bar: Oops!, 2014 Harold Leventhal Lecture (Sept. 12, 2014), [https://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech\(DC\)_09-12-2014.pdf](https://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech(DC)_09-12-2014.pdf) [<https://perma.cc/7JQT-5467>].

²⁶⁰ See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1909 (1994); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 329–30 (1993). But see Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1159 (1996) (contending that "cross-border voting would undermine the local conditions conducive to political participation" by reducing opportunities for "deliberation, discussion, and debate at the neighborhood level").

²⁶¹ See 558 U.S. 310, 342–43 (2010).

²⁶² See *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012) (upholding the federal corporate contribution ban).

²⁶³ *Bluman v. FEC*, 132 S. Ct. 1087 (2012), *aff'g* 800 F. Supp. 2d 281 (D.D.C. 2011); see also *Citizens United*, 558 U.S. at 423 (Stevens, J., concurring in part and dissenting in part) (noting that the Court has "never cast doubt on laws that place special restrictions on campaign spending by foreign nationals"). Justice Stevens's *Citizens United* opinion noted that the Court had also "consistently approved laws that bar Government employees, but not others, from contributing to or participating in political activities." *Id.*

NORTHWESTERN UNIVERSITY LAW REVIEW

may be excluded from, activities of democratic self-government.”²⁶⁴ As this reasoning suggests, framing the analysis in terms of the right to participate in the electoral process (rather than in terms of a general First Amendment right to speak) highlights the inevitable need to define the community’s membership.²⁶⁵ This definitional task is not one for courts alone; it requires considered judgments from legislators and the public.

B. The Big Participatory Picture

Because the right to participate embraces multiple election-related activities, it also may prompt greater attention to the overall circumstances of participants. Perhaps a voting regulation becomes especially suspect if it turns out to place the greatest burdens on individuals who are otherwise at risk of being marginalized in the political process. For those who lack the financial resources to contribute to their preferred candidates, or lack the connections to seek out candidates directly, or lack the capability to provide meaningful volunteer assistance to a campaign, an onerous voting rule may sever the one tenuous link they have to our system of self-government.²⁶⁶

This sort of holistic analysis could also make the burdens imposed by certain spending regulations appear less severe. People in Shaun McCutcheon’s shoes have ample means to participate vigorously in elections even if their aggregate annual campaign contributions are capped. Indeed, empirical evidence indicates that affluent individuals have far more contact with public officials than do their low-income counterparts.²⁶⁷ *McCutcheon* offered an implicit response to this point by suggesting that the burden imposed by the aggregate contribution cap was “especially great” because contributors like McCutcheon had no other “realistic” way

²⁶⁴ *Bluman*, 800 F. Supp. 2d at 288.

²⁶⁵ *Cf. Minor v. Happersett*, 88 U.S. 162, 165–66 (1874) (“There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association.”); Bulman-Pozen, *supra* note 256, at 1138 (“After *Bluman*, it is no longer sufficient to define [contributions and expenditures] as speech; it is also necessary to define who is speaking and how the speaker relates to the political community.”).

²⁶⁶ *See, e.g., Fishkin, supra* note 24, at 1353 (“Because the right to vote is a central mechanism of democratic inclusion, it is particularly important to protect the right to vote of citizens who are already marginalized—treated as less than full and equal citizens—in other domains of political and social life. Such citizens may be less likely to be able to pursue other avenues of participation in politics or the public sphere. . . . When other paths by which we might contribute to political and public life are closed off, the bare civic minimum—the vote—takes on a greater importance. The significance of the vote as a mark of civic inclusion is greatest for those whose inclusion might otherwise be in doubt.”).

²⁶⁷ LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 276–77, 282 (2008).

111:655 (2017)

Right to Participate

to support the many candidates he favored.²⁶⁸ It would not be possible, for instance, to volunteer his time to them all. In reality, this line of argument just seems to confirm McCutcheon's privileged position. The cap still left him free to do more than most people ever could.²⁶⁹ Notably, while the Court's analysis was incomplete, the very fact that it considered other available options suggests that the Court accepts the propriety of taking the big participatory picture into account.

To be clear, there are limits to this sort of holistic analysis. Voting and spending are not perfect substitutes, and the exercise of one participatory right generally should not preclude the exercise of others. But a participation-oriented approach does offer courts and legislators a mechanism for thinking more comprehensively about how laws affect opportunities for inclusion in democratic governance.

Along similar lines, the right to participate may encourage analysis of the interplay between voting and spending regulations. As election-related spending becomes increasingly unregulated, perhaps it becomes all the more important to protect voting rights and facilitate the exercise of the franchise in order to ensure that "the great body of the people"²⁷⁰ is still ultimately calling the tune. And perhaps there is a need for countermeasures in those areas where money is most likely to exert influence that the exercise of the franchise alone cannot check. For instance, money plays a crucial role in establishing the field of viable candidates long before votes are ever cast.²⁷¹ Or, approached from another angle, perhaps voting restrictions could be seen as burdening not just voters, but spenders as well. As the Court explained in *Citizens United*, someone's willingness "to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials."²⁷² But if voting becomes more costly, then more money may need to be spent to organize voter drives and to convince potential voters that casting a ballot is worth the hassle.

²⁶⁸ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1449 (2014) (plurality opinion).

²⁶⁹ In earlier cases, the Court did not treat contribution limits as unduly burdensome merely because they prevented a contributor from doing more. Instead, the Court asked "whether the contribution limitation was so radical in effect as to render political association ineffective." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 337, 397 (2000).

²⁷⁰ THE FEDERALIST No. 57, *supra* note 174, at 278 (James Madison).

²⁷¹ See Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 91 (2004) (discussing "the importance of meaningful participation in determining the viability of candidates").

²⁷² 558 U.S. 310, 360 (2010).

NORTHWESTERN UNIVERSITY LAW REVIEW

C. *Thinking About Electoral Structure*

Finally, fleshing out the right to participate may go some way toward bridging a longstanding divide in election law scholarship between those who emphasize individual rights and those who focus on structural values. At risk of oversimplifying a rich and nuanced literature, those in the individual-rights camp take the position that the judiciary's proper role in election law cases, as in other contexts, is to safeguard the rights of individuals, not to engage in a freewheeling effort to improve the workings of the democratic system.²⁷³ Structuralists, in contrast, contend that an individual-rights orientation obscures the fact that election law rulings inevitably shape the character of our democracy.²⁷⁴ It is better, in their view, to resolve disputes by thinking directly about which outcomes will make the system function better overall.²⁷⁵ To this end, some leading structuralists stress the goal of maintaining "an appropriately competitive political order,"²⁷⁶ while others emphasize the importance of assuring broad public engagement,²⁷⁷ or of "aligning the preferences of voters with those of their elected representatives."²⁷⁸

²⁷³ See, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 7* (2003) (eschewing "process theory" in favor of a "substantive theory of political equality"); Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1127 (2005) ("The traditional objection to structuralism, from the time of Frankfurter to today, is that courts cannot do political philosophy."); Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1515–17 (2003). Professor Hasen has called structural arguments "misguided and potentially dangerous. They evince judicial hubris, a belief that judges appropriately should be cast in the role of supreme political regulators." Richard L. Hasen, *The Supreme Court and Election Law: A Reply to Three Commentators*, 31 J. LEGIS. 1, 4 (2004).

²⁷⁴ See, e.g., Pildes, *supra* note 22, at 54–55.

²⁷⁵ See, e.g., *id.* at 39–41; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998). Finding this back-and-forth unproductive, at least one prominent commentator has tried to bridge the gap by calling upon both sides to recognize the "dualistic nature of election law claims." Charles, *supra* note 273, at 1113.

²⁷⁶ Issacharoff & Pildes, *supra* note 275, at 716.

²⁷⁷ See, e.g., Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 673–74 (2007). In a recent synopsis of this literature, Stephanopoulos also places Justice Stephen Breyer and Christopher Elmendorf in this camp. Stephanopoulos, *supra* note 26, at 297 (first citing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5 (2005); and then citing Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 653 (2008)).

²⁷⁸ Stephanopoulos, *supra* note 26, at 291. Scholars sometimes spar over which of these values deserves primacy, but the values are more complementary than antagonistic: An electoral system with healthy levels of competition will tend to encourage broad participation, and broad participation is more likely to produce the election winners whose preferences track those of the public as a whole. Cf. Issacharoff & Pildes, *supra* note 275, at 646 ("Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.").

111:655 (2017)

Right to Participate

For the most part, the Supreme Court has not heeded calls to “unify constitutional oversight” of election-related controversies by focusing on one or more of these structural values.²⁷⁹ The Court continues to use the vocabulary of individual rights, and issues like voting and spending remain as “cubbyholed” as ever.²⁸⁰ Part of the reason may be that structuralists offer no clear path from here to there. Courts are presumably uncomfortable with the idea of replacing familiar rights-oriented analysis with something more akin to political theorizing, and appropriately so.²⁸¹

The right to participate may offer the judiciary a way to take greater account of structural values in at least a subset of election law cases without abandoning the individual-rights paradigm that is the judiciary’s traditional bread and butter.²⁸² The right to participate is plainly an individual right, but, at the same time, it is context-specific, applying only in the electoral domain. It directs attention toward that domain’s distinctive institutional features in ways that reliance on broader First Amendment or equal protection principles may not. The right to participate is thus a *structured* individual right, not a “general, intrinsic libert[y].”²⁸³ It gives individuals the opportunity to be part of something—namely, the electoral process.²⁸⁴ Accordingly, judgments about the proper structure of that process determine the right’s scope and application.²⁸⁵

For this reason, framing legal analysis in terms of the right to participate encourages us to reflect upon how the electoral process

²⁷⁹ Pildes, *supra* note 22, at 39–40.

²⁸⁰ *Id.* at 39.

²⁸¹ *See id.* at 40 (“Constitutional lawyers are trained to think in terms of rights and equality and to elaborate the conceptual structure, legal and moral, of these core constitutional commitments.”); *see also* Fishkin, *supra* note 24, at 1329 (“[C]ourts are accustomed to . . . deciding, on the basis of the facts of an individual plaintiff’s case, whether the burdens the state has placed on individual rights are justified by the state’s interests, or whether some other route to casting a ballot needs to be widened or created. Courts are less comfortable deciding on massive structural reforms that alter the way everyone votes in the hope of striking a better balance between vital but competing structural interests.”).

²⁸² *Cf.* Gerken, *supra* note 107, at 521 (“[I]t is hard to identify sensible limiting principles without the aid of an individual-rights-based framework, which brings with it a set of well-developed strategies for cabining judicial action.”).

²⁸³ Pildes, *supra* note 22, at 52; *see also* Schauer & Pildes, *supra* note 220, at 1814–16 (describing the “structural conception of rights”); Waldron, *supra* note 151, at 308 (“[O]ne cannot understand political rights in terms of the drawing of boundaries around autonomous individuals . . .”).

²⁸⁴ *See* Waldron, *supra* note 151, at 311 (“To participate is to ‘take a part or share in an action . . .’ something which necessarily supposes that one is not the *only* person with a part or share in the activity in question.” (footnote omitted)).

²⁸⁵ *See* Schauer & Pildes, *supra* note 220, at 1807 n.15 (“To the extent that many constitutional rights are best understood as tools for realizing various common or collective or public goods, rather than in more individualistic terms, the content of rights depends on how the relevant public good ought best be understood.”).

NORTHWESTERN UNIVERSITY LAW REVIEW

functions and should function. Courts will need to develop baseline conceptions of how easy or difficult it should be for individuals to engage in various forms of electoral participation. And they will need to do so not in a vacuum, but against a backdrop of evolving popular discourse and legislative action. As perspectives and electoral practices change, baselines may need to shift as well. It is an iterative process, with judicial decisions shaping participation, and participation shaping judicial decisions.

CONCLUSION

As Pam Karlan once observed: “It may be impossible to think intelligently about any of the critical problems that beset the American electoral system without ultimately having to think about all of them”²⁸⁶ This Article has tried to put together two of the important pieces of the electoral puzzle. In so doing, it has exposed some glaring incongruities in the law of voting and spending. Though voting and spending differ in important ways, this Article concludes that it is nevertheless valuable to conceptualize them as aspects of a broader constitutionally grounded right to participate in the electoral process. The right to participate holds the potential to make voting and spending jurisprudence more coherent and principled, and perhaps it can help to reshape other aspects of election law as well.

²⁸⁶ Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1706 (1999).