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Restraint and Responsibility: Judicial Review of Campaign Reform

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The constitutional doctrine governing campaign finance law allows judicial outcomes to turn on often unstated political assumptions. As illustrated by the conflicting opinions of different United States Supreme Court Justices in McConnell v. FEC, *current narrow tailoring and substantial overbreadth doctrines provide inadequate guidance for balancing the need for regulation against the right of free speech. This Article identifies four democratic values that judges should balance in deciding whether campaign finance laws restrict too much protected speech: democratic deliberation, widespread participation, individual autonomy, and electoral competition. Courts should make these values the explicit bases for reviewing campaign finance laws in the future.*

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I. Introduction

Two opposing approaches have emerged in judicial review of campaign finance reforms. The majority and dissenting opinions in the recent United States Supreme Court case of *McConnell v. FEC*[1] illustrate the competing perspectives. Judges supportive of reform often tolerate regulations said to prevent corruption, even at the expense of infringing on some speech that poses

1. McConnell v. FEC, 124 S. Ct. 619 (2003).

little threat of corruption. Judges skeptical of reform err on the side of protecting speech, even if doing so may increase the risk of government corruption. Much more is at issue in this conflict than rhetoric about judicial restraint or judicial responsibility to protect speech. Campaign spending and regulations shape the outcomes of elections and legislative struggles over such critical issues as quality health care, clean air, and tax cuts. Ultimately, the stakes include the meaning of democracy itself.

The need to resolve this clash is now more urgent than ever. In the aftermath of the passage of the Bipartisan Campaign Reform Act of 2002 and the Court's decision in *McConnell* to uphold most of the Act's provisions,[2] reformers have continued their crusade to close loopholes by working to broaden other federal and state regulations.[3] This expansion will involve

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2. *See infra* Part II.B (discussing in detail the various provisions of the Bipartisan Campaign Reform Act of 2002).

3. In the aftermath of the ban on unlimited soft money contributions to political parties, a few individuals contributed millions to groups organized under Section 527 of the Internal Revenue Code. These groups plan to spend such money to support or attack particular candidates, and some reformers have worked to restrict contributions to such groups. *See Examining the Scope and Operation of Organizations Registered Under Section 527 of the Internal Revenue Code: Hearing Before the Senate Comm. On Rules,* 108th Cong. (2004) (testimony of John McCain, U.S. Senator from Arizona) (asserting that Section 527 organizations are intended to influence federal elections and therefore should be regulated like political committees that are limited to accepting contributions from individuals of $5000 or less); Dan Balz & Thomas B. Edsall, *Democrats Forming Parallel Campaign; Interest Groups Draw GOP Fire,* WASH. POST, Mar. 10, 2004, at A01 (describing formation of 527 groups in the aftermath of the ban on soft money). *But see* Richard Hasen, *A GOP Flip-Flop on Political Ads*, L.A. TIMES, Mar. 14, 2004, at M7 (asserting that under the U.S. Supreme Court's current doctrine holding that limits on independent expenditures by individuals are unconstitutional because such expenditures pose little threat of corruption, "it is hard to see how contributions to [527] groups could constitutionally be regulated," at least with regard to 527s that make independent expenditures in support of candidates and do not make contributions to candidates or parties or make coordinated expenditures in support of such entities). Over the past ten years, evasion has surfaced as a primary challenge to campaign reform. *See* MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 79–96 (1998) (describing various tactics that interest groups use to circumvent campaign finance regulations); Stephen Ansolabehere & James M. Snyder Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 598 (2000) ("American campaign finance law is often described as more loophole than law."); Richard Briffault, *The Political Parities and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 652 (2000) ("Campaign finance reform cannot survive unless the loopholes developed or exploited by the parties are plugged."); Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing that Wouldn't Leave,"* 17 CONST. COMMENTARY 483, 508 (2000) ("The pressures from voters and reformers who will continue to challenge *Buckley* on the one hand, and the loophole-driven campaign finance reality that undermines the Court's *Buckley* structure on the other, suggest that something must give."); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) ("First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we

regulation of additional expressive activities. Civil liberties groups will respond immediately with litigation.

As yet, however, judges lack adequate guidance as to the point at which reforms go too far in infringing on speech. Narrow tailoring and substantial overbreadth tests forbid reforms that regulate an unacceptable amount of protected speech—speech that does not pose a threat of corruption or a similar danger. Yet even in the aftermath of the majority opinion in *McConnell* the tests do not specify precisely how much of such speech a campaign finance law must regulate before a judge should invalidate the law. Academic commentators have also largely ignored this question, choosing instead to focus on the general benefits of either greater or lesser regulation.[4] This Article represents the first step toward developing a framework that will facilitate more principled judicial review of reforms.

Inadequate doctrinal guidance compels even the best judges to rely on their own assumptions about politics when reviewing reforms. The judges may cloak their decisions in First Amendment clichés like "the marketplace of ideas"[5] or vague phrases like "preventing corruption and the appearance of

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think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole."); Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 531 (2000) ("The hydraulics of campaign finance make it so that people will find creative loopholes around the limits, as long as politicians want to take that money and people receive a benefit from giving it or spending it."). The Supreme Court has tolerated some regulations designed not to prevent corruption directly, but to prevent the circumvention of other regulations that directly prevent corruption. *See* FEC v. Beaumont, 123 S. Ct. 2200, 2209–10 (2003) ("Nonprofit advocacy corporations are . . . no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals."); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 456 (2001) (asserting that "all Members of the Court agree that circumvention is a valid theory of corruption").

4. *See, e.g.*, Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1763 (1999) (advocating less regulation); D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears about "Big Money" and Protecting Incumbents*, 52 ADMIN. L. REV. 687, 741 (2002) (same); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L. J. 45, 95–96 (1997) (same); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 664 (1997) (same); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principal of Campaign Finance*, 94 COLUM. L. REV. 1204, 1215 (1994) (advocating greater regulation); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 27–28 (1996) (same); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1057 (1999) (same); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 279 (1993) (same); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392–93 (1994) (same).

5. FCC v. League of Women Voters of Cal., 468 U.S. 364, 412 (1984).

corruption."[6] They fail, however, to detail doctrinal specifics that limit these concepts. Instead, assumptions about the appropriate role of money in politics animate the decisions. Unfortunately, judges often leave these assumptions unstated because conventional First Amendment doctrine provides insufficient avenues for judges to discuss and analyze democratic values.

Because judges' individual assumptions about politics differ, courts often reach inconsistent decisions.[7] These holdings sometimes neglect relevant issues such as fair deliberation about public affairs and widespread participation by citizens. Other holdings fail to respect the importance of individual autonomy or the need to ensure that incumbent officeholders do not design reforms to disadvantage challengers. Too many of the decisions go too far in infringing on either speech or legislative authority to regulate campaigns. The incoherent doctrine that emerges from these cases carries significant costs. Legislatures, unclear about the shape of constitutionally permissible regulation, often lack the will to enact what citizens perceive as much-needed reforms. As a result, legislation is likely to be either ineffective or deemed unconstitutional. The lack of constitutional direction also hampers compliance with, and enforcement of, such laws by those generally skeptical of campaign reform.

This Article uses the controversy in *McConnell*[8] illustrates the challenge that courts face when attempting to distinguish between effective reforms that properly close loopholes and those that go too far. Under prior law, statutes prohibited corporations and unions from spending money on political advertisements containing express words of advocacy, such as "vote for" or "defeat" a particular candidate. Corporations and unions, however, circumvented these laws by spending money on advertisements that omitted words like "vote for" and "defeat," but attacked or praised a particular candidate. In response, Congress passed the electioneering provisions of the Bipartisan Campaign Reform Act of 2002 (the Act or BCRA).[9] The Act restricted corporate and union spending on targeted advertisements that refer to a federal candidate and are broadcast in the few weeks prior to an election, regardless of whether such advertisements use express words of advocacy.[10]

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6. Buckley v. Valeo, 424 U.S. 1, 45 (1976).

7. *See infra* Part III (discussing and providing examples of the incoherence that emerged from political assumptions among the Supreme Court Justices in *McConnell v. FEC* and in earlier campaign finance cases).

8. McConnell v. FEC, 124 S. Ct. 619 (2003).

9. *See infra* Part II.B (discussing the Act).

10. Other significant provisions of the Act banned soft money contributions and increased hard money limits. *See infra* Part II.B (explaining in detail the statute challenged in the case and citing specific provisions).

In *McConnell*, a majority of the United States Supreme Court upheld the electioneering provisions, with four Justices dissenting.[11] Although it was framed in doctrinal language, the Justices' dispute in *McConnell* centered on disagreements about the role of money in politics. The dissenters' focus on unfettered political spending, for example, led them to conclude that the Act covered too many advertisements that did not pose a threat of corruption. The five Justices in the majority, concerned about political spending unduly influencing elected officials, concluded that the number of advertisements that posed no threat of corruption was small relative to the number of corrupting activities that would occur in the absence of the statute. The lack of doctrinal guidance allowed the Justices' personal assumptions about politics to drive their decisionmaking.

This Article proposes that the Court expressly articulate the values that its doctrine seeks to serve, rather than suppress the assumptions about democracy that underlie its own opinions. The cases suggest that the Justices aim to promote four democratic values: democratic deliberation, widespread participation, individual autonomy, and electoral competition. Judges should uphold reforms that, on balance, advance these values. The doctrinal origins and the definitions of these values, as well as how a judge would apply the test, are detailed below. The important initial point, however, is that campaign reforms necessarily implicate democratic values. A better judicial test should provide an avenue for judges to consider these values explicitly when reviewing reforms.

Although less than perfect, the new test is a better compromise of sensitivity to context, substantive democratic values, and judicial guidance. Substantial overbreadth and narrow tailoring doctrines inadequately define the "prevention of corruption" rationale that justifies regulation, and they fail to articulate the democratic objectives attained by unregulated use of money in campaigns. Further, these conventional tests do not clearly describe the proportion of illegitimate applications of a statute that is sufficiently "substantial" to warrant facial invalidation of the statute. In contrast, this Article extensively details each of the four democratic values that campaign spending and regulations should advance. The requirement that judges invalidate regulations that do more harm than good to these four values provides more normative guidance than the "substantial" overbreadth doctrine. In short, the values give legislatures clearer guidance for crafting reforms and they provide judges more direction in protecting speech and respecting legislative authority.

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11. *See McConnell*, 124 S. Ct. at 659–84 (upholding various electioneering provisions).

A balancing test is also preferable to mechanical, bright-line judicial rules that categorize the activities a legislature may regulate and invalidate attempts to regulate all other activities. Although these rigid rules provide guidance, they would become obsolete quickly. Politics constantly evolves, and fixed boundaries would prevent legislatures from responding to corrupting activities outside of the predetermined categories. If the Court attempts to avoid this problem by drawing a broader category that allows regulation of more activities, legislatures might infringe on an unacceptable amount of speech that poses no threat of corruption.

While political assumptions may influence judicial balancing of these values, the concrete listing of the most important values provides at least a common starting point from which judges can analyze cases. Absent explicitly articulated common values, judges rely on personal assumptions about politics that often remain unstated and avoid challenge or debate. An honest exchange about how courts should balance the values in particular contexts, rather than glossing over tough issues with abstract rhetoric and mechanical categories, will allow for a more coherent doctrine.[12]

Part II of this Article illustrates the problem of campaign law circumvention and details a legislative response to the problem through the enactment of the Bipartisan Campaign Reform Act of 2002. This Part also reviews judicial tests that require statutes to be narrowly tailored and prohibit ones that are substantially overbroad. Part III reviews the Court's opinion in *McConnell v. FEC*. This Part also argues that overbreadth tests allow for judicial decisions that are shaped largely by unstated normative and empirical assumptions about politics and examines the costs of these tests. Part IV explores the shortcomings of bright-line rules in resolving this problem. Part V identifies four important democratic values in the campaign finance context and applies a new test that balances these values.

II. A Loophole, a Legislative Response, and First Amendment Doctrine

As mentioned above, litigation surrounding the Act's provisions illustrates the challenge courts face in distinguishing between effective reforms that properly close loopholes and those that go too far in regulating speech that poses no threat to state interests. This Part details the issue-advocacy loophole,

12. *Cf.* Frank I. Michelman, *The Supreme Court, 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 35 (1986) (observing that balancing tests make a judge "confront the parties in the flesh" and deny the judge "the refuge of objective determinacy lodged in some force other than herself").

the legislative response of the Act, and the First Amendment doctrine that opponents of the legislation asserted courts should employ to invalidate the provisions.

A. The Issue-Advocacy Loophole

Prior to 1976, the broad statutory language of the Federal Election Campaign Act (FECA) purported to regulate spending "relative to" a federal candidate[13] and spending "for the purpose of influencing" the election of a federal candidate.[14] In *Buckley v. Valeo*,[15] the Supreme Court stated that FECA's imprecise language raised constitutional concerns about vagueness and overbreadth. The Court limited the scope of the statute to cover spending only on communications that contained express words of advocacy for election or defeat, such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'"[16] Thereafter, FECA required disclosure of spending on express words of advocacy and prohibited corporations and unions from spending money on such speech.[17]

In 1996, a large number of individuals, parties, corporations, and unions began funding political advertisements designed to influence elections, including attack advertisements that cast specific candidates in a negative light. The advertisements stopped short of using magic words such as "vote for" or "vote against." As a result, they were not subject to FECA's disclosure requirements or prohibitions on spending by corporations and unions.

Consider an example. In 2000, Texas billionaires Charles and Sam Wyly aired the following advertisement in Ohio just days before that state's Republican presidential primary:

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13. *See* Buckley v. Valeo, 424 U.S. 1, 41–42 (1976) ("The key operative language of the provision [Section 608(e)(1)] limits 'any expenditure . . . relative to a clearly identified candidate.'").

14. *See* 2 U.S.C. § 434(e) (1974) (repealed 1976) (requiring disclosure and reporting of the use of money or other valuable assets "for the purpose of . . . influencing the nomination or election of candidates for federal office").

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

16. *Id.* at 44 n.52.

17. *See* Federal Election Campaign Act, 2 U.S.C. § 434(b)(2)(A) (2000) ("Each report under this section shall disclose . . . contributions from persons other than political committees."); *id.* § 441b(a) (stating that corporations and unions are prohibited from using funds from their general treasuries on independent expenditures); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249 (1986) (construing the prohibition in 2 U.S.C. § 441b of corporate spending "in connection with" any federal election to be limited to corporate spending on express advocacy).

> Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. Ohio Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush's clean air laws will reduce air pollution more than a quarter million tons a year. That's like taking 5 million cars off the road. Governor Bush, leading, for each day dawns brighter.[18]

Because the Wylys avoided the use of express words of advocacy such as "vote for Bush," they were not required to disclose the expenditure to the FEC.[19] For the same reason, federal law would not have prevented Microsoft Corporation or the AFL-CIO from spending unlimited amounts to broadcast the pro-Bush advertisement.

Such easy circumvention of FECA resulted in a steady growth of spending on "issue advocacy" designed to influence federal elections. The Annenberg Public Policy Center at the University of Pennsylvania estimated that parties, groups, unions, corporations, and individuals spent up to $150 million on issue advocacy in the 1995–96 election cycle,[20] $341 million in the 1997–98 cycle,[21] and $509 million in the 1999–2000 cycle.[22] By comparison, FECA required disclosure of only $36.7 million in independent expenditures on express advocacy in support of candidates during the 1999–2000 election cycle.[23]

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18. CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 25 (2002), *available at* http://www.brennancenter.org/programs/downloads/buyingtime2000/chapter3.pdf.

19. Indeed, the advertisement included a tag line reading "paid for by Republicans for Clean Air," misleading many to believe that an established environmental group sponsored the advertisement. *Id.*

20. *See* DEBORAH BECK ET AL., ANNENBERG PUB. POLICY CTR., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 3 (1997) (observing that during the 1995–96 election cycle, political parties, labor unions, trade and business associations, and ideological interest groups spent between $135 and $150 million—more than a third as much as did the candidates themselves—on issue-advocacy advertising), *available at* http://www.appcpenn.org/03_political_communication/issueads/REP16.PDF.

21. *See* JEFFREY D. STANGER & DOUGLAS G. RIVLIN, ANNENBERG PUB. POLICY CTR., ISSUE ADVOCACY ADVERTISING DURING THE 1997–1998 ELECTION CYCLE 1 (1998) (estimating spending on issue ads during the 1997–98 election cycle to be between $275 and $341 million).

22. *See* ANNENBERG PUB. POLICY CTR., ISSUE ADVERTISING IN THE 1999–2000 ELECTION CYCLE 6 (2001) ("In the 2000 cycle we estimate that more than $509 million was spent on issue advocacy television and radio advertising."), *available at* http://www.appcpenn.org/03_political_communication/issueads/2001_1999-2000issueadvocacy.pdf.

23. *See* CTR. FOR RESPONSIVE POLITICS, TOTAL INDEPENDENT EXPENDITURES FOR/AGAINST FEDERAL CANDIDATES, 1999–2000, at fig. 6 (Oct. 17, 2002) (indicating that entities reported to the FEC $36,693,258 in federal independent expenditures during the 1999–2000 election cycle) (on file with author). Note that other entities, primarily political parties, made $50,182,796 in

B. A Legislative Response: The Electioneering Provisions

In response to the growth of issue advocacy, Congress passed the electioneering provisions of the Act.[24] The Act expanded FECA's regulatory scope beyond spending on *express advocacy* consisting of words such as "vote against" to include expenditures on *electioneering communications* that mention a candidate in the weeks before an election. Specifically, the statute defines "electioneering communications" to consist of (1) any television, radio, cable, or satellite broadcast (2) that refers to a clearly identified candidate for federal office, (3) run within 60 days before a general election or 30 days before a primary election, and (4) that can be received by at least 50,000 people in the district that the federal candidate seeks to represent.[25] To address the evasion of FECA's provisions that require disclosure of spending on express advocacy, the Act requires disclosure of expenditures on electioneering communications by any spender that exceed an aggregate of $10,000 per year.[26] The Act also prohibits corporations and unions from spending money from their general treasuries on electioneering communications.[27] This prohibition extends to nonprofit

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coordinated expenditures during the cycle, and that corporations and unions expended $17,838,437 in communication costs. *Id.* at figs. 2, 3, 6. Communication costs are funds used by unions and corporations, directly from their general treasuries, to communicate political messages expressly advocating the election or defeat of specific candidates or parties to a restricted class, defined as the union's members and their families or the corporation's executives, management personnel, stockholders, and their families. *See* 2 U.S.C. § 441b(b)(2) (2000) (excluding communication costs from the definition of contribution or expenditure).

24. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.). *McConnell v. FEC* is the consolidation of eleven suits challenging various provisions of the Act. *See* McConnell v. FEC, Civ. No. 02-CV-582 (D.D.C. May 13, 2002) (ordering consolidation). In addition to the electioneering provisions, the Act banned "soft money" contributions, increased hard money contribution limits, and contained other reforms. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 101, 304, 307, 116 Stat. 81, 82, 99–100, 102–03 (2002).

25. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88–90 (2002). In the event the Court declared this definition unconstitutional, the Act provided that an electioneering communication shall mean any broadcast, cable, or satellite communication:

> which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

Id. § 201(a), 116 Stat. at 89.

26. *Id.* § 201, 116 Stat. at 88.

27. *Id.* § 203, 116 Stat. at 91. The Act also attempted to clarify the contested question of candidates' collaboration with funders to create issue advertisements by treating electioneering spending that was coordinated with a candidate or party as a contribution subject to the source

corporations, such as the National Rifle Association (NRA) and the American Civil Liberties Union (ACLU), which receive money from business corporations or unions.[28] Political action committees affiliated with corporations and unions, however, can continue to spend money on electioneering communications.[29]

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and amount limitations of the Federal Election Campaign Act of 1971 (FECA). Id. § 202, 116 Stat. at 90–91.

28. Not unlike FECA's restrictions on corporate spending on express advocacy, the electioneering provisions limit most nonprofit corporations' spending. Although the electioneering provisions' prohibitions on spending do not apply to nonprofit corporations that operate under § 501(c)(3) of the Internal Revenue Code (11 C.F.R. § 100.29(c)(6) (2003)), other legal directives prohibit § 501(c)(3) organizations from intervening in political campaigns or expressing an opinion about a politician's position on a given issue during a political campaign. *See* Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 856 (10th Cir. 1972) (stating that efforts to defeat certain political candidates through public criticism violated § 501(c)(3)), *cert. denied*, 414 U.S. 864 (1973); Treas. Reg. § 1.501(c)(3)-(1)(c)(3)(iii) (as amended in 1990) (same). The electioneering provisions' spending prohibitions are also inapplicable to § 501(c)(4) nonprofits that (1) have as their express purpose the promotion of political ideas only; (2) do not engage in business activities; (3) have no shareholders or other persons who receive any benefit that would be a disincentive for them to disassociate themselves from the corporation if they were to disagree with the corporation's position; (4) were not established by a business corporation or labor organization; and (5) do not accept donations or anything of value from business corporations or labor organizations. *See* 11 C.F.R. § 100.16 (2003) (codifying exemption from spending prohibitions created by the Court in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986)). Note that even § 501(c)(4) nonprofits that meet all of these requirements may lose their tax-exempt status if they engage in too much campaign activity. Although the IRS has allowed § 501(c)(4) nonprofits to engage in some campaign advocacy, the extent of that activity is unclear. *See* Rev. Rul. 81-95, 1981-1 C.B. 332 (stating that "the regulations do not impose a complete ban" on campaign activities); *see also* Laura B. Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 328–29 (1990) (suggesting that election-related activity may comprise up to somewhat less than half of the corporation's total activity).

29. FECA allows corporations and unions to establish political action committees (PACs), but requires that financial contributions to such PACs come from natural persons, such as union members or corporate managers, rather than from the corporation or union's general treasury. *See* Federal Election Campaign Act, 2 U.S.C. § 441b (2003) (prohibiting corporations, national banks, and labor organizations from contributing to federal elections, and prohibiting political committees from accepting contributions from these sources). PACs are also regulated by 2 U.S.C. §§ 432, 433, 434, and 441a (2003). Due to the ability of corporations and unions to pay for electioneering from PAC funds, the defendants characterize the limitations on corporate and union spending not as restrictions or prohibitions on spending, but rather as "source" rules. *See, e.g.*, Brief for Intervenor-Defendants Senator John McCain et al., at 43, McConnell v. FEC, 124 S. Ct. 619 (2003) (No. 02-1674) [hereinafter, Brief for *McConnell* Intervenor-Defendants] ("[N]othing in Title II 'bans' any speech . . . . Corporations and unions remain entirely free to run an ad at any time . . . so long as they use funds raised by their PACs."), *available at* http://sitepilot.firmseek.com/client/clc/www/attachment.html/defbrief.congsponsors.redacted.pdf?id=894.

Soon after Congress passed the Act, Senator Mitch McConnell (R-Ky.) and others filed suit. They claimed, among other things, that the electioneering provisions restrict an unacceptable amount of core political speech that poses no threat of corruption or similar danger. Specifically, they claimed that the provisions are not narrowly tailored to advance a compelling state interest and that they are substantially overbroad.[30] According to plaintiffs, *Buckley v. Valeo* established a firm constitutional line that prevents Congress from regulating spending on any speech that does not contain express advocacy.[31] A majority of a special three-judge court voted to invalidate the electioneering provisions as overbroad,[32] and the parties appealed the matter to the United States Supreme Court.[33]

C. Overbreadth Doctrine

Courts use two First Amendment tests to determine whether to invalidate statutes that regulate too many instances of speech that do not pose the danger that prompted the regulation. One test focuses on whether statutes are narrowly tailored. The other looks for statutes that are substantially overbroad on their face.

"Suspect-content" tests require that lawmakers narrowly tailor statutes to advance a compelling governmental interest.[34] The Court has identified the

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30. *See* Brief for Appellants/Cross-Appellees Senator Mitch McConnell, et al. at 49–57, McConnell v. FEC, 124 S. Ct. 619 (2003) (No. 02-1674) [hereinafter, Brief for *McConnell* Plaintiffs] (contending that the electioneering provisions would cover communications devoted to policy without an intent to influence a federal election, such as "advertisements that urge support of or opposition to pending legislation where the communication merely urges the viewer to contact an official."), *available at* http://www.campaignlegalcenter.org/attachment.html/02-1674+brief.pdf?id=848.

31. *See id.* at 40 (contending that in order to "eliminate constitutional overbreadth," the Court in *Buckley* "drew the constitutional line at express advocacy").

32. *See* McConnell v. FEC, 251 F. Supp. 2d 176, 798–99 (D.D.C. 2003) (Leon, J.) (concluding that the electioneering provisions were "substantially overbroad"); *id.* at 364–66 (Henderson, J.) (concluding that prior cases set forth a firm constitutional rule that any regulation of spending on political speech was substantially overbroad unless all of the speech regulated included 'express advocacy'). Judge Kollar-Kotelly was the sole judge on the court below to uphold the electioneering provisions. *Id.* at 628 (Kollar-Kotelly, J.). The three-judge court, however, upheld a backup definition of the electioneering provisions that was more vague than the primary definition.

33. A special provision of the BCRA allowed for a direct appeal to the United States Supreme Court.

34. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 666 (1990) ("Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a

prevention of both corruption and the appearance of corruption as compelling governmental objectives for campaign finance regulations.[35] To be narrowly tailored, the statute must further the government's objectives, must not be overinclusive or underinclusive to an unacceptable extent, and must not be unnecessarily burdensome.[36] "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."[37] Generally, heightened scrutiny functions as a rule-like category because it presumes that regulation is impermissible.[38] In the campaign finance context, however, some regulations, such as limits on contributions,[39] coordinated expenditures, and independent expenditures by corporations, survive more stringent scrutiny.

A second judicial test allows for facial invalidation of "substantially overbroad" statutes. Substantial overbreadth occurs when the proportion of invalid applications of the statute is substantially high relative to valid applications.[40] The doctrine works to prevent overly broad statutes from "chilling" constitutionally protected speech.[41] Facial invalidation based on

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compelling governmental interest.").

35. The Court has acknowledged additional state interests that justify disclosure requirements: providing the electorate with the data necessary to make informed political decisions, exposing large contributions to public scrutiny, and enforcing campaign finance laws. Buckley v. Valeo, 424 U.S. 1, 66–68 (1976). Unless otherwise stated, this Article uses the term "prevention of corruption" as shorthand to refer to state interests generally, and uses terms such as "corruption" and "corrupt" to refer to the various dangers posed by political activities that justify regulation.

36. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422–23 (1996).

37. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 265 (1986); *see* United States v. Edge Broad. Co., 509 U.S. 418, 430 (1993) ("The validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case.").

38. *See* Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 865 (1991) ("The 'compelling state interest' test that is applied to content-based regulations of fully protected speech is a balancing test of a kind, but is generally not so labeled, due to the heavy presumption that regulation is impermissible.").

39. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 385–87 (2000) (reviewing contribution limits using a standard of scrutiny more stringent than intermediate scrutiny but "different" from the strict scrutiny applied to expenditure limits).

40. *See* New York v. Ferber, 458 U.S. 747, 773 (1982) (rejecting a substantial overbreadth claim because the statute's "legitimate reach dwarfs its arguably impermissible applications"); Broadrick v. Okla., 413 U.S. 601, 615 (1973) ("[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

41. *See Broadrick*, 413 U.S. at 612 (finding that laws burdening expression must be

overbreadth has been described as "strong medicine" that "has been employed by the Court sparingly and only as a last resort."[42] Some have described First Amendment vagueness as a subset of the substantial overbreadth doctrine.[43] Statutory language that requires disclosure of spending "for the purpose of influencing" federal elections is particularly susceptible to a large number of invalid applications and therefore presents vagueness concerns.[44]

Scholars have described First Amendment applications of the narrow tailoring and substantial overbreadth tests as substantively identical.[45] Narrow tailoring is a judicial tool used to implement substantive constitutional principles, whereas substantial overbreadth has been described as an "ancillary" tool with origins in First Amendment, due process, and federal courts doctrines.[46] Further, the narrow tailoring test can invalidate not only overinclusive statutes but also those that are underinclusive.[47] Both doctrines, however, balance state and private interests in expression and association. An

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invalidated if the "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"); *see also* Fallon, *supra* note 38, at 857 ("One theory characterizes the doctrine as procedural or prophylactic, aimed at eliminating the 'chill' that overbroad statutes cast on constitutionally protected speech.").

42. *Broadrick*, 413 U.S. at 613.

43. *See* Fallon, *supra* note 38, at 904 ("First Amendment vagueness doctrine—as distinct from ordinary or non-First Amendment vagueness doctrine—is best conceptualized as a subpart of First Amendment overbreadth doctrine . . . ."); *id.* at 905 ("[W]e have reason to be sufficiently worried about vagueness to want a special First Amendment vagueness doctrine only insofar as vagueness threatens constitutionally protected speech—that is, only insofar as vague statutes are, or are too likely to be experienced as, overbroad.").

44. *See* 2 U.S.C. § 434(e) (1974) (repealed 1976) (requiring disclosure and reporting of the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or election of candidates for federal office).

45. *See* Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1782 n.46 (2001) ("Other legal doctrines, such as the requirement of 'narrow tailoring' under strict scrutiny, serve a function similar to overbreadth."); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 37 n.152 ("The issue generally is framed in terms of the availability of less restrictive alternatives . . . . In the First Amendment area we speak of overbreadth, but fashions in the use of language cannot disguise the substantive identity of the two inquiries . . . .").

46. *See* Fallon, *supra* note 38, at 866–67 ("Overbreadth has aptly been termed an 'ancillary' doctrine, which should be shaped to reflect the values and concerns that underlie substantive First Amendment principles."); *id.* at 856 ("Although overbreadth doctrine rises to prominence in the heady garden of constitutional law, the roots that define its strength lie in the rocky and mysterious soil of federal courts doctrines.").

47. If the statute captures too much activity whose regulation does not advance the purposes of the statute, the statute is not narrowly tailored. If the statute is so narrow that it can be circumvented easily, the statute loses its justification because there is little reason to burden the speech covered.

overbreadth claim is necessarily a facial challenge to a statute; a narrow tailoring analysis can involve not only an as-applied challenge but also a facial one.[48]

Most important for this Article, both doctrines present normative and empirical challenges in determining how many invalid applications of the statute constitute a "substantial" amount that warrants facial invalidation.[49] Therefore, the remainder of this Article will use the terms "overbroad" and "overinclusive" to refer to overinclusiveness under both the narrow tailoring and the substantial overbreadth doctrines. The Article will also use the term "substantial" to refer to the amount of overinclusiveness necessary to trigger facial invalidation under both doctrines.

Judicial application of the overbreadth doctrine is complicated because many effective reforms are overinclusive to some degree yet do not require invalidation. Standard-like regulations allow for an intolerable degree of prosecutorial discretion, legal uncertainty, and chilling of speech.[50] Vagueness

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48. *See* Richard H. Fallon Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1347 (2000) ("First Amendment overbreadth doctrine does not stand alone in the category of constitutional tests that require statutes to be relatively fully specified at the time of their first application and assessed in whole, rather than simply as applied. Various 'suspect-content' tests also occupy this category."). Professor Edward Foley distinguishes the doctrines along the lines of as-applied and facial challenges. Foley asserts that the Court in *McConnell* should first engage in essentially an as-applied narrow tailoring analysis to determine whether Congress is entitled to regulate some particular example of genuine issue advocacy. Even if the Court determines that the particular example is improperly regulated, it still must engage in a substantial overbreadth analysis to determine whether the number of improper applications is substantially high to warrant facial invalidation of the statute. *See* Edward B. Foley, *"Narrow Tailoring" Is Not the Opposite of "Overbreadth": Defending BCRA's Definition of "Electioneering Communications"*, 2 ELECTION L.J. 457, 472–78 (2003). In contrast, this Article focuses on facial challenges with regard to both narrow tailoring and substantial overbreadth doctrines and does not address as-applied challenges. The Article asks how a court should determine when a campaign finance statute is so significantly overinclusive in its invalid applications that it should be struck down as facially invalid under either narrow tailoring or substantial overbreadth doctrines. Consequently, the distinction between the doctrines is irrelevant to the primary purpose of this Article.

49. According to Henry Paul Monaghan:

> [T]he dominant idea [overbreadth] evokes is serious means scrutiny. Wherever the law mandates strict or intermediate scrutiny, a requirement of regulatory precision is involved; a substantial congruence must exist between the regulatory means (the statute, as construed) and valid legislative ends. Thus, the Court has reacted interchangeably to "overbreadth" and "least restrictive alternative" challenges both inside and outside the First Amendment context.

Monaghan, *supra* note 45, at 37.

50. *See* Buckley v. Valeo, 424 U.S. 1, 41 n.48 (1976) ("[V]ague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing citizens to 'steer far wider of the

concerns also require that lawmakers craft campaign regulations in the form of bright-line rules. It is difficult, however, to craft a bright-line rule that prevents all corruption and also avoids infringing on expression that does not pose the danger that prompted the regulation. The rule necessarily will be either underinclusive and allow for circumvention or overinclusive and raise overbreadth concerns.[51]

For example, the electioneering provisions allow for circumvention because corporations and unions may corrupt candidates by threatening to spend money on attack advertisements prior to the final sixty days of a campaign. On the other hand, the electioneering provisions are overinclusive because they restrict speech that is unlikely to corrupt or appear to corrupt the process, such as a tourism commercial narrated by a popular U.S. Senator that airs just before an uncontested election. It is practically impossible for legislatures to provide clearly defined exceptions in the text of a statute for all of the varied activities that are less likely to corrupt, or appear to corrupt, the process.[52] The failure of any bright-line rule to capture all activity that implicates the state's interest and refrain from infringing upon any expressive activity that does not implicate the state's interest leads to the core question unanswered by current doctrine: How should a court determine the extent to which a statute may err on the side of overinclusiveness to prevent circumvention more effectively?

III. The Ambiguity of Overbreadth Doctrine

This Part reviews the conflicting opinions of the Justices in *McConnell* and illustrates how the shortcomings of overbreadth doctrine allow judges to employ personal political assumptions and suppress essential democratic values in reviewing campaign finance regulations.

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unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); NAACP v. Button, 371 U.S. 415, 433 (1963)).

51. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) ("A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness.").

52. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE 112–18 (1991) (observing that rules are unable to include all of the possible exceptions the rule makers would desire); *see also* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (explaining that in the property context, "over time, the straightforward common law crystalline rules have been muddied repeatedly by exceptions and equitable second-guessing").

A. McConnell v. FEC

In *McConnell*, the United States Supreme Court upheld almost all of the provisions of the Act.[53] Justices Stevens and O'Connor coauthored a majority opinion that upheld the electioneering provisions,[54] and Justices Breyer, Ginsburg, and Souter joined in the Stevens/O'Connor opinion. The opinion cited with approval past cases that tolerated regulation of express advocacy,[55]

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53. The Court invalidated two relatively minor provisions of the Act. In striking down the prohibition on contributions by minors, the Court reasoned that the defendants provided insufficient evidence in support of the ban and asserted that more closely tailored means were available. McConnell v. FEC, 124 S. Ct. 619, 711 (2003). The Court also invalidated the Act's requirement that political parties choose between unlimited independent expenditures and limited coordinated expenditures to support their candidates. *Id.* at 700–04.

54. The Stevens/O'Connor opinion also analyzed and upheld the soft money restrictions (Title I). *See id.* at 659–70 (upholding BCRA § 323(a), which prohibits national political parties and their agents from soliciting, receiving, or spending soft money, but construing the restriction on solicitation by national party officers to allow them to "[sit] down with state and local party committees or candidates to plan and advise how to raise and spend soft money"); *id.* at 670–77 (upholding BCRA § 323(b), which prevents state and local parties from using contributions that exceed federal regulatory limits to finance "federal election activity"); *id.* at 678–82 (upholding BCRA § 323(d), which prohibits national, state and local parties from soliciting funds for or making or directing any donations to certain tax-exempt organizations that make expenditures in connection with elections for federal office, but construing the provision narrowly to allow parties to "make or direct donations of money to any tax-exempt organization that has otherwise been raised in compliance with FECA"); *id.* at 682–83 (upholding BCRA § 323(e), which limits the ability of federal candidates and officeholders to solicit, receive, direct, transfer, or spend soft money in connection with federal, state and local elections); *id.* at 683–84 (upholding BCRA § 323(f), which prohibits state and local officeholders and candidates from spending soft money to fund communications that refer to a clearly identified candidate for federal office and that promotes, supports, attacks or opposes a candidate for that office).

Chief Justice Rehnquist authored the majority opinion that addressed BCRA Titles III (miscellaneous contribution restrictions and other provisions) and IV (provisions related to severability, effective dates, and judicial review), which was joined in its entirety by Justices Kennedy, O'Connor, Scalia, and Souter, and in part by Justices Breyer, Ginsburg, Stevens, and Thomas. Justice Breyer authored the majority opinion that upheld BCRA Title V (requiring that broadcasters keep publicly available records of politically related broadcasting requests), which was joined in its entirety by Justices Ginsburg, O'Connor, Souter, and Stevens. Hereinafter, this Article's reference to the "majority opinion" shall mean the opinion coauthored by Justices Stevens and O'Connor.

55. *See id.* at 690 ("[T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements . . . apply in full to BCRA."); *id.* at 696–97 (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), for the proposition that restrictions on corporate spending are necessary to prevent "the corrosive and distorting effects of immense aggregations of wealth" that "have little or no correlation to the public's support for the corporation's political ideas"). The majority states:

> Prior to the enactment of BCRA, FECA required [not-for-profit] corporations, like business corporations, to pay for their express advocacy from segregated funds

equated electioneering communications with express advocacy, and thus upheld the regulation of electioneering communications.[56]

The Court rejected the plaintiffs' argument that the Constitution prohibits Congress from regulating spending on communications that do not contain express advocacy.[57] According to the Court, an express advocacy requirement is "functionally meaningless" because advertisers can easily evade the requirement and the line "has not aided the legislative effort to combat real or apparent corruption."[58] The Court concluded that the justifications for regulating express advocacy apply equally to ads that do not contain express advocacy but are "intended to influence the voters' decisions and have that effect."[59]

In two paragraphs that briefly explained its rejection of plaintiffs' overbreadth claims, the Court stated that:

> rather than from their general treasuries. Our recent decision in [*FEC v. Beaumont*] confirmed that the requirement was valid except insofar as it applied to a subcategory of corporations described as "*MCFL* organizations" . . . .

Id. at 698.

56. *See id.* at 689–99 (upholding various provisions related to disclosure of disbursements on electioneering communications, treatment of coordinated electioneering communications as contributions, and restrictions on corporate, labor, and not-for-profit corporate disbursements on electioneering communications). Note that while earlier holdings suggested that restrictions on political spending by labor unions were constitutional, the Court in *McConnell* upheld restrictions on union spending for the first time. Restrictions on non-profit electioneering were valid as applied to not-for-profits that did not possess the characteristics of "MCFL organizations." *Id.* at 699.

57. *See id.* at 688 ("[O]ur decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech."). The Court clarified that past holdings limiting the regulatory scope of FECA to express advocacy were attempts to construe regulations of spending on communications "relative to a clearly identified candidate" and "for the purpose of . . . influencing" a federal election to avoid impermissible vagueness. *Id.* at 688. The Court states:

> Thus, a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.

Id. The Court reasoned that the components of the electioneering communication definition were "easily understood and objectively determinable," and thus raised "none of the vagueness concerns" that drove the Court's analysis in *Buckley*. *Id.* at 689.

58. *Id.*

59. *Id.* at 696.

> We are therefore not persuaded that plaintiffs have carried their heavy burden . . . . Even if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not "justify prohibiting all enforcement" of the law unless its application to protected speech is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion.[60]

Justice Kennedy dissented in a separate opinion joined by Chief Justice Rehnquist and Justice Scalia.[61] The Kennedy dissent acknowledged that regulation of spending on express advocacy is easy to circumvent[62] and generally agreed with the majority's decision to uphold the provisions requiring disclosure of the electioneering communications.[63] The dissent concluded, however, that the restrictions on corporate and union electioneering spending were overinclusive. The opinion described the provision, "with its crude temporal and geographic proxies," as "a severe and unprecedented ban on protected speech"[64] because reference to an elected official often facilitates communication about pending legislation and other matters that pose no threat of corruption. The Kennedy dissent concluded that:

> [The restriction on corporate and union electioneering] is a comprehensive censor: On the pain of a felony offense, the ad must not refer to a candidate for federal office during the crucial weeks before an election . . . .

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60. *Id.* at 696–97 (citations omitted).

61. Justice Thomas also concluded that the electioneering provisions were overbroad. Unlike the other eight Justices on the Court, however, Justice Thomas interpreted *Buckley* to require that "any regulation of political speech beyond communications using words of express advocacy is unconstitutional." *Id.* at 737 (Thomas, J., dissenting). According to Justice Thomas, *Buckley* construed the statutory language regulating independent expenditures to be limited to express advocacy not merely to enhance their clarity, but to narrow their coverage. *Id.* at 739 (Thomas, J., dissenting) (asserting that the express advocacy test was adopted to "avoid problems of overbreadth" (citing FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 248 (1986)). For a more detailed analysis of Justice Thomas's approach, see *infra* text accompanying notes 139–41.

62. *See id.* at 761 (Kennedy, J., dissenting) ("The Government and the majority are right about one thing: The express-advocacy requirement, with its list of magic words, is easy to circumvent.").

63. *Id.* (Kennedy, J., dissenting) (asserting that the electioneering disclosure provisions are substantially related to state interests, but noting that requirements that expenditures be disclosed before electioneering communications have aired impose unconstitutional burdens on speech).

64. *Id.* at 768 (Kennedy, J., dissenting).

> In defending against a facial attack on a statute with substantial overbreadth, it is no answer to say that corporations and unions may bring as-applied challenges on a case-by-case basis. When a statute is as out of bounds as [the restriction on corporate and union electioneering], our law simply does not force speakers to "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation." If they instead "abstain from protected speech," they "har[m] not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." Not the least of the ill effects of today's decision is that our overbreadth doctrine, once a bulwark of protection for free speech, has now been manipulated by the Court to become but a shadow of its former self.[65]

B. Normative Judgments

The prohibition on overbreadth forbids a statute from restricting a substantial amount of speech that does not pose the threat that the regulation was intended to prevent.[66] But, even after *McConnell*, normative questions remain. For example, how much speech constitutes a "substantial" amount?[67] A statute that regulates a single case of speech not implicating the state interest is probably not substantially overbroad.[68] Courts have not provided guidance, however, on the number or proportion of instances of such speech that will trigger the doctrine.

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65. *Id.* at 769–70 (Kennedy, J., dissenting).

66. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 120–21 (1991) (asserting that although the state has a compelling interest in compensating criminal victims, there is not a compelling government interest in limiting such compensation to the proceeds of the wrongdoers' speech); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 500–01 (1985) (finding federal law that dealt with the independent expenditures of political action committees to be overbroad because it restricted a number of activities that posed no threat of corruption or the appearance of corruption); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978) (explaining that a Massachusetts statute that would prevent a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized a contribution or expenditure was overinclusive).

67. *See* Fallon, *supra* note 38, at 893 ("The hard question, normatively as well as doctrinally, is how the substantiality of a statute's overbreadth ought to be gauged."); Hasen, *supra* note 45, at 1782 ("The term 'substantial' is hardly self-defining, and the Court in *Broadrick* did not offer much guidance. Thus, it is difficult to know how to apply the rule of substantial overbreadth.").

68. *See* Broadrick v. Okla., 413 U.S. 601, 630 (1974) (Brennan, J., dissenting) (noting that the Court had "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application").

Granted, in its discussion of the soft money contribution restrictions, the majority opinion in *McConnell* required only that contribution limits be "closely drawn" rather than "narrowly tailored" to prevent corruption or the appearance of corruption.[69] The Court stated that this less rigorous standard of review "provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."[70] The opinion failed to specify, however, the amount of protected activity that a regulation must restrict before facial invalidation is warranted under the baseline "narrowly tailored" standard or how much more regulation of protected expressive activity a judge applying the "closely drawn" standard should tolerate.

The *McConnell* majority opinion provided even less guidance as to how judges should review corporate and labor spending restrictions. Outside of concluding that the amount of protected speech covered by the electioneering provisions was not "substantial," the majority in *McConnell* did not detail how future courts should determine whether a restriction on corporate or labor spending has exceeded the extent of prophylactic room Congress enjoys in the area.[71]

Not only did the majority opinion in *McConnell* fail to adopt sufficiently defined tools, it did not explain its decision in a way that would provide

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69. *McConnell*, 124 S. Ct. at 656 (quoting FEC v. Beaumont, 123 S. Ct. 2200, 2210–11 (2003)); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388 (2000) (stating that with regard to contribution limits, "the dollar amount of the limit need not be 'fine tuned'").

70. *McConnell*, 124 S. Ct. at 656–57; *see also* FEC v. NRWC, 459 U.S. 197, 210 (1982) (upholding restriction on a nonprofit corporation's solicitation of contributions, stating that the Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared").

71. Earlier holdings have provided mixed signals about the tailoring of corporate and labor spending restrictions. On one hand, the Court in *Massachusetts Citizens for Life (MCFL)* invalidated a spending restriction on nonprofit corporations, stating that "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *MCFL*, 479 U.S. 238, 265 (1986). The Court determined that the spending restriction as applied to nonprofits in *MCFL* was "too blunt an instrument for such a delicate task." *Id. Cf.* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 642 (1996) (Thomas, J., concurring in part and dissenting in part) ("Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they sweep protected speech within their prohibitions."). On the other hand, the Court in *Austin* stated a corporate spending restriction that covered less wealthy corporations that posed little threat of corruption was not overbroad because poorer corporations "receive from the State the special benefits conferred by the corporate structure and present the *potential* for distorting the political process." Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 661 (1990) (emphasis added).

guidance for future courts.[72] Whereas the lower court judge who concluded that the electioneering provisions were not overbroad devoted over a dozen pages to analyzing the issue,[73] the Stevens/O'Connor majority opinion dedicated just two conclusory paragraphs to it.[74] Granted, the Justices who joined the Stevens/O'Connor opinion might have intended to refrain from articulating a broad judicial pronouncement about overbreadth that could obstruct future legislative attempts to respond to corruption or license excessive legislative infringement on expressive activities.[75] Or perhaps the Justices in the majority agreed that the electioneering provisions should be upheld but did not want to highlight the divisions in their reasoning.[76] Whatever the rationale, the Court's failure to provide more substantive guidance, either in its prior cases or in *McConnell*, allows judges' normative and empirical assumptions about politics to animate their overbreadth decisions in the campaign finance context.

Indeed, not only did the Court in *McConnell* fail to provide guidance, but the Justices' conflicting opinions illustrate the problems that arise from existing overbreadth doctrine. The differences between the Stevens/O'Conner majority opinion and the Kennedy dissent stem in part from different normative

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72. *Cf.* Richard L. Hasen, Buckley *is Dead, Long Live* Buckley: *The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 152 U. PA. L. REV. (forthcoming 2004) (available at www.ssrn.com) ("[T]he joint majority opinion [in *McConnell*] fails to engage in a serious analysis of the potential overbreadth issues raised by regulating election-time advertisements that may not in fact be intended to influence and may not even affect federal elections.").

73. *See* McConnell v. FEC, 251 F. Supp. 2d 176, 625–39 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part). The two judges who voted to invalidate the electioneering provisions as overbroad also collectively dedicated several pages to analyzing the issue. *Id.* at 367–70 (Henderson, J., concurring in part and dissenting in part); *id* at 792–99 (Leon, J., concurring in part and dissenting in part).

74. *See supra* text accompanying note 60 (quoting the *McConnell* majority).

75. *See* Spencer Overton, *Judicial Modesty and the Lessons of* McConnell v. FEC, 3 ELECTION L.J. 305, 309 (2004) (" . . . *McConnell* also teaches that a court reviewing campaign finance regulations should avoid bloated opinions containing unbounded dicta not necessary to support the decision reached by the court . . . . Prolonged opinions that provide elaborate rationalizations are more likely to obstruct future legislative and judicial attempts to respond to context-specific problems."); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1755 (1995) ("Once offered publicly, reasons may therefore apply to cases that the court, in justifying a particular decision, does not have before it . . . . Whenever a court offers reasons, there is a risk of future regret . . . . The constraint produced by the reason may limit discretion and promote predictability, but it may also produce a bad result.").

76. *See* Sunstein, *supra* note 75, at 1733 ("When the convergence on particular outcomes is incompletely theorized, it is because the relevant actors are clear on the result without being clear, either in their own minds or on paper, on the most general theory that accounts for it.").

assumptions of the Justices about the value of the expressive activity restricted and the state interest advanced by the regulation.[77]

For example, the majority opinion focused on the electioneering provisions' reduction of circumvention of laws designed to prevent corruption. Although the Court explicitly acknowledged that the "precise percentage of [restricted] issue ads" that "had no electioneering purpose" was "a matter of dispute," it recognized that "the vast majority of ads" clearly had an electioneering purpose.[78] From the majority's perspective, the number of advertisements that did not influence federal elections represented a minority of the total ads regulated by the statute, and therefore the statute should not be considered overbroad.

In contrast, the Kennedy dissent focused on the importance of the speech improperly restricted by the electioneering provisions. The opinion presented a hypothetical in which the electioneering provisions prevent a nonprofit environmental group from running an ad opposing a proposed law that would allow more logging in national forests.[79] According to the Kennedy dissent, a reference to the incumbent sponsors of the bill might be the most effective way to communicate with the public about the merits of the bill, as the names of the bill's sponsors might have become synonymous with the proposal[80] or the well-known ideological biases of the sponsors might provide essential information to citizens about the content of the bill.[81] Because the sponsors otherwise possess strong environmental records or face little competition, the environmental group lacks any interest in corrupting the process by threatening to spend vast sums to defeat the incumbents.[82]

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77. The divergent decisions of three lower court judges in *McConnell v. FEC* also illustrate the challenges courts face in determining the normative meaning of "substantial" overbreadth. United States District Court Judge Colleen Kollar-Kotelly wrote that the "overwhelming majority" of the ads restricted under the new law were designed to affect elections and voted to uphold the definition of electioneering communication. *McConnell*, 251 F. Supp. 2d at 633. District Court Judge Richard Leon believed that up to 17% of the speech restricted did not pose a threat of corruption, and voted to strike down the primary provision as "substantially overbroad." *Id.* at 777. District of Columbia Circuit Court Judge Karen LeCraft Henderson asserted that any regulation of spending on political speech was substantially overbroad unless all of the speech regulated included "express advocacy." She therefore voted to invalidate the provision. *Id.* at 293.

78. *McConnell*, 124 S. Ct. at 696.

79. *Id.* at 769 (Kennedy, J., dissenting).

80. *Id.* (Kennedy, J., dissenting).

81. *Id.* (Kennedy, J., dissenting).

82. *Id.* (Kennedy, J., dissenting).

While the Kennedy dissent did not identify definitively the proportion of ads without an electioneering purpose,[83] Chief Justice Rehnquist and Justices Kennedy and Scalia thought that the hypothetical environmental group's ads and similar forms of expression are incredibly important to communicating with citizens and elected officials about legislative matters. In light of the importance of this speech, these Justices concluded that the statute was overbroad.

The disagreement between the majority opinion and the Kennedy dissent stems from different value-based judgments about the normative definition of "substantial" overbreadth. The Kennedy dissent emphasized unfettered spending and believed that speech like that of the hypothetical environmental group was sufficiently valuable that the costs of its restriction would outweigh the benefits that would result from legitimate applications of the statute. An emphasis on other important values—the prevention of corruption and the appearance thereof—led the majority to reject the overbreadth claim.

To illustrate, assume that Senator Green and Senator Soot introduce the pro-logging Green-Soot Act a few weeks before election day and that due to news coverage the pro-logging bill is synonymous with the names of the two senators. Senator Green has a strong pro-environment record and has little competition in his reelection bid. On the other hand, Senator Soot has a history of rolling back environmental protections and faces a tightly contested election. Also imagine that the electioneering provisions would prevent the environmental group from threatening to run one hundred candidate advertisements attacking Senator Soot that are, for the sake of argument, corrupting. The group also plans to run ten advertisements in Green's state detailing the problems with the Green-Soot bill that pose no threat of corruption.[84]

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83. *See* Osborne v. Ohio, 495 U.S. 103, 112 (1990) (commenting that in previous decisions, overbreadth has not only had to be "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973))); *see also* Fallon, *supra* note 38, at 893–94 (stating that the Supreme Court has "occasionally tried to express the substantiality requirement in terms of a geometric proportion. The proper comparison, it has been suggested, is between the number of cases to which a court might constitutionally apply a statute, and the number of cases in which the statute's application would violate constitutional rights."); Hasen, *supra* note 45, at 1783 ("[T]he question of substantial overbreadth involves a *comparative* effort; one looks at the proportion of overbroad applications of the statute compared to legitimate ones . . . . [T]he substantial overbreadth requirement, however, . . . fails to define the relevant proportion.").

84. Note that one can argue that advertisements about bills named after congressional sponsors could corrupt candidates, just as a threatened attack on a bill in its sponsor's home district could be construed as an attack on the sponsor for whom the bill is named.

The focus by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer on preventing the corrupting influence of the one hundred attack ads might lead them to believe that the ten Green-Soot issue advertisements do not constitute a "substantial" amount of speech. Plaintiffs, after all, can bring a claim challenging the electioneering communications as applied to the ten Green-Soot advertisements.

Even if Justices Kennedy, Rehnquist, and Scalia accepted the premise that corporate attack ads corrupted politics, their focus on the importance of the ten Green-Soot issue advertisements would likely lead them to the conclusion that such speech constituted a "substantial" amount. To this group, the option to challenge these specific instances on an as-applied basis is inadequate. The possibility that the statute's language or the cost of filing a lawsuit will chill speech outweighs the importance of preventing any threat of corruption posed by the one hundred attack advertisements.[85]

The Justices' varied approaches to weighing the properly regulated activity against improperly regulated activity also stems, in part, from differences in their normative understandings of the state interest that justifies restrictions on campaign spending. For example, the Justices who joined the Stevens/O'Connor majority opinion accepted that restrictions on corporate spending on express advocacy are necessary to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[86] According to the majority, the question of whether the state interest in restricting corporate

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85. *McConnell*, 124 S. Ct. at 769–70 (Kennedy, J., dissenting) (asserting that as-applied challenges are considerably burdensome, and that if speakers "'abstain from protected speech,' they 'har[m] not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas'").

86. *Id.* at 695–96. The majority expanded its discussion of the meaning of corruption in its discussion of the soft money restrictions. The majority conceived of the legitimate state interest in regulating political contributions not merely as preventing quid pro quo corruption, but also curbing "undue influence on an officeholder's judgment, and the appearance of such influence." *Id. at* 746–47 (Kennedy, J., concurring in part and dissenting in part). A quid-pro-quo view of corruption "ignores precedent, common sense, and the realities of political fundraising . . . ." *Id.* at 665. Corruption is not evidenced by altered legislative votes alone, but may also result in less obvious distortions, such as "manipulations of the legislative calendar" or the sale of "access." *Id. at* 666. In the absence of regulation, the special access given to large contributors results in an appearance of corruption that erodes public confidence and participation in the political process. *See id.* at 664–65 (observing that large contributions result in access to high-level government officials, and that such access results in an appearance of corruption); *id.* at 656 ("Because the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,' . . . contribution limits . . . tangibly benefit public participation in political debate.").

spending is compelling was "easily answered" by prior campaign finance decisions that "represent respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'"[87] In evaluating the expressive activities that properly fall under the scope of the electioneering provisions, therefore, the majority included corporate and labor spending on communications that are intended to influence voters' decisions in candidate elections and have that effect.[88]

Justices who joined the Kennedy dissent, on the other hand, would strike down all regulations other than those necessary to prevent quid pro quo corruption.[89] Justice Kennedy indicated that the "corrosive and distorting" corruption rationale used to justify restrictions on corporate and union spending in candidate elections is amorphous, unbounded, and unjustified and should be overruled.[90] As Justice Kennedy wrote, "The mere fact that an ad may, in one fashion or another, influence an election is an insufficient reason for outlawing it. I should have thought influencing elections to be the whole point of political speech."[91] According to the Kennedy dissent, corporate and labor spending represent critical political activity that should remain unrestricted.[92]

Consequently, even though the Kennedy dissent purports to accept the state interest in restricting corporate spending for the sake of analyzing the overbreadth of the electioneering provisions,[93] it should not be surprising that the dissent places less weight on the benefits gained by the electioneering provisions' limitation on corporate and union spending.[94] The varied

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87. *Id.* at 695 (quoting FEC v. Beaumont, 123 S. Ct. 2200, 2207 (2003) (quoting FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 209–10 (1982))).

88. *See id.* at 696 ("The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect.").

89. *See id.* at 747 (Kennedy, J., concurring in part and dissenting in part) ("The majority ignores the *quid pro quo* nature of the regulated conduct central to our earlier decisions.").

90. *Id.* at 762 (Kennedy, J., dissenting) ("Instead of extending *Austin* to suppress new and vibrant voices, I would overrule it and return our campaign finance jurisprudence to principles consistent with the First Amendment.").

91. *Id.* at 770 (Kennedy, J., concurring in part and dissenting in part).

92. *Id.* (Kennedy, J., concurring in part and dissenting in part) (asserting that "the majority's ready willingness to equate corruption with all organizations adopting the corporate form is a grave insult to nonprofit and for-profit corporations alike, entities that have long enriched our civic dialogue").

93. *Id.* at 766 (Kennedy, J., concurring in part and dissenting in part) ("Even under *Austin*, BCRA § 203 could not stand . . . . § 203 . . . is far from narrowly tailored.").

94. *See id.* at 772 (Kennedy, J., concurring in part and dissenting in part) ("The severe First Amendment burden of this ban on [corporate and union] independent expenditures requires much stronger justifications than the majority offers.").

approaches of the majority opinion and the Kennedy dissent stem, in part, from different normative assessments of the weight to give the state interest advanced by the electioneering restrictions.

C. Empirical Assumptions

In addition to normative judgments about the meaning of "substantial" overbreadth, the Justices and litigants in *McConnell* made politically-charged empirical assumptions. These questions are factual, such as the percentage of regulated activities that if unregulated would pose no threat of corruption.

For example, although the majority opinion refused to specify the precise percentage of issue ads regulated by the electioneering provisions that had no electioneering purpose and thus presumably posed little threat of corruption, it found that the "vast majority of ads" clearly had an electioneering purpose.[95] Thus, the Court concluded, "[f]ar from establishing that BCRA's application to pure issue ads is substantial . . . the record strongly supports the contrary conclusion."[96] While the Kennedy dissent also avoided specifying the precise percentage of speech improperly covered by the electioneering provisions, it did claim the provisions constitute "a severe and unprecedented ban on protected speech . . . . Never before in our history has the Court upheld a law that suppresses speech to this extent."[97]

Both the majority opinion and the Kennedy dissent rely on the Justices' own empirical assumptions about whether particular instances of speech covered by the regulation pose a threat or appearance of corruption. While the Justices do not elaborate on these assumptions in their opinions, a debate between the parties to the litigation illustrates the conflict. Because of their emphasis on unfettered speech, plaintiffs cited the following advertisement sponsored by the American Association of Health Plans as a "true issue advertisement that would be unfairly captured" by the electioneering provisions:

> Worried about rising health-care costs? Then look out for the trial lawyers. They want Congress to pass new liability laws that could overwhelm the system with expensive new health care lawsuits. Lawsuits that could make trial lawyers richer. That could make health care unaffordable for millions. Senator Lauch Faircloth is fighting to stop the trial lawyers['] new laws.

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95. *Id.* at 696.

96. *Id.* at 697.

97. *Id.* at 768–69 (Kennedy, J., concurring in part and dissenting in part).

> Call him today and tell him to keep up his fight. Because if trial lawyers win, working families lose.[98]

The defendants countered that the advertisement was designed to influence an election, posed a threat of corruption, and therefore implicated the government interest advanced by the electioneering provisions. Senator Lauch Faircloth was in a close race against trial lawyer John Edwards. Other advertisements portrayed Edwards as a "deceptive, truth-stretching trial lawyer."[99] In this context, the defendants argued, the tag line of the American Association of Health Plans' advertisement "may as well have read 'if John Edwards wins, working families lose.'"[100]

The Justices also make different empirical assumptions about the burden on speech under the electioneering provisions. The majority assumes that corporations and unions can easily engage in political advocacy by paying for an ad from a separate PAC.[101] According to the Kennedy dissent's assessment of political reality, however, a PAC does not effectively represent the views of the "corporation as a corporation,"[102] a PAC does not allow the public to evaluate the credibility of the organizational speaker,[103] and complex and burdensome PAC regulations chill speech by several organizations.[104] Whereas

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98. Brief for *McConnell* Plaintiffs, *supra* note 30, at app. 9a.

99. Opposition Brief of Defendants at 82, McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582), *available at* http://sitepilot.firmseek.com/client/clc/www/attachment.html/F+Electioneering+Communications.pdf?id=379.

100. *Id.*

101. *See McConnell*, 124 S. Ct. at 695 ("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 . . . . The PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . ." (quoting FEC v. Beaumont, 123 S. Ct. 2200, 2211 (2003))).

102. *Id.* at 766 (Kennedy, J., concurring in part and dissenting in part) ("What the law allows—permitting the corporation 'to serve as the founder and treasurer of a different association of individuals that can endorse or oppose political candidates'—'is not speech by the corporation.'" (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 681 (1990) (Scalia, J., dissenting))).

103. *Id.* at 768 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy states:

> Forcing speech through an artificial "secondhand endorsement structure . . . debases the value of the voice of nonprofit corporate speakers . . . [because] PAC's are interim, ad hoc organizations with little continuity or responsibility." In contrast, their sponsoring organizations "have a continuity, a stability, and an influence" that allows "their members and the public at large to evaluate their . . . credibility."

Id. (quoting *Austin*, 494 U.S. at 708–09 (Kennedy, J., dissenting)).

104. *Id.* at 766–67 (Kennedy, J., concurring in part and dissenting in part) ("[PAC]

the majority surmises that corporations and unions can effectively engage in genuine issue advocacy by avoiding a reference to a federal candidate,[105] Justice Kennedy believes that avoiding a reference to a federal candidate diminishes the communicative effectiveness of many issue ads to an intolerable degree.[106] While each of the conflicting versions of political reality is plausible, the Justices fail to ground their empirical assumptions in an extensive evidentiary record.

As illustrated by the examples above, empirical assumptions by the Justices and the litigants often involve ad hoc, contestable conjecture about the frequency of electioneering spending, the probability that unregulated spending will corrupt the political process, the extent of such corruption, and the feasibility of alternative avenues of expression under the regulations.[107] Such speculation also extends to the probability and extent to which the electioneering provisions will prevent corruption, the frequency of activities that will not pose a threat of corruption being regulated,[108] and the probability that less restrictive alternatives will prevent an equal amount of corruption.

The current doctrine's failure to provide guidance allows normative and empirical political assumptions to drive the litigants' arguments and judicial decisionmaking.[109] In the absence of clearer doctrinal guidance, many judges

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regulations are more than minor clerical requirements. Rather, they create major disincentives for speech, with the effect falling most heavily on smaller entities that often have the most difficulty bearing the costs of compliance.").

105. *Id.* at 696 ("Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates . . . .").

106. *See id.* at 769 (Kennedy, J., concurring in part and dissenting in part) (referencing situations in which the identity of a bill's sponsors provides "essential instruction to citizens on whether the policy benefits them or their community" or when the sponsors have become so synonymous with the proposal that reference to the politicians "is the most effective way to communicate with the public").

107. *Cf.* Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 28 (1951) (discussing clear and present danger, and arguing that the "ultimate question of constitutionality depends . . . on subsidiary determinations with respect to probability, gravity, and necessity").

108. According to Richard H. Fallon, Jr.:

> The hard question, normatively as well as doctrinally, is how the substantiality of a statute's overbreadth ought to be gauged. The Supreme Court has occasionally tried to express the substantiality requirement in terms of a geometric proportion. The proper comparison, it has suggested, is between the number of cases to which a court might constitutionally apply a statute, and the number of cases in which the statute's application would violate constitutional rights.

Fallon, *supra* note 38, at 893–94.

109. *Cf.* Baker v. Carr, 369 U.S. 186, 217 (1962) (indicating that a prominent characteristic of a case that involves a political question may be "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"); Frederick Schauer,

inclined to favor a campaign regulation can find some plausible explanation as to how it prevents at least the appearance of corruption or provides adequate avenues for expressive activity.[110] Judges skeptical of reform can imagine a multitude of activities that might arise in the future and would fall under the statute, but that would not corrupt the process.[111] In summary, the seemingly neutral application of the conventional overbreadth doctrine conceals judges' and litigants' value-laden empirical assumptions and normative aspirations for democracy.

D. The Costs of Ambiguity

Significant costs accompany the doctrine's failure to provide courts with adequate guidance in resolving questions about campaign regulations that are

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Judicial Review of the Devices of Democracy, 94 COLUM. L. REV. 1326, 1332 n.18 (1994) ("In the absence of the canonical formulation, judicial power to create and, at the same time, apply the analogizing rule likely locates much of the purchase for the judge's decision in what the judge believes the result in the present case simply ought to be.").

110. *Compare Beaumont*, 123 S. Ct. at 2211 (concluding that prohibition on contributions by certain nonprofits is "closely drawn" because nonprofits can establish segregated political action committees), *Nixon*, 528 U.S. at 395–96 (reasoning that state contribution limits are adequately tailored because candidates can still amass resources needed for effective advocacy), *Austin*, 494 U.S. at 661 (concluding that restriction on corporate spending that includes less wealthy corporations is "not substantially overbroad" because less wealthy corporations "present the potential for distorting the political process"), *and Mass. Citizens for Life, Inc.*, 479 U.S. at 268 (Rehnquist, C.J., dissenting) (asserting that regulations restricting corporate spending properly extend to nonprofit corporations because the differences between nonprofit and business corporations are "'distinctions in degree' that do not amount to 'differences in kind'"), *with* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 642–43 (1996) (Thomas, J., concurring in part and dissenting in part) (asserting that restriction on coordinated party spending is not narrowly tailored because "the statute indiscriminately covers the many conceivable instances in which a party committee could exceed the spending limits without any intent to extract an unlawful commitment from a candidate"), *Austin*, 494 U.S. at 688 (Scalia, J., dissenting) (arguing that restriction on corporate spending is not narrowly tailored because it applies to less wealthy corporations that lack "amassed 'war chests'"), *Mass. Citizens for Life, Inc.*, 479 U.S. at 263 (observing that restriction on corporate spending improperly included certain nonprofit corporations because they "have features more akin to voluntary political associations than business firms"), *and First Nat'l Bank of Boston*, 435 U.S. at 794 (reasoning that the "overinclusiveness" of restriction on corporate spending on ballot questions to protect dissenting shareholders is demonstrated by fact that restriction also bans corporate spending unanimously authorized by shareholders).

111. *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 233–34 (1989) (Stevens, J., concurring) (adopting Blackmun's concurrence in Illinois State Bd. of Elections v. Socialist Workers Party); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring) ("[F]or me, 'least drastic means' is a slippery slope . . . . A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down.").

heavily charged with partisan political interests. As explained by many commentators, improper judicial deference to campaign reforms may result in excessive suppression of expressive and associational values.[112] The lack of guidance provided by the doctrine allows for the charge that the majority's opinion was driven by ideology rather than law.[113]

On the other hand, unnecessary judicial invalidation of campaign regulations infringes on legislative authority.[114] Article I, Section 4 of the U.S. Constitution grants Congress the power to regulate federal elections.[115] Nebulous overbreadth doctrines fail either to constrain judicial power from infringing upon the discretion entrusted to the legislature by the Constitution or to give notice to legislatures and citizens as to how courts will implement the Constitution's balance of individual rights and lawmaking.[116] Improper judicial invalidation sacrifices the state's interest in preventing the corruption and the appearance of corruption that flow from the activities that the statute would

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112. *See, e.g.*, Robert Bauer, McConnell, *Parties and the Decline of the Right of Association*, 3 ELECTION L.J. 199 (2004) (asserting that *McConnell* failed to address the impact of the challenged campaign regulations on associational rights); Lillian R. BeVier, McConnell v. FEC: *Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 145 (2004) (asserting that in dissenting in *McConnell*, "Justice Scalia was surely right when he bemoaned the 'sad day for the freedom of speech.'") (quoting *McConnell*, 124 S. Ct. at 720 (Scalia, J., concurring in part, dissenting in part)); Hasen, *supra* note 72 (asserting that "[t]he result [of *McConnell*] is jurisprudential incoherence and a lead opinion in the most important campaign finance case in a generation that appears to pay only cursory attention to the First Amendment interests that must be balanced in evaluating any campaign finance regime").

113. *See, e.g.*, Bradley A. Smith, McConnell v. Federal Election Commission: *Ideology Trumps Reality, Pragmatism*, 3 ELECTION L.J. (forthcoming 2004) ("Ideology, not a careful consideration of facts, theory, or the real-world effects of legislation, appears to drive the majority to repeatedly fashion its opinion in such categorical terms.").

114. *Cf.* Baker v. Carr, 369 U.S. 186, 217 (1962) (indicating that prominent characteristics of a case involving a political question may be "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"). Unlike *Baker*, which involved a state legislature's decisionmaking, the *McConnell* litigation involves some questions to be decided by Congress, a political branch of government co-equal with the Court.

115. *See* U.S. CONST. 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 choosing Senators."); *see also* Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 838–39 (2003) (asserting that the Guarantee Clause's mandate to protect the republican form of government in the states empowers Congress to enact campaign finance reform).

116. *Cf. Baker*, 369 U.S. at 217 (noting that a prominent characteristic of a case involving a political question may be "a lack of judicially discoverable and manageable standards for resolving" the case).

have otherwise regulated.[117] One rationalization for judicial hypersensitivity to campaign regulation is a special concern for speech, but erring on that side of the scale is not without social and constitutional costs.

Unique problems in applying the overbreadth doctrine to review campaign finance regulations arise from the political nature of the context as well as the institutional limitations of courts. Campaign finance implicates not only individual rights but also values related to political structure, such as democratic deliberation, widespread participation, and electoral competition.[118] Judicial decisions in the campaign finance context are likely to result in unanticipated consequences or become obsolete due to legal, technological, and social changes in campaign methods and fund-raising practices. Unlike legislatures, federal judges do not regularly consider questions of political structure and are not democratically accountable. Further, courts possess fewer comprehensive fact-finding tools to make judgments about political activities and regulations.

In light of the institutional limitations of court, the political nature of campaign finance, and the important democratic values furthered by both the political use of money and the regulation of such use, judges need more guidance than the current overbreadth doctrine provides.[119] Commentators and courts have extensively analyzed the manageability of doctrines and competing democratic values in other contexts, such as the relative population of legislative districts,[120] partisan gerrymandering,[121] the use of race in

117. *See* Virginia v. Hicks, 123 S. Ct. 2191, 2197 (2003) ("[T]here are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech . . . . To ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial.'").

118. Scholars have recognized structural issues in other areas of the law of democracy. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001) (arguing that vote dilution claims cannot be squeezed into the conventional individual-rights framework that the Court has chosen); Lani Guinier, *The Supreme Court, 1993 Term: [E]Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 113 (1994) (emphasizing the inadequacy of existing voting rights jurisprudence for handling claims involving racial groups); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998) (asserting that the judiciary "invert[s] the focus of constitutional doctrine from the foreground of rights and equality to the background rules that structure partisan political competition"); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (observing that election law's evolution "has led us away from a largely rights-based, individual-centered view of politics, to a more pragmatic and structural view of politics as a matter of institutional arrangements").

119. *Cf.* Baker v. Carr, 369 U.S. 186, 217 (1962) (articulating that a variety of indicators may suggest that a case involves a nonjusticiable political question, including "a lack of judicially discoverable and manageable standards for resolving [an issue]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion").

120. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 124 (1980) (explaining that the Court

implementing the Voting Rights Act,[122] and ballot-access cases.[123] Although adequate doctrinal guidance is crucial to judicial review of campaign finance regulations, the issue remains largely unexamined.[124]

IV. The Rigidity of Bright-Line Judicial Rules

Courts have devised various tests to aid them in balancing individual rights and lawmaking as they believe the Constitution intended.[125] Courts have created these tools both to constrain judicial power from infringing upon the discretion entrusted to the legislature by the Constitution and to give notice to society as to how courts will implement the Constitution. The tools determine the appropriate scope of legislative authority over campaign finance, or what this Article refers to as the boundaries of campaign reform.

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adopted a one-person, one-vote rule "precisely because of considerations of administrability").

121. *See* Davis v. Bandemer, 478 U.S. 109, 155–56 (1986) (O'Connor, J., concurring) (arguing that the standard adopted by the plurality will "prove unmanageable and arbitrary" and result in "greater judicial intrusion into the apportionment process"); *see also* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1334 (1987) (outlining a test requiring that the electoral system be arranged to frustrate voting groups' influence on the political process).

122. *See* Bush v. Vera, 517 U.S. 952, 1012 & n.9 (1996) (Stevens, J., dissenting) (observing the difficulty and practical impossibility of discerning the primary motive of the legislature in the apportionment process); *see also* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 508 (1993) (observing that judicial review of expressive harms of racial considerations in redistricting recognized in *Shaw* is "fraught with complexity and unlikely to yield determinate, single right answers").

123. *See* Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 115–30 (2002) (discussing various judicial approaches to ballot-access cases).

124. In the aftermath of *Buckley v. Valeo*, Judge Harold Leventhal highlighted courts' relative inexperience with problems of political organization, and counseled judges to proceed pragmatically and carefully, to avoid a rush to judgment based on speculation, and to avoid dogma that precludes reconsideration and correction. Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 376, 378–80, 387 (1977). While he emphasized the importance of judicial humility and caution in reviewing campaign finance regulations, Judge Leventhal did not explore doctrines that would provide judicial guidance. *See generally id.* Richard Briffault observed that courts tolerate greater regulation of activities closer to elections, that similar treatment should extend to the regulation of political money, and that a statute like the Act is closer to elections and should be rendered constitutional. *See generally* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999). Briffault did not explain, however, how courts should determine the "elections/politics" line. *See generally id.*

125. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57, 67–75 (1997) (outlining the tests developed by the Supreme Court in defining constitutional doctrine).

As illustrated above, the overbreadth doctrine both prior to and in the aftermath of *McConnell* provides inadequate direction to judges in determining the appropriate boundaries of reform. A judicial tool in the form of either a bright-line rule or a balancing test that weighs clearly identified values would provide greater guidance to courts. This Part analyzes the strengths and weaknesses of four alternative rule-based tests that the Court might adopt. It ultimately concludes that the rules overlook important democratic values and are too rigid to respond to the evolving nature of campaign practices and reforms.

The two most straightforward rules involve either judicial tolerance of almost all reforms or judicial invalidation of all reforms. Courts could also adopt fixed categories of the particular campaign activities that political bodies may regulate. For example, the Court could adopt a content-based judicial rule that invalidates all statutes that purport to regulate spending on speech that does not contain express advocacy. The Court could also craft a multidimensional rule that allows regulation of activities based on predetermined factors related not only to content, but also to timing, audience, and speaker identity.

A. Deference to Reforms

Some have proposed that the judiciary defer to legislative decisions regarding campaign finance,[126] and this approach would provide greater guidance to judges than current doctrine.[127] Proponents of a passive judiciary assert that judges should allow campaign finance battles to occur in the political, rather than in the judicial arena. Democracy requires that people use democracy to decide how democracy will be structured.[128] Courts tolerate other

126. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 24, 46 (1998) (claiming that "the overall electoral process, including campaign-oriented speech, should be viewed as a special governmental institution" which can be regulated by legislatures); Briffault, *supra* note 124, at 1768 ("Election-related activities are different, and necessarily subject to more regulation, than other forms of political activity."); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1804 (1999) (exploring whether "electoral politics—or even elections *simpliciter*—could also be the subject of special election-specific First Amendment principles because of their special role in democracy").

127. *See* Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 698 (2002) (asserting that, with regard to the *Shaw v. Reno* cases, the Court can disentangle itself from "the political thicket" by "recast[ing] the form of review in highly deferential terms, and leav[ing] enforcement of this constitutional constraint to the political branches, as [the Court] did in the areas of economic due process and the Commerce Clause").

128. *See* Schauer, *supra* note 109, at 1335 (articulating the argument that "if the people

restrictions in the election context, such as prohibitions on campaigning within 100 feet of a polling place,[129] because such restrictions promote democratic deliberation.[130]

The deference approach would uphold not only the electioneering provisions' disclosure requirements and spending restrictions but also the remainder of the Act. The campaign finance structure as a whole could operate as Congress intended.[131] Further, deference would allow more expansive reforms such as restrictions on individual and candidate spending, essentially overruling *Buckley v. Valeo*.[132]

One approach to deference would involve the Court declaring challenges to campaign finance regulations nonjusticiable and exiting the field altogether. However, while a judicial declaration that all challenges to campaign finance regulations are nonjusticiable provides guidance to judges, it ignores important First Amendment values. Courts protect speech from regulation to preserve individual autonomy and to prevent incumbent legislators from enacting speech regulations designed to disadvantage political challengers. Complete deference to democratic decisionmaking in the campaign finance context would sacrifice

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cannot in democratic fashion make decisions about what their democracy will look like, then the notion of democracy is hollow").

129. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding that because "the exercise of free speech rights conflicts with [the fundamental] right to cast a ballot in an election free from the taint of intimidation and fraud . . . some restricted zone around polling places is necessary to protect that fundamental right").

130. *See* Schauer & Pildes, *supra* note 126, at 1817 ("The justification of these structures is that they promote a 'fairer' mode of representation, that they enhance the deliberative quality of choosing candidates and making policy, or that they improve the quality of voter decisionmaking.").

131. *Cf. McConnell*, 124 S. Ct. at 659 ("Because the five challenged provisions of § 323 implicate different First Amendment concerns, we discuss them separately. We are mindful, however, that Congress enacted § 323 as an integrated whole to vindicate the Government's important interest in preventing corruption and the appearance of corruption."); Spencer Overton, *Judicial Modesty and the Lessons of* McConnell v. FEC, 3 ELECTION L.J. 305, 313 (2004) ("Campaign finance statutes often work 'as an integrated whole,' and a judge who carelessly invalidates a minor provision might unwittingly poke a hole in the entire regulatory structure."). Indeed, one might argue that many current problems stem from the Court's failure to appreciate the structural nature of campaign finance in *Buckley v. Valeo*. By upholding individual contribution limits but invalidating candidate spending limits the Court in *Buckley* limited the supply of money but created an unlimited demand, thereby placing a premium on large contributions. In a dissent in *Nixon v. Shrink Missouri Government PAC* Justice Kennedy asserted that the Court's prior invalidation of spending limitations resulted in adverse, unintended consequences, such as issue advocacy and soft money. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409–10 (2000) (Kennedy, J., dissenting).

132. *See* Buckley v. Valeo, 424 U.S. 1, 39–59 (1976) (discussing and invalidating restrictions on individual and candidate expenditure limits).

these values. In the alternative, the Court might adopt a rational-basis standard to review reforms.[133] Unlike nonjusticiability, rational-basis review might allow the Court to invalidate laws that infringe individual autonomy or entrench incumbent politicians to a great extent.[134]

Legislators, however, would likely enact statutes that favor incumbents to different degrees to test judicial willingness to invalidate such laws. To many legislators, the gains of tempering electoral competition probably outweigh the embarrassment of voting for a law that a court invalidates as entrenching. Further, the more often a court invalidates such legislation, the more complex the process becomes for future courts to determine the appropriate boundaries of legislative authority.

Further, neither nonjusticiability nor rational-basis review define which regulations courts should subject to lesser scrutiny. How should a court treat a regulation affecting money spent on a movie like *Bowling for Columbine*,[135] which examines America's obsession with guns and violence and was released immediately before the 2002 midterm elections? How should a court treat regulations of election-related speech by media outlets, including endorsements, editorials, and news reports that discuss candidates or ballot initiatives? Granted, courts engage in less-than-clear categorical line drawing in classifying other forms of expression that are subject to greater regulation, such as "commercial speech."[136] The vagueness in categorization, however, diminishes the guidance afforded by the deference approach.

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133. *See* Karlan, *supra* note 127, at 686–88 (describing the evolution of economic substantive due process doctrine and suggesting that the adoption of a new standard for election law cases may allow the Supreme Court to extricate itself from the campaign finance issue); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38–39 (discussing the Court's options of nonjusticiability or rational-basis review in relaxing its enforcement of economic substantive due process).

134. While entrenchment differs from discrimination and challengers differ from hippies, gays, and the mentally retarded, the use of rational-basis review to invalidate statutes has often occurred when the Court has believed that government decisions were enacted out of improper motives designed to disadvantage a particular group. *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (using rational-basis review to invalidate a state constitutional amendment that prohibited any state or local government body from enacting a law that prohibited discrimination based on homosexual, lesbian, or bisexual orientation); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (using rational-basis review to invalidate zoning requirement that a group home for the mentally retarded obtain a special permit for operation); USDA v. Moreno, 413 U.S. 528, 534 (1973) (using rational-basis review to invalidate restriction limiting food stamps to households in which all members were related, observing that "a bare congressional desire to harm a politically unpopular group [hippies] cannot constitute a legitimate governmental interest").

135. BOWLING FOR COLUMBINE (United Artists 2002).

136. *See* Schauer & Pildes, *supra* note 126, at 1828 ("[T]he Supreme Court has relied on a boundary between commercial advertising and other speech that is no more clear and

B. Invalidation of All Reforms

On the other end of the spectrum, a doctrinal test that requires invalidation of all reforms would provide greater guidance than does the existing overbreadth doctrine.[137] Absolute invalidation prevents entrenchment-minded legislators from skewing campaign finance regulations in order to retain their power. It would allow individuals to engage freely in political activity without fear of unintentionally violating obscure campaign regulations and facing criminal penalties. Unlike absolute deference to campaign reforms, invalidation would not pose significant boundary problems. Courts would strike down the electioneering provisions, the remainder of the Act, and other campaign reforms along with other regulations of political speech.

Just as judicial deference overlooks democratic values, absolute invalidation also ignores important values. The Court has reasoned that large contributions and spending by corporations and unions pose the twin dangers of corruption and the appearance of corruption. Further, undisclosed spending and contributions might also allow for corruption and the appearance of corruption.[138] As explained in detail in Part V, corruption prevents democratic deliberation, widespread participation, individual autonomy, and electoral competition. An absolute right of business corporations to contribute and spend unlimited and undisclosed amounts, for example, results in outcomes based on covert political auctions rather than deliberation. It also minimizes the influence of citizens over the political process and reduces the incentives of many individuals to participate in democracy.

In summary, both judicial invalidation and judicial deference provide guidance to judges while compromising other substantive democratic values. To many, mutually exclusive binary choices, whether they involve judicial invalidation or complete deference, seem overly simplistic and incomplete. To these individuals, a well-functioning, participatory democracy does not exist at either extreme but instead exists somewhere along the continuum between the two poles.

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impermeable than a putative boundary between electoral speech and other forms of political speech.").

137. As discussed earlier, the heightened scrutiny applied to campaign reforms is not "fatal-in-fact" because courts tolerate contribution limitations, disclosure requirements, and limitations on spending by business corporations, unions, and many nonprofit corporations.

138. *See* Buckley v. Valeo, 424 U.S. 1, 67 (1976) ("[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.").

C. Content-Based Rules

The Court could provide guidance and avoid the extremes described above by adopting a bright-line rule that limits regulation to spending on political expression that contains specific words or references. In his separate dissent in *McConnell*, for example, Justice Thomas interpreted *Buckley* to require that "any regulation of political speech beyond communications using words of express advocacy is unconstitutional."[139] In applying an express advocacy rule, the Court would almost certainly find the electioneering provisions unconstitutional because they regulate spending on speech that does not contain express advocacy.

Just as the one-person, one-vote rule provided greater guidance in the districting context,[140] the express advocacy rule gives more direction than the conventional overbreadth doctrine. In the words of Justice Thomas, "speech containing the 'magic words' is 'unambiguously campaign related,' . . . while speech without these words is not."[141] The rule clearly notifies legislators of their regulatory authority, which increases the likelihood that reforms will meet constitutional requirements. The ease in administration streamlines judicial decisionmaking and reduces concerns that judges will decide cases based on personal political assumptions.

Granted, the express advocacy rule might require difficult judgments regarding whether the advocate uses words that are synonymous with "vote for"

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139. *McConnell*, 124 S. Ct. at 737 (Thomas, J., dissenting) (asserting that the express advocacy test was adopted not merely to enhance the clarity of statutory language regulating independent expenditures, but to narrow its coverage, and asserting that six of the seven circuits that have considered the question have interpreted express advocacy as a constitutional rule). Even aside from the broad scope of the electioneering provisions, Justice Thomas stated that, unlike the other eight Justices, he would invalidate the disclosure requirements of the electioneering provisions. He asserted that the interest in "providing 'information' about the speaker to the public" does not outweigh the right to anonymous speech. *McConnell*, 124 S. Ct. at 736 (Thomas, J., dissenting).

140. *See* Baker v. Carr, 369 U.S. 186, 226 (1962) ("Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action."); *see also* ELY, *supra* note 120, at 124 (explaining that the Court adopted a one-person, one-vote rule "precisely because of considerations of administrability"); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 175 (2d ed., rev. vol. 2002) (suggesting that "the one-person, one-vote rule based on strict population equality could be readily managed by the courts and thus allowed a justiciable standard for judicial immersion into the 'political thicket' of elected institutions") (quoting Karcher v. Daggett, 462 U.S. 725, 732 (1983)).

141. *McConnell*, 124 S. Ct. at 739 (Thomas, J., dissenting).

or "defeat" in particular contexts; thus, the rule is less mechanical than the one-person, one-vote rule.[142] Nevertheless, by focusing only on magic words, courts avoid thorny empirical questions that characterize the conventional overbreadth doctrine—such as the projected number of regulated activities that will not corrupt or appear to corrupt the political process. The rule also allows for a consistent protection of speech and regulation of the most blatant attempts to influence and corrupt the political process.[143]

The express advocacy rule, however, sacrifices key governmental interests related to preventing corruption and the appearance of corruption.[144] There is no good reason to believe that express words of advocacy like "vote for" or "vote against" always or even usually threaten these state interests more than communications that do not contain such words.[145] Campaign advertisements without "express advocacy," for example, are often more politically effective, as evidenced by the fact that only 10.4% of all candidate-sponsored advertisements that aired during the 2000 federal election cycle used express

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142. *See* Edward B. Foley, *"Smith for Congress" and its Equivalents: An Enforcement Test under* Buckley *and* MCFL, 2 ELECTION L.J. 3 (discussing different interpretations of the "express advocacy" standard, and arguing for an interpretation that is fairly clear-cut and supportive of regulation); Glenn J. Moramarco, *Magic Words and the Myth of Certainty*, 1 ELECTION L.J. 387, 398 (2002) (discussing the "practical difficulties that arise when one tries to determine whether particular words, phrases, or images meet the *Buckley* and *MCFL* tests for express advocacy").

143. *McConnell*, 124 S. Ct. at 740 (Thomas, J., dissenting). Justice Thomas states:

> *Buckley* did not draw [the express advocacy] line solely to aid in combatting real or apparent corruption, but rather also to ensure the protection of speech unrelated to election campaigns . . . . [A]s "the distinction between discussion of issues and candidates . . . may often dissolve in practical application," . . . the only way to prevent the unjustified burdening of nonelection speech is to impose the regulation only on speech that is "unambiguously campaign related," . . . *i.e.*, speech using words of express advocacy.

Id.

144. The rule might also be said to sacrifice values related to informed political decisions and the enforcement of campaign finance laws through disclosure of financial support:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office . . . . [Further,] recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

See Buckley, 424 U.S. at 66–68 (quoting H.R. REP NO. 92-564, at 4 (1971)).

145. *Cf.* DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 112 (The Brookings Institution, 1995) ("There is . . . no good reason to believe that connections that are proximate and explicit are any more corrupt than connections that are indirect and implicit.").

advocacy.[146] By erring so heavily away from statutes that are overinclusive, the judicial rule effectively mandates underinclusiveness by prohibiting legislatures from responding to activity that poses a threat of corruption but does not include express advocacy. It provides a safe harbor for corruption and thus encourages shrewd and calculating political actors to engage in such activity.[147] The state's interests that are sacrificed by the express advocacy rule cannot be minimized by a more measured interpretation of the test due to the rigidity of the rule.

Some might propose that the Court restore prevention-of-corruption values by expanding the boundaries of the judicial tool past express advocacy to tolerate regulation of spending on any speech that refers to a federal candidate. Absent any additional tools to determine overbreadth, this broader judicial tool sacrifices values related to the protection of speech, such as prevention of incumbent entrenchment and promotion of individual autonomy. Such a rule would presumably tolerate the regulation of money spent on activities that pose little threat of corruption, such as a *60 Minutes*[148] newsmagazine interview of a senator or a constituent's letter to her representative. Similarly, it prevents legislative attempts to regulate corruptive spending on speech that does not include a reference to a candidate. An oil company attempting to curry favor with George W. Bush during the 2000 presidential election, for example, could have run an ad attacking the honesty of Democrats without ever mentioning the name of Al Gore.[149]

Content-based boundaries are inadequate because the corrupting potential of money depends not merely upon *what* is said. It also depends upon context-specific factors such as speaker identity, audience, extent of regulation, and

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146. *See* CRAIG B. HOLMAN ET AL., BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 72, fig. 8-1 (2002) (showing that only 10.4% of all candidate-sponsored advertisements that aired during the 2000 federal election cycle used the magic words), *available at* http://www.brennancenter.org/programs/download/buyingtime2000/chapter8.pdf.; JONATHAN S. KRASNO ET AL., BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS 9 (2000) (stating that only 4% of all candidate-sponsored advertisements that aired during the 1998 federal election cycle used the magic words).

147. The rule might also be said to confuse constitutionally prohibitable activity with constitutionally protected activity, thereby enabling the rationalization of circumvention. Rather than honestly admitting that only judicial policy protects their activity, political actors avoid moral culpability by dressing their activity as a "right" protected by the First Amendment.

148. *60 Minutes* (CBS television broadcast).

149. FEC regulations would likely exclude a party reference from the scope of the electioneering provisions' coverage, unless the reference constituted an "unambiguous reference to [a candidate's] status as a candidate such as 'the Democratic presidential nominee.'" 11 C.F.R. § 100.29(b)(2) (2003).

timing—*who*, *where*, *how*, and *when*.[150] The Court's rulings reflect the importance of context to a limited extent. For example, prior to *McConnell* the Court determined that corporate spending poses a greater threat of corruption than spending by individuals.[151] Along similar lines, disclosure requirements are less intrusive upon expressive interests than are spending limitations.[152]

The jurisprudence of the mechanical, content-based, express advocacy test, however, does not fully incorporate context-specific distinctions and results in illogical outcomes. For example, a legislature could prohibit spending on express advocacy by a corporation, but it could not require disclosure of corporate spending on a slightly different advertisement that omits express advocacy yet is clearly designed to influence the election and corrupt the process. This focus on *how* spending on speech is regulated exposes the shortcomings of a one-dimensional, content-based construction of the boundaries of reform. One can make a strong argument that *what* type of speech can be regulated should vary depending on *how* legislators propose to regulate the money, *who* is using the money, and *when* and *where* the expressive activity will take place.

D. A Multidimensional Rule

In light of the limitations of a content-based judicial rule, the Court might adopt a rule that accounts for content, form of regulation, speaker identity, timing, and audience. The electioneering provisions of the Act attempt to do this statutorily, but the Court could adopt similar guidelines as the boundaries of reform. Judges might interpret the electioneering provisions as the effective boundaries of reform, much as plaintiffs and some earlier courts interpreted the Court's express advocacy holding in *Buckley* as the boundary of legislative authority. Following the Court's guidance in *McConnell*, judges might presume constitutional those state statutes that are identical to the electioneering provisions. Courts might also invalidate those statutes that are more restrictive than the electioneering provisions. This de facto judicial test, however, provides no guidance as to whether other types of reforms improperly infringe on too much speech. Constitutional questions about low contribution

150. *Why*, or the intent of the speaker to corrupt the process, is relevant but is less useful due to the difficulty that courts and legislatures face in discerning speaker intent in a manageable manner that allows for effective regulation.

151. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 682 (1990) (discussing the substantial risk of corruption posed by the vast wealth of corporations).

152. *See* Buckley v. Valeo, 424 U.S. 1, 23 (1976) (discussing the severe impact of expenditure limits on protected political speech).

limits or restrictions on political spending by nonprofit organizations that receive minimal funds from business corporations, for example, remain unanswered.

In addition, to the extent that courts emphasize the electioneering provisions as a fixed boundary for the permissible scope of regulation, they unjustifiably warp the evolution of legislative responses to corruption.[153] Local and state elections differ from federal elections. Democracy continuously evolves based on legal, technological, and social changes in the distribution of resources, in campaign methods, and in fundraising practices. A rigid judicial rule impedes this growth,[154] mechanically substituting the Court's fixed political judgment for the legislature's normal function of reviewing and repairing obsolete statutes.[155] Courts only muddy the test by adding additional rules and exceptions to address context-specific issues.[156]

Further, distinctions between those who use statutes and judicial tests might justify greater flexibility for judicial tests. Clear, rule-like statutes benefit speakers. Such rules provide instant notice to citizens as to prohibited and permissible activities. The legislature may periodically craft new bright-line rules to respond to evolving campaign strategies, technologies, and problems. In contrast, judicial tests are intended to provide guidance to legislatures and judges for reviewing statutes and also to promote consistency in decisions. Unlike lay speakers, judges and legislatures generally have legal staff, law libraries, time, and other resources to help them interpret and apply more sophisticated judicial tests. Granted, judicial review requires judges to have a clearer understanding of the relevant democratic objectives and values than that provided by the current overbreadth doctrine. Nevertheless, judicial tests might become obsolete if crafted as simple, inflexible rules. The

153. *See* Sullivan, *supra* note 51, at 66 (noting the argument that rules "tend toward obsolescence" whereas standards "are flexible and permit decisionmakers to adapt them to changing circumstances over time").

154. *Cf.* Fallon, *supra* note 125, at 62 (stating that "in shaping constitutional tests, the Supreme Court must take account of empirical, predictive, and institutional considerations that may vary from time to time").

155. *See* Brief for *McConnell* Intervenor-Defendants, *supra* note 29, at 61 (arguing that "periodic statutory repair is a normal process—and the natural province of legislatures, not of courts"); *cf. McConnell*, 124 S. Ct. at 643–54 (surveying the continuous process of enacting campaign regulations in response to evolving threats money posed to democratic integrity); *id.* at 706 ("We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.").

156. *Cf.* Rose, *supra* note 52, at 578–79 (noting that "over time, the straightforward common law crystalline rules have been muddied repeatedly by exceptions and equitable second-guessing").

simplicity and inflexibility that characterize an ideal campaign finance statute might prove detrimental when adopted as characteristics of a judicial tool.

V. Balancing Clearly Defined Values to Review Campaign Reform

In contrast to a judicial rule, a balancing test would allow judges to consider different values and respond to evolving and context-specific campaign practices and reforms. This Part proposes, applies, and analyzes a test that balances four values: democratic deliberation, widespread participation, individual autonomy, and electoral competition. To appreciate fully the benefits of balancing values, however, it may be helpful to first explore the inadequacies of other balancing tests.

One balancing test would define substantial overbreadth by a fixed percentage of invalid applications of a statute relative to total applications. For example, a ten percent overbreadth threshold would assume that the harms of ten invalid applications are sufficiently weighty to offset any gains from ninety valid applications. Context-specific factors associated with overbreadth, however, evade quantification by a single fixed number. Different types of regulations advance the state interest and infringe on expression to varying degrees. For example, spending prohibitions are perceived to burden expressive interests more than disclosure requirements. Therefore, a spending prohibition in which ten percent of the applications were invalid might be more troubling than a disclosure requirement in which ten percent of the applications were invalid. Similarly, different applications of any single statute are often not simply "invalid" or "valid," but advance the state's interest and infringe upon expressive values to varying degrees. A numerical threshold such as ten percent would fail to reflect the true harms and benefits of a particular statute.

Professor Richard Hasen, observing that numbers alone do not reveal whether overbreadth is substantial, proposed that courts ultimately weigh "the benefits that the legislation hopes to achieve" against the "costs of overbreadth."[157] Along similar lines, Justice Breyer has suggested that courts

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157. Hasen, *supra* note 45, at 1801. Hasen notes:

> [T]he answer to the overbreadth question for regulating sham issue advocacy depends not only on *the percentage* of genuine issue advertisements captured but also on the *benefits* that the legislation hopes to achieve compared to the *costs* of requiring corporations and unions wishing to run genuine issue ads to do so only through a separate PAC.

Hasen, *supra* note 72. Hasen's proposal draws upon that of Professor Richard Fallon, who suggested that courts applying overbreadth doctrine ultimately balance:

> (a) the state's substantive interest in being able to impose sanctions for a particular

reviewing campaign finance regulations ask "whether the statute burdens any one such [constitutionally protected] interest in a manner out of proportion to the statute's salutary effects upon the others."[158] The flexibility of Hasen's and Breyer's tests would likely allow courts to respond to evolving and context-specific political activities and regulations.

Although Hasen's and Breyer's approaches seem right in principle, they provide minimal guidance because they inadequately define the benefits and the costs.[159] Judges predisposed against reform will likely see great harm in a statute that chills even a small number of expressive activities that do not pose threats of corruption. They may not appreciate the extent to which a statute advances a vague objective like "the prevention of corruption." Judges predisposed in favor of reform will likely have different understandings of the relevant values, and thus might arrive at an opposite conclusion.[160]

Perfect solutions that provide mechanical guidance, respect all relevant democratic values, and allow courts to respond to context-specific factors might not exist. A balancing test that provides more guidance, however, would advance these variables more than the alternatives. One way to enhance guidance would be to further develop the specific values that campaign activities and regulations should promote. For example, although the Court has accepted prevention of corruption as a compelling state interest, it has failed to clearly develop the values promoted by this interest.[161] Similarly, the Court has

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> kind of conduct under a particular legal standard, as opposed to being forced to rely on other, less restrictive substitutes against (b) the First Amendment interest in encouraging narrow statutes and avoiding as much as possible the chilling of constitutionally protected conduct.

Fallon, *supra* note 38, at 894.

158. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring); *see also* Jerome Barron, *The Electronic Media and the Flight From First Amendment Doctrine: Justice Brewer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 821 (1998) (discussing the merits of Justice Breyer's balancing approach *vis-à-vis* First Amendment tests).

159. Indeed, Professor Hasen recognizes the lack of clarity that comes from his proposal, and notes that his "[e]ssay is not the place to explore all of these questions in detail, which go to the heart of the debate over modern campaign finance regulation." Hasen, *supra* note 45, at 1804.

160. The conflicting opinions in *McConnell* illustrate the indeterminacy of such balancing. The Stevens/O'Connor majority opinion and the Kennedy dissent both avoided a discussion on the precise proportion of protected activities that would be covered by the electioneering provisions. Instead, the Stevens/O'Connor opinion seemed to conclude that the benefits of restricting corporate and union spending to influence political campaigns outweighed the costs of restricting speech unrelated to campaigns. The Kennedy dissent came to the opposite conclusion.

161. *See* Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENT. 97, 103 (1986) (observing that although the phrase

not fully articulated the democratic values that judicial protection of the use of money to support political candidates is intended to promote.

Without a concrete understanding of such values, judges are likely to justify their conclusions using abstract terms like "free speech" or "prevention of corruption" without a meaningful explanation as to when these concepts should be limited. By fleshing out relevant values and painting a more coherent vision of democracy, the Court would provide additional guidance to lower courts, to legislatures, and to itself in future cases.[162]

This Part elaborates upon four democratic values inherent in the Justices' approaches to campaign finance cases: democratic deliberation, widespread participation, individual autonomy, and electoral competition. A court would invalidate a campaign reform that, on the whole, detracts from these values more than it advances them. Granted, even with such a test, political assumptions may influence judicial decisionmaking. As discussed in further detail below, greater transparency in the accounting of the political values at stake allows for a more coherent doctrine than that afforded by a conventional overbreadth approach, and more flexibility than bright-line judicial rules.

A. Four Democratic Values

Campaign regulation and expressive activities implicate four democratic values: democratic deliberation, widespread participation, individual autonomy, and electoral competition. As evidenced below, different Justices have alluded to these values in both supporting and opposing campaign regulation. This Subpart culls the values from the Justices' opinions in *McConnell* and other campaign finance cases and more clearly articulates them. Individuals will likely dispute the primacy of these four values. Some might favor alternative values; others might note that aspects of the values overlap,[163] or they might describe or categorize the values differently.[164] Whatever one thinks of these

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prevention of corruption "has a ring that most Americans will like . . . its apparent clarity is deceptive, and its origin is at best clouded").

162. *See* Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 796 (2000) (arguing that "an emphasis on principles . . . might bring some sense and could help foster some predictability" to election law).

163. The values intersect in many different ways. For example, widespread participation provides diverse perspectives that allow enhanced democratic deliberation. Participation is most effective in competitive races when vulnerable candidates must respond to citizens. Participation and individual autonomy are both justified, in part, on the grounds of citizen self-fulfillment.

164. The values are not presented in the form of a conventional Republican, Pluralist, or

specific values suggested by the Justices, the central objective is to illustrate that a more explicit acknowledgment and detailed articulation of democratic values will allow for greater understanding and coherence of campaign finance doctrine.

1. Democratic Deliberation

The state's interest in preventing corruption is intended, in part, to promote democratic deliberation. The Court's discussions of prevention of corruption presume the existence of a deliberative norm from which officeholders may stray.[165] Corruption, according to the Court, consists not just of "quid pro quo agreements," but also of "undue influence on an officeholder's judgment"[166] or the threat of "politicians too compliant with the wishes of large contributors."[167] In *McConnell*, the Stevens/O'Connor opinion expressed concern that large contributions would prevent officeholders would prevent officeholders from deciding issues "on the merits."[168]

The Court has also acknowledged a deliberative norm among the citizenry. In *Austin v. Michigan Chamber of Commerce*,[169] the Court defined corruption as the use of immense wealth acquired through state-created advantages to distort political debate to such a degree that it does not reflect the public's support for ideas.[170] In another example, the Court acknowledged that

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Descriptive theory of democracy, although elements of all three can be found in considering the values.

165. *See, e.g.*, Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 128 (1997) ("In order to employ the concept of corruption . . . one must have some underlying notion of the pure, original or natural state of the body politic."); *cf.* Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, *in* POLITICAL CORRUPTION 963, 966 (Heidenheimer et al. eds., 1989) (defining corruption as "behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence").

166. FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001).

167. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000). While the Court in *McConnell* recognized that the interest in preventing corruption extends past "cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence,'" it also noted that "mere political favoritism or opportunity for influence alone is insufficient to justify regulation." *McConnell*, 124 S. Ct. at 664, 666.

168. *See McConnell*, 124 S. Ct. at 666.

169. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

170. *See id.* at 660 ("Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."); United States v. UAW, 352 U.S. 567, 575 (1957) (observing that the objective of the prohibition on corporate political contributions "was not merely to prevent the subversion

disclosure requirements provide "the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office."[171]

Spending on speech may also be said to facilitate deliberation. In striking down spending restrictions, the Court in *Buckley* reasoned that a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[172] The Kennedy dissent in *McConnell* called for invalidation of the provisions restricting electioneering spending by corporations, unions, and many nonprofits because of the "dynamic contribution diverse groups and associations make to the intellectual and cultural life of the Nation."[173] Justice Thomas would invalidate contribution limits because they infringe upon "the distinct role of candidate organizations as a means of individual participation in the Nation's civic dialogue."[174]

Despite conflicting assumptions about the role of regulation in advancing democratic deliberation, the Justices have not fleshed out the meaning of deliberation. "*Deliberative* politics connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect . . . ."[175] Deliberation does not simply allow for the discovery of pre-existing valid results, but allows for results that citizens consider valid due to the legitimacy of the deliberative process.[176] A variety of tools facilitate

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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").

171. Buckley v. Valeo, 424 U.S. 1, 66–67 (1976).

172. *Id.* at 19.

173. *McConnell*, 124 S. Ct. at 772 (Kennedy, J., concurring in part and dissenting in part).

174. *Nixon*, 528 U.S. at 417 (Thomas, J., dissenting); *see also* James Madison, *Report on the Resolutions (1799–1800)*, *in* 6 WRITINGS OF JAMES MADISON 397 (Gaillard Hunt ed., 1906) (noting that democracy depends on the freedom of "examining and discussing [the] merits and demerits of the candidates").

175. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293 (1989).

176. *Cf.* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 167 (1984) ("[W]here politics is the preeminent domain of things public (*res publica*), political knowledge is communal and consensual rather than either subjective (the product of private senses or of private reason) or objective (existing independently of individual wills)."); JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 121–23 (1920) (illustrating a change in science from valuing theoretical knowledge to experimental knowledge as an example of the process defining the result); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 170–71 (1979) (observing that "[i]f we see knowledge as a matter of conversation and social practice, rather than as an attempt to mirror nature," we develop a philosophy separated from the quest for certainty); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619,

deliberation, including but not limited to legislative hearings, letters to newspaper editors, campaign materials, and town hall meetings.[177]

Although most people are never completely removed from their own interests and experiences,[178] deliberative democracy aspires to focus on reason and argument rather than on strategic bargaining or coercion in collective decisionmaking.[179] The failure to consider a wide, representative range of views sacrifices deliberation.[180] This might occur when one uses contributions or spending to coerce a government official into making a decision. It might also occur when a disproportionately larger percentage of an elected official's time is spent with wealthier financial supporters than with those who have

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2634 (1995) (describing that private adjudicative disputes achieve validity because they exemplify the application of the law, which is a visible residue of public action); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 351–52 (Elly Stein & Jane Mansbridge trans., 1987) (arguing that "the source of legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself").

177. Other examples include citizen and expert testimony, committee reports, public statements, campaigning, exchanges with lobbyists and constituents, petition signing, Weblogs, Websites, letters to government officials, membership in political parties or public interest groups, handbills, leaflets, speeches, debates, news appearances, and television and radio advertisements.

178. *See* Richard A. Primus, *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1449 (1997) (asserting that "people never stand completely outside their personalities, class backgrounds, levels of education, and so on").

179. *See* Thomas Jefferson, First Annual Message (Dec. 8, 1801), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 325, 331 (Adrienne Koch & William Peden eds., 1944) ("The prudence and temperance of your discussions will promote, within your own walls, that conciliation which so much befriends rational conclusion; and by its example will encourage among our constituents that progress of opinion which is tending to unite them in object and in will."); JÜRGEN HABERMAS, LEGITIMATION CRISIS 110 (Thomas McCarthy trans., 1975) (examining the effects of using practical deliberation rather than force); THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he *causes* of faction cannot be removed and . . . relief is only to be sought in the means of controlling its *effects*."); Michelman, *supra* note 175, at 293 (describing that the "deliberative medium is a good faith exchange of views . . . in which all participants remain open to the possibility of persuasion by others"); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544 (1988) ("Under republican approaches to politics, laws must be supported by argument and reasons; they cannot simply be fought for or be the product of self-interested 'deals.'").

180. *Cf.* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963) (listing one of the values of speech as "attainment of truth" acquired "by considering all facts and arguments which can be put forth in behalf of or against any proposition"). Widespread participation and honest consideration of different perspectives is especially important to democratic deliberation in light of criticisms that an overemphasis on "reasoning" favors educated elites and an aspiration of a single "common good" ignores the diversity of society.

fewer resources.[181] Business corporations can contribute important information toward deliberation. The charters of many corporations, however, limit the objectives of such entities to making money for the shareholders. While this goal may sometimes overlap with the common good, the objectives are not coterminous.

2. Widespread Participation

The Court has suggested that the prevention of an appearance of corruption preserves citizen participation. In *Nixon v. Shrink Missouri Government PAC*, for example, the Court stated that preventing the appearance of corruption was important because "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[182] In *McConnell*, the Court stated that contribution limits "require candidates and political committees to raise funds from a greater number of persons" and "tangibly benefit public participation in political debate."[183]

On the other hand, complex campaign regulations of grassroots activity might hinder widespread participation. For example, the Court has acknowledged that disclosure requirements of contributions as low as ten dollars "may well discourage participation by some citizens in the political process."[184] In a similar vein, Justice Thomas has stated that contribution

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181. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1283 (1994) ("If the candidate is not substantially free . . . to spend her time considering . . . the grievances, information, and ideas of non-donors . . . the process falls short, not just of the ideal but of the constitutional norm.").

182. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000); *see id.* at 401 (Breyer, J., concurring) (writing that campaign finance restrictions seek to "build public confidence in [the democratic] process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes") (citing A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24–27 (1948)); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982) (finding that the interests of preventing both actual corruption and the appearance of corruption "directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process'").

183. *McConnell*, 124 S. Ct. at. at 656; *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002) (observing that campaign finance laws seek 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").

184. Buckley v. Valeo, 424 U.S. 1, 83 (1976).

restrictions relegate individuals' attempts to participate to less effective and less convenient methods.[185]

Scholars have defined citizen participation as "purposeful activities in which citizens take part in relation to government."[186] Participation is a crucial democratic value. As Justice Brandeis remarked, "the greatest menace to freedom is an inert people."[187] Participation includes, but is not limited to voting;[188] involvement or financial support of a campaign, political party, issue, or interest group; public advocacy and protest; and absorbing news about public affairs.[189]

Widespread participation serves four primary functions. First, it exposes decision-makers to a variety of ideas and viewpoints, which ensures fully informed decisions.[190] Second, it enhances the legitimacy of government decisions, which increases the likelihood that citizens will voluntarily comply with such decisions.[191] Third, widespread participation allows for a

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185. *See Nixon*, 528 U.S. at 417–18 (Thomas, J., dissenting) (noting that restrictions result in the "suppression of political speech" and "relegate donors' points of view to less effective modes of communication").

186. Stuart Langton, *What is Citizen Participation?*, *in* CITIZEN PARTICIPATION IN AMERICA 13, 17 (Stuart Langton ed., 1978). *See generally* CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970) (presenting essays on the nature and value of public participation in the democratic process); PARTICIPATION IN POLITICS: NOMOS XVI (J. Roland Pennock & John W. Chapman eds., 1975) (same); THE CASE FOR PARTICIPATORY DEMOCRACY (C. George Benello & Dimitrios Roussopoulos eds., 1971) (same).

187. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

188. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985) (asserting that the early Republican conception of political participation included deliberative dialogue and debate, and was not limited simply to the act of voting). *But see* John H. Aldrich, *Rational Choice and Turnout*, 37 AM. J. POL. SCI. 246, 246 (1993) (stating that "turning out to vote is the most common and important act of political participation in any democracy").

189. *See* JAMES BURKHART ET AL., STRATEGIES FOR POLITICAL PARTICIPATION 41 (1972) (providing examples of participation in information gathering and opinion forming); MARY GRISEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH 54–60 (1981) (providing examples of citizen participation); Langton, *supra* note 186, at 21–23 (same).

190. *See* Walter A. Rosenbaum, *Public Involvement as Reform and Ritual: The Development of Federal Participation Programs*, *in* CITIZEN PARTICIPATION IN AMERICA 81, 87 (Stuart Langton ed., 1978) ("Many commentators favor public involvement because it can reduce administrative freedom to make decisions from narrowly professional bureaucratic of self-interested motivations."); Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 267–68 (1999) ("Widespread participation exposes decisionmakers to a healthy mix of perspectives, which is believed to improve the decisionmaking process.").

191. *See* KWEIT & KWEIT, *supra* note 189, at 132 (presenting the hypothesis that "[t]he more satisfied the citizens are with participation, the more trusting and efficacious they will

redistribution of government resources and priorities to reflect evolving problems and needs.[192] Finally, participation furthers self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that impact their lives.[193] These functions suggest that as many natural persons as possible, or at least as many citizens as possible, should have access to the instrumentalities of participation. While corporate participation might expose decision-makers to additional ideas and viewpoints, self-fulfillment and other functions of participation seem uniquely applicable to natural persons.

To the extent that vast disparities exist in the instrumentalities of participation, citizens might feel less able to shape the decisions that impact their lives and may question the legitimacy of the laws.[194] Formal equality of some instrumentalities of participation, such as voting, is appropriate. Uniform equality of other instrumentalities, however, is sometimes inconsistent with widespread participation.[195] Precise equality fails to appreciate that excessive restrictions can deaden political participation to the detriment of society as a whole. For example, a complete prohibition on the use of private funds for political purposes would outlaw even the purchase of a poster board to make a sign criticizing the government. By tying the use of instrumentalities of participation to fixed and inflexible principles, mechanical equality aspires to a

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be"); Luis Fuentes-Rohwer, *The Emptiness of Majority Rule*, 1 MICH. J. RACE & L. 195, 201 (1996) ("To deserve the democratic denomination, the people must take part in political affairs.").

192. *See* KWEIT & KWEIT, *supra* note 189, at 162 (asserting that the goals of public participation include the redistribution of power).

193. *See* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989) (discussing a "constitutive" vision of politics whereby citizens define themselves through their participation); *see also* C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 47–48, 51–52 (1977) (asserting that public participation increases "the amount of personal self-development of all the members of society").

194. According to James A. Gardner:

> Generally, participation is most meaningful when it is a means by which citizens can play a significant role in shaping the decisions that affect their lives. For this condition to hold, citizens must feel that there is some reasonable prospect for their participation to lead eventually to actions that affect them.

James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1247 (2002) (footnote omitted).

195. *See* RONALD DWORKIN, SOVEREIGN VIRTUE 198 (2000) (distinguishing between equality of deliberation, or "influence," and decisionmaking, and arguing that "equality of influence is incompatible, even in principle, with other attractive aspects of an egalitarian society"); Andrei Marmor, Authority, Equality and Democracy 18 (Jan. 2003) (unpublished manuscript, *at* http://lawweb.usc.edu/cleo/working-papers/olin/documents/03_15_paper.pdf) (asserting that "a principle of equality need not be the same kind of equality with respect to these two main stages of the political process, namely, deliberation and decision").

mathematical certainty that is inconsistent with fair and practical implementation in many areas other than voting. The democratic value of widespread participation is not synonymous with dull uniformity.

3. *Individual Autonomy*

Individual autonomy is an important principle generally undergirding expression. In emphasizing a form of individual autonomy that stems from freedom from government restriction, Justice Thomas wrote:

> Even if contributions to a candidate were not the most effective means of speaking . . . an individual's choice of that mode of expression would still be protected . . . . *Buckley* completely failed in its attempt to provide a basis for permitting government to second-guess the individual choices of citizens partaking in quintessentially democratic activities . . . . [T]he right to free speech is a right held by each American, not by Americans en masse.[196]

On the other hand, campaign regulation that prevents corruption has been described as implicating "the responsibility of the individual citizen for the successful functioning" of the electoral process.[197] A contested concept with multiple meanings, individual autonomy requires further development to be useful in the campaign finance context.[198]

Perhaps the most familiar concept of individual autonomy stems from an individual's freedom from government interference in doing or determining what she wants.[199] To achieve self-realization, the mind must be free. Self-expression is perceived as an "integral part of the development of ideas, of mental exploration, and of the affirmation of self."[200] Government suppression of such thoughts is an affront to one's individual dignity.[201]

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196. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 417 n.5, 418, 420 (2000) (Thomas, J., dissenting).

197. United States v. UAW, 352 U.S. 567, 570 (1957).

198. *See* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994) ("Autonomy, however, is a protean concept, which means different things to different people, and occasionally appears to change its meaning in the course of a single argument.") (footnote omitted).

199. *See* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 122–31 (1969) (describing the notion of negative freedom).

200. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1967); *see* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11 (1984) ("[T]he constitutional guarantee of free speech ultimately serves only one true value, . . . 'individual self-realization.'").

201. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) ("For the

Individual autonomy involves choice—"a right [of individuals] to make important decisions defining their own lives for themselves."[202] Autonomy means "having a say in what affects you," including how one is governed.[203] The extent to which a person exercises this choice, however, does not depend upon mere government action or inaction. Other variables are relevant, including one's personal talents, access to resources, and the actions of other nongovernmental actors. Autonomy also requires "freedom from coercion, manipulation, and temporary distortion of judgment,"[204] and the existence of meaningful alternatives from which to choose.[205] Government activity or restriction—such funding that enables additional choices or restrictions on coercive behavior—can therefore enhance the autonomy of a particular individual.

Any action to expand autonomy by government or other entities, however, requires judgments about resources, coercion, and options that are external to the individual. Such judgments can be said to paternalistically compromise a person's autonomy by attributing her successes and failures to factors external to herself.[206] Others, however, see this paternalism argument as rhetoric designed to preserve the status quo and prevent widespread access to

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achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 787 (2d ed. 1988) (explaining that "much of our commitment to freedom of speech" stems from the belief that "political participation is valuable in part because it enhances personal growth and self-realization"). *But see* OWEN M. FISS, THE IRONY OF FREE SPEECH 83 (1996) (noting that "[t]he autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, as it might be in some moral code, but is rather a means to further the democratic values underlying the Bill of Rights").

202. RONALD DWORKIN, LIFE'S DOMINION 222 (1993); *see* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 138 (1995) (noting that autonomy can be defined as permitting or empowering individuals to be "authors of the narratives of their own lives").

203. *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 75 (1989) (defining individual autonomy as "the importance of each individual having a say in how he or she is governed"); Michael H. Shapiro, *Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1567 n.48 (1988) ("'Autonomy,' as used in the text, refers to that aspect of autonomy dealing with opportunities to pursue preferences—an ability generally enhanced by having a say in what affects you.").

204. Fallon, *supra* note 198, at 877.

205. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 373–77 (1986) (explaining that without an adequate range of options, one does not enjoy an autonomous life).

206. *Cf.* Fallon, *supra* note 198, at 878 ("Employed as an *ascriptive* concept, autonomy represents the purported metaphysical foundation of people's capacity and also their right to make and act on their own decisions, even if those decisions are ill-considered or substantively unwise.").

substantive autonomy. It seems possible to consider the substantive, relative aspects of autonomy as long as they do not overshadow the intimate, personal, self-determinative nature of the concept. A significant difference exists, for example, between a sixty-day restriction on corporate spending on broadcast ads and a government requirement that the government itself own and program all media outlets. In light of the self-realization values undergirding autonomy, the concept seems uniquely applicable to natural persons. Restrictions on corporations, however, might diminish the autonomy of potential listeners by eliminating the option to hear corporate-sponsored speech.[207]

4. Electoral Competition

Many Justices on the Court have expressed concern that incumbent politicians will design reforms to keep themselves in power and disadvantage challengers.[208] In the words of Justice Scalia, "[t]he incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition."[209] In

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207. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978) (invalidating restrictions on corporate spending on ballot measures, asserting that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual").

208. The dissenting opinions in *McConnell* expressed concerns about the entrenching effects of the Act. *See McConnell*, 124 S. Ct. at 721 (Scalia, J., concurring in part, dissenting in part) ("*[A]ny* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents."); *id.* at 753–54 (Kennedy, J., concurring in part, dissenting in part) ("Name recognition and other advantages held by incumbents ensure that as a general rule incumbents will be advantaged by the legislation the Court today upholds."). Indeed, the Stevens/O'Connor opinion in *McConnell* was too quick to dismiss dangers that lawmakers passed the Act to preserve their own political power. The Stevens/O'Connor majority opinion addressed this issue with two sentences:

> Any concern that Congress might opportunistically pass campaign-finance regulation for self-serving ends is taken into account by the applicable level of scrutiny. Congress must show concrete evidence that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption and that the chosen means of regulation are closely drawn to address that real or apparent corruption.

Id. at 684 n.72.

The Court's application of a generic "closely drawn to prevent corruption" test, however, does not take into account the threat of incumbent entrenchment. Lawmakers may craft a regulation, for example, that both prevents corruption and entrenches incumbents. Recognizing that a primary purpose of the First Amendment is to prevent elected officials from enacting laws that prevent criticism of government, the Court in *McConnell* should have provided a more meaningful discussion of the competing dangers of entrenchment and corruption.

209. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 692 (1990) (Scalia, J.,

contrast, reformers have argued that the ability of the wealthy to contribute and spend large sums on behalf of incumbent lawmakers undermines the competitiveness of elections and ensures that government officials are not responsive to the concerns of most Americans.[210]

Electoral competition means that insurgents challenge incumbents, candidates actively pursue voter support, incumbents face a real possibility of losing, and voters have meaningful choices.[211] The electorate can "only express a 'free and uncorrupted choice' if it has the ability to select among competing political prospects."[212] The primary purpose of electoral competition is to produce government officials and policy outcomes that are responsive to the interests of citizens.[213] Absent competition, elected officials lack incentives to respond to evolving problems and opportunities.[214] Competition puts a check on the power of government officials who might otherwise enact or tolerate

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dissenting); *see* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 404 (2000) (Breyer, J., concurring) ("[W]e should not defer in respect to whether its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge."); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in part and dissenting in part) (asserting that judicial deference to campaign reforms "amounts to letting the fox stand watch over the henhouse").

210. *See* Raskin & Bonifaz, *supra* note 4, at 301 ("The systemic degradation of the political influence of the nonaffluent is best witnessed by government policy. Congress is far more responsive to the political interests of the wealthy than the poor, and often acts to the detriment of those who do not participate in the wealth primary.").

211. *See* Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1212 (2002) (describing the problem of inadequate funding for challengers who face well-funded incumbents and its negative effects on informed voter decisionmaking); Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2190 (2001) (defining electoral competitiveness as, at a minimum, "the ability of elections to present contests to the voters in which the winners are not predetermined"). Electoral competitiveness is distinct from the competitive marketplace of ideas metaphor used to justify judicial protection of speech from regulation. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

212. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615 (2002).

213. *See* Issacharoff & Pildes, *supra* note 118, 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.").

214. *See* Issacharoff, *supra* note 212, at 600 ("Viewed differently, however, this form of political market manipulation threatens a core tenet of democratic legitimacy: accountability to shifting voter preferences.").

abusive practices.[215] This accountability to the electorate ensures democratic legitimacy.[216]

When incumbent responsiveness to the needs of a majority of constituents creates a lack of competition, little cause for concern exists. The process malfunctions, however, when incumbents diminish competition not by responding to a majority of the electorate, but by using the power of office to manipulate campaign rules or to acquire other special advantages over challengers.[217] While reforms could in principle enhance competition, in reality incumbents aspire to preserve their power. Therefore, a court should aspire to ensure that reforms do not, on the whole, diminish competition.

B. Institutions and Empirical Inquiries

Even if the Court adopted the four democratic values, thorny empirical issues remain. This Subpart identifies fact-finding challenges unique to judicial review of campaign finance regulations. It also proposes an evidentiary standard and lists some types of evidence that courts should consider when reviewing campaign reforms.

Judicial speculation about political effects differs from the traditional judicial fact-finding role. In most cases, judges feel comfortable with their ability to predict the effects of activities and statutes. In the campaign finance context, unanticipated political consequences abound and judges face difficulties in predicting the extent to which reforms like the electioneering provisions will further state interests.

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215. *Cf.* THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("A dependence on the people is no doubt the primary controul [sic] on the government . . . .").

216. *See* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 205–07 (1989) (identifying responsiveness "as the core of a theory of legitimacy"); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 232 (1967) (arguing that a "representative government must not merely be in control, not merely promote the public interest, but must also be responsive to the people"). Note that some defend anticompetitive practices as furthering democratic stability and avoiding factionalism. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 736 (1974) (upholding various California restrictions on ballot access due to a state interest in political stability, and stating that "California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government").

217. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997) (describing legislative entrenchment and stating that "the desire of representatives to perpetuate their hold on office may induce them to act contrary to the preferences of their constituents on a variety of issues"); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999) ("Democratic systems are subject to certain characteristic manipulations; we seek to identify those dangers and suggest the need for some external institution or legal rule structures to counteract these tendencies.").

Even with the benefit of hindsight, campaign finance determinations differ from more ascertainable questions, such as "was the defendant at the scene of the crime?"[218] For example, how does a defendant establish that money unduly influenced deliberations on a large number of bills?[219] This question has no definitive answer. Relevant variables include the merits of each bill, alternative proposals, and the influence of monetary factors relative to nonmonetary factors in the passage of each bill. No static, controlled set of variables exists that allows the isolation and mathematical determination of the influence of one causal factor like corporate and union spending on electioneering ads.[220]

Courts should not invalidate reforms simply because defendants cannot establish their effects with absolute certainty. This indefiniteness might stem from the practical difficulty in obtaining definitive answers to questions of a political nature rather than from a lack of justification for the reform. If courts are to engage in meaningful review rather than mechanical invalidation of reforms, the inability to measure political effects with mathematical precision cannot, by itself, jeopardize the regulation.

The unique nature of campaign finance fact-finding raises the question of whether judges should defer to the legislative record in the campaign finance context.[221] Judges traditionally consider cases involving individual harms, and they might possess expertise in assessing facts regarding individual autonomy. Legislators, however, seem best positioned to assess the effects of money and regulations upon deliberation. Due to their experience as candidates, legislators also possess the most expertise to determine the effects of money and campaign regulations on widespread participation and electoral competition.

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218. *See* Sorauf, *supra* note 161, at 110 (explaining the problems of definition and proof-facing determinations of "improper" or "excessive" influence within campaigns).

219. Similar problems confront fact-finding related to other values. For example, how can a plaintiff establish conclusively that the electioneering provisions, if implemented, will dampen competition by advantaging incumbents and disadvantaging challengers? How can a defendant show definitively that more citizens will participate in politics once the electioneering provisions are enacted?

220. A fact finder, one might argue, could engage in a comparative analysis of the thought process of every legislator regarding every piece of legislation considered, and enter into a complex "but for" analysis about which bills would have passed. Even in the unlikely event that one could practically engage in such a survey, the Speech and Debate Clause of the Constitution might prohibit members from being questioned about the motivations for their legislative acts. *See* U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place."); *see also* Powell v. McCormack, 395 U.S. 486, 503 (1969) (stating that the Speech and Debate Clause ensures "that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation").

221. *Cf.* Richardson, *supra* note 107, at 31 (examining the problems inherent in judicial review of speech prohibition laws).

Complete judicial deference to legislative fact-finding regarding any single value would hamper judicial review. Simply by beefing up the legislative record with findings that a regulation enhances deliberation, participation, autonomy, and competition, Congress could enact laws effectively immune from judicial review.[222] Incumbents' incentives to pass reforms that insulate themselves from challengers make this especially problematic.[223]

The doctrine provides few answers to fact-finding problems. While the Court requires an evidentiary showing of corruption to justify campaign restrictions,[224] its standards are unclear. In *Nixon v. Shrink Missouri Government PAC*, the Court stated that "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden"[225] but 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."[226] The method by which a court determines novelty or plausibility remains unclear.

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222. *Cf.* Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) (asserting that "the enactment of the statute cannot alone establish the facts which are essential to its validity").

223. *See* ELY, *supra* note 120, at 106 (noting that incumbents, as "ins[,] have a way of wanting to make sure that outs stay out"); *see also* Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 961 (1995) ("Rent-seeking incumbents unfettered by term limits might stand united on one principle: suppress information or controversy that might lead voters to drive them from office."); *cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Recognizing the occasional tyrannies of governing majorities, [the founders] amended the Constitution so that free speech and assembly should be guaranteed.") (quoting *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring)); Klarman, *supra* note 217, at 498 (describing the phenomenon of a temporary political majority attempting to "extend its hold on power into the future, when its members may no longer enjoy majority status" as "the problem of 'cross-temporal majorities'").

224. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 617–18 (1996) (describing the required evidentiary showing).

> [T]he lack of coordination between the candidate and the source of the expenditure . . . prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system. The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures.

Id.

225. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000).

226. *Id.* at 391. In *Nixon*, the Court required only an affidavit from a legislator and the passage of a campaign finance ballot initiative to establish corruption sufficient to warrant contribution limits, and some have suggested that the evidentiary standard is effectively lower. *See* D. Bruce La Pierre, *The Bipartisan Campaign Reform Act, Political Parties, and the First Amendment: Lessons From Missouri*, 80 WASH. U. L.Q. 1101, 1105 (2002) (asserting that since *Buckley*, the state's burden of production in establishing the need for contribution limits has

The Court might adopt an alternative evidentiary standard that responds to institutional competencies and incentives. Such a test would create a rebuttable presumption that reforms entrench incumbents and infringe upon individual autonomy. To rebut that presumption, the defendants could produce evidence showing that reform benefits incumbents no more than it does challengers[227] and that it refrains from infringing upon individual autonomy. In the alternative, the defendants may rebut the presumption by showing that the overall gains in deliberation and participation outweigh any small losses in competition and autonomy. If the defendant successfully rebuts this initial presumption, the burden of producing additional evidence about the negative impact of the regulation on any of the four values shifts to the plaintiff. The more compelling the defendant's evidence, the more evidence the plaintiff must present to meet her burden successfully. The ultimate burden of persuasion, however, would remain with the defendant at all times.

To meet their burdens, the parties could introduce testimony and studies by political scientists, public interest groups, and other circumstantial evidence.[228] Information about the jurisdiction that campaign reform covers would be most relevant, although parties could draw inferences from the effects of regulations and unregulated activity in other jurisdictions. Numbers of people and percentages of the population helped or harmed by the regulation—as well as the frequency with which the regulation impacts these individuals, the probability that they would be affected, and to what extent they would be affected—would be relevant but not dispositive. In addition to testimony and studies presented by the parties, the judge should examine the adequacy of the legislature's investigation of the facts.[229] The judge should consider any factors

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diminished).

227. The term "incumbents" may be used to refer to either incumbent individual government officials or an incumbent majority party within a legislature.

228. Similarly, expert reports, surveys, and polls should not be disqualified due to hearsay and other evidentiary rules. The purpose of the fact-finding tools, which legislatures often use to deal with these very types of questions, is to make fact finding by a judge more manageable. Few judges desire to hear direct testimony from thousands of random citizens in order to reach a conclusion regarding the citizens' perception of money in politics. The technical challenges that result from the political nature of the facts should not be held against the parties.

229. *See, e.g.*, Richardson, *supra* note 107, at 37 (discussing Whiting v. California, 279 U.S. 357 (1927), in which the Court accepted the California legislature's determination that a law criminalizing communist activity was necessary to public peace). Unfortunately, ballot initiatives, which may allow for the most effective reform because self-interested legislators do not enact them, would lack a legislative record. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85, 113 (1999) (stating that courts invalidated political contribution and expenditure limits passed by ballot initiative in Alaska, Arkansas, and Austin, Texas because of the absence of legislative records or findings).

that have arisen since the legislative investigation that might impact the extent to which the regulation advances or detracts from the values.[230]

C. The Least Imperfect Solution

Although balancing clearer values is less than perfect, the test is a good compromise of guidance and flexibility. As stated, the test clearly articulates four values: democratic deliberation, widespread participation, individual autonomy, and electoral competition. The test requires that courts invalidate a statutory provision in which the harms to these four values that arise from the provision, on the whole, outweigh the provision's benefits to these values.

The same criticisms that this Article applies to conventional overbreadth tests could be leveled against balancing the four values. Preconceived notions of different judges, for example, might lead them to emphasize particular values or facts over others. Any judicial test, however, must be examined in light of the alternatives. Inflexible rules such as an express advocacy test might provide mechanical guidance. Such tests become obsolete quickly due to the evolving nature of campaign practices and reforms. Judicial rules, regardless of where they are set, also gloss over important democratic values. At the other end of the spectrum, current overbreadth doctrines fail to articulate values clearly or to address thorny empirical issues, forcing even the best judges to make decisions, often subconsciously, based on their own implicit assumptions and values. In the absence of a perfect solution, this Article's balancing test provides a good compromise of substantive democratic values, sensitivity to context, and judicial guidance in this difficult area.[231]

Some might argue that political assumptions will influence judicial use of the balancing test and that judges lack the capacity to articulate and apply these four democratic values.[232] While political assumptions may influence judicial

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230. Richardson, *supra* note 107, at 36.

231. It is interesting to note Professor Gerken's perspective that:

> One need not adhere to a highly philosophical, top-down approach to lawyering to conclude that theory has a role to play in judicial decisionmaking. From a pragmatic perspective, incompletely or minimally theorized agreements may deprive courts of the opportunity to articulate mediating principles that can cabin judicial discretion, render doctrine more coherent, and avoid the trap of inflexible rules or mechanically applied proxies.

Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1466 (2002).

232. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 163 (forthcoming 2003) (asserting that the Court should not provide a uniform definition of political equality); Bruce E. Cain, Commentary, *Garrett's*

use of the balancing test, the concrete listing of the most important values allows judges to develop at least a common starting point from which to analyze cases. In the absence of explicitly articulated common values, judges rely on their own assumptions about how democracy should work to apply the substantial overbreadth doctrine. These assumptions often remain unstated and are therefore not subject to challenge or debate, resulting in inconsistent decisionmaking. Explicit normative engagement is likely once judges are required to explain how their decisions advance specific values. An honest exchange about the values that are to be balanced, rather than a glossing over of difficult issues with abstract rhetoric and mechanical lines, will allow for the development of a more coherent doctrine.

Some might doubt the competency of courts to balance normative values and engage in political fact-finding. Section Two Voting Rights Act claims, however, require that a court take account of polls, past election results, and other political factors to make a decision based on a "totality of the circumstances."[233] In Section Five Voting Rights Act cases, courts determine "retrogression" of minority voting strength by weighing factors such as whether minority gains in a redistricting plan as a whole offset the loss in a particular district and whether the plan adds or subtracts "influence districts."[234]

The takings doctrine offers an analogy to the benefits of balancing values in the campaign finance context. In 1922, the Court recognized that if a regulation goes "too far" in infringing on property rights, it constitutes an unconstitutional taking of property.[235] It was not until 1978, however, that the Court crafted a balancing test to improve judges' ability to determine whether a regulatory taking exists.[236] Difficult cases still arose after the adoption of the

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Temptation, 85 VA. L. REV. 1589, 1589–90, 1600–03 (1999) (criticizing ballot notations as a slippery-slope to greater judicial intrusion into the electoral process); Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, *in* THE UNITED STATES SUPREME COURT AND THE ELECTORAL PROCESS 245, 258–65 (David K. Ryden ed., 2000) (criticizing theories that support aggressive judicial review in election law).

233. Thornburg v. Gingles, 478 U.S. 30, 43 (1986).

234. *See* Georgia v. Ashcroft, 123 S. Ct. 2498, 2511–12 (2003) (describing the rough balance in majority-minority districting between boosting minority representation and isolating minority voters from the rest of the state). Courts have also used context-specific, circumstantial evidence to make politically tinged decisions about whether members of the Communist party represented a "clear and present danger" to the United States. *See* Dennis v. United States, 341 U.S. 494, 508–11 (1951) (applying the "clear and present danger" test not rigidly, but in light of the circumstances of the case); *see also* Richardson, *supra* note 107, at 10 (discussing the importance of the circumstances in which an utterance is made to the determination that evil will probably ensue).

235. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

236. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978)

balancing test, but fewer of them existed because judges and legislators had more guidance. As with regulatory takings, the balancing of clearer values in the campaign finance context reduces the extent to which outcomes turn on judicial guesswork.

Difficult campaign finance cases will continue to surface. The most difficult campaign reforms to review will combine both negative and positive effects—the reform that infringes on individual autonomy and disadvantages challenger candidates, for example, but enhances deliberation and widespread participation. Nevertheless, a clearer articulation of values and evidentiary standards will provide greater direction to judges and will result in fewer difficult cases than under the current overbreadth doctrine.

D. Application of Balancing Clearly Defined Values to the Electioneering Provisions

This Article now turns from abstract values to a detailed application of the balancing test to the restriction on nonprofit electioneering spending and a brief explanation of how the other provisions would fare. This Subpart concludes by explaining the test's comparative benefits over the conventional overbreadth doctrine and an express advocacy rule.[237]

1. Applying the Balancing Test

The balancing test this Article proposes would likely tolerate the restriction on electioneering spending by nonprofit organizations, but—unlike the majority opinion in *McConnell*—only with regard to those funds that the nonprofit receives from business corporations or labor unions. The electioneering provisions prohibit nonprofit corporations that receive money from business corporations or unions from spending their general treasury funds, as distinguished from segregated PAC funds, on electioneering communications. An "electioneering communication" consists of (1) any television, radio, cable, or satellite broadcast, (2) that refers to a clearly

(establishing that the factors to balance in determining a regulatory taking include: (1) character of governmental action; (2) economic impact; and (3) interference with reasonable investment-backed expectations).

237. The analysis below relies on hypothetical evidence. As stated above, to prevent over-reliance on political assumptions, courts should avoid the temptation to take judicial notice of likely political incentives and effects. Instead, they should require that the parties develop a factual record.

identified candidate for federal office, (3) run within sixty days before a general election or thirty days before a primary election, (4) that can be received by at least 50,000 people in the district the federal candidate seeks to represent.[238] The court should invalidate the nonprofit restriction if the harms to competition, deliberation, participation, and autonomy that arise from the restriction, on the whole, outweigh the benefits to these values that result from the restriction. Due to the diverse ideological agendas of nonprofits, the restriction on nonprofits probably does not dampen competition by entrenching incumbents over challengers. Studies showing that most nonprofit advertisements broadcast in past elections depicted incumbents positively and challengers negatively would strengthen this assumption.[239]

The nonprofit restrictions, however, do raise complicated issues regarding deliberation, widespread participation, and individual autonomy that were overlooked by the majority opinion in *McConnell* and inadequately articulated by the Kennedy dissent. Nonprofit restrictions promote deliberation and widespread participation because they prevent circumvention of the restriction on corporate and union electioneering spending. The threat that a disgruntled business corporation, for example, will use resources from its general treasury to run attack ads in the final hours of a campaign interferes with legislative deliberation. Further, such spending alienates potential voters who feel as though their participation is less meaningful relative to the influence of corporate treasuries. The restriction on nonprofit spending prevents a business corporation or union from using resources from its general treasury to set up and fund a nonprofit like Citizens for Better Medicare that will run attack ads in the final hours of a campaign.

Many nonprofits that accept limited funds from corporations and unions, however, are not fronts for business corporations or unions. Individuals organize nonprofits like the ACLU, the NRA, and the National Association for the Advancement of Colored People (NAACP) to advance issues rather than profits. Nonprofits engage in research, organizing, and advocacy, and are likely to make unique and important contributions to citizen and legislative deliberation.

Nonprofit spending also advances widespread participation and individual autonomy. Whereas many shareholders of business corporations view their

238. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88–90 (codified as amended at 2 U.S.C. § 434 (2002)).

239. The study would be especially effective if it showed that advertisements that primarily promote tourism, pending legislation, state candidates, and ballot initiatives were more likely to feature incumbents in a positive light.

shares as investments rather than associational mechanisms,[240] nonprofits serve as important vehicles for individual citizens to participate in an exchange about public issues. To the extent that people choose to make, for example, modest fifty-dollar contributions to these nonprofits to combine their resources to promote advertisements they could not otherwise afford, these organizations facilitate meaningful, widespread participation and individual autonomy.[241] Unlike shareholders of a business corporation, individual contributors to a nonprofit corporation generally expect their funds to be used to engage in political expression that is consistent with the stated objectives of the nonprofit corporation.[242] Elected officials who respond to nonprofits are responding to the desires of people who have assembled to further a particular issue. Such a situation differs from government responsiveness to the raw economic power of many business corporations that sell shares rather than issues to amass capital.[243]

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240. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 807 (1978) (White, J., dissenting) ("[C]orporate expenditures designed to further political causes lack the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech provided by the First Amendment. Ideas which are not a product of individual choice are entitled to less First Amendment protection."). Randall P. Bezanson notes:

> The requirement that speech be traceable to the intention and beliefs of individuals in order for the liberty of speaking to apply is an important factor in the institutional speech calculus . . . . It serves to distinguish untraceable, and therefore institutional, speech from individual speech that occurs in a collective or corporate form.

Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 749 (1995); *see also* Adam P. Hall, Note, *Regulating Corporate "Speech" in Public Elections*, 39 CASE W. RES. L. REV. 1313, 1320 (1989) (stating that First Amendment protection based on self-realization "does not seem appropriate for artificial persons such as corporations, unless the corporation is utilized as an associational mechanism through which its members can exercise their individual rights to self-expression").

241. *See* Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 4, 22 (1964) (discussing the unique qualities of associations).

242. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 260–61 (1986) ("Individuals who contribute to [Massachusetts Citizens for Life] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.").

243. A court, of course, should focus on evidence that supports and challenges these general assertions. For example, some citizens may refrain from participating because they believe nonprofits are "special interest groups" that control the democratic process. Nonprofits do not always reflect their contributors' views, and restraints on nonprofit spending might not infringe on the autonomy of these contributors. For example, a contributor could clearly support a cause yet oppose a candidate that the nonprofit supports because of the candidate's stand on other issues. Further, unlike corporate shareholders who enjoy voting power, contributors often have little recourse when they disagree with the nonprofits' electioneering. Hall, *supra* note 240, at 1340–41.

These values are not diminished simply because an organization accepts donations from business corporations or unions. Distinguishing ideological nonprofits that receive a few business contributions, such as the ACLU or the NRA,[244] from nonprofits organized and funded primarily by business corporations, like Citizens for Better Medicare, presents a formidable challenge. Although a nonprofit could sponsor electioneering communications with funds from a segregated Political Action Committee (PAC), this option might burden small, individual contributors who are required to donate to both a PAC and a general expense fund. In balancing the relevant values, a court might resolve the dilemma by limiting the application of the nonprofit electioneering restrictions to nonprofit funds that originate from entities other than natural persons.[245] This would effectively require that nonprofits segregate corporate and union contributions to ensure the funds are not used for electioneering.

With regard to the other electioneering provisions, a court balancing the four values might uphold the disclosure requirements and the restrictions on corporate and union spending. Disclosure provides information that furthers deliberation, but it does not interfere with individual autonomy to the extent that the nonprofit spending restriction might. As mentioned above, corporate spending poses special threats to legislative deliberation and generally does not advance individual autonomy and widespread participation to the same extent as nonprofit spending. Distinctions between unions and corporations might cause a court to consider invalidating the union restriction.[246] Electoral competition concerns, however, might counsel against upholding corporate restrictions while allowing overwhelmingly pro-Democratic unions to spend on electioneering ads. Although the Court upheld restrictions on union spending for the first time in *McConnell*, it provided no explanation for this expansion of campaign finance doctrine. At the very least, clearer values would prompt a court to explain the principles that undergird its decision to uphold union spending restrictions.

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244. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 698 (1990) (Kennedy, J., dissenting) ("With the *imprimatur* of this Court, it is now a felony in Michigan for the Sierra Club, or the American Civil Liberties Union, or the Michigan Chamber of Commerce, to advise the public how a candidate voted on issues of urgent concern to its members.").

245. Note that evidence may show, now or at some future time, that spending by nonprofits (or by individuals) causes grave harm to values like deliberation and participation, thus warranting limitations on such spending.

246. Unions represent a large group of people rather than financial interests, and thus union restrictions might pose a greater threat to widespread participation. Union spending presents fewer individual autonomy problems because union members, unlike shareholders, can request that the union not use their dues to support political causes. 11 C.F.R. § 114.5(a)(1) (2003).

2. A Comparative Analysis of Tests

Judicial balancing of specific values enhances both normative guidance and sensitivity to context in judicial review of campaign reforms. A quick application of conventional overbreadth and express advocacy tests to the electioneering provisions might be helpful before comparing them to the balancing of values. The conventional overbreadth doctrine would require a court to compare the proportion of invalid applications of the electioneering provisions to valid applications of the provisions. Due to the contested meaning of "substantial" and nebulous evidentiary standards, some judges might uphold the law while others might strike it down, as evidenced by the Stevens/O'Connor majority opinion and the Kennedy dissent in *McConnell*. A judge applying the express advocacy test would likely follow Justice Thomas's path and invalidate all four of the electioneering provisions for a different reason: Each provision regulates spending on advertisements that do not contain express words of advocacy like "vote for" or "defeat."

Legal, technological, and social changes in politics abound, and the proposed balancing test would allow courts to adhere to a stable set of values while also responding to context-specific factors more effectively than other tests. For example, the express advocacy test, focused solely on the content of the regulated speech, would strike down the electioneering disclosure provision even though it does not burden speech to the same degree as limits on electioneering spending. A judge applying the conventional overbreadth tests might do the same, referencing the possible invalidity of seventeen percent of the disclosure provision applications. Different types of regulation, however, advance the state's interest and infringe on expression to varying degrees. A disclosure provision with a seventeen percent invalid application rate, for example, might be less troubling than a spending restriction in which seventeen percent of the applications are invalid.

Balancing these values not only allows judges to respond to the differences between the regulations but also supports the distinction with principled analysis. The public dissemination of spending data that stems from disclosure advances democratic deliberation. Further, disclosure does not restrict spending on speech. Advertisements that attack legislation like Sarbanes-Oxley, for example, will still be a part of public deliberation so long as sponsors disclose spending on such ads. In contrast, nonprofit spending restrictions can sometimes reduce deliberation.

For similar reasons, disclosure causes minimal harm to individual autonomy. The threat to individual autonomy is reduced further because the disclosure provisions only apply to those who spend more than $10,000 per

year on electioneering.[247] Disclosure will not likely represent an insurmountable regulatory burden for those who can afford to spend this much on speech. Although large spenders may prefer to influence public issues anonymously, democratic deliberation outweighs the autonomy interest advanced by anonymous spending.[248]

Further, numbers like seventeen percent seem credible and weighty, but they mislead judges. Different applications of any single statute are often not simply "invalid" or "valid," but advance the state's interest and infringe upon expressive values to varying degrees. Even if such categorization were useful, seventeen percent is not the percentage of ads that pose no threat of corruption or appearance of corruption. Instead, it is the percentage of ads that study participants classified as primarily advancing an issue or a cause rather than a candidacy. An ad designed primarily to advance an issue can corrupt the process as well, especially if it casts a member of Congress in a positive or negative light.[249]

In short, the balancing process allows a court to focus on how values are manifested in particular contexts. Tests that focus on counting invalid applications or words of express advocacy are cumbersome tools to apply in a fluid political environment. Values are better than fixed words or activities in defining the boundaries of legislative authority over campaign finance.

The balancing of clearly defined values also provides greater normative guidance than conventional overbreadth doctrine, which relies on nebulous terms like "substantial." Granted, people will disagree about whether particular activities or regulations advance the values and about how to resolve conflicts between the values, but most people can understand the normative goal of invalidating regulations that do more harm than good. A "substantial" amount of overbreadth, on the other hand, is unclear and contested. Is it five percent? Is it thirty-five percent? The four values also provide more guidance than abstract phrases like "prevention of corruption." They unpack such terms and explain the democratic objectives inherent in promoting expressive activity and in regulating political money.

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247. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 90 (codified as amended at 2 U.S.C. § 434 (2002)).

248. The threat to autonomy is minimal. Those who disclose will not likely face intimidation, loss of employment, or physical violence when their identities are disclosed. *Cf.* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (holding that an Alabama court's contempt order against the NAACP for refusing to disclose its membership lists abridged the NAACP members' right "to engage in lawful association in support of their common beliefs").

249. This factor was overlooked by Judge Richard Leon. *McConnell*, 251 F. Supp. 2d at 798.

These democratic values bring the Court's campaign finance decisions together into a coherent whole. They allow courts to respect more fully both expressive values and legislative authority, and give legislatures clearer guidance for crafting reforms. Further, the values themselves are substantively important—they represent what many believe are essential components of democracy. Collectively, the values expose the unbalanced nature of tools like the express advocacy test, which overemphasizes the promotion of individual autonomy at the expense of the democratic deliberation and widespread participation values.

VI. Conclusion

This Article uses the Court's conflicting opinions in *McConnell v. FEC* to illustrate problems with current doctrine, but its analysis has far-reaching implications for the next generation of campaign finance reform and jurisprudence. Evasion has emerged as a primary challenge to campaign finance regulation and Congress and state and local legislatures have begun to close loopholes. The primary questions that remain ask how far campaign finance regulations can go to prevent circumvention before they cover an unacceptable amount of speech, and how courts should make this judgment in a principled manner.

The Court in *McConnell* failed to take the opportunity to develop tools to identify the boundaries of campaign reform. This Article proposes that in future cases the Court adopt a judicial test that determines whether a campaign regulation, on balance, results in greater benefit than harm to four values: democratic deliberation, widespread participation, individual autonomy, and electoral competition. The Court should also craft clearer evidentiary standards that allow judges to make more competent and consistent predictions about the probable political effects of reform.

Even if the Court does not substitute or supplement conventional overbreadth tools with a formal balancing test, legislators should consider the four values when drafting reforms, and judges should use them in reviewing reforms. Rather than engaging in covert assumptions about cloudy objectives, legislators and judges should explicitly examine whether a reform advances the values underlying the Court's reasoning in its campaign finance cases. Granted, an adoption of a formal balancing test might do this most efficiently. The larger objective, however, is for political and judicial decision-makers to recognize that campaign finance involves a balancing of specific democratic

values, and that greater understanding and coherence arises through explicit discussion of those values.