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## The Election Period and Regulation of the Democratic Process

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## THE ELECTION PERIOD AND REGULATION OF THE DEMOCRATIC PROCESS

Saul Zipkin\*

In the Bipartisan Campaign Reform Act of 2002, Congress introduced regulation of “electioneering communications”—broadcast communications that name a candidate, target the relevant electorate, and air within a specified time before an election. In doing so, Congress shaped an election period, a temporal zone preceding the election in which the government would have enhanced authority to regulate the democratic process. While upheld on a facial challenge in 2003, the electioneering communications framework was effectively struck down as applied to restrictions on corporate political advocacy by the Supreme Court in 2007. Taking stock of these developments, this Article presents a detailed consideration of the election period model and its treatment by the Court.

A survey of election law reveals a divide: current doctrine generally treats the vote as so important that the government must regulate it, and political speech as so important that the government cannot regulate it. These commitments clash in the context of political speech surrounding the election. I develop the election period concept as a means of approaching this tension and challenge the Court’s emphasis on the vote itself in validating regulation, advancing a model of the election period as not only the time in which voters make electoral choices, but also as the primary setting in which the representative relationship is constructed through the interaction between candidates and the people that surrounds the election. I argue that the election period model articulates a regulatory framework that blurs the sharp distinction between the domains of politics and elections and better recognizes the interest in protecting the representative process as well as the vote. In doing so, the Article calls attention to fundamental premises underlying the regulation of campaign finance, assessing how the structure of campaign finance law coheres with a broader conception of the democratic process.

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## INTRODUCTION

Constitutional doctrine governing campaign finance regulation has long relied on an array of lines marking permissible and impermissible limitations on political activity. Most prominently, the Supreme Court has distinguished between contributions and expenditures, generally allowing regulation of the former but not the latter.<sup>1</sup> The doctrine has likewise drawn a line between elections and politics, historically framed by a distinction between “express advocacy” and “issue advocacy.”<sup>2</sup>

<sup>1</sup> See *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding contribution limits and striking down limitations on expenditures).

<sup>2</sup> See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 398–99 (3d ed. 2007) (explaining that “[a]ny regulation of campaign-related spending must confront the need to define a boundary between campaigns (the ‘electoral domain’) and more general public debate over issues, ideas, and policies (the ‘domain of public discourse’)”); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1753 (1999) (noting that “[t]he

In distinguishing communications that expressly advocate or oppose the election of a particular candidate from those that do not expressly do so, the express advocacy line focuses regulation on activities indisputably within the electoral process and bars restrictions that threaten to intrude on the broader realm of politics.

In light of the varying treatment given the right to vote and the right to free speech, the government is given broad authority to regulate elections and little deference to regulate speech, especially political speech.<sup>3</sup> These commitments to protecting elections through regulation and protecting speech by limiting regulation sharply clash in the context of political speech in the election setting. The Court has noted that “it can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”<sup>4</sup> At the same time, the Court has acknowledged compelling state interests in preserving values such as the integrity and legitimacy of the democratic process.<sup>5</sup> Campaign finance doctrine, and the lines it has drawn, reflects an effort to negotiate the tensions between these commitments.<sup>6</sup>

Congress challenged the express advocacy line with the Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>7</sup> prohibiting the use of corporate and union general treasury funds for “electioneering communications”—broadcast communications that name a candidate for federal office within sixty days of a general election or thirty days of a primary and are targeted at the relevant electorate.<sup>8</sup> The BCRA scheme

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express advocacy/issue advocacy distinction grows out of the need to draw a line between election campaign spending and general political spending”).

<sup>3</sup> See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 313 (“We have strong norms of equality in voting, and strong norms of liberty for speech.”); see also *infra* Part IV (discussing this point).

<sup>4</sup> *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

<sup>5</sup> See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting) (suggesting that “no justification for regulation is more compelling than protection of the electoral process”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (“Preserving the integrity of the electoral process, preventing corruption, and ‘sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government’ are interests of the highest importance.” (quoting *United States v. UAW-CIO*, 352 U.S. 567, 575 (1957))).

<sup>6</sup> See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (noting that in the campaign finance context “constitutionally protected interests lie on both sides of the legal equation”).

<sup>7</sup> While I focus on BCRA’s regulation of corporate- and union-funded ads in the election period, BCRA does other things as well, most prominently restricting the use of “soft money”: funds raised by political parties that were not subject to federal campaign finance law. For discussion of the BCRA provisions, see generally Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147 (2004); see also *Davis v. FEC*, 554 U.S. \_\_\_, 128 S. Ct. 2759 (2008) (striking down the “Millionaire’s Amendment” enacted in BCRA).

<sup>8</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 441b(b)(2) (2006) (restricting use of corporate funds for electioneering

presented a new framework for regulating election advertising, shaping an election period, a temporal zone preceding the election in which the government would have enhanced authority to regulate the democratic process.<sup>9</sup> This election period model, familiar from international and other domestic settings,<sup>10</sup> and prefigured by commentators before BCRA's enactment,<sup>11</sup> provided an alternative to an express advocacy line that distinguishes an electoral process confined to the vote from a larger sphere of politics.

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communications) and 2 U.S.C. § 434(f)(3)(A)(i) (2006) (defining "electioneering communications"). The statute allows corporations and unions to pay for electioneering communications from a separate segregated fund. *See infra* note 21.

<sup>9</sup> *See* Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1458 (2007) (noting that in passing BCRA, "Congress for the first time introduced the concept of a distinct election period for restrictions on what are termed 'electioneering communications'"). Similar provisions enacted in some states have been struck down as overbroad. *See, e.g.,* Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 389–91 (2d Cir. 2000) (striking down disclosure requirement for "mass media activities" naming candidate within thirty days of election); Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766, 771 (W.D. Mich. 1998) (striking down a state administrative rule prohibiting corporations and labor unions from using general treasury funds to pay for communications naming candidate within forty-five days prior to election); Planned Parenthood Affiliates of Mich., Inc. v. Miller, 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998) (same); W. Virginians for Life, Inc. v. Smith, 960 F. Supp. 1036, 1042 (S.D. W. Va. 1996) (striking down state law establishing a presumption that publication or distribution of "scorecard, voter guide, or other written analysis" of candidate's positions on issues within sixty days of election constitutes electoral advocacy). Courts have upheld state laws banning contributions in periods preceding elections for the purpose of effectuating public funding schemes. *See, e.g.,* N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 440–41 (4th Cir. 2008), *cert. denied*, Duke v. Leake, 129 S. Ct. 490 (2008) (upholding a North Carolina provision banning judicial candidates from accepting contributions during the twenty-one days preceding a general election when the candidate's opponent is participating in the public funding program); Gable v. Patton, 142 F.3d 940, 949–53 (6th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) (upholding a Kentucky statutory provision prohibiting gubernatorial candidates from accepting contributions during the twenty-eight days preceding a primary or general election but striking down a restriction on candidates contributing to their own campaigns during that period).

<sup>10</sup> *See* Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 PEPP. L. REV. 373 (2009) (discussing campaign finance regulations in other democracies); *see also infra* Part I.B.

<sup>11</sup> *See, e.g.,* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998); Briffault, *supra* note 2; Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 806–11 (1998); *see also* Dennis F. Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98 AM. POL. SCI. REV. 51, 62 (2004) (arguing that "[b]ecause of their finality, elections and the campaigns leading up to them should be considered more a part of government than a part of politics that influences government"); *infra* notes 62–66 and accompanying text.

The new approach was soon rebuffed. Though upheld by the Supreme Court on a facial challenge in *McConnell v. Federal Election Commission* in 2003,<sup>12</sup> the electioneering communications provision was effectively struck down as applied in *Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL)* in 2007.<sup>13</sup> The Court there concluded that the restrictions could be applied only to express advocacy and its “functional equivalent,” essentially reinstating the pre-BCRA standard.<sup>14</sup> Taking stock of these developments, this Article presents a detailed consideration and endorsement of the election period model in the campaign finance setting, arguing against a sharp distinction between politics and elections as a means of protecting interests in representation as well as the vote.

Because there is broad consensus that the First Amendment demands an unregulated sphere of public discourse and because elections, as regulated settings, have received distinct constitutional treatment,<sup>15</sup> identifying a constitutionally acceptable regulatory line demands an articulation of the boundaries of the “election.” Does the electoral sphere include only the actual vote or does it encompass some larger account of the democratic process? The express advocacy framework provides one possible border, allowing some regulation of advertisements that solicit the vote: those that by their content enter the voting process. To one side of that model are those who would reject any regulation of political speech, except for disclosure requirements or restrictions on speech that may directly interfere with the ballot-casting process, while BCRA goes the other way, broadening the sphere of the election as a regulable entity.<sup>16</sup> These varying placements of the regulatory line exemplify the contested borders of the politics and elections domains.

This Article develops an account of the election period as not only the site in which voters make electoral choices but also as the primary setting in which the representative relationship is constructed through the interaction between the people and the candidates that surrounds the election. On this account, the election period

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<sup>12</sup> 540 U.S. 93 (2003).

<sup>13</sup> 551 U.S. 449 (2007).

<sup>14</sup> *See id.* at 457.

<sup>15</sup> This point is developed in Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999). See Baker, *supra* note 11, and Briffault, *supra* note 2, for discussion of the election as a distinct setting for constitutional purposes. See Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998), and Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005), for discussion of the role of institutions in First Amendment analysis more generally. *But see* Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1839 (1999) (arguing that “[w]hat is necessary to make the [elections as First Amendment institutions] approach convincing . . . is a detailed appraisal of what constitutionally would be gained, and what lost, by demarcating elections as a separate domain of First Amendment doctrine”).

<sup>16</sup> In this paper, I am not so much interested in the precise placement of the regulatory line as in the type of regulatory line that is being drawn and the commitments that underlie the choice of that line.

provides a regulatory line that blurs the sharp distinction between the domains of politics and elections. In advancing the election period model of regulation, I seek to challenge the emphasis on the vote itself in validating regulation and to highlight the interests in protecting the representative process as well.<sup>17</sup> In short, I argue that fundamental democratic commitments are present in the pre-election period as well as the ballot-casting moment, and that where particular forms of regulation are permitted in the election setting, we should assess their applicability in the election period as well.

We may be at the dawn of a new era of campaign finance doctrine. Shortly before this Article went to press, the Supreme Court issued its decision in *Citizens United v. Federal Election Commission*, dramatically reshaping campaign finance law in overruling the decisions that had allowed for regulation of corporate electoral advocacy.<sup>18</sup> In light of these developments, it is all the more important to press our thinking about what kinds of regulatory lines can be drawn going forward. My goal in this Article is to explore the institutional framework within which election regulation occurs, assessing the permissible domain of regulation and the values that underlie those borders, and calling for a broader vision of the democratic process, attending to both representation and the vote. By considering the implications of the election period framework as a case study in regulation of the democratic process, I seek to integrate our approach to campaign finance regulation into a larger vision of the practice of American democracy.

The Article proceeds in five parts. Part I sets out the election period model, describing the underlying account of representative democracy and detailing the conception of the election period as a temporal zone preceding the election that affects both the vote and the shaping of the continuing representative relationship. The Article then steps back to explore the relationship between politics and elections in the doctrine governing the regulation of corporate election advertising. I assess in Part II the development of the express advocacy doctrine and its reemergence in *WRTL* in the face of Congress's attempt to supercede it through BCRA's electioneering communications regulations. Part III explores the various interests the Court has identified as viable justifications for election speech regulations, arguing that justifications for regulation are moving towards premising regulation on protection of the governing process and representation rather than the electoral process. The tension between the emphasis on protection of the representative process and the limitation of regulation to the electoral process speaks to a deeper tension between the treatment of political

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<sup>17</sup> To be sure, agreeing that we should not subordinate political speech to the vote does not dictate any view on the legitimacy or desirability of regulation of political advertising. Compare Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993) (arguing against various justifications for regulating political speech), with NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY 226 (2006) (arguing that the Supreme Court's decision in *McConnell* "is a positive although timid step in the right direction").

<sup>18</sup> No. 08-205, slip op. (U.S. Sup. Ct. Jan. 21, 2010).

deliberation and the vote, discussed in Part IV, which develops and evaluates the distinctions between these models. Ultimately, this distinction, which stems from competing conceptions of the deliberative and electoral processes, results in the drawing of a sharp line between the two domains. I argue that we instead see these as continuous elements of a unitary democratic process, and suggest in Part V that the particular characteristics of corporate political speech present a context in which an election period framing can shape a viable approach to structuring the deliberative process. The conclusion presents some early thoughts on the *Citizens United* decision in relation to the discussion here.

### I. THE ELECTION PERIOD MODEL

For a number of years the express advocacy rule governed the constitutionality of corporate political advertising regulation, turning on whether the advertisement expressly advocated the election or defeat of a particular candidate.<sup>19</sup> Congress restructured this framework in the Bipartisan Campaign Reform Act of 2002, prohibiting a corporation<sup>20</sup> or labor union from using general treasury funds to pay for an “electioneering communication,”<sup>21</sup> defined as

any broadcast, cable, or satellite communication which (i) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.<sup>22</sup>

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<sup>19</sup> See *infra* Part II (discussing development of express advocacy rule).

<sup>20</sup> The term “corporation” refers, here and throughout unless otherwise specified, to any entity organized under the corporate form, whether for profit or non-profit, though with an exception for ideological corporations that meet certain criteria, as discussed *infra* note 89.

<sup>21</sup> 2 U.S.C. § 441b(b)(2) (Supp. III 2003). BCRA did not ban corporate or union ads, but required them to be funded from segregated funds, or “PACs.” As *McConnell* explained, “[b]ecause 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.” *McConnell v. FEC*, 540 U.S. 93, 204 (2003) (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)).

<sup>22</sup> 2 U.S.C. § 434(f)(3)(A)(i) (Supp. III 2003). BCRA also enacted a backup definition in the event the primary definition “is held to be constitutionally insufficient by final judicial decision to support the regulation provided [therein].” § 434(f)(3)(A)(ii). The backup definition defines “electioneering communication” as

any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for

In triggering regulation based on the airing of a corporate-funded, candidate-naming ad within a specified time preceding the election, this provision constructed an election period, reshaping not only the form of regulation but also the relationship between political speech and the vote.<sup>23</sup> BCRA regulated electioneering communications through disclosure and disclaimer requirements as well.<sup>24</sup>

In this Article, I develop the concept of an election period and argue that this framing bridges a recurring tension between the Court's treatment of regulations designed to protect the vote and those designed to protect the deliberative process. This Part lays out the vision of the representative process underlying this approach before describing the election period model.

#### *A. Representative Democracy and the Vote*

This section situates the analysis by describing the conceptions underlying the model of the representative process relied upon here. My basic premise is that democracy is not reducible to the opportunity to vote every few years, but encompasses a continuing process of representation, characterized by interaction between the citizenry and its representatives. A minimalist account of democracy focused on regular elections alone has been advanced by some commentators, notably Joseph Schumpeter,<sup>25</sup> and has been argued to constitute the dominant vision of the Federalists in the late eighteenth century.<sup>26</sup> In eschewing this model, which leaves citizens out of the

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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.*

<sup>23</sup> Congress apparently did not intend to shape a formal election period. See Bob Bauer, *Looking for the Missing Logic of Campaign Finance Regulation*, MORE SOFT MONEY HARD LAW, Nov. 24, 2008, [http://www.moresoftmoneyhardlaw.com/updates/other\\_related\\_legal\\_developments.html?Archive=1&AID=1377](http://www.moresoftmoneyhardlaw.com/updates/other_related_legal_developments.html?Archive=1&AID=1377) (noting that the election period “was not really meant to be a conceptual innovation: in fact, the sponsors of BCRA hastened to insist that it was not”).

<sup>24</sup> The disclosure requirements are triggered when any person spends more than \$10,000 in a calendar year for the direct costs of producing electioneering communications. See § 434(f)(1); see also § 441d (detailing disclaimer requirements applicable to electioneering communications).

<sup>25</sup> See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 295 (1976) (suggesting that voters “must understand that, once they have elected an individual, political action is his business and not theirs”).

<sup>26</sup> See, e.g., Larry D. Kramer, Lecture, “*The Interest of the Man*”: James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 713–16 (2006) (discussing Federalists’ views in the 1790s such as Benjamin Rush’s statement that: “[The people] possess [political power] only on the days of their elections. After this, it is the property of their rulers, nor can they exercise or resume it, unless it is

continuing process of governing, I follow scholars who have called for a less exclusive focus on the vote and for greater attention to other modes of political participation and structures of democracy,<sup>27</sup> and, correspondingly, those arguing that the right to participate in the political process should be seen to extend beyond the casting of the ballot alone.<sup>28</sup>

I adopt here a model of representative democracy developed by various commentators. Nadia Urbinati has articulated a comprehensive contemporary defense of representative democracy, emphasizing continuing communication between representatives and constituents as a means of continually recreating the representative relationship, in opposition to a static view in which the public expresses its views solely through the vote and remains silent at other times.<sup>29</sup> In particular, Professor Urbinati argues that “political representation is far more than a system of division of labor and a state institution; it entails a complex political process that activates the

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abused”). The Federalist conception is also developed in James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117 (1999). This minimalist account has been argued to have been developed in seventeenth-century Massachusetts. See J.S. MALOY, THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT 17 (2008) (“John Winthrop invented the proposition that regular elections are sufficient to control the elected precisely in order to take non-electoral forms of accountability off the table.”).

<sup>27</sup> See, e.g., BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 136 (1984) (“Where voting is a static act of expressing one’s preference, participation is a dynamic act of imagination that requires participants to change how they see the world.”); URBINATI, *supra* note 17, at 14 (arguing that “[e]lections make apathy, not agency, the main quality of popular sovereignty”); Lani Guinier, *Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger*, 71 MOD. L. REV. 1, 3 (2008) (arguing that “[t]he goals (in terms of its legitimacy, outcomes and process) of representative democracy are not served when we define citizens’ participation primarily by the capacity of the electorate to vote” and conceptualizing “alternative forms of citizen mobilization—outside of elections—that have the potential to remake elections into more effective mechanisms of democratic accountability”); Post, *supra* note 15, at 1842 (arguing that “the very predominance of egalitarian thinking in the campaign finance reform literature suggests the extent to which political speech, which was meant both to inform voting and to endow it with democratic legitimacy, has become identified with and subordinated to the process of voting itself”).

<sup>28</sup> See, e.g., Kathryn Abrams, “Raising Politics Up”: *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 489–92 (1988) (advocating the application of “a wider lens to the political process” which “would describe the activity that legitimized governmental power not as a single electoral event, but as a process that began with reflection on, and discussion of, preferences and concluded with the enactment of substantive policies”); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1708 (1993) (arguing that the right to vote protects interests in participation, aggregation, and governance).

<sup>29</sup> See URBINATI, *supra* note 17, at 228 (“Politics keeps the sovereign in perpetual motion, so to speak, while transforming its presence into an exquisite and complex manifestation of political influence.”).

‘sovereign people’ well beyond the formal act of electoral authorization.”<sup>30</sup> Larry Kramer has recounted a complementary view in the democratic thought of James Madison, relying on “the primacy of popular opinion in controlling a republican government, and the concomitant obligation this imposed on citizens to remain vigilant and involved.”<sup>31</sup> As he explains, “Madison’s politics are better characterized as a conversation, a conversation in which the elite now led by persuasion an electorate actively engaged in making its own judgments and decisions.”<sup>32</sup> On these accounts, representatives and citizens engage in a dynamic process of opinion formation, with representatives responsive to the public opinion that emerges from and responds to the political process.<sup>33</sup>

This approach calls for a continuing role for citizens in the democratic process. Viewing citizens as intermittent ballot-casters limits the autonomy and sovereignty of the people relative to their rulers.<sup>34</sup> Commentators emphasize forms of democratic practice extending beyond the vote, prominently the exercise of public discourse, as crucial for democratic legitimacy.<sup>35</sup> This framing dovetails with arguments that our conception of voting rights should not be limited to the ability to cast a ballot, but must also protect the ways in which votes are aggregated and elections yield governance

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<sup>30</sup> *Id.* at 5. On her account, “representation can encourage political participation insofar as its deliberative and judgmental character expands politics beyond the narrow limits of decision and voting.” *Id.* at 16.

<sup>31</sup> Kramer, *supra* note 26, at 717.

<sup>32</sup> *Id.* at 732; *see also id.* at 737–38 (“Note how the people’s control, while real and substantial, is not direct. It is indirect: mediated through popular responses to arguments and to the action or inaction of representatives in different parts of different governments, representatives who are in turn taking their cues from the public.”).

<sup>33</sup> The responsibility to be responsive to the opinions of their constituents is inherent in the concept of representation itself. *See* HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 232–33 (1967) (“[A] representative government requires that there be machinery for the expression of the wishes of the represented, and that the government respond to these wishes unless there are good reasons to the contrary.”).

<sup>34</sup> *See* Guinier, *supra* note 27, at 3 (arguing that “elections—however they are conducted—are an insufficient instrument of democratic accountability, democratic outcomes and democratic processes”); *see also* MALOY, *supra* note 26, at 17 (noting that “[v]oting and elections are the institutional practices most directly associated with consent, but today they are usually burdened with the double expectation of simultaneously effecting popular control,” an expectation they cannot meet).

<sup>35</sup> *See* BARBER, *supra* note 27, at 136 (arguing that “ongoing talk,” and not just the vote, is necessary for what he terms “strong democratic legitimacy”); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 282 (1991) (viewing “public discourse” as providing legitimacy to results reached through the vote inasmuch as “the normative essence of democracy is . . . located in the communicative processes necessary to instill a sense of self-determination, and in the subordination of political decisionmaking to those processes” (internal citation omitted)); Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758, 760 (2000) (arguing that “public discourse is one of the main features that characterize and give value to democratic politics”).

structures, so that all citizens can be included in “the practice of decisionmaking through representatives.”<sup>36</sup> As Pamela Karlan explains, “[t]hinking about voting in this way requires abandoning the view of voting as a declaratory event—the act of pulling a lever on Election Day—and replacing it with an image of voting as part of an ongoing conversation.”<sup>37</sup> Justice Breyer has likewise developed the argument, in both opinions and non-judicial writings, that the Constitution embodies a model of “participatory self-government” characterized by “active liberty,” consisting of “an active and constant participation in collective power,” and “the sharing of a nation’s sovereign authority among that nation’s citizens.”<sup>38</sup> In short, the vote presents but one (undoubtedly significant) moment in a larger continuing process of representative governance.

Emphasizing a top-down rather than bottom-up approach to this issue, Michael Kang has recently called for attention not simply to electoral competition, but to “democratic contestation” more broadly,<sup>39</sup> a dynamic process extending beyond the election in which political leaders compete to shape the political identities of the voting public and in doing so “make[] possible the central goal of promoting mass participatory politics.”<sup>40</sup> Like the model advanced here, in which dynamic interchange between representatives and the public shapes the terms of representation, this conception of the representative process rejects the notion of a pre-existing or naturally occurring public opinion that representatives must identify, in favor of an ongoing process in which representatives and citizens together forge a democratic practice.

These views, emerging from different contexts and in the service of varying visions of a properly functioning democratic process, counsel against embracing a

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<sup>36</sup> Karlan, *supra* note 28, at 1716.

<sup>37</sup> *Id.* In considering the scope of the Voting Rights Act, Kathryn Abrams argues for “the right to a relationship of representation with an elected official, which begins before and continues after the aggregative exercise of election day.” Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1412 (1993); see also Abrams, *supra* note 28, at 453 (proposing “a description of the political process that highlights not only ‘aggregative’ events such as elections, but the ongoing ‘interactive’ participation among interested groups that shapes and translates those events”). Lani Guinier argues for a concept of “collective efficacy” to explore the ways in which citizens can mobilize and participate in democracy outside of the voting context. See Guinier, *supra* note 27, at 35.

<sup>38</sup> See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 4, 46 (2005) (quoting Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), in *POLITICAL WRITINGS* 309, 318 (Biancamaria Fontana trans. & ed. 1988)); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (emphasizing “the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action”).

<sup>39</sup> See Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 738 (2008) (defining “democratic contestation” as “the deliberative competition among political leaders to shape and frame the public’s understandings about elective politics, public policy, and civic affairs”).

<sup>40</sup> *Id.* at 740; see also *id.* at 762 (“A theory of democratic contestation therefore extends beyond a narrow focus on elections to a broader consideration of ongoing legislative and pluralistic politics.”).

stark distinction between political activity and the vote. As I develop here, the election period approach offers the possibility of shading the bright line between elections and politics and shaping a unitary process of democratic representation.

### *B. The Election Period*

In designating a fixed period prior to federal elections in which certain broadcast ads funded by corporations or unions would be restricted, BCRA demarcated an election period, a zone preceding the election in which the government would have enhanced regulatory authority for the purpose of protecting the democratic process.<sup>41</sup> I suggest that the value of the election period model stems from its capacity to shape a conception of the election that bridges the interests in a reliable vote and an effective representative process. It does so by recognizing the role of the election period as a time of enhanced democratic engagement and dynamic interaction between politicians and citizens. While protection of the representative process does not inherently demand enhanced regulatory power over forms of political speech, the acceptance of such restrictions in the context of protecting the vote argues for taking them seriously here as well.

The pre-election period is a time of heightened engagement with the democratic process: a time when both voters and political actors are more attentive to one another.<sup>42</sup>

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<sup>41</sup> See *supra* notes 20–23 and accompanying text.

<sup>42</sup> See, e.g., *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (noting that it is on election day that campaigning “can be most effective”); *McConnell v. FEC*, 251 F. Supp. 2d 176, 793–94 (D.D.C. 2003) (Leon, J.) (discussing belief of interest groups “that the periods immediately preceding elections are the most effective times to run issue advertisements discussing pending legislation because the public’s interest in policy is at its peak”); 148 CONG. REC. S2096 (daily ed. Mar. 20, 2002) (statement of Sen. Hutchinson) (“How many times have we heard that a large portion of the voting public really doesn’t focus on the campaign until 2 weeks before the election? . . . That is when the majority of the public begins to collect the data they have been getting in the mail to start studying it. They start to listen to what is being said on television, which is where most people get their news.”). 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 n.7 (1994), states that “the process of representation really begins in the campaign itself” as “[t]hat is when future representatives forge their political identities and often when constituents are most actively engaged in expressing their complaints and preferences.” Justice Kennedy has noted that “[u]ntil a few weeks or even days before an election, many voters pay little attention to campaigns and even less to the details of party politics,” *Cal. Dem. Party v. Jones*, 530 U.S. 567, 586 (2000) (Kennedy, J., concurring), and acknowledged in his *McConnell* dissent the “crucial weeks before the election.” *McConnell v. FEC*, 540 U.S. 93, 335 (2003) (Kennedy, J., dissenting). *But see id.*, at 334 (Kennedy, J., dissenting) (referring to BCRA’s “crude temporal and geographic proxies”). The *Citizens United* Court made this point as well. See *Citizens United v. FEC*, No. 08-205, slip op. at 17 (U.S. Sup. Ct. Jan. 21, 2010). (“It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held.”); *id.*

Political scientists have found that voters pay closer attention as the election draws near<sup>43</sup> and posit a “recency bias” (the “what have you done for me lately” phenomenon), where voters weigh more heavily their representatives’ recent actions, in response to which politicians seeking re-election attempt to accomplish more for their constituents toward the end of their terms.<sup>44</sup> These studies reflect a simple point: the election period is not just when voting happens, but when citizens are most democratically engaged, and most actively participating in the work of self-government. As a result, the election period is a time of “higher” politics, a time of heightened involvement and higher democratic stakes.<sup>45</sup>

On this account, the electoral process is the primary site in which the representative relationship is constructed. Indeed, “[c]ampaigns . . . are a main point—perhaps *the* main point—of contact between officials and the populace over matters of public policy.”<sup>46</sup> The period in which the putative representative goes before the voters for their approval is a time of creating that relationship, calling for special attention to the proper functioning of the democratic process at that time. As the representative relationship is historically a matter of constitutional concern,<sup>47</sup> and is shaped by

at 45 (referring to “the critical preelection period”); *id.* at 56 (indicating that the “necessity” for speech “is most evident . . . in the public dialogue preceding a real election”).

<sup>43</sup> See, e.g., Andrew Gelman & Gary King, *Why Are American Presidential Election Campaign Polls So Variable When Votes Are So Predictable?*, 23 BRIT. J. POL. SCI. 409, 434–35 (1993) (explaining that voters pay attention “disproportionately just before election day”); Martin Gilens et al., *The Mass Media and the Public’s Assessments of Presidential Candidates, 1952–2000*, 69 J. POL. 1160, 1170 (2007) (finding that “the impact of advertising on respondents’ presidential considerations is far stronger at election time than months before”).

<sup>44</sup> See, e.g., Sunil Ahuja, *Electoral Status and Representation in the United States Senate: Does Temporal Proximity to Election Matter?*, 22 AM. POL. Q. 104, 114 (1994) (concluding that “proximity to the next election has a clear impact on how United States senators cast their votes”); Kenneth A. Shepsle et al., *The Senate Electoral Cycle and Bicameral Appropriations Politics*, 53 AM. J. POL. SCI. 343, 344 (2009) (describing the “what have you done for me lately” principle and presenting evidence regarding the distribution of federal money to states and districts towards the end of Senatorial terms); cf. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 287–88 (2008) (“As standing for reelection approaches, judges become significantly more punitive, meting out longer sentences and imposing the death penalty more frequently.”).

<sup>45</sup> While studies suggest that many citizens end up making the same decisions they would have anyway—in other words, they revert to their longstanding political preferences—it is during the election period that voters pay sufficient attention to ultimately decide. See Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1050–53 (2005) (discussing this point and citing relevant literature).

<sup>46</sup> WILLIAM H. RIKER, *THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION* 3 (Randall L. Calvert et al. eds., 1996).

<sup>47</sup> See Blasi, *supra* note 42, at 1302 (arguing that “the quality of representation” is “an interest that is itself of constitutional dimension” and that “[t]o a considerable degree, the debates over the Constitution were debates over how best to achieve a high quality of representation”); Kramer, *supra* note 26, at 727 (elaborating Madison’s theory of “deliberative

political activity and speech in the electoral setting, we might broaden the narrow focus on ballot-casting in our assessment of the democratic process.

We see in the international context a formalized model of the election period. The United Kingdom presents a prominent example, in which the election period stems from the unfixed nature of the political calendar, where elections are called at a certain point and then occur some set period later.<sup>48</sup> The bounded nature of this election period allows for significant state regulation and shapes the election as a managed enterprise distinct from the surrounding non-electoral world. The United Kingdom also limits independent expenditures in elections and adopts a broad view of what constitutes election-related expenditures, tightly circumscribing outside involvement in the electoral process.<sup>49</sup> The Canadian context presents another election period model, in which the state can limit expenditures to ensure a level playing field, in contrast with a largely unregulated broader political sphere.<sup>50</sup> A number of countries ban political broadcast advertising within a designated period preceding the election, and some limit campaigning in the days immediately before the election as well.<sup>51</sup> The United Kingdom goes further on this, barring from television and the radio all political advertising at all times,<sup>52</sup> by parties or independent groups, thus rejecting a purely election-based regulatory line for political speech. These regulatory schemes reflect different speech rights traditions and have been justified on grounds of protecting both voters and candidates from undue influence.<sup>53</sup>

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democracy” in which “a government is republican only if and to the extent that its actions are guided and controlled by public opinion”); cf. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009) (showing “how the fight against corruption is a central part of the United States Constitution—its historical origins, the language of the debates around it, its substance, and its structure”).

<sup>48</sup> See Issacharoff, *supra* note 10, at 377–78.

<sup>49</sup> See K.D. EWING, *THE COST OF DEMOCRACY: PARTY FUNDING IN MODERN BRITISH POLITICS* 148–51, 157–59 (2007) (discussing spending limits and third parties); see also *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (1998) (striking down £5 spending limit for third parties).

<sup>50</sup> See Issacharoff, *supra* note 10, at 389–91.

<sup>51</sup> See, e.g., FRITZ PLASSER with GUNDA PLASSER, *GLOBAL POLITICAL CAMPAIGNING: A WORLDWIDE ANALYSIS OF CAMPAIGN PROFESSIONALS AND THEIR PRACTICES* 144 (2002) (describing election period campaign restrictions in Israel); Jacob Rowbottom, *Access to the Airwaves and Equality: The Case against Political Advertising on the Broadcast Media*, in *PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE* 77, 94 (K.D. Ewing & Samuel Issacharoff eds., 2006) (noting Italian broadcast ad restrictions).

<sup>52</sup> The restrictions apply to advertising “on behalf of any body whose objects are wholly or mainly of a political nature” as well as “any advertisement which is directed towards any political end.” Andrew Scott, “*A Monstrous and Unjustifiable Infringement*”? *Political Expression and the Broadcasting Ban on Advocacy Advertising*, 66 MOD. L. REV. 224, 228 (2003) (quoting Section 8(2) and 92(2) of the Broadcasting Act of 1990, regulating television and radio respectively); see also Rowbottom, *supra* note 51, at 77 (“Commercially purchased political advertisements have never been permitted on the UK broadcast media.”).

<sup>53</sup> See, e.g., *Bowman*, 318 Eur. Ct. H.R., at 16–17 (listing bases for spending limit).

The election period framework appears in domestic settings as well.<sup>54</sup> The union representation election setting provides an example, as the National Labor Relations Board (NLRB) has established an election period preceding the vote (which is called rather than held at a fixed time) in which courts have allowed restrictions on speech that might otherwise be constitutionally questionable.<sup>55</sup> In particular, employers are prohibited from either threatening or promising benefits to employees with regard to union representation and the NLRB has prohibited electoral appeals based on racial prejudice when they are sufficiently “inflammatory.”<sup>56</sup> Other restrictions are premised on preventing an inappropriate effect on the “sober and thoughtful choice” of the employee-voters.<sup>57</sup> These provisions shape a UK-like election period before union representation elections.

In the political realm, examples of election period regulations include restrictions on the use of the Congressional franking privilege in the pre-election period and the Department of Justice’s policy limiting investigations of election crimes in the pre-election and balloting periods.<sup>58</sup> In the campaign finance setting, BCRA also employs

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<sup>54</sup> See *CBS, Inc. v. FCC*, 453 U.S. 367, 388 (1981) (affirming the FCC’s authority to determine when the presidential campaign has begun and the obligations of the reasonable access rule attach). A bill introduced in 2008 in the Senate would have set the election period as the standard for limiting “robocalls” as well. See *Robocall Privacy Act of 2008*, S. 2624, 110th Cong. (2008) (limiting the use of “political robocalls”—meaning outbound telephone calls playing a recorded message (without a person available to speak) and which “promotes, supports, attacks, or opposes a candidate for Federal office”—during the BCRA election period, 60 days before the general election and 30 days before the primary).

<sup>55</sup> See Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 7–15 (2008) (discussing restrictions in union elections); Neuborne, *supra* note 11, at 801 (discussing union representation election as a bounded institution for First Amendment purposes).

<sup>56</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (holding that “an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit’” (quoting the National Labor Relations Act, 29 U.S.C. § 158(c) (2006))).

<sup>57</sup> See *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953) (instituting rule “that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election” because “last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect”).

<sup>58</sup> Both the Senate and House of Representatives restrict the use of the Congressional franking privilege for candidates before elections: within 60 days of a primary, general, or runoff election in the Senate, and within 90 days in the House. See 39 U.S.C. § 3210(a)(6)(A) (2006); Standing Rules of the Senate, Rule XL(1); Rules of the House of Representatives, Rule XXIV(8).

The Department of Justice’s manual on election crimes specifies that when investigating election crimes, voters should generally not be interviewed in the pre-election period, as “[s]uch

an election period framework to define the types of federal election activities for which state and local party committees cannot use “soft money” funds, providing that such activities include “voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election.”<sup>59</sup> Likewise, the FEC has established the presumption that political party events at which the candidate appears are “election-related” (and subject to regulation) if occurring after January 1 of the election year, and “party-related” if occurring before January 1.<sup>60</sup> Such provisions again reflect the intuition that activity in the pre-election period is somehow distinct.

The framework I advance here describes not a formalized election period but a liminal region where the voting domain meshes into the larger political world. This pre-election zone would not be a comprehensively regulated area where all manner of speech limitations are given deference, but neither would traditionally robust political speech protections apply, leaving a middle ground of permissible targeted regulation, perhaps governed by a proportionality approach like that advanced by Justice Breyer.<sup>61</sup> I seek to frame the election period as a viable framework for regulatory efforts in the election context, recognizing that any particular regulation may or may not be constitutional.

The temporal approach to the regulation of political advertising stems from the idea of elections as distinct institutions under the First Amendment.<sup>62</sup> This “First Amendment institutions” model recognizes that courts have treated political speech differently in the electoral process, enforcing the right less vigorously as a means of

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overt investigative steps may chill legitimate voting activities” and “are also likely to be perceived by voters and candidates as an intrusion into the election.” FEDERAL PROSECUTION OF ELECTION OFFENSES 12 (7th ed. May 2007), *available at* <http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf>. In particular, the manual provides that DOJ “views any voter interviews in the pre-election and balloting periods, other than interviews of a complainant and any witnesses he or she may identify, as beyond a preliminary investigation” and that the Public Integrity Section should be consulted before conducting any such interviews. *See id.* at 92; *see also* UNITED STATES ATTORNEYS’ MANUAL § 9-85.210, *available at* [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/) (same).

<sup>59</sup> 2 U.S.C. § 431(20)(A)(i) (2006); *see also* Bauer, *supra* note 23 (advancing this provision as another election period framing, as well as 11 C.F.R. § 100.24(a)(1)(i) (2009), which treats as federal election activity any get-out-the-vote programs conducted after “the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law” or in states without primaries, after January 1 of the election year).

<sup>60</sup> *See* 11 C.F.R. § 110.8(e)(2)(i-ii) (2009); *see also* Bauer, *supra* note 23 (discussing this provision).

<sup>61</sup> *See also* Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 402–03 (2000) (Breyer, J., concurring); Ysursa v. Pocatello Educ. Assoc., 555 U.S. \_\_\_, 129 S. Ct. 1093, 1103 (2009) (Breyer, J., concurring in part and dissenting in part) (asking “whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve”).

<sup>62</sup> *See supra* note 11 (listing sources).

protecting the vote.<sup>63</sup> Following this model, some scholars called for an election period framing before the enactment of BCRA. For example, Richard Briffault proposed a definition of regulable election speech based on “(i) content, (ii) timing, and (iii) the amount of money involved,” on the premise that the express advocacy framing was ineffective and as consistent with the broader regulation of elections as “mechanism[s] of collective choice.”<sup>64</sup> In another formulation, Edwin Baker argued that electoral speech should be seen “as an integral part of the institutionally bound electoral process” such that campaign speech and other forms of “overtly election-oriented speech” (presumably a standard similar to express advocacy) be subject to regulation for the purpose of “promot[ing] the accuracy of the translation of the public will into efficacious political power,” as necessary for the process of “democratic will-formation”: a means of translating public opinion into election results.<sup>65</sup> Burt Neuborne likewise advocated a temporal framing as a means of identifying speech within the electoral institution.<sup>66</sup> These proposals envision the election period as a penumbral space surrounding the election in which voters make voting choices.

The election period framework advanced here differs from these in emphasizing the formation of the representative relationship rather than the citizen’s electoral choices alone. This framework tracks the distinction that Dennis Thompson has drawn between two “concepts of corruption” in the campaign area: “governmental corruption,” the traditional notion of corruption involving the behavior of government officials, and “electoral corruption,” which focuses on “the integrity of the elections and the campaigns that lead up to them.”<sup>67</sup> As Professor Thompson explains, “[p]rivate interests can seek to influence politicians in office, or they can seek to influence which politicians win office.”<sup>68</sup> The difference is whether we are most concerned about influence on politicians or on voters, though these of course overlap in that private actors may seek to influence voters in order to obtain influence over politicians.<sup>69</sup> As this framing suggests, my concern is not for the electoral campaign in the sense of pre-election efforts to persuade voters whom to vote for but for the campaign period as the time of engagement between citizens and candidates.

In analyzing the treatment of the campaign in election law, James Gardner has argued that the Court has preferred a “tabulative” model over a “deliberative” model of political campaigns: viewing the election as a means of calculating pre-existing support for the candidates rather than a transformative process in which public deliberation

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<sup>63</sup> See *supra* note 15 and accompanying text.

<sup>64</sup> Briffault, *supra* note 2, at 1769, 1776–80.

<sup>65</sup> Baker, *supra* note 11, at 3, 33, 37–45, 50. “Regulation may be necessary for elections to perform the crucial democratic role of properly connecting public opinion with institutionalized structures of democratic will formation.” *Id.* at 45.

<sup>66</sup> See Neuborne, *supra* note 11, at 809 (suggesting that we “separate the bulk of campaign speech from the rest of the speech universe by defining it temporally and descriptively”).

<sup>67</sup> Thompson, *supra* note 45, at 1036–37.

<sup>68</sup> *Id.* at 1039.

<sup>69</sup> See *id.*

can shape preferences and affect election results.<sup>70</sup> Such a tabulative model presupposes a distinction between elections and a broader sphere of politics, envisioning political preferences as formed somewhere outside campaigns,<sup>71</sup> and may have the hydraulic effect of moving deliberation out of the election period.<sup>72</sup>

In this Article, I resist this tabulative approach, seeing the heightened politics of the election period as a time of increased democratic engagement and attention, the raw materials of effective deliberation. The election period presents the moment of highest engagement with the continuing democratic process and, as optimal representation calls for engagement with the expressed interests of constituents, is therefore a crucial moment for democracy, not only with regard to election results but also the actions to be taken by elected officials. As a result, limited regulation designed to promote an effective democratic process is particularly appropriate in this setting. In short, to the extent particular forms of regulation are at all appropriate, I argue for their application in the election period as well as to the vote itself.

This Part has advanced a model of the election period as a framework for regulation of the democratic process. I now turn to the development of the doctrine, exploring the treatment of both the regulatory line and the acceptable rationales for regulation in order to assess the fit of this model with the Court's decisions.

## II. THE REGULATORY LINE: EXPRESS ADVOCACY AND ELECTIONEERING COMMUNICATIONS

BCRA presents another step in Congress's effort to regulate corporate participation in the political process, a goal it has pursued for over one hundred years. The Court's rulings in response to these efforts have indicated that corporate political speech in the election setting may constitutionally be regulated in at least some ways<sup>73</sup> (at least for

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<sup>70</sup> James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 *BUFF. L. REV.* 1413, 1417 (2007) (concluding that "although the American constitutional regime pays emphatic lip service to the ideal of reasoned persuasion in elections, its actual institutional arrangements in fact presuppose just the opposite—election campaigns that are thin rather than thick, that are aggregative rather than deliberative, that are aimed at counting political preferences, not creating them").

<sup>71</sup> *See id.* (arguing that "American constitutional law rests on the presupposition that public opinion is exogenous to political campaigns rather than endogenous to them—that political opinion, in other words, is something citizens bring to election campaigns, not something they formulate during campaigns").

<sup>72</sup> *See id.* at 1475–76 ("The main effect, then, of substituting tabulative for deliberative election campaigns is probably not to destroy or diminish democratic politics, but rather to shift their locus from the confined realm of the election campaign to the broader realm of the political."); Baker, *supra* note 11, at 37–45; Thompson, *supra* note 45, at 1053–56; *see also* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *TEX. L. REV.* 1705 (1999) (describing hydraulic effects in campaign finance law).

<sup>73</sup> *See* *FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding limitations on corporate political contributions). *But see* *Citizens United v. FEC*, No. 08-205, slip op. at 9 (U.S. Sup. Ct. Jan. 21, 2010) (invalidating restrictions on corporate political advocacy).

now), leaving us to consider exactly what speech may be subject to regulation.<sup>74</sup> What distinguishes regulable from protected speech and what conception of free speech and the democratic process shapes this regulatory line? This Part explores the shifting regulatory line—in its “express advocacy” and “electioneering communications” forms—assessing the concerns that have shaped its placement. I provide this account of the doctrine to demonstrate that the reinstatement of the express advocacy line in *WRTL* reflects a regulatory border shaped by a tight focus on the voting process rather than concerns about vagueness, the original basis for the line. As I develop below, this focus is consistent with the Court’s approach across election law.<sup>75</sup> Though *Citizens United* has made the express advocacy line inoperative in the context of restricting corporate political advocacy, this discussion serves to illustrate the shaping of the elections/politics line in this setting as a substantive ideal.

#### A. The Pre-BCRA Framework—Issue Advocacy and Express Advocacy

The Supreme Court’s decision in *Buckley v. Valeo* drew the distinction between “express advocacy” and “issue advocacy” thereafter enshrined in campaign finance jurisprudence.<sup>76</sup> *Buckley* presented a challenge to the Federal Election Campaign Act Amendments of 1974 (FECA), which provided that “[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$ 1,000.”<sup>77</sup> In light of vagueness concerns, the Court construed the “relative to” language “to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”<sup>78</sup> This construction gave rise to the “magic words” doctrine, which limited “the application of [the statute] to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”<sup>79</sup> The Court distinguished this “express advocacy” from “funds spent to propagate one’s views on issues without expressly calling for a candidate’s election

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<sup>74</sup> See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482 (2007) (describing “the issue we do have to decide” as “defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban”); see also Briffault, *supra* note 7, at 167 (arguing that because “campaign speech may be regulated—through disclosure requirements, contribution limits, and the ban on corporate and union treasury funds—in ways that would be constitutionally unacceptable if applied more generally to other political speech . . . there needs to be some line distinguishing election-related speech from other political speech”).

<sup>75</sup> See *infra* Part IV.

<sup>76</sup> 424 U.S. 1, 39–44 (1976).

<sup>77</sup> *Id.* at 39 (quoting FECA § 608 (e)(1)).

<sup>78</sup> *Id.* at 44.

<sup>79</sup> *Id.* at 44 n.52.

or defeat.”<sup>80</sup> Notwithstanding this narrowing, the Court struck down the expenditure limits under the First Amendment,<sup>81</sup> though it approved the application of disclosure requirements to expenditures for express advocacy,<sup>82</sup> emphasizing that the regulated speech was “unambiguously campaign related.”<sup>83</sup> The *Buckley* Court based the express advocacy line primarily on concerns about the vagueness of the statutory language, gesturing also towards constitutional concerns about the regulation of speech not obviously related to the election campaign.<sup>84</sup>

A separate provision of FECA, stemming originally from the Tillman Act of 1907,<sup>85</sup> prohibited corporations and unions from making campaign contributions or expending treasury funds “in connection with any [federal] election.”<sup>86</sup> In *FEC v. Massachusetts Citizens for Life* (MCFL), the Court construed this “in connection with” provision as it did the “relative to” provision at issue in *Buckley*, holding, again because of vagueness concerns, that “an expenditure must constitute ‘express advocacy’ in order to be subject to the prohibition.”<sup>87</sup> The Court did not decide the constitutional validity of the expenditure provision in *MCFL*,<sup>88</sup> concluding that ideological corporations like MCFL could not be subject to the prohibition under any circumstances.<sup>89</sup> Four years later, in *Austin v. Michigan Chamber of Commerce*, the Court upheld a

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<sup>80</sup> *Id.* at 44 (quoting non-governmental appellees’ brief).

<sup>81</sup> *Id.* at 51.

<sup>82</sup> *See id.* at 80–82.

<sup>83</sup> *Id.* at 81.

<sup>84</sup> *See also* *McConnell v. FEC*, 540 U.S. 93, 277–83 (2003) (Thomas, J., dissenting in part) (discussing constitutional concerns in *Buckley*).

<sup>85</sup> Pub. L. No. 59-36, 34 Stat. 864, 864–65 (1907) (prohibiting federal corporations from making a money contribution “in connection with any election to any political office” and any corporation from making a money contribution “in connection with any [federal] election”).

<sup>86</sup> 2 U.S.C. § 441b (2006); *see also* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 245–46 (1986) (discussing statutory language).

<sup>87</sup> 479 U.S. at 248–49.

<sup>88</sup> The Court did not determine the constitutionality of the expenditures provision at any point during its more than fifty-year history before being amended by BCRA. *See id.* at 263 (withholding determination of ultimate constitutional question); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 400 (1972) (noting that the Court’s “disposition makes decision of the constitutional issues premature, and we therefore do not decide them”); *United States v. UAW-CIO*, 352 U.S. 567 (1957) (withholding determination of constitutional questions); *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 123–24 (1948) (finding an earlier incarnation of the expenditure restriction did not reach union endorsement of candidate printed in an in-house publication and not intended for the public).

<sup>89</sup> The *MCFL* Court gave three reasons for this exemption: that the organization “was formed for the express purpose of promoting political ideas” and did not engage in business, thus ensuring “that political resources reflect political support”; that it had no shareholders or others with a claim on its assets or earnings, allowing those connected to the organization to easily disaffiliate if they disagree with its political positions; and that it was “not established by a business corporation or labor union” and did not “accept contributions from such entities,” preventing it from serving as a conduit for problematic spending. *MCFL*, 479 U.S. at 263–64.

Michigan law prohibiting corporate expenditures “in support of, or in opposition to” candidates for state office, approving regulation of corporate express advocacy.<sup>90</sup>

The effect of these rulings was to draw a bright line between ads that used the “magical and forbidden” words of express advocacy,<sup>91</sup> which could be regulated in some ways, and other ads, treated as “issue advocacy,”<sup>92</sup> which could not. On this framing, issue advocacy is not a category with defined content, but is the residual category for political ads that are not express advocacy. As *Buckley* indicates, the term “express” modifies the implicit term “electoral”: express electoral advocacy is thus distinguished from other advocacy, which can be either non-expressly electoral, or not electoral at all.<sup>93</sup> Having defined “election-related” as limited to the presence of the magic words, this framework characterizes ads without the magic words as not electoral advocacy, even though on some other definition (such as ordinary English usage), a particular issue advocacy ad could be seen as designed or likely to influence an election.<sup>94</sup> As this suggests, significant distinctions might be drawn within the issue advocacy category.

Regulating political speech on the basis of the election demands some method of identifying which speech is within the electoral domain. Limiting regulation to express advocacy serves as a reliable if underinclusive means of calibrating regulation to election-related speech.<sup>95</sup> The fact that any regulation would be implemented in the heat of political campaigns by potentially partisan regulators calls for an easily administered bright-line in this setting.<sup>96</sup> The limitation to express advocacy clearly establishes what is and is not allowed, with little risk of confusion or doubt on the part of speakers or regulators. In doing so, this model avoids both a more calibrated but

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<sup>90</sup> 494 U.S. 652, 654 (1990) (involving a statute that prohibited “corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections to state office”). Unlike FECA, the Michigan law did not apply to unions. *Id.* at 665–66 (rejecting argument that statute was underinclusive in not applying to independent expenditures by labor unions).

<sup>91</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 489 (2007) (Scalia, J., concurring in part and concurring in the judgment) (noting that “the ad at issue in *Austin* used the magical and forbidden words of express advocacy” (citing *Austin*, 494 U.S. at 714)).

<sup>92</sup> See *supra* note 80 and accompanying text.

<sup>93</sup> See *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976) (referring to “express words of advocacy of election or defeat”).

<sup>94</sup> Examples are not hard to imagine, or to find. See, for example, the infamous Yellowtail ad described in *McConnell v. FEC*, 540 U.S. 93, 193–94 n.78 (2003).

<sup>95</sup> See Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 702 (2004) (“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.”).

<sup>96</sup> See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 539–40 (2d ed. 2001) (discussing this point).

more discretionary approach as well as a more protective but more speech-restrictive approach, both of which raise heightened First Amendment concerns.

The express advocacy line thus collapses two separate distinctions: between general political speech (issue advocacy in a colloquial sense) and political speech that is election-related and between express electoral advocacy and ads classifiable as electoral advocacy though they lack the magic words. The difficult questions involve speech that falls in that middle category—non-express electoral advocacy—asking whether it can be identified in practice. The goal of re-separating these collapsed distinctions looms in the post-BCRA cases.

### *B. BCRA and the Regulation of Electioneering Communications*

Savvy political actors quickly realized, assuming they didn't already know, that political ads could be as or more effective without the magic words.<sup>97</sup> As Justice Souter later noted, “narrowing the corporate-union electioneering limitation to magic words soon reduced it to futility.”<sup>98</sup> By the 1990s, hundreds of millions of dollars were being spent on “issue ads” which, though patently intended to influence elections, were immune from challenge because they avoided express terms of electoral advocacy.<sup>99</sup> The proliferation of such ads bolstered those who doubted that the use of particular wording was the appropriate trigger for permissible regulation of corporate-funded political ads.<sup>100</sup>

Congress enacted BCRA in 2002, dramatically reshaping campaign finance law.<sup>101</sup> As relevant here, BCRA redrew the regulatory line for corporate political advertising in the election setting, prohibiting a corporation or union from using general treasury funds to pay for an “electioneering communication.”<sup>102</sup> To the extent the concern with FECA's “relative to” language was its vagueness, the problem was solved. In the words of the *McConnell* Court, BCRA's definition of electioneering communications “raises none of the vagueness concerns that drove our analysis in *Buckley*.”<sup>103</sup>

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<sup>97</sup> See *McConnell*, 540 U.S. at 193 & n.77 (“Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted.”).

<sup>98</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 515 (Souter, J., dissenting).

<sup>99</sup> See *McConnell*, 540 U.S. at 127–28 n.20.

<sup>100</sup> The soft money provisions of BCRA were also in large part a response to distortions introduced by the express advocacy line. See *id.* at 126–28 (noting that while political parties “could not use soft money to sponsor ads that used any magic words[,] . . . [s]o-called issue ads . . . not only could be financed with soft money but could be aired without disclosing the identity of, or any other information about, their sponsors”).

<sup>101</sup> See *supra* note 7.

<sup>102</sup> 2 U.S.C. § 441b(b)(2) (2006); see *supra* notes 20–22 and accompanying text.

<sup>103</sup> *McConnell*, 540 U.S. at 194; see also *WRTL*, 551 U.S. at 457 (noting that this definition is “clear and expansive”); *id.* at 499 (Scalia, J., concurring in part and concurring in the judgment) (“Section 203's line is bright, but it bans vast amounts of political advocacy indistinguishable from hitherto protected speech.”).

This new definition of regulable speech highlighted questions about where the regulatory line could constitutionally be drawn. Like all political observers, Congress knew that issue advocacy and express advocacy were “functionally identical in important respects.”<sup>104</sup> *Buckley* had distinguished the two categories not as being functionally distinct, but rather as facially distinct, thereby curing the vagueness defect.<sup>105</sup> Concluding that the bright-line rule was ineffective, BCRA supplemented the content-based characterization approach governing expenditures with a context-based rule redrawing the regulatory line as a temporal zone preceding the election.<sup>106</sup>

Though the Court upheld the electioneering communications provision on a facial challenge in *McConnell v. FEC*, in what was described as a “stunning triumph” for supporters of campaign finance reform,<sup>107</sup> the majority opinion subtly subverted Congress’s reframing of regulable election speech. In an unusually brief discussion of the First Amendment questions raised by the provision,<sup>108</sup> the Court rejected plaintiffs’ argument that the electioneering communications provision was overbroad in regulating more than express advocacy. The Court explained that

[t]his argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. 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.<sup>109</sup>

By describing the target of the provision as ads that are the “functional equivalent” of express advocacy, the Court blurred the statutory scheme. While BCRA moved beyond the issue/express advocacy framework, the Court enshrined that distinction in campaign finance law by upholding the provision to the extent it regulates only the “functional equivalent” of express advocacy.<sup>110</sup> In other words, upholding the new

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<sup>104</sup> *McConnell*, 540 U.S. at 126.

<sup>105</sup> *Buckley v. Valeo*, 424 U.S. 1, 76–82 (1976) (discussing the vagueness of BCRA).

<sup>106</sup> “Expenditures,” in the sense of corporate spending that expressly advocates for or against a candidate, remained prohibited under BCRA. *See* 2 U.S.C. § 441b(a).

<sup>107</sup> Briffault, *supra* note 7, at 147 (describing *McConnell* as the “single greatest legal victory for campaign finance regulation” in the post-*Buckley* period).

<sup>108</sup> *See* Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 515 & n.55 (2004) (noting that “[m]any commentators simply dismiss *McConnell* as an example of poor judicial craftsmanship” and providing sources); Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 54 (2004) (characterizing as “surprising” that the majority opinion “devoted only a single paragraph” to the First Amendment overbreadth issue).

<sup>109</sup> *McConnell*, 540 U.S. at 206.

<sup>110</sup> The Court did exclude “genuine issue ads.” *Id.* at 206 n.88 (assuming “that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads”).

provision by virtue of its being functionally identical to the express advocacy approach maintains the relevance of that line.

The Court's insistence that the express advocacy line is not constitutionally mandated suggests that the "functional equivalent" language was not intended to reinstate a content-based requirement like the express advocacy rule.<sup>111</sup> Rather, this language required that the function or effect of the newly regulated speech be equivalent—that by "intend[ing] to influence the voters' decisions and hav[ing] that effect"<sup>112</sup> the speech create the same harm as express advocacy, thus allowing for its regulation.<sup>113</sup> We might then read *McConnell* as an attempt to shift the basis of regulation from the type of speech at issue to the intent and effect of the relevant speech. The continued reliance on the express advocacy model would allow for the rejection of this approach just a few years later.

### C. WRTL and the Return of the Express Advocacy Line

*McConnell* appeared to bless a new era of campaign finance regulation in which Congress was granted a larger regulatory sphere due to the harms threatened by corporate election speech. Three years later, however, the Court unanimously ruled that the decision on the facial challenge in *McConnell* did not foreclose as-applied challenges to the BCRA restrictions.<sup>114</sup> This holding, in response to an as-applied challenge to the electioneering communications rule by WRTL, foreshadowed a decision the next Term that would raise doubts about the vitality of *McConnell* and invigorate questions about the regulation of election speech.

*McConnell*'s framing proved significant on WRTL's as-applied challenge to the electioneering communications rule. Chief Justice Roberts's principal opinion makes much of the "functional equivalent" phrasing and relies on what it saw as *McConnell*'s limitation of the BCRA provision to express advocacy and its functional equivalent to justify narrow readings of the previously recognized state interests in regulation.<sup>115</sup>

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<sup>111</sup> *See id.* at 190–92 (explaining that "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law" and again, one page later, that "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").

<sup>112</sup> *Id.* at 206.

<sup>113</sup> The *McConnell* majority appeared to like this "functional" formulation. *See id.* at 126 ("While the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects."); *id.* at 193 ("Indeed, the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless.").

<sup>114</sup> *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411–12 (2006) ("In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges.").

<sup>115</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477–81 (2007) (principal opinion). The principal opinion is joined only by Justice Alito.

Because the principal opinion purports to follow *McConnell* in concluding that the express advocacy line is not constitutionally required,<sup>116</sup> we might question why it places so much weight on that distinction. Ultimately, *WRTL* holds that only express advocacy or its functional equivalent may be regulated, with “functional equivalent” defined as whether the ad “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>117</sup> This reads “functional equivalent” to mean the equivalent type of speech,<sup>118</sup> in tension with the *McConnell* framing, which was based on the intent and effect—the “function”—of the speech. Despite concluding that the electioneering communications restrictions were unconstitutional as applied to the *WRTL* ad at issue, the Court maintained that it was not revisiting or overruling *McConnell*.<sup>119</sup>

The resurrection of the express advocacy standard in *WRTL* raised questions about the distinction between issue advocacy and express advocacy. In their separate opinions, both Justice Scalia and Justice Souter treat the distinction as largely meaningless.<sup>120</sup> In contrast, the principal opinion indicates that speech that expressly solicits votes is qualitatively different than other political speech, and presents the first post-*Buckley* effort by the Supreme Court to articulate a substantive basis for the distinct treatment of express advocacy.

In their “widely divergent” *WRTL* opinions, Justice Scalia and Justice Souter agree on at least one point beyond the fact that the principal opinion silently overrules *McConnell*:<sup>121</sup> that the distinction between express advocacy and issue advocacy is of limited constitutional relevance. Justice Scalia makes clear his opposition to regulation of any political speech, whether or not expressly intended to affect the election.<sup>122</sup>

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<sup>116</sup> *Id.* at 474 n.7 (“*Buckley*’s intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test. The *Buckley* Court’s ‘express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.’” (quoting *McConnell*, 540 U.S. at 190)).

<sup>117</sup> *Id.* at 470.

<sup>118</sup> Richard Briffault describes this as “linguistic equivalence.” See Richard Briffault, *WRTL II: The Sharpest Turn in Campaign Finance’s Long and Winding Road*, 1 ALB. GOV’T L. REV. 101, 117 (2008) (noting that “[f]or Chief Justice Roberts, an ad is the functional equivalent of express advocacy only if it is the linguistic equivalent of an express ad”).

<sup>119</sup> *WRTL*, 551 U.S. at 482 (“*McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today.”).

<sup>120</sup> *Cf. McConnell*, 540 U.S. at 193 (noting that “the unmistakable lesson from the record in this litigation . . . is that *Buckley*’s magic-words requirement is functionally meaningless”).

<sup>121</sup> See *WRTL*, 551 U.S. at 498 n.7 (Scalia, J., concurring in part and concurring in the judgment) (noting “that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so”).

<sup>122</sup> Justice Scalia’s argument recalls Justice Douglas’ dissent in the *UAW-CIO* case fifty years earlier: “The Court asks whether the broadcast constituted ‘active electioneering’ or

Inasmuch as the distinction cannot be drawn except where the speaker self-identifies the speech as regulable by using a magic word and to the extent that any restriction of political speech should be constitutionally impermissible, Justice Scalia argues that courts should not further distinguish between forms of advocacy,<sup>123</sup> and indicates that the only virtue of the express advocacy rule is that it limits the speech subject to regulation.<sup>124</sup> On this view, the First Amendment simply does not permit regulation of speech to protect the deliberative process.<sup>125</sup>

In his dissent, Justice Souter likewise downplays any substantive distinction between express and issue advocacy but for the opposite reason: because the purpose of the regulation is to protect the democratic process by limiting the influence of corporate and union money,<sup>126</sup> what matters for constitutional purposes is whether the speech presents the relevant threat, not any formal characterization. So long as the regulated speech is related to the electoral process, and the regulatory line is sufficiently clear so as to not chill other speech, the Court need not draw difficult distinctions except in individual cases where speech falls under the provision but is indisputably not election-related.<sup>127</sup> This approach maintains a distinction between election-related and other political speech, but broadens the parameters of the election domain. In rejecting substantive distinctions between different forms of political speech and urging either wholesale rejection of or broad deference to campaign finance regulation, these conflicting approaches are reminiscent of the indication from roughly the same configuration of Justices that *Buckley*'s treatment of contributions and expenditures should be reconsidered.<sup>128</sup>

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simply stated 'the record of particular candidates on economic issues.' What possible difference can it make under the First Amendment whether it was one or the other? The First Amendment covers the entire spectrum." *United States v. UAW-CIO*, 352 U.S. 567, 595 (1957) (Douglas, J., dissenting).

<sup>123</sup> See *WRTL*, 551 U.S. at 499 (Scalia, J., concurring in part and concurring in the judgment); cf. *McConnell*, 540 U.S. at 326 (Kennedy, J., concurring in part and dissenting in part) ("The distinction, however, between independent expenditures for commenting on issues, on the one hand, and supporting or opposing a candidate, on the other, has no First Amendment significance apart from *Austin*'s arbitrary line.").

<sup>124</sup> *WRTL*, 551 U.S. at 490 (Scalia, J., concurring in part and concurring in the judgment) (noting that "at least *Austin* was limited to express advocacy").

<sup>125</sup> See also Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 20 (reading *Buckley* to enact the proposition that "[g]overnmental abridgements that are aimed at enlarging the collective interest by suppressing individual expression, even in the presence of massive documentation that the two interests are in hopeless conflict, are unconstitutional").

<sup>126</sup> *WRTL*, 551 U.S. at 504–22 (Souter, J., dissenting).

<sup>127</sup> See, e.g., Op. FEC 2004-31 (Sept. 10, 2004) (concluding that ads for a business with same name as a federal candidate (the Russ Darrow Group, Inc.) are not electioneering communications); see also Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 820 (2007).

<sup>128</sup> See *Randall v. Sorrell*, 548 U.S. 230 (2006) (revealing three Justices skeptical of or ready to overrule *Buckley*'s treatment of contributions, and three Justices amenable to at least some

In contrast, Chief Justice Roberts's principal opinion suggests a substantive distinction between express advocacy and other forms of political speech, framing the "functional equivalent" inquiry as whether the viewer has no choice but to view the ad as an appeal for a vote.<sup>129</sup> A striking passage explains, in response to the argument that any ad that names a candidate before the election is the functional equivalent of express advocacy, that "[i]ssue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions."<sup>130</sup> This language—in particular the enigmatic distinction between, on the one hand, "convey[ing] information and educat[ing]," and, on the other, "[ ]invi[t]ing" voters "to factor [that information] into their voting decisions"—suggests that something turns on the invitation to factor the conveyed information into voting decisions, and that it is that something that may allow for the regulation of the speech.<sup>131</sup> Here, much as with contributions, it is only speech that can be seen to explicitly enter into the actual election process that can be regulated.

In indicating that express advocacy and its functional equivalent may sufficiently threaten the democratic process to justify regulation,<sup>132</sup> but that the attempted regulation of the *WRTL* ad ignores its value as speech, the principal opinion draws a bright line between express advocacy and other electoral advocacy. As a result, while the opinion may overrule *McConnell* without saying so, it does not take on the Court's approval of regulation of corporate express advocacy in *Austin*. The preservation of *Austin* raises questions about the basis for treating express advocacy differently than other advocacy in the election setting.

As this discussion demonstrates, we can distill from the *WRTL* opinions three distinct accounts of the express advocacy approach in establishing a regulatory zone governing corporate electoral advocacy. The express advocacy line might be meaningless because all limitations on political ads (except perhaps disclosure) are constitutionally prohibited, as the *McConnell* dissents and Justice Scalia's *WRTL* concurrence

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restrictions on expenditures, either as not inconsistent with *Buckley* or because *Buckley* should be overruled on this point).

<sup>129</sup> In explaining why the ads are not the functional equivalent of express advocacy, the principal opinion articulates the "indicia of express advocacy." *WRTL*, 551 U.S. at 470. "The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office." *Id.* By contrast, the "indicia" of issue advocacy are present when "[t]he ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Cf. Dorie E. Apollonio & Margaret A. Carne, *Interest Group Advocacy and the Power of "Magic Words,"* 4 ELECTION L.J. 178, 178 (2005) (concluding that "the magic words test made a valid distinction between different types of political spending").

<sup>132</sup> *WRTL*, 551 U.S. at 478–80.

maintain.<sup>133</sup> Alternatively, the express advocacy line might be irrelevant because regulation of any ads that can be seen as election-related and present the relevant harm is permissible, as *McConnell* and Justice Souter's *WRTL* dissent indicate. Finally, the line might be significant because regulation can encompass only the solicitation of votes (or its functional equivalent), as the pre-BCRA regime provided and the *WRTL* principal opinion reinstates.<sup>134</sup>

In contrast to those who reject any regulation of political speech, both the *WRTL* principal opinion and the dissent allow regulation of corporate advertising in the election setting in at least some circumstances: the divide between them is whether the regulatory line can extend beyond the speech's express intervention in the electoral process. By enshrining the "express advocacy or its functional equivalent" line, the principal opinion marks the border of regulable speech at the point of entry into the electoral process through solicitation of the vote.<sup>135</sup> Significantly, this approach shifts the basis for the line from vagueness concerns to a substantive ideal based on the election itself. I turn in the next Part to the question of how this line fits with the interests recognized as legitimate justifications for regulation.

### III. GOVERNMENT INTERESTS IN REGULATING THE DEMOCRATIC PROCESS

Notwithstanding the robust protection of political speech, the Supreme Court has identified interests pursuant to which Congress may regulate at least some forms of political activity in the election setting. In this Part, I canvass the justifications the Court has recognized for campaign finance regulation, emphasizing a heightened emphasis on protection of representation as the basis for regulation, gestured toward in *McConnell* and developed in Justice Souter's *WRTL* dissent.<sup>136</sup> I argue that the varying approaches taken by Chief Justice Roberts and Justice Souter in their *WRTL* opinions highlight the tensions shaping this area since *Buckley*, founded in efforts to protect the broader representative process through regulation of the electoral process.

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<sup>133</sup> Even on this view, regulation might be permitted for speech within the immediate election setting that can affect the casting of votes. See *infra* notes 152–159 and accompanying text.

<sup>134</sup> Justice Alito appears to adopt this position as well in his brief concurrence. See *WRTL*, 551 U.S. at 482–83 (Alito, J., concurring) (concluding that the statute "cannot constitutionally ban any advertisement that may reasonably be interpreted as anything other than an appeal to vote for or against a candidate").

<sup>135</sup> See *id.* at 481.

<sup>136</sup> The *Citizens United* oral argument may indicate that this approach has come full circle, with the government disavowing an equality-based reading of *Austin*, and relying on an anti-corruption argument to justify regulation of corporate election speech. See Transcript of Oral Argument at 45, 47–48, *Citizens United v. FEC*, No. 08-205, slip op. (U.S. Sup. Ct. Jan. 10, 2010) (suggesting that "*Austin* did not articulate what we believe to be the strongest compelling interest, which is the anticorruption interest" and stating that "[w]e do not rely at all on *Austin* to the extent that anybody takes *Austin* to be suggesting anything about the equalization of a speech market").

Much as the divide over the placement of the regulatory line turned on whether regulation must be limited to the electoral process itself, the question here concerns whether protection of representation can extend beyond the election itself. It is this tension between a vision of the electoral process as the exclusive setting for control of the democratic process and an account of democracy that envisions a broader model of citizen participation and a less tightly circumscribed sphere of regulatory involvement that gives rise to the divide in this area,<sup>137</sup> a dynamic I illustrate across election law in the next Part.

### A. Regulatory Interests before WRTL

#### 1. Preventing Corruption and its Derivative Interests

In *Buckley*, the Court determined that limitations on political contributions were justified by Congress's interest in preventing not only actual corruption but also the appearance of corruption,<sup>138</sup> explaining that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"<sup>139</sup> The Court later articulated a limited account of corruption, explaining that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors."<sup>140</sup> This framing served to limit the source of corruption (or its appearance) to direct financial contributions to candidates, thereby constraining the invocation of the corruption concern to justify other forms of regulation.<sup>141</sup> Consistent with this account of corruption, the Court denied states the possibility of limiting corporate speech in referendum elections because the direct democracy context presents no elected officials to corrupt,<sup>142</sup> much as it had indicated in *Buckley* that self-funded

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<sup>137</sup> See *supra* note 34.

<sup>138</sup> *Buckley v. Valeo*, 424 U.S. 1, 26–28 (1976).

<sup>139</sup> *Id.* at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973) (ellipsis in original)).

<sup>140</sup> *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

<sup>141</sup> Undoubtedly, "corruption" is a contested concept. For discussions, see Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT 127 (1997); Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 799–806 (1985) (discussing definitions of "corruption"); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (arguing that "'corruption' in the system of campaign finance is a concern not for the reasons that true corruption, such as conventional bribery, is a concern, but principally because of inequality and the dangers of interest group politics"); Teachout, *supra* note 47, at 373–83 (providing an account of corruption as "the use of public forum to pursue private ends").

<sup>142</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (internal citations omitted)).

candidates pose no risk of corruption.<sup>143</sup> As these holdings indicate, the corruption concern, which the Court has suggested to be the only valid basis for campaign finance regulation,<sup>144</sup> is at heart a concern about representation.

The Court later identified “another reason for regulating corporate electoral involvement” in *FEC v. Beaumont*, explaining that “recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for ‘circumvention of [valid] contribution limits.’”<sup>145</sup> In particular, the Court expressed concern about individuals affiliated with corporations funneling funds in excess of individual contribution limits.<sup>146</sup> This circumvention framing is a second-order interest in preventing violation of existing regulations that are designed to prevent corruption.

## 2. *Austin*’s Different Type of Corruption

The Court supplemented the *Buckley* model in *Austin* with a “different type of corruption”: “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>147</sup> The Court explained that “the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. 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.”<sup>148</sup> This framing appears to be a concern that concentrated wealth accumulated by means of the state-provided corporate form will have a disproportionate or “distorting” effect on the electoral process,<sup>149</sup> what Richard Hasen has described as a “barometer equality

<sup>143</sup> *Buckley*, 424 U.S. at 53.

<sup>144</sup> See *Nat’l Conservative Political Action Comm.*, 470 U.S. at 496–97 (“We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”). But see *Davis v. FEC*, 554 U.S. \_\_\_\_, 127 S. Ct. 2759, 2780 (2008) (Stevens, J., dissenting) (arguing that “[t]he Court is simply wrong when it suggests that the ‘governmental interest in eliminating corruption or the perception of corruption,’ is the sole governmental interest sufficient to support campaign finance regulations.” (internal citation omitted)).

<sup>145</sup> *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 & n.18 (2001) (alteration in original)).

<sup>146</sup> See *id.*

<sup>147</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990).

<sup>148</sup> *Id.* at 660. This framing was prefigured in *MCFL*, which had explained that “[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes.” *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986).

<sup>149</sup> There is some debate about how best to understand this form of corruption. See, e.g., Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 109–10 (“Nobody ought to be fooled. This [*Austin* corruption rationale] is simply

rationale,” applied only to corporations.<sup>150</sup> Commentators have emphasized *Austin*’s intervention in the deliberative setting to protect voters, especially in light of the focus on public support for the ideas expressed.<sup>151</sup> On this account, *Austin* marks a departure from that articulated in *Buckley* and its successor cases, not only in suggesting a sort of equality rationale (notwithstanding the use of “corruption” language) for regulation rather than the prevention of quid pro quo corruption, but also, correspondingly, in emphasizing the electoral rather than representative process.

### 3. Protecting the Act of Voting

Less often discussed in this context (likely because it is not directed at campaign “finance”) is a separate rationale for government regulation of speech in the electoral setting: the interest in protecting the exercise of the ballot. In *Burson v. Freeman*, the Court upheld a Tennessee law prohibiting campaigning within an area surrounding the entrance to any polling place,<sup>152</sup> because “some restricted zone is necessary in

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a repackaging of the equalization goal.”); Post, *supra* note 17, at 1122–23 n.54 (describing the *Austin* opinion as “opaque and difficult” and noting that “[o]n [Justice] Marshall’s account the Michigan statute seems to be an effort to enforce a particular image of collective identity, from which vantage the influence of corporate wealth can be excised as ‘corrosive and distorting.’”); Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 155–62 (1998) [hereinafter Winkler, *Beyond Bellotti*] (arguing that the *Austin* corruption interest is based on corporations’ improper use of other people’s money in the political process); Adam Winkler, “*Other People’s Money*”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871 (2004) [hereinafter Winkler, *Other People’s Money*] (developing history of this concern). As noted, Solicitor General Kagan rejected an equalization account of *Austin* in the *Citizens United* oral argument. See *supra* note 136.

<sup>150</sup> RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* 111–14 (2003) (arguing that *Austin* “endorsed the barometer equality rationale” for campaign finance regulation).

<sup>151</sup> See Baker, *supra* note 11, at 32 (identifying the Court’s concern as that “the corporate treasury does not necessarily reflect *political* commitments of either consumers or even wealthy owners” and “accept[ing] the legitimacy of the state’s concern that views expressed in the electoral arena should reflect real people’s actual support”); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL’Y REV. 236, 264 (1991) (arguing that *Austin* recognized that the interests invoked in campaign finance regulation serve the end of “correcting the unfair advantage of the corporate form in the political marketplace of ideas”); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 676 (1997) (characterizing *Austin* as raising a “distortion” argument, that “the unequal deployment of resources in electoral campaigns causes the wrong people to get elected, distorting the true preferences of voters”).

<sup>152</sup> See *Burson v. Freeman*, 504 U.S. 191 (1992). The Tennessee statute only applied to campaign speech, i.e., express advocacy. *Id.* at 193–94 (statute applied to “the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question” (quoting TENN. CODE ANN. § 2-7-111(b) (Supp. 1991))); *id.* at 216 (Scalia, J., concurring in the judgment) (noting that the statute “prohibits only electioneering speech”).

order to serve the States' compelling interests in preventing voter intimidation and election fraud."<sup>153</sup> The Court would not second-guess the State's fixing of the boundary at 100 feet from the polling place, as "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question."<sup>154</sup> In a significant footnote, the Court explained that

[t]his modified 'burden of proof' does not apply to all cases in which there is a conflict between First Amendment rights and a State's election process—instead, *it applies only when the First Amendment right threatens to interfere with the act of voting itself*, i.e., cases involving voter confusion from overcrowded ballots, . . . or cases such as this one, in which the challenged activity physically interferes with electors attempting to cast their ballots.<sup>155</sup>

In short, where the state's justification for the speech restriction is to protect the act of ballot-casting—rather than the electoral process in some larger sense—restrictions on speech are not only permissible, but the state will not be held to evidentiary requirements. Thus, because "the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud,"<sup>156</sup> the restriction on political speech was justified. Here, the right to free speech can be limited to protect the exercise of the ballot.

Justice Kennedy made this point explicit, noting in his concurring opinion that "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional

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<sup>153</sup> *Id.* at 206 (majority opinion).

<sup>154</sup> *Id.* at 208–09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (alteration in original)).

<sup>155</sup> *Id.* at 209 n.11 (emphasis added).

<sup>156</sup> *Id.* at 211. It is not self-evident that what was at issue in *Burson* was better characterized as the individual right to vote rather than a state interest in a secure voting process. Professor Karlan argues that in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in which the Court denied an injunction against an Arizona voter identification law before the 2006 election after invoking voters' rights against dilution stemming from fraudulent voting, the Court "took a concern that—if it were valid at all—almost certainly sounds in structural terms and shifted it toward an individual account." Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 764 (2007). Justice Stevens, who dissented in *Burson*, rereads *Burson* in a later opinion for the Court to emphasize not voters' rights but the state interest in preventing last minute misinformation, along with intimidation and fraud, from infecting the election process. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352 n.16 (1995).

right.”<sup>157</sup> He applied that principle to the *Burson* case because “under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote.”<sup>158</sup> Justice Scalia went further in his separate opinion, arguing that the area surrounding the polling place has never been a public forum and that reasonable viewpoint-neutral regulations are therefore permissible.<sup>159</sup> This approach enacts a conception of election space, identifying the area in which voting occurs as physically committed to the state, a spatial counterpart to the temporal election period model.

#### 4. *McConnell*’s Interests in Preventing Undue Access and Promoting Democratic Self-Government

In considering the challenge to BCRA, the Court had to determine whether the state interests recognized in the earlier cases sufficed to justify the new restrictions imposed on soft money and electioneering communications. While *McConnell* did not formally identify new grounds for campaign finance regulation, commentators have read the opinion to expand the permissible bases for regulation. Richard Pildes, among others, argues that *McConnell* hinted at the “governmental effort to advance participation in self-government itself” as a novel basis for regulation.<sup>160</sup> This view, associated with Justice Breyer’s “participatory self-government” approach,<sup>161</sup> is based on “governmental preservation of the essential premise of democracy itself.”<sup>162</sup> Likewise, both Professor Pildes and Professor Briffault identify an expansion of the corruption rationale to include concerns about “special access” to representatives, as “[b]y focusing on special access, *McConnell* reframed the corruption analysis from the consideration of the impact of contributions on formal decisions to their effect on the *opportunity to influence* government actions.”<sup>163</sup>

<sup>157</sup> *Burson*, 504 U.S. at 213 (Kennedy, J., concurring).

<sup>158</sup> *Id.* at 213–14.

<sup>159</sup> *Id.* at 214–16 (Scalia, J., concurring in the judgment) (concluding that “[b]ecause restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [the statute] does not restrict speech in a traditional public forum”).

<sup>160</sup> Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 149 (2004); Briffault, *supra* note 7, at 148 (arguing that “*McConnell* appears to have placed the democracy-promoting features of campaign finance law at the heart of the Court’s analysis”); Hasen, *supra* note 108, at 57–60 (reading the *McConnell* opinion as “a *sub silentio* acceptance of the participatory self-government rationale”).

<sup>161</sup> See BREYER, *supra* note 38, at 43–50; see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 399–405 (2000) (Breyer, J., concurring).

<sup>162</sup> Pildes, *supra* note 160, at 150.

<sup>163</sup> Briffault, *supra* note 7, at 162–63; see also Daniel R. Ortiz, *The Difference Two Justices Make: FEC v. Wisconsin Right to Life, Inc. II and the Destabilization of Campaign Finance Regulation*, 1 ALB. GOV’T L. REV. 141, 148–50 (2008) (discussing *McConnell*’s recognition of corruption concerns regarding improper influence, access, and circumvention); Pildes, *supra* note 160, at 151–52.

While these rationales provide a basis more expansive than the prevention of quid pro quo corruption or its appearance for regulation of the broader democratic process, they are developed in the section of the *McConnell* opinion reviewing BCRA's restrictions on soft money contributions.<sup>164</sup> In contrast, the Court upheld the electioneering communications restrictions based on the interests in preventing the electoral distortion threatened by corporations as identified in *Austin*, and the circumvention concern recognized in *Beaumont*,<sup>165</sup> leaving open the question whether the newly recognized interests in promoting democracy and preventing undue influence apply to the advertising restrictions as well.

It is worth pausing over *McConnell*'s invocation of the circumvention concern. As noted, in concluding that the prohibition of corporate contributions applied to non-profit advocacy corporations, *Beaumont* indicated that "recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for 'circumvention of [valid] contribution limits.'"<sup>166</sup> *McConnell* altered this phrasing slightly, shifting *Beaumont*'s "restricting contributions by various organizations" to "certain restrictions on corporate electoral involvement," presumably in order to expand the point beyond the contributions context.<sup>167</sup> However, in modifying only the first part of the sentence, the implication is that electioneering communications serve not only as attempts to circumvent the ban on express advocacy, as the discourse about "sham issue ads" suggests.<sup>168</sup> Instead, *McConnell* addresses "circumvention of valid contribution limits," suggesting that the ads substitute for contributions, framing a tight connection between campaign advocacy and contributions.

If "circumvention" means that private actors are taking advantage of a rule's underinclusiveness by acting in an unregulated manner in order to achieve the identical effect as the regulated conduct, the problem is not the circumvention *per se*, but the creation of the relevant harm—a harm already found to justify regulation. In

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<sup>164</sup> See *McConnell v. FEC*, 540 U.S. 93, 144 (2003) ("Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" (quoting *Shrink Mo.*, 528 U.S. at 390)); *id.* at 137 ("Because the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,' contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate." (quoting *Shrink Mo.*, 528 U.S. at 401 (Breyer, J., concurring))).

<sup>165</sup> See *id.* at 205.

<sup>166</sup> *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 & n.18 (2001) (alteration in original)).

<sup>167</sup> See *McConnell*, 540 U.S. at 205 (stating that "recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against 'circumvention of [valid] contribution limits'" (quoting *Beaumont*, 539 U.S. at 155)).

<sup>168</sup> See, e.g., 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 (2001).

seeking to prevent actors from creating the specified harm via unregulated channels, a focus on circumvention targets that harm through another means.<sup>169</sup> *McConnell*'s invocation of *Beaumont*'s concern about circumvention of contribution limits thus suggests a tentative step towards an acceptance in the corporate election ads context of the same corruption concerns that underlie regulation of contributions.<sup>170</sup>

This move is significant because the Court had previously rejected the possibility of justifying advertising restrictions on the basis of corruption as traditionally defined. In *Buckley*, though allowing contribution limits based on corruption concerns, the Court had emphasized that uncoordinated expenditures pose little or no threat of corruption and may even be counterproductive.<sup>171</sup> *Austin* avoided this limitation by re-framing the corruption concern as one of distortion.<sup>172</sup> The *McConnell* suggestion, later developed in Justice Souter's *WRTL* dissent, presents a step away from the *Austin*

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<sup>169</sup> See *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 456 (noting that "all Members of the Court agree that circumvention is a valid theory of corruption; the remaining bone of contention is evidentiary").

<sup>170</sup> The *WRTL* principal opinion reads *Buckley* to foreshadow such a move, noting that "[w]e have suggested that this interest might also justify limits on electioneering expenditures because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'" *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (quoting *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) ("Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.").

The Court's approach to electioneering communications is in marked contrast to its discussion of the coordination provisions in Section 214(a) of BCRA. See *McConnell*, 540 U.S. at 219–23 (discussing plaintiffs' challenge to "BCRA § 214's Changes in FECA's Provisions Covering Coordinated Expenditures"). The Court there emphasized that limitations on truly independent expenditures pose a significant burden on free speech "while 'fail[ing] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.'" *Id.* at 221 (quoting *Buckley*, 424 U.S. at 47–48). There is some disconnect between this discussion and the treatment of electioneering communications a few pages earlier, in which the Court had acknowledged that such ads may serve to circumvent contribution limits and are regulable on that basis, see *id.* at 205, as well as with Justice Stevens's (the co-author of the *McConnell* opinion) *Austin* concurrence, which focused on "the fact, or the appearance, of quid pro quo relationships" as a basis for regulating corporate electioneering expenditures, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring); see also *infra* note 173.

This divide suggests that the Court viewed corporate expenditures as more likely to be influence-securing than expenditures by individuals, perhaps because they are more likely to be helpful even if not coordinated. Whatever the rationale, the different approaches highlight again the distinct treatment of the corporation in campaign finance law.

<sup>171</sup> See *Buckley*, 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive.").

<sup>172</sup> See *supra* notes 147–151 and accompanying text.

approach and gestures toward the dissolution of *Buckley*'s line between contributions and expenditures, at least in the corporate setting. Significantly, Justice Stevens, the co-author of the *McConnell* majority opinion, concurred separately in *Austin*, challenging the use of a line between contributions and expenditures in the corporate context and justifying the Michigan ad restrictions based on the threat or the appearance of corruption.<sup>173</sup>

This discussion reveals the various interests the Court has invoked in justifying campaign speech regulations: 1) corruption and its derivative interests in the appearance of corruption and circumvention of campaign finance restrictions designed to prevent corruption; 2) *Austin*'s "different type of corruption" involving the distorting character of corporate political participation; 3) protecting the act of ballot-casting; 4) the participatory self-government ideal; and 5) concerns about special access and the ability to influence elected officials. We can also add 6) the interest in "providing the electorate with information" as recognized by the Court in the disclosure context.<sup>174</sup> These varied justifications reflect the distinct interests in protecting both the electoral and the representative processes.

#### *B. Articulating Regulatory Interests in WRTL*

The *WRTL* opinions highlight the tensions surrounding the identification of permissible regulatory interests and their connection to permissible restrictions. I focus here on the principal opinion and Justice Souter's dissent, both of which depart from *McConnell*'s treatment of the state interests.<sup>175</sup> I discuss here how each engages the existing precedent and the questions raised in doing so.

Consistent with its general departure from *McConnell*, the *WRTL* principal opinion rejects the extension of any interests justifying regulation beyond their framing in the earlier cases.<sup>176</sup> In barring regulation of the *WRTL* ad, Chief Justice Roberts explains that the interest in preventing quid pro quo corruption and the *Austin* distortion concern apply only to express advocacy and its functional equivalent, which on his definition the *WRTL* ad is not.<sup>177</sup> He further states that the anti-circumvention "prophylaxis-upon-prophylaxis approach" is not compatible with strict scrutiny and that because "[i]ssue ads like *WRTL*'s are by no means equivalent to contributions, . . . the *quid-pro-quo* corruption interest cannot justify regulating

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<sup>173</sup> See *Austin*, 494 U.S. at 678 (Stevens, J., concurring) ("In my opinion the distinction between individual expenditures and individual contributions that the Court identified in *Buckley v. Valeo*, should have little, if any, weight in reviewing corporate participation in candidate elections." (internal citation omitted)).

<sup>174</sup> *McConnell*, 540 U.S. at 196.

<sup>175</sup> As noted, Justice Scalia's separate opinion largely rejects the regulation of electoral advocacy for any reason.

<sup>176</sup> See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477–80 (2007).

<sup>177</sup> See *id.* at 479–81.

them.”<sup>178</sup> To the extent regulation is based on preventing circumvention, the principal opinion notes there must be a limiting point, which it draws at the election line.<sup>179</sup>

In rejecting the possibility of these government interests justifying regulation, the principal opinion demonstrates that it is the characterization of the speech that is doing the work. Likewise, though the principal opinion does not mention *Burson*, the emphasis on the distinction between political speech and campaign speech tracks that opinion’s distinction between the state’s power to regulate the exercise of the vote but not the deliberative process shaping the exercise of the vote.<sup>180</sup> Further, nothing in the principal opinion indicates that it took seriously concerns about special access or self-government as a basis for regulation.<sup>181</sup> In sum, the principal opinion relies primarily on a framing dependent on the identification of the speech as a trigger for the recognized regulatory interests.

Rather than follow *McConnell* in relying primarily on *Austin* and its emphasis on corporate distortion of the electoral process, Justice Souter’s *WRTL* dissent reads the BCRA restrictions to emphasize protection of the representative relationship. The first section of the opinion is dedicated to demonstrating that:

Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries, with no redolence of “grassroots” about them. Neither Congress’s decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions. From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.<sup>182</sup>

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<sup>178</sup> *Id.* at 478–79.

<sup>179</sup> *See id.*

<sup>180</sup> *See supra* note 155 and accompanying text.

<sup>181</sup> Professor Briffault argues that a vision of “campaign finance law as the balancing of competing democratic values, with effectiveness in preventing corruption and promoting political integrity counting as much as freedom of political participation, largely drops out” of the *WRTL* opinion, which sees the case as about political speech alone. Briffault, *supra* note 118, at 127–29.

<sup>182</sup> *WRTL*, 551 U.S. at 522 (Souter, J., dissenting).

The emphasis here is on political institutions and the “integrity” of the American government.<sup>183</sup> In its focus on money (the word appears three times in these three sentences alone, along with a reference to “wealth”) and the absence of any reference to speech, this paragraph treats corporate electioneering expenditures as the functional equivalent of corporate campaign contributions. Under *Buckley*, of course, contributions are regulated because of their potentially corrupting effects on representatives and the appearance of such corruption.<sup>184</sup> Like *McConnell*’s treatment of the restrictions on soft money contributions,<sup>185</sup> Justice Souter emphasizes concern about the special access and guaranteed favor that donors—or those who run ads—receive.<sup>186</sup> This framing shapes a vision of the “corruption” arising from electioneering communications as akin to that stemming from contributions.

In preferring a focus on representation to *Austin*’s emphasis on the electoral process, the argument recalls *Buckley* but is in some tension with that opinion. While the *Buckley* Court had emphasized that uncoordinated expenditures pose little threat of corruption,<sup>187</sup> the electioneering communications restrictions are not limited to coordinated activity. This conflict stems in part from the different premises underlying regulation: if, following *McConnell*, there is a valid state interest in preventing not only quid pro quo corruption but undue influence as well, *Buckley*’s distinction between coordinated and uncoordinated expenditures is blurred. While it is logical that uncoordinated quid pro quo deals are unlikely, uncoordinated expenditures, at least by corporations, might still buy access and be regulable under an expanded vision of corruption.<sup>188</sup>

In treating these ads as quasi-contributions, with the concerns that justify regulating contributions, Justice Souter challenges *Buckley*’s line between contributions

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<sup>183</sup> See *id.* at 507 (“Devoting concentrations of money in self-interested hands to the support of political campaigning therefore threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves.”); *id.* at 507–08 (“Before the turn of the last century, as now, it was obvious that the purchase of influence and the cynicism of voters threaten the integrity and stability of democratic government, each derived from the responsiveness of its law to the interests of citizens and their confidence in that focus.”); *id.* at 518 (emphasizing that “[the ads] were worth the money of those who ultimately paid for them” in obtaining access to legislators).

<sup>184</sup> See *Buckley v. Valeo*, 424 U.S. 1, 26–28 (1976).

<sup>185</sup> See *supra* notes 160–164 and accompanying text.

<sup>186</sup> See *WRTL*, 551 U.S. at 522 (Souter, J., dissenting); *id.* at 506 (“What the high-dollar pragmatists of either variety get is special access to the officials they help elect, and with it a disproportionate influence on those in power.” (citing *McConnell*, 540 U.S. at 130–31)).

<sup>187</sup> See *supra* note 171 and accompanying text. Justice Scalia makes a similar point. *WRTL*, 551 U.S. at 490 n.4 (Scalia, J., concurring in part and concurring in the judgment) (“No one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures.”).

<sup>188</sup> See *supra* note 170 (noting that *Buckley*, and *Bellotti* in the corporate context specifically, had suggested that this presumption about uncoordinated expenditures could be rebutted).

and expenditures.<sup>189</sup> *Buckley* had distinguished these on both sides of the constitutional balance, finding a greater speech interest in expenditures than in contributions<sup>190</sup> and, as discussed, a lesser state interest in regulating expenditures than in regulating contributions.<sup>191</sup> On the *Buckley* account, the value of a contribution is the symbolic expression for the speaker, with little value for listeners (none, possibly, without mandatory disclosure).<sup>192</sup>

Despite arguing that *McConnell* governs,<sup>193</sup> Justice Souter steps back from that opinion, which had invoked *Austin* and the circumvention concern as the bases for regulating electioneering communications.<sup>194</sup> By deemphasizing the focus on equality in the electoral process in favor of the threat of corporate money to the representative process, and in analogizing the advertisements to contributions, the *WRTL* dissent does not follow the *Austin* voter-focused approach, but confronts *Buckley* on its own representational integrity terms, thereby preferring Justice Stevens's *Austin* concurrence to Justice Marshall's opinion for the Court. The result is that Chief Justice Roberts's *WRTL* principal opinion is left as the heir to *Austin*, raising doubts as to its viability.<sup>195</sup>

Justice Souter's repeated concern for public confidence in the democratic process<sup>196</sup> recalls not only *Buckley*'s validation of concern about the appearance of

<sup>189</sup> Justice Souter questions the distinction more explicitly at the end of the opinion. *See WRTL*, 551 U.S. at 536 (noting that “it may be that today’s departure from precedent will drive further reexamination of the constitutional analysis: of the distinction between contributions and expenditures, or the relation between spending and speech, which have given structure to our thinking since *Buckley* itself was decided”).

<sup>190</sup> *See Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976) (“By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.”).

<sup>191</sup> *See supra* note 171 and accompanying text.

<sup>192</sup> *Buckley*, 424 U.S. at 21 (describing contributions as “a general expression of support for the candidate and his views” that “does not communicate the underlying basis for the support” and noting that “the expression rests solely on the undifferentiated, symbolic act of contributing”).

<sup>193</sup> *See WRTL*, 551 U.S. at 525 (Souter, J., dissenting) (concluding that “it is beyond all reasonable debate that the ads are constitutionally subject to regulation under *McConnell*”).

<sup>194</sup> Justice Souter does invoke a circumvention concern, though he does not cite *Beaumont* for this point or acknowledge *McConnell*'s reliance upon it. *See id.* at 536 (“After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention . . .”).

<sup>195</sup> *Cf. Citizens United v. FEC*, No. 08-205, slip op. (U.S. Sup. Ct. Jan. 21, 2010) (overruling *Austin*).

<sup>196</sup> *See WRTL*, 551 U.S. at 522 (explaining that “[c]ampaign finance reform has . . . consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions”); *id.* at 507 (“Devoting concentrations of money in self-interested hands to the support of political campaigning therefore

corruption, but also Justice Breyer's argument for protection of the participatory self-government ideal.<sup>197</sup> Justice Souter notes that politicians are unlikely to care whether helpful ads include magic words or their functional equivalents,<sup>198</sup> and indicates that the regulatory concern is triggered when viewers could identify the ad as intended to affect the outcome of the election.<sup>199</sup> The notion that it is voters' understanding of the ad that guides the constitutionality of regulation<sup>200</sup> indicates that it is the ad itself that threatens to undermine public confidence, rather than any later legislative action traceable to gratitude for the ad. This public confidence framing suggests voters see certain ads as intended to obtain influence, whether by helping the candidate directly or by attacking the opponent. On this account, the BCRA scheme is designed to protect the representative process, not only by preventing corporate advertisers from obtaining special access, but also by defending against the harm to public confidence that follows from the saturation of the airwaves by ads read by voters as bids for influence and the cynicism about the electoral process such ads can engender.

Thus, whereas the *WRTL* principal opinion returns to *Buckley*'s regulatory line in reinstating an express advocacy standard to ensure the regulation only of

threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves.”); *id.* at 507–08 (“Before the turn of the last century, as now, it was obvious that the purchase of influence and the cynicism of voters threaten the integrity and stability of democratic government, each derived from the responsiveness of its law to the interests of citizens and their confidence in that focus.”); *id.* at 504 (describing “the demand for campaign money in huge amounts from large contributors, whose power has produced a cynical electorate”).

<sup>197</sup> See *supra* notes 38, 160–161 and accompanying text. Professor Hasen characterizes Justice Souter's *WRTL* dissent as “demonstrat[ing] an emerging egalitarian view of campaign finance law,” which he views as similar to Justice Breyer's “participatory self-government” approach. Richard L. Hasen, *Justice Souter: Campaign Finance Law's Emerging Egalitarian*, 1 ALB. GOV'T L. REV. 169, 171, 184–87 (2008).

<sup>198</sup> *WRTL*, 551 U.S. at 518 (Souter, J., dissenting) (“[The ads] were worth the money of those who ultimately paid for them. According to one former Senator, ‘Members will . . . be favorably disposed to those who finance’ interest groups that run ‘issue ads’ when those financiers ‘later seek access to discuss pending legislation.’” (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 556 (D.D.C. 2003) (Kollar-Kotelly, J.))); see also Overton, *supra* note 95, at 701 (“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 [in preventing corruption and the appearance of corruption] more than communications that do not contain such words.”).

<sup>199</sup> Justice Souter explains that “[w]hile we left open the possibility of a ‘genuine’ or ‘pure’ issue ad that might not be open to regulation under § 203, we meant that an issue ad without campaign advocacy could escape the restriction.” *WRTL*, 551 U.S. at 526 (Souter, J., dissenting) (internal citation omitted). Further, “[t]he implication of the adjectives ‘genuine’ and ‘pure’ is unmistakable: if an ad is reasonably understood as going beyond a discussion of issues (that is, if it can be understood as electoral advocacy), then by definition it is not ‘genuine’ or ‘pure.’” *Id.*

<sup>200</sup> See *id.* at 525 (“Any alert voters who heard or saw *WRTL*'s ads would have understood that *WRTL* was telling them that the Senator's position on the filibusters should be grounds to vote against him.”).

“unambiguously campaign related” advertisements, the dissent returns to *Buckley*’s focus on protecting the representative process in justifying an electioneering communications standard, an emphasis consistent with the election period model. It is this continuing tension, internalized in *Buckley* and exemplified by *WRTL*, between a tight focus on elections and a perspective that takes account of the larger democratic process that underlies debates surrounding the regulatory line and implicates broader questions about the relationship between political speech and the electoral process. I turn to those questions in the next Part.

#### IV. POLITICAL SPEECH AND THE VOTE

Citizen participation in the democratic process takes two primary forms: political deliberation and the exercise of the vote, protected respectively by the right of free speech and the right to vote. These rights have received different treatment by courts. The right of free political speech has largely been treated as sacrosanct; in the words of Justice Scalia, “[i]t is perhaps [the Court’s] most important constitutional task to ensure freedom of political speech.”<sup>201</sup> At the same time, as Justice Scalia has elsewhere noted, “no justification for regulation [of speech] is more compelling than protection of the electoral process.”<sup>202</sup> In this Part, I demonstrate that the difficulties in drawing the regulatory line in the electoral advocacy setting reflect a broader tension, appearing throughout election law, between protecting the vote through regulation and protecting political speech by prohibiting regulation.

The elections/politics line exemplifies the differing treatment of these forms of participation, allowing some regulation of speech closely tied to the vote while protecting other political speech against state involvement. The *WRTL* principal opinion re-inscribed this line after its elision in *McConnell*, freeing it from its roots in the vagueness doctrine in favor of a substantive foundation in the type of political speech that can be subject to regulation. In doing so, the opinion limits state regulation to the vote, either protecting the casting of ballots, as in *Burson*, or regulating activity that enters into the electoral process, as with contribution limits or corporate express advocacy—in either case requiring a direct connection to the election itself. On this model, restricting political speech that is not unambiguously election-related lacks the tight connection to the vote that has traditionally allowed for state intervention in this context. Ultimately, this distinction reduces the democratic process to the vote itself.

##### *A. Regulation of the Vote and Political Speech*

The Court has explained that

[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring

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<sup>201</sup> *Id.* at 503 (Scalia, J., concurring in part and concurring in the judgment).

<sup>202</sup> *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting).

elections; “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>203</sup>

The *Burson* Court likewise made clear the state’s authority to limit political speech in order to protect the exercise of the ballot.<sup>204</sup> On these views, invoking an interest in protecting the exercise of the vote can accord the state deference to regulate even political speech.

This move is consistent with other decisions addressing the electoral process.<sup>205</sup> In *Burdick v. Takushi*, the Court upheld a Hawaii law prohibiting write-in votes,<sup>206</sup> noting that the purpose of elections is to choose a winner.<sup>207</sup> The Court indicated that “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>208</sup> Likewise, in *Crawford v. Marion County Election Board*, the recent challenge to Indiana’s voter identification requirement, the Court held that the state’s interests in preventing voter fraud and maintaining public confidence in the electoral process justified, at least on a facial challenge, restrictions on the ballot that may burden some voters.<sup>209</sup> In ballot access cases, the Court has permitted state restrictions that make it difficult for third parties to get on the ballot as a means of protecting against voter confusion potentially caused by ballot overcrowding.<sup>210</sup> The common theme is that to avoid chaos, to protect the ability of voters to cast a ballot free of intimidation, confusion, and fraud, and to run elections efficiently, fairly, and reliably, the state can adopt a wide array of regulations that limit the right to vote or other political rights, including the right to free speech.

In contrast to the Court’s broad approval of state regulation of the voting process, regulation of political speech aimed at protecting the broader deliberative process has been largely disapproved. In *Mills v. Alabama*, which struck down a state law

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<sup>203</sup> *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); see also *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) (noting that “[t]he constitutional power of Congress to regulate federal elections is well established”).

<sup>204</sup> See *supra* notes 152–159 and accompanying text.

<sup>205</sup> See *Baker*, *supra* note 11, at 24–33 (discussing ways in which the state may regulate expression in the election context); *Briffault*, *supra* note 2, at 1766–71 (same).

<sup>206</sup> *Burdick*, 504 U.S. at 430.

<sup>207</sup> *Id.* at 438 (quoting *Storer*, 415 U.S. at 735).

<sup>208</sup> *Id.* at 433.

<sup>209</sup> See 553 U.S. 181, 128 S. Ct. 1610 (2008).

<sup>210</sup> See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189, 193–94 (1986) (recognizing the “important state interest” in “avoiding confusion, deception, and even frustration of the democratic process at the general election” (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971))).

prohibiting newspaper editorial endorsements of candidates the day before the election, the Court rejected the state interest in protecting the public ““from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day,”” because it is on election day that campaigning “can be most effective.”<sup>211</sup> The *Burson* majority’s distinguishing of *Mills* based on a distinction between the broader deliberative process and the direct exercise of the ballot further demonstrates the varying treatment of the voting and deliberative processes.<sup>212</sup> This point is sharpened by the Court’s recent decision in a challenge to Washington’s “blanket primary,” in which it acknowledged concerns about voter confusion, involving the actual design of the ballot itself.<sup>213</sup>

Consistent with the view that the primary purpose of the First Amendment is protection of political speech, the Court has blocked a number of attempts at state regulation of such speech. In striking down a California ban on party endorsements, the Court explained that “[c]ertainly the State has a legitimate interest in fostering an informed electorate. However, ‘[a] State’s claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.’”<sup>214</sup> The Court likewise found unconstitutional an Ohio ban on anonymous campaign speech upon concluding that no legitimate state interest justified regulation of such speech.<sup>215</sup> The Court’s skepticism about regulation of the speech of judicial candidates despite the distinct judicial role and concerns about prejudice presents a similar approach,<sup>216</sup> as do other cases emphasizing the importance of political speech despite asserted state interests in regulation.<sup>217</sup>

### *B. Framing these Rights in Election Speech Cases*

This discussion highlights important differences between the right to free speech and the right to vote. The right to free speech reflects a norm of liberty and takes the

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<sup>211</sup> 384 U.S. 214, 219–20 (1966) (quoting the Alabama Supreme Court’s decision, *State v. Mills*, 278 Ala. 188, 195–96 (1965)).

<sup>212</sup> See *Burson v. Freeman*, 504 U.S. 191, 209 n.11 (1992).

<sup>213</sup> *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454–57 (2008).

<sup>214</sup> *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228–29 (1989) (quoting *Tashjian v. Republican Party*, 479 U.S. 208, 221 (1986) (internal citations omitted)).

<sup>215</sup> *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 357 (1995) (“Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech.”).

<sup>216</sup> See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (striking down state prohibition on judicial candidates announcing their views on “disputed legal or political issues”).

<sup>217</sup> See, e.g., *Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999) (striking down various requirements imposed by state on initiative petition circulators under the First Amendment); *Meyer v. Grant*, 486 U.S. 414 (1988) (finding unconstitutional a state prohibition on paid petition circulators); *Brown v. Hartlage*, 456 U.S. 45 (1982) (finding Kentucky Corrupt Practices Act unconstitutional as applied to candidate’s public promise to serve in office at reduced salary).

form of a negative right, protecting against interference by the state,<sup>218</sup> while the right to vote is premised on equality and functions as a procedural right that cannot be separated from the rules that construct the vote itself.<sup>219</sup> Where the right to free speech allows the individual to engage in primary conduct free from government restriction, the right to vote entitles her to participate on an equal basis in a government-run process, leaving no way to avoid state involvement. The state is thus given broad deference to regulate the vote to protect against threats from private actors and little authority to regulate speech to protect the deliberative process.

The differing treatment of such threats reflects this divide. The perceived danger to the vote posed by private actors is evident in *Burson*'s extended description of the sketchy activity surrounding elections in the nineteenth century,<sup>220</sup> as well as in the judicial credulity about voter fraud in the recent voter identification cases<sup>221</sup> and the Court's emphasis on protecting against "chaos" in the voting process in the ballot access cases.<sup>222</sup> Indeed, Professor Pildes has suggested that the Court often sides with those in the democratic cultural clash who are concerned about disorder and stability rather than those who embrace the tumult.<sup>223</sup> In articulating a "fundamental right . . . to cast a ballot in an election free from the taint of intimidation and fraud,"<sup>224</sup> the Court defines regulation into the right and gives the state substantial deference to limit political rights in the name of protecting them. In contrast, in the political speech context, the threat from the state is seen as the more worrisome.<sup>225</sup> Though commentators

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<sup>218</sup> See Sullivan, *supra* note 151, at 667 (discussing this point).

<sup>219</sup> See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 265–66 (1994) (identifying the right to vote as a procedural right, a "right that can be exercised only in a government-created forum," as distinct from rights to engage in primary conduct like the right to free speech).

<sup>220</sup> See *Burson v. Freeman*, 504 U.S. 191, 200–05 (1992). For a colorful description of nineteenth-century voting, see Jill Lepore, *Rock, Paper, Scissors: How We Used To Vote*, NEW YORKER, Oct. 13, 2008, at 90 (noting, among other things, that "[i]n the middle decades of the nineteenth century, eighty-nine Americans were killed at the polls during Election Day riots").

<sup>221</sup> See, e.g., *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 1619 (2008) (concluding that "not only is the risk of voter fraud real but that it could affect the outcome of a close election" based on citations to Boss Tweed and evidence of one fraudulent voter in 2004 Washington gubernatorial election).

<sup>222</sup> See, e.g., *Storer v. Brown*, 415 U.S. 724, 730 (1974).

<sup>223</sup> See Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 714 (2001) ("Whether democracy requires order, stability, and channeled, constrained forms of engagement, or whether it requires and even celebrates relatively wide-open competition that may appear tumultuous, partisan, or worse, has long been a struggle in democratic thought and practice (indeed, historically it was one of the defining set of oppositions in arguments about the desirability of democracy itself."); cf. *Burson*, 504 U.S. at 228 (Stevens, J., dissenting) ("The hubbub of campaign workers outside a polling place may be a nuisance, but it is also the sound of a vibrant democracy.").

<sup>224</sup> *Burson*, 504 U.S. at 211.

<sup>225</sup> See, e.g., Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L.

have argued that in the modern environment state regulation can be consistent with First Amendment values,<sup>226</sup> the doctrine largely remains opposed to state regulation.

On this account, the state regulates elections as a formalized process that demands administration in order to achieve reliable, efficient, and democratic results, while public political deliberation is not treated as a “process” reaching a binding result and need not be administered, precluding state involvement. In the context of political speech, chaos is treated as a goal rather than something to be avoided at all costs.<sup>227</sup> We might debate whether chaos currently reigns with regard to political speech in the election setting in view of the nature of the media structure and the power of some private actors in that setting. Still, the longstanding (and historically justified) fear of state regulation of political speech has created a strong presumption against such restrictions. In short, current doctrine generally treats the vote as so important that the state *must* regulate it, and political speech as so important that the state *cannot* regulate it.

This divide gives rise to a number of concerns on both sides of the line. Whatever the case historically, it is far from obvious that the primary threat to the vote today is the actions of private actors. While there is some evidence of fraud by private actors in recent years, particularly in the absentee ballot context,<sup>228</sup> these practices are episodic and nothing like those described in such detail in *Burson*, which seared the Court’s imagination.<sup>229</sup> The chaos at issue in elections nowadays is often that created by state actors, either by difficulties in administering elections or by state regulations that prevent individuals from voting.<sup>230</sup> The controversy over voter identification

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REV. 1, 2 (1989) (“Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers.”).

<sup>226</sup> See, e.g., Cole, *supra* note 151, at 266 (“Where the laissez-faire model had focused almost exclusively on the threats to free expression posed by public actors, the First Amendment antitrust model recognized that a robust and wide-open debate could also be undermined by powerful private actors.”); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1415–16 (1986) (arguing that “contemporary social structure is as much an enemy of free speech as is the policeman” and that “[w]hen the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment”); Schauer & Pildes, *supra* note 15, at 1806 (questioning the notion that First Amendment values “are better served by treating government intervention as the unqualified enemy than by allowing the state a limited role in fostering the proliferation of voices in the public sphere or of increasing the importance of message and effort by decreasing the importance of wealth”).

<sup>227</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (discussing the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

<sup>228</sup> See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 22 (2007) (“There is widespread consensus among those who study voter fraud that the greatest potential for fraud—and certainly the most reported cases of such fraud—involve absentee ballots that are cast outside the presence of election officials.”).

<sup>229</sup> See *Burson*, 504 U.S. at 200–07.

<sup>230</sup> See Hasen, *supra* note 228, at 15–28 (discussing the “continued lack of confidence of voters in the competence of election officials”).

requirements likewise raises concerns that partisan actors can potentially manipulate the mechanics of electoral administration to achieve partisan ends by excluding voters.<sup>231</sup> Focusing concerns about democratic control on the vote itself may thus yield excessive deference to state regulation in that setting, in contrast to the distrust of regulation designed to protect effective representation.

In sum, the Court's approach has the effect of reducing the democratic process to the vote itself and distinguishing it sharply from the surrounding spheres of deliberation and representation, demanding state intervention in the former and largely prohibiting it in the latter. As an alternative, acknowledging the continuing process of democratic activity and recognizing that the dangers from the state and private actors flow unabated in each sphere and that values of equality and liberty might be maximized in both allows for an election period that bridges the two and accommodates settings in which values of both elections and politics are at issue.

#### V. REGULATING CORPORATE POLITICAL ADVERTISING IN THE ELECTION PERIOD

In this Part, I examine the context of corporate political advocacy presented by BCRA and the *WRTL* case as a proving ground for the election period model. The corporate political speech context has been characterized by a focus on the speech rather than the speaker, a framing that emphasizes the structural protection of the electoral process rather than questions of individual rights. This framing in turn marks the corporate political advocacy setting as fitting for the election period approach, especially in light of the corresponding recognition of a concern for public confidence in the electoral process. While *Citizens United* sharply limits Congress's authority to regulate corporate political speech, this discussion can provide guidance for any targeted regulation enacted in the future. In short, protecting speech because of a structural interest in its value for democratic governance will presume an account of the democratic process, and that account should include ideals of representation as well as the vote.

##### *A. Corporate Election Advertising and the First Amendment*

The BCRA advertising restrictions follow, both historically and conceptually, from general limits on corporate money in elections which have existed at the federal level for over one hundred years.<sup>232</sup> This history speaks to a continuing sense that

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<sup>231</sup> See *id.* at 5 (noting “the possibility that some laws, most prominently new laws requiring voters to show identification at the polls, are being enacted for partisan advantage rather than to remedy any real problem”).

<sup>232</sup> See *supra* note 183 and accompanying text. Some states restricted corporate contributions even before. See ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW xvii (1988) (noting that “[i]n 1897 four states—Nebraska, Missouri, Tennessee, and Florida . . . —prohibited corporation political contributions, in reaction

something about corporations threatens the political process and must be monitored or limited and, though it cannot itself justify campaign finance regulation or any particular limitation on corporate participation, forces us to grapple with where the appropriate line can be drawn, reflecting constitutional commitments to free speech and to an effective democratic process.<sup>233</sup> I do not seek to justify restrictions on corporate political activity from first principles, but to highlight, in light of the longstanding belief that such restrictions are necessary, that the structure of corporate speech protection lends itself to an election period model.

A number of reasons for limitations on corporate political participation appear in the literature: corporate speech is not the speech of any human speaker<sup>234</sup> or only reflects the investment interests of shareholders,<sup>235</sup> corporations are uniquely skilled at rent-seeking,<sup>236</sup> their state-created structure allows corporations to accumulate well-stocked coffers which they can deploy in the political process,<sup>237</sup> corporations fund

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against Mark Hanna's successful solicitation of corporate support for William McKinley" and noting enactment of state-level disclosure laws in the 1890s as well (citations omitted)).

<sup>233</sup> Cf. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) ("A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.").

<sup>234</sup> See Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 384 (2006) (noting that "no speaker interests are at stake in corporate speech: it is not the speech of shareholders, officers or directors, or any other constituency" in arguing that all corporate speech should be treated as commercial speech); Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1244-48, 1254 (1991) (characterizing business corporations as "utilitarian organizations" and arguing that "the speech of utilitarian organizations is devoid of expressive value and its protection depends exclusively on the listeners' interests served by it"); Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L. Q. 1, 6 (2001) (arguing that "[b]ecause corporate election-related spending decisions are not made in consultation with a corporation's shareholders or other constituents, such spending does not constitute individual expression" and thus "does not deserve the same First Amendment protection enjoyed by individual political spending").

<sup>235</sup> See Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1654-56 (1999) (discussing problems of "fractionated superagency").

<sup>236</sup> See, e.g., Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1113 (2002) (identifying the "plausible argument that the corporate form furnishes a competitive advantage in the market for legislation" as a basis for discriminating against corporate political speech); Issacharoff & Ortiz, *supra* note 235, at 1668 (suggesting that the corporate structure "makes the corporation a uniquely effective superagent," thus presenting a basis for *Austin's* distinction between corporations and individuals).

<sup>237</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (noting that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures").

advertisements with “other people’s money,”<sup>238</sup> or simply that corporations are not proper participants in the democratic process.<sup>239</sup> The consistent theme is that corporations are different, and different in ways that make people leery of their participation in the democratic process, either because they are more likely to get what they want from elected officials, because they wield disproportionate influence on voters, or because they are not people, citizens, or voters and behave differently than those actors in a way that can be harmful to the democratic process.

Determining whether and how the state can regulate corporate speech will depend on how and why that speech is protected in the first place. Numerous justifications have been advanced for the robust protection of free speech, most prominently the protection of individual autonomy and self-development, the value of free speech for an unrestricted marketplace of ideas and the search for truth, and the information needs of liberal democracy.<sup>240</sup> As commentators have argued, autonomy or self-realization interests are less compelling in the context of corporate speech than in the context of individual speakers.<sup>241</sup> The Supreme Court addressed this point in *First National Bank of Boston v. Bellotti*, a 1978 decision rejecting state restrictions on corporate advertising in referendum elections, indicating that a focus on the speech rights of corporations presented “the wrong question.”<sup>242</sup> The Court clarified: “The

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<sup>238</sup> See *id.* at 675 (Brennan, J., concurring); Winkler, *Beyond Bellotti*, *supra* note 149 (developing the “other people’s money” argument); Winkler, *Other People’s Money*, *supra* note 149 (discussing the history of the “other people’s money” argument).

<sup>239</sup> See, e.g., MUTCH, *supra* note 232, at 176 (noting that arguments against corporate participation “must be understood in the context of another, deeper question—whether corporations as entities should participate in politics at all”); ROBERT B. REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* (2007) (arguing for separation of capitalism and democracy, including added restrictions on corporate political activity); C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1174 (2004) (“The state concern need not reflect an inherent objection to the content of any view—nor to an interest in *keeping people ignorant* of any content. The reason for regulation is presumably a concern that participation *by this speaker* distorts the (constitutionally protected and valued) dialogue.”); Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1003 (1998) (arguing that the “picture of the corporation acting on behalf of a fictional shareholder leads to the conclusion that corporations are defined by the law and the market in a way that makes them inappropriate participants in the political debate”); Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2353 (2007) (arguing for the separation of business and politics); Daniel R. Ortiz, *The Unbearable Lightness of Being McConnell*, 3 ELECTION L.J. 299, 303 (2004) (arguing that the distinction between the treatment of individual speech and corporate speech “analogizes election spending more to voting than to ordinary speech” and that “[n]atural people can participate in politics this way; non-natural entities, like corporations and unions, cannot—and no one has a problem with that”).

<sup>240</sup> See generally FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

<sup>241</sup> See *supra* note 234 and accompanying text.

<sup>242</sup> 435 U.S. 765, 776 (1978).

proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged provision] abridges expression that the First Amendment was meant to protect.”<sup>243</sup> On this account, the protection of corporate political speech is based on its value for listeners.<sup>244</sup>

This “the speech not the speaker”<sup>245</sup> approach frames two important moves: first, it concentrates the inquiry on the speech itself, asking if it is the kind of expression protected by the First Amendment; and second, it reflects constitutional protection of the deliberative environment rather than the speaker personally. Following this approach, the express advocacy line provides a means of articulating which speech the state can constitutionally regulate in protecting the deliberative process. In de-emphasizing the speaker interest in the speech, this framing may allow for state regulation directed at protecting the deliberative environment, because a vision of the First Amendment premised on the audience interest in hearing the speech is susceptible to arguments predicated on an audience interest in being protected from the speech.<sup>246</sup> While campaign finance cases involving individuals have also highlighted the structural elements of robust First Amendment protection, there is in those contexts a personal right of the speaker, implicating participatory or dignitary interests, in the balance as well.<sup>247</sup> Here, that element is limited.<sup>248</sup>

Justice Scalia and Justice Kennedy challenge this account in their *Austin* dissents, arguing that corporate political speech does implicate significant individual interests in associational rights, as individuals join through the corporate form to advance interests, speech and otherwise.<sup>249</sup> Both dissents quote Tocqueville on the importance

<sup>243</sup> *Id.* The Court explicitly left open the question whether corporations have lesser First Amendment rights than individuals. *See id.* at 777–78 & n.13.

<sup>244</sup> *Id.* at 777 (“The 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.”); *see also* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”).

<sup>245</sup> *See* Greenwood, *supra* note 239, at 1003 (noting that *Bellotti* “explicitly rejects the notion that a corporation might have different speech rights from a human speaker, and insists that it is the speech, not the speaker, that determines constitutional protection”).

<sup>246</sup> *See* Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 986 (2008) (arguing that “[a]n audience-centered theory of free speech . . . cannot accept that the First Amendment is satisfied by government nonintervention into the market”).

<sup>247</sup> *See, e.g., Nixon v. Shrink Mo. Gov’t. PAC*, 528 U.S. 377, 418, 420 (2000) (Thomas, J., dissenting) (noting that “limiting contributions curtails individual participation” and that “the right to free speech is a right held by each American, not by Americans en masse”).

<sup>248</sup> *See* Dan-Cohen, *supra* note 234, at 1248 (noting that regulation of speech may be constitutional “when it targets corporations even though it would fail if individual speech was the target” because individuals are “also protected by an original active right to self-expression”).

<sup>249</sup> Likewise, Justice Scalia argues in *McConnell* that “[i]n the modern world, giving the government power to exclude corporations from the political debate enables it effectively to

of associations (including corporations) in American life and public debate,<sup>250</sup> and reject the argument that “these groups and their views are not of importance and value to the self-fulfillment and self-expression of their members, and to the rich public dialogue that must be the mark of any free society.”<sup>251</sup> However, there is reason to doubt the strength of an association argument in this context. To the extent the argument is premised on business corporations, there is no reason to believe that any investors look to those corporations to represent their speech interests rather than simply to make money.<sup>252</sup> Further, if the argument focuses on ideological advocacy corporations,<sup>253</sup> such groups may be constitutionally exempted from any regulation,<sup>254</sup> and if they are, it is likely because they are funded by for-profit corporations, the basic target of the regulation. As a result, this right of association argument in free speech form adds little to an argument premised on the audience’s right to hear the speech.

This dispute emerged as a tussle in the *WRTL* opinions over the “grassroots” nature of the ads, as *WRTL* had self-dubbed its advocacy efforts.<sup>255</sup> Justice Scalia seized on this characterization, complaining that BCRA had “undermine[d] the traditional and important role of grassroots advocacy in American politics”<sup>256</sup> and noting the “wondrous irony” that while “wealthy individuals dominate political discourse, it is this small, grass-roots organization of Wisconsin Right to Life that is muzzled.”<sup>257</sup>

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muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views.” *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., dissenting in part). Justice Kennedy there argues that corporations “are the engines of our modern economy,” that “[t]hey facilitate complex operations on which the Nation’s prosperity depends,” and that “[t]o say these entities cannot alert the public to pending political issues that may threaten the country’s economic interests is unprecedented.” *Id.* at 340 (Kennedy, J., dissenting in part).

<sup>250</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 693–94 (1990) (Scalia, J., dissenting) (quoting 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 109 (P. Bradley ed., Vintage Books 1948) (1840)); *id.* at 710–11 (Kennedy, J., dissenting) (quoting TOCQUEVILLE, *supra*, at 106).

<sup>251</sup> *Id.* at 710 (Kennedy, J., dissenting).

<sup>252</sup> *See supra* note 235 and accompanying text; *see also* Winkler, *Beyond Bellotti*, *supra* note 149, at 199 (noting that “it is hardly clear that corporate political speech serves any self-realization goals of the individuals who have chosen to associate with the corporate entity”).

<sup>253</sup> *See McConnell*, 540 U.S. at 258 (Scalia, J., dissenting in part) (noting that “with increasing frequency, incorporation is chosen by those who associate to defend and promote particular ideas—such as the American Civil Liberties Union and the National Rifle Association, parties to these cases”).

<sup>254</sup> *See supra* note 89 and accompanying text.

<sup>255</sup> *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 458 (2007) (describing what *WRTL* calls its “grassroots lobbying campaign”).

<sup>256</sup> *Id.* at 502–03 (Scalia, J., concurring in part and concurring in the judgment) (“If § 203 has had any cultural impact, it has been to undermine the traditional and important role of grassroots advocacy in American politics by burdening the ‘budget-strapped nonprofit entities upon which many of our citizens rely for political commentary and advocacy.’” (quoting *McConnell*, 540 U.S. at 340 (Kennedy, J., dissenting in part))).

<sup>257</sup> *Id.* at 503–04.

Justice Souter countered by emphasizing the “documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries, with no redolence of ‘grassroots’ about them.”<sup>258</sup> For Justice Scalia, then, BCRA strikes not only at audience interests but at speaker interests as well, while for Justice Souter, WRTL’s corporate status and corporate funding trumps any potential speaker interest.<sup>259</sup>

Consistent with a “speech not the speaker” approach, the principal opinion emphasizes the general availability of political speech, affirming the proposition that “[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>260</sup> Viewing WRTL’s ad as “grassroots” adds weight on the side of First Amendment protection; in avoiding this characterization, the principal opinion relies on the distinction between issue advocacy and express advocacy, letting the content of the speech shape the permissibility of regulation.

In specifying the use of express advocacy or its functional equivalent as the sole valid regulatory line, the principal opinion limits the regulatory sphere to speech about the election in a “commercial” sense, speech that solicits action by voters. We see a similar distinction in the commercial speech context.<sup>261</sup> The treatment of ads that invite voters to support or oppose a candidate recalls commercial speech cases in which the Court considered the level of First Amendment protection for speech that “does ‘no more than propose a commercial transaction.’”<sup>262</sup> Much as advertising is a distinctive form of speech,<sup>263</sup> we can read the *WRTL* principal opinion to indicate

<sup>258</sup> *Id.* at 522 (Souter, J., dissenting).

<sup>259</sup> Justice Souter points out that “[t]he bills for [the ads] were not paid by WRTL’s PAC, but out of the general treasury with its substantial proportion of corporate contributions; in fact, corporations earmarked more than \$50,000 specifically to pay for the ads.” *Id.* at 523 (Souter, J., dissenting) (citation omitted).

<sup>260</sup> *Id.* at 474 (majority opinion) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)); *see also id.* (“Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election.”).

<sup>261</sup> Kathleen Sullivan draws a different analogy, comparing express advocacy to incitement: “In Judge Hand’s view, only action verbs that were triggers to action were punishable, while speech merely increasing the probability that one would become subversive was to be allowed. Likewise, the lower courts have limited FEC discretion to determine what constitutes incitement to vote.” Sullivan, *supra* note 3, at 314 (citing *Masses Publ’g Co. v. Patten*, 244 F. 535, 537–43 (S.D.N.Y. 1917)).

<sup>262</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

<sup>263</sup> *See* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 VAND. L. REV. 693, 726 (2002) (noting that “[a]dvertising assumes a particular attitude towards the subject, one of promotion or ‘advocacy’”).

that speech that proposes a particular vote (even if it does more)<sup>264</sup> receives different constitutional protection than speech that educates and informs,<sup>265</sup> an approach consistent with *Bellotti*'s emphasis on the type of speech at issue.<sup>266</sup> This point recalls arguments that what makes a speaker's interest in commercial speech unworthy of robust constitutional protection is that in proposing a commercial transaction and with commercial gain as its primary motivation, the speaker forgoes First Amendment interests in its speech and advances speech protected by virtue of the audience's interest in hearing it.<sup>267</sup> Analogously, the express solicitation of votes constitutes the corporate speaker as a participant in the electoral process subject to regulation, rather than as an educator or provider of information.

The "speech not the speaker" framing sets up the clash of the speech interests and democracy interests in these cases as a clash of structural interests rather than of an individual right and a state interest.<sup>268</sup> This framing presents the opposite of the clash between rights and rights sometimes adopted in the voting context, for example in *Burson*<sup>269</sup> or some of the voter identification claims.<sup>270</sup> Here, rather than characterizing the state interest in rights terms,<sup>271</sup> *WRTL* frames the rights claim as a structural

<sup>264</sup> See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 852–53 (1999) (explaining that the definition is underinclusive and would be more accurate if phrased as "all speech that proposes a commercial transaction (whether or not it does more)").

<sup>265</sup> See *supra* text accompanying note 130.

<sup>266</sup> See *supra* notes 242–245 and accompanying text.

<sup>267</sup> See C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 653 (1982) (arguing that "the market mechanism, by forcing the enterprise to make the most efficient (profit-maximizing) decisions, dictates the content of the enterprise's speech, and thus separates the decision concerning speech content from the value decisions of either the employees or the owners of the enterprise"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 12 (2000) ("Commercial speech, however, does not seem a likely candidate for inclusion within public discourse, because we most naturally understand persons who are advertising products for sale as seeking to advance their commercial interests rather than as participating in the public life of the nation.").

<sup>268</sup> See Gerken, *supra* note 108, at 519–20 (noting Justice Breyer's move to structural framing in campaign finance context).

<sup>269</sup> See *supra* note 156 and accompanying text.

<sup>270</sup> Some courts have balanced the right to vote of voters without identification against the right to vote of other voters who have an interest in not having their votes diluted by fraudulent voters. See, for example, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)), for the proposition that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *But see Crawford v. Marion County Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610 (2008) (not relying on this framing).

<sup>271</sup> Ronald Dworkin has urged this move in the campaign finance context. See Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996, at 19, 21–23 (arguing that the right to vote includes a subsidiary right of equal influence on the electoral process).

interest in which the significance of the speech is its value for democratic governance, rather than the interest of the individual speaker.<sup>272</sup> Under this clash of structural interests, the Court must identify the extent to which the First Amendment mandates a hands-off approach to protecting speech in the democratic process, distinct from any individual interest in speaking. Further, if the speech interest is not seen as absolute, the Court must then determine whether the state interests in preventing undue influence on representatives and protecting public confidence in the democratic process can outweigh the corresponding interest in unrestricted deliberation.

This structural framing shifts the focus of the analysis from speech and rights to regulation of the political process—determining the sphere within which the state can intervene.<sup>273</sup> The use of an express advocacy line for regulation of political ads reveals a model in which the state’s interest in regulating activity explicitly within the election process is sufficiently weighty to justify the regulation of speech. Recognizing a role for the state in protecting representational integrity shifts this analysis, giving the state an interest in this larger sphere just as it has in protecting the vote. Ultimately, the question reduces to the role the government can play in the political process beyond administering the ballot-casting process.

#### *B. The Election Period Approach in the Corporate Advocacy Context*

The interest in regulating corporate political advertisements can be understood to stem from the way such ads insert themselves into the representative relationship. Broadcast ads differ from influence secured through more direct mechanisms, such as lobbying or campaign contributions, in their use of voters as a means by which to secure influence, a tool that can be most effective in the election period, when voters are both paying closer attention and can take direct action.<sup>274</sup> On a representational account, the concern is not about influence running from the advertisers to the public, but about the extent to which the benefit thought to be conveyed by any such influence can yield access and favor from elected officials.<sup>275</sup> While ideological advocacy

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<sup>272</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22–27 (1948); Post, *supra* note 15, at 1841 (explaining that “the Meiklejohnian model focuses on the capacity of citizens to receive and utilize information in deciding future action” and contrasting this model with a “participatory model”).

<sup>273</sup> The tension between individual rights and structural approaches is a longstanding one in the election law field. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643, 648 (1998) (arguing that “courts should shift from the conventional first-order focus on rights and equality to a second-order focus on the background markets in partisan control”); Gerken, *supra* note 108, at 504 (arguing that “[a]n individual-rights framework, however, does not provide adequate analytic tools for resolving” claims about the structure of the political process); HASEN, *supra* note 150, at 135 (arguing against supporters of the “structural approach” and arguing courts should only intervene in the political process to protect rights).

<sup>274</sup> See *supra* notes 41–45 and accompanying text.

<sup>275</sup> See *supra* note 198.

corporations are often authentically seeking to sway public opinion on their issues, the use of corporate funds and the corporate form can make such ads equally threatening, especially in light of the regular use of such organizations as conduits for corporate funds.<sup>276</sup>

The concern that these ads harm public confidence in the democratic process, deriving in its “appearance of corruption” form from *Buckley*, supports the focus on representation as well.<sup>277</sup> This public confidence argument is somewhat enigmatic; we don’t limit speech for other public confidence ends, so it is not obvious why a concern for public confidence in democracy would justify any limitation on speech.<sup>278</sup> Many reacted angrily when the Supreme Court invoked a seemingly analogous argument that the threat of voter fraud may cause voters to feel disenfranchised as a possible justification for voter identification laws,<sup>279</sup> and there is little evidence that these speech restrictions actually improve public confidence in the democratic process.<sup>280</sup>

The public confidence argument serves here as an analogue of the interest in participatory self-government, addressing the ways reduced trust in government can turn citizens away from the democratic activity necessary for the functioning of the representative relationship.<sup>281</sup> Much as contribution limits can be seen to “democratize the influence that money itself may bring to bear upon the electoral process,”<sup>282</sup> the BCRA ad restrictions correspondingly sought to democratize public discourse and its influence on representation by limiting the role of corporate actors in that realm.<sup>283</sup>

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<sup>276</sup> See, e.g., *McConnell v. FEC*, 540 U.S. 93, 128 (2003) (noting that “[b]ecause FECA’s disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity” and providing examples); *id.* at 197 (providing examples of misleading names used by advertisers). Corporate funds were earmarked for the WRTL ads. See *supra* note 259.

<sup>277</sup> See *supra* note 196 and accompanying text.

<sup>278</sup> See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 124 (2004) (noting the “extraordinary nature of the state’s interest in preventing appearances of corruption in the context of First Amendment law”); see also *McConnell*, 540 U.S. at 329 (Kennedy, J., dissenting in part) (rejecting a perception-of-corruption rationale for restrictions on political speech because “[t]his rationale has no limiting principle”).

<sup>279</sup> See *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”); see also Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 665 n.165 (collecting sources criticizing this move in *Purcell*).

<sup>280</sup> See Persily & Lammie, *supra* note 278, at 122–23.

<sup>281</sup> See Post, *supra* note 17, at 1134–36 (noting that the public confidence argument “forces us to confront the possibility that the achievement of democratic values may, in discrete circumstances, require carefully bounded structures of managerial control”).

<sup>282</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring).

<sup>283</sup> Cf. Joshua Green, *The Amazing Money Machine*, ATLANTIC MONTHLY, June 2008, at 52, 54 (listing “the effect of campaign-finance laws in broadening the number and types of people who fund the political process” as one of the primary forces shaping then-Senator

On this account, public disenchantment stemming from the “special access and guaranteed favor” that concentrated corporate and union wealth is perceived to receive and from ads seen as bids for such influence threatens to discourage the individual participation that is crucial for developing the dynamic interaction between representatives and the people upon which democratic legitimacy depends.<sup>284</sup> This account bolsters the second side of the relationship between the public and the representative: whereas the special access and undue influence secured by the funding of the ads can make the representative less responsive to public opinion,<sup>285</sup> the harm to public confidence created by the ads may threaten to inhibit participation in such a way as to limit the dynamic interaction with representatives. A majority of the Justices have taken such an argument seriously in the contributions and voter identification contexts, despite the lack of reliable empirical support.<sup>286</sup>

From this perspective, we might read the public confidence framing as a means by which the Court ratifies an expressive or aspirational move by the government signaling a commitment to promoting effective representation. Given the existence of threats to an effective representative process stemming from corporate bids for influence,<sup>287</sup> the recognition of public confidence concerns reinforces campaign finance

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Obama’s “ability to fully harness the excitement that his candidacy has created, in votes and in dollars”).

<sup>284</sup> Cf. STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* (1995) (arguing that negative political advertising on television suppresses voter turnout and contributes to disillusionment about politics); Richard R. Lau et al., *The Effects of Negative Political Campaigns: A Meta-Analytic Reassessment*, 69 J. POL. 1176, 1184 (2007) (concluding that “[n]egative campaigning has the potential to do damage to the political system itself, as it tends to reduce feelings of political efficacy, trust in government, and perhaps even satisfaction with government itself” though it does not appear to depress voter turnout).

<sup>285</sup> Cf. *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (noting that “[t]he evidence connects soft money to manipulations of the legislative calendar, leading to Congress’ failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation”).

<sup>286</sup> See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 1620 (2008) (noting that “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process”); *McConnell*, 540 U.S. at 144 (“Take away Congress’ authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’” (quoting *Shrink Mo.*, 528 U.S. at 390)). Stephen Ansolabehere and Nathaniel Persily call this argument into question in the voter ID context as an empirical matter. See Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1760 (2008) (concluding that “[t]he use of photo identification requirements bears little correlation to the public’s beliefs about the incidence of fraud” and that “[t]he possible relation of such beliefs to participation appears even more tenuous”); see also Persily & Lammie, *supra* note 278 (raising a similar challenge to the use of the public confidence argument in the campaign finance context).

<sup>287</sup> See *Crawford*, 128 S. Ct. at 1642 (Souter, J., dissenting) (arguing that “the force of the [public confidence] interest depends on the facts (or plausibility of the assumptions) said to

law's goal of shaping a more participatory and more democratically responsive representative process. As a result, though the undue influence argument has been placed in a corruption box, largely due to *Buckley*,<sup>288</sup> a better way to think about it is as a failure of representation.<sup>289</sup> A campaign finance scheme targeting such failures presents an attempt to protect the practice of representative democracy against the representational harms threatened by corporate influence.

The election period framing allows for calibration of the interest in effective representation. Much as attention to representation demonstrates that concerns about certain forms of influence are not limited to the voting process itself, the election period framing focuses regulation on the time when such concerns are most salient while retaining a close connection to the election setting. Simultaneously, the structural framing of the speech-focused approach shapes an account emphasizing the deliberative environment, and calls attention to the broader structure of the democratic process and the interests at stake on both sides of the election line. The combination of concerns about corporate political influence and the governing framework of First Amendment protection in this setting thus yields a context where regulation is constitutionally plausible. In turn, these meet with the democratic interest in protecting the deliberative environment in the pre-election period as a formative moment in the development of the representative relationship to shape the type of regulation for which the election period approach is appropriate. The election period framework does not do all the work; it is only once the speech in question may be subject to regulation that the concept can serve as a viable framework. While regulation of corporate political advocacy has not survived the Court's consideration of *Citizens United*, this analysis of that setting demonstrates the way the election period framework interacts with a structural protection of the democratic process and concerns about the effectiveness and legitimacy of the representative process to present a fruitful model of regulation.

#### CONCLUSION

The recent decision in *Citizens United v. Federal Election Commission* marks a decisive shift in campaign finance law, striking down restrictions on corporate electoral advocacy.<sup>290</sup> Though the full implications of *Citizens United* will emerge over

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justify invoking it"); *Shrink Mo.*, 528 U.S. at 395 (finding that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters").

<sup>288</sup> See *Landell v. Sorrell*, 406 F.3d 159, 163–64 (2d Cir. 2005) (en banc) (Calabresi, J., concurring in denial of rehearing en banc) (noting that "[e]fforts to tailor all campaign finance reform to corruption . . . surely have constrained possibilities for creative proposals that may not fit comfortably into the proffered box").

<sup>289</sup> See URBINATI, *supra* note 17, at 226 (arguing that campaign finance reform can be justified on the basis of preventing the undue influence of some private actors from creating representational failures).

<sup>290</sup> *Citizens United v. FEC*, No. 08-205, slip op. (U.S. Sup. Ct. Jan. 21, 2010).

time, I offer some early thoughts on the decision in connection with the discussion here. I suggest that the divide between Justice Kennedy's opinion for the Court and Justice Stevens' dissent<sup>291</sup> reflects a divide between an account of democracy focused on the vote itself and a broader vision in which the government would have some authority to promote self-government and protect the representative process. Ultimately, the debate over campaign finance in *Citizens United* stands in for a broader debate about the democratic process and the role of the state, the same divide underlying the election period model discussed here.

In rejecting an anti-corruption rationale for the challenged restrictions, Justice Kennedy emphasizes that “[i]ngratiation and access . . . are not corruption.”<sup>292</sup> This framing not only limits the model of corruption that can justify regulation<sup>293</sup> (and rejects *McConnell* on this point),<sup>294</sup> but sketches a theory of representation as well. Justice Kennedy previously advanced this account in his *McConnell* dissent, indicating that the threat of special access, which the *McConnell* majority accepted as a basis for regulation, was not a harm at all, but a dynamic inherent in democratic representation.<sup>295</sup> As he stated there (and repeated in *Citizens United*), “[i]t is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.”<sup>296</sup> In short, “[d]emocracy is premised on responsiveness,”<sup>297</sup> with the only regulable form of “[b]ad responsiveness” being quid pro quo corruption, demonstrated by “a relationship between an official and a *quid*.”<sup>298</sup> This account of representation denies the state a compelling interest in promoting a model of representation premised on ensuring responsiveness to the public more generally and preventing undue influence stemming from powerful interests.<sup>299</sup>

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<sup>291</sup> The dissent—technically, an opinion concurring in part and dissenting in part—is joined by Justices Ginsburg, Breyer, and Sotomayor. *Id.*

<sup>292</sup> *Id.* at 45.

<sup>293</sup> See Heather K. Gerken, *The Real Problem with Citizens United*, AM. PROSPECT, Jan. 22, 2010, [http://www.prospect.org/cs/articles?article=the\\_real\\_problem\\_with\\_citizens\\_united](http://www.prospect.org/cs/articles?article=the_real_problem_with_citizens_united).

<sup>294</sup> See *supra* notes 152–156 and accompanying text.

<sup>295</sup> See *McConnell v. FEC*, 540 U.S. 93, 291–98 (2003) (Kennedy, J., dissenting); see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (2003) (Kennedy, J., dissenting) (noting that “[t]here are no easy answers” to the question “[w]hether our officeholders can discharge their duties in a proper way when they are beholden to certain interests both for reelection and for campaign support,” but concluding that “the Constitution relies on one: open, robust, honest, unfettered speech that the voters can examine and assess in an ever-changing and more complex environment”).

<sup>296</sup> See *Citizens United*, No. 08-205, slip op. at 43–44 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting)); see also *id.* at 43 (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”).

<sup>297</sup> *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting).

<sup>298</sup> *Id.*

<sup>299</sup> Justice Scalia, who joined this portion of Justice Kennedy's *McConnell* dissent,

Justice Kennedy signaled the limits of this responsiveness framework with his opinion for the Court in *Caperton v. A.T. Massey Coal Co.*, which read the Constitution's due process guarantee to require recusal where a judge receiving "extraordinary" levels of campaign support in the form of independent expenditures<sup>300</sup> considered a case involving the supporter, creating a "serious, objective risk of actual bias."<sup>301</sup> While responsiveness is a virtue for representatives, it is not a virtue of judging; even so, any harm must be prevented by regulating the elected official rather than the private speaker.<sup>302</sup> The interplay of *Caperton* and *Citizens United* speaks to the tangle of speech, democracy, and rule-of-law ideals animating the doctrine and highlights the absence of concern about forms of legislative responsiveness short of the *quid pro quo* relationship.<sup>303</sup>

This account of representation aligns with the model of free speech the Court draws in *Citizens United*. Justice Kennedy emphasizes that "[t]he First Amendment confirms the freedom to think for ourselves,"<sup>304</sup> summing up a vision of the First Amendment in which the primary value of corporate speech, notwithstanding the identification of corporations as "associations of individuals,"<sup>305</sup> is the information it provides voters.<sup>306</sup>

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suggested a similar view in his own *McConnell* dissent. *Id.* at 259 (Scalia, J., dissenting) (noting that "[i]t cannot be denied . . . that corporate (like noncorporate) allies will have greater access to the officeholder, and that he will tend to favor the same causes as those who support him (which usually is *why* they supported him)" and that "[t]hat is the nature of politics—if not indeed human nature—and how this can properly be considered 'corruption' (or 'the appearance of corruption') with regard to corporate allies and not with regard to other allies is beyond me").

<sup>300</sup> Justice Kennedy referred to such expenditures as "contributions," thereby emphasizing the assistance they provide to candidates. *Caperton v. A. T. Massey Coal Co.*, 559 U.S. \_\_\_, 129 S. Ct. 2252, 2256, 2257, 2264–66 (2009).

<sup>301</sup> *Id.* at 2265 (concluding that "there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal").

<sup>302</sup> See *Citizens United*, No. 08-205, slip op. at 44–45 ("*Caperton's* holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."); cf. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 101–02 (2009) (framing this as a structural protection of electoral process).

<sup>303</sup> See *Citizens United*, No. 08-205, slip op. at 68–70 (Stevens, J., dissenting) (discussing *Caperton* and judicial elections).

<sup>304</sup> *Id.* at 40; see also *id.* at 24 ("The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."); *id.* at 39 ("Factions should be checked by permitting them to all speak, and by entrusting the people to judge what is true and what is false." (internal citation omitted)).

<sup>305</sup> *Id.* at 33, 38, 40 (referring to corporations as "associations of citizens")

<sup>306</sup> See *id.* at 25 ("[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."); *id.* at 38–39 ("By suppressing the speech of manifold corporations, both for-profit and non-profit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.").

This freedom is a protection of the listener, limiting the government's power "to command where a person may get his or her information or what distrusted source he or she may not hear."<sup>307</sup> The implication is that because Americans can think for themselves, more information cannot hurt them,<sup>308</sup> but can only help in the voting process.<sup>309</sup> Much as the Court emphasized the vote as a means of promoting proper representation, it treats free speech largely as a tool for casting that vote. Together, these approaches yield a role for the government in the democratic process largely limited to administering the election itself.

In contrast, Justice Stevens is concerned about "the integrity of elected institutions."<sup>310</sup> He argues that "in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets"<sup>311</sup> and that "[i]n a democracy, officeholders should not make public decisions with the aim of placating a financial benefactor."<sup>312</sup> The repeated "in a democracy" language in these statements suggests that these views stem from an underlying vision of what democracy demands.<sup>313</sup> This account of proper representation and governmental integrity counsels a responsiveness to the people generally rather than those who accrue heightened access or influence through financial support. Likewise, the concern for the public's "faith" emphasizes the state's responsibility to encourage democratic self-government. In recognizing here these state interests that extend beyond the vote, Justice Stevens follows his (and Justice O'Connor's) opinion for the Court in *McConnell* and Justice Souter's *WRTL* dissent.

The divide is thus clear. Because for the *Citizens United* majority the vote itself serves as the means of policing representation, the government cannot enact any speech restrictions that limit the ability to cast a fully informed vote. In contrast, the *Citizens United* dissenters' concerns about proper representation and democratic integrity allow for at least some targeted regulation of election-related speech to promote representation and popular self-government. The question may ultimately reduce to how much weight we believe the vote can carry as an instrument of democratic governance.

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<sup>307</sup> *Id.* at 40.

<sup>308</sup> *See id.* at 45 (noting that "it is our law and our tradition that more speech, not less, is the governing rule).

<sup>309</sup> *See supra* note 227 (presenting sources challenging this model).

<sup>310</sup> *Citizens United*, No. 08-205, slip op. at 4 (Stevens, J., concurring in part and dissenting in part) (stating that "[t]he Court's ruling threatens to undermine the integrity of elected institutions across the nation"). Recall Justice Souter's emphasis on "integrity" in his *WRTL* dissent. *See supra* notes 182–183 and accompanying text. Notice also Justice Kennedy's subtle response to this point, emphasizing "the primary importance of speech itself to the integrity of the election process." *Citizens United*, No. 08-205, slip op. at 17.

<sup>311</sup> *Id.* at 55 (Stevens, J., dissenting).

<sup>312</sup> *Id.* at 59 n.63 (applying this view "except to the extent that the benefactor is seen as representative of a larger constituency or its arguments are seen as especially persuasive").

<sup>313</sup> *See also id.* at 57 (arguing that the majority's approach "disregards our constitutional history and the fundamental demands of a democratic society"); *id.* at 63 ("A democracy cannot function effectively when its constituent members believe laws are being bought and sold.").

The treatment of the disclosure and disclaimer rules applicable to electioneering communications under BCRA reflects this dynamic as well. In challenging these requirements, *Citizens United* raised a question left open by the *WRTL* decision: if the government cannot ban ads that are not the functional equivalent of express advocacy, can any forms of regulation be premised on the election period? The *Citizens United* Court disposed of this claim relatively easily, noting the previously recognized interests in “‘provid[ing] the electorate with information,’” and “‘insur[ing] that the voters are fully informed’ about the person or the group who is speaking.”<sup>314</sup> Further, because “disclosure is a less restrictive alternative to more comprehensive regulations of speech,”<sup>315</sup> even after *WRTL* the requirements could constitutionally apply to electioneering communications and not express advocacy alone. The disclosure context thus presents the intersection of the competing accounts, with the Justices in the majority approving a regulation that increases the available quantum of information for making electoral choices,<sup>316</sup> and the dissenters approving a regulation designed to protect the integrity of the democratic process as well, by enabling monitoring and deterring corruption.<sup>317</sup> On this account, disclosure requirements present the best of both worlds.

While commentators have begun to debate ways in which regulation might be more closely targeted at particular corporations, we should also consider how any such regulation might be structured. To take one example, new limits on foreign-controlled corporations are being proposed by Congress.<sup>318</sup> Can such limits be based on an electioneering communications framework, as the statute barring participation by “foreign nationals” in the electoral process currently provides?<sup>319</sup> The *Citizens United* Court indicated that protecting against foreign influence in the political process could be a compelling government interest.<sup>320</sup> The Court’s discussion may

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<sup>314</sup> *Id.* at 52–53 (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003) and *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)). This portion of the opinion was joined by all the Justices except Justice Thomas.

<sup>315</sup> *Id.* at 53.

<sup>316</sup> *Id.* at 55 (concluding that disclosure and related transparency requirements “enable[] the electorate to make informed decisions and give proper weight to different speakers and message”).

<sup>317</sup> *See McConnell*, 540 U.S. at 196 (agreeing that “the important state interests that prompted the Buckley Court to uphold FECA’s disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA”).

<sup>318</sup> *See* David D. Kirkpatrick, *Democrats Try to Rebuild Campaign-Spending Barriers*, N.Y. TIMES, Feb. 12, 2010, available at <http://www.nytimes.com/2010/02/12/us/politics/12citizens.html> (discussing proposed legislation).

<sup>319</sup> *See* 2 U.S.C. § 441e(a)(1)(C) (2006).

<sup>320</sup> *See Citizens United*, No. 08-205, slip op. at 46–47 (“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”).

leave open the possibility that, as in the contexts of judges or *quid pro quo* deals, responsiveness to foreign nationals is a form of “bad responsiveness” in the representation process and may be limited on that basis, thus accommodating an electioneering communications framework. Again, an underlying account of what democracy both demands and allows would be doing the work here. My goal is to identify and assess that theory.

In calling attention to the varying accounts of democracy embedded in the judicial approaches to campaign finance regulation, this paper counsels greater accommodation of state protection of the representative process—and not only the vote itself—and seeks to integrate campaign finance regulation into a larger account of the democratic process. In this light, BCRA’s reshaping of election speech regulation through the development of an election period provokes deeper questions underlying the goals, forms, and legitimacy of regulating political activity in the election setting and interrogates our conception of the role of the state in regulating the democratic process. Articulating a sharp distinction between politics and the vote is one way of striking a balance, avoiding “chaos” in the voting process while leaving the deliberative environment free from government regulation. I advance the election period framework as a model of continuity between politics and elections, seeking the best of representative democracy, combining the democratic voice of the public and a properly representative government in both periods.

Congress’s expansion of the electoral domain in BCRA might thus be read as a tacit statement of democratic theory, emphasizing the broader inputs into democratic legitimacy beyond the vote itself, while the *WRTL* principal opinion and the *Citizens United* decision articulate and reinvigorate an opposing theory in which the vote is sharply distinguished from a surrounding sphere of political deliberation into which the state cannot enter. As a result, identifying the significance of the electoral setting beyond the fact of ballot-casting is crucial in developing frameworks for state administration of the political process. As voting scholars consider administrative models of election law,<sup>321</sup> and as we enter a new era of thinking about campaign finance regulation, we would do well to focus on the proper scope of state involvement in structuring the operation of our democratic process.

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<sup>321</sup> See Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 746–48 (2006) (discussing utility of administrative law paradigms in the right to vote context); Issacharoff, *supra* note 9, at 1458 (noting “that some pressures toward an administrative law of elections are beginning to present themselves here” in America).