OF BALLOT BOXES AND BANK ACCOUNTS: RATIONALIZING THE JURISPRUDENCE OF POLITICAL PARTICIPATION AND DEMOCRATIC INTEGRITY

Participation in the political process comes in many forms. A few people run for office. An even smaller number spend more money than most will make in a lifetime to support their policy preferences.[1] Millions make small contributions to candidates or volunteer for campaigns.[2] But by far the most common way Americans take part in our democracy is through voting.[3] Without the participation of those voters, elected institutions would lack legitimacy, or even cease to function. Yet, despite the ballot box lying at the heart of our constitutional structure and representing the most frequent means by which Americans participate in the political process, your ballot receives less protection under the Constitution than your checkbook. Indeed, the level of protection that the current constitutional framework provides to a given form of participation ends up being inversely proportional to the number of Americans who use that method to engage with our elected institutions. The constitutional doctrine governing the political process has twisted into the mirror image of what one would expect a healthy democracy to employ. This Note identifies the case law creating that distortion and suggests that the doctrine can be analyzed under a uniform analytical framework that weighs a fundamental right to political participation against a government interest in the integrity of elected institutions. It concludes by proposing two approaches that would improve the doctrine's coherence and increase political participation, which are both values that the current constitutional regime has undermined.

Cases involving campaign finance regulations and voting rights both start in the same place: a government actor tries to limit a form of political participation. Restricting the financing of campaigns for political office potentially infringes on the First Amendment rights of candidates, donors, and supporters. Many voting rights cases evaluate constitutional protections for suffrage and the rights of voters to political expression and association. In both, the Supreme Court has recognized

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[1] *See, e.g.*, Ctr. for Responsive Politics, *2016 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&disp=D&type=V&superonly=N [https://perma.cc/PB6M-2AM9] (listing the one hundred individuals who — according to available disclosure data — each made more than $1,400,000 in political expenditures during the 2016 election cycle).

[2] Shane Goldmacher, *Trump Shatters GOP Records with Small Donors*, POLITICO (Sept. 19, 2016, 5:04 AM), https://www.politico.com/story/2016/09/trump-shatters-gop-records-with-small-donors-228338 [https://perma.cc/B69U-BKDY] (noting that as of August 2016, the presidential campaigns of the two major-party candidates had more than 4.4 million individual donors).

[3] Philip Bump, *More Votes Were Cast in 2016 than in 2012 — But That Doesn't Mean Turnout Was Great*, WASH. POST: THE FIX (Nov. 15, 2016), http://wapo.st/2gcVlfG [https://perma.cc/73J9-EQKB] (stating that the total number of votes cast for President in 2016 was "about 130 million").

an unwritten but fundamental constitutional right to participate in the political process. The boundaries of that right have expanded over time when expressed through money, but not when expressed through the polls. Complicating the doctrinal framework, government actions limiting political participation are subject to varying degrees of scrutiny. Government actors have responded by invoking an interest in preserving the integrity of and public confidence in government institutions. That interest, however, receives far greater deference in the voting rights cases than in those involving campaign finance.

This Note argues that while the common interest and right implicated by these doctrines weigh in favor of a more consistent jurisprudence, the case law has instead developed incoherently, diverging with destructive pace in the past decade. First, the Court has upheld state voter identification laws despite their burden on participation and the weakness of the laws' link to the government's integrity interest. Second, the Supreme Court has struck down independent expenditure limits — that is, limits on expenditures not made in coordination with candidates — in the face of overwhelming evidence that such regulations serve the integrity interest. The assumptions and reasoning employed thus inconsistently protect foundational constitutional values. Absent an effort to restore coherence to the constitutional jurisprudence of the electoral process, the ability to spend money in support of a candidate will continue to receive more protection than the right to vote for one. That imbalance floods the political conversation with the preferences of wealthy interests while simultaneously threatening the suffrage of the poorest and least politically powerful elements of society, which contain people far less likely to be able to utilize the expansive protections granted to speech. This growing asymmetry in the legal protections for political participation has led at least one scholar to conclude that the Court "seems more concerned with protecting the ability of the powerful to spend money in the political process than with protecting equal access to the levers of political power."[4]

To remedy this distortion of the constitutional norms underlying representative democracy, the Court could prioritize the right to political participation by decreasing the deference to government actors in the voter identification context. Alternatively, it could apply the more expansive conception of the integrity interest from the voting cases to campaign finance regulations. While the former would more straightforwardly promote political participation, the latter would mitigate the participation-suppressing effect of the growing ability to translate wealth into political power. Both have shortcomings, however, that illuminate the difficulty of crafting consistent doctrine when data and public perception are relevant to the constitutional analysis.

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[4] Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 41 (2012); *see also id.* at 32.

In Part I, this Note argues that campaign finance and voting rights cases imply a common right of political participation, despite the Court's references to scattered constitutional provisions. Part II then establishes that the government interests recognized in these cases are also merely different facets of a more fundamental interest in protecting the integrity of elected institutions. Having identified in the prior Parts areas in which the Court inconsistently applies the shared rights-interest framework, Part III argues in favor of a more consistent jurisprudence and suggests two approaches for achieving it.

I. THE RIGHT TO POLITICAL PARTICIPATION

Though framed as implicating distinct rights grounded in the First and Fourteenth Amendments or inferred from the structure of the Constitution, the major voting rights and campaign finance cases of the past half century all involve a burden on an underlying right to participate in the political process. That these doctrinal strands implicate variations of the same constitutional value suggests the laws across them should be subjected to a uniform level of scrutiny, a proposition explored in Part III. This Part will demonstrate how a right to political participation underlies the key opinions, and then contrast the constitutional frameworks employed by the Court.

A. Participation Through Money

Campaign finance cases consistently describe contribution and expenditure limits as burdening not only the ability to use money to facilitate speech and association, but also the very right to participate in the political process. A discussion of the doctrine must begin with *Buckley v. Valeo*,[5] the seminal 1976 case in which the Court held that restrictions on expenditures not made in coordination with a candidate must overcome strict scrutiny, whereas limits on contributions to candidates are subjected only to the "closest scrutiny."[6] The Court noted that unlike with expenditures, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."[7] Still, the Court described the rights restrained by contribution limits as "basic constitutional freedom[s]"[8] that "lie[] at the foundation

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[5] 424 U.S. 1 (1976) (per curiam).

[6] *Id.* at 25, 44. Though "[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion," Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000), the Court "ha[s] consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending," FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259–60 (1986).

[7] *Buckley*, 424 U.S. at 21.

[8] *Id.* (quoting Kusper v. Pontikes, 414 U.S. 51, 57 (1973)).

of a free society."[9] Both contribution and expenditure limits implicate political participation, which involves "the most fundamental First Amendment activities."[10]

Buckley thus rejected the contention that money could turn speech or association into more readily regulated conduct, and began using the First Amendment as a textual hook to craft a more general right to political participation.[11] As the Court noted, the facilitation of "citizen participation" underlies many campaign finance regulations.[12] This connection to political participation solidified over the campaign finance cases of the Rehnquist Court. In *McConnell v. FEC*,[13] the Court noted that the challenged restrictions "tangibly benefit public participation in political debate,"[14] "[b]ecause the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action.'"[15] *Austin v. Michigan State Chamber of Commerce*[16] and *FEC v. Massachusetts Citizens for Life, Inc.*[17] relied on the same argument in upholding restrictions on the ability of corporations to participate in politics by noting the negative effect that such involvement could have on the political participation of noncorporate actors.[18]

The decisions of the Roberts Court have only expanded on this relationship between speech, association, and political participation. In *Randall v. Sorrell*,[19] the Court for the first time struck down a contribution limit.[20] Justice Breyer, writing for a fractured Court, found that the low limits at issue were a "substantial restriction[]" on political participation.[21] The severity of the burden led the Court to strike down the limits under heightened scrutiny,[22] despite contributors retaining the symbolic ability to make *some* donation that was the key to *Buckley*'s dichotomy.[23] The Court supported its reasoning with the observation that the contribution limits were "not narrowly tailored"[24] — a surprising conclusion given that the *Buckley* test only demands the restrictions

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9 *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)).
10 *Id.* at 14.
11 *See id.* at 16, 19–23.
12 *Id.* at 36.
13 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310, 365 (2010).
14 *Id.* at 137.
15 *Id.* (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).
16 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. at 365.
17 479 U.S. 238 (1986).
18 *See Austin*, 494 U.S. at 659–60; *Mass. Citizens for Life*, 479 U.S. at 257–59.
19 548 U.S. 230 (2006).
20 *Id.* at 236 (plurality opinion).
21 *Id.* at 253.
22 *Id.* at 262–63.
23 Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam).
24 *Randall*, 548 U.S. at 261 (plurality opinion).

be "closely drawn."[25] *Randall* instead emphasized more generally that the challenged laws limited the ability of "individuals to participate in the political process."[26]

This expansion of both the protection for and content of the right to political participation continued in *Citizens United v. FEC*,[27] in which the Court overruled *Austin* and *McConnell* to hold that restrictions on political participation through independent expenditures could not be based on the speaker's corporate identity.[28] The majority distinguished the speech of Political Action Committees (PACs) from that of the organizations that had formed them.[29] A PAC did not provide an outlet for the speech of the corporation, and even if it did, such an option would not relieve the restriction on the right because "PACs are burdensome alternatives."[30] Because of these "onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign."[31] The opinion described the value of the potentially suppressed speech in terms of political participation, noting that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[32] Moreover, by only regulating corporations, the "restrictions distinguish[] among different speakers," letting some participate when others cannot.[33] Finally, the Court observed that protection under the First Amendment should "not depend on the speaker's 'financial ability to

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[25] *Buckley*, 424 U.S. at 25. Justice Thomas, joined by Justice Scalia, concurred in the judgment and criticized the plurality's application of *Buckley* as being neither "coherent" nor "principled." *Randall*, 548 U.S. at 266 (Thomas, J., concurring in the judgment). This separate opinion argued that strict scrutiny should apply to both contribution and expenditure limits because they equally burden First Amendment rights, and suggested the plurality had instead applied a "newly minted, multifactor test." *Id.* at 267. Given Justice Breyer's invocation of the closely drawn test, narrow tailoring, and the government's compelling interest in preventing corruption or its appearance, the precise test applied by the plurality seems unclear. As Justice Thomas pointed out, however, a higher standard of scrutiny seems to be one of the few ways to explain why the limits here were struck down when those in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and *Buckley* were upheld. *Randall*, 548 U.S. at 269 (Thomas, J., concurring in the judgment). Regardless of the precise constitutional test, the plurality opinion evinced a greater respect for the burden caused by contribution limits than did earlier decisions.

[26] *Randall*, 548 U.S. at 258 (plurality opinion); *id.* at 261 (describing the limits in question as "hamper[ing] participation").

[27] 558 U.S. 310 (2010).

[28] *Id.* at 319.

[29] *Id.* at 337 ("A PAC is a separate association from the corporation. So the PAC exemption . . . does not allow corporations to speak.").

[30] *Id.*

[31] *Id.* at 339.

[32] *Id.*

[33] *Id.* at 340.

engage in public discussion.'"[34] Because of these features of the regulatory scheme, the Court subjected it to strict scrutiny.[35]

The building of a fundamental right to political participation culminated in *McCutcheon v. FEC*.[36] Writing for a plurality, Chief Justice Roberts described running for office, donating to a campaign, voting, advocating, and volunteering as growing out of a foundational "right to participate in electing our political leaders."[37] The opinion observed that "[t]here is no right more basic in our democracy"[38] than "participat[ing] in the public debate through political expression and political association,"[39] and held that aggregate contribution limits would interfere with political speech by forcing large donors to choose which candidates to support.[40] Just as in *Randall*, the Court discounted *Buckley*'s distinction between the First Amendment rights implicated by contribution limits versus expenditure limits,[41] and may have effectively elevated the constitutional protection for the right to contribute to that of the right to spend.[42]

B. Participation Through the Ballot

Voting connects logically to the right to political participation, and the Court has frequently invoked participation when evaluating restrictions on the exercise of the franchise. The text of the Constitution does not create a general, affirmative right to vote. However, the Supreme Court has long inferred from the Equal Protection Clause of the Fourteenth Amendment and the protections of the First Amendment a fundamental right to cast a ballot on equal terms with other citizens.[43] In *Yick Wo v. Hopkins*,[44] the Court stated that "voting . . . is regarded

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[34] *Id.* at 350 (quoting Buckley v. Valeo, 424 U.S. 1, 49 (1976) (per curiam)).

[35] *Id.* at 339–40.

[36] 134 S. Ct. 1434 (2014). Justices Scalia, Kennedy, and Alito joined the Chief Justice's opinion, and Justice Thomas concurred in the judgment. *Id.* at 1434, 1440.

[37] *Id.* at 1440–41 (plurality opinion).

[38] *Id.* at 1440.

[39] *Id.* at 1448.

[40] *See id.* at 1448–50.

[41] *See id.* at 1445–46.

[42] *See The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 191, 207–08 (2014) (describing Justice Thomas's contention that *McCutcheon* cannot be reconciled with *Buckley*).

[43] *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) (observing that "the right to vote, *per se*, is not a constitutionally protected right," but that there exists a "protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters"). Though these cases often involve challenges under the Fourteenth Amendment's Equal Protection Clause, the Supreme Court has acknowledged that the "'fundamental rights' strand of equal protection analysis" applied here differs little from that which would be employed in a direct challenge under the First and Fourteenth Amendments. Anderson v. Celebrezze, 460 U.S. 780, 786 n.7 (1983).

[44] 118 U.S. 356 (1886).

as a fundamental political right."[45] During the second half of the twentieth century, the Supreme Court vigorously expanded the boundaries of that right. In *Reynolds v. Sims*,[46] the Court held that "an inalienable right to full and effective participation in the political process[]" belongs to "each and every citizen,"[47] and that oblique restrictions can deny "suffrage . . . just as effectively as by wholly prohibiting the free exercise of the franchise."[48] Shortly thereafter, the Court made clear that while "the States have the power to impose voter qualifications . . . if a challenged statute grants the right to vote to some citizens and denies the franchise to others," strict scrutiny should be applied.[49]

After *Reynolds*, decisions began to ground the right to vote more explicitly in the First Amendment,[50] and found strict scrutiny appropriate only when "heavy burdens" existed.[51] But, beginning with *Burdick v. Takushi*,[52] the cases delineate a less robust participatory right. Though acknowledging "voting is of the most fundamental significance,"[53] *Burdick* held that strict scrutiny need not apply to every "law that imposes any burden."[54] Instead, courts must evaluate "the character and magnitude of the asserted injury" and "the precise interests put forward by the State.'"[55] Only severe burdens are then subject to strict scrutiny.[56] "[R]easonable, nondiscriminatory restrictions" are evaluated under a lower standard.[57]

In *Clingman v. Beaver*,[58] the Court affirmed that voting rules "impos[ing] severe burdens on associational rights must be narrowly tailored to serve a compelling state interest,"[59] but limiting participation in primaries through registration requirements created only a "minor

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[45] *Id.* at 370; *accord* Smiley v. Holm, 285 U.S. 355, 366 (1932) (referencing participation in elections as a "fundamental right").

[46] 377 U.S. 533 (1964).

[47] *Id.* at 565.

[48] *Id.* at 555.

[49] Dunn v. Blumstein, 405 U.S. 330, 336–37 (1972).

[50] *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).

[51] Williams v. Rhodes, 393 U.S. 23, 31 (1968); *accord* Kusper v. Pontikes, 414 U.S. 51, 58–61 (1973); *Dunn*, 405 U.S. at 336–37; Bullock v. Carter, 405 U.S. 134, 144 (1972). These early cases do, however, struggle to distinguish between total and partial abridgments of the participatory right expressed through voting. *Compare* Rosario v. Rockefeller, 410 U.S. 752, 757 (1973) (holding that a "time deadline" on enrollment in a political party did not abridge the right to associate freely), *with Kusper*, 414 U.S. at 60–61 (striking down a time-based requirement for participation in a primary).

[52] 504 U.S. 428 (1992).

[53] *Id.* at 433 (quoting Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)).

[54] *Id.* at 432.

[55] *Id.* at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

[56] *Id.* at 434, 438.

[57] *Id.* at 434 (quoting *Anderson*, 460 U.S. at 788).

[58] 544 U.S. 581 (2005).

[59] *Id.* at 586 (citing Timmons v. Twin Cities Area City New Party, 520 U.S. 351, 358 (1997)).

barrier[]" that was "ordinary and widespread."[60] Justices O'Connor and Breyer — supplying the fifth and sixth votes for much of the opinion — offered a more robust description of the burdened participatory right: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[61] They concluded that "heightened scrutiny" would sometimes be necessary "to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary . . . restrictions."[62]

The Court's latest decision in this area produced a series of fractured opinions. In *Crawford v. Marion County Election Board*,[63] a three-Justice plurality announcing the judgment of the Court was accompanied by a second group of three Justices concurring in the judgment.[64] Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, wrote the lead opinion and found that an Indiana law requiring nearly all voters to present photo identification survived a facial challenge under the First and Fourteenth Amendments.[65] The Court focused its analysis on the balancing test used by *Burdick*.[66] Justice Stevens concluded that because the necessary identification required no payment to the state:

> For most voters who need [state identification], the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.[67]

The opinion did observe that the necessary identification documents included items that required payment to obtain, and could be tricky to come by for some voters.[68] That acknowledgement left open the possibility that as applied, the burden of obtaining identification could be severe enough to warrant additional scrutiny.[69] The decision suggests, however, that the relevant interest was that of voters generally, not those actually burdened.[70]

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[60] *Id.* at 593.

[61] *Id.* at 599 (O'Connor, J., concurring in part and concurring in the judgment) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

[62] *Id.* at 603.

[63] 553 U.S. 181 (2008).

[64] *Id.* at 183.

[65] *Id.* at 188–89 (plurality opinion).

[66] *Id.* at 190. The Court suggested that the rights implicated by restrictions on ballot access in the primary elections cases were analogous to those in *Crawford*. *Id.*

[67] *Id.* at 198.

[68] *Id.* at 198 n.17, 199.

[69] *Id.* at 199–200.

[70] *See id.* at 202–03.

The opinion's most idiosyncratic elements are contained within this portion of its analysis. Justice Stevens attacked the empirical basis for the plaintiffs' claims of burden, approvingly citing the trial court's negative evaluation of a key expert witness and disparaging the plaintiffs' reliance on "extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court" to bolster claims about the burden.[71] Depositions failed to "provide any concrete evidence of the burden imposed," and even when eligible voters stated that they had actually been denied photo identification, there existed "no indication of how common the problem [was]."[72] Finally, Justice Stevens devoted a lengthy footnote to rebutting Justice Souter's contention in dissent that even evidence available online demonstrated that tens of thousands of Indiana citizens could face difficulty in obtaining the necessary identification.[73] He concluded that "[s]upposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication."[74]

Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment.[75] He would have dispensed with Justice Stevens's unusual evidentiary analysis in favor of a categorical analysis.[76] For this third of the Court, "[o]rdinary and widespread burdens" become severe only when "they go beyond the merely inconvenient."[77] Any burden must be evaluated with respect to the public writ large because "individual impacts" are simply not "relevant to determining the severity of the burden."[78] Unlike in the campaign finance cases, the conservative wing of the Court ignored actual burdens on some voters because the restrictions were generally applicable and facially nondiscriminatory.[79]

C. Inconsistent Protections

Despite the case law across these two areas consistently referencing the same right to participate in the political process, the level of scrutiny applied across and within them inexplicably differs, even when the burdens are described in nearly identical terms. For example, in the campaign finance cases the Court has acknowledged that contribution and expenditure limits both burden the participatory right. Yet, instead of subjecting both to strict scrutiny, the Court has "applied a lesser but still 'rigorous standard of review'" to contribution limits that requires only

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[71] *Id.* at 200.
[72] *Id.* at 201–02.
[73] *Id.* at 202 n.20.
[74] *Id.*
[75] *Id.* at 204 (Scalia, J., concurring in the judgment).
[76] *See id.*
[77] *Id.* at 205.
[78] *Id.*
[79] *See id.* at 207.

a "sufficiently important interest" and that the restriction be "closely drawn."[80] Whether or not this distinction should ever have been made,[81] the Court has long defended it on the basis that "contribution limits impose a lesser restraint on political speech" than expenditure limits because voters are still able to symbolically associate themselves with candidates through some level of contribution.[82] That justification could not have been present in *McCutcheon*, where the Court characterized the aggregate contribution limits in question as completely preventing the support of some candidates through contributions.[83] Once a donor reached the aggregate limit, the ability to nominally or symbolically associate with additional candidates — supposedly the linchpin of the *Buckley* dichotomy — disappeared. The *Buckley* rationale for differentiating the scrutiny applied to contribution and expenditure limits also fails to explain the result in *Randall*, where no one disputed that voters could still give *something*.[84] The problem was that people could not give enough, despite *Buckley*'s clear guidance that "the expression rests solely on the undifferentiated, symbolic act of contributing."[85] Even within campaign finance, the Court has failed to uniformly protect the right to political participation.

Further complicating the doctrinal framework, the voting rights cases have adopted an entirely different scheme of scrutiny. *Burdick* held that burdens on voters were inevitable in any election regulation and that not all restrictions triggered strict scrutiny.[86] The test echoed in form *Buckley*'s discussion of the extent of the burden.[87] However, unlike the heightened scrutiny *Buckley* applied to even "marginal restriction[s]" on political association and communication[88] and the strict scrutiny applied to any restriction on independent political expenditures, "reasonable, nondiscriminatory restrictions" on voting require only "important regulatory interests."[89]

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[80] McCutcheon v. FEC, 134 S. Ct. 1434, 1444 (2014) (plurality opinion) (quoting Buckley v. Valeo, 424 U.S. 1, 25, 29 (1976) (per curiam)).

[81] *See id.* at 1462–63 (Thomas, J., concurring in the judgment).

[82] *Id.* at 1444 (plurality opinion).

[83] *Id.* at 1443.

[84] Randall v. Sorrell, 548 U.S. 230, 238 (2006) (plurality opinion).

[85] *Buckley*, 424 U.S. at 21. That is not to say that subjecting contribution limits to strict scrutiny should necessarily result in more of them being struck down. The *Buckley* Court also observed a stronger connection between corruption and large contributions than between corruption and expenditures; contribution limits might be held to serve the compelling government interest in protecting the integrity of the electoral process even if expenditure limits do not. *See infra* Part III, pp. 1457–64.

[86] 504 U.S. 428, 433 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

[87] *See id.* at 434.

[88] *Buckley*, 424 U.S. at 20.

[89] *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

The recent voter identification decisions demonstrate just how idiosyncratically *Burdick* balancing treats those seeking to cast a ballot themselves rather than spend to influence the votes of others. *Crawford* initially suggested that even a "slight" burden on voting "must be justified by relevant and legitimate state interests" that were "sufficiently weighty."[90] The Court, however, went on to characterize the plaintiffs as "bear[ing] a heavy burden of persuasion" and rigorously analyzed their evidence.[91] "[E]vidence in the record and facts of which [the Court took] judicial notice . . . indicate[d] that a somewhat heavier" or even "special burden" might "be placed on a limited number of persons,"[92] but those facts were ultimately ignored. Despite voluminous evidence of the burdens faced by the poor and elderly in obtaining proper identification — and at least one voter who was actually unable to obtain it — the law in *Crawford* imposed only a "limited burden" and merely required a "precise" government interest to be justified.[93] Contrast this reasoning to the campaign finance cases, where assertions of burden have been accepted even when identifying that burden has required the construction of elaborate hypotheticals.[94]

II. THE DEMOCRATIC INTEGRITY NORM

The previous Part identified a common right of political participation and noted how near-identical levels of restriction result in differing levels of constitutional scrutiny. This Part argues that protecting the integrity of elected institutions underlies the government interest asserted in these cases, strengthening the argument for applying a consistent constitutional framework. Though expressed in both procedural and substantive terms — and frequently referenced even when applying lesser forms of scrutiny — this foundational integrity norm pervades both doctrinal strands.

A. Preventing Corruption to Preserve Democratic Integrity

The Supreme Court has continually characterized as compelling the government's interest in protecting the integrity of elected institutions, although its delineation of that interest has recently narrowed. *Buckley* emphasized "the prevention of corruption and the appearance of corruption."[95] The danger of even "the appearance of improper influence"

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[90] 553 U.S. 181, 191 (2008) (plurality opinion) (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)).

[91] *See id.* at 200; *supra* p. 1451.

[92] *Crawford*, 553 U.S. at 199 (plurality opinion).

[93] *Id.* at 203 (quoting *Burdick*, 504 U.S. at 434, 439).

[94] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1452–55 (2014) (plurality opinion).

[95] Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam).

posed a "critical" threat to "confidence in . . . representative Government."[96] Other early campaign finance decisions also articulated a capacious integrity-based conception of corruption, noting that maintaining "the individual citizen's confidence in government"[97] and "[p]reserving the integrity of the electoral process" were interests "of the highest importance."[98] More recently, the Court has narrowed the sweep of the government interest. Drawing away from the dangers of "improper influence,"[99] the Court has focused on quid pro quo corruption or its appearance, demanding increasing evidence of a connection between a regulation and the prevention of corruption.[100]

The reason this formulation of the interest remains compelling stems from the Court's analysis of what actions "cause the electorate to lose faith in our democracy."[101] Setting aside for the moment the validity of the Court's factual conclusions about the perception of money in politics by voters — which are contested[102] — the Court continually evaluates the strength of the interest in this way, referencing the effect of a restriction on public confidence in the integrity of the electoral process and representative institutions. In *Citizens United*, that analysis led to the conclusion that the level of access and influence engendered by independent expenditures would not lead voters to question the integrity of the democratic process.[103] The dissenters vigorously contested this conclusion, but also framed their analysis in terms of integrity.[104]

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96 *Id.* at 27 (quoting U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973)).

97 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 789 (1978).

98 *Id.* at 788–89.

99 *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1447 (2014) (plurality opinion). *Compare id.* at 1450–51 ("[T]he Government may not seek to limit the appearance of mere influence or access." *Id.* at 1451.), *with* McConnell v. FEC, 540 U.S. 93, 145 (2003) (observing that "donors would seek to exploit" the "gratitude" of candidates).

100 *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010).

101 *Id.* at 360.

102 *See generally* Christopher Robertson et al., *The Appearance and the Reality of* Quid Pro Quo *Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375 (2016); PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 72–82 (2015), http://assets.pewresearch.org/wp-content/uploads/sites/5/2015/11/11-23-2015-Governance-release.pdf [https://perma.cc/Z28P-YSZA].

103 *See Citizens United*, 558 U.S. at 360–61.

104 *See id.* at 396 (Stevens, J., concurring in part and dissenting in part). Somewhat incongruously, cases involving the regulation of candidates for judicial office also define the government interest in terms of integrity, but unlike in the recent campaign finance cases, the Court has vigorously embraced the "appearance of corruption" element of the integrity norm without demanding the level of evidence the campaign finance cases required. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015).

B. Preventing Fraud to Preserve Democratic Integrity

The voting rights cases formulate the government interest in much the same way.[105] The Court has justified voting restrictions because of their protective effect on "the legitimacy of representative government"[106] and "the integrity of the electoral process."[107] This interest is compelling because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."[108] *Crawford* articulated the government interest in a similar fashion, though it recognized as distinct interests "the integrity and reliability of the electoral process"[109] and "public confidence in the integrity of the electoral process."[110]

C. Inconsistent Deference

Government assertions that without measures like voter identification requirements, "honest citizens" would shrink from democratic participation out of "fear [that] their legitimate votes will be outweighed by fraudulent ones"[111] have been accepted without much, if any, analysis of how the laws in question actually serve the underlying integrity interest.[112] Whereas the Court has been skeptical of claims that independent expenditures compromise political participation,[113] it has required much less of governmental actors alleging that voting restrictions

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105 State power to regulate voting in federal elections derives in part from the Constitution's command that states be allowed to regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, § 4, cl. 1, but the constitutional analysis generally focuses on the specific interest proffered by the government.

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

107 Clingman v. Beaver, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part and concurring in the judgment); *see also* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) ("A State indisputably has a compelling interest in preserving the integrity of its election process." (quoting Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989))).

108 *Purcell*, 549 U.S. at 4.

109 553 U.S. 181, 191 (2008) (plurality opinion).

110 *Id.* at 197.

111 *Purcell*, 549 U.S. at 4.

112 *See, e.g.*, *id.*

113 *Compare* Citizens United v. FEC, 558 U.S. 310, 360–61 (2010) (dismissing the asserted connection between regulated expenditures and public confidence in the integrity of our democracy in three generally conclusory paragraphs, with the only rebuttal of the government's evidence of such a connection being the lack of "direct examples of votes being exchanged for . . . expenditures," *id.* at 360 (omission in original) (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 560 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part))), *with id.* at 472 (Stevens, J., concurring in part and dissenting in part) (suggesting that the mass of money corporations could bring to bear on an electoral contest might "diminish citizens' willingness and capacity to participate in the democratic process"), *id.* at 448 (describing the depth of analysis done by the district court and its findings supporting "the corrupting consequences" of regulated expenditures), *and* STEPHEN BREYER, ACTIVE LIBERTY 44–45 (2005) (arguing that the flood of money made possible by the Court's reluctance to uphold campaign finance laws may cause voters to "lose confidence in the political system and become less willing to participate in the political process").

protect the integrity of the electoral process or elected institutions. For example, *Crawford* held that requiring photo identification — which can prevent only in-person voter impersonation — promoted Indiana's interest in preventing fraud that could compromise the integrity of its elections, despite "[t]he record contain[ing] no evidence of any such fraud actually occurring in Indiana at any time in its history."[114] The plurality admitted proof existed of only "scattered instances" of this type of fraud anywhere,[115] and that almost all of the evidence presented by the government involved other kinds of deception completely unaddressed by the regulation.[116] With respect to the integrity interest more generally, the Court could muster only the tautology that an "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[117] Though the lack of "direct examples" had been dispositive in the campaign finance context, here the Court required no such evidence to link the law to the interest. If such evidence were required, it seems unlikely that it could be marshaled.[118]

The integrity interest driving these decisions — despite being unevenly applied — traces its roots to the Founding. As Professors Lawrence Lessig and Zephyr Teachout have explored,[119] and as recent attention to the Emoluments Clause has reaffirmed,[120] concerns about public confidence in democratic institutions colored the design of our Constitution. This history and the continued importance of citizen participation to democratic legitimacy, which the cases recognize, justify the Court's emphasis on the importance of the interest. As this section has demonstrated, however, these doctrinal strands delineate the integrity interest unevenly, deferring much less to the government when it attempts to prevent the rich from commandeering the political process than when it inhibits poor, elderly, and minority citizens from exercising the one facet of the right to political participation in which all Americans can be equal.

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114 553 U.S. at 194 (plurality opinion).

115 *Id.* at 195 n.12.

116 *See id.* at 195–96, 195 n.12.

117 *Id.* at 197 (quoting COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18 (2005), https://www.eac.gov/assets/1/6/Exhibit%20M.PDF [https://perma.cc/E9JB-G2GG]).

118 *See* Stephen Ansolabehere & Nathaniel Persily, Essay, *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, 1759 (2008) (concluding that even an unfounded perception of voting fraud has no empirical impact on the likelihood of casting a ballot).

119 *See, e.g.*, LAWRENCE LESSIG, REPUBLIC, LOST 18–20 (2011); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 17–31 (2014).

120 *See* David A. Fahrenthold & Jonathan O'Connell, *What Is the "Emoluments Clause"? Does It Apply to President Trump?*, WASH. POST (Jan. 23, 2017), http://wapo.st/2k9QSs5 [https://perma.cc/ZM8F-NJNG].

III. RESOLVING THE DOCTRINAL INSTABILITY

These inconsistent approaches to evaluating a common right and interest have produced a body of law antagonistic to the ways in which ordinary people participate in our democratic system. Today the Constitution zealously protects participation in the political process through speaking about political topics and through most forms of spending money. By contrast, participation through campaign contributions and even voting itself receive less constitutional protection. Infringements on both methods of participation receive lower levels of scrutiny despite burdens equivalent to those in the spending cases. And, with respect to voting, the Court applies a much less rigorous review of how the challenged law advances the integrity interest. This Part offers two approaches for reform, either of which would remedy the inconsistencies previously described in this Note and promote participation in the political system — the very right the constitutional analysis seeks to protect. First, and most simply, the Court could subject the integrity interest offered to justify voter restrictions to the same level of evidentiary examination as that interest receives in the campaign finance cases. Second, the Court could apply strict scrutiny to all burdens on political participation, importing the robust conception of the right from the expenditure context to the contribution and voting cases.

Either of these proposals would be preferable to the disharmony of existing constitutional doctrine, as the current distinctions facilitate a political process that protects the wealthy at the expense of the average citizen. That observation — and the proposition that such an outcome is undesirable in a liberal democracy — is hardly novel, but no less forceful for its obviousness. Professor Spencer Overton, for example, has suggested that decreased regulation of campaign finance allows society's existing "[m]assive disparities in the distribution of wealth" to translate into "disparities in political participation."[121] The argument against such translation resembles Professor Michael Walzer's defense of complex equality. Walzer divides the world's social goods into spheres, such as money, education, and political power, and argues that an egalitarian society must be one in which "no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good."[122] What the current system's divergent treatment of monetary and nonmonetary participation permits, or even encourages, is the translation of standing with regard to one social good (material wealth) into standing in another sphere (political power). Those who accumulate the resources to spend

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[121] Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 77 (2004).

[122] MICHAEL WALZER, SPHERES OF JUSTICE 19 (1983).

millions of dollars in support of candidates secure political power that allows them to entrench their wealth,[123] while simultaneously making money a necessary prerequisite for even the most basic aspect of political participation.[124]

On this conception of the interplay between money and politics, allowing success in one sphere to dominate the distribution of goods in another tends toward a tyranny antithetical to democratic values.[125] Consistent treatment of the different means of democratic participation would, by contrast, help insulate the political sphere both by preventing money from impeding the exercise of the franchise and by limiting the ability of the rich to court politicians at the expense of those citizens unable to spend vast sums in support of preferred candidates. The argument that current campaign finance law unmoors government action from the preferences of the majority of voters is another variation of this critique, as it speaks to the way in which moneyed interests secure political power such that the actions of representatives no longer reflect the will of the represented.[126] Indeed, the failure to police the borders of these spheres challenges the very majoritarian norms that motivated the creation of our constitutional system.[127]

In addition to promoting equality of this "complex" sort by decoupling economic and political power, there are sound jurisprudential and institutional reasons for favoring consistency. With respect to the institutional reasons, Justice Scalia argued that coherence was vital to the democratic legitimacy of the Court; he called it "the only thing that prevents th[e] Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy."[128] The argument that consistency promotes the rule of law made by Justice Scalia in his famous — if not always successful[129] — promotion of rules over standards is illustrative of the institutional rationale.[130] As to the jurisprudential reasons, the very structure and origin of common law reasoning by analogy — the

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123 *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014) (arguing that, absent state intervention, wealth concentrates).

124 *See* Veasey v. Perry, 135 S. Ct. 9, 11–12 (2014) (Ginsburg, J., dissenting from denial of application to vacate stay) (describing the costs of complying with a voter identification law and noting that about 4.5% of registered Texas voters lacked compliant identification).

125 *See* WALZER, *supra* note 122, at 19–20.

126 *See, e.g.*, Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1436–37 (2015).

127 *See* THE FEDERALIST NO. 22, at 143 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (deeming it a "poison . . . to subject the sense of the greater number to that of the lesser").

128 Dickerson v. United States, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting).

129 *See* Jamal Greene, *The Supreme Court, 2015 Term — Essay: The Age of Scalia*, 130 HARV. L. REV. 144, 165–73 (2016).

130 *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

foundation of the American legal system — requires consistency. Decisions are to have general applicability, which demands consonance with existing law.[131]

Despite these arguments in favor of consistency, the Court has continued to treat the doctrines differently. The strongest argument in favor of that approach rests on the nature of the interest being burdened. Voting is binary: you cast a ballot or you do not. Contributions are also easy to construe in a binary sense, in that you either give to a candidate or you do not.[132] Expenditures, however, defy such description because the participation has no clear end. You can always buy another ad. Thus, voter identification laws and contribution limits can be viewed as a different sort of regulation than expenditure caps because they continue to allow "complete" exercise of the right at issue, whereas an expenditure cap serves (after a certain point) as an absolute bar.

There are two problems with relying on such a distinction to justify the current state of the doctrine. First, and less importantly, the Court's recent treatment of contribution limits suggests that the Court itself no longer believes that the act of contribution is binary. In *Randall v. Sorrell*,[133] the Court struck down contribution limits as overly restrictive,[134] a conclusion that cannot coexist with a binary conception of donating to a candidate. But more vitally, the Supreme Court has refused to reckon with the reality that many restrictions on voting do in fact bar some significant number of voters from casting ballots, despite that number often being far higher than those who would have their rights affected in any way by expenditure limits. In *Crawford*, for example, both lower courts observed that a significant number of voters were likely to be unable to comply with the law's identification requirements.[135] During the lead up to the 2016 presidential election, by contrast, at one point "[f]ewer than four hundred families [were] responsible for almost half the money raised."[136] Nationally, only slightly more than 45,000 people contributed more than $10,000 to candidates, parties, or PACs in that election cycle[137] — approximately the same number of

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131 *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 389–90 (1908); *see also* Nicole A. Saharsky, Note, *Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence*, 85 MINN. L. REV. 1119, 1150–52 (2001) (arguing that constitutional provisions referencing due process, equal protection, and cruel and unusual punishment require jurisprudential commitment to consistency, revealing a constitutional norm in favor of consistency).

132 *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam).

133 548 U.S. 230 (2006).

134 *Id.* at 253 (plurality opinion).

135 Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 221 (2008) (Souter, J., dissenting).

136 Nicholas Confessore et al., *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), https://nyti.ms/2nFlQfG [https://perma.cc/T7T2-Y7AH].

137 Ctr. for Responsive Politics, *Donor Demographics*, OPENSECRETS.ORG, https://www.opensecrets.org/overview/donordemographics.php [https://perma.cc/3B8J-FGJY].

people who lacked the requisite photo identification in Indiana alone at the time *Crawford* was decided.[138] Yet, those 45,000 people would still be able to spend large amounts of money to support their favored candidates if a $10,000 expenditure limit were imposed. That means basing a distinction on the character of the right requires treating such a limit as a total bar to the speech of those moneyed interests while positing that actually denying the right to vote of a similar number of people upon passage of Indiana's voter identification law presents a merely incremental burden. Treating the burden imposed by voter identification laws as of a different kind than that imposed by campaign finance regulations ignores how restrictions on the franchise actually function.[139]

The proposals described below offer a vision of what would happen if the Court rejected this theoretical distinction between incremental and absolute restrictions, embracing the similarity of these cases and the value of a consistent jurisprudence.

A. Reconciling Deference to the Government Interest

The most striking discrepancy between the approach of the Supreme Court in these areas of law — particularly in the last decade — comes in how it evaluates evidence presented by the government to justify the connection between the proffered interest and challenged regulation. At one extreme lie the voter identification decisions, in which no evidence of actual in-person fraud is required to justify laws demanding photo identification that can prevent only in-person fraud.[140] At the other rest the campaign finance cases, in which ample evidence of public perception of the appearance of corruption has been dismissed as irrelevant.[141] Despite the similarity of the interests involved, the Court has made no attempt to evaluate them consistently.

A reformed jurisprudence could take one of two paths. First, courts could begin applying the deference to legislative determinations from the voter identification cases to the campaign finance cases. Rather than reject as logically impossible that the public would perceive massive expenditures on behalf of candidates as creating an expectation of future reciprocity, or that access and influence on the basis of having run tens of millions of dollars of advertisements for an embattled candidate would appear to someone outside the Beltway as indicia of corruption, courts would defer more readily to legislative determinations that the

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138 *Crawford*, 553 U.S. at 187–88 (plurality opinion).

139 *See generally* Atiba R. Ellis, *Economic Precarity, Race, and Voting Structures*, 104 KY. L.J. 607 (2015–2016) (describing the disenfranchising effect of voter identification laws); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006) (same).

140 *See supra* notes 111–118 and accompanying text.

141 *See, e.g.*, *supra* note 113.

ability to transform wealth into political power corrodes democratic institutions. This approach has the benefit of reflecting what people actually think. The mid-2010s have seen historically high levels of distrust of elected officials, with more than seventy-five percent of Americans believing that "money has a greater influence on politics and elected officials today than in the past."[142] Voters name the influence of special interest money as their foremost problem with their representatives in Washington.[143] Under the deference given to the integrity interest in *Crawford*, the perception of corruption would seem pervasive enough to justify restrictions on independent expenditures of any sort, much less the narrow category at issue in *Citizens United*. Similarly, the aggregate limits struck down in *McCutcheon* serve the integrity interest as much as voter identification laws do because they reduce the likelihood that individual contribution limits can be circumvented through contributions to candidates in noncompetitive races, PACs, or party committees, all of which can then transfer campaign funds to the candidates originally targeted by the contributions.[144] They also reduce the ability of individual donors to "capture" the agenda of an entire party, pulling representatives to vote in favor of policy positions disfavored by their constituents for fear of turning off the spigot.

McCutcheon is the closest the case law has come to reconciling the doctrines. Justice Breyer's dissent noted that the plurality seemed to be forgoing exactly the sort of record analysis typical of prior campaign finance decisions,[145] resulting in an opinion more like what would be expected in the voting cases. Of course, that lack of engagement with evidence resulted in striking down a contribution limit,[146] rather than deferring more to the legislature's judgment regarding the corrupting reality and public perception of money in politics. These sorts of considerations are precisely the types on which — for reasons of institutional competency and democratic legitimacy — the Court so often strains to avoid relying. *McCutcheon* thus suggests that adopting an approach in which government evidence of the need for the restriction receives less searching examination opens the door to judicial policymaking at the expense of legislative factfinding.

Alternatively, courts could begin employing the added scrutiny given to the government interest in the campaign finance cases to laws requiring voter identification. Rather than accepting the circular logic that some restrictions must be necessary for public confidence in the integrity of the electoral process because without restrictions there could be no

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142 *See* PEW RESEARCH CTR., *supra* note 102, at 11.
143 *Id.* at 74.
144 *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1472–75 (2014) (Breyer, J., dissenting).
145 *Id.* at 1480.
146 *Id.* at 1442 (plurality opinion).

confidence in the process,[147] courts would demand laws be justified by proof that voter fraud is actually affecting elections, or at least that voters indeed perceive in-person fraud to be a problem. While the first category of evidence is generally believed to be unavailable, whether the second type exists is an open question. Somewhat ironically, proponents of voter identification laws have begun to offer public perception of in-person fraud as a rationale for further restrictions, having convinced many voters that such fraud does indeed exist as part of campaigns to enact earlier restrictions.[148] Opponents of these efforts point to such disingenuous tactics as evidence that voter suppression, particularly of minority groups, really lies behind identification laws, which are pushed exclusively by Republican politicians.[149] Given the line of cases culminating in *McCutcheon* that apply a narrow standard for what type of public perception indicates the regulation serves the integrity interest, it seems unlikely that voter identification laws in states with statistically insignificant levels of in-person voter fraud could be justified on this perception-based rationale.

B. Standardizing the Level of Scrutiny for a Given Burden

An alternative method of addressing the inconsistencies across these areas would be to import the robust boundaries of political association delineated in the analysis of expenditures to the evaluation of restrictions on contributions and voting. In the former category of cases, the Court treats the slightest burden on the right as demanding strict scrutiny. By contrast, limits on contributions have traditionally been evaluated under a lesser form of scrutiny because of the supposedly lower burden placed on rights through those restrictions.[150] So too have restrictions on the right to vote been subject to lesser levels of scrutiny.

More recently, however, the Court struck down contribution limits as being overly burdensome,[151] despite the limits still permitting "the symbolic expression of support" key to the original finding of a minor burden.[152] Less than a decade later, the Court was unable to assemble a majority for striking down a contribution limit under less than strict scrutiny, demonstrating an increasing recognition of the equivalent burden.[153] Indeed, the dissent in *McCutcheon* focused on the strength of

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147 Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197 (2008) (plurality opinion) (quoting COMM'N ON FED. ELECTION REFORM, *supra* note 117, at 18).

148 Michael Wines, *One Rationale for Voter ID Debunked, G.O.P. Has Another*, N.Y. TIMES (Mar. 23, 2017), https://nyti.ms/2nHmrOx [https://perma.cc/FT3Y-RLD6].

149 *See id.*

150 Buckley v. Valeo, 424 U.S. 1, 44–45 (1976) (per curiam).

151 Randall v. Sorrell, 548 U.S. 230, 253 (2006) (plurality opinion).

152 *Id.* at 247 (quoting *Buckley*, 424 U.S. at 21).

153 *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1462–63 (2014) (Thomas, J., concurring in the judgment).

the government interest rather than arguing that a lesser burden justified the law.[154] It would take little movement in the case law for contribution limits to begin to be subjected to strict scrutiny on the basis of the equivalent burden they impose on political association.

The voting rights cases present a more interesting question. *Burdick* and *Crawford* explicitly rejected the notion that "strict scrutiny applies to all laws imposing a burden on the right to vote."[155] What those cases fail to do, however, is persuasively explain why the burden on the right to vote imposed by measures such as voter identification laws deserves less constitutional protection than the right to spend or donate money. As Part I of this Note argues, these latter rights derive their constitutional significance from the role that they play in facilitating the participation of voters in the political process. Despite that significance, the Court has continually suggested that unlike burdens on spending that deter political association, for example, by making it more cumbersome — but still possible — to participate in the political process, a burden on the right to vote will not be subject to strict scrutiny even when evidence exists that some individuals will be completely denied the ability to participate in the political process at the ballot box.[156] Though at least eight Justices agreed in *Crawford* that strict scrutiny should apply to severe restrictions on the right to vote,[157] what exactly constitutes such a restriction remains unclear.

Remedying this divergent treatment of burdens on actions equally necessary to the political process requires only the application of strict scrutiny to all burdens on the right to vote. Given the deficiencies in the connection between the integrity interest and photo identification laws discussed in Part II, application of strict scrutiny would likely be fatal to laws such as the one in question in *Crawford*, despite the government's compelling interest in protecting the integrity of elected institutions and the electoral process. Judge Posner — author of the lower court opinion approved of in *Crawford* — has recently suggested as much, given the increasing evidence of how strict photo identification laws deter the elderly, the poor, and minorities from participating in the political process, and the little evidence of in-person voter fraud.[158]

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154 *See id.* at 1465–66 (Breyer, J., dissenting).

155 Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190 n.8 (2008) (plurality opinion); Burdick v. Takushi, 504 U.S. 428, 433–34 (1992).

156 *See, e.g.*, *Crawford*, 553 U.S. at 201–02 (plurality opinion).

157 *Compare id.* at 204 (Scalia, J., concurring in the judgment) (describing both the plurality of three Justices and his own opinion, joined by two Justices, as agreeing that a severe burden, under *Burdick*, triggers strict scrutiny), *with id.* at 215 (Souter, J., dissenting) (implying that a severe burden would lead to strict scrutiny and adopting the *Burdick* framework).

158 *See* Frank v. Walker, 773 F.3d 783, 786, 791–97 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

Even if we accept both that consistency is an attractive feature of constitutional jurisprudence and that these facets of political participation are sufficiently similar to warrant consistent treatment, this mode of reform leaves unaddressed the problems associated with the unchecked flow of money into politics, especially if it were to be accompanied by the recognition that the burdens of contribution limits may also demand the protection of strict scrutiny. Justice Breyer's and Professor Lessig's argument that unchecked political spending depresses democratic participation would remain unresolved, and it does not wrestle with the contested conclusions of the *Citizens United* majority regarding public perceptions of integrity. It would, however, bring election law into line with the rest of the Court's First Amendment jurisprudence by protecting participation in the political marketplace.[159] Throwing off restrictions across both of these areas would essentially put our faith in the vibrancy of that exchange.

CONCLUSION

As currently formulated, the Supreme Court's jurisprudence on campaign finance regulations and restrictions on voting fails to reflect the similarity of the rights being burdened and government interests being served. Rather than two distinct areas of law, these decisions involve a fundamental right of political participation and a foundational government interest in protecting the integrity of democratic institutions. Given that the constitutionally relevant features of these cases closely resemble one another, the Court should seek to harmonize its jurisprudence. Such consistency promotes legitimacy; while "[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc[,] law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."[160] Anything less promotes the perception that Justices are political actors justifying ex post their preferred policy outcomes and breeds only further calls for politically motivated decisions. Moreover, extending the greater protection afforded to the ways in which primarily wealthy people participate in politics to the means by which most Americans experience democracy will increase overall participation, improving the health of democratic institutions. Though none of the reforms suggested by this Note would address all the criticisms leveled at the individual lines of decisions, each would offer a path away from both the internal tension and outside pressure the present state of the case law has created.

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[159] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing the marketplace metaphor). *See generally* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008).

[160] Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (plurality opinion).