VOTING AND CAMPAIGN FINANCING: INCONSISTENCIES IN LAW AND POLICY

PABLO AABIR DAS*

TABLE OF CONTENTS

INTRODUCTION ............................................................................................................. 416
I. THE SUPREME COURT’S DOCTRINAL DIVERGENCE .................. 419
   A. OVERVIEW .............................................................................................................. 419
   B. SPENDING REGULATIONS FRAMEWORK .............................................. 420
   C. ANTICORRUPTION CONCERNS ................................................................. 422
   D. VOTING RIGHTS RESTRICTIONS FRAMEWORK ......................................... 423
   E. ANTIFRAUD CONCERNS ........................................................................... 426
   F. POLICY RATIONALES FOR VOTING AND SPENDING LAWS .................. 427
II. STATE REGULATION OF VOTING AND SPENDING ................... 428
   A. OVERVIEW .............................................................................................................. 428
   B. METHODOLOGY .............................................................................................. 429
   C. SCORING CRITERIA .......................................................................................... 430
   D. A MURKY DIVERGENCE ............................................................................ 433
   E. VOTER ID LAWS AND PUBLIC FINANCING OPTIONS .......................... 434
   F. FELON DISENFRANCHISEMENT LAWS AND DISCLOSURE LAWS .... 436
   G. CONVERGENCE OF SPENDING AND VOTING ......................................... 437
III. THE RISKS OF INCONSISTENT REGULATION ......................... 440
   A. OVERVIEW .............................................................................................................. 440
   B. THE CASE OF GEORGIA ............................................................................... 441
   C. AN UNJUSTIFIED DIVERGENCE ................................................................. 443
   D. THE BROADER DEMOCRATIC HARM .................................................................. 444

---

* Executive Senior Editor, Southern California Law Review, Volume 95; J.D. Candidate 2022, University of Southern California Gould School of Law; B.A. International Relations 2016, Boston University. I would like to thank my family for their invaluable support. I would also like to thank Professor Abby Wood for her guidance while drafting this Note. Finally, thank you to the Southern California Law Review editors for their exceptional work.
INTRODUCTION

The right to vote in elections and the right to spend\(^1\) in elections are both historically revered rights that function as critical elements of American democracy.\(^2\) These rights have earned their salience because they are two of the most common and accessible mechanisms by which Americans can participate in the democratic process. In different ways, each right enables citizens to express their views of their elected representatives and to support causes they identify with, ultimately ensuring that government remains responsive to the needs of the electorate. Due to their vital roles within the democratic process, condoning the restriction of one of these rights while overlooking the regulation of the other undermines democratic principles.

Despite their shared value to democratic participation, the Supreme Court analyzes the right to vote and the right to spend through distinct doctrinal lenses. The Court’s differential analysis manifests in significant regulation of voting but a more laissez-faire approach to spending. As a result, voting and spending rarely reference each other in jurisprudence and are infrequently compared. This has led to limited scholarship contrasting the Supreme Court’s legal analysis of each right and even less of an examination into how the two rights relate at a policy level. Such a comparison is instructive when evaluating the transparency and integrity of the American electoral process. Indeed, if two core democratic rights are treated differently by both courts and legislatures, then the rationale behind such divergent treatment should be scrutinized. This Note explores how voting rights and spending rights interact at both the judicial and state policy levels. This Note’s central argument is that voting and spending are closely related activities that are jointly paramount to the functioning of American democracy and, as a result, the inconsistent regulation of these two issues in jurisprudence and state-level policy is unjustified and detrimental to the

---

1. For the purpose of this Note, I am borrowing Professor Robert Yablon’s concept of the “right to spend,” which encompasses both political contributions and political expenditures. As both Professor Yablon and this Note point out, the Supreme Court has assessed regulations pertaining to contributions and expenditures differently, and when it is necessary to distinguish the Court’s legal framework around these two issues, this Note will do so. See Robert Yablon, Voting, Spending, and the Right to Participate, 111 NW. U. L. REV. 655, 658 n.9 (2017).

2. The first federal campaign finance law was passed in 1876 when the Naval Appropriations Bill became the first enacted law regulating how citizens could contribute to elected representatives. See History of Campaign Finance Regulation, BALLOTPEDIA, https://ballotpedia.org/History_of_campaign_finance_regulation [https://perma.cc/FAA3-VCCG]. Voting rights date back even further to the country’s founding, but until the Fourteenth Amendment was adopted in 1868, such rights were primarily controlled by state legislatures.
democratic process.

This is a timely moment to explore the intersection of voting and spending, as both issues have come to the forefront of public discourse over the past several years. Since 2016, the media has prominently covered issues of voting integrity, and these concerns served as the primary flashpoint in the 2020 presidential election. Landmark court decisions like Crawford v. Marion County Election Board\(^6\) and Shelby County v. Holder\(^4\) contributed to the prevalence of voting rights issues, as both cases, in different ways, endorsed states’ broad authority to impose voting restrictions. On the spending side, the last two presidential elections enjoyed historic contributions from major donors and political action committees (“PACs”),\(^5\) while independent expenditures also reached an all-time high. This dramatic increase in political contributions and expenditures has underscored concerns around the sizable influence of money in politics. Moreover, in contrast to voting rights, spending rights are often protected by the Supreme Court. Notably, key decisions in Citizens United v. FEC\(^6\) and McCutcheon v. FEC\(^7\) have limited states’ ability to regulate campaign financing.

Policy developments around these rights are actively playing out in state legislatures across the country. Since the 2020 elections, in response to unverified allegations of mass voter fraud, dozens of states have introduced bills to restrict voting access.\(^8\) These bills have impeded voter registration options, limited vote-by-mail accessibility, and strengthened voter ID requirements. There is no indication, however, that there is similar state-level momentum to regulate spending. In fact, some state legislatures have taken the opposite step and loosened campaign finance restrictions.\(^9\) The reluctance of policymakers to take action on regulating spending is especially striking given that dark money groups\(^10\) spent hundreds of

---

5. A political action committee is an independent expenditure committee that typically spends money in support of a political candidate.
10. Dark money groups are political nonprofit entities that have no legal obligation to disclose their donors. With minimal regulation or oversight, these groups often spend undisclosed amounts of money in support of political candidates.
millions of dollars on undisclosed political expenditures during the 2020 elections.\textsuperscript{11}

Such policy shifts partially stem from the Supreme Court’s divergent treatment of voting and spending rights. Disputes over voting restrictions, on the one hand, are traditionally analyzed under the Fourteenth Amendment to determine if a given voting law violates the Equal Protection Clause.\textsuperscript{12} Challenges to spending laws, on the other hand, are typically evaluated under the First Amendment to establish whether a spending regulation excessively or improperly regulates free speech.\textsuperscript{13} As a result of this bifurcated analysis, the Supreme Court tends to defer to states’ discretion regarding voting laws while being wary of regulating spending due to sacrosanct First Amendment concerns.\textsuperscript{14}

As the integrity of American elections comes under close scrutiny over the next several years, clearly defining the scope of voting rights and spending rights will be increasingly important. The Supreme Court has already recognized the significance and interrelation of these two rights and grouped them together under a broader “right to participate,” defined as the most basic right in democracy.\textsuperscript{15} Nevertheless, the Court continues to afford each right a differing level of judicial protection. In exploring the Court’s doctrinal divergence, as well as state-level policies regulating either right, this Note considers three questions:

\textit{First}, have state laws mirrored the judicial posture of the Supreme Court by implementing minimal spending regulations while significantly restricting voting rights?

\footnotesize
\begin{itemize}
  \item \textsuperscript{13} See Citizens United v. FEC, 558 U.S. 310, 339–50 (2010).
  \item \textsuperscript{14} While the Court’s differential posture toward voting rights and spending rights has remained largely consistent since the late 1960s, this doctrinal divergence has been particularly prominent over the past decade. Since the 2010 elections, in the face of legal challenges, states have successfully adopted a variety of restrictions around voting rights, including additional voter ID laws, barriers to voter registration, limitations on absentee voting, and more. In fact, “[i]n 2016, [fourteen] states had new voting restrictions in place for the first time in a presidential election.” \textit{New Voting Restrictions in America}, \textbf{BRENNAN CTR. FOR JUST.} (Nov. 19, 2019), https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america [https://perma.cc/T7UG-FJVL]. On the other side, the Court has weakened states’ capacity to regulate campaign financing—especially the regulation of expenditures. See Pamela S. Karlan, \textit{The Supreme Court, 2011 Term—Foreword: Democracy and Disdain}, 126 \textbf{HARV. L. REV.} 1, 32 (2012) (“A striking feature of the Roberts Court is that, when it comes to the act of voting, the Justices are decidedly less skeptical of government restrictions [than campaign finance regulations].”).
  \item \textsuperscript{15} McCutcheon v. FEC, 572 U.S. 185, 191 (2014) (plurality opinion) (“There is no right more basic in our democracy than the \textit{right to participate} in electing our political leaders. Citizens can exercise that right in a variety of ways . . . [. . .] [including] vot[ing] . . . and contribut[ing] to a candidate’s campaign.” (emphasis added)).
\end{itemize}
Second, are certain spending regulations or voting restrictions more common than others, and if so, what does an analysis of why these laws are implemented show?

Third, why is the inconsistent regulation of these two rights unjustified?

This Note addresses these questions in three Parts. The first Part describes the Supreme Court’s legal analysis of both voting rights and spending rights. It proceeds to provide an overview of each right’s respective legal framework as well as the notable cases that define each right. The Part concludes by evaluating the public policy imperatives that drive the regulation of either right. Through this jurisprudential comparison, this Part suggests that while the Court applies different levels of scrutiny to voting and spending regulations, the underlying public policy rationales that drive the regulation of these rights are almost identical.

In the second Part, this Note transitions to the policy realm and explores whether the state laws that regulate voting and spending actually further public policy imperatives such as election integrity. The analysis relies on a score-based methodology that calculates how many key spending regulations or voting restrictions each state has adopted. This score is then used to rank how regulatory each state is toward voting and spending, respectively. Ultimately, these scores determine that the policy disparity between voting restrictions and spending regulations is not as stark as the Court’s doctrinal divergence. Moreover, this Part argues that although the overall policy disparity is not pronounced, on a granular level, there are certain voting or spending laws that can predict the absence—or presence—of other voting or spending laws.

In the third Part, this Note argues that both the states’ and the Supreme Court’s approaches to regulating voting versus spending are unjustified and damage the basic principle of equal participation that underpins the political system. This Part first responds to arguments in defense of the existing regulatory disparity and then proceeds to lay out how this divergence negatively affects democratic values and practices.

I. THE SUPREME COURT’S DOCTRINAL DIVERGENCE

A. OVERVIEW

Despite fundamental differences in the Supreme Court’s legal analysis of voting restrictions and spending regulations, the overarching frameworks are remarkably similar. Generally, the Court weighs individual rights against states’ interests in order to determine whether a given restriction or
regulation has legal merit. As a result, the Court often considers “whether the law’s purported benefits . . . justify the burdens,” and if they do, then the Court looks favorably on upholding the law in question.

The differences begin to arise, however, in how the Court interprets the state’s interest in regulating either right. For voting rights, the Supreme Court believes that the state has a broad interest in mitigating voter fraud and ensuring election integrity. Thus, laws that further these efforts are generally permissible. For spending rights, the Court determines that the state’s interest in regulating such an activity is less compelling and strictly confined to mitigating corruption in the political process. Due to this divergent approach, the Court consistently assigns voting restrictions a lower degree of scrutiny than spending regulations. This has paved the way for a slew of case law permitting restrictions on the right to vote while limiting states’ authority to police spending.

B. SPENDING REGULATIONS FRAMEWORK

The Supreme Court typically applies different standards of review to different types of spending regulations depending on how greatly they impede First Amendment liberties. As a result, the Court applies a distinct analysis for each of the three most discussed aspects of campaign finance law: expenditures, contributions, and disclosures.

Because the Supreme Court defines political spending as free speech, limitations on political expenditures receive the highest level of scrutiny. In Citizens United v. FEC, for example, the Supreme Court struck down a spending regulation that limited the amount of money a corporation or union could spend in support of a political candidate. The Supreme Court relied on First Amendment principles equating political spending to speech and

---


17. Yablon, supra note 1, at 663.

18. See Abby K. Wood & Ann M. Ravel, Fool Me Once: Regulating “Fake News” and Other Online Advertising, 91 S. CAL. L. REV. 1223, 1238 (2018) (“Campaign finance cases analyze regulations differently depending on whether they ban speech or merely burden it in some way.”).


articulated that since “[s]peech is an essential mechanism of democracy, . . . [l]aws that burden political speech are ‘subject to strict scrutiny.’ ”21 Under this strict scrutiny standard, states must show a “compelling . . . interest” in order to justify expenditure regulations.22

Limitations on campaign contributions, on the other hand, warrant a “lesser but still ‘rigorous standard of review.’ ”23 In such cases, the Court closely analyzes the state’s interests and permits regulations only if the state “demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”24 The Court in McCutcheon v. FEC applied this review when it struck down a restriction on how much money—in aggregate—contributors could give to political candidates over a two-year period.25 In McCutcheon, the State failed to convince the Supreme Court that the proposed aggregate limits furthered the State’s regulatory interest in preventing corruption.26 Instead, the Court concluded that such limits excessively infringed on contributors’ First Amendment rights, as well as their ability to participate in democratic processes.27 Despite this ruling, the Court concedes that “restrictions on contributions require [a] less compelling justification than restrictions on [expenditures].”28

Finally, the Supreme Court deems disclosure requirements more permissible than expenditure or contribution limitations, given that disclosures demonstrate a “sufficiently important governmental interest[].”29 The Court’s justification is that disclosure laws merely require campaigns, PACs, political parties, and other political entities to disclose their political spending and contributions, and thus they are less of a threat to free speech than expenditures or contributions. The Supreme Court developed this rationale in Buckley v. Valeo, in which it upheld a federal provision that required donors to report their political contributions and expenditures to the Federal Election Commission.30 In Buckley, the Court explained that disclosure requirements do not “unfairly or unnecessarily burden[] . . . any party or candidate” and that states have a compelling interest in following

21. Id. at 339–40.
24. Id. (quoting Buckley, 424 U.S. at 25).
25. Id. at 227.
26. Id.
27. Id. at 206–07.
29. Buckley, 424 U.S. at 95.
30. Id. at 95–96.
the flow of money in an effort to increase transparency for voters and to deter corruption.31

In essence, the Supreme Court adopts a stratified approach to analyzing campaign finance regulations—an approach that evaluates whether the state's interest is justified when contrasted with the burden placed on political spenders. The questions that arise when evaluating proposed spending laws are what qualifies as a "state interest," and what are the policy rationales that justify these regulations?

C. ANTICORRUPTION CONCERNS

The Supreme Court repeatedly—and almost exclusively—points to anticorruption imperatives as the predominant justification for spending regulations. This rationale evolved over several decades but has narrowed in scope in recent years. In *Buckley*, the Court explained that the state's interest in regulating campaign finance is restricted to "prevent[ing] . . . corruption [or] the appearance of corruption."32 As a result, following *Buckley*, states had to show that a spending regulation furthered an anticorruption interest in order to establish a "constitutionally sufficient justification."33 Almost three decades later, in *McConnell v. FEC*, the Court expanded this interest slightly and ruled that the state's regulatory interest was "not confined" to preventing corruption but also included inhibiting "'improper influence' and 'opportunities for abuse.'"34 In 2014, however, the Court in *McCutcheon* narrowed the state's interest in regulating spending from broad corruption to strictly "quid pro quo" corruption.35

The Court has evidently grappled with the precise scope of the state’s anticorruption interest and typically incorporates an element of subjectivity when determining whether a certain spending regulation would deter corruption. In *Citizens United*, for example, the Court reasoned that even though corporations involved in political spending "may have influence over . . . elected officials," that in and of itself "does not mean that those officials are corrupt."36 Writing for the majority, Justice Kennedy asserted that this presence of money in politics "will not cause the electorate to lose faith in this democracy."37

31. *Id.*
32. *Id.* at 25.
33. *Id.* at 26.
37. *Id.*
At first glance, Justice Kennedy’s reasoning seems sound—if political spending is equivalent to speech, then it is unjustified to regulate such an activity merely because there is an abstract concern that the activity might lead to corruption. However, studies both at the time and in subsequent years showed clear public skepticism toward political spending and concern over the corruptive potential of money in politics. Notably, in a University of Rochester study, a majority of respondents believed that the campaign finance system is corrupt and that political spending can be equated to bribes.38 If public opinion polls at the time of Citizens United were not enough to establish that there may be an “appearance of corruption,” there were also ample examples of actual corruption stemming from improper or illicit corporate spending.39 Although such evidence may not have been dispositive,40 in the face of public opinion polls and empirical instances of campaign finance violations, Justice Kennedy’s assertion that the Citizens United decision would not cause Americans to lose faith in democracy is striking. In this sense, Citizens United serves as an exemplar of the Court’s belief that the state’s authority to regulate political expenditures and contributions is narrow, fact-specific, and subject to high levels of scrutiny.41

D. VOTING RIGHTS RESTRICTIONS FRAMEWORK

Unlike the tiered approach used to analyze spending regulations, the Supreme Court has not adopted a formal “litmus test” to determine the


40. Typically, courts are split on how much evidentiary weight to give to such public opinion polls. See, e.g., Suster v. Marshall, 149 F.3d 523, 532 (6th Cir. 1998) (rejecting a public opinion poll regarding citizens’ opinion on spending limits in judicial elections); Republican Party of Minn. v. Pauly, 63 F. Supp. 2d 1008, 1017–18 (D. Minn. 1999) (rejecting a public opinion poll regarding how party expenditures create a perception of corruption). But see Homans v. City of Albuquerque, 217 F. Supp. 2d 1197, 1198, 1201 (D.N.M. 2002) (accepting a public opinion poll of citizens who believed that special interest spending influences local officials’ decisions).

41. It is worth noting that the Court has articulated that the state has a broader interest when implementing disclosure laws. Dating back to Buckley, the Court has justified upholding disclosure laws because of the state’s additional interest in “provid[ing] the electorate with information” and gathering “data necessary to detect violations of [relevant laws].” Buckley v. Valeo, 424 U.S. 1, 66–68 (1976). This explains the lower scrutiny that disclosure requirements warrant in contrast to expenditure or contribution limitations.
constitutionality of voting laws.\textsuperscript{42} Instead, the Court opts for a subjective sliding scale or "balancing approach" to weigh the permissibility of any given restriction.\textsuperscript{43} At its core, this balancing approach pits states’ regulatory interests against the burden on voters. However, a deeper analysis shows that the Court applies different levels of scrutiny to voting rights cases depending on whether the law is "invidiously discriminatory."\textsuperscript{44} If the law in question is invidiously discriminatory, then the Court applies a heightened level of scrutiny and demands that the state’s interest be significantly more compelling than the burden on the voter.\textsuperscript{45} However, if the law is not found to be invidiously discriminatory, then the state has a lesser burden and must show that the benefits of the law to the state merely outweigh the impediment to the voter.\textsuperscript{46}

The Court has wavered on precisely what qualifies as "invidiously discriminatory" in voting rights cases. Generally, the term is used to describe laws that impede the right to vote for some citizens but not for others. In \textit{Harper v. Virginia State Board of Elections}, for example, the Court struck down a Virginia "poll tax" because it inhibited the right to vote for lower-income residents who may not have been able to afford the tax.\textsuperscript{47} Similarly, in \textit{Kramer v. Union Free School District No. 15}, the Court held that New York could not restrict eligible voters in a school district election to just property owners and parents.\textsuperscript{48} In \textit{Kramer}, the Court reasoned that laws must receive higher levels of scrutiny when they clearly discriminate against a group’s right to vote.\textsuperscript{49}

The Court has not extended this rigorous analysis to laws that it does not find invidiously discriminatory. Notably, in \textit{Burdick v. Takushi}, the

\begin{itemize}
\item \textsuperscript{42} See Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) ("Constitutional challenges to specific provisions of a State’s election laws . . . cannot be resolved by any ‘litmuspaper test’ that will separate valid from invalid restrictions.").
\item \textsuperscript{44} See Joshua A. Douglas, \textit{Is the Right to Vote Really Fundamental?}, 18 CORNELL J.L. & PUB. POL’Y 143, 145 (2008) ("In one breath, the Court calls the right to vote ‘fundamental’ and applies strict scrutiny review. In another, the Court fails to give the right the status of a fundamental right by using a lower level of scrutiny.” (footnote omitted)).
\item \textsuperscript{45} See Richard W. Trotter, \textit{Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right}, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 515, 524 (2013) (arguing that the Supreme Court has intentionally avoided a “mechanical [or] inflexible” standard of review for voting rights cases and instead adopted a “balancing test” that compares state interests and the burden on individual liberties).
\item \textsuperscript{46} Crawford, 553 U.S. at 209.
\item \textsuperscript{49} Id.
\end{itemize}
Court upheld Hawaii’s ban on write-in voting options on ballots. The Court concluded that although such a ban would “prevent[] [some] voters from participating in Hawaii elections in a meaningful manner,” the law was permissible because it affected the rights of all voters equally. There, the Court asserted that states may impose “reasonable, nondiscriminatory” burdens on individuals’ right to vote if the state’s “‘regulatory interests are generally sufficient to justify’ the restrictions.”

Crawford v. Marion County Election Board is an instructive case for understanding the Court’s complex application of its voting rights analysis. In Crawford, the Supreme Court upheld a voting law that required all voters to present a government-issued photo ID before voting. The Court concluded that “slight” burdens on the right to vote are permissible when there is a “state interest of compelling importance.” At the time, the compelling state interest was to prevent or mitigate voter fraud. Although the majority embraced the vague “balancing approach” in coming to its conclusion, the concurrence pointed out that this analysis was “amorphous” in nature and proceeded to critique the Court’s lack of a formal approach to analyzing voting rights restrictions. While the majority characterized the law as “neutral and nondiscriminatory,” it failed to consider the detriment to voting rights in practice, as millions of Americans do not possess government-issued photo ID. Specifically, minorities, the elderly, the poor, and the disabled are most likely to lack government-issued photo ID. Despite the fact that some of these subsets of voters would be ineligible to vote in states that required photo ID, the Court did not believe that the law in question was invidiously discriminatory and thus applied a lower level of

51. Id. at 443 (Kennedy, J., dissenting).
52. Id. at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).
54. Id. at 190–91.
55. Id. at 237 (Souter, J., dissenting) (suggesting that the Court instead apply a formal “two-track approach” to voting rights cases).
56. Id. at 196–97.
scrutiny, ultimately upholding the law.  

*Crawford* is indicative of the Supreme Court's larger approach to voting rights restrictions: under a nonstrict equal protection analysis, the Court appears content with restricting voting liberties so long as the state demonstrates a slightly legitimate public policy concern.

**E. Antifraud Concerns**

The Court reasons that states have a "broad interest[] in protecting election integrity" and in "protecting public confidence 'in the integrity and legitimacy of representative government.' " This "broad interest" has generally allowed states to enact voting restrictions as long as the restriction enhances a state's ability to prevent fraud. Moreover, the Court asserts that even in the absence of empirical instances of fraud, voting rights restrictions that deter the mere prospect of fraud are permissible simply on the grounds that they "inspire public confidence." As a result, as long as the state demonstrates a valid regulatory interest, the Court has looked favorably on upholding a voting restriction even if it disenfranchises a "significant number" of voters.

In 2013, the Supreme Court's decision in *Shelby County v. Holder* made it even easier for states to enact voting restrictions. In *Shelby County*, the Court overturned a section of the Voting Rights Act of 1965 that required certain states to receive preclearance from the federal government before revising their voting laws. The Court did not base its rationale on the equal protection framework laid out above but instead reasoned that the preclearance "formula" was outdated and thus should be invalidated. As a

---


60. See Yablon, supra note 1, at 680 (arguing that in *Crawford*, the Court failed to follow the "standard equal protection script" that analyzes whether a given restriction violates the Equal Protection Clause but instead "derived its balancing approach . . . from a line of ballot access cases that applied an amalgam of equal protection and First Amendment principles").


62. *Id.* at 197 (quoting Brief for State Respondents at 53, *Crawford*, 553 U.S. 181 (No. 07-21)).

63. *Id.*

64. *Id.* at 190 (recounting that in its application of the "balancing approach," the Court has upheld laws that prevent a "significant number of voters from participating in . . . elections in a meaningful manner" if there is a justifiable state interest (quoting *Burdick* v. *Takushi*, 504 U.S. 428, 443 (1992) (Kennedy, J., dissenting))).


66. *Id.* at 551 (stating that the preclearance formula is "based on decades-old data and eradicated
result of this ruling, states received autonomy to implement voting restrictions with no federal oversight. In the twenty-four hours after the ruling, Texas, Alabama, and Mississippi announced that they would enforce stricter photo ID laws that were previously barred under the preclearance requirement. 67

F. POLICY RATIONALES FOR VOTING AND SPENDING LAWS

While the Supreme Court has adopted different levels of scrutiny for voting and spending, the underlying public policy rationale that drives the regulation of each of these rights is the same: to strengthen the democratic process, whether through increasing the integrity or the transparency of elections. Thus, laws that govern these rights should advance this underlying cause. 68

Also embedded in the regulation of both of these rights are concerns about liberty and equality, albeit in different ways. The Court primarily analyzes spending under the First Amendment liberty of free speech. However, the regulation of spending also concerns equality. Indeed, if public officials are beholden to donors, then that threatens the very foundation of a representative democracy—the government would no longer be working for its citizens. Similarly, for voting, while the Court has stopped short of calling voting a constitutionally protected right, voting is widely accepted as a critical civil liberty. Under this framing, the unencumbered right to vote is an exercise of this liberty. Voter fraud, on the other hand, threatens the equality of the voting process and has the capacity to undermine the one-person, one-vote system. Thus, the regulation of voting is a way to ensure the equality of the democratic process.

While spending and voting regulations fundamentally share the same policy rationales, there has yet to be an in-depth comparative analysis of how state policies regulating either right function in practice. The next Part explores this issue.

practices”). Since Shelby County, the Voting Rights Act has been undermined even further by the Supreme Court. In Brnovich v. Democratic National Committee, the Supreme Court upheld two provisions of Arizona’s voting laws that disproportionately denied voters of color the right to vote. Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321, 2343–44 (2021). In its decision, the Court proposed new “guideposts” to determine whether certain voting laws abridge the right to vote, shifting the focus from “social and historical conditions” that led to disenfranchisement to strictly whether a given law burdens the right to vote for a large enough group of voters. Id. at 2335–36.


II. STATE REGULATION OF VOTING AND SPENDING

A. OVERVIEW

Studies of how states respect voting rights and spending rights will inevitably increase over the next several years. The 2020 election integrity disputes paved the way for states to take legislative action under the pretense of restoring probity to the electoral process. The Georgia, Texas, and Arizona legislatures have already introduced or passed laws that limit the accessibility and ease of voting. These laws, which were conceived after conclusive evidence that the overwhelming majority of voter fraud allegations in the 2020 elections were meritless, illustrate how easily states can enact voting restrictions in the name of election integrity. However, comparing a state’s regulatory position toward voting versus spending paints a more complete picture of how committed a given state is to actually protecting the democratic process.

Using the Court’s bifurcated approach to the two rights as a departure point, this Part proceeds to analyze how state laws treat voting and spending. In doing so, this Part answers two key questions: First, do state-level policies reflect the Supreme Court’s differential treatment of voting rights and spending rights? In other words, have states uniformly adopted more restrictive voting laws, while refraining from regulating spending? Second, if state-level policies do not reflect the Supreme Court’s differential treatment of the rights, which regulations have states enacted and not enacted? Ultimately, the answers to these questions will shed light on the disparity between the treatment of voting rights and spending rights.

There are two ways that states could theoretically apply the Supreme Court’s decisions regarding spending rights and voting rights. In the first scenario (“Scenario One”), states could mirror the judicial divergence toward spending regulation and voting restrictions. In this scenario, states


71. See Oversight of the Federal Bureau of Investigation: The January 6 Insurrection, Domestic Terrorism, and Other Threats: Hearing Before the S. Comm. on the Judiciary, 117th Cong. (2021) (statement of Christopher A. Wray, Director, Federal Bureau of Investigation) (“We are not aware of any widespread evidence of voter fraud, much less that would have affected the outcome in the presidential election.”).
adopt laws that deregulate spending while adding barriers to voting, such as voter ID laws or mail-in voting limitations. Such an approach would reinforce the Court’s policy rationales: if concern about voter fraud justifies a Florida voter ID law, such a concern could likely justify a voter ID law in any state. Conversely, if certain contribution limitations were ruled too regulatory in California, then these limitations would likely fail in other states as well.

In the second scenario (“Scenario Two”), states could regulate both spending and voting in pursuit of the policy imperatives that justify the restriction of both rights. In this scenario, states adopt moderate voting restrictions that effectively prevent legitimate threats of voter fraud, and similarly, there would be practical regulation of spending to robustly deter political corruption. In short, regulations would only exist to the extent necessary to protect the democratic process.

In practice, states apply a murky hybrid of the two proposed scenarios. Today, states regulate spending and restrict voting to varying degrees and with remarkable inconsistency. There is no discernable indication that states pass laws with the intention of adhering to Supreme Court doctrine nor with the intention of inhibiting voter fraud or political corruption. Instead, many states restrict voting through voter ID laws or mail-in voting limitations, while failing to regulate spending through contribution limitations or disclosure requirements. Simultaneously, other states have expanded certain voting rights, such as early voting options, while adopting strict spending regulations, like banning corporate contributions. Thus, individual states’ treatment of the rights is more varied than the Court’s treatment of the rights.

B. METHODOLOGY

To adequately analyze the extent of any policy divergence through a comparative lens, this Note employs a score-based methodology. This system appoints a “regulatory score” and a “restrictiveness score” to each of the fifty states, as well as Washington, D.C. The “regulatory score” is scored on a 0–9 scale and measures how many spending regulations a state adopts, while the “restrictiveness score” is scored on a 0–7 scale and measures how many voting restrictions a state adopts. Comparing the two scores helps determine a state’s regulatory posture toward each right. Applying this system to the two theoretical scenarios listed in the previous Section, states in Scenario One—where state policy follows the Supreme Court’s doctrinal divergence—would likely have a regulatory score of 1 or 2 but a restrictiveness score of 6 or 7. In Scenario Two—where there is a consistent adoption of the same types of voting rights restrictions and spending regulations—states would likely score 4 or 5 on both scales.
The purpose of this scoring system is not to create a comprehensive profile of each state’s regulatory framework around voting rights and campaign finance. This would warrant a more sophisticated methodology and is an endeavor that scholars have undertaken in the past. Instead, this system merely compares how severely a state regulates spending versus voting rights, and vice versa. Critically, this system also allows for a granular comparison of states’ adoption of particular restrictions. For example, this methodology allows for a comparison of how many states adopted voter ID laws but chose not to implement corporate contribution limitations.

There are some caveats to discuss when using such a system. First, as with any scoring methodology, there is an element of discretion in determining which criteria are included in constructing the scale. The criteria used in this scoring system are largely derived from other data-based studies and are also frequently litigated spending and voting rights issues. Second, this study gives equal weight to each criterion as opposed to employing a weight-based system that allots different weights to different laws depending on how much they actually inhibit either right. Third, the binary approach utilized in this system may overlook some of the nuances and complexities in voting rights laws and campaign finance regulations. For example, the mere fact that a state limits corporate contributions does not account for the fact that State A may have a limitation that is substantially higher than State B.

C. SCORING CRITERIA

The scoring criteria are based on some of the most common and quantifiable voting restrictions and spending regulations. These criteria are described in Table 1 and Table 2.

72. See, e.g., Quan Li, Michael J. Pomante II & Scot Schraufnagel, Cost of Voting in the American States, 17 ELECTION L.J. 234, 234 (2018) (providing a principal component analysis on thirty-three different state election laws and ultimately proposing a Cost of Voting Index for each of the fifty American states); Christopher Kulesza, Christopher Witko & Eric Waltenburg, Reform Interrupted? State Innovation, Court Decisions, and the Past and Future of Campaign Finance Reform in the States, 15 ELECTION L.J. 143, 143 (2016) (providing a systematic measurement of state campaign finance regulations based on state statutes over two decades).

73. For voting rights rankings and methodologies, see generally, for example, Quan Li et al., supra note 72; Paul Gronke, Eva Galanes-Rosenbaum & Peter A. Miller, Early Voting and Turnout, 40 PS: POL. SCI. & POL. 639 (2007). For spending rights rankings and methodologies, see generally, for example, Kulesza et al., supra note 72; INST. FOR FREE SPEECH, FREE SPEECH INDEX (2018), https://www.ifs.org/wp-content/uploads/2018/03/IFS-Free-Speech-Index-Grading-the-50-States-on-Political-Giving-Freedom.pdf [https://perma.cc/MP22-N66E]; Campaign Finance Law Database, CAMPAIGN FIN. INST. (2021), https://cfinst.github.io [https://perma.cc/64QN-JV37].
# Voting and Campaign Financing

## Table 1: Restrictiveness Score Criteria

<table>
<thead>
<tr>
<th>Restriction Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requires any form of identification to vote</td>
<td>States that require any form of ID to vote, such as a driver’s license or bank statement.</td>
</tr>
<tr>
<td>Requires government-issued photo ID to vote</td>
<td>States that require a government-issued form of photo ID in order to vote.</td>
</tr>
<tr>
<td>Does not offer early voting options</td>
<td>States that offer only in-person Election Day voting.</td>
</tr>
<tr>
<td>Does not offer no-excuse voting by mail</td>
<td>States that require excuses in order to vote by mail.</td>
</tr>
<tr>
<td>Does not offer automatic voter registration</td>
<td>States that do not register voters during a visit to state agencies, like the Department of Motor Vehicles.</td>
</tr>
<tr>
<td>Does not permit Election-Day voter registration</td>
<td>States that do not allow voters to register to vote on Election Day.</td>
</tr>
<tr>
<td>No automatic restoration of felon voting rights upon release</td>
<td>States that do not restore felon voting rights upon release from incarceration.</td>
</tr>
</tbody>
</table>

### TABLE 2. Regulatory Score Criteria

<table>
<thead>
<tr>
<th>Regulation Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limits PAC contributions</td>
<td>States that limit the amount of money a PAC can contribute to a political entity.</td>
</tr>
<tr>
<td>Limits corporate contributions</td>
<td>States that limit the amount of money a corporation can contribute to a political entity.</td>
</tr>
<tr>
<td>Limits union contributions</td>
<td>States that limit the amount of money a union can contribute to a political entity.</td>
</tr>
<tr>
<td>Bans corporate contributions</td>
<td>States that prohibit any amount of corporate contributions to a political entity.</td>
</tr>
<tr>
<td>Bans union contributions</td>
<td>States that prohibit any amount of union contributions to a political entity.</td>
</tr>
<tr>
<td>Offers public financing for state-level office</td>
<td>States that offer public financing options for candidates, which often limits the amount of money a candidate can privately raise.</td>
</tr>
<tr>
<td>Requires PACs to disclose spending</td>
<td>States that require PACs to disclose political expenditures and contributions.</td>
</tr>
<tr>
<td>Requires political parties to disclose spending</td>
<td>States that require political parties to disclose political expenditures and contributions.</td>
</tr>
<tr>
<td>Requires issue committees to disclose spending</td>
<td>States that require issue committees(^74) to disclose political spending.</td>
</tr>
</tbody>
</table>


---

74. Issue committees are also known as “ballot initiative committees” and can go by other names. These types of spenders include all organizations, individuals, or groups of people that spend money in support of or opposition to a state ballot proposition.
D. A Murky Divergence

Unlike the clear-cut divergence between voting and spending at the judicial level, a comparison of states’ regulatory and restrictiveness scores tells a different story. It might be expected that a strong negative correlation exists between a state’s restrictiveness score and its regulatory score, as is the case in Scenario One. In reality, although there is a slight negative correlation between these two variables,\textsuperscript{75} the relationship is not significant. Moreover, the average regulatory score was around 4.8 out of 9, while the average restrictiveness score was 3.3 out of 7; this might seem similar to the reality proposed in Scenario Two, in which the scores averaged in the middle of the scoring range. However, there is significant inconsistency in the types of regulations that states have implemented. In other words, it does not appear that states have come to a consensus about the specific voting rights restrictions or spending regulations that actually achieve the public policy imperatives that drive the regulation of both rights. As a result, to address the first posited question of whether states’ approaches toward the regulation or restriction of these rights mirrors the Supreme Court’s judicial disposition, the answer is, generally no. Instead, the high-level reality is an opaque amalgam of different states adopting different regulations or restrictions of either right.

Analyzing the second question—which regulations have states enacted and not enacted?—paints a more detailed picture. While there is not a significant correlation between states’ high-level restrictiveness and regulatory scores, telling relationships exist between specific voting restrictions and spending regulations. As the correlation matrix in Table 3 indicates, there are a number of relationships worth analyzing.

\textsuperscript{75} A regression analysis of states’ regulatory scores against states’ restrictiveness scores yielded a correlation of -0.18.
TABLE 3. Correlation Matrix

<table>
<thead>
<tr>
<th></th>
<th>Any ID</th>
<th>Photo ID</th>
<th>No Early Voting</th>
<th>Excuse for Vote-by-Mail</th>
<th>No Same Day Reg.</th>
<th>No Auto Voter Reg.</th>
<th>No Felon Vote Post-Release</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limit PAC Contributions</td>
<td>0.06</td>
<td>-0.01</td>
<td>0.09</td>
<td>0.04</td>
<td>-0.18</td>
<td>-0.16</td>
<td>0.05</td>
</tr>
<tr>
<td>Limit Corp. Contributions</td>
<td>0.06</td>
<td>0.11</td>
<td>0.12</td>
<td>0.08</td>
<td>-0.15</td>
<td>-0.01</td>
<td>0.01</td>
</tr>
<tr>
<td>Limit Union Contributions</td>
<td>-0.02</td>
<td>0.06</td>
<td>-0.03</td>
<td>0.02</td>
<td>-0.12</td>
<td>-0.1</td>
<td>-0.09</td>
</tr>
<tr>
<td>Ban Corp. Contributions</td>
<td>0.25</td>
<td>-0.15</td>
<td>0.05</td>
<td>0.01</td>
<td>0.04</td>
<td>0.09</td>
<td>0.05</td>
</tr>
<tr>
<td>Ban Union Contributions</td>
<td>0.28</td>
<td>-0.09</td>
<td>0.21</td>
<td>0.06</td>
<td>0.05</td>
<td>0.02</td>
<td>-0.1</td>
</tr>
<tr>
<td>Public Financing</td>
<td>-0.31</td>
<td>-0.12</td>
<td>-0.1</td>
<td>-0.16</td>
<td>-0.22</td>
<td>-0.33</td>
<td>-0.27</td>
</tr>
<tr>
<td>PAC Disclosure</td>
<td>0.15</td>
<td>0.09</td>
<td>0</td>
<td>0.03</td>
<td>0.06</td>
<td>0.25</td>
<td>-0.06</td>
</tr>
<tr>
<td>Political Parties Disclosure</td>
<td>-0.03</td>
<td>-0.3</td>
<td>-0.24</td>
<td>-0.25</td>
<td>-0.13</td>
<td>-0.16</td>
<td>-0.36</td>
</tr>
<tr>
<td>Issue Committees Disclosure</td>
<td>-0.09</td>
<td>-0.26</td>
<td>0.13</td>
<td>-0.12</td>
<td>-0.47</td>
<td>-0.29</td>
<td>-0.21</td>
</tr>
</tbody>
</table>

Notably, the adoption of voter ID laws is correlated with the absence of public financing laws. Additionally, felon disenfranchisement laws post-release have a strong negative correlation with public financing laws, as well as disclosure laws. It is worth considering the role of each of these laws in practice and evaluating whether the adoption and non-adoption of these laws provides insight into why states choose to enact certain policies.

E. VOTER ID LAWS AND PUBLIC FINANCING OPTIONS

While examining the relationship between voter ID laws and public financing options, it is important to keep in mind their respective roles in policy. In a nutshell, voter ID laws verify that voters are who they claim they are, while public financing options operate as government-run financial substitutes to private donors in order to promote the transparency of money in politics.

76. The correlation between these two variables is -0.31. For the proprietary data used, please contact the author.
The basic principle behind voter ID laws is seemingly sound. Such laws require voters to present a valid form of government-issued ID in order to cast a ballot. Proponents assert that these laws deter voter impersonation and also increase the integrity of the voting process. However, it is widely established that there is little to no evidence of significant voter fraud or voter impersonation that would justify strict voter ID laws. In fact, major studies have shown that even mere allegations of voter impersonation are incredibly rare. Thus, in practice, many voter ID laws merely strengthen the perceived integrity of the voting process. These efforts to boost the apparent integrity of the voting process come with serious, restrictive costs: millions of American citizens lack a government-issued photo ID, and these voters tend to be lower-income voters of color, the elderly, and people with disabilities. As a result, voter ID laws may reduce turnout among marginalized voters and widen the participation gap between voters of color and white voters.

Public financing options, on the other hand, dilute the power that major contributors and spenders have over candidates by offering candidates state-subsidized financing to run for office in exchange for a limit on how much they can raise from private donors. In practice, public financing options manifest in a number of ways. On the condition that the candidate limits the amount of money solicited from private donors, some states offer candidates a set amount of money in return. In other states, the government matches the amount of money candidates raise from small donors. Regardless of the system, however, public financing ensures that major donors do not gain a disproportionate influence over candidates, which theoretically reduces corruption and surely reduces the appearance of corruption.

Juxtaposing the prevalence of voter ID laws with the absence of public


78. Seventeen states have passed photo ID laws. Id.


financing laws sheds light on many states’ approaches toward each issue and toward election integrity more broadly. Currently, thirty-five states have some sort of voter ID law in place, while only fourteen offer any sort of public financing option.\(^8^2\) States that are concerned with both corruption and voter fraud should, in theory, implement laws that address each of these issues equally. Instead, states have passed restrictive voter ID laws that disenfranchise voters despite the absence of evidence of mass voter fraud and have largely been wary of offering public financing options that would likely decrease instances of corruption.

F. FELON DISENFRANCHISEMENT LAWS AND DISCLOSURE LAWS

There is also a relevant correlation between the presence of felon disenfranchisement laws post-release and the absence of disclosure laws.\(^8^3\) Felon disenfranchisement laws prevent millions of incarcerated and released Americans from voting. These laws take a number of different forms. In many states, people who committed felonies and are serving time in prison are denied the right to vote; in more restrictive states, these citizens are deprived of the right to vote both during incarceration and after release, until the completion of probation, parole, or some other requirement. Over the past several years, some states have taken efforts to overturn such laws, but the laws still remain prevalent.\(^8^4\) Currently, twenty-seven states have some form of law that inhibits the right to vote of a person has committed a felony even after their release.\(^8^5\)

The constitutionality of felon disenfranchisement laws has been debated, but the Supreme Court has generally accepted such restrictions.\(^8^6\) However, these laws strip the right to vote from millions of incarcerated Americans, the majority of whom are Black or Latino. When considered in


\(^8^6\) See Richardson v. Ramirez, 418 U.S. 24, 53 (1974) (“Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions.”).
light of the public policy goals that typically drive voting restrictions, felon disenfranchisement is hard to justify. The Supreme Court upholds voting restrictions to prevent voter fraud and maintain the integrity of the election process. Yet there is no indication that people who committed felonies engage in more voter fraud than any other citizen, nor is there any justifiable argument for why allowing people who committed felonies the right to vote would imperil the integrity of the voting process.\footnote{See JAMIE FELLNER & MARC MAUER, HUM. RTS. WATCH & SENT’G PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 14–17 (1998), https://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony -Disenfranchisement-Laws-in-the-United-States.pdf [https://perma.cc/55AA-GFG5].} Some states have suggested that restricting people who committed felonies’ right to vote results in greater public faith in the electoral process. However, the relationship between felon voting and election integrity is tenuous. States that do not have felon disenfranchisement laws have not experienced more voter fraud from people who committed felonies, nor have the citizens of these states reported less trust in their states’ electoral process merely because people who committed felonies are allowed to vote.\footnote{See id.} Along with voter ID laws, felon disenfranchisement is one of the most restrictive voting laws that results in millions of citizens losing their vote.

Felon disenfranchisement laws also have an inverse relationship with disclosure requirements for political parties and issue committees. Disclosure laws are common checks on the spending process, improve transparency, and give citizens an insight into how money is flowing in and out of candidates’ accounts. The Supreme Court has commented on the need for disclosure laws,\footnote{See Buckley v. Valeo, 424 U.S. 1, 60–68 (1976).} and thus it is notable that certain states have chosen not to implement such laws for political parties and issue committees but have readily implemented voting restrictions for people who committed felonies.

G. CONVERGENCE OF SPENDING AND VOTING

The disparity in how states treat voting restrictions versus spending regulations can be traced back to the Supreme Court’s disposition toward each issue. While, on a foundational level, the Court has established that states have an interest in preventing corruption in the political spending process just as they have an interest in preventing fraud during the voting process, through its unique doctrinal analysis of either right—equating spending to free speech while considering voting merely an equal protection issue—the Court has implicitly elevated the right to spend over the right to vote. State legislatures have followed suit and often selectively chosen
restrictive voting laws to limit the accessibility of voting, while ignoring the detrimental effect that unregulated spending has on the democratic process. The congruity and overlap of these two rights indicate that such a disparate approach conflicts with broader social, political, and legal frameworks.

On a doctrinal level, voting and spending both fall under the umbrella of election law and follow a relatively similar legal analysis—a comparison of individual burdens versus states’ interests. Moreover, in *McCutcheon’s* plurality opinion, Chief Justice Roberts articulated a broad “right to participate in electing our political leaders,” which consisted of both voting and spending.91 Such a statement indicates that these rights are not truly distinct but instead are both part of participation in the democratic process. While there is a divide in the legal field as to whether the right to participate is the appropriate framework to jointly analyze the issues of spending and voting,92 there is still value in exploring how the Court could analyze these rights through a lens of democratic participation and thus afford the regulation of each right the same level of scrutiny and analysis.93 Additionally, even before *McCutcheon*, the Supreme Court has alluded several times to the general “right to participate” and commented on how critical it is that such a right be uninfringed except in exceptional circumstances.94 As a result, if the “right to participate” exists even in a nuanced, informal manner, it is critical that the different rights enumerated under this “participation” are freely exercisable by all citizens.

On a legislative level, the right to vote and the right to spend have often been coupled, especially in recent years. These two issues have most recently converged following the 2018 midterm elections when the first bill that

91. *Id*.
92. Compare Yasmin Dawood, *Democracy Divided: Campaign Finance Regulation and the Right to Vote*, 89 N.Y.U. L. REV. ONLINE 17, 17 (2014) ("By placing the activities of voting and contributing in a common matrix of participation, the Court has demoted the right to vote from its usual position as the most fundamental democratic right.") with Yablon, *supra* note 1, at 660 ("There is nothing inherently pernicious about the prospect of a more unified jurisprudential approach to voting and spending. To the contrary, it is an idea that proponents of stringent campaign finance regulation have themselves sometimes embraced."). This Note does not intend to issue a judgment on whether the right to participate is the proper structure for analyzing issues of voting and spending. Instead, it simply relies on the right to participate as a practical framework on a policy level for grouping two activities that are critically important to democratic participation.
93. See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 324 n.42 (2007) ("For whatever reasons, the Court has not attempted to integrate its campaign finance, gerrymandering, and electoral mechanics cases into a unified body of law . . . .").
94. See, e.g., *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Thomas, J., dissenting) (commenting on citizen participation being essential to the functioning of our participatory democracy); *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 342 (2014) (Sotomayor, J., dissenting) (arguing that the Court must protect citizens’ “right to participate meaningfully and equally in [the country’s] politics”).
Speaker of the House Nancy Pelosi brought to the floor of the House of Representatives proposed a series of reforms centering on both voting rights and money in politics.\textsuperscript{95} After that bill failed in the Senate, Speaker Pelosi brought the bill to the floor again, emphasizing the importance of democratic reforms. The version of the bill that passed the House of Representatives on March 3, 2021, explicitly listed the issues of spending and voting side by side, including stricter disclosure laws, mandatory automatic voter registration, and the expansion of vote-by-mail options. The intersection of these two issues in policy date back even further. Following the \textit{Citizens United} decision in 2010, the Senate recognized the dangers around regulation of both voting and spending and held a formal hearing titled “The \textit{Citizens United} Court and the Continuing Importance of the Voting Rights Act.”\textsuperscript{96} Moreover, even a cursory online search into various lawmakers’ policies and proposals yields a number of results that group voting rights and campaign finance reform together.\textsuperscript{97} In the legislative arena, the issues of voting rights and spending rights remain so closely linked because of the recognition of the role each plays in ensuring a prosperous democracy.

Finally, from a social policy perspective, spending and voting are inherently intertwined and affect each other in critical ways. Primarily, there is weight in the argument that as unregulated money continues to flow in and out of elections, the idea of “one person, one vote” is diluted.\textsuperscript{98} The very basis for protecting the right to vote is that voting is the purest, most democratic aspect of a representative democracy—voters have the power to vote in representatives that they believe will serve their interests best. Infringing on this right is certainly problematic, but this issue is only compounded when the power of money in the political process is elevated and when the rights of voters are diminished.

In sum, despite the ways in which voting laws and spending laws are implemented by states, there are fundamental similarities between these two democratic activities that should mandate comparable levels of deference.

\textsuperscript{95} H.R. 1, 116th Cong. (2019).
\textsuperscript{96} \textit{The Citizens United Court and the Continuing Importance of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary}, 112th Cong. (2012).
\textsuperscript{98} David Cole, \textit{First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance}, 9 YALE L. & POL’Y REV. 236, 244 (1991) (“When unequal monetary resources translate into unequal influence in electoral campaigns, the democratic function of the ‘one person, one vote’ guarantee is undermined.”).
III. THE RISKS OF INCONSISTENT REGULATION

A. OVERVIEW

The tension between restrictive voting laws and lax spending regulations is indicative of both courts’ and legislatures’ broader attitude toward election integrity. Repeatedly, even absent any evidence of fraud, voting rights have been trampled under the pretense of election integrity, while spending has remained less regulated. This Part will argue that this divergence is unjustified and undermines fundamental democratic principles.

Defenders of the status quo usually justify the puzzling dichotomy between voting restrictions and spending regulations with the constitutional defense: spending has been classified as a freedom of speech issue and voting as an equal protection issue. However, such a defense fails to explain the varying treatment of different spending regulations, is based on the incorrect assumption that hyperregulation of voting makes elections fairer, and is inconsistent with historical beliefs and the contemporary reality that both voting and spending regulation play a comparable role in ensuring election integrity and protecting democratic ideals.

Proponents of the constitutional defense often argue that the integrity of the voting process is critical to the functioning of democracy; thus, voting restrictions are defensible in order to ensure that the system is fair and equal. However, these restrictions have led to a system that is all but fair and equal. The disenfranchisement of those without IDs, those incarcerated, or those unable to vote on Election Day due to accessibility issues undermines the very purpose of a representative democracy, since millions of votes are not cast. Moreover, while sensible voting restrictions certainly have a place within the democratic process, it is unclear whether states that have adopted stricter voting restrictions have actually experienced lower levels of voter fraud. 99

Finally, the constitutional defense implies that voting and spending somehow operate on different democratic planes and that the hyperregulation of voting will lead to more integrous elections. This presumption is flawed for both historical and contemporary reasons. The Founders believed that democratic governance contained two key components: first, a government that “deriv[es its] just powers from the

consent of the governed," and second, elected representatives that prioritize the interests of their constituents above their own. In other words, from its inception, American democracy has been predicated not only on voting integrity but also on the expectation that elected representatives are devoid of corruption and beholden only to the will of their constituents. In the modern election setting, voting and spending have joint importance in the roles that they play in getting candidates elected. While voting is often the focus of elections, the financing of the political process is similarly important. Spending is not only key for candidates’ messaging and outreach but also is also important as an avenue for citizens to participate meaningfully in the democratic process.

B. THE CASE OF GEORGIA

Georgia best illustrates how many legislatures address election integrity, as it serves as a microcosm of the election integrity debate unfolding across the country. After the 2020 presidential election, President Trump alleged widespread voter fraud across the country, including in Georgia. President Trump’s allegations led to numerous lawsuits in Georgia and forced the state to undergo two recounts and certify President Biden’s victory multiple times. Ultimately, in addition to certifying President Biden’s win, Georgia election officials conducted a thorough investigation, concluding that there was no evidence of widespread voter fraud in the state. Despite this determination, however, months later the Republican-controlled Georgia state legislature passed a sweeping voting-restriction bill. This bill included limitations on mail-in voting options, unlimited challenges to a voter’s registration status, and additional voter ID requirements.

100. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
102. See Daniel L. Weiner & Benjamin T. Brickner, Electoral Integrity in Campaign Finance Law, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 101, 116 (2017) (arguing that electoral integrity is measured by a process that “effectuates the will of the voters and ... does not create incentives that subsequently undermine the loyalty of elected leaders to their constituents”).
While the Georgia bill has received harsh public criticism for its restrictiveness, what has received less attention is the fact that the bill was passed as the state simultaneously expanded spending rights, even in the face of serious campaign finance concerns. In 1974, Georgia was one of the few states that passed an ethics law creating a commission to oversee the role that money played in state politics. This commission grew for over thirty years and, in 2008, closed over one hundred ethics cases related to campaign finance violations and collected hundreds of thousands of dollars in civil penalties. However, from 2008 to 2013, the state cut the commission’s budget by over forty percent, reducing its staff by nearly seventy percent. After the dramatic reduction of the commission’s budget and capacity, in 2019 the remaining few members of the commission proceeded to raise state campaign contribution limitations. This retreat from campaign finance oversight culminated in more “dark money” spending in the 2020 Georgia elections than any other congressional election.

Despite the large amount of political spending in 2020, the Georgia state legislature has failed to meaningfully regulate such activity or even bolster disclosure laws in an effort to improve transparency. In this sense, Georgia is an example of the current state of affairs when it comes to regulating voting versus spending. Although state election officials conclusively declared that no election fraud took place, the state legislature took a bevy of steps to restrict the free exercise of voting under the pretense of “election integrity.” However, in the face of evident election integrity issues regarding dark money spending and campaign finance violations, the legislature is silent.

108. Id. at 2.
109. Id.
112. In February 2021, the Georgia Senate passed a bill that allowed the "governor, lieutenant governor, a party’s nominee for those positions, and House and Senate Republican and Democratic leaders [to] create [leadership] committees," to which “lobbyists, industry associations or businesses” could donate as much money as they like. James Salter, Georgia Senate GOP Passes Bill to Get More Money from Big Political Donors, ATLANTA J.-CONST. (Feb. 26, 2021), https://www.ajc.com/politics/georgia-senate-leaders-push-bill-to-get-more-money-from-big-political-donors/D3YV4C2NZNCEPG6TJ5PCABGPH4 [https://perma.cc/3ZBB-NNXD].
C. AN UNJUSTIFIED DIVERGENCE

As this Note observed in Part II, the regulatory paradox present in Georgia is not unique but instead part of an established trend of inconsistent regulation of voting versus spending. At its core, this inconsistency has been justified by a belief that voter fraud is more damaging to American democracy than campaign finance violations. That is, voter fraud can fundamentally change the results of an election and undermine the democratic process, whereas campaign finance violations do not pose as profound a threat. This argument notably overlooks how institutions treat allegations of voter fraud versus claims of campaign finance violations.

In recent decades, voter fraud—such as the use of fake IDs or manipulated mail-in ballots—has been exceedingly uncommon. Even when it happens, fraud rarely takes place on a scale significant enough to actually influence an election. Even if voter fraud did exist at the level that voting-restriction proponents claim it does, immediate and often effective remedies exist for voting violations. Claimants of voter fraud can place the election results on hold until the alleged issue is adequately investigated. Consider the 2020 race for Iowa’s 2nd Congressional District as an example. At the end of the voting period, Republican Mariannette Miller-Meeks led Democrat Rita Hart by only six votes. Hart then claimed that ballots were improperly counted and proceeded to file claims with both the state canvassing board and the U.S. House of Representatives. The House of Representatives had the authority to proceed with a review, though they did not ultimately do so, since Hart withdrew. Nevertheless, the various institutions available to investigate Hart’s claim serve as a reminder that when elections are close and there are claims of ballot irregularities, there are a number of immediate remedies available to candidates.

The rapid adjudication of voting irregularities is best appreciated when contrasted with the remedies available for campaign finance violations. First, there are more windows for campaign finance violations to occur than for voter fraud to occur. While voter fraud takes place solely during the voting process, campaign finance issues arise during campaigning, elections, and even once an official is in office. If violations do arise, then the remedy is often slow, arduous, and, depending on the relevant disclosure laws, hard to detect. Once again, Georgia can serve as a useful example. In 2019, former

---

114. Id.
115. Id.
Georgia Senator David Perdue was fined $30,000 for campaign finance violations. Senator Perdue was penalized for accepting hundreds of thousands of dollars in campaign contributions that both exceeded the contribution limit and came from prohibited entities. What was often overlooked in the coverage of Senator Perdue’s penalty was the fact that the violations occurred five years prior, in 2014, during a race he ultimately won. Unlike claims of voter fraud, which are often quickly apparent due to the closely monitored nature of elections, Senator Perdue’s infractions were not detected until half a decade later, and when they were detected, his fine was a fraction of the amount of money he illegitimately received.

These examples are not to suggest that voting should have no restrictions, and campaign finance should be heavily regulated. Instead, they show that the inconsistent regulation of these similarly important rights is unjustified and that current arguments in defense of the status quo are insufficient. Moreover, the system as it exists has a detrimental impact on the modern democratic system.

D. THE BROADER DEMOCRATIC HARMs

The inconsistent regulation of voting versus spending is damaging both to theoretical democratic principles and to the actual functioning of American democracy. The backbone of a representative democracy is the belief that every person is entitled to one vote that they can freely exercise. This vote translates into citizens’ primary mechanism to participate in the democratic process and ensure that their elected representatives are advocating for their needs and interests. Any infringement of this right is a direct threat to the democratic process. Certainly, regulations to monitor the electoral process will always exist; however, when these regulations evolve into prohibitive measures that restrict the ability of citizens to exercise their vote, these regulations threaten democratic ideals.

117. Id.
118. Id.
119. Legal scholars from both the campaign finance and voting rights fields have long warned of this possibility. See, e.g., Cole, supra note 98, at 244 (“When unequal monetary resources translate into unequal influence in electoral campaigns, the democratic function of the ‘one person, one vote’ guarantee is undermined.”); Richard Briffault, Of Constituents and Contributors, 2015 U. Chi. LEGAL F. 29, 33 (2015) (arguing that the deregulation of campaign finance and excessive regulation of voting rights could “shift[] the focus of elected representatives away from the concerns of their voting constituenc[ies]”). Additionally, even the Supreme Court has cautioned against unnecessary or unequal restrictions on, or regulations of, the ways in which citizens participate in the political process. See Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (“Any unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government.”).
Once these democratic principles begin to decay, so does the foundation of the democratic system itself. Elected representatives should only be responsive to the needs of their constituents, and the ability to vote and spend should facilitate the meaningful engagement of citizens in choosing those representatives. If voting restrictions continue to disenfranchise voters while corporations and unknown entities are allowed to contribute freely to political campaigns, then citizens’ votes will naturally become diluted compared to the role of big money. Moreover, while voting restrictions are often passed under the pretense of election integrity, the fundamental question arises: How can citizens have faith in an electoral system that deliberately and systematically disenfranchises millions of voters?

Any policy that strives to enhance election integrity but also infringes on citizens’ democratic rights should be met with skepticism. Indeed, there will always be a need for regulating rights such as voting and spending, but at the moment, the divergent approach to the regulation of both of these rights is compromising the foundation of representative democracy while elevating the role of money in politics.

CONCLUSION

One role of the government is undoubtedly to preserve the democratic system, and doing this sometimes requires laws that, on their face, seem prohibitive. But there are deep-rooted issues with the inconsistent regulation of voting and spending. Put simply, millions of citizens are disenfranchised because of their status as felons, voter ID laws, lack of accessibility to the ballot boxes, or inability to easily register to vote.

One way to understand the impact of voting restrictions, as well as the arbitrary manner in which legislatures adopt such laws, is to contrast it with the right to spend. Unlike voting, spending rights have received a higher level of protection by the Supreme Court. Thus, the legal argument that voting and spending should sit on equal doctrinal planes is often criticized. However, the Supreme Court’s disposition toward these two issues is difficult to reconcile with the long-standing belief that the regulation of both voting and spending are similarly important to election integrity and the maintenance of democracy. If, in fact, state legislatures are determined to ensure fair elections, then their regulatory attitude should surely extend to campaign finance. The sheer amount of money that goes in and out of campaigns today can be estimated but is unknown because some states have even declined to pass strict disclosure laws.

Within the current democratic system, it is sometimes easier for a multinational corporation to spend millions of dollars—unregulated—in
support of a candidate than it is for the elderly\textsuperscript{120} or the marginalized\textsuperscript{121} to cast their ballot. The incongruity in states’ approaches to these two issues undermines the principles of liberty and equality that underpin the democratic system. Moving forward, state legislatures must look at voting and spending as interrelated activities that are jointly important to the success of American democracy and thus warrant similar types of restrictions and scrutiny.
