REMEMBERING DEMOCRACY IN THE DEBATE OVER ELECTION REFORM

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ABSTRACT

In FEC v. Wisconsin Right to Life, Inc.*, the United States Supreme Court held that the federal Bipartisan Campaign Reform Act violated the First Amendment right to free speech because the statute restricted a form of political speech known as issue advocacy. In attempting to protect this right from government intrusion, however, the Court improperly excluded considerations of democracy from its free speech analysis. The opinion consequently misrepresented the nature of the right to free speech for two independent but related reasons. First, because preserving a well-functioning democracy is the primary reason free speech is protected, the right to free speech does not exist when it is not justified by—nor when it conflicts with—the interest in preserving a healthy democracy. Second, an inductive review of American history and law shows that democracy is an independent right. The Court was therefore responsible for determining whether the political speech in question conflicted with the right to democracy and adjudicating between these two rights. By explicitly deciding not to weigh the impact that issue advocacy has on democracy, the Court set the dangerous precedent that courts can decide free speech cases without considering whether the speech in question tramples on the interests and rights that define it and determine its scope.*

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INTRODUCTION

Americans have long understood that the First Amendment's guarantee of free expression protects critical elements of American democracy.[1] It promotes tolerance within a heterogeneous nation,[2] protects the diversity of beliefs among citizens,[3] helps citizens separate truth from falsehood in politics,[4] and enables the education of citizens so they are capable of governing themselves.[5] Democracy and the freedom of expression are so intertwined that Professor Alexander Meiklejohn describes the right to free speech as "a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[6]

In the area of campaign finance reform, however, it is not always so clear that the freedom of expression uniformly promotes—rather than degrades—democratic health. In several United States Supreme Court cases, proponents of campaign finance regulation have charged that unregulated speech encourages corruption and allows wealth to inappropriately influence policy decisions.[7] Such possibilities have prompted courts to examine the relationship between free speech rights and democracy in an attempt to reevaluate how much political speech the First Amendment should protect.

The Supreme Court took up this task in two conflicting decisions: *McConnell v. Federal Election Commission*[8] and *Federal Election*

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1. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 47 (1963) ("It is a basic element in the democratic way of life, and as a vital process it shapes and determines the ends of democratic society.").

2. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1.2, at 930 (3d ed. 2006) (outlining the reasons freedom of speech should be a fundamental right (citing LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 9–10 (1986))).

3. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 132 (1993).

4. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963).

5. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For a discussion of the philosophical and practical goals that underpin the right to free speech, see *infra* Part III.A.

6. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948).

7. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2672–73 (2007) (Roberts, C.J., announcing the judgment of the Court) (responding to arguments that the unregulated use of issue advertisements encourages corruption, the perception of corruption among citizens, and the undue influence of wealth on politics).

8. McConnell v. FEC, 540 U.S. 93 (2003).

Commission v. Wisconsin Right to Life (WRTL), Inc.[9] Although less than four years separated the cases, the Court took opposing approaches in analyzing the relationship between free speech and democracy. Whereas the Court in *McConnell* was sensitive to how unregulated political advertising affects democratic governance, the *WRTL* Court refused to consider these effects and opted instead to focus on the right to free speech in isolation. This Note argues that *McConnell* properly treated democracy as a value worthy of protection. But because *WRTL* failed to consider the harms that political advertising may inflict on democracy, the Court improperly overlooked this fundamental American value.

The central issue over which the *McConnell* and *WRTL* cases disagreed was whether the federal Bipartisan Campaign Reform Act of 2002[10] (BCRA) could constitutionally prohibit a kind of paid political advertising known as issue advocacy.[11] Whereas express advocacy is speech that explicitly advocates for or against a candidate for public office, issue advocacy includes any speech that mentions a candidate for public office.[12] In *McConnell*, the Court upheld the

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9. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).

10. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 28 and 47 U.S.C.).

11. *Compare McConnell*, 540 U.S. at 223 (upholding the prohibition), *with Wis. Right to Life,* 127 S. Ct. at 2659 (striking down the prohibition). The extensive *McConnell* opinion evaluated the constitutionality of many separate provisions of the statute; this Note addresses only the provision relevant to the Court's decision in *WRTL*.

12. *E.g.*, *Wis. Right to Life*, 127 S. Ct. at 2659. The BCRA regulates both express advocacy and issue advocacy because it applies to any political advertisement that (1) "names a federal candidate for elected office," (2) "is targeted to the electorate," and (3) does not expressly solicit a vote for or against a candidate. *Wis. Right to Life,* 127 S. Ct. at 2658–59 (citing 2 U.S.C. § 441b(b)(2) (2000 & Supp. IV 2004)). The Supreme Court had held since its 1976 decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), that Congress could regulate "express advocacy," that is, political advertisements that encourage voters to vote for or against a candidate by using "magic words" such as "vote for," "elect," "support," and "defeat," *id.* at 44 & n.52. Partly to ensure that their advertisements would remain outside this realm of limitable speech, political advertisers instead began using "issue advocacy," broadcasting advertisements that supported or attacked a candidate or issue without using *Buckley*'s magic words. *McConnell*, 540 U.S. at 131. The *McConnell* Court noted that

> [i]n 1996 both parties began to use large amounts of soft money to pay for issue advertising designed to influence federal elections. . . . [T]he ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide. Moreover, though ostensibly independent of the candidates, the ads were often actually coordinated with, and controlled by, the campaigns. The ads thus provided a means for evading FECA's candidate contribution limits.

Id. (citations omitted). Congress responded with the BCRA, which prohibited corporations and unions from airing issue advocacy pieces within 30 days of a primary election and 60 days of a general election. *Id.* at 132, 333–34.

BCRA's ban on issue advocacy.[13] In a 5–4 decision, the Court reasoned that electioneering communications, including "issue advertisements," were the functional equivalent of express campaign advocacy.[14] The Court concluded that Congress could therefore constitutionally regulate issue advocacy for the sake of mitigating various harmful effects, including the corruption and perception of corruption that might result from attempts to buy access to candidates through political contributions.[15]

Yet after a two-Justice change from the *McConnell* Court,[16] the majority in *WRTL* struck down a typical application of the same BCRA provision. The majority effectively overruled *McConnell*,[17] claiming that "the interests held to justify" the BCRA "do not justify restricting issue advocacy" because such advocacy is expression the First Amendment protects.[18] The *WRTL* opinion claimed that the interests underlying the BCRA did not justify curtailing political speech. But the Court's evaluation of those interests was in reality a series of explanations why the Court did not need to consider them.[19] The *McConnell* Court's decision emphasized the need to weigh the value of protecting free speech against the practical interest in

13. *McConnell*, 540 U.S. at 223.

14. *Id.* at 206.

15. *Id.* at 205.

16. Chief Justice John Roberts replaced Chief Justice William Rehnquist in 2005, and Justice Samuel Alito replaced Justice Sandra Day O'Connor in 2006. The Supreme Court of the United States, Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Dec. 28, 2008).

17. Chief Justice Roberts's principal opinion purported not to overrule *McConnell*. *Wis. Right to Life*, 127 S. Ct. at 2674 (Roberts, C.J., announcing the judgment of the Court). Despite his efforts, however, seven of the nine Justices expressed their belief that *WRTL* was in fact a decision to overturn *McConnell*. *Id.* at 2683 n.7 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he principal opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so."); *see also id.* at 2687 (Souter, J., dissenting) (declaring the McConnell decision to be "effectively, and unjustifiably, overruled"). After all, although *WRTL* was only an as-applied challenge, the Court struck down a mainstream application of the law. *Id.* at 2659 (majority opinion). If an ordinary application could not survive a constitutional challenge, little reason exists to think that many other applications could.

18. *Id.* Justices disagree whether paying for political advertising should be considered political speech in the first place. Justice Stevens, for example, has claimed that "[m]oney is property; it is not speech." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring). This Note assumes for its purposes that political advertising expenditures constitute political speech, or at least its functional equivalent.

19. *See infra* notes 38–50 and accompanying text.

protecting democracy from "the corrosive and distorting effects of immense aggregations of wealth."[20] Yet the majority in *WRTL* was less willing to restrict political speech and perceived no conflict between free speech and democratic health.[21] In fact, Justice Roberts's and Justice Scalia's opinions, which together formed the Court majority, ruled out democracy as a consideration by proclaiming that the Court's sole responsibility is to protect speech—not democracy.[22] The *WRTL* Court thereby rendered inapposite the same factors on which the *McConnell* Court lingered just forty-two months earlier.[23]

This Note contends that *WRTL* improperly excluded considerations of democracy from its free speech analysis, setting a one-sided and dangerous precedent for future free speech cases.[24] The Court erred by excluding democracy from its free speech analysis for two reasons, both having to do with the nature of rights themselves. First, democracy is the primary reason the First Amendment protects free speech. Rights such as the right to free speech are extrinsically valuable; they exist for the sake of some other interest or interests. Any number of values—autonomy, good governance, and so on—can underlie a right. But whatever the underlying interest, a right extends only so far as the interest for which it exists. One of the primary interests that justify political speech rights is citizens' collective interest in a well-functioning democratic government. Democracy is thus one of free speech's reasons for being. By ignoring democracy,

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20. McConnell v. FEC, 540 U.S. 93, 205 (2003) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)); *see also infra* notes 25–32 and accompanying text.

21. *See infra* text accompanying notes 46–52; *see also, e.g.*, *Wis. Right to Life*, 127 S. Ct. at 2686 (Scalia, J., concurring in part and concurring in the judgment) (noting that if "the two values . . . coexist . . . . [i]t is perhaps our most constitutional task to assure freedom of political speech").

22. *See infra* Part III.

23. *See infra* Part I.

24. This Note does not evaluate the accuracy of claims that unregulated money in politics harms democracy; many other writers and organizations have already done so. *See, e.g.*, BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 12 (2003) (arguing that the existing election regulation system is effective, that it is not particularly expensive in the context of consumers' other expenditures, and that there is little evidence that it actually produces significant corruption); Miles Rapoport & Jason Tarricone, *Election Reform's Next Phase: A Broad Democracy Agenda and the Need for a Movement*, 9 GEO. J. ON POVERTY L. & POL'Y 379, 401 (2002) (arguing, among other things, that the U.S. Congress should implement more restrictive campaign finance measures to "level[] the playing field for people of color and quality candidates who will represent the interests of average citizens and the poor instead of the interests of a few wealthy donors").

the *WRTL* majority protected the particular application of a right without using the proper tools to determine the true extent of that right.

Second, the *WRTL* Court's logic was flawed because democracy is an independent right and the Court should have considered it as such. When one right abuts another, courts determining the extent of one right must consider the other right. A review of the Constitution, American tradition, and American law supports the notion that citizens have an entitlement to republican government. By failing to balance the right to democracy with—or against—the right to free speech, the *WRTL* Court sent the message that courts may discard efforts by the elected branches to improve participatory government without concern for the Republic.

Part I of this Note explains how the *WRTL* majority treated democracy merely as a backdrop, a value that lacks meaningful implications for judicial decisionmaking. After reviewing some basic principles of rights theory in Part II, this Note shows in Part III that the Court's unwillingness to consider democracy when evaluating political speech restrictions belied the reasons citizens have a right to free speech. Part IV explains that democracy is a right of the American people and shows how the *WRTL* Court allowed campaign finance practices to infringe that right. This Note concludes that the *WRTL* Court's treatment—or nontreatment—of democracy is at odds with any coherent notion of free speech or American democracy.

I. THE SUPREME COURT'S DOUBLE VISION

The members of the Court are sharply divided on whether to consider the value of democracy when evaluating political speech regulations. Whereas the *McConnell* majority affirmed the BCRA's restrictions by emphasizing how democratic values influence the decision to allow government restrictions on political speech, the *WRTL* majority cast out democracy as a value unworthy of their consideration.

A. Considering Democracy When Defining Free Speech: McConnell *and the* WRTL *Dissent*

In *McConnell*, the Court upheld BCRA provisions imposing blackout periods before primary and general elections on paid broadcast advertisements by corporations and unions that mentioned

a candidate's name.[25] The majority reasoned that political speech without such regulation would damage the integrity of elected officials and the public's perception of government.[26] It explained that the Court's case law has "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[27] Beyond these implications for the political process, the Court explained that regulating all electioneering communications helps prevent the circumvention of the other "[valid] contribution limits" that restrain the influence of money in politics.[28] It also explained that when candidates receive large sums of corporate money, corruption and the perception of corruption that may result can harm the political process. "Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide"—or be perceived as deciding—"issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."[29] Lastly, the Court recognized, as did the later dissent in *WRTL*,[30] that a system that fails to govern the use of money in politics undermines the connection between ideological agreement and political support.[31] The majority remarked that corporations and other entities often feel compelled to give "substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were

25. *McConnell*, 540 U.S. at 189–94.

26. *See infra* notes 36–40 and accompanying text.

27. *McConnell*, 540 U.S. at 205 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

28. *Id.* (alteration in original) (citing FEC v. Beaumont, 539 U.S. 146, 155 (2003)).

29. *Id.* at 153. "Even if it occurs only occasionally, the potential for such undue influence is manifest." *Id.* These quotations appeared in the Court's discussion of a BCRA provision that prohibited national parties from receiving certain forms of financial contributions, but its analysis applied to this provision as well. The Court went on to remark that its

> treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."

Id. at 136 (quoting FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982)).

30. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2688 (2007) (Souter, J., dissenting).

31. *McConnell*, 540 U.S. at 148.

seeking influence, or avoiding retaliation, rather than promoting any particular ideology."[32]

Justice Souter's dissenting opinion in *WRTL* echoed *McConnell*'s list of concerns[33] and expressed worry that unregulated elections threatened "democratic integrity."[34] Justice Souter feared that, if unregulated money corrupted politics, the electorate could become cynical.[35] "[E]normous demands" for funds in an unregulated setting, Justice Souter wrote, ultimately "assign power to deep pockets."[36] Because "[v]oters know this," an additional, "important consequence of the demand for big money to finance publicity [is] pervasive public cynicism."[37]

B. The WRTL *Opinion*

In contrast to *McConnell*, Chief Justice Roberts's principal opinion[38] in *WRTL* dismissed democracy's relevance. He took up only two of the dissenters' concerns. First, regarding arguments that unregulated issue advocacy risks creating at least the appearance of corruption, Chief Justice Roberts stated that the Court's prior decisions only held that corruption was an interest to be considered in financial contribution cases and were silent on whether the corruption interest is a factor in issue advocacy cases.[39] In saying so, he did scarcely more than assert: "Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo*

32. *Id.*

33. *Wis. Right to Life*, 127 S. Ct. at 2689 (Souter, J., dissenting).

34. *Id.* at 2687.

35. *Id.* For other decisions expressing concern about the harmful effects of corruption, see McConnell v. FEC, 540 U.S. 93, 148 (2003); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 446 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388 (2000); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 648 (1996) (Stevens, J., dissenting).

36. *Wis. Right to Life*, 127 S. Ct. at 2688 (Souter, J., dissenting).

37. *Id.* (citing statistics and analysis for this position).

38. Chief Justice Roberts delivered the opinion of the Court with respect to the Court's holding that it had jurisdiction to decide the case. *Id.* at 2663 (majority opinion). Joined only by Justice Alito, he wrote separately to argue that the BCRA was unconstitutional as applied. *Id.* at 2663–74 (Roberts, C.J., announcing the judgment of the Court). Justice Scalia, joined by Justice Kennedy and Justice Thomas, concurred in the judgment, concluding that the statutory provision in question was unconstitutional and that *McConnell* should be overruled. *Id.* at 2684 (Scalia, J., concurring in part and concurring in the judgment). Because Chief Justice Roberts's opinion was the narrower of the two opinions, it controls.

39. *Id.* at 2672 (Roberts, C.J., announcing the judgment of the Court).

corruption interest cannot justify regulating them."[40] Because no precedent requires courts to consider the interest in avoiding corruption in political expenditure cases, he claimed, the interest in avoiding corruption does not apply.[41] Without more, this line of argument is problematic because it takes the absence of a command to do something as a command *not* to do something; that no decision had yet required the Court to consider the effects of corruption in issue advocacy cases does not mean that the Court is not at liberty to take up the issue if it so chooses. Therefore, Chief Justice Roberts's first argument concludes that the "corruption interest cannot justify regulating"[42] issue advocacy because the Court's hands are tied, yet it was clearly not encumbered in this way.

Second, Chief Justice Roberts similarly addressed the "corrosive and distorting effects of immense aggregations of wealth" that prior Court opinions had argued do not indicate "the public's support for the corporation's political ideas."[43] Roberts again relied on precedent to argue that this consideration had no pedigree outside of campaign speech cases.[44] For instance, he explained that the *McConnell* Court was "willing to 'assume that the interests that justify the regulation of campaign speech *might not* apply to the regulation of genuine issue ads.'"[45] Therefore, the argument goes, the fact that prior discussions do not mandate that the corrosive effects of wealth be considered in genuine issue advocacy cases may be taken as evidence that the effects of money on politics should not be considered in issue advocacy situations. This, again, is problematic because it conflates license not to consider something with a reason—or even a mandate—not to consider it.

Instead of addressing two of the democracy-related concerns articulated by prior courts, Chief Justice Roberts found reasons to

40. *Id.* In 1976, *Buckley v. Valeo* ruled that campaign contributions could be regulated for corruption-avoidance purposes. Buckley v. Valeo, 424 U.S. 1, 19–21 (1976) (per curiam).

41. *Wis. Right to Life*, 127 S. Ct. at 2672 (Roberts, C.J., announcing the judgment of the Court).

42. *Id.*

43. *Id.* (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

44. *Id.* at 2672–73.

45. *Id.* (emphasis added) (quoting McConnell v. FEC, 540 U.S. 93, 206 n.88 (2003)). Justice Roberts also argued that including issue advocacy under a ban on campaign speech "would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights." *Id.* (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 778 (1978)). He made no claim that doing so would actually overturn or otherwise be inconsistent with *Bellotti*, however.

ignore them. His opinion made no descriptive claim as to whether wealth and corruption are corrosive to democracy in this setting. Chief Justice Roberts failed to address Justice Souter's fears about threats to democratic governance. As a poor substitute, he used the same logic to dismiss both of the dissent's concerns: because previous Court decisions failed to definitively answer a question, he reasoned, the Court should not consider the question.

At least Justice Scalia's concurring opinion outwardly recognized that it was unconcerned with democratic considerations. His central argument was that the BCRA's restrictions on broadcast media were impermissibly vague, proscribing a much greater swath of expression than the legislation intended.[46] Justice Scalia acknowledged the concerns raised in *McConnell* regarding the potentially corrosive effects of wealth in politics, the potential for corruption, and the likelihood that corporations and unions could "devis[e] expenditures that skirted the restriction on express advocacy."[47] But after recognizing these problems, he stated that speech was the Court's only consideration.[48] Freedom of speech and "our desire for healthy campaigns in a healthy democracy"[49] may be incompatible in this case, he argued, but even if the "two values can coexist, it is pretty clear which side of the equation *this institution* is primarily responsible for."[50]

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In the *McConnell* and *WRTL* opinions, the Justices disagreed not simply about how democracy is best maintained; they disagreed on democracy's relevance. Whereas some Justices claimed threats to democratic integrity were immaterial, others considered it of prime importance. They consequently talked past each other without conveying a comprehensive sense of how all the factors in a political speech analysis should be weighed against one another. More simply, Justices such as Scalia who have found it "pretty clear" that the Court

46. *Id.* at 2680 (Scalia, J., concurring in part and concurring in the judgment). This Note does not consider the accuracy of Justice Scalia's contention.

47. *Id.* at 2682 (quoting Buckley v. Valeo, 424 U.S. 1, 45 (1976) (per curiam)).

48. *Id.* at 2686 ("Perhaps overruling this one part . . . of BCRA would not 'ai[d] the legislative effort to combat real or apparent corruption.' But the First Amendment was not designed to facilitate legislation, even wise legislation." (second alteration in original) (citations omitted) (quoting *McConnell*, 540 U.S. at 194)).

49. *Id.* (quoting Rep. Richard Gephardt).

50. *Id.*

should not protect democracy have failed to consider the practical implications of their speech jurisprudence.[51] This speech-at-all-costs view both erodes American citizens' right to democracy and, as Part II demonstrates, belies the nature of rights.[52]

II. THE NATURE OF RIGHTS

Before explaining how the Court's decision in *WRTL* is incongruent with democracy and the logic of rights, it is important to establish some basic principles that govern rights.

First, no right exists for its own sake. Rather, "rights exist to serve relevant interests of the right-holder" and are therefore only valuable because they promote those interests.[53] By definition, to have a right is to have a legally or morally cognizable claim to or from something.[54] Some rights are shorthand for entitlements that people have to some human good (for example, life, water, safety, and equality);[55] others protect—or protect from—human action (for

51. *See, e.g.*, *id.* at 2705 (Souter, J., dissenting) ("[T]he understanding of the voters and the Congress that this kind of corporate and union spending seriously jeopardizes the integrity of democratic government will remain. The facts are too powerful to be ignored . . . . It is only the legal landscape that now is altered, and it may be that today's departure from precedent will drive further reexamination of the constitutional analysis . . . .").

52. *See infra* Part III.B.

53. WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 121 (2004). This Note builds upon the "instrumental approach" to rights, which asserts that rights are valuable because—and insofar as—they yield other established social goods. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO 102 (1994) ("'Free speech' is just the name we give to verbal behavior that serves the substantive agendas we wish to advance."); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 62–64 (2001) ("[A]lthough not commanded by the First Amendment, the instrumental approach has a respectable constitutional pedigree." (citing Schenck v. United States, 249 U.S. 47 (1919))). Not all writers have shared this view; some have argued that that free speech is inherent in the moral nature of people as autonomous agents. *Id.* at 62–63 & nn.1–2 (noting that this position is sometimes taken). A number of commentators have discussed the nature of rights as instrumental (versus intrinsic). *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198 (1977) (explaining that enforcing rights must have some point or purpose as its object); JEFF MCMAHAN, THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE 330 (2002) ("[R]ights presuppose interests . . . ."); JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 74 (1990) (explaining that "[r]ights are . . . justified for instrumental reasons" in a utilitarian framework).

54. *See* EDMUNDSON, *supra* note 53, at 42–43 (summarizing the Burkean argument that "the specification of any plausible kind of right presupposes the existence of a background of social convention").

55. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at 71 art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (affirming the universal "right to life, liberty and security of person").

example, rights to assembly, free exercise of religion, working in a discrimination-free environment).[56] Either way, a right is always tethered to some purpose that it serves.[57] This is particularly apparent when rights shield citizens from governmental interference or obligate the government to enforce other rights. As Professor Ronald Dworkin has explained, instituting rights "is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point."[58] Therefore, "[a]nyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is."[59]

It follows that a right exists only insofar as legitimate interests underlie it: its license is its limitation. Failing to acknowledge this limit can quickly cause a right to appear capable of trampling other values and rights in ways generally thought undesirable. An unlimited right to free speech would permit libel;[60] an unlimited right to the free exercise of religion could disrupt schools and other government functions.[61] This problem is why an absolutist conception of rights is widely considered untenable.[62] Treating rights as absolutes "is an

56. *See, e.g., id.* at 71 art. 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

57. For example, a person's right to property exists, among other reasons, for the right holder's "enjoyment and disposal . . . of all his acquisitions." 1 WILLIAM BLACKSTONE, COMMENTARIES *73.

58. DWORKIN, *supra* note 53, at 198, 198–200.

59. *Id.*

60. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U. S. 323, 341 (1974) ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . . .").

61. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 867–70 (1982) (plurality opinion) (holding that a school board could not remove books from the school library "in a narrowly partisan or political manner" because doing so infringes students' "right to receive ideas"); Mozert v. Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) ("[T]he requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion.").

62. *See, e.g.*, Am. Bank & Trust Co. v. Fed. Reserve Bank of Atlanta, 256 U.S. 350, 358 (1921) ("[T]he word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."); EDMUNDSON, *supra* note 53, at 147 ("At some point, what has been called the 'no threshold' view [of rights] begins to seem implausible."); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT

illusion" that "tend[s] to downgrade rights into the mere expression of unbounded desires and wants."[63] The First Amendment does not protect people who shout "fire!" in a crowded theater because that action strays beyond what the justification for free speech rights allows.[64] Therefore, a court's first job when determining whether a right has been violated is to decide whether the asserted right protects the action at issue. As part of this inquiry, one ground "that can consistently be used to limit the definition of a particular right. . . . [is to] show that the values protected by the original right are not really at stake in the marginal case or are at stake only in some attenuated form."[65] When a right's underlying values are not involved, that right does not exist.

Second, rights act as "trumps." The point of declaring something a right is to establish that it "trumps . . . other competing moral considerations," even when the government is tempted to hamper the right for the sake of some social value.[66] But just because a right indicates an underlying "trump suit"[67] of moral or legal interests does

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OF POLITICAL DISCOURSE 44–46 (1991) (presenting several reasons interpreting rights as absolutes is unworkable).

63. GLENDON, *supra* note 62, at 45.

64. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

65. DWORKIN, *supra* note 53, at 198–204 (arguing that rights cannot be violated merely "for supposed reasons of the general good"). Professor Dworkin continues by reasoning that the government should only abridge a right "in clear-cut cases . . . when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based. It cannot be an argument for curtailing a right, once granted, simply that society would pay a further price for extending it." *Id.* at 200. Facing a challenge to a state's election laws, Justice Stevens summarized quite nicely how a court would weigh rights and underlying interests:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

66. EDMUNDSON, *supra* note 53, at 145. This explanation of the function of rights reflects a rather strong view of rights. Although rights are sometimes considered weaker and more easily violable than this Part describes, the view of rights this Note takes only makes the Note's argument more difficult because it establishes a high bar for infringing traditionally protected free speech.

67. *Id.*

not mean it cannot be overridden by another trump.[68] "[T]aking any [constitutional right] as far as it can go soon brings it into conflict with others," at which point one right must override the other.[69] To trump a right—that is, to infringe on it—one may prove another right conflicts with it. The conflict of one right with another right prompts a court, a legislature, or some other decisionmaker to consider the various factors and interests and arrive at a decision to limit one right or the other.[70]

Two ways therefore exist to limit a right—either by showing that a right cannot logically exist beyond when underlying, legitimate interests justify its existence or by showing why it must yield to another right.[71] These two mechanisms are central to explaining the flaw in the *WRTL* Court's analysis. The next two Parts apply these mechanisms to demonstrate how the notion of democracy provides two independent reasons for limiting the First Amendment right to free speech. First, Part III develops the idea that, because the maintenance of democracy and good governance is the primary reason for First Amendment political speech protections, it also marks the outer boundary of political speech rights. Second, Part IV shows that in campaign finance reform cases, the independent right to democratic governance conflicts with political speech rights. For both reasons, the logic of the *WRTL* Court is problematic because it arbitrarily vitiated essential considerations from its calculus, setting a dangerous precedent.

III. DEMOCRACY AS THE RATIONALE FOR FREE SPEECH

As Part II has explained, a right can exist only when its underlying interests are at stake. Campaign finance cases such as *McConnell* and *WRTL* provide opportunities for the Supreme Court to trace the contours of the right to free speech, identifying the right's legal and historical rationales to evaluate more precisely the bounds of that right. As Section A explains, a robust set of philosophical and practical goals underpin the right to free speech. Section B shows how

68. *Id.* at 146.

69. GLENDON, *supra* note 62, at 44; *see also supra* notes 60–65 and accompanying text.

70. DWORKIN, *supra* note 53, at 198–200.

71. *Cf.* DVD: American Foreign Policy in the War on Terror: Is Torture Ever Acceptable? (Columbia Law School 2005) (on file with author) (explaining that one can qualify or limit a right either "by . . . [allowing] it to be subordinated to" other rights or values or by "redefin[ing] the central idea" to exclude certain circumstances).

the *WRTL* Court ignored these purposes, undermining its analysis and its holding.

A. Why the First Amendment Right to Free Speech Exists

Commentators often lament the Supreme Court's muddled jurisprudence regarding the use of money in politics.[72] Although the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech,"[73] its simple language gives little indication as to what that freedom of speech entails. "Even the rhetorically principled Justice Scalia, with his almost religious adherence to textualism . . . has acknowledged that '[the First Amendment] does not list the full range of [protected] communicative expression.'"[74] There is, as a result, plenty of room for disagreement over the meaning of the First Amendment, including whether it was intended to protect financial expenditures made to communicate a political message.[75]

The task of determining the meaning of the pithy amendment ultimately falls upon the United States Supreme Court. "Because campaign finance reform legislation, in its attempt to effectively combat circumvention, invariably touches upon so many types of conduct the Court has been forced to apply First Amendment principles to a complex array of regulatory provisions."[76] Typically mired in fact-specific determinations and opinions by justices who can scarcely agree, the Court's jurisprudence consequently tends not to provide broad or straightforward answers to constitutional questions

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72. *See, e.g.*, Wayne Batchis, *Reconciling Campaign Finance Reform with the First Amendment: Looking Both Inside and Outside America's Borders*, 25 QUINNIPIAC L. REV. 27, 48–49 (2006) ("The confusing morass of perspectives on the constitutionality of campaign finance reform revealed by the Court's decisions to date, and solidified by its most recent opinions in *McConnell* and *Randall*, has cast the future of reform into a cloud of uncertainty."); *see also, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982) ("There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression.").

73. U.S. CONST. amend. I.

74. Batchis, *supra* note 72, at 42 (alterations in original) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37–38 (Amy Gutmann ed., 1997)).

75. *Id.*

76. *Id.* at 43. "[T]he Supreme Court's jurisprudence with regard to [campaign finance reform] issues makes matters worse." *Id.*

on the subject.[77] As the disagreement between the *McConnell* and *WRTL* opinions demonstrates, the Justices disagree not only on the conclusion (whether to allow restrictions on certain forms of speech) but also on how to arrive at a conclusion.

Since the Founding, "several different views as to why freedom of speech should be regarded as a fundamental right" have emerged.[78] None of these rationales is exclusive, and writers often assume that they all coexist.[79] Among the rationales for free speech are the advancement of individual autonomy,[80] the discovery of truth,[81] and the promotion of tolerance.[82] But one of the strongest explanations is that the right to free speech derives from the nature of democracy itself.[83] There is a great deal of evidence that the Founders were concerned about "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."[84] On one hand, the Founders valued free speech because it "[l]et[s] [Truth] and Falsehood

77. *Id.*; *see also* Redish, *supra* note 72, at 591 ("There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression. These efforts have been characterized by 'a pattern of aborted doctrines, shifting rationales, and frequent changes of position by individual Justices.'" (footnote omitted) (quoting Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 526)).

78. CHEMERINSKY, *supra* note 2, § 11.1.2, at 925–30 (outlining the four major speech rationales this Section summarizes); *see also* Emerson, *supra* note 4, at 878–79 (identifying four categories of "values sought by society in protecting the right to freedom of expression").

79. CHEMERINSKY, *supra* note 2, § 11.1.2, at 925.

80. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (arguing for a "liberty theory [that] justifies protection because of the way the protected conduct fosters individual self-realization and self-determination"); Redish, *supra* note 72, at 593 ("[T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled 'individual self-realization.'").

81. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); Emerson, *supra* note 4, at 878 ("The values sought by society in protecting the right to freedom of expression . . . [include] a means of attaining the truth . . . .").

82. *See, e.g.,* CHEMERINSKY, *supra* note 2, § 11.1.2, at 930 (outlining the reasons freedom of speech should be a fundamental right (citing LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 9–10 (1986))).

83. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression . . . ."); *see also, e.g.*, MEIKLEJOHN, *supra* note 6, at 27 (noting that the right to free speech is "a deduction from the basic American agreement that public issues shall be decided by universal suffrage").

84. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 5, at 33.

grapple"; it provides the ground rules through which robust debate and dialogue can most easily promote human happiness.[85] On the other hand, the right to free speech prevents "suppression by the government of political ideas of which it disapprove[s], or which it f[inds] threatening."[86] For these reasons, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[87]

Supreme Court jurisprudence has long reflected this view, often taking the position that "the ability to criticize government and government officers [is] 'the central meaning of the First Amendment.'"[88] As Justice Louis Brandeis put it, "[t]hose who won our independence believed that . . . . [the] freedom . . . to speak as you think" is "indispensable to the discovery and spread of political truth," protects "against the dissemination of noxious doctrine," guarantees the substance of the freedom of assembly, and promotes "stable government."[89] The freedom of expression is therefore a "fundamental principle of the American government."[90] The democracy rationale seems especially appropriate for political speech, for which the First Amendment has its "fullest and most urgent

85. JOHN MILTON, AREOPAGITICA; A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENC'D PRINTING TO THE PARLIAMENT OF ENGLAND 35 (London, Percy Lund, Humphries & Co. Ltd. 1927) (1644); *see also* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255, 255–57 ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.").

86. SUNSTEIN, *supra* note 3, at 132. "There can be little doubt that suppression by the government of political ideas of which it disapproved, or which it found threatening, was the central motivation for the [First Amendment free speech] clause." *Id.*

87. Mills v. Alabama, 384 U.S. 214, 218 (1966); *see also* SUNSTEIN, *supra* note 3, at 132 ("The best view of the relevant history is that political speech was thought to form the core of the free speech principle.").

88. CHEMERINSKY, *supra* note 2, § 11.1.2, at 927 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964)). "There is little disagreement that political speech is at the core of that protected by the First Amendment." *Id.*; *see also, e.g.*, *Mills*, 384 U.S. at 218 (explaining that the "free discussion of governmental affairs" is one of the primary rationales for First Amendment protections); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[M]en . . . may come to believe . . . that the ultimate good desired is better reached by free trade in ideas . . . and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

89. Whitney v. California, 274 U.S. 357, 375, 375–76 (1927) (Brandeis, J., concurring).

90. *Id.* at 375; *see also* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

application" and for which the content of the speech is most clearly aimed at affecting the political process.[91]

Thus, maintaining a healthy democracy is one of the key interests justifying First Amendment free speech protections. Its long tradition in American history, legal theory, and jurisprudence establishes its central role in questions of political expression.

B. The First Role Democracy Should Have Played in WRTL

The central issue before the Court in *WRTL* was whether the BCRA's regulations unjustifiably infringed on free speech rights.[92] Because rights exist only when interests justify them,[93] it makes little sense to evaluate the constitutionality of infringements on rights without first determining the boundaries of the rights. Answering this question would have required the Justices to establish whether free speech rights existed to the extent that they conflicted with BCRA restrictions. Determining the extent of free speech rights in turn would have required them to examine the interests free speech rights are supposed to protect: individual autonomy, the discovery of truth, promotion of tolerance, and, most applicably, the maintenance of a healthy democratic republic.[94]

The *WRTL* majority, however, did not consider the effect that BCRA had on democracy and other interests giving rise to free speech rights.[95] The Court therefore endeavored to protect a right without inquiring whether the right exists. Because the Court refused to determine whether political speech rights extended to protect WRTL's advertisements, it did not distinguish the right to political

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91. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971); *see also* Brown v. Hartlage, 456 U.S. 45, 53–54 (1982) (requiring a state to have a compelling interest before it restricts political speech). To this end, the Supreme Court has held that political speech is entitled to protection under the strict scrutiny standard. *E.g.*, FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2664 (2007) ("Because BCRA § 203 burdens political speech, it is subject to strict scrutiny."); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 666 (1990); *Brown*, 456 U.S. at 53–54 (holding that a statute nullifying a candidate's electoral victory based on a false campaign promise that the candidate promptly retracted was unconstitutional as applied because it was "inconsistent with the atmosphere of robust political debate protected by the First Amendment"); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) ("Especially where . . . speech is intimately related to the process of governing . . . 'the burden is on the government to show the existence of [a compelling] interest.'" (quoting Elrod v. Burns, 427 U.S. 347, 362 (1976))).

92. *Wis. Right to Life*, 127 S. Ct. at 2664.

93. *See supra* Part II.

94. *See supra* notes 78–87 and accompanying text.

95. *See supra* notes 38–49 and accompanying text.

speech from the mere act of political speech. The Supreme Court therefore gave the dint of precedent to the idea that courts can protect speech by presuming that the speaker had a right to it without ever investigating to see whether in fact that right extended to the speaker.

Tracing free speech back to its purposes adds another step to courts' free speech analysis, but requiring justification for First Amendment rights does not necessarily make it more difficult to protect them. Indeed, it is not a foregone conclusion that the *WRTL* majority would have upheld the BCRA's restrictions on speech had the Court considered the extent of free speech protections based on the purpose of the right. Instead of ignoring the underpinnings of free speech, the Court could have said that free speech creates an open marketplace of ideas, which best promotes democracy by allowing citizens to discover the truth for themselves.[96] It could have argued that campaign finance regulations make it harder for challengers to defeat incumbents;[97] that political speech is most important during the days before an election; or that the BCRA unduly encumbered other interests underlying speech rights, such as self-realization and self-expression.[98] The Court raised none of these points. By abstaining, it not only blinded itself to any harm it may have been doing (acceptable or not), but it also signaled to future courts that considering such values is not required.

IV. THE RIGHT TO DEMOCRACY

When one right conflicts with another, a court must balance the rights to determine which one predominates.[99] Although it only recognized one, the *WRTL* Court was in fact deciding between two rights: the right to free speech *and* the right to democracy.[100] Without identifying both rights and determining the extent to which they conflicted (if at all), the Court overlooked the risk its decision posed to the right of American citizens to democratic governance.

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96. *See* JOHN STUART MILL, ON LIBERTY 112 (Yale University Press 2003) (London 1859) ("[E]very opinion which embodies somewhat of the portion of truth which the common opinion omits, ought to be considered precious . . . .").

97. *See* POSNER, *supra* note 53, at 92 (describing the "perverse effects" of campaign finance laws and the "arbitrary advantage" they confer to candidates with affluent supporters).

98. Baker, *supra* note 80, at 966.

99. *See supra* note 71 and accompanying text.

100. *See supra* Part I.B.

A. The Right to Democracy in American Law

The notion that United States citizens are entitled to republican democracy is well worn in America's history and its law. Two-and-a-half years after the Boston Tea Party violently rejected taxation on tea imports under the slogan, "No taxation without representation,"[101] the Declaration of Independence declared that, as Professor Thomas M. Franck explains, "governments, instituted to secure the 'unalienable rights' of their citizens, derive 'their just powers from the consent of the governed.'"[102] The Declaration of Independence reinforced this position by providing "a second proposition": "that a nation earns 'separate and equal station' in the community of states by demonstrating 'a decent respect to the opinions of mankind.'"[103] The Constitution formally establishes elected legislative and executive branches.[104] It "guarantee[s] to every State . . . a Republican Form of Government."[105]

Since the Founding, the sense that the United States government is to be "of the people, by the people, for the people"[106] has only solidified. One indicator of the entitlement to participatory government is the increasing inclusiveness of American democracy, as the series of constitutional amendments extending the right to vote demonstrates.[107] Nearly half of the amendments passed after the Bill of Rights have somehow expanded democratic participation.[108]

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101. *See* DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 21–23 (1998) (discussing the Boston Tea Party and other examples of popular resistance to taxes in America).

102. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .").

103. Franck, *supra* note 102, at 46; *see also* THE DECLARATION OF INDEPENDENCE para. 1 (articulating the philosophical basis for the Declaration of Independence).

104. U.S. CONST. arts. I–II; *see also* THE FEDERALIST No. 57 (James Madison), *supra* note 5, at 351 ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.").

105. U.S. CONST. art. IV, § 4.

106. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 263 (1992).

107. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[H]istory has seen a continuing expansion of the scope of the right of suffrage in this country.").

108. U.S. CONST. amend. XII (allowing voters to cast independent votes for president and vice president); *id.* amend. XV (prohibiting proscriptions on the right to vote based on race,

Another indicator is the importance this overarching notion of democracy has been given in specific application, that is, how democracy's constituent practices have been protected by the government. Perhaps the most direct proxy for the right to democracy is the franchise. The Supreme Court has consistently held that the right to vote is a fundamental right protected by the Equal Protection Clauses of the Fifth and Fourteenth Amendments.[109] As Chief Justice Earl Warren wrote, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[110] Because the right to vote is "preservative of all rights," it is a "fundamental political right"[111] that demands heightened protection under a strict scrutiny standard.[112] The right to democratic participation is so important that "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."[113]

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color, or previous servitude); *id.* amend. XVII (mandating the direct election of senators); *id.* amend. XIX (establishing that neither states nor the federal government may deny the right to vote based on the voter's sex); *id.* amend. XXIII (granting presidential electors to the District of Columbia); *id.* amend. XXIV (banning poll taxes in federal elections); *id.* amend. XXVI (setting the minimum voting age at eighteen); *see also* CHEMERINSKY, *supra* note 2, § 10.8.1, at 871–72 (discussing some of these amendments).

109. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 104 (2000) ("[T]he right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969) ("Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore . . . the Court must determine whether the exclusions are necessary to promote a compelling state interest." (footnote omitted)); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."); *Reynolds*, 377 U.S. at 555 ("The right to vote can neither be denied outright . . . nor diluted . . . ." (citations omitted)).

110. *Reynolds*, 377 U.S. at 555.

111. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); *see also* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("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. Other rights, even the most basic, are illusory, if the right to vote is undermined.").

112. *E.g.*, *Kramer*, 395 U.S. at 627 (citing Carrington v. Rash, 380 U.S. 89, 96 (1965)); *see also Reynolds*, 377 U.S. at 562 ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

113. *Kramer*, 395 U.S. at 626.

The Supreme Court has zealously protected the right to vote from many impediments. It has struck down poll taxes,[114] residency duration minimums,[115] exclusions from the franchise based on race,[116] and property ownership requirements.[117] Since 1962, the Supreme Court has held that the population of electoral districts must be roughly equal and that plaintiffs seeking their rights under this rule may bring a justiciable claim.[118] The Court has subsequently invalidated various attempts to malapportion or otherwise dilute the voting power of particular citizens or districts.[119] The Court has also invalidated multimember voting districts in cases in which they tended to "minimize the voting strength of [economic, ethnic, political, or racial] minority groups."[120] In each case, the Court made the right to vote fundamental—and extended equal protection—because of the critical link between voting and democratic health.[121]

The Court has also treated another individual right based on the entitlement to democracy, the right of a candidate to appear on the ballot, as a right worthy of protection.[122] Courts have protected access

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114. *Harper*, 383 U.S. at 666; *see also id.* at 686 (Harlan, J., dissenting) ("Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized.").

115. Dunn v. Blumstein, 405 U.S. 330, 360 (1972).

116. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 341–48 (1960) (invalidating a districting plan in Tuskegee, Alabama, that put almost all black residents outside the city limits); Nixon v. Herndon, 273 U.S. 536, 540–41 (1927) (declaring unconstitutional a Texas statute that barred African Americans from voting in primaries).

117. City of Phoenix v. Kolodziejski, 399 U.S. 204, 208–09 (1970) (municipal bonds); Cipriano v. City of Houma, 395 U.S. 701, 702 (1969) (per curiam) (utility bond referenda); *Kramer*, 395 U.S. at 622 (property ownership requirements in school board elections).

118. Baker v. Carr, 369 U.S. 186, 237 (1962).

119. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 744 (1983) (declaring unconstitutional a districting scheme for the House of Representatives because of small variations in district size); Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

120. Rogers v. Lodge, 458 U.S. 613, 616–17 (1982). *But see* City of Mobile v. Bolden, 446 U.S. 55, 70 (1980) ("[A] disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose."); White v. Regester, 412 U.S. 755, 765–66 (1973) (finding that two challenged multimember districts were unconstitutional because they discriminated against blacks and Mexican Americans).

121. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); *Sanders*, 372 U.S. at 380–81.

122. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 32, 30–32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize

to the ballot against exorbitant filing fees[123] and requirements that candidates own real property.[124] Defending a candidate's right to appear on the ballot, the Supreme Court provided yet another democracy-oriented rationale by pointing out that infringing on that right injures "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes *effectively*," two of "our most precious freedoms."[125]

A third example is the status of political speech as the crux of the First Amendment right to speech. For the reasons Part III.A discussed, free speech exists in large part to promote healthy political discourse in a democracy. According to the Court, "speech concerning public affairs" is "more than self-expression; it is the essence of self-government."[126] The Supreme Court has therefore held that political speech is entitled to protection under the strict scrutiny standard largely because of its link to democracy.[127]

These examples prompt a few observations. First, as the founding documents and the constitutional amendments expanding the electorate demonstrate, citizens are constitutionally entitled to participatory governance. Second, the Court so highly values this entitlement to democracy that it has found even lesser rights to be fundamental to protect democratic governance. Third, the Court has consistently struck down laws and practices that make the democratic process substantially more ineffective, inequitable, or inauthentic.[128]

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in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.").

123. *See, e.g.*, Lubin v. Panish, 415 U.S. 709, 718 (1974) (invalidating filing fees imposed on indigent candidates); Bullock v. Carter, 405 U.S. 134, 149 (1972) (invalidating filing fees for primary ballots).

124. *E.g.*, Quinn v. Millsap, 491 U.S. 95, 106–07 (1989); Turner v. Fouche, 396 U.S. 346, 362 (1970).

125. *Williams*, 393 U.S. at 30 (emphasis added).

126. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); *see also* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); Whitney v. California, 274 U.S. 357, 376, 375–76 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the Founders] amended the Constitution so that free speech and assembly should be guaranteed."); *supra* Part III.A.

127. *See supra* note 91.

128. One might point out that antidemocratic elements are also central to the American theory of government. Although true, the Court has tended to limit those elements to what specific provisions explicitly mandate—but no further. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that, although the membership of the United States Senate is apportioned by state and not by population, states may only apportion representatives and districts by population).

B. The Second Role Democracy Should Have Played in WRTL

American law establishes that democracy is an independent right, an entitlement that people may expect the government to protect. As a right itself, the democratic entitlement can conflict with other rights. Whether the right to democracy conflicted with First Amendment free speech protections in *WRTL* is an unresolved question—one the Court majority did not even ask. In undertaking to protect political speech without considering democracy, the Court resembled homeowners who erect a fence around their property without knowing where their property ends and their neighbor's begins.

One might wonder what harm occurs when a court fails to consider any rights other than free expression in political speech cases such as *WRTL*. The first answer is that, if a court fails properly to recognize a right that nonetheless exists, it risks unknowingly encroaching on the unrecognized right in ways that it might not be able to justify otherwise. Some commentators, for example, have argued that the Court's decision in *WRTL* was a blow to the health of American democracy.[129] These impacts aside, the *WRTL* majority's decision has set the precedent that free speech may be considered in a vacuum; if future cases follow it, their decisions too could injure the democratic process.

Applying the right of representative governance in questions of election reform would have other important implications. Recognizing the right to democratic governance would put it on more equal footing with the right to political speech. Political speech is normally entitled to strict scrutiny protection, which is usually enough to sound the death knell for whatever challenges it.[130] But when free speech conflicts with another right, the presumption against whatever

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129. *See, e.g.*, Press Release, Brennan Ctr. for Justice, Brennan Center Statement on Ruling in FEC v. Wisconsin Right to Life (June 25, 2007), http://www.brennancenter.org/content/resource/brennan_center_statement_on_ruling_in_fec_v_wisconsin_right_to_life/ ("The Supreme Court's decision today re-opens the floodgates of unlimited special interest money in federal elections . . . . The Court is willfully ignoring how modern campaigns work. The exception created with this decision swallows the rule the Court found constitutional less than four years ago."). *But see* Newt Gingrich, *Blacking out Speech: McCain-Feingold's Assault on Freedom*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES., June 1, 2006, http://www.aei.org/publications/filter.all,pubID.24468/pub_detail.asp (arguing that the BCRA injured the "bond of trust between the American people and their elected representatives" and made "it harder for candidates of middle-class means to run for office at all").

130. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) ("[I]t is the rare case in which we have held that a law survives strict scrutiny."); *supra* note 91 and accompanying text.

conflicts with it is not so one-sided. For example, *Burson v. Freeman*[131] held that a Tennessee statute barring political signage and vote solicitation within one hundred feet of a polling location did "not constitute an unconstitutional compromise."[132] The Court concluded that when "the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud," the statute restraining free speech may survive strict scrutiny.[133] Because the government "indisputably has a compelling interest in preserving the integrity of its election process,"[134] recognizing democracy as a right would prompt the Court to engineer a "compromise";[135] the Court would weigh the two competing considerations against each other without giving speech the benefit of the doubt.[136] Recognizing democracy as a fundamental right would therefore level the playing field, weakening the presumption in favor of unbridled speech.

No Justice of the Supreme Court has explicitly used the right to democracy as an enforceable right in the context of election reform. The pro-regulation opinions of the *McConnell* majority and the *WRTL* dissent have come close, however. In *McConnell*, the majority used a less stringent standard of review than strict scrutiny because of concerns regarding democracy:

> Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." . . . Because the electoral process is the very "means through which a free society democratically translates political

131. Burson v. Freeman, 504 U.S. 191 (1992).

132. *Id.* at 211.

133. *Id.* As the Court noted,

> [Because activity], even in a quintessential public forum, may interfere with other important activities for which the property is used. . . . the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.

Id. at 197.

134. *Id.* at 199 (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 231 (1989)).

135. *Id.* at 211.

136. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2669 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

> speech into concrete governmental action," contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate. For that reason, when reviewing Congress' decision to enact contribution limits, "there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'"[137]

This reasoning suggests recognition that democracy is anomalous among interests. The Court could just as easily have said that the integrity of the democratic process is a compelling interest that meets the strict scrutiny standard. Its refusal to afford strict scrutiny protection in this case—and to require the government to meet the compelling government interest standard that accompanies strict scrutiny protections—marks democracy as fundamentally different from the typical interests that might arise in such a case. The Court treats democracy as a right to be balanced against another right, rather than an interest that must meet its heavy burden.

In the *WRTL* dissent, Justice Souter cites the "compelling interest" standard only once and only when recounting *McConnell*'s understanding of the importance of limiting electioneering communications.[138] Yet he made extended appeals to an idea he called "democratic integrity,"[139] a concept whose roots may stretch back at least to the Court's 1989 opinion in *Eu v. San Francisco County Democratic Central Committee*,[140] which discussed the importance of "preserving the integrity of [the] election process."[141] Justice Souter claimed that keeping undue power out of the hands of "deep pockets,"[142] making political expenditures better represent "political

137. McConnell v. FEC, 540 U.S. 93, 136–37 (2003) (citations omitted) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401, 400 (2000) (Breyer, J., concurring); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982)). *McConnell* was referring to *Buckley*'s use of "closely drawn" scrutiny for campaign contributions. The *McConnell* majority recognized that setting a less stringent standard of review has been a lightning rod for attacks from the more conservative Justices. *See id.* at 137 ("Our application of this less rigorous degree of scrutiny has given rise to significant criticism in the past from our dissenting colleagues.").

138. *Wis. Right to Life*, 127 S. Ct. at 2696 (Souter, J., dissenting) ("[In *McConnell*, we] understood that Congress had a compelling interest in limiting this sort of electioneering by corporations and unions . . . .").

139. *Id.* at 2687.

140. Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214 (1989).

141. *Id.* at 231; *see also* Burson v. Freeman, 504 U.S. 191, 199 (1992) (discussing the protection of "the integrity and reliability" of the electoral process).

142. *Wis. Right to Life*, 127 S. Ct. at 2688 (Souter, J., dissenting).

preference" rather than the interests of "high-dollar pragmatists" that buy influence,[143] and mitigating "pervasive public cynicism"[144] are all "elements summed up in the notion of political integrity, *giving it a value second to none in a free society*."[145] He then spent several pages delineating the historical evolution and ideological roots of the democratic integrity concept, claiming also that it has been "obvious" since roughly the end of the Civil War "that the purchase of influence and the cynicism of voters threaten the integrity and stability of democratic government, each derived from the responsiveness of its law to the interests of citizens and their confidence in that focus."[146]

Thus, the *WRTL* dissent emphasized protecting political integrity and not the question of showing a compelling interest narrowly tailored to achieving that object. This departure from the traditional threshold question, although not an embrace of the rights-oriented analysis this Note suggests, moves in that direction.

Using the right to democratic governance to counterbalance the freedom of speech would hopefully counteract the tendency of regulation opponents to dismiss the harms to democratic governance that a failure to regulate could cause. Courts should not consider impacts on democracy only when doing so is convenient or supports their arguments. Acknowledging democracy as a right would hold judges accountable to addressing it. If democracy is more than a backdrop for individual rights, courts cannot ignore or circumvent its implications for lack of precedent. Consequently, recognizing the right to democracy would clarify the debate over campaign reform because both pro- and anti-regulation advocates would be able to identify the core issue—whether free speech conflicts with democracy and, if so, whether it trumps democratic considerations.

Additionally, the Supreme Court's failure to recognize democracy as a right has uncomfortable implications for the United States' international relations. When the United States government advocates for something abroad that it is unwilling to implement domestically, it may be seen as hypocritical by foreign nations.[147]

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143. *Id.*

144. *Id.*

145. *Id.* at 2689 (emphasis added). Justice Souter also remarked that Congress has recognized democratic integrity and acted against threats to it. *Id.* at 2687.

146. *Id.* at 2689.

147. For example, before the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954), and before the civil rights movement had run its course, observers often remarked that segregation and racial discrimination in the United States were "a source of

While the Supreme Court was handing down its *WRTL* decision, the federal government was working to maintain a fledgling electoral system in Iraq that imposed by law a "media silence period" directly during elections.[148] This regulation went far beyond the proscriptions of the BCRA; it barred the media from reporting on partisan activities for a certain length of time before Iraqi elections.[149] Thus, the law would have been unconstitutional by *WRTL* standards. The United States' efforts to set up such electoral systems abroad, combined with its emphatic participation in treaties that entitle individuals to democratic governance,[150] causes the Court's language in *WRTL* to ring hollow. Recognizing the right to democracy at home would not hurt United States foreign policy efforts to spread democracy abroad.[151]

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constant embarrassment to [the United States] Government in the day-to-day conduct of its foreign relations; and it jeopardize[d] the effective maintenance of [its] moral leadership of the free and democratic nations of the world." Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Address at the Centre for Human Rights of the University of Pretoria (Feb. 7, 2006), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07a-06.html (quoting Brief for the United States as Amicus Curiae at 8, *Brown*, 347 U.S. 483 (1954) (Nos. 8, 101, 191, 413, 448), 1952 WL 82045). As Chief Justice Earl Warren explained eighteen years after *Brown*, the change in United States race relations policies

> was fostered primarily by the presence of [World War II] itself. . . . While proclaiming themselves inexorably opposed to Hitler's practices, many Americans were tolerating the segregation and humiliation of nonwhites within their own borders. The contradiction between the egalitarian rhetoric employed against the Nazis and the presence of racial segregation in America was a painful one.

Id. (alteration in original) (quoting retired Chief Justice Earl Warren). Thus, "there is little doubt" that the *Brown* decision "both reflected and propelled the development of human rights protection internationally." *Id.*

148. *See* Independent Electoral Commission of Iraq Regulation 11/2004, § 2.3 (2004), *available at* http://uniraq.org/elections/regulations.asp ("There shall be a media silence period between the end of the campaign period and the closing of the polling stations at the end of polling, during which there shall be no media coverage of any Iraqi partisan political activity.").

149. *Id.*

150. *See, e.g.*, G.A. Res. 55/96, U.N. GAOR, 55th Sess., U.N. Doc. A/55/96 (Feb. 28, 2001) (calling on states to promote democracy by establishing certain rights); G.A. Res. 46/137, U.N. GAOR 46th Sess., U.N. Doc. A/RES/46/137 (Dec. 17, 1991) (calling on states to enhance the effectiveness of periodic and genuine elections by affirming and respecting their citizens' right to political participation); Charter of the Organization of American States art. III, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (creating a duty for states to work toward "the effective exercise of representative democracy").

151. The United States has sometimes used whether another government is democratically governed as a criterion for recognizing a state. *See, e.g.*, LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 258 (4th ed. 2001) (discussing U.S. Secretary of State James Baker's policy, which included support for democracy as a criterion for recognition of statehood).

CONCLUSION

Democracy is more than background scenery. It is both an underlying justification for free speech rights and an independent entitlement of citizens distinct from other rights. Regulations and private action can strengthen or threaten it. The Supreme Court's decision in *WRTL* overlooks this important value, not because it found that the government's regulations burdened political speech or because it determined that free speech and democracy could coexist, but because it held that the empirical implications of political speech and government regulation had no bearing.

This decision was problematic for two reasons. First, democracy is one of the primary reasons political speech rights exist. The right to political speech therefore extends only insofar as this root purpose demands. But when a court forgets the interests underlying a right and seeks to enforce a right in absolute form—as the Court did in *WRTL*—it risks extending the protections of that right to a point so unjustified that the right's exercise becomes antithetical to its purpose. Second, democracy is an independent entitlement. The Constitution, the American tradition, and American law all implicitly recognize this democratic entitlement. To ignore this right as the *WRTL* majority did is to deny its validity and its value, signaling that democracy is of no consequence in free speech jurisprudence.

Hopefully future judges will genuinely consider how money in politics strengthens or hinders democracy, because upholding other rights and interests without considering their impacts on democracy ignores a critical element in the American system of rights. Democracy has played a central role in American history and legal theory. For any judicial decision to remain true to democracy's importance, it is up to the judge to treat it as more than a mere paper commitment.