Democracy, power, and the
Supreme Court: Campaign finance
reform in comparative context

Yasmin Dawood*

The debate over campaign finance reform is usually framed as a conflict between reducing corruption in the electoral process, on the one hand, and protecting freedom of speech, on the other. There is far more at stake, however, in the controversy over campaign finance regulation. By engaging in a comparative analysis of key decisions by the U.S. Supreme Court and the Supreme Court of Canada, this article shows that the judicial oversight of campaign finance reform raises fundamental and complex questions about democratic values, processes, and institutions. Specifically, I argue that conflicts over campaign finance regulation are at base disputes about how power should be distributed within a democracy. In addition, I claim that the decision to regulate campaign finance should be viewed as inevitably involving a trade-off among competing distributions of power in a democracy. In other words, campaign finance regulation does not simply present a choice between reducing corruption and protecting speech; instead, the actual decision involves a far more complex balancing of competing objectives. This article outlines a proposal for how courts should analyze the power trade-offs involved in the regulation of campaign finance.

Elections are an expensive business in the United States. In the 2000 election cycle, for instance, the Republican and Democratic parties spent over 1.2 billion dollars.1 House and Senate candidates spent about one billion dollars, while presidential candidates spent $500 million.2 To finance elections, political parties and candidates are largely dependent on private donations from individuals, corporations, and special interests. The debate over

* Ph.D. candidate, Department of political science, University of Chicago. I am deeply grateful to Danielle Allen, Stanley Katz, Jacob Levy, Patchen Markell, Jennifer Rubenstein, and anonymous reviewers for invaluable comments on an earlier version of this article. Special thanks are also owed to Ran Hirschl and Christopher Eisgruber for excellent editorial suggestions, and for organizing the North American Constitutionalism conference, at which this paper was presented. In addition, I am indebted to many people for very helpful questions and suggestions, including Karen Barrett, Sujit Choudhry, Norman Dorsen, Leslie Goldstein, Mark Graber, Mark Hansen, Vicki Jackson, Kent Roach, Kim Lane Scheppele, Richard Simeon, Mark Tushnet, and Melissa Williams. I am especially grateful to Cass Sunstein and Lisa Wedeen for extremely helpful and incisive comments on a larger project, of which this article forms a part. Email: ydawood@uchicago.edu


2 See id. at 599–600.
campaign finance reform addresses the following question: should there be any rules governing the giving and spending of money for political campaigns? This debate has generated two opposing viewpoints in American judicial decisions. According to some judges, campaign finance regulations are necessary to combat governmental corruption. On this view, the electoral process must be protected from quid pro quo exchanges in which contributors provide cash to officeholders in exchange for political favors. By contrast, others argue that campaign finance regulations violate freedom of speech as protected by the Constitution. People communicate ideas by donating money to candidates, parties, and other organizations that support their political viewpoints; as such, restrictions on contributions have the effect of abridging political speech. Courts have thus framed the campaign finance debate as a choice between reducing the risk of corruption on the one hand and protecting the right of free speech on the other.

There is far more at stake in the controversy over campaign finance reform, however, than the conventional judicial choice between reducing corruption and protecting speech. A primary objective of this article is to recast the terms of the campaign finance debate. I claim that the judicial oversight of campaign finance reform raises fundamental and complex questions about democratic values, processes, and institutions. Specifically, I argue that conflicts over campaign finance regulation are at base disputes about how power should be distributed within a democracy. In addition, I claim that the decision to regulate campaign finance should be viewed as inevitably involving a trade-off among competing distributions of power in a democracy.

This article seeks to restructure the campaign finance debate by placing it within a comparative context. In a remarkable parallel, the Supreme Court of the United States and the Supreme Court of Canada recently upheld the constitutionality of campaign finance restrictions. In December 2003, the U.S. Supreme Court upheld the major provisions of the Bipartisan Campaign Reform Act of 2002 in *McConnell v. Federal Election Commission*. A mere six months later, the Supreme Court of Canada upheld the constitutionality of the Canada Elections Act of 2000 in *Harper v. Canada (Attorney General)*. A comparison between the United States and Canada is instructive both because of the similarities that arise between two constitutional democracies with a tradition of judicial review and because of the differences that exist between two countries with distinct histories, cultures, institutions, and politics.

---

In comparing the *McConnell* and *Harper* decisions, I am particularly interested in judicial discourse; that is, in examining how the two Supreme Courts have conceived of the democratic process and how they have articulated the values, norms, and ideals of democratic governance. In general, I argue that the debate over campaign finance reform is at heart a conflict among competing visions of democracy. Conflicts between majority and dissenting opinions are often rooted in deeper, foundational disagreements about the nature of democracy itself. More importantly, I claim that the justices implicitly relied upon rival conceptions of how political power should be fairly distributed within a democracy. Judicial reliance on these competing conceptions of power, however, is not openly discussed in the opinions, with the result that judges are deciding campaign finance cases without having to either identify or defend their theoretical and normative commitments.

My objective is not to endorse any one conception of how power should be distributed within a democracy. I claim that both sides of the constitutional equation—the justifications offered by the Courts in favor of regulations, on one side, and the arguments in favor of free speech, on the other side—are fundamentally concerned with larger, structural questions about the fair distribution of power in a democracy. With regard to the first half of the constitutional equation—the justifications for campaign finance regulations—I argue that both Courts were primarily concerned with the equal distribution of political power. Notwithstanding this similarity, the Courts articulated very different understandings of what the equality of political power means. I refer to the understanding of equal political power in *McConnell* as the *empowered citizen* model and the understanding in *Harper* as the *informed voter* model. In a similar manner, the second half of the constitutional equation—freedom of speech—can be understood in two distinct ways, which I shall call the *liberty* view of freedom of speech and the *equality* view of freedom of speech. Rather than viewing free speech solely as an individual right, I claim that these two conceptions of speech are structural; that is, they are ultimately concerned with the power of speech to reorder the relationship between the citizens and the state.

Three insights emerge from this analysis. First, a comparative study of judicial discourses on power distribution raises the following issue: to what extent are these discourses realized in practice? This article examines how campaign finance decisions, and the regulations that they upheld, affect the actual distribution of power within the government and society. Although campaign finance regulations have a democratizing effect by preventing

---


8 See id. at 35–36, 44–53.
inequalities in wealth from being translated into inequalities in political power, such regulations may also protect incumbents from being effectively challenged and may shift power to a smaller set of elites within society. In other words, campaign finance restrictions may have disturbing consequences for the entrenchment of governmental and social power.

Second, and relatedly, I claim that a comparative focus on power sheds light on the actual choices at stake in the regulation of campaign finance, thereby restructuring the very terms of the debate itself. Campaign finance regulation, I suggest, is characterized by the following dilemma: the imposition of campaign finance restrictions will democratize the distribution of power in some ways, yet entrench the distribution of power in other ways, while the absence of campaign finance restrictions will lead to the consolidation of power in some respects, yet prevent the consolidation of power in other respects. For this reason, I argue that the decision to regulate campaign finance should be viewed as inevitably involving a trade-off among competing distributions of power within a democracy. In other words, the debate over campaign finance reform does not simply present a choice between protecting the electoral process and protecting speech; instead, the decision involves a far more complex balancing of competing objectives.

Third, a comparative analysis sheds new light on the role of courts. At the institutional level, campaign finance reform raises questions about which institution—the legislature or the Supreme Court—should wield ultimate authority to determine the rules that govern elections. In both Harper and McConnell, a majority of the justices deferred to the legislature’s determination that campaign finance restrictions were necessary. Judicial deference is often considered to be democracy-enhancing because important policy decisions remain with the legislative branch. I claim, however, that the Courts’ posture of deference in the campaign finance decisions was ultimately misguided. Given the possibility that campaign finance regulation could lead to the entrenchment of governmental and social power, judicial skepticism was warranted.

Based on these observations, this article develops a proposal for the adjudication of campaign finance cases. Rather than taking one side or another (pro-regulation or anti-regulation), I suggest instead that courts should openly discuss the power trade-offs involved. I claim that an ideal trade-off involves the maximization of three competing objectives—one, preventing the domination of the electoral process by the wealthy; second, allowing citizens to criticize the government; and third, enabling challengers to compete effectively against incumbents. The burden would be on the legislature to demonstrate that these objectives have been considered and that a reasonable balance has been achieved among them. Courts would then evaluate campaign finance regulations on the basis of how well the legislature has balanced the competing claims. This proposal has two main objectives: first, to ensure that the power trade-offs are addressed by
legislatures, and second, to ensure that the resulting regulations are subject to skeptical, rather than deferential, review by courts.

There is little doubt that American and Canadian courts will address again the constitutionality of campaign finance reform in the coming years. In *McConnell*, for instance, the U.S. Supreme Court predicted that because “[m]oney, like water, will always find an outlet,” Congress will inevitably enact new campaign finance regulations at some point in the future. On the whole, a comparative approach enables us to identify some of the universal, but not immediately apparent, features of the judicial supervision of campaign finance reform. By comparing the political theories that undergird the constitutional doctrines in *McConnell* and *Harper*, it is possible to shed new light on the structure of the campaign finance debate itself. Indeed, it is the similarities, and not the differences, between the two decisions that best reveal the complexity of the choices at stake. Although I focus on the United States and Canada, these issues would also be present in any electoral system that is partially or fully funded by private donations. The American and Canadian experience thus offers lessons for the study of electoral fairness in other jurisdictions.

1. Courts and the law of campaign finance

A comparison of the laws of campaign finance in the United States and Canada reveals striking points of similarity and difference. This section briefly outlines campaign finance regulations in each country with a particular focus on recent Supreme Court decisions.

1.1. Campaign finance regulations in the United States

The contemporary framework of campaign finance regulation in the United States was ushered in by the U.S. Supreme Court’s landmark ruling in *Buckley v. Valeo*. In *Buckley*, the Court considered the constitutionality of the Federal Election Campaign Act (FECA). The Court found that restrictions on the giving and spending of money for political campaigns did in fact impose restrictions on speech. At the same time, the Court held that FECA’s limits on contributions were justified by the government’s interest in preventing corruption and the appearance of corruption. Unlimited contributions raise the specter of corruption when they “are given to secure a political quid pro quo from current and potential officeholders.” However, the Court struck

---


11 See id. at 14–15.

12 Id. at 26–27.
down FECA’s limits on expenditures on the basis that these limits consisted of
direct restraints on speech in violation of the First Amendment.

Since Buckley was decided, critics have focused upon a number of defects in
the campaign finance framework. One serious problem concerned the
rampant use of “soft money”—funds that were not subject to FECA’s amount
limitations and disclosure requirements. The use of soft money has increased
dramatically in the last twenty years: it accounted for 5% ($21.6 million) of
the two parties’ total spending in 1984 and 42% ($498 million) in 2000.13

Another concern centered on the prominence of political action committees
(PACS), which were permitted under FECA to make unlimited expenditures
to support or oppose a candidate.14 Critics have also argued that the use of
so-called “issue advertising”—which could be funded by soft money provided
that specific words of support or opposition were avoided15—was yet another
way in which campaign finance laws were circumvented. In short, as Cass
Sunstein has observed, legislative efforts to regulate campaign finance have
been a prime example of the fact that even well-intentioned laws can have
serious unintended consequences.16

Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA) in
order to address its concerns about soft money and issue advertising. BCRA
placed new restrictions on the use of soft money, with the result that national
political parties, candidates, and officeholders could only raise money subject
to contribution limitations. BCRA also restricted corporations and unions
from financing any advertising that was intended to (or had the effect of)
influencing federal election outcomes, thereby subjecting issue advertising
to regulation.

In McConnell v. Federal Election Commission,17 a five-member majority of
the Supreme Court upheld the constitutionality of BCRA’s soft money and
issue advertising provisions. The Court reaffirmed its holding in Buckley that
the prevention of corruption and the appearance of corruption was the only
permissible justification for campaign finance regulations. In what appears
to be a departure from Buckley, however, the majority found that corruption
did not simply mean “cash-for-votes exchanges,”18 but also encompassed the
“undue influence on an officeholder’s judgment, and the appearance of such
influence.”19 The Court concluded that because undue influence is hard to

15 See Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976).
16 See Cass R. Sunstein, Political Equality and Unintended Consequences, 94 COLUM. L. REV. 1390–
1391 (1994).
18 Id. at 143.
19 Id. at 150.
detect and criminalize, Congress was justified in regulating soft money contributions.\textsuperscript{20} The Court also held that BCRA’s new restrictions on the financing of issue advertising were necessary to counteract actual and apparent corruption.\textsuperscript{21}

### 1.2. Campaign finance regulations in Canada

The regulation of campaign finance in Canada has been focused in large part on imposing limits on “third party spending.” Third party spending refers to campaign spending that is conducted by individuals or groups that are neither candidates nor political parties—in other words, all citizens, interest groups, and corporations. In the last thirty years, all the government’s attempts to impose third party spending limits have led to litigation. In 1984, a court of appeals struck down third party spending limits for violating the Charter’s guarantee of free expression.\textsuperscript{22} Although the court’s ruling applied only in Alberta, the national government did not appeal the court’s decision, nor did it enforce the third party spending limits elsewhere in the country.\textsuperscript{23} After the 1988 election cycle, Parliament created the Royal Commission on Electoral Reform and Party Financing, also known as the Lortie Commission.\textsuperscript{24} The Lortie Commission recommended the enactment of spending limits in order to promote electoral fairness, and based on those findings, Parliament re-enacted third party spending limits.\textsuperscript{25} Once again, a court of appeals struck down the limits as a violation of the freedoms of expression and association.\textsuperscript{26}

The Supreme Court of Canada did not consider the constitutionality of campaign spending limits until its 1997 decision in \textit{Libman v. Quebec (A.G.)}.\textsuperscript{27} At issue in \textit{Libman} was the third party spending limits set out in Quebec’s referendum legislation. Although the Court struck down the spending limits in \textit{Libman}, it appeared to favor an “egalitarian” approach to rules governing spending during a referendum or an election.\textsuperscript{28} The Court stated that it was important to prevent “the most affluent members of society

---

\textsuperscript{20} See \textit{id.} at 153.

\textsuperscript{21} See \textit{id.} at 193–194.


\textsuperscript{26} See Somerville v. Canada (A.G.) [1996], 184 A.R. 241, 266.

\textsuperscript{27} [1997] 3 S.C.R. 569.

\textsuperscript{28} See Feasby, supra note 24, at 31–32.
from exerting a disproportionate influence by dominating the referendum debate through access to greater resources.”

In 2000, Parliament adopted the Canada Elections Act, which placed significant limitations on third party spending. The spending limits are low; they do not enable, for instance, an individual to take out a one-time full-page ad in major Canadian newspapers. The central provisions of the Act were struck down at the trial and appellate levels as violations of the Charter’s guarantees of freedom of expression and association.

In Harper v. Canada (A.G.), a six-member majority of the Supreme Court of Canada upheld the constitutionality of the third party spending limits. Writing for the majority, Justice Bastarache confirmed that Parliament had adopted an “egalitarian model” of elections. Under this model, wealth is the main obstacle that prevents individuals from enjoying an equal opportunity to participate in the electoral process. Spending limits are thus required to prevent the most affluent citizens from “monopolizing electoral discourse” and thereby preventing other citizens from participating on an equal basis. The Court held that although the spending limits infringed upon the freedoms of expression and association guaranteed by the Charter, the provisions were nonetheless justifiable under section 1 of the Charter as “a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.”

To summarize, the Supreme Courts of the United States and Canada recently held that campaign finance restrictions did not violate freedom of speech. Despite this similarity, there are notable differences between the two campaign finance regimes. Broadly speaking, the campaign finance regime in the United States imposes heavy restrictions on political contributions, but far fewer restrictions on spending. The campaign finance regime in Canada, by contrast, imposes heavy restrictions on both contributions and expenditures. In the United States, campaign finance restrictions apply year round, while in Canada they apply only during the election period. Election time speech in Canada is dominated by political parties and

34 See id. at 868.
35 See id. at 869.
36 Id. at 893.
candidates. By contrast, individuals and groups are prominent participants in election time speech in the United States. The constitutionality of campaign finance restrictions was first upheld by the U.S. Supreme Court in 1976, while the constitutionality of national campaign finance restrictions was first considered and upheld by the Supreme Court of Canada in 2004. The U.S. Supreme Court relied upon an anti-corruption rationale to justify campaign finance regulations, while the Canadian Supreme Court relied upon an equalization rationale.

2. Judicial discourse and conceptions of power

In both the McConnell and Harper decisions, the debate over campaign finance reform is framed as a choice between preventing the corrosive effects of money on the political process on the one hand, and protecting the individual’s right to free expression on the other. But a comparison of the judicial discourse within the two decisions shows that there are larger, structural concerns about power distribution on both sides of the constitutional equation. Although the justifications for campaign finance restrictions appear to be different—corruption in McConnell and equality in Harper—I claim that both Courts are primarily concerned with the equal distribution of political power in a democracy. Notwithstanding this shared focus on equal power, however, the two Courts enunciate very different understandings of what it means.

2.1. The empowered citizen model in McConnell v. FEC

In Buckley v. Valeo, the U.S. Supreme Court rejected outright an equalization rationale to justify campaign finance regulations, stating in a key phrase that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”38 According to the equalization rationale, campaign finance restrictions “equalize the relative ability of all citizens to affect the outcome of elections”39 by constraining the ability of wealthy people to give money to politicians. As Cass Sunstein describes it, campaign finance restrictions prevent the electoral process from translating wealth into political influence.40

Over the years, however, the Supreme Court’s anti-corruption rationale has transformed into something close (or even identical) to the equalization rationale that was originally rejected in Buckley v. Valeo. Although the Court has not openly embraced the equalization rationale, the understanding of

39 Id. at 25–26.
40 See Sunstein, supra note 16, at 1392.
corruption, at least by some of the justices, has become so broad that it is at times indistinguishable from the equalization rationale. As early as 1982, the Court noted that “substantial aggregations of wealth” could be translated into unequal political influence.\(^41\) In a later case, the Court observed that the “corrosive influence of concentrated corporate wealth”\(^42\) may make “a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”\(^43\) A few years later, the Court found once again that large expenditures have “corrosive and distorting effects” since they do not necessarily reflect public support for the corporation’s political ideas.\(^44\) Although this position appears to embrace the equalization rationale, the Court argued, somewhat implausibly, that the legislation at issue did not attempt “to equalize the relative influence of speakers on elections.”\(^45\) More recently, Justice Breyer seemed to endorse the equalization rationale when he stated that “by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process.”\(^46\)

Commentators have pointed out that the definition of “corruption” as adopted by some of the justices is in effect identical to the equalization goal. According to David Cole, the Supreme Court was wrestling with the difficulty that concentrated wealth gives “certain voices inordinate influence, not because of the power of their ideas, but because of the volume they can generate for their voices with dollars earned through commercial activities.”\(^47\) Those who are successful in the economic marketplace have disproportionate influence in the political realm for the simple reason that “even ‘free speech’ costs money.”\(^48\) Kathleen Sullivan observes that the corruption argument “is really a variant on the problem of political equality: unequal outlays of political money create inequality in political representation.”\(^49\) Corruption and inequality mean substantially the same thing; as Stephen Gottlieb notes, “corruption is abhorrent because it permits


\(^{43}\) Id. at 258.


\(^{45}\) Id.


\(^{48}\) Id.

disproportionate influence.” 50 Hence, the Court’s anti-corruption justification is “simply a repackaging of the equalization goal.” 51

The Supreme Court continued to collapse the distinction between the anti-corruption rationale and the equalization rationale in McConnell v. FEC. The Court majority asserted that:

Our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing “undue influence on an officeholder’s judgment, and the appearance of such influence.” 52

In its analysis of undue influence, the Court paid particular attention to the issue of special access. According to the Court, undue influence is apparent in the way that political parties have sold access to federal candidates and officeholders. The sale of access implies that “money buys influence.” 53 Because the record contained numerous examples of political parties selling access to federal officeholders in exchange for large soft money donations, the Court concluded that Congress was justified in determining that such contributions give rise to the appearance and reality of corruption.

Why is the Court concerned about undue influence? What does “undue influence” actually mean? Is the political influence garnered by wealthy corporations a problem for democracy, and if so, why? Should the Court be concerned about the sale of access to public officials? Is the sale of special access the same thing as corruption?

I argue that the concept of undue influence is based implicitly on a set of assumptions about the baseline distribution of political power in a democracy, against which the influence of wealthy donors appears “undue.” I refer to this set of principles and assumptions, some of which are only partially articulated by the Court, as an empowered citizen model. The baseline distribution of political power that seems to be at work in the Court’s opinion is the idea that all those affected by a decision ought to have a say in the decision. In A Theory of Justice, John Rawls refers to a similar idea as the principle of participation: “It requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply.” 54 The empowered


53 Id. at 154.

The citizen model has two components: first, every citizen must be included in the decision-making process (equal presence); and second, every citizen must have the equal right to influence the decision-making process by which she is governed (equal influence).

Why does corruption pose a problem for democracy? I claim that corruption is problematic because it violates the ideal of empowered citizenship. It does so in two related ways. First, corruption illegitimately empowers private parties. The problem with the exchange of cash for political favors is that wealthy groups and individuals convert their money into an illegitimate and disproportionate amount of power. As Rawls observes:

> The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation. In due time they are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances.55

The wealthy can use their private advantages to ensure their presence—a presence that may dominate the public discourse. As a direct result of this greater presence, they will soon enjoy a "larger influence" over decision-making, and will eventually acquire a "preponderant weight" in deciding social questions. In other words, they will exert "undue influence." As Rawls points out, there is a direct connection between presence and influence; or stated differently, between access and power. Corruption illegitimately empowers certain private parties by granting them disproportionate presence and disproportionate influence.

When identifying what is wrong with corruption, we tend to focus almost exclusively on the illicit gains reaped by those engaging in corrupt acts. Such gains appear unfair in a system premised on equal empowerment. What is often overlooked, however, is that corruption also leads to a broader and more diffuse democratic harm. Specifically, I claim that corruption illegitimately disempowers all citizens, regardless of whether they are directly affected by the particular policy issue at stake in the corrupt transaction. It does so in two ways. By granting certain private parties special access to public officials, corruption prevents other citizens from being present in those conversations. In a corrupt system, the views and interests of ordinary citizens are thereby excluded from deliberative and decision-making processes. As Mark Warren argues, corruption results in "duplicitous exclusion" because it excludes those who have a right to be included in democratic decision

55 Id. at 197–198.
making, and does so in a manner that cannot be publicly justified. Corruption is also disempowered by corruption because they lose the equal opportunity to influence policy making. In a corrupt political system, the lack of presence or access is translated into a lack of influence or power.

Corruption is thus distinguished by the illegitimate empowerment of certain private parties and the illegitimate disempowerment of other citizens. The Supreme Court’s understanding of “undue influence” reflects both of these concerns. According to the Court, evidence in the record showed that “lobbyists, CEOs and wealthy individuals alike have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials.” Indeed, as the Court noted, more than half of the top fifty donors contributed large sums to both national parties. The Court asserted that it “is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.”

Not only was the Supreme Court focused on the illegitimate empowerment of private parties, but it also expressed concerns about the illegitimate disempowerment of citizens. The Court noted, for instance, that soft money donations were connected to “manipulations in the legislative calendar, leading to Congress’ failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation.” In addition, citizens are adversely affected by the appearance of corruption that results from large soft money donations to politicians. The Court asserted that the “cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.” The appearance of corruption is almost as damaging as corruption itself because it undermines the integrity of the electoral process and erodes public confidence in democracy.

In its analysis of the “undue influence” standard, the Court stated that the democratic system faces the “danger that officeholders will decide 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.” Representatives may illegitimately empower wealthy donors

58 See id. at 148.
59 Id. at 145.
60 Id. at 150.
61 Id. at 144.
62 See id. at 137.
63 Id. at 153.
in order to repay the debts of obligation they have amassed; by so doing, they may also ignore the best interests of their constituents, thereby disempowering them. The undue influence standard thus reflects concerns about both the illegitimate empowerment of private parties and the illegitimate disempowerment of citizens.

But does special access to officeholders amount to undue influence? The Court focused on the manner in which political parties sold special access to officeholders.\textsuperscript{64} It noted that political parties have created “menus of access” for donors that show increased “prices” for increased levels of access to public officials.\textsuperscript{65} By selling access to officeholders, political parties created the perception that “money buys influence.”\textsuperscript{66} Indeed, those who purchased the access readily admitted that they were buying influence.\textsuperscript{67} The Court asserted that even if the sale of access did not secure actual influence, it gave rise to the appearance of undue influence.\textsuperscript{68}

The sale of access violates the empowered citizen model because it enables unequal presence. Special access illegitimately empowers private parties by providing them with a disproportionate presence, and it does so at the expense of ordinary citizens who are excluded from decisions in which their interests are also at stake. As such, the sale of special access to public officeholders does create an appearance of undue influence. A more difficult question is whether the sale of access constitutes corruption itself (regardless of whether such access is translated into actual influence). Arguably, all citizens in a democracy should have an equal opportunity to have their views heard by their representatives; selling access to the highest bidder is, on this view, not only apparently corrupt, but also actually corrupt.

In sum, the Supreme Court’s concern with undue influence is structural. The concept of corruption has been expanded beyond a narrow quid pro quo relationship between an individual donor and an individual officeholder to encompass the distribution of political power within the electoral process itself. The Court is not interested solely in individual cases of corruption but in the larger structural question of how inequalities in wealth are systematically translated into inequalities in political power—a concern that implicates the various norms and principles embedded in the empowered citizen model.

2.2. The informed voter model in Harper v. Canada (A.G.)

In Harper v. Canada (A.G.), the Supreme Court of Canada articulated a distinct conception of an egalitarian electoral process that can be understood as an

\textsuperscript{64} See id. at 153–154.

\textsuperscript{65} See id. at 151.

\textsuperscript{66} Id. at 154.

\textsuperscript{67} See id.

\textsuperscript{68} See id. at 153–154.
informed voter model. Under an informed voter model, the electoral process is fair provided that “equality in the political discourse”\(^{69}\) exists. The first requirement for discursive equality is that voters are adequately informed of all the political positions supported by candidates and parties.\(^{70}\) An informed voter “must be able to weigh the relative strengths and weaknesses of each candidate and political party. . . . [and] must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist.”\(^{71}\) A citizen cannot participate in a meaningful way unless she can exercise her vote in an informed manner.\(^{72}\) The model’s second requirement is that all candidates and political parties are given a reasonable opportunity to present their positions to voters.\(^{73}\) These two requirements share the same ultimate objective: to ensure that voters are fully informed about their choices.

According to the Court, unlimited spending during an election can undermine discursive equality, thereby impairing the right of voters to be adequately informed. Third party spending limits are essential to preserve electoral fairness:

For voters to be able to hear all points of view, the information disseminated by third parties, candidates, and political parties cannot be unlimited. In the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse. . . . If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out.\(^{74}\)

Because people have unequal financial resources, direct state intervention is required to prevent the wealthy from exerting a disproportionate influence on the electoral process.\(^{75}\) Not only do spending limits protect voters, they also ensure that candidates and parties have equal opportunities to communicate their positions. In an important passage, the Court stated that “[o]wing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to


\(^{70}\) See id. at 871–872.

\(^{71}\) Id. at 871.

\(^{72}\) See id.

\(^{73}\) See id. at 879.

\(^{74}\) Id. at 872.

\(^{75}\) See id. at 868.
speak and be heard.”76 The concern here is the “unequal dissemination of points of view.”77 Such an unequal dissemination will result in the voter not being adequately informed which in turn affects the voter’s ability to participate meaningfully in the electoral process.78

Although both the empowered citizen model and the informed voter model are broadly concerned with the problem of equalizing political power, these two conceptions are different in important ways.79 In McConnell, the Court was focused on the undue influence exerted by various groups on the ability of officeholders to engage in fair and informed decision-making. In Harper, by contrast, the Court was focused on the undue influence exerted by various groups on the ability of voters to identify their true preferences, and to reach an informed decision prior to election day.

The Supreme Court of Canada used the analogy of a “level playing field”80 to describe an egalitarian electoral process. A better analogy, however, is that of a formal debate. As in a formal debate, the voters/audience “have an equal opportunity to hear all viewpoints” because “no one voice is overwhelmed by another.”81 As in a formal debate, the candidates/debaters have an “equal opportunity to present their positions to the electorate.”82 As in a formal debate, the government/chair enforces the rules of the debate to ensure that it is “possible to hear from all groups and thus promote a more informed vote.”83 Under the informed voter model, equality is defined as an “equality of discourse,” which means an equal opportunity for each voter to hear both sides of the debate, and an equal opportunity for each contender to make her case.

Under the empowered citizen model, by contrast, political equality means the chance to exert an equal influence on the political process. The animating idea here is that citizens should have an opportunity to influence electoral, and even legislative, outcomes.84 In the informed voter model, however, meaningful participation means hearing all sides of the debate; it “is not

76 Id. at 867 (quoting Libman, [1997] 3 S.C.R. at 599).
77 Id. at 878.
78 See id. at 871.
79 But see Reference re Prov. Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158 (Canadian Supreme Court’s “effective representation” standard, defined as a relative parity of voting power, evokes some aspects of the empowered citizen model).
81 Id.
82 Id. at 876.
83 Id.
synonymous with the ability to mount a media campaign capable of determining the outcome.’’ The empowered citizen speaks, while the informed voter listens. The informed voter model values presence because it leads to informed voting, while the empowered citizen model values presence because it leads to influence. The role of the empowered citizen is more active, while the posture of the informed voter is more reflective.

2.3. The power of speech: a structural approach

The second half of the constitutional equation—freedom of speech—is also concerned with larger, structural questions about the distribution of power in a democracy. As Cass Sunstein observes, there are two main conceptions of free speech at stake in the campaign finance context. I shall call these two conceptions the liberty view of freedom of speech and the equality view of freedom of speech. I claim that these conceptions of free speech should be understood in a structural sense; that is, I focus on the power of speech to reorder the relationships between the citizens and the state, and among citizens of a democratic polity.

A primary focus of the liberty view is the power of speech to criticize and contest the government without fear of censorship or reprisal. In a representative democracy, the power of speech holds the government accountable, allows citizens to express their preferences to the government, and enables citizens to mobilize, organize, and persuade other citizens to replace officeholders if they have violated the public trust. Unfettered speech is essential for all these various functions in a democratic polity. Under the liberty view, democracy is endangered once speech is regulated. If the government is able to restrict speech, then it may be tempted to silence speech that is critical of its performance. For this reason, the liberty view of free speech sees any governmental intrusion or regulation as a violation of the right.

By contrast, the central focus of the equality view is to promote the equalization of speaking power within a democracy. Under this understanding, political speakers not only have a right to be free from government censorship; they also have the right, in some sense, to be heard by listeners, and even to have an equal opportunity to persuade others of their positions. But because the dissemination of viewpoints is expensive, those with the greatest wealth could monopolize the means of communication. Concentrations of private power may mean that the speech of those less powerful is never heard.

87 See id. at 8–10.
89 See id. at 291.
and consequently, that the marketplace of ideas does not represent the full range of views and speakers.

On this view, intelligent and informed public debate may even require that government restrain certain voices in order to ensure that all points of view have a roughly equal opportunity of being heard. As Cass Sunstein argues, “in some circumstances, what seems to be government regulation of speech actually might promote free speech, and should not be treated as an abridgment at all.”

Restrictions on campaign finance “promote political delibration and political equality by reducing the distorting effects of disparities in wealth. On this view, such laws promote the system of free expression by ensuring that less wealthy speakers do not have much weaker voices than wealthy ones.” Understood this way, government regulation of speech may promote the freedom of expression.

In the campaign finance cases, the dissenting justices in both the United States and Canada adopted the liberty view of free speech. This parallel is interesting because it occurred despite the significant differences in the free speech traditions in Canada and the United States. In McConnell, Justice Scalia declared that “[g]iven the premises of democracy, there is no such thing as too much speech.” By regulating corporate speech, officeholders have insulated themselves “from the most effective speech that the major participants in the economy and major incorporated interest groups can generate.” Free speech and the distribution of power are thus directly connected. As Scalia wryly noted, the “first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”

Justice Scalia concluded that BCRA “cuts at the heart of what the First Amendment is meant to protect: the right to criticize the government.”

In a like manner, Chief Justice McLachlin and Justice Major, who wrote the dissenting opinion in Harper, argued that the spending limits imposed a “virtual ban” on citizens who wished to participate in the political deliberation during the election period. The spending limits are so low that citizens

---

90 Id. at 267.
91 Id. at 291.
94 Id. at 258.
95 Id. at 263.
96 Id. at 248.
cannot advertise through the national media. At most, citizens can place ads in local papers, print some flyers, and distribute these flyers by hand. In addition, the spending limits imposed on citizens are significantly lower than those imposed on candidates and parties; indeed, citizens are permitted to spend only 1.3 percent of the national advertising spending limits for political parties. For all intents and purposes, the only individuals and groups that can engage in political discussion during an election period are candidates and political parties. Echoing the liberty view of freedom of speech, the dissenting justices concluded that this “denial of effective communication to citizens violates free expression where it warrants the greatest protection—the sphere of political discourse.”

By contrast, the majority opinion in *Harper v. Canada (A.G.* explicitly endorsed the equality view of the freedom of expression. Indeed, the informed voter model discussed above is based on the idea that the speech of some must be constrained in order for the participation of all to be equal. The Court did not address, however, the dissent’s observation that election time speech would be dominated by political parties and candidates. The spending limits are so low that it seems unlikely that citizens will be able to participate effectively. Rather than equalizing speaking power, the regulations appear to shrink the pool of effective participants, and hence the diversity of viewpoints in the marketplace of ideas.

In sum, these two views of free speech are based upon differing conceptions of democratic power. For opponents of campaign finance regulation, free speech provides governmental accountability, and in the absence of such accountability, the power of speech provides citizens with the opportunity to contest, and ultimately replace, those in power. For supporters of campaign finance regulation, speech is not truly free if those with greater wealth can dominate the public discourse, and, by extension, control public policy. Under both conceptions, freedom of speech is fundamentally concerned with the distribution of power in a democracy.

3. Democracy and power trade-offs

Under both the empowered citizen model and the informed voter model, campaign finance regulations are justified on the basis that they prevent the corrosive influence of concentrated wealth on politics. To what extent

---

98 See id. at 837.
99 See id. at 838.
100 See id. at 848.
101 Id. at 836.
102 See id. at 878.
are judicial discourses on power distribution realized in practice? More generally, what should be the Supreme Court’s role in the judicial supervision of campaign finance regulation?

3.1. Power dynamics within the government

One problem with campaign finance regulations is that they can help to entrench the power of officeholders.\textsuperscript{103} Elected officials, in the guise of “democratizing” politics by freeing it from the curse of big money, may in fact be protecting their offices from potential challengers. In a general sense, rules that make fundraising more difficult are detrimental to challengers and therefore beneficial for incumbents.\textsuperscript{104} A very low contribution limit makes it difficult for a challenger to gather enough funds from an initial group of supporters.\textsuperscript{105} By contrast, incumbents can rely upon a far larger base of supporters, and other advantages including a free staff, free mailings to their constituents, name recognition, press coverage, and official opportunities to help their constituents.\textsuperscript{106} It is very difficult for a challenger to surmount all the advantages enjoyed by an incumbent, particularly if she does not have significant financial resources at her disposal. Empirical studies have shown, for instance, that the more a challenger spends on a campaign, the more likely she is to win.\textsuperscript{107}

The entrenchment of power by officeholders strikes at a basic assumption of democratic government: that the people can choose their representatives, can hold them accountable, and can replace them in the event that they perform poorly or betray the public trust. Congressional self-dealing that prevents or blocks challenges from those outside of power present significant dangers to a representative democracy.\textsuperscript{108} As James Madison noted in \textit{Federalist No. 52}, the best tool to restrain the power of government is the mechanism of frequent elections.\textsuperscript{109} A political system that all but guarantees the re-election of officeholders means that the people

\begin{footnotesize}
\begin{enumerate}
\item See Sunstein, supra note 16, at 1400–1402.
\item See Gottlieb, supra note 50, at 220–221.
\item See id. at 224.
\item See FRANK J. SORAFU, \textit{Money in American Elections} 162 (Scott Foresman 1988).
\item See \textit{The Federalist No. 52}, at 295 (James Madison), in ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, \textit{The Federalist Papers} (Mentor 1999).
\end{enumerate}
\end{footnotesize}
no longer have at their disposal the most effective mechanism for restraining the power of government.

3.2. Power dynamics within society

Supporters of campaign finance reform argue that regulation helps to democratize the electoral process by providing citizens with greater opportunities to participate in an equal fashion. As scholars have argued, however, campaign finance restrictions may shift political power to an even smaller subset of elites.\textsuperscript{110} Restrictions on donations may, for instance, provide greater political influence to those wealthy individuals who own media corporations.\textsuperscript{111} As Lillian BeVier observes, “eliminating the unequal influence of wealth will not eradicate the phenomenon of unequal political influence.”\textsuperscript{112} There are numerous sources of political influence including time and energy, organizational skills, speaking and writing ability, personality, wealth, celebrity, media access, and ownership of the press.\textsuperscript{113} In other words, monetary inequalities are not the only type of inequality that could potentially affect the electoral system. Instead of democratizing the political process, restrictions on contributions could make the political system even more elitist. For this reason, some commentators argue that one way to protect a representative from the demands of narrow interests is to increase, rather than decrease, the number of people that are exerting influence.\textsuperscript{114} On this view, wealthy groups and individuals may “cancel each other out.”\textsuperscript{115}

It is important to be cautious, however, about reaching definitive conclusions on the impact of any regulation, including campaign finance restrictions, on society and government. For instance, there are many factors that are thought to contribute to incumbency protection.\textsuperscript{116} In Canada, there is less protection for incumbents than in the United States, but it is not clear whether differences in campaign finance regulations are a


\textsuperscript{111} See Sanford Levinson, \textit{Regulating Campaign Activity: The New Road to Contradiction?}, 83 MICH. L. REV. 939, 946 (1985) (arguing that restrictions shift power to media corporations).


\textsuperscript{113} See Smith, \textit{supra} note 110, at 1077; BeVier, \textit{supra} note 112, at 1118;


factor.\textsuperscript{117} In addition, research suggests that cash donations do not cause major changes in legislation.\textsuperscript{118} Instead, a large donation “likely buys access, small favors, energy in casework, intercession with regulators, and a place on the legislative agenda.”\textsuperscript{119} Contrary to popular perception, special interests donate only one-fourth of all contributions.\textsuperscript{120} In addition, campaign finance restrictions may not reduce the total amount of money spent on elections.\textsuperscript{121} This empirical uncertainty does not mean, however, that we cannot assess the judicial supervision of campaign finance reform; instead, such uncertainty should be incorporated into our analysis. Most importantly, the lack of empirical certainty suggests that courts should proceed with caution when evaluating the regulations at issue.

3.3. Power trade-offs and the role of courts
Campaign finance restrictions are said to prevent inequalities in wealth from being translated into inequalities in political power. Regulations, according to this view, have a democratizing effect by equalizing the relative political power of all citizens. At the same time, campaign finance regulations may protect incumbents, and may also shift power to a smaller set of elites within society. Far from having a democratizing effect, campaign finance reform could lead to the further entrenchment of governmental and social power.

I claim, therefore, that campaign finance regulation is characterized by the following dilemma: the imposition of campaign finance regulations will democratize the distribution of power in some ways, yet entrench the distribution of power in other ways, while the absence of campaign finance regulations will lead to the consolidation of power in some respects, yet prevent the consolidation of power in other respects. The question of what to do about campaign finance regulation thus leads to a troubling paradox. An unregulated marketplace of ideas may result in the entrenchment of the wealthy, while a regulated marketplace of ideas may result in the entrenchment of the powerful.

\textsuperscript{117} See Michael M. Atkinson & David C. Docherty, \textit{Moving Right Along: The Roots of Amateurism in the Canadian House of Commons}, 25 CAN. J. POL. SCI. 295, 295–296, 305 (noting that electoral defeat has been the most important source of high legislative turnover since 1965).

\textsuperscript{118} See \textit{SORAUF}, supra note 107, at 316.

\textsuperscript{119} Figueiredo & Garrett, supra note 1, at 611.

\textsuperscript{120} See id; but see Spencer Overton, \textit{The Donor Class: Campaign Finance, Democracy, and Participation}, 153 U. PA. L. RIV. 73 (2004) (arguing that a small group of individuals contribute money to political campaigns).

This dilemma of campaign finance reform is also mirrored by an institutional dilemma of sorts. If we leave the problem to the legislature entirely, we run the risk of self-serving legislation that perpetuates incumbent power. If we employ the argument that the Court should take an active role in policing democratic processes, we face the problem that courts are not particularly well-suited to making the kind of large scale structural determinations that would be required here.

Although there is no obvious solution to either dilemma, I offer the following briefly sketched proposal. As discussed above, campaign finance regulations may democratize the distribution of power in some ways, yet entrench the distribution of power in other ways. For this reason, I think that we should see the decision to regulate campaign finance as inevitably involving a trade-off among competing distributions of power in a democracy. In other words, the campaign finance debate should not be framed simply as a choice between protecting the electoral process and protecting speech; instead, the regulation of campaign finance should be viewed as requiring a complex balance to be struck among competing objectives. I claim that the ideal trade-off involves the maximization of three competing goals: the regulations would (1) prevent the domination of the electoral system by the wealthy, yet, at the same time, (2) allow for citizens to criticize the government and (3) enable challengers to compete effectively against incumbents.

In an ideal system, the role of the legislature would be to consider all three goals and to achieve a reasonable trade-off among them. Of course, it would be impossible to fully realize all three objectives for the good reason that they conflict with one another. Instead, the legislature would need to show that the regulations do not overly constrain the ability of citizens to criticize the government or the ability of challengers to compete effectively against incumbents, in addition to showing that the regulations reduce corruption or enhance equality. Not only would this approach allow for debate and discussion, it would also help to ensure that the specific content of the regulations is democracy-enhancing.

The role of the courts would be to determine whether the legislature had met its burden of showing that a reasonable trade-off had been achieved. To ensure judicial restraint, the court would not offer its own ideas on what kind of power distribution would be best; rather, it would be evaluating the legislature’s accommodation of these goals, and would do so by an adequately probing standard of review. Rather than simply noting the democratizing

122 See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard Univ. Press 1980).

effects of campaign finance reform, as did the majority opinion in *Harper*,124 or the incumbency-protecting effects of campaign finance reform, as did the dissenting opinions in *McConnell*.125 I suggest that courts should consider the legislature’s accommodation of all three goals—protecting the electoral system, protecting freedom of speech, and preventing incumbency protection—in a systematic fashion.

In addition, I think that courts should not be overly deferential to the legislature when reviewing campaign finance regulation. In both *McConnell* and *Harper*, by contrast, a majority of the justices deferred not only to the legislature’s determination that campaign finance restrictions were necessary, but also to the specific content of those restrictions. In *McConnell*, the U.S. Supreme Court stated that the “closely drawn” scrutiny first adopted in *Buckley v. Valeo* “shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.”126 In a similar fashion, the Supreme Court of Canada held in *Harper* that it “should afford deference to the balance Parliament has struck between political expression and meaningful participation in the electoral process.”127

In general, judicial deference to legislative decision-making is democracy-enhancing because it is the legislature, and not the judiciary, that directly represents the interests of the people. Despite the significant benefits of judicial restraint, I claim that in the campaign finance context the Courts should not have deferred so readily to the respective legislatures, particularly given the uncertainty about the impact of regulations on the distribution of power.128 Judicial skepticism is warranted any time the legislature devises rules that are likely to enhance its capacity to retain a hold on power. It is not the case that the political arena is one in which legislatures are the most expert and courts the least. Instead, the judiciary must be vigilant against the possibility that legislatures are acting in self-interested, rather than public-spirited, ways.

With regard to the campaign finance regulation trade-off, I think that courts should employ a more rigorous standard of review. By this, I do not mean strict scrutiny. A mid-range standard of review, such as the “closely drawn” scrutiny in *McConnell*, would be appropriate provided that it was not accompanied by a presumption of deference to the legislature. The Court

126 Id. at 137.
would need to determine whether or not the legislature had achieved a reasonable balance among the three goals, without assuming that it had done so. In other words, the court would need to decide whether or not the legislature had protected not only against the distorting effect of entrenched wealth on politics, but also against the distorting effect of entrenched power on politics.

There are some drawbacks to this proposal. One potential criticism is that legislatures would have no incentive to enact campaign finance regulations if they were prohibited from protecting themselves from challengers in too overt a fashion. But campaign finance regulation provides other benefits to politicians. These regulations serve an expressive function by signaling to voters that legislators are taking a strong stand against corruption. Apart from the possible political mileage gained from an anti-corruption position, campaign finance regulation may also serve a partisan purpose. Politicians may decide that it is preferable to be limited by certain rules provided that the opposing camp is also subject to the same restrictions. Another potential criticism is that a more rigorous standard of review may lead to the invalidation of all campaign finance legislation. By a more rigorous standard of review, however, I mean that the Supreme Court should not automatically defer to the legislature on the basis that campaign finance reform falls within the legislature’s particular expertise. A mid-range standard of review is not necessarily fatal. Instead, the courts would evaluate the legislation on the basis that the decision to regulate involves a difficult trade-off among competing objectives. Despite these drawbacks, closer attention to the actual power trade-offs involved would furnish courts with better tools to evaluate campaign finance legislation.

4. Conclusion

This article has asserted that the debate over the constitutionality of campaign finance is not simply a conflict between protecting the electoral process, on the one hand, and protecting speech, on the other. Instead, I have argued that the values at stake are fundamentally concerned with larger structural questions about how power should be distributed in a democracy. In addition, the article has claimed that campaign finance regulation is beset by the dilemma that the presence of regulation may democratize the distribution of power in some ways, yet entrench the distribution of power in other ways, while the absence of campaign finance regulations may lead to the consolidation of power in some respects, yet prevent the consolidation of power in other respects. For this reason, the decision to regulate campaign finance should be viewed as inevitably involving a trade-off among competing distributions of power in a democracy. The article outlines a proposal for how courts should analyze the trade-offs involved in campaign finance regulation.