JUDICIAL MANAGEABILITY AND THE CAMPAIGN FINANCE THICKET

Spencer Overton[*]

The U.S. Supreme Court should craft more manageable legal and evidentiary tools that courts can use to review future campaign reforms. Commentators and courts have extensively analyzed the manageability of judicial tools employed to review other political processes, such as partisan gerrymandering,[1] the use of race in implementing the Voting Rights Act,[2] and the relative population of legislative districts. Indeed, the key electoral doctrine of "one person, one vote" was adopted precisely because it is administrable.[3] Although manageable standards are no less relevant to judicial review of campaign finance regulations, the issue remains largely unexamined.[4]

---

[*] Associate Professor of Law, The George Washington University Law School. Brandon Briscoe, Robin Lenhardt, and Fane Wolfer read earlier drafts of this Essay and provided helpful comments.

[1] *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 155-56 (1986) (O'Connor, J., dissenting) (arguing that the standard adopted by the plurality will "prove unmanageable and arbitrary" and result in "greater judicial intrusion into the apportionment process").

[2] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 1012 n.9 (1996) (Stevens, J., dissenting) (observing that "determining the 'predominant' motive" of the legislature "is not a simple matter," and may be impossible) (citing Palmer v. Thompson, 403 U.S. 217, 225 (1971)).

[3] *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis" and that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State"); JOHN HART ELY, DEMOCRACY AND DISTRUST 124-25 (1980) (explaining that the Court adopted a one-person, one-vote rule "*precisely because of considerations of administrability*"); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 175 (2d ed. 2001) (suggesting that "the one-person, one-vote rule based on strict population equality could be readily managed by the courts and thus allowed a justiciable standard for judicial immersion into the 'political thicket' of elected institutions").

[4] In 1977, Judge Harold Leventhal highlighted courts' relative inexperience with problems of political organization, and counseled judges to proceed pragmatically and carefully, to avoid a rush to judgment based on speculation, and to avoid dogma that precludes reconsideration and correction. While he emphasized the importance of judicial humility and caution in reviewing campaign finance regulations, Judge Leventhal did not propose that the Supreme Court adopt doctrines that provide additional judicial guidance. *See* Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 376, 378-80, 387 (1977).

A special three-judge court's fractured decision in *McConnell v. FEC* illustrates the need for greater doctrinal guidance.[5] The confusing opinion totaled more than 1600 pages, with each judge writing separately. A rough summary provides: Judge Colleen Kollar-Kotelly voted to uphold various provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[6] Judge Karen LeCraft Henderson voted to invalidate most provisions, and Judge Richard Leon adopted a middle position. Although lower courts generally handle fact-finding, the three judges' disagreements prevented them from developing a complete factual record in the case.

Personality conflicts and ideological squabbles alone do not account for the differences among the three judges. Campaign finance doctrine itself also deserves blame. Current doctrine provides judges too little guidance in making legal conclusions or factual determinations. As a result, greater opportunity exists for individual judges' political inclinations for or against campaign reform to influence outcomes, which in turn leads to inconsistent decisions.

For example, because "substantial overbreadth" in the campaign finance context lacks clarity of meaning, the three judges went different ways on the question as to whether the primary definition of electioneering communications was "substantially overbroad." Under the primary definition, corporations and unions are prohibited from using their general treasury funds to finance targeted advertisements that refer to a federal candidate and are broadcast during the sixty-day period before a general election.[7]

Under traditional First Amendment doctrine, substantial overbreadth occurs when the proportion of applications of the statute that do not advance the state's interest is substantially high relative to the applications of the statute that do advance the state's interest.[8]

Courts must address two questions to determine if a law is substantially overbroad—a factual question and a legal question. Because campaign finance doctrine provides inadequate guidance on how to answer either one, judges' individual political philosophies about reform influence decisions.

---

[5] 251 F. Supp. 2d 176 (D.D.C.) (three-judge court), *prob. juris. noted*, 123 S. Ct. 2268 (2003) (mem.).

[6] *See* Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

[7] BCRA, Pub. L. No. 107-155, §§ 201, 203, 116 Stat. 81, 80-90, 91.

[8] *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."); Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1782-83 (2001) ("The key point appears to be that the question of substantial overbreadth involves a comparative effort; one looks at the proportion of overbroad applications of the statute compared to legitimate ones.").

I. UNCLEAR ON THE FACTS

First the factual question: which applications of the primary electioneering provision do not advance the state's interest of preventing corruption or the appearance of corruption?

Based on the evidence, Judge Leon found that as much as 17 percent of the speech regulated by the law would be "genuine issue advocacy" because it was not directed at influencing federal elections.[9] For example, the electioneering provision's bar on mentioning federal candidates would restrict corporate and union spending on ads that support or attack some federal legislation that is named after congressional sponsors, such as Sarbanes-Oxley. Therefore, according to Judge Leon, the regulation of such speech would not advance any state interest in preventing corruption.

Judge Kollar-Kotelly was more skeptical of the finding that 17 percent of the speech regulated posed no threat of corruption. She noted that strong arguments existed that the percentage was actually lower, and highlighted the fact that one person's genuine issue advocacy is another person's electioneering communication.[10]

Judge Henderson went the opposite direction, finding that the electioneering provisions did not prevent corruption and failed to advance any other state interest.[11]

While judges may differ on the facts in all types of cases, in the campaign finance context a lack of clear standards exacerbates these differences. In *Nixon v. Shrink Missouri Government PAC*, the Court stated that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[12]

Well, sure, but "novel" to whom? At what point along the continuum of plausibility do judges ratchet up the evidentiary requirements? To Judge Henderson, it was implausible that the electioneering provisions prevented corruption.[13] To Judge Kollar-Kotelly, the fact that many ads labeled "genuine issue advocacy" were designed to influence the election and curry favor was not only plausible, but likely.[14] *Shrink* does not instruct judges on how to build a factual re-

---

[9] *See McConnell*, 251 F. Supp. 2d at 798-99 (Leon, J.).

[10] *Id.* at 635-36 (Kollar-Kotelly, J.).

[11] *Id.* at 369 (Henderson, J., concurring in the judgment in part and dissenting in part).

[12] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000).

[13] *See McConnell*, 251 F. Supp. 2d at 324 (Henderson, J., concurring in the judgment in part and dissenting in part) ("The record reflects that BCRA's ban on corporate and labor disbursements for electioneering communications will not prevent actual or apparent corruption of federal candidates.").

[14] *Id.* at 453 (Kollar-Kotelly, J.) ("[P]olitical party 'issue advocacy' campaigns are targeted at federal elections, particularly competitive races, and are intended to, and do affect the outcome of those contests.").

cord in the campaign finance context. Instead, it invites them to make factual assumptions that support the legal conclusion they think best.

II. UNCLEAR ON THE LAW

Even if the judges could agree on the facts, questions remain about the legal standard to use in determining whether a statute is substantially overbroad. Judge Kollar-Kotelly's emphasis on preventing corruption and closing regulatory loopholes led her to reject overbreadth claims. Even if 17 percent of the ads posed no threat of corruption or the appearance of corruption, the "overwhelming majority" of the restricted ads posed such a threat.[15] While 17 percent may not have been too much for Judge Kollar-Kotelly, it was too much for Judge Leon. Consequently, he struck down the primary provision as "substantially overbroad."[16] Judge Henderson was at the other end of the spectrum from Judge Kollar-Kotelly regarding the meaning of substantial overbreadth. Judge Henderson read prior cases as setting forth a firm constitutional rule effectively announcing that any regulation of spending on political speech was substantially overbroad unless all of the speech regulated included "express advocacy."[17]

As evidenced by the lower court's fractured opinions, judges lack both evidentiary and legal standards in reviewing campaign reforms. One should not be surprised that an individual judge's assumptions about democracy fill the void in fact-finding and legal decision making.

III. THE COSTS OF FUZZY DOCTRINE

The proposition that democratic assumptions shape campaign finance perspectives is nothing new. To a certain extent, such assumptions explain the differences between the legislative agendas of reformers and those skeptical of reform. But unique issues arise when assumptions about politics explain the differences between the opinions of Judges Kollar-Kotelly and Henderson.

Justice Frankfurter's warning that courts should not enter the political thicket without manageable tools is particularly relevant in the campaign finance context.[18] Federal courts are not democratically

---

[15] *Id.* at 628 (Kollar-Kotelly, J.).

[16] *Id.* at 798-99 (Leon, J.).

[17] *Id.* at 364-66 (Henderson, J., concurring in the judgment in part and dissenting in part).

[18] *See* Baker v. Carr, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting) ("[Judges] do not have accepted legal standards or criteria or even reliable analogies [in the reapportionment context] to draw upon for making judicial judgments."); *see also id.* at 217 (majority opinion)

accountable, they lack political expertise, and they possess fewer comprehensive fact-finding tools. Courts cannot readily revise past decisions to respond to the unanticipated consequences that often arise in the campaign finance arena. The lack of judicial guidance leaves too much room for political preferences of individual judges to influence outcomes, results in an incoherent doctrine, and compromises the credibility of the federal bench. Legislatures, unclear about the shape of constitutionally permissible regulation, often lack the will to enact what citizens perceive as much-needed reforms.

Further, there are constitutional costs. A judge can emphasize "the prevention of corruption and the appearance of corruption" to justify rejecting almost any overbreadth claim. At the other end of the spectrum, overly aggressive judicial invalidation of reforms undermines the authority that Article I, Section 4 of the Constitution delegates to Congress to regulate federal elections.[19]

This short Essay highlights the importance of judicial manageability with the hope that judges and scholars will consider this value in crafting tools to review campaign finance regulations. As they engage in this undertaking, judges and scholars should devise clearer evidentiary requirements that explicitly allocate burdens and standards of proof, and describe the types of proof needed to establish certain propositions. They should also develop legal norms that provide more guidance than the status quo. The quest for enhanced guidance does not mean, however, that judges and scholars should adopt rigid rules that mechanically sacrifice other relevant values, like individual autonomy, electoral competition, democratic deliberation, and widespread participation.

Pointing fingers at the three-judge panel for its bloated and inconsistent decision in *McConnell* ignores the larger lesson. It is the Supreme Court, finally, that must provide the guidance to navigate the campaign finance thicket.

("Prominent on the surface of any case held to involve a political question is found . . . a lack of judicially discoverable and manageable standards for resolving [the issue] . . . .").

[19] *See* U.S. CONST. art. I, § 4.