

A Right to Participate in the Electoral Process

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Robert Yablon, *Voting, Spending, and the Right to Participate*, available at [SSRN](#).

In [McCutcheon v. FEC](#), Chief Justice Roberts described campaign contributions as a form of participation in electoral politics. His plurality opinion invalidating aggregate limits on contributions to federal candidates concluded that “[c]onstituents have the right to support candidates who share their views and concerns” and that representatives’ responsiveness to such concerns “is key to the very concept of self-governance through elected officials.”

As [commentators](#) quickly noticed, there was something curious about this paean to democratic representation: the “constituents” the Chief Justice described were not eligible to vote for most of the candidates they were funding. They were not, in other words, constituents in the usual sense. Was this a mere “oops”? A deliberate, if subtle, move to reshape campaign finance law? Something else?

[Robert Yablon](#)’s insightful new article, *Voting, Spending, and the Right to Participate*, offers a fresh approach to this conundrum. Rather than dismiss *McCutcheon*’s arguments about political participation as rhetoric or subterfuge, Yablon engages the opinion’s suggestion that “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders,” a right that may be exercised through the franchise or through monetary contributions. What would it mean, he asks, for our disparate law concerning voting and spending to instead conceptualize both as forms of participation in the electoral process?

The question is hard, and more important than it might at first seem, because of the distance between voting and spending doctrine. Yablon provides a bracing discussion of the Supreme Court’s current approaches to voting and campaign finance regulations. While the doctrinal disparity itself will not come as a surprise to any Court-watcher, Yablon’s analysis is at once meticulous and creative. By slicing existing case law into a series of inquiries undertaken in both voting and spending doctrine, he shows the substantial tension between these two areas. When it comes to voting, for example, he describes how the Supreme Court has downplayed the burdens of governmental regulations in part by assessing their consequences in the aggregate; when it comes to spending, the Court has instead considered burdens on particular individuals and readily recognized these burdens as severe. The Court has likewise understood the governmental interests underlying voting regulations in generous terms, required plaintiffs to establish that a voting regulation’s burdens outweigh its benefits, and been unconcerned about lawmaker motives, including entrenchment. For spending, the reverse is true.

Yablon’s analysis thus does more than substantiate a widespread belief that would-be donors fare better than would-be voters before the Supreme Court. It reveals that the Court is engaged in two different analytical projects. Particularly illuminating are Yablon’s reverse-the-doctrine hypotheticals. He asks, for instance, how the Court would have analyzed the voter ID law at issue in [Crawford v. Marion County Election Board](#) under the approach it uses in campaign finance cases, or how the Court would have evaluated the expenditure limits at issue in [Citizens United v. FEC](#) under the approach it deploys for voting regulations.

Not so fast, you might say. Voting and spending are different activities, implicating different constitutional provisions, and rightly considered using different approaches. Yablon addresses this objection at length. He shows, among other things, how doctrinal silos like equal protection and the First Amendment do not capture existing voting and spending doctrine. The Court’s voting decisions sometimes invoke First Amendment principles, and they depart from conventional equal protection analysis insofar as they focus on the fundamental nature of the right at issue. Meanwhile, campaign finance is a distinctive area of First Amendment law that eschews standard frameworks like content- and

viewpoint-neutrality or time, place, and manner restrictions. Acknowledging conceptual differences between voting and spending, Yablon further argues that these differences do not in fact underpin the doctrinal divergence. For example, voting is part of a formalized system that aggregates individual preferences and allocates governmental power, while spending may occur in a more individualized, less structured manner. Yet this does not explain why the Court more readily accepts the government's regulatory rationales for voting regulations or why it is quicker to recognize regulatory burdens as severe for spending regulations. Some will no doubt disagree with Yablon's take on the doctrine, the Constitution, or voting and spending as a functional matter, but they will have to look beyond existing case law to press their arguments.

In the final parts of the article, Yablon suggests ways that courts might reconcile voting and spending doctrine, seizing on *McCutcheon's* suggestion that these two acts are particular instantiations of a more general right to participate in electoral politics. He considers the constitutional foundations for a right to participate (in particular, Article I, the First Amendment, and the Fourteenth Amendment) and begins to explore how courts might implement the right across contexts. He also provides tentative thoughts on questions that would be raised by a participatory approach, including the one *McCutcheon* tees up without analyzing: who is eligible to participate in elections and in what ways?

As Yablon readily concedes, he is not attempting to provide a definitive account of a right to participate, and his article generates a host of new questions (indeed, the right to participate he endorses is "multifaceted" and could thus itself be vulnerable to the sort of doctrinal discrepancies he attacks so forcefully). But this just means we can look forward to new articles addressing these questions. For now, judges and scholars alike will benefit from Yablon's careful doctrinal analysis and his ambitious yet grounded argument for a fundamental right to participate in the electoral process.

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