MAKING IT REIGN: Bow Down to Money (as Speech)

Tracy Alice Olson*

"You can't separate speech . . . from the money that . . . facilitates speech. . . . It's utterly impossible."

– Justice Antonin Scalia.[1]

INTRODUCTION

Americans enjoy monetary autonomy within a free market.[2] When cash is king, you can buy essentially anything. So what about buying an election? The gut response to this question is no. American society values fairness and it seems inherently unfair to buy a politician or election on a whim.

At the same time, Americans are guaranteed fundamental rights by the Constitution. Arguably the right we are most proud of is the freedom of speech and association.[3] And importantly, this right is strongest when speaking politically.[4] The United States was founded on this ability to speak freely, and it is innate in our existence to exercise our political function through speech and association.[5] But even though money is speech,[6]

---

* J.D. Candidate, 2017, Sandra Day O'Connor College of Law, Arizona State University; BBA in Accounting, Southern Methodist University. Editor-in-Chief, *Arizona State Law Journal*. I would like to thank the professors who helped to shape my writing and challenge my ideas, especially Chad Noreuil, Michael Liburdi, and David Gartner, and my parents Polly and Bill Olson for their never-ending support.

1. *Piers Morgan Tonight: Interview with Antonin Scalia*, CNN (July 18, 2012), http://transcripts.cnn.com/TRANSCRIPTS/1207/18/pmt.01.html [hereinafter *Interview with Antonin Scalia*].

2. GARY WOLFRAM, THE CAPITALIST MANIFESTO: UNDERSTANDING THE MARKET ECONOMY AND DEFENDING LIBERTY 45–48, 53 (2012).

3. U.S. CONST. amend. I.

4. *See* Roth v. United States, 354 U.S. 476, 484 (1957).

5. *Id.*

6. Buckley v. Valeo, 424 U.S. 1, 15–19 (1976). Some scholars disagree with the characterization of money as speech. *See, e.g.*, BRENNAN CTR. FOR JUSTICE, WRITING REFORM: A GUIDE TO DRAFTING STATE AND LOCAL CAMPAIGN FINANCE LAWS, at I-2 n.1 (Ciara Torres-Spelliscy ed., rev. ed. 2010), http://www.brennancenter.org/sites/default/files/legacy/Writing%20Reform%202010%20FINAL.pdf. However, for the purposes of this Comment, I characterize money as speech in the sense that in today's mass media society, money enables the receipt of

Congress clearly disagrees with the idea of using money to buy elections. As early as 1867, Congress has regulated campaign finance donations, mandating restrictions and disclosure,[7] and created the Federal Election Commission ("FEC") tasked with regulating and enforcing limitation and disclosure of campaign contributions.[8] Congress claims this policy is meant to promote transparency and reduce corruption.[9] But, reconciling Congress' interests with the individual's interest is a difficult balance between ethical political-processes, and the fundamental right to free speech.[10]

In January 2010, the Supreme Court contributed to the ever-heated campaign finance debate with their decision in *Citizens United v. Federal Election Commission*.[11] Notably, the Court held that disclosure requirements in the Bipartisan Campaign Reform Act of 2002 ("BCRA") were constitutional.[12] This decision broke down the First Amendment protection afforded to campaign finance spending by reaffirming burdensome BCRA disclosure. Then in 2014, the Roberts Court decided *McCutcheon v. Federal Election Commission*, striking down aggregate limits on campaign contributions,[13] showing deference to campaign contributions as protected political speech. This decision was the first in some time that swung the pendulum towards First Amendment freedoms and built on the Roberts Court's trend to deregulate campaign finance.

The recent spotlight on anonymous or "dark money" donors fuels public concern and propmts legislators to increase transparency in campaign disclosure and enforce existing contribution limits.[14] Recognizing the burden

---

speech, and like the ability to hear or see, becomes inseparable from the concept of speech. This Comment assumes that as long as money is speech, it deserves to be treated accordingly. *See also Interview with Antonin Scalia*, *supra* note 1.

7. *See generally The Federal Election Campaign Laws: A Short History*, FED. ELECTION COMM'N, http://www.fec.gov/info/appfour.htm (last visited Mar. 3, 2017). Comprehensive reform came with the 1907 Tillman Act, followed by laws in 1908 and 1910 mandating disclosure and contribution limits. *Id.*

8. *Id.*

9. *See Buckley*, 424 U.S. at 25–26.

10. *Id.*

11. Citizens United v. FEC, 558 U.S. 310 (2010).

12. *Id.* at 319. The Bipartisan Campaign Reform Act sections 201 and 311 mandate disclosure of donor names for electioneering communications in excess of $10,000 and clear identification of sponsors of election-related advertising. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 201, 311 (2002) (codified at 52 U.S.C. §§ 30104, 30120 (2012)). This decision is also well-known for recognizing corporations as people in relation to campaign finance laws. *Citizens United*, 558 U.S. at 365.

13. McCutcheon v. FEC, 134 S. Ct. 1434, 1442 (2014).

14. *See, e.g.*, Paul Blumenthal, *Montana Republicans and Democrats Unite to Ban Dark Money*, HUFFINGTON POST (Apr. 15, 2015, 7:53 PM),

of this trend on First Amendment rights, attorneys and activists are challenging state and federal laws, hoping to soften current legislation.[15] For example, *Citizens United* attorney James Bopp is back to challenge the campaign finance disclosure paradigm, specifically targeting Montana's Disclose Act.[16] The Act attempts to make Montana's the most transparent election process in the nation.[17] Moreover, the Montana Legislature intends to overshadow any political free speech protection that campaign spending was once afforded with disclosure.[18] Despite Justice Kennedy's denial of Bopp's application for stay in October 2015,[19] the Roberts Court tends to pay deference to First Amendment rights in the campaign finance setting and could possibly consider the issue at a later date.[20] And notwithstanding the Supreme Court's hesitation to completely deregulate campaign finance disclosure in *Citizens United*, its decision in *McCutcheon* reaffirms the paradigm that money *is* speech.[21] This Comment argues that the Supreme Court needs to capitalize on its current momentum and reevaluate contribution limitations and disclosure requirements to realign political free speech for consistency. Deference should be paid to the individual's fundamental right to speech and association; without a compelling state or

---

http://www.huffingtonpost.com/2015/04/15/montana-dark-money_n_7074084.html (describing recent Montana legislation that seeks to eliminate "dark money").

15. *See, e.g.*, Scott Blackburn, *Center for Competitive Politics Comments on Proposed Changes to California's Coordination Regulations*, CTR. COMPETITIVE POL. (Oct. 14, 2015), http://www.campaignfreedom.org/2015/10/14/center-for-competitive-politics-comments-on-proposed-changes-to-californias-coordination-regulations/ (criticizing California legislation as burdensome on speakers ability to illustrate their views); *Fountain Hills, Arizona Speech*, INST. JUST., http://ij.org/case/fountain-hills-arizona-speech/ (last visited Mar. 3, 2017) [hereinafter *Fountain Hills*] (challenging Arizona legislation as "vague, overbroad, and unduly burdensome").

16. Derek Brouer, *Out of the Dark: Attorney Challenges Disclose Act, Commissioner Motl*, MISSOULA INDEP. (July 30, 2015), http://missoulanews.bigskypress.com/missoula/out-of-the-dark/Content?oid=2367895.

17. Press Release, Office of the Governor State of Montana, Governor Steve Bullock Signs Montana Disclose Act into Law (Apr. 22, 2015), https://governor.mt.gov/Portals/16/docs/2015PressReleases/042215DiscloseActSigningRelease.pdf.

18. Blumenthal, *supra* note 14.

19. *No. 15A398*, SUP. CT. U.S. (Oct. 19, 2015), http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15a398.htm (Justice Kennedy denied James Bopp's application for stay and injunctive relief).

20. Ronald Collins, *The Roberts Court and the First Amendment*, SCOTUSBLOG (July 9, 2013, 11:34 AM), http://www.scotusblog.com/2013/07/the-roberts-court-and-the-first-amendment/.

21. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1441–42 (2014) (noting that expenditures of political contributions are protected by the First Amendment, subject to certain limits).

federal interest, regulation is an undue burden on verified and anonymous political speech.

Specifically, this Comment considers reconciling the level of scrutiny and deference due to campaign contributions and disclosure requirements with campaign expenditures. Part I traces the historical legal basis of campaign finance. Beginning with the Constitution, the background establishes the standards applied to free speech and campaign finance, including: anonymous speakers in the campaign finance context; recent congressional campaign finance legislation; and current challenges to campaign finance regulation. Part II proposes a reevaluation and elevation of the intermediate scrutiny standard to the strict scrutiny standard to better align campaign contributions and disclosure requirements as free speech.

I. BACKGROUND

Interestingly classified in the campaign context, money is speech.[22] More importantly though, money is protected speech.[23] To understand the constitutional jurisprudence and proposed realignment, it is important to parse the constitutional underpinnings behind freedom of speech, how money became classified as speech, and the Roberts Court's judicial review of campaign finance. Moreover, campaign finance legislation is considered as well as the legislation's interplay with the Court. Finally, this constitutional jurisprudence is considered alongside current challenges to campaign finance legislation.

A. Historical and Constitutional Basis

Money as speech is not an enumerated right in the Constitution but emanates from the First Amendment.[24] The Court first constructed this right

22. Buckley v. Valeo, 424 U.S. 1, 21, 23 (1976) ("A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." And importantly, financial contribution and expenditure in politics "implicate fundamental First Amendment interests.").

23. *Id.* at 23–46.

24. *Id.* at 19.

in *Buckley v. Valeo*,[25] and the right has since expanded and contracted from that construction through a rich history of litigation.[26]

1. First Amendment Freedoms

Our Founding Fathers granted people the freedom of speech as a fundamental right in the First Amendment: "Congress shall make *no* law . . . abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the government for a redress of grievances."[27] Suggested by the last part of the clause, freedom of speech is particularly integral to a person's right to express unpopular ideas.[28] Indeed, the freedom of speech was crafted to guarantee political discourse in an "unfettered exchange."[29] According to Justice Black, there was universal agreement that the First Amendment's purpose is to protect "free discussion" of the government on all levels, including candidates and the political process.[30] And the history of speech supports this notion; there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[31] As demonstrated, constitutional scholars agree that political speech is uniquely protected as a fundamental right.

---

25. *Id.* at 23. While *Buckley* is not the first law restricting contributions or imposing disclosure requirements, it is the first doctrinal assessment of campaign finance rights by the Court, and accordingly the starting place for this discussion's background. *See The Federal Election Campaign Laws: A Short History*, *supra* note 7.

26. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 318 (2010); Davis v. FEC, 554 U.S. 724, 728 (2008); First Nat'l Bank v. Bellotti, 435 U.S. 765, 767 (1978).

27. U.S. CONST. amend. I (emphasis added).

28. United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate.").

29. Roth v. United States, 354 U.S. 476, 484 (1957) (citing a letter from the Continental Congress to the people of Quebec from 1774).

30. Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

31. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

However, no right is absolute;[32] when a fundamental right is challenged, the Court will apply a heightened level of scrutiny.[33] Strict scrutiny dictates that at times, compelling interests can overcome a fundamental right if the law is narrowly tailored.[34] Known to be notoriously fatal in application, strict scrutiny rarely finds a narrowly tailored compelling interest to overcome fundamental rights.[35] In fact, in a 2006 study, First Amendment cases yield the least amount of successful strict scrutiny challenges; First Amendment challenges were successful only twenty-two percent of the time.[36] Other interests successfully challenged strict scrutiny more often (fundamental rights at twenty-four percent; suspect class at twenty-seven percent; religious liberty at fifty-nine percent).[37] When looking at all First Amendment freedom of speech challenges, the speech most often challenged is campaign speech, and those challenges yield a low success rate of twenty-four percent.[38] These statistics refute the conclusion that strict scrutiny is unworkable but rather prove that a justifiably high First Amendment bar may be overcome if a true compelling interest is presented.

Also founded in the First Amendment, the freedom of association is regularly considered in campaign finance reform challenges.[39] Here, freedom of association is implicated in two ways: first, when money is used to associate (e.g., when donating to a particular party or candidate indicating support); and second, when money is used to anonymously associate (*e.g.*, when donating to a super PAC or other intermediary organization that will collectively advocate for a certain issue or candidate). Similar to the freedom of speech, courts regularly apply strict scrutiny when evaluating burdensome legislation.[40] And also similar to the freedom of speech, the success rate of strict scrutiny challenges to freedom of association is a low yield of only

---

32. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (2007). Fallon explains that the balancing test which the Court applies to fundamental right challenges is a burden on those rights. Thus, rights are not absolute, but subject to regulation if they pass the appropriate level of scrutiny.

33. *Id.*

34. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002).

35. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794 (2006).

36. *Id.* at 815.

37. *Id.*

38. *Id.* at 845.

39. Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 WYO. L. REV. 253, 275 (2014).

40. Winkler, *supra* note 35, at 867.

thirty-three percent.[41] Strict scrutiny presents a necessarily high bar to protect the fundamental rights of speech and association, but is passable when the circumstances are justified.

2. The Court's Construction of Campaign Finance Constitutionality in *Buckley v. Valeo*

The First Amendment right to freedom of speech does not remain purely fundamental when considered as money. The Supreme Court carefully constructed campaign finance jurisprudence in *Buckley v. Valeo*, granting limited political speech protection to campaign contributions and spending.[42] In considering the constitutionality of campaign finance laws and the outer limit of permissible legislation, the Court wrote a lengthy per curium opinion explaining the doctrinal discourse behind each holding.[43] Generally, the Court echoed First Amendment concerns to promote the "[d]iscussion of public issues and debate on the qualifications of candidates," and ensure an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[44] The Court rejected the idea that the First Amendment extended only to "the exposition of ideas" but necessarily extended to the discussion of candidates.[45] In short, the Court reaffirmed the conclusion that political discourse should be "uninhibited, robust, and wide-open."[46]

Important here, are three conclusions that the Court made in its 137-page opinion: the constitutionality of (1) disclosure requirements, (2) contribution limits, and (3) expenditure limits.[47] First, the Court held disclosure requirements for donors were constitutional because "the substantial public interest in disclosure" was not outweighed by the alleged harm.[48] The Court reasoned that even under strict scrutiny, compelled disclosure fulfills

---

41. *Id.*

42. Buckley v. Valeo, 424 U.S. 1, 23 (1976).

43. DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES & MATERIALS 644 (5th ed. 2012).

44. *Buckley*, 424 U.S. at 14.

45. *Id.*

46. *Id.*

47. *Id.* at 143. The Court also upheld the public financing system for presidential elections and that those enforcing the legislation on the FEC were unconstitutionally established and must be appointed. *Id.*

48. *See id.* at 64–74 ("It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation.").

sufficiently important government interests.[49] In the Court's opinion, disclosure provided the "least restrictive means of curbing the evils of campaign ignorance and corruption," because it successfully provides the electorate with necessary information, discourages corruption, and gathers data to enforce violations of contribution limits.[50] The Court acknowledged that individuals have a right to group association under the First Amendment by pooling funds to create amplified advocacy,[51] and that disclosure of this group association will certainly discourage some individuals from contributing to candidates.[52] But despite this burden on speech, disclosure requirements were held constitutional.[53]

In addition, the Court upheld contribution limits but struck down expenditure limits.[54] Distinguishing the restrictions made on time, place, and manner, the Court recognized contribution and expenditure restrictions as burdensome and thus evaluated them under strict scrutiny.[55] The Court reasoned that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[56] In the context of campaign finance spending, money is important because it essentially enables speech and is not purely conduct but is in itself communication.[57] The Court recognized that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[58] And while the Court in *Buckley* clearly dismissed the idea that "the dependence of a communication on the expenditure of money . . . introduce[s] a nonspeech element or . . . reduce[s] the exacting scrutiny required by the First Amendment,"[59] they also degraded campaign contributions in the hierarchy of speech:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic

---

49. *Buckley*, 424 U.S. at 66–68.
50. *Id.*
51. *Id.* at 65.
52. *Id.* at 68. The Court suggested that individuals, fearing harassment or retaliation for their views, might be discouraged from contributing. *Id.*
53. *Id.* at 143–44.
54. *Id.* at 143.
55. *Id.* at 17–18.
56. *Id.* at 19.
57. *Id.*
58. *Id.*
59. *Id.* at 16.

> expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.[60]

Although the Court reasoned that contribution limitations hinder the ability of "like-minded persons to pool their resources in furtherance of common political goals," they did not extend pure First Amendment protection.[61] The Court allows restrictions on contributions because a contribution is only a "general expression of support for the candidate and his views, but does not communicate an underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution" because the contribution is symbolic.[62] In sum, the Court viewed expenditures as an exercise of speech and contributions as an exercise of association, and treated them accordingly.[63]

Finally, to avoid issues of unconstitutional vagueness, the Court recognized that the only kind of speech covered by the BCRA independent expenditure provision is express candidate advocacy—speech that directly advocates for or against a candidate.[64] By interpreting the provision narrowly, the Court exempted effective advocacy of issues from the limitation requirements, recognizing issue advocacy as the purest form of speech.[65]

However, the *Buckley* Court wrote with foresight and set an outer limit to permissible regulation.[66] The Court reasoned "contribution restrictions *could* have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."[67] Nevertheless, the Court has backed away from the strict scrutiny standard they applied in *Buckley* and the standard that the First Amendment is usually afforded.[68] In *Nixon v. Shrink Missouri Government PAC*,[69] the Court revised the standard to intermediate scrutiny.[70] Under this

60. *Id.* at 21.
61. *Id.* at 22.
62. *Id.* at 21.
63. BRENNAN CTR. FOR JUSTICE, *supra* note 6, at I-2, I-3.
64. *Buckley*, 424 U.S. at 44–45, 79.
65. *Id.* at 44–45.
66. *Id.* at 21.
67. *Id.* (emphasis added).
68. Winkler, *supra* note 35, at 846 n.221.
69. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).
70. *Id.* at 387–88; Winkler, *supra* note 35, at 846 n.221.

standard, the government must only show an important state interest that is substantially related to the infringement to overcome the right in question.[71] Moreover, the Court in *Shrink* contested the outer limit suggested in *Buckley*[72] and concluded that contribution limitations are only unconstitutional when they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."[73] This new limit made a constitutional challenge nearly insurmountable and effectively lowered the government's burden when proving an important interest. Finally, the Court in *Shrink* expanded corruption as a compelling interest to include an appearance of corruption.[74] Overall, the small victory that *Buckley* had represented for campaign finance reformers was clawed back by *Shrink*.

3. Current Judicial Treatment of Campaign Finance: *Citizens United* and *McCutcheon*

Within the past decade, the Court has issued two landmark campaign finance decisions: *Citizens United* and *McCutcheon*. These cases were in large part a reaction to the emergence of political action committees ("PACs") on the campaign finance landscape.[75] In *Citizens United*, the Court held that the film *Hillary: The Movie*, sponsored by the PAC Citizens United, was not a violation of the electioneering communication provision of the BCRA.[76] Even though the Court's prior precedent set in *Austin v. Michigan Chamber of Commerce* would disallow the corporate speech, the Court refused to follow its own opinion.[77] The Court reasoned that "speech restrictions based on the identity of the speaker are all too often simply a means to control content."[78] Of particular importance was the Court's treatment of precedent and complete refusal to apply it, setting a new tone for First Amendment deference in accordance with strict scrutiny.[79]

---

71. *Shrink*, 528 U.S. at 387–88; Winkler, *supra* note 35, at 846 n.221.
72. BRENNAN CTR. FOR JUSTICE, *supra* note 6, at I–9.
73. *Shrink*, 528 U.S. at 397.
74. *Id.* at 390.
75. The introduction of new technology to campaign finance could prompt a similar wave of litigious reactions to technology's impact on current regulatory framework. *See* discussion *infra* Section II.D.2.
76. Citizens United v. FEC, 558 U.S. 310, 319 (2010).
77. *Id.* at 348–56.
78. *Id.* at 340.
79. *Id.* at 340, 348–56.

Since *Citizens United*, the ability to speak anonymously through corporate or political action committee campaign contributions has proved to be popular in practice, with many anonymous seven-figure donations to super PACs reported.[80] In addition to the large anonymous monetary donations, campaigns note decreased campaign receipts from the typical individual donor.[81] This could be the start of a trend (and perhaps a demonstration of societal preference), to not only preserve anonymity, but also to seek heightened speech-like protection for donations.

However, with this unlimited ability to speak anonymously through super PACs comes apprehension that wealthy individuals may become too powerful.[82] Some argue that the danger of classifying campaign contributions as speech would result in catalyzing the recent uptick in anonymous contributions, commonly termed "dark money."[83] In the campaign finance context, an anonymous speaker is one who donates without disclosure or identification.[84] Although anonymous speakers bring with them concern of abuse, they are also fundamental to the understanding of the Constitution.[85] For example, the Federalist Papers were written by influential men of the Federalist Party but signed under a single pseudonym, Publius.[86] The anonymous nature of the papers increased their effectiveness and was integral to the ratification of the Constitution.[87] Validity of anonymous speech relies

80. Theodore Schleifer, *Super PAC Fundraising Reports: Five Top Takeaways*, CNN (Aug. 3, 2015), http://www.cnn.com/2015/08/03/politics/super-pac-fundraising-2016-takeaways/.

81. *Campaign Receipts Down from 2007—Can Super PACs Make Up the Difference?*, CAMPAIGN FIN. INST. (Oct. 19, 2015), http://www.cfinst.org/Press/PReleases/15-10-19/Campaign_Receipts_Down_from_2007_%E2%80%93_Can_Super_PACs_Make_Up_the_Difference.aspx.

82. Richard Hasen, *Of Super PACs and Corruption*, POLITICO (Mar. 22, 2012, 6:13 AM), http://www.politico.com/story/2012/03/of-super-pacs-and-corruption-074336. John Coates on the other hand finds that corporations have begun to displace people as primary subjects of First Amendment protection. *See generally* John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, CONST. COMMENT. (forthcoming 2016). This conclusion supports the corporations' access to unlimited spending.

83. Blumenthal, *supra* note 14.

84. Anonymous speakers' ability to speak (in the campaign finance context) is severely abridged because of the Court's rules. *See* Barr & Klein, *supra* note 39, at 263–64.

85. *See id.*

86. *Id.* at 254.

87. *See id.*

heavily on the First Amendment right to associate.[88] Moreover, the Court has dismissed the notion that anonymous speech is inherently misleading[89]:

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. . . . They can evaluate it's anonymity along with its message. . . .[O]nce they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.[90]

Yet, the holding in *Buckley* makes it nearly impossible to express anonymous speech through campaign contributions.

Although it did not disable campaign finance regulation, *Citizens United* created significant vulnerability in campaign finance law.[91] Because of this vulnerability, the Roberts Court's treatment of the First Amendment is particularly important. Through the 2014 term, the Roberts Court upheld the First Amendment in at least fifteen out of forty First Amendment cases, with others soon to be decided.[92] Justices Roberts, Kennedy, and Scalia have authored two-thirds of First Amendment opinions affixing a decidedly conservative lens on this Court's interpretation of the First Amendment.[93]

One of the Court's more deferential decisions, and the jumping off point of this discussion, is in *McCutcheon v. Federal Election Commission* decided in April of 2014.[94] In *McCutcheon*, the Court held that aggregate limits on campaign contributions violated the First Amendment.[95] While the decision was not a windfall, it further demonstrates the Roberts Court's willingness to defer to the First Amendment. Indeed, James Bopp, the most well-known advocate for campaign finance deregulation, believes the arguments

88. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–43 (1995); DeGregory v. Att'y Gen. of N.H., 383 U.S. 825, 828–30 (1966); NAACP v. Alabama, 357 U.S. 449, 463–66 (1958).

89. *McIntyre*, 514 U.S. at 349–51.

90. *Id.* at 348 n.11 (quoting New York v. Duryea, 351 N.Y.S.2d 978, 996 (1974)).

91. Andrew Kreighbaum, *Campaign Finance Reformers Facing Major Political, Legal Obstacles*, OPENSECRETS.ORG (Sept. 1, 2010), http://www.opensecrets.org/news/2010/09/campaign-finance-reformers-facing-major/.

92. Ronald Collins, *The 2014 Term and the First Amendment—Surprising Twists & Turns*, SCOTUSBLOG (Jun. 19, 2015, 11:26 AM), http://www.scotusblog.com/2015/06/the-2014-term-the-first-amendment-surprising-twists-turns/; Collins, *supra* note 20.

93. Collins, *supra* note 20; *see also infra* Section II.D.1.

94. McCutcheon v. FEC, 134 S. Ct. 1434 (2014).

95. *Id.* at 1442.

previously rejected by the Rehnquist Court but accepted by the Roberts Court in *Citizens United* and *McCutcheon* open the door for further deregulation.[96]

B. Legislating and Reviewing Campaign Finance Regulations

Campaign finance reform came in three waves of legislation. The first major flood of statutory reform was in response to President McKinley's major fundraising efforts against former running-mate President Roosevelt, initiating campaign finance reform to curb corruption.[97] Important here, are the second and third waves of legislation: the Federal Election Campaign Act ("FECA"),[98] and the Bipartisan Campaign Reform Act of 2002 ("BCRA").[99] While both acts have been significantly curtailed since enactment, they lay the foundation for the United States campaign finance system.

The Federal Election Campaign Act Amendments of 1974 lay out four basic forms of regulation promulgated by the Federal Election Commission: (1) disclosure; (2) limits on monetary value of campaign contributions; (3) limits on monetary expenditures by campaigns; and (4) public financing of campaigns.[100] At the time FECA was passed, there was also a ban on corporate and labor union donations,[101] but *Citizens United* later overturned that provision.[102] Although this legislation only applies to federal elections, most states have similar laws for state and local elections.[103]

The more recent BCRA contains restrictions on soft money, electioneering communications, contribution limits, coordinated and independent expenditures, and the use of collected funds among other provisions.[104] Some parts of the BCRA have been overturned on First Amendment grounds, such

---

96. *See* Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 532–33 (2016); *see also Attorney Profiles*, BOPP LAW FIRM, http://www.bopplaw.com/attorney-profiles (last visited Mar. 10, 2017); Brouer, *supra* note 16.

97. Jamie Fuller, *From George Washington to Shaun McCutcheon: A Brief-ish History of Campaign Finance Reform*, WASH. POST (Apr. 3, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/.

98. Federal Election Campaign Act of 1971, Pub. L. No. 92–225, 86 Stat. 3 (codified as amended at 52 U.S.C. §§ 30101–30146 (2012)).

99. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (codified as amended in scattered sections of 52 U.S.C.).

100. LOWENSTEIN ET AL., *supra* note 43, at 643.

101. *Id.*

102. Citizens United v. FEC, 558 U.S. 310, 318–19 (2010).

103. LOWENSTEIN ET AL., *supra* note 43, at 644.

104 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (codified as amended in scattered sections of 52 U.S.C.).

as the Millionaire's restriction and aggregate contribution limits.[105] And although the act was passed with bipartisan support,[106] it continues to be etched away by the Supreme Court.

C. Challenges to Current Campaign Finance Framework

Although new campaign finance laws advocating for the end of dark money and heightened disclosure are cropping up across the nation, advocates are countering new legislation with challenges to those laws. Take for example James Bopp's most recent attempt to challenge the campaign finance paradigm in Montana.[107] Montana's DISCLOSE Act[108] amended previous campaign finance legislation and redefined terms to create a broader scope in disclosure.[109] Among a variety of campaign finance requirements, were heightened e-reporting and website access to donor information.[110] In October of 2015, Justice Kennedy—the deciding vote in *Citizens United*—declined stay and injunctive relief.[111]

In a similar fashion, a campaign finance law was challenged in Arizona and successfully found unduly burdensome.[112] The Federal District Court for the District of Arizona held the definition of "political committee" to be facially overbroad, illustrating the undue burden that the government imposes on citizens to exercise their speech.[113] Likewise, opponents recently commented on California legislation because as written, it severely burdens the individual's ability to communicate through campaign contributions by restricting contributions to family members' campaigns, limiting certain forms of communication, and mandating increased disclosure of information.[114] These examples demonstrate the relevancy of the issue, and

---

105. McCutcheon v. FEC, 134 S. Ct. 1434, 1442 (2014); Davis v. FEC, 554 U.S. 724, 753–54 (2008).

106. 2 U.S.C. § 431 (2002).

107. Brouer, *supra* note 16.

108. S.B. 289, 64th Leg., Reg. Sess. (Mont. 2015).

109. Press Release, Office of the Governor State of Montana, *supra* note 17.

110. S.B. 289, 64th Leg., Reg. Sess. (Mont. 2015).

111. *No. 15A398*, *supra* note 19 (Justice Kennedy denied James Bopp's application for stay and injunctive relief).

112. *Fountain Hills*, *supra* note 15.

113. *Id.*

114. Scott Blackburn, *Center for Competitive Politics Comments on Proposed Changes to California's Coordination Regulations*, CTR. FOR COMPETITIVE POL. (Oct. 14, 2015), http://www.campaignfreedom.org/2015/10/14/center-for-competitive-politics-comments-on-proposed-changes-to-californias-coordination-regulations/ (criticizing California legislation as burdensome on speakers' ability to illustrate their views).

the importance of a consistent, nation-wide solution for treatment of federal campaign contributions and contributors.

II. ANALYSIS

Today instead of reading "Congress shall make no law"[115] to infringe the freedom of speech, the Constitution practically reads, "Congress shall make *some* laws" to infringe the freedom of speech. In the wake of *Citizens United* and *McCutcheon*, campaign finance is considered a pressing legal issue,[116] and a remedy has been long overdue.[117] The Court has previously reevaluated the appropriate standard of review,[118] and now they should do the same. And although the Supreme Court has at times been hesitant to review campaign finance issues, challengers should not be discouraged. Indeed, it took the Court three times to hear *Buckley*,[119] finally finding a "sufficient personal stake" in the decision.[120] But without the advocate's third attempt, and subsequently the Court's decision in *Buckley*, money would have not become speech in 1976.

In *Buckley*, the Court predicted changing circumstances and reasoned "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."[121] And while the Court held that those circumstances were not present in 1976,[122] those circumstances are present now. Today it is markedly more expensive to conduct a successful election. Between the 2008 and 2012 presidential elections, independent

---

115. U.S. CONST. amend. I.

116. Kamanzi Kalisa, *Top Five Issues States Face in 2015: Elections*, COUNCIL ST. GOV'TS, http://www.csg.org/pubs/capitolideas/enews/cs2_1.aspx (last visited Mar. 10, 2017).

117. *See, e.g.*, J. Robert Abraham, Note, *Saving* Buckley*: Creating a Stable Campaign Framework*, 110 COLUM. L. REV. 1078, 1080 (2010) (proposing a realignment to *Buckley*'s strict scrutiny standard, and finding contribution limits unconstitutional).

118. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 837–38, 866–67 (4th ed. 2013). Chemerinsky describes the debate surrounding the scrutiny standard applied to affirmative action challenges. The issue has sparked a heated debate amongst Justices resulting in a fluctuating standard and finally resulting in the application of strict scrutiny. He also describes the debate surrounding gender classifications and which standard to apply to those challenges.

119. LOWENSTEIN ET AL., *supra* note 43, at 644 (encountering a problem with the "adjudicating the cases and controversies" clause).

120. Buckley v. Valeo, 424 U.S. 1, 12. (1976) (internal quotations omitted).

121. *Id.* at 21.

122. *Id.* In addition, this standard was tightened by *Shrink*. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000). However, under either standard, contributions limits are unduly burdensome today.

spending increased by 224% (with inflation) to remain competitive.[123] Similarly, independent expenditure exploded in House and Senate races between 2008 and 2012, by 662% and 1338% respectively.[124] Moreover, the Court has begun finding some limits too low. For example, in *Randall v. Sorrell*, the Court held the contribution limits between two-hundred and four-hundred dollars unconstitutionally low.[125] While this is just a start, it shows the Court's readiness to act once the market demands deregulation.

The fundamental right of expression through campaign contributions should be guaranteed fundamental protection. Although scholars present interests in regulating campaign contribution limits and disclosing those contributions,[126] the interests fall short of compelling and are far from narrowly tailored solutions. In short, current campaign finance laws should be found unconstitutional.

A. Fundamental Rights Deserve Fundamental Protection

The Court should unquestionably apply strict scrutiny whenever political speech is at play, regardless if it is reviewing disclosure, contribution, or expenditure limits. Instead, the Court applies many different standards, and political speech deserves a reconciliation of these standards. Although the Court claimed to apply strict scrutiny in *Buckley*,[127] whether strict scrutiny was actually applied is questionable. Moreover, the standard was demoted to intermediate scrutiny in *Shrink*.[128] As a result, *Buckley* is a unilateral divestiture of all constitutional interest in speech made by the contributor and affords protection *only* to speech made by the mouthpiece of the party.[129] In other words, when the candidate spends money, she is speaking, but when an individual spends money, she is associating. This is an unacceptable burden on free speech. Speech of the individual should be valued at least as much as that of a party or candidate.

> Th[e] free trade of ideas allows the citizenry to best govern themselves by seeking out information, contributing to debates, and keeping government accountable. Thus the right of the citizenry to discourse in a free market of ideas is a precondition to enlightened

123. LOWENSTEIN ET AL., *supra* note 43, at 643.
124. *Id.*
125. Randall v. Sorrell, 548 U.S. 230, 236–38 (2006).
126. LOWENSTEIN ET AL., *supra* note 43, at 643.
127. *Buckley*, 424 U.S. at 75.
128. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000).
129. *Buckley*, 424 U.S. at 21.

> self-government and a necessary means to protect it. . . . Actions destroying political privacy destroy free society.[130]

The interest in energizing citizens to speak freely should be more than adequate to activate strict scrutiny.

Furthermore, all avenues of campaign finance regulation—expenditures, contributions, and disclosure—should be viewed equally. Many agree that the distinction between contributions and expenditures was arbitrary.[131] As Justice Burger stated, "contributions and expenditures are two sides of the same First Amendment coin."[132] Indeed, "[i]t is not simply speculation to think that the limitations on contributions will foreclose some candidacies. The limitations will also alter the nature of some electoral contests drastically."[133] The identity of the speaker should not dictate whose money becomes speech. And although not as traditionally supported, disclosure has a case to be treated under the heightened free speech standard. Disclosure of donors' names and personal information is a direct chill on speech,[134] infringing on the individual's ability to speak anonymously and thus violating the First Amendment.[135] It is evident that the First Amendment requires consistent application of strict scrutiny as a fundamental right.

B. Targeting Compelling Interests

To burden a First Amendment right, the state or federal government needs to present a compelling policy interest to justify the burden on expenditures, contributions, or disclosure of those contributions. There are many reasons offered to justify regulating campaign finance: preventing corruption, promoting equality, creating competiveness, instilling public confidence, and reducing time spent by candidates on fundraising, to name a few.[136] However, as Daniel Lowenstien, law professor and election law expert, points out these

---

130. Barr & Klein, *supra* note 39, at 264–65 (internal quotations omitted).

131. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 678 (1990) (Stevens, J., concurring); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 518–19 (1985) (Marshall, J., dissenting).

132. *Buckley*, 424 U.S. at 241 (Burger, J., concurring in part and dissenting in part).

133. *Id.* at 244 (Burger, J., concurring in part and dissenting in part).

134. Disclosure chills speech because it poses a fear of harassment. *Id.* at 73–74; *see also* Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1854–56, 1873–74 (2013) (discussing disclosure's chilling effect on speech and attempting to balance the chill with an "information tradeoff").

135. *See infra* Section II.D.2 (regarding emerging technology's impact on the chilling nature of disclosure and the potential to lose control).

136. LOWENSTEIN ET AL., *supra* note 43, at 643.

goals are hardly cohesive.[137] For example, when imposing contribution restrictions to promote equality and limit corruption, it necessarily increases time spent fundraising by the candidate.[138] Moreover, the Court has flat out rejected "leveling the playing field"[139] as a legitimate compelling interest, leaving only two legitimate compelling interests: counteracting corruption and the appearance of corruption.[140]

However, scholars speculate that if current and future courts truly apply strict scrutiny, future size limitations of contributions would be struck down.[141] This is because corruption as imagined in 1976 would unlikely be found compelling under strict scrutiny today. Under the current framework, the Court allows laws that protect against the mere *appearance* of corruption.[142] But without proof of actual corruption, this interest will not hold up. And, because the decisions in *Citizens United* and *McCutcheon* arguably limit the definition of corruption to "the quid pro quo exchange of money for official acts," corruption is exceedingly hard to find, and likely not a valid basis for limiting contributions.[143] The Court's modern interpretation of corruption is a much-needed limit on burdensome legislation. Indeed, the late Justice Scalia argues that the ability to buy an election—regardless of corruption—is exactly what the founding fathers would have intended.[144] When Justice Scalia was asked if he thought that super PACs were a dark force the Court should be concerned with, he responded, "No. . . . I think Thomas Jefferson would have said the more speech, the better. That's what the First Amendment is all about."[145]

This logic should also be extended to disclosure and its potential chilling effect on speech. Because disclosing contributions is a limit on contribution itself, disclosure requirements and contribution limitations should be evaluated identically—only to be overcome by a compelling interest. But

---

137. *Id.* Daniel Lowenstein is a professor at UCLA Law School who specializes in election law. *Daniel Hays Lowenstein*, UCLA LAW, http://law.ucla.edu/faculty/faculty-profiles/daniel-hays-lowenstein/ (last visited Mar. 20, 2017).

138. LOWENSTEIN ET AL., *supra* note 43, at 643.

139. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 748–49 (2011).

140. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000).

141. LOWENSTEIN ET AL., *supra* note 43, at 671.

142. McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014).

143. LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 110 (5th ed. 2012 & Supp. 2015); *see also McCutcheon*, 134 S.Ct. at 1438–39.

144. *Interview with Antonin Scalia*, *supra* note 1.

145. *Id.* To be sure, Justice Scalia conditioned his conclusion with the fact that the speaker should be disclosed. *Id.*

proponents of disclosure, including Justice Scalia,[146] argue that the information obtained from disclosure requirements allows voters to make a more informed decision and decreases the risk of corruption.[147] That's why scholars advocate for more disclosure; take Harvard Professor and brief 2016 Presidential candidate Larry Lessig, for example.[148] Lessig's presidential run was motivated in large part by his desire to completely reform the way the United States treats campaign finance.[149] He advocates to improve disclosure, restrict lobbying, and fix the "superPAC problem."[150] And the empirical evidence supports these concerns, revealing a small number of people provide most of the campaign finance funding.[151] The United States Public Interest Research Group reports that "donors giving more than $1000 . . . account for 3.7[%] of all contributors" give more than 50% of all direct fundraising campaign dollars.[152] And these deep-pocketed donors would benefit most from more lenient disclosure laws. Others argue that the problem with unlimited campaign contributions is that it translates to unlimited speech, giving the rich more power and influence in politics.[153]

Additionally, from a doctrinal standpoint some argue that a campaign finance system with disclosure requirements is closer to the political discourse imagined by the First Amendment; because disclosure requirements provide voters with more information, campaign finance requirements create a widespread "opportunity to participate effectively in political debate."[154] Prior to *Buckley's* writ of certiorari, the D.C. Circuit reasoned that money polluted the political process: "The [F]irst

146. *Interview with Antonin Scalia*, *supra* note 1.

147. Gilbert, *supra* note 134, at 1853; *Interview with Antonin Scalia*, *supra* note 1. *Cf.* Doe #1 v. Reed, 561 U.S. 186, 190 (2010) (holding that disclosure of names on referendum petitions does not violate the First Amendment).

148. Mark Schmitt, *How Larry Lessig's Presidential Campaign Changed the Campaign Reform Agenda*, VOX (Aug. 28, 2015, 10:50 AM), http://www.vox.com/polyarchy/2015/8/28/9217355/larry-lessig-campaign-reform.

149. *Id.*

150. *Id.*

151. Chris MacKenzie, *New Filing Shows Largest 3.7% of Donors Account for Half of Campaign Funds*, U.S. PIRG (Oct. 19, 2015), http://uspirg.org/news/usp/new-filing-shows-largest-37-donors-account-half-campaign-funds; *see also* FIGHTBIGMONEY.COM, http://fightbigmoney.com/ (last visited Mar. 5, 2017) (advocating to restore politician focus on the *people* not big donors).

152. MacKenzie, *supra* note 151.

153. *See* Dana Milbank, *If Money Is Speech, This Is What Twenty-Six Billion Dollars Sounds Like*, WASH. POST (Oct. 19, 2015), https://www.washingtonpost.com/opinions/sheldon-adelson-rambling-mogul/2015/10/19/db3a8218-76a1-11e5-bc80-9091021aeb69_story.html.

154. LOWENSTEIN ET AL., *supra* note 43, at 662.

[A]mendment works to promote an open market in areas. But we restrict the freedom of monopolists controlling a market to enhance the freedom of others in the market."[155] What these scholars lose sight of—and what they have been criticized for—is the placement of tangential First Amendment values over the First Amendment's direct command to protect political speech.[156] Furthermore, the Court has rejected the notion that Congress can "regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others."[157] But in spite of these concerns, the Court ultimately settles on quid pro quo corruption as the only interest compelling enough to burden political speech.[158] Accordingly, although these interests may be important, they fall short of compelling.

C. Narrowly Tailored Remedies?

Only narrowly tailored remedies (motivated by a compelling interest) can challenge a fundamental First Amendment right to freedom of speech.[159] Even if the interests are compelling enough, the narrowly tailored burden is not met. Most agree that campaign finance legislation has been ineffective in preventing conflicts of interest arising from campaign contributions.[160] And the fact that the laws have not achieved their purpose is evidence that they are not narrowly tailored enough.

Moreover, the existence of alternative remedies bolsters the conclusion that the law is not narrowly tailored. If Congress chose to abandon limitations on contributions to candidate campaigns, it could solve the dark money problem by allowing money to more readily reflect *whom* they support, rather than filtering money through an intermediary PAC. This would in turn decrease the total amount of money needed in a campaign cycle, which has

---

155. Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 373 (1977); *see also* J. Skellly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 611, 633 (1982).

156. LOWENSTEIN ET AL., *supra* note 43, at 663; Daniel D. Polsby, Buckley v. Valeo*: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 42–43 (1976).

157. McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014).

158. *See* Barr & Klein, *supra* note 39, at 265.

159. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015); *see also* NAACP v. Button, 371 U.S. 415, 438–39 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

160. LOWENSTEIN ET AL., *supra* note 43, at 675 (quoting Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 CAP. U. L. REV. 381, 398–99 (1992)).

spun out of control within the past decade.[161] Further, a deregulation in campaign finance legislation might increase the level of candidate responsibility expected by voters. Without a regulatory scheme in place, the ethical burden will be placed on the candidates to discourage corruption. While perhaps idealistic,[162] it is important to our political process to allow the voters and their popular opinion to dictate the behavior of each candidate.

Finally, the Court's inconsistent treatment of campaign finance demonstrates the apparent disagreement and the arbitrary lines drawn in their opinions. For example, the Court has found some disclosure limits unconstitutionally low.[163] But it is incredibly difficult to draw a line and almost any amount can become arbitrary. For example, under that reasoning a donation of twenty dollars does not require disclosure, but if the donor instead donates twenty-one dollars, they are subject to public record. In short, the legislative and judicial remedies are inconsistent and ineffective. As imagined today, campaign finance laws can never be narrowly tailored enough to justify the infringement of fundamental political speech.

D. Forward Looking Considerations

Two unknowns are important to consider when evaluating the likelihood of successful strict scrutiny implementation. First, the changing Court make up will likely have an impact on campaign finance jurisprudence. Because campaign finance decicions are typically decided on partisan grounds,[164] the future make-up of the Court (and by proxy their appointing and confirming bodies) depends on which political ideology prevails in the 2016 and

---

161. Some argue that the amount of money spent in campaigns is not something to blow out of proportion. The amount spent in campaigns is minimal compared to commercial goods and services advertising. *Id.* at 642. This demonstrates that the amount spent is not unreasonable but on par with the cost of communication in the American marketplace. And arguably, the communication of political ideas is much more valuable to consumers than what brand of coffee to buy.

162. This is not too far from reality. In the 2016 presidential primary, Donald Trump voluntarily refused PAC dark money. Jenna Johnson, *Trump Tells All PACs Supporting His Candidacy to Return All Money to Donors*, WASH. POST (Oct. 23, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/10/23/donald-trump-tells-super-pacs-supporting-his-candidacy-to-return-all-money-to-donors/. Although Trump is exceptionally wealthy, most politicians are wealthy in comparison to the average American.

163. *See generally* LOWENSTEIN ET AL., *supra* note 43, at 768–810.

164. Collins, *supra* note 20; *see also* Collins *supra* note 92 (describing how the Justices dealt with the three free speech cases of the 2014 term). To be sure, this conclusion paints a Justice's ideology with a wide-brush and does not take into account an individual justice's tendency to decide against his or her ideology on a case-by-case basis.

subsequent elections. Second, in our increasingly technological world, the impact of emerging technologies on campaign finance must be considered. Disclosure is more accessible in online mediums, increasing the chill factor in disclosure, and as anonymous payment technologies become more mainstream, a new donor identification question must be considered.

1. Court Make-Up and Likelihood of Success

Scholars acknowledge that the Roberts Court's deference to the First Amendment creates possibility for changing jurisprudence.[165] Others target a change on the Court as the best way to affect change in campaign finance reform.[166] In the wake of Justice Scalia's passing, the longest serving Justice on the Supreme Court,[167] imminent and potential change must be considered. And, in addition to the late Justice Scalia's empty seat, three justices are at the age of retirement and may choose to retire prior to or upon the inauguration of a new president: Justice Ginsburg at eighty-three, Justice Kennedy at eighty, and Justice Breyer at seventy-eight.[168] Taking a look back at the most recent five-four *McCutcheon* decision, Justices Scalia and Kennedy voted with the majority and Justice Ginsburg joined Justice Breyer's dissent.[169]

While party lines don't necessarily dictate a justice's vote on campaign finance issues, conservative justices are historically more likely to vote in favor of deregulation, while liberal justices are historically more likely to vote in favor of increased regulation.[170] Accordingly, Justice Scalia's passing along with Justice Kennedy's potential retirement might endanger the recent trend to show deference to speech. The slight five-four majority could be set off by the appointment of a moderate to liberal justice that sympathizes with

---

165. LOWENSTEIN ET AL., *supra* note 43, at 919; *see also* Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 877 (8th Cir. 2012) (en banc) (finding that burdensome reporting requirements were "most likely unconstitutional" in holding that a preliminary injunction against these reporting requirements was proper).

166. RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 177–78 (2016).

167. Jaime Gangel et al., *Antonin Scalia, Supreme Court Justice, Dies at Seventy-Nine*, CNN (last updated Feb. 15, 2016, 7:22 AM), http://www.cnn.com/2016/02/13/politics/supreme-court-justice-antonin-scalia-dies-at-79/.

168. Allan P. Mendenhall, *The Next President and the Supreme Court*, IMAGINATIVE CONSERVATIVE (Apr. 21, 2015), http://www.theimaginativeconservative.org/2015/04/next-president-supreme-court.html.

169. McCutcheon v. FEC, 134 S. Ct. 1434, 1440 (2014).

170. *Id.*

transparency concerns. Justice Scalia's death, ten months from President Obama's oval office exit, provides this opportunity.[171] Richard Hasen, a leading expert in the campaign finance and election law field, argues "it likely will take a Democratic president nominating progressives who can be confirmed by the Senate" to affect the campaign finance/regulation paradigm.[172] President Obama's attempted appointment of D.C. District Judge Merrick Garland,[173] could have sealed the fate for money's continued existence as speech.

However, in wake of the 2016 election, this is unlikely. Because Republican candidate and President-Elect Donald Trump won the election and Congress retained its conservative majority,[174] it was possible to appoint and confirm Neil Gorsuch, a "reliable conservative," rather than a more moderate justice like Chief Justice Roberts.[175] If Congress and President hail

---

171. Rick Hasen, *Justice Scalia's Death and Implications for the 2016 Election, the Supreme Court, and the Nation*, ELECTION L. BLOG (Feb. 13, 2016, 2:29 PM), http://electionlawblog.org/?p=79915. Richard Hasen, a professor at University of California, Irvine, School of Law, has authored an election law textbook, written multiple books on election law and campaign finance, and maintains a blog dedicated to election law. *Richard L. Hasen*, U.C. IRVINE SCH. L., http://www.law.uci.edu/faculty/full-time/hasen/ (last visited Jan. 23, 2017).

172. HASEN, *supra* note 166, at 178.

173. Hasen argues that it is unlikely for President Obama to get his pick through the conservative Senate in an election year, even if that pick is a moderate. Hasen, *supra* note 171. This has to do in part with Scalia's role as a conservative and originalist heavyweight on the Court and the high level of political dysfunction that accompanies an election year. *Id.* Moreover, Obama's first nomination, Judge Merrick Garland of the D.C. Circuit, has not been well-received by Senate republicans. Lyle Dennison, *Judge Garland and the Senate: If Not Now, Maybe Later?*, SCOTUSblog (Mar. 17, 2016, 5:41 PM), http://www.scotusblog.com/2016/03/judge-garland-and-the-senate-if-not-now-maybe-later/. Republicans have generally refused to meet with him until a new President is elected. *Id.*; *see also* Siobhan Hughes, *First Senate Republican Meets with Supreme Court Nominee Garland*, WALL STREET J. (Mar. 29, 2016, 5:50 PM), http://www.wsj.com/articles/first-senate-republican-meets-with-supreme-court-nominee-garland-1459283885. The nomination of Judge Garland expired and upon President Trump's inaguration, Trump nominated Judge Neil Gorsuch of the Tenth Circuit Court of Appeals. *See* Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, WALL. STREET J. (Jan. 3, 2017, 5:53 PM), https://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952; Ariane de Vouge, *President Trump Nominates Neil Gorsuch for Supreme Court*, CNN (Feb. 1, 2017, 5:05 AM), http://www.cnn.com/2017/01/31/politics/donald-trump-supreme-court-nominee/.

174. Eric Bradner, *Republicans Keep Control of Congress*, CNN (Nov. 9, 2016, 3:08 AM), http://www.cnn.com/2016/11/08/politics/congress-balance-of-power-2016-election/.

175. *See* Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html; *see also* Ryan Black & Ryan Evans, *Neil Gorsuch Could Be the Most Conservative Justice on the Supreme Court*, WASH. POST (Mar. 20, 2017),

from different parties, potentially later in President-Elect Trump's term, more moderate justices are likely to be installed on the Court.[176] If more conservative justices are nominated in place of someone such as swing-vote Justice Kennedy (although he usually votes in favor of First Amendment deference),[177] deference towards First Amendment speech protection could increase. The infinite amount of unknown circumstances could significantly impact the success of affording money the same protection that speech is guaranteed.

2. Effect of Technology on the Future of Disclosure

The emergence of new technology has the opportunity to aggravate the current regulation and intensify campaign finance regulation's infringement on the First Amendment. As state and federal lawmakers adopt e-disclosure and anonymous payment methods become more widely accepted, disclosure is likely to chill speech even more than it already does. Moreover, the anonymity of online payment methods creates an opportunity to circumvent contribution limits. It is important to recognize the potential for disruption and react accordingly.

a. E-Disclosure

Advancement in technology, specifically the ability to disclose campaign finance documentation instantly online, will likely strengthen the effect of current disclosure laws. Because technology is increasingly commonplace, what once was on paper in an office is oftentimes available online and easily accessible.[178] For example, the Montana state legislature recently passed the Disclose Act, mandating electronic filing (also known as e-filing or e-disclosure) for any candidate, issue committee, or political committee supporting or advocating a statewide office or issue.[179] Although this Act

---

https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/neil-gorsuch-could-be-the-most-conservative-justice-on-the-supreme-court/?utm_term=.6e09cfe8c68d; Ed O'Keefe & Robert Barnes, *Senate Confirms Neil Gorsuch to Supreme Court*, WASH. POST (Apr. 7, 2017), https://www.washingtonpost.com/powerpost/senate-set-to-confirm-neil-gorsuch-to-supreme-court/2017/04/07/da3cd738-1b89-11e7-9887-1a5314b56a08_story.html?utm_term=.4a25ac6bc62a; Mendenhall, *supra* note 168.

176. *Id.*

177. Collins, *supra* note 20.

178. Craig B. Holman & Robert M. Stern, *Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Activity*, 3 PUB. INTEGRITY 11, 12–13 (2001).

179. Disclose Act, S.B. 0289, 64th Leg., Reg. Sess. (Mont. 2015).

might finally achieve effective disclosure, it will likely demonstrate the insurmountable burden that disclosure also presents. Because access to donor information becomes increasingly easy, e-disclosure could increase disclosure's chill on speech. In the world where money is speech, the integration of e-disclosure systems necessarily burdens speech in an undesirable way. Not only is donor information available at the click of a mouse, but also donors are more susceptible to data hacks.[180] The ease of access could discourage individuals from speaking in fear that their view might hurt current or prospective employment situations or targeted data hacks might expose their personal information. A citizen has the right to hold and express his or her own views anonymously[181] and e-disclosure unduly burdens this right.

b. Emergence of Hard to Track Currency and Its Interaction with Disclosure Laws

The increased development and recognition of crypto-currencies, such as Bitcoin, might revolutionize the application of current campaign finance laws. Some PACs and campaigns now accept Bitcoin as contributions.[182] Bitcoin is defined as "a form of digital currency, created and held electronically."[183] Unique to the crypto-currency, Bitcoin is decentralized, meaning "[n]o single institution controls the [B]itcoin."[184] Moreover, Bitcoin is famous for providing its users with anonymity,[185] and this feature makes Bitcoin more difficult to track than traditional currency.[186] In the campaign finance setting, the emergence of crypto-currencies means that it is more difficult than ever to maintain disclosure and contribution limits.

---

180. Brody Mullins & Rebecca Ballhaus, *Weak Internet Security Leaves U.S. Elections Agency Vulnerable to Hackers, Reports Find*, WALL STREET J. (June 10, 2015, 5:09 PM), http://www.wsj.com/articles/weak-internet-security-leaves-fec-vulnerable-to-hackers-reports-find-1433945246.

181. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995); DeGregory v. Att'y Gen. of N.H., 383 U.S. 825, 828–29 (1966); NAACP v. Alabama, 357 U.S. 449, 459 (1958).

182. *See* Eric Lichtblau, *In Accepting Bitcoin, Rand Paul Raises Money and Questions*, N.Y. TIMES (Apr. 9, 2015), http://www.nytimes.com/2015/04/10/us/politics/in-accepting-bitcoin-rand-paul-raises-money-and-questions.html.

183. *What Is Bitcoin?*, COINDESK (Mar. 20, 2015), http://www.coindesk.com/information/what-is-bitcoin/.

184. *Id.*

185. *Id.* It is possible to trace the Bitcoin payment the Bitcoin address; however, Bitcoin addresses are devoid of personal names or identifying features.

186. Timothy B. Lee, *How Private Are Bitcoin Transactions*, FORBES (July 14, 2011, 9:31 AM), http://www.forbes.com/sites/timothylee/2011/07/14/how-private-are-bitcoin-transactions/.

If standards are not reconciled before Bitcoin or other crypto-currency becomes commonplace, the anonymous speaker and dark money problem is likely to spin out of control. Even if widespread use of the Bitcoin might not be imminent,[187] the anonymity feature could be isolated by those wishing to conceal their identity.[188] Although some might see this as an opportunity to avoid responsibility for negative attacks, it also allows donors to exercise their political activism while still maintaining their First Amendment privacy rights under anonymous speech.

The anonymity of Bitcoin not only poses problems to disclosure of campaign funds but also to maintaining contribution limits. Without proper disclosure, some donors can circumvent the limitation system.[189] It is possible that those wishing to donate anonymously will find loopholes to current campaign finance laws through the ability to secretly aggregate Bitcoin funding sources. Moreover, because crypto-currencies like Bitcoin are backed by mathematics, rather than gold or silver,[190] their value is widely unpredictable.[191] Without a stable conversion rate, the crypto-currencies could allow donors to severely under- or over-donate.[192] Additionally, some campaigns have set Bitcoin contribution limits significantly lower than the contribution limit for normal cash contributions.[193] Whether an individual under- or over-donates, there are severe equal protection concerns in arbitrarily setting and enforcing disparate limits among constituents.

The emergence of crypto-currency technology such as Bitcoin demonstrates why the outdated campaign finance framework is incompatible with society's needs and values. People are now searching for discretion and

---

187. Lichtblau, *supra* note 182. While scholars disagree to whether Bitcoin is a stepping-stone to new crypto-currencies, or whether Bitcoin is the crypto-currency giant to beat, they agree that crypto-currencies are here to stay and are changing the monetary landscape. Andy Extance, *The Future of Cryptocurrencies*: *Bitcoin and Beyond*, 526 NATURE 21, 23 (2015).

188. Lichtblau, *supra* note 182.

189 Dana Liebelson, *Turns Out Nobody Wants to Donate to Politicians with Bitcoin*, HUFFINGTON POST (Oct. 28, 2014), www.huffingtonpost.com/2014/10/28/bitcoin-political-campaigns_n_6062156.html (noting that critics of Bitcoin say using bitcoin for donations is an easy way to dodge campaign finance laws).

190. *What Is Bitcoin?*, *supra* note 183.

191 Laura Shin, *Bitcoin Production Will Drop by Half in July, How Will That Affect the Price?*, FORBES (May 24, 2016, 7:30 AM), www.forbes.com/sites/laurashin/2016/05/24/bitcoin-production-will-drop-by-half-in-july-how-will-that-affect-the-price/#7f063eb499e1 (noting that critics of Bitcoin say using bitcoin for donations is an easy way to dodge campaign finance laws).

192 *See* Ashley Pittman, *The Evolution of Giving: Considerations for Regulation of Cryptocurrency Donation Deductions*, 14 DUKE L. & TECH. REV. 48, 63 (2016).

193. Jerry Brito, *Let Bitcoin into the Campaign*, COIN CTR. (Apr. 10, 2015), https://coincenter.org/2015/04/let-bitcoin-into-the-campaign/.

anonymity, giving legislators yet another reason to reconcile and deregulate the current campaign finance system.

III. CONCLUSION

It's time to let money (as speech) reign free of regulation. Above all, the fundamental right to speech and association is strongest when in the political sphere. And, if campaign money is ever going to be treated as speech, it must always be treated as speech. Accordingly, the framework set forth in *Buckley* should be revisited and revised for consistency. The Court should reinstate strict scrutiny as the standard of review when evaluating campaign finance laws. No interest thus far is compelling enough or narrowly tailored enough to overcome this burden. It is likely that the Roberts Court is this generation's best chance for much-needed campaign finance reform. With technological developments, access to campaign finance disclosure will become exceedingly simple, effectively chilling political speech, and new technologies like Bitcoin present new issues to consider when reworking campaign finance framework.