Removing Direct Contribution Limits: Free Speech and Disclosure

Adam G. Byrne

Carol is a politician. She is a state legislator, to be more specific, and a very good one. Quickly rising through the ranks of her party, Carol has come to be revered by both her constituents at home and her colleagues at the Capitol. Propelled by her popularity, Carol seeks to unseat a member of Congress in an upcoming election. As a challenger, Carol faces the typical disadvantages that come with running against an incumbent: she has less experience, less recognition, and less clout. One area where Carol might be able to outperform her opponent, however, is raising money. Carol is a master fundraiser. Her charm and charisma have enabled her to befriend some of the wealthiest individuals in her district.

Dora is a wealthy businesswoman who happens to be close friends with Carol. The two share similar views when it comes to political, economic, and social issues. Dora hopes Carol gets elected and, in order to fully support her campaign efforts, she offers Carol a $25,000 check. As beneficial as that money would be for Carol, she must refuse it. Under federal contribution limits, she can accept only $2,600 per election from any one individual.

Contribution limits, therefore, impose significant difficulties. Not only do they burden Carol's efforts to raise money, but they also restrict Dora's interest in spending money the way she desires to express her political beliefs.

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The purpose of this article is twofold. First, I will demonstrate why direct contribution limits placed on campaigns ought to be removed. To do this, I will argue that money is in fact speech, and therefore is entitled to strict constitutional protection. Second, I will argue that disclosure requirements can act as an adequate safeguard against corruption.

Buckley's Basics

Buckley v. Valeo, decided in a 1976 per curiam opinion, is the wellspring of campaign finance law. Many of the Supreme Court cases dealing with campaign finance revolve around this decision, and an abundance of academic literature also draws upon it in one way or another. This section examines the *Buckley* Court's decision and its implications.

Giving and Spending Money Equals Speech

The idea that money is equal to speech underlies the holding of the Supreme Court in its seminal campaign finance case, *Buckley v. Valeo* (424 U.S. 1 [1976]). The *Buckley* Court repeatedly affirmed its belief that contribution and expenditure limitations violate the First Amendment rights of political expression and association (424 U.S. at 14, 23, 54). The Court is led to conclude that money is equal to speech by the fact that "virtually every means of communicating in today's mass society requires the expenditure of money" (424 U.S. at 19). For example, imagine that Senator Chuck Schumer (D-NY), as part of his 2016 reelection campaign, wanted to send out a mailer boasting of all his accomplishments since he took office. To do this, he would have to spend tens of thousands of dollars to mail the flyer to his constituents in New York City, let alone the entire state. Of course, he has alternative options. He could knock on doors or drive a soundtruck around Manhattan, opting not to spend any money communicating. That this alternative gives him any chance of winning the election, however, strains credulity. He could also rely on free social media platforms to disseminate his speech, but many successful political campaigns end up paying for social media ads or outsourcing their accounts to help increase their presence on these platforms. For a New York senatorial candidate, as for any viable contender, spending money is a necessary part of communicating.

To give another example, imagine that a wealthy actor wants to become more politically active and, in order to be seen as a stalwart Democrat, makes a sizeable donation to the California Democratic Party. He could have simply drafted a press release, e-mailed it to a tabloid, and had them blog about it free of charge. But by actually donating money, he is making a statement that he truly stands behind the Democratic cause. Regardless of whether one thinks money is or is not speech, the old maxim still stands: "Actions *speak* louder than words."

In equating money with speech, the *Buckley* Court gives an analogy of its own: "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline" (424 U.S. at 19). Many who oppose the idea that money is equal to speech take this metaphor and deconstruct it. For instance, even after the car runs out of gas, the driver is still able speak, for speech is unlimited (Levinson 2013: 898). Arguments such as this, however, misconstrue the metaphor. The car is what symbolizes speech, not the driver of the car. So when the car (speech) runs out of gas (hits expenditure ceiling), the car can no longer drive (no more speech).

Despite these examples and analogies, some believe that, because money is merely the antecedent to speech, it does not merit the same level of First Amendment protection as speech itself (Levinson 2013: 899). A brief search in any ordinary dictionary would support this position. According to the *American Heritage Dictionary*, "speech" is defined as "the faculty or act of speaking; the act of expressing or describing thoughts, feelings, or perceptions by the articulation of words." No connection with money can be drawn from this definition, so it is quite obvious that money is not speech in the literal sense. However, it is the *act* of giving and spending money that equals speech.

Even then, some claim that although the act of giving and spending money does serve an expressive function, it is not sufficient to fall within the protection afforded by the First Amendment. In explaining this position, Professor Deborah Hellman (2011: 967) notes how money facilitates the exercise of other fundamental rights and yet spending money in connection with some of these rights is not protected. As an example, she brings up the fundamental right to vote and how that does not include the right to buy or sell votes (Hellman 2011: 976). This is true because money has nothing to do with the

right to vote. Giving and spending money, however, has become an integral part of the right to speak freely in the context of political campaigns. One's donation or receipt of a political contribution constitutes a form of political expression and therefore it merits constitutional protection. In other words, giving and spending money is so closely linked to the right to free speech that, unlike buying and selling votes, it should fall within that right's penumbra. Therefore, "the right to speak necessarily encompasses the right to pay for the speech, just as the right to counsel encompasses the right to pay for a lawyer and the right to free exercise of religion includes the right to contribute to a place of worship," as Levy (2010) argues.

Justice White's opinion in *Buckley* touches directly on the question of whether giving and spending money equals speech. In his mind, "the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much" (424 U.S. at 262). Money alone, he argues, is not speech. Only speech is speech. Money simply facilitates someone's speech. To support his argument, Justice White points out that many campaign activities are not themselves communicative or even remotely related to speech. After all, spending campaign money on a candidate's travel and lodging expenses surely does not amount to that money being used for political expression. Justice White goes on, however, to discuss how all campaigns differ, with some spending less money while still managing to communicate more. Yet to suggest that the level of efficiency with which candidates use their money has any sort of impact on the constitutional protection afforded to their speech is to stray away from the issue at hand. Whether candidates spend every penny wisely or waste a million dollars on an unsuccessful television ad, their political speech still deserves to be free from any government restriction limiting its amount.

Justice Stevens echoes Justice White's concerns in *Nixon v. Shrink Missouri Government PAC* (528 U.S. 388 [2000]), but offers an alternative reason for why money is not equal to speech. In his view, "Money is property; it is not speech" (see Sharma 2008). Money, whatever its worth, is simply a medium of exchange. Speech, on the other hand, has nouns, verbs, and adjectives. It has the "power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field," tasks that money can only pay people to do (528 U.S. at 398). Generally, deprivations of

property violative of the Fifth Amendment receive a lower level of constitutional scrutiny than infringements on speech that contravene the First Amendment. The Constitution, therefore, protects the right to "use one's own money to hire gladiators," but a deprivation of this property interest by enacting campaign finance restrictions deserves a lower level of review than an act depriving one of the right to say what one pleases. Mixing money and speech, it seems, would be a category error.

Unfortunately for Justice Stevens, the argument that money is completely distinct from speech quickly falters. As the late Justice Scalia stated in a recent interview, "You cannot separate speech from the money that facilitates the speech. It is utterly impossible."[1] A glimpse at newspapers proves his point. If the government were to tell publishers that they could only spend so much money in publishing their newspapers, the government would certainly be abridging their freedom of speech, not just depriving them of property. Even Justice Breyer, who has consistently voted in favor of upholding campaign finance restrictions, has admitted that there is an identifiable link between money and speech. In his opinion, "a decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it *enables* speech" (528 U.S. at 400). Under this line of reasoning, permitting restrictions on the amount of money is a way for the government to *disable* speech.

For the government to wield such control over speech, any use of that power must be subject to strict constitutional scrutiny. Otherwise, it would be as if the government could tell an author that he has the right to publish so long as his book does not exceed 1,000 pages, or tell an artist that he has the right to paint so long as he spends no more than $1,000 on materials.

Contribution and Expenditure Limits

The *Buckley* Court established a number of things after it was asked to look at amendments made to the Federal Election Campaign Act (FECA). For one, the Court differentiated its treatment of contribution limits and expenditure limits (424 U.S. at 23).

[1]CNN interview with Justice Scalia (July 18, 2012). A transcript of the interview is available at transcripts.cnn.com/TRANSCRIPTS/1207/18/pmt.01.html.

Contributions, it was found, are a type of speech by proxy. The act of giving money to a person and enabling that person to spend it for campaign purposes warrants a lower level of constitutional protection than the act of spending money directly for campaign purposes (424 U.S. at 20–21). The existence of an intermediary, then, renders limitations on the activity susceptible to a lesser form of judicial scrutiny. Expenditures, on the other hand, involve no such intermediary. An expenditure limit simply restricts the amount of overall spending a person can make relative to a clearly identified candidate. It was thought that this type of action is more reflective of the spender's expression, and therefore it merits a higher standard of review. By distinguishing contributions and expenditures, the Court essentially upheld limitations on the former and struck down restraints on the latter.

The Court needed to put forth clear reasoning in order to justify why it was gutting half of FECA's amendments. In regards to contribution caps, it found only "a marginal restriction" was imposed upon the contributor's interests as a speaker (424 U.S. at 20). Such interferences are appropriate if the government has a sufficiently important interest. Here, the Court viewed the government's interests, namely, curbing corruption or the appearance of corruption, as sufficiently important. After all, "to the extent that large contributions are given to secure a political quid pro quo from current and potential officeholders, the integrity of our system of representative democracy is undermined" (424 U.S. at 26–27). Although opponents might have argued that such a limitation is too sweeping and that bribery laws were already in place, the Court paid deference to Congress' decision that bribery laws alone do not suffice. It was believed that the Court "has no scalpel to probe" in determining which contribution level works best (424 U.S. at 30).

With respect to expenditure limitations, the Court found a "severe restriction" was placed on the spender's interests as a speaker (424 U.S. at 23). Given this greater burden, the Court applied a heightened standard of review. It held that the government's interest in curbing corruption or its appearance was insufficient to justify the expenditure ceilings it had imposed. Furthermore, the Court found that the expenditure limits were insufficiently tailored. A candidate, it was reasoned, was less susceptible to corruption when spending money than when receiving money. Challengers to FECA argued

that the law's $1,000 limitation on expenditures "relative to a clearly identified candidate" was overly vague and ambiguous. The Court responded by interpreting the phrase "relative" as meaning "advocating the election or defeat of a candidate" (424 U.S. at 42). The Court further narrowed this interpretation as meaning any "explicit words of express advocacy" such as "vote for," "elect," "support," "defeat," or "reject" (424 U.S. at 44). The result of this magic-words test was that campaigns could still put out ads without being subject to the $1,000 spending limit by simply not including any of these magic words. Consequently, the law limited only a narrow scope of spending—that is, spending on ads using a magic word—and was in the end ineffective in carrying out the government's goal of deterring corruption.

Rejecting Alternative Frameworks

The Court's complex bifurcation and disputed metaphors aside, it must be remembered that fundamental rights are never absolute. One's freedom of expression, for example, can be limited in several respects. Consider *U.S. v. O'Brien* (391 U.S. 367 [1968]), where a man was convicted for burning his draft card on the steps of a Boston courthouse. While his actions had an expressive component—namely, protesting the war in Vietnam—the Court upheld his conviction because it found the law to be targeted at the nonexpressive component of his actions. Symbolic speech, therefore, does not always receive complete constitutional protection.

The *Buckley* Court explicitly addressed *O'Brien* and considered whether or not it could take a similar approach. It ultimately concluded that *O'Brien* could not apply to the FECA amendments because there is a distinct difference between the expenditure of money and the destruction of a draft card. Unlike the actual burning of a card, which introduces a nonexpressive component that is subject to government restriction, it has never been suggested that "the dependence of a communication on the expenditure of money . . . introduce[s] a non-speech element or reduce[s] the exacting scrutiny required by the First Amendment" (424 U.S. at 16). In other words, because the purpose of the FECA amendments was to limit potentially harmful speech, as opposed to regulating conduct wholly unrelated to the interest of suppressing speech, the *O'Brien* framework proved inappropriate and inapplicable.

Speech can also be regulated by time, place, and manner restrictions. These limitations must be content-neutral, meaning they apply to speech regardless of who is speaking and the topic they are speaking about. For example, a Los Angeles municipal ordinance prohibiting any protests on Hollywood Boulevard at 8 a.m. on Mondays would most likely be upheld as constitutional. The regulation is not aimed at any specific speaker or topic; rather, it serves the government's interest in ensuring freedom of movement on public roads. The *Buckley* Court opted not to treat the expenditure ceilings of the FECA amendments as time, place, or manner restrictions. It reasoned that unlike time, place, or manner regulations, the expenditure limitations imposed "direct quantity restrictions on political communication" (424 U.S. at 18).

Those defending the FECA amendments compared money with a sound truck: the more money involved, the higher the decibel level of the sound truck. The Court rejected this analogy, finding that requiring a sound truck to reduce its decibel level still leaves other channels of communication available to the speaker, while the same is not so with expenditure limitations. It has been argued that the sound truck analogy still holds water because even after FECA's enactment, speakers remain free to say as much as they want (Levinson 2013: 896). This assertion, however, assumes giving money is not speech, something that *Buckley* explicitly rejected. If speakers truly remained free to say as much as they wanted under FECA's limits, then they would be able to spend any amount of money to support whatever candidate or cause they chose (424 U.S. at 19–20).

The Court's Mishandling of Contribution Limits

As previously explained, the *Buckley* Court struck down FECA's expenditure limits but upheld its contribution limits. Recognizing the "opportunities for abuse inherent in a regime of large individual financial contributions," the Court found the contribution limits to be only marginal restrictions on freedom of speech, which were sufficiently justified by the government's interest in preventing corruption and the appearance of corruption (424 U.S. at 26–27). It reasoned that an individual or organization's contribution to a specific candidate only communicates a general expression of support that does not contain a specific message. In the Court's view, whether a donor contributed $10 or $1,000, the message of support remains the same. "At most," the Court explained, "the size of the

contribution provides a very rough index of the intensity of the contributor's support for the candidate," making any limit on that amount have "little direct restraint on his political communication" (424 U.S. at 21).

However, the Court's suggestion that the amount a donor contributes matters much less than the simple fact of the contribution is untenable. To illustrate, imagine a donor with an average income gave $1,000 to a city council candidate who was a Democrat bent on education reform. This donor is likely one who cares significantly about local affairs, favors Democratic causes, and wants to see a change in the way education is run. Now imagine that same donor gave $50 to an incumbent state senator. This shows that the donor is likely content with the way things are run at the state level and cares far more about the composition of her city council. The way people spend their money reveals an abundance of information about them and giving money to a campaign is no exception. Donors, therefore, can convey a number of different messages simply through the magnitude of their donations. The "intensity of the contributor's support," to use the Court's words, should be free from government restriction because any limit placed upon it imposes a substantial restraint on the various political messages conveyed. Contributing money is not just a mere "general expression of support;" rather, it is one way that an individual engages in what should be constitutionally protected political speech.

Nevertheless, the Court tried to support its argument by pointing out how contributions are a type of speech by proxy, requiring the presence of an intermediary to convey the communication that is sought to be expressed. After one contributes money to a candidate or association, "the transformation of contributions into political debate involves speech by someone other than the contributor" (424 U.S. at 21). The Court's analysis here may seem accurate, but it is mistaken. Just because the money is one step removed from entering political debate has no bearing on whether or not the contribution should be protected. Once the contribution has been made, the political expression of the donor has been established. What actually happens to the money after that point in time is irrelevant. Whether it is used to pay for consultants, yard signs, or coffee, donors have still told the recipient and disclosed to the world at large that they stand in support of that cause. Furthermore, even expenditures usually require the use of an intermediary to get the message across, be it a

television station or a newspaper publisher (528 U.S. at 413). The existence of an intermediary therefore does little to distinguish contributions and expenditures, yet the *Buckley* Court relied on this slender reed to justify its bifurcation.

Finally, the *Buckley* Court looked at political action committees (hereinafter "PACs") and struck down the FECA amendments' ceiling on independent expenditures. Given the ability of PACs to make unlimited independent expenditures, the Supreme Court has often used this option to justify contribution limits (see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 [1990]). Once individuals reach the contribution limit, the thinking was that they could still speak by making an unlimited amount of independent expenditures. As the Supreme Court has come to recognize, however, the PAC option is not as easy as once made out to be. There are in fact a number of administrative costs involved with establishing and maintaining these types of committees. PACs are often required to appoint a treasurer, keep records of all contributions, file a statement of organization, send frequent reports to the Federal Election Commission (FEC), and make known any changes to the above information (see *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253 [1986]). In his majority opinion in *Citizens United v. FEC* (558 U.S. 310, 337 [2010]), Justice Kennedy held that a prohibition on corporations and labor unions from using their general treasury funds to make independent expenditures was an outright "ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." Under this view, PACs do not alleviate the First Amendment problem because they are entirely separate entities. Their formation still does not allow the original contributor to speak. The existence of PACs, therefore, provides no justification for preserving contribution limits.

Overall, the contribution limits that were upheld in *Buckley* have proven to be largely ineffective. They have forced a substantial amount of political speech underground as contributors and candidates have devised elaborate methods of avoiding them. Along with this rise in "soft money," *Buckley's* framework has also created an indirect system of accountability that confuses voters (528 U.S. at 408). Instead of rooting out corruption, *Buckley's* bifurcation has created an endless cycle of fundraising where incumbents must solicit money from as many donors as possible instead of spending that time fulfilling their duties in office.

It is also important to ask why contribution limits are set the way they are. Chief Justice Burger's opinion in *Buckley* raised this issue and he noted that "it is clearly arbitrary Congress has imposed the same ceiling on contributions to a New York or California Senatorial campaign that it has put on House races in Alaska or Wyoming" (424 U.S. at 242). Why the majority in *Buckley* thought that a $1,000 contribution limit was enough to prevent corruption but not $900 or $1,100 is also a question left unanswered. However, the Court reasoned, as it almost invariably has since, that it has no scalpel to probe which contribution level works best, for such a determination ought to be made in the galleries in Congress (424 U.S. at 30). Justice White, a staunch proponent of contribution limits, believed that Congress was entitled to determine that bribery and disclosure laws were not enough. He accepts the Congressional judgment that "the evils of unlimited contributions are sufficiently threatening to warrant restriction regardless of the impact of the limits on the contributor's opportunity for effective speech" (424 U.S. at 260).

Such deference to Congress, though, is fraught with danger. It must not be forgotten that many of the legislators setting these limits will run for reelection in the future. Naturally, they may feel inclined to manipulate the contribution limits to their advantage and protect their seats. Incumbents enjoy a variety of advantages by virtue of already being in office. They also tend to disfavor large contributions because a challenger who is able to receive an unlimited amount in contributions has a much better shot at beating them than a challenger who can only take in a certain amount per donor. It is no coincidence that over half of the legislators in Congress have a net worth of over $1 million (see Choma 2014); those with substantial amounts of money will win more often than those without such funds. In light of the potential for incumbency protectionism, the fact that contribution limits are set by legislators themselves casts more doubt on the validity of such restrictions.

In sum, the act of giving and spending money on political activities is equal to political speech and deserves the full protection of the First Amendment. Contribution limits "infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits" (*Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 640 [1996]). Being "two sides of the same First Amendment coin," contribution limits should be

subject to the same heightened level of scrutiny as expenditure limits (424 U.S. at 241).

Disclosure Requirements

If the current election system is to function properly without contribution limits, then the weight of democracy is put on the back of disclosure requirements. Compelling disclosure of political activity requires a careful balancing of the individual's interest in privacy and anonymity with the public's interest in access and transparency. As will be demonstrated, this balancing will generally, but not always, tip in favor of the public's interest in information. An aware and well-informed polity has always been an indispensable part of what makes the United States government work. In 1788, American patriot Patrick Henry remarked that "the liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them."[2] Over two centuries worth of elections, scandals, and reforms later, his words remain relevant.

Sunlight Is the Best Disinfectant

Along with contribution and expenditure limits, *Buckley v. Valeo* considered an as-applied challenge to FECA's disclosure provisions. FECA required that each political committee register with the FEC and keep detailed records of all the funds it was receiving and spending (2 U.S.C. § 431 *et seq*. [1970 ed., Supp. IV]). Committees and candidates were also required to file quarterly reports with the Commission that included information such as the names, addresses, and occupations of those involved. Opponents of the law claimed that it was overbroad in its application to minor-party and independent candidates and that it should not have included contributions as small $11. While the Court recognized that compelled disclosure can seriously infringe on rights guaranteed by the First Amendment, it ultimately found that the asserted governmental interests were sufficiently important to outweigh the possibility of such infringement (424 U.S. at 64–66).

The Court found three governmental interests underlying FECA's disclosure requirements. One was the public's interest in

[2]Patrick Henry, "Speech On the Expediency of Adopting the Federal Constitution," Delivered in the Virginia Ratifying Convention (June 9, 1788).

information. If the public had access to data displaying all the exchanges of political money, it would be able to judge who was indebted to whom and get a better sense of what a candidate or organization truly stood for. Another interest was the deterrence of corruption or the appearance of corruption. Whether money was being used improperly, or special favors were being granted, would become more perceptible to the public eye and therefore less likely to occur. Lastly, the recordkeeping requirements would serve the government's enforcement interest and make violations easier to detect. "Electric light," as Justice Brandeis (1914: 92) aptly put it, is "the most efficient policeman."

With these three interests in mind, the Court next looked at the burdens that FECA's disclosure requirements place on individuals and associations. It conceded that public disclosure would likely deter some individuals from contributing and may even subject some donors to harassment or retaliation (424 U.S. at 68). The Court had previously held that such threats of retaliation can be sufficient to exempt a candidate or association from disclosure, but only where there has been an uncontroverted showing that such threats have occurred on past occasions (see *NAACP v. Alabama*, 357 U.S. 449, 462 [1958]). In *Buckley*, however, there was no evidence in the record of such threats or reprisals occurring or even being likely to occur. Instead, these potential threats against contributors were found to be "highly speculative," and therefore the disclosure requirements did not seriously infringe on First Amendment rights (424 U.S. at 70). With respect to the provision's low threshold, the Court shed light on the fact that Congress did not focus on setting the perfect level but rather adopted the threshold existing some 65 years prior. Nonetheless, because of the complexity of the legislation, the Court paid deference to Congress in making this determination (424 U.S. at 83). In the end, the Court facially upheld the law's disclosure requirements, seemingly hesitant to tamper with them after having already eviscerated half of FECA.

The merits of *Buckley* aside, there are many advantages in requiring disclosure. An open and transparent campaign finance system enables the public to hold candidates and committees accountable for their fundraising. To illustrate, imagine the executive of a natural gas company donated the maximum amount of direct contributions to every Republican senator. Each of these senators then voted against an anti-fracking bill. By virtue of disclosure, the public would

be able to judge for themselves the motivations of their legislators, whether it be serving constituents or pleasing special interests. This would remain just as true in a world without contribution limits. If a wealthy woman named Claire were to contribute $3 million directly to a candidate's campaign efforts, that candidate would be identified by the public as "Claire's Candidate" and the public would be much more sensitive to any special favors Claire might one day receive.

Disclosure requirements can also serve to help contributors. Donors who want to make it known to the public who they support and how much they support them can use disclosure as a tool to amplify their political expression. It is one thing for individuals to claim that they stand behind certain candidates or issues; it is an entirely different thing to be able to examine the records and see the numerous contributions those individuals have made in the past.

Mandatory Disclosure's Impact on Individual Autonomy

For all of the benefits inherent in disclosure requirements, there remain a number of encumbrances that they impose on contributors. Chief Justice Burger raised several of these burdens in his separate opinion in *Buckley*. For instance, he agreed with the Court that these requirements would deter some individuals who might otherwise contribute. To illustrate, he cites rank-and-file union members and rising junior executives who might not want to run the risk of being caught supporting causes unpopular with upper management (424 U.S. at 237). The Chief Justice claimed that the "public interest" was too vague and ill-defined to risk breaching the historic safeguards of the First Amendment.

What the Chief Justice overlooked, however, is that the First Amendment not only encompasses the value of self-expression, but it also furthers the public's strong interest in knowing where speech is coming from. If the Chief Justice's examples were taken at full value, then anyone could donate a substantial amount of funds to candidates or committees but then claim exemption from disclosure to conceal their actions because it might reflect negatively on the donor. Speakers cannot expect their expressions to be locked in a box when matters of national magnitude are concerned. For as-applied challenges that make an uncontroverted showing that threats and reprisals have occurred and are likely to keep occurring, the Court has recognized that exemptions can be made. For anything falling short of that standard, the public's interest on this front outweighs that of the individual.

Disclosure requirements also raise the potential for public confusion. Committees making independent expenditures have been known to use ambiguous names like "Organization for a Better America" or "U.S.A. All the Way," leaving voters with little to no information about what the group's mission is or what it stands for. The premise of the First Amendment, though, is that "the American people are neither sheep nor fools, and hence fully capable of considering the substance of the speech presented to them" (*McConnell v. FEC*, 540 U.S. 93, 258 [2003]). So every time a campaign commercial airs on television, viewers are presumed to be able to judge for themselves the substance of the ad, regardless of the ambiguous disclaimer at the end.

Yet another topic of concern related to compulsory disclosure is timing. As mentioned above, one of the governmental interests underlying disclosure is the deterrence of corruption, but exactly *when* corruption is prevented is a difficult question. FECA's penalty for violation of its record-keeping and reporting provisions was a fine not more than $1,000 or a prison term of not more than one year, or both. When used in the context of the First Amendment, criminal sanctions like these create many problems. For instance, consider donors who were unsure about whether they needed to disclose. They would have to go through the courts and seek a declaratory ruling in order to avoid possible criminal sanctions. A chilling effect like this runs afoul of the First Amendment.

Further problems arise in the time period just before an election. If in the last week of the campaign donors were to violate the disclosure requirements, their wrongdoing would likely not be revealed until after the election was over and the damage was already done. The fear is that candidates may accept undisclosed funds at the tail end of their campaigns. Here, however, more than just criminal sanctions act as a deterrent. The political repercussions of using unlawful, undisclosed money also help ensure that candidates run proper campaigns in accordance with the law (424 U.S. at 56).

Another controversial facet of disclosure requirements concerns the advent of the Internet. The disclosure provisions examined in *Buckley* took place in a context remarkably different than today. When *Buckley* was decided in 1976, the reports that were sent to the FEC were stored on location, available to anyone willing to travel there and have a look. In contrast, today these reports are compiled in a database and uploaded onto the Internet just a few mouse clicks

away from anywhere in the world. As a result, modern technology has enabled the public to make prompt evaluations of political spending. Critics of disclosure requirements raise an important issue, though, and that is the fact that most Americans do not go to the FEC website and use the information it offers to help them choose who to support and what to vote for. But that was not how disclosure was intended to work. What matters is that any individual who does want such information will be able to access it easily. Nonprofit organizations and media outlets, for instance, put great effort into investigating and analyzing the information, looking for anything worth sharing with the general public.

Still, there are a number of alarming concerns raised by the Internet that are less easy to address. With all of this information readily available to the public, individuals can collect and use it however they would like. Nosey neighbors and personal enemies have access to the names, addresses, and occupations of people who have contributed. Justice Thomas has demonstrated how real this danger is. In his separate opinion in *Citizens United v. FEC*, he described how opponents of a state ballot measure were able to compile the disclosed information and use it to inflict property damage and make death threats targeted at those donors who supported the measure (558 U.S. at 480). Horror stories like this reflect the chilling effect that disclosure requirements can have on speech. The hard-won right to privacy is undeniably impacted by compulsory disclosure. This is especially true for groups who may have unpopular views or unfashionable ideas, the exact groups that the First Amendment was designed to protect.

Many tools, from hammers to knives, can be used as weapons when in the wrong hands, but that does not detract from their utility. Similarly, disclosure is a tool that must be used with great care within the realm of the First Amendment. Ultimately, because the Court has held that disclosure laws appear to be "the least restrictive means of curbing the evils of campaign ignorance and corruption" (424 U.S. at 68), and because exemptions can be made for cases involving an uncontroverted showing of threats or reprisals, some of the most common arguments against mandatory disclosure are unavailing (Hasen 2012: 559).

In addition to the negative aspects of disclosure mentioned above, the true costs of mandated disclosure, according to one commentator, are higher than will ever be known (see Samples 2010). This is because the rate at which disclosure leads citizens to decide not to

donate is something that cannot be accurately measured. Furthermore, some critics believe that compulsory disclosure directs public attention toward the speech's source of funding and away from its content. By promoting the notion that identity matters more than ideas, mandatory disclosure "moves us away from the ideal of popular government" (see Samples 2010). Berkeley Professor Bruce Cain believes that these immeasurable costs could be prevented by "adopting a narrower tailoring of disclosure practices" (see Cain 2010). He recommends a regime of "semi-disclosure," which involves the full reporting but only partial disclosure of campaign donor information. Regardless of whether this suggestion would be successful, proposals like this lend optimism to the belief that a proper balance can be struck between mandatory disclosure and the preservation of individual political rights.

Disclosure in the Modern Campaign Finance Landscape

In the wake of *Citizens United* and its progeny, American elections have experienced an influx of outside spending in the form of independent expenditures. Media outlets and campaign finance reformers have focused a lot of attention on "SuperPACs" and the massive amounts of money they have poured into recent elections. The proliferation of SuperPACs, however, does not pose a problem in a system devoid of contribution limits. This is because SuperPACs are legally required to publicly disclose who their donors are, making them suitable within a regime that would wholly rely on mandatory disclosure. If anything, the presence of SuperPACs argues against the continued use of contribution limits. If donors want to exceed the maximum amount levied upon them by a contribution limit, they now enjoy the option of donating to an outside, independent organization that will use the money to further the donors' political causes.

The real threat of independent expenditures in this post-*Citizens United* world comes from organizations that generally do not have to disclose who their donors are (Heerwig and Shaw 2014). Nonprofit organizations registered under § 501(c)(4) of the Internal Revenue Code are allowed to receive unlimited donations from corporations, unions, and individuals and have been spending that money to influence elections. To maintain their 501(c)(4) status, these organizations must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community." Unlike SuperPACs, which are required to disclose their donors, 501(c)(4)

organizations are permitted to carry out their political activities without having to publicly disclose the identity of their donors.

To completely depend on disclosure, public light must be cast on the money that is being spent by these 501(c)(4) groups. This is especially true given that recent spending by 501(c)(4) organizations has been significant, amounting to 4.7 percent of total election spending in 2014.[3] The seemingly obvious solution to this problem is to amend the tax code so that these groups are required to share with the public who their donors are. However, a number of commentators suggest that merely expanding disclosure will not be enough. In their view, the existing disclosure regime is deeply flawed in ways that neither the courts nor reformers have yet acknowledged (Heerwig and Shaw 2014). To give just one example, candidates and political committees are currently not required to use standardized disclosure forms; this obfuscates the information that gets disclosed and makes enforcement of reporting requirements more difficult.

To remedy these existing flaws and create a disclosure regime that offers accessible, comprehensible, and credible information, revisions must be made to the mechanisms by which data on election spending are collected, maintained, and disseminated (Heerwig and Shaw 2014). These changes may require time, as well as some trial and error, but with a determined approach they can ultimately confront and eliminate the controversial problems caused by 501(c)(4) spending.

The More Speech, the Better

When the drafters of the Bill of Rights proposed that "Congress shall make no law . . . abridging the freedom of speech," they recognized how fundamental it was for individuals to be able to speak their views, beliefs, and ideologies free from governmental restraint. Admittedly, not all types of speech enjoy First Amendment protection (e.g., fighting words). Still other types of speech enjoy protection, but to a lesser degree (e.g., commercial speech). Political expression, however, is at the heart of the First Amendment. Self-government depends on the open exchange of ideas, in which citizens can criticize

[3]Author calculation based on figures from www.OpenSecrets.org. 501(c)(4) spending has played an outsized role in a number of competitive races. For example, Congresswoman Joni Ernst (R-IA) was backed by over $17 million of 501(c)(4) spending in support of her 2014 senate campaign.

their leaders and propound unpopular beliefs, all without facing retaliation from the majority. Any laws limiting such speech must be subject to strict constitutional scrutiny.

The premise of democracy requires that "there is no such thing as *too much* speech" (540 U.S. at 259). Therefore, speech must be allowed access to the marketplace of ideas without any barriers to entry. Not everyone agrees, of course. For example, Professor Wayne Batchis posits that a marketplace lacking enforceable rules is no marketplace at all. "Even the most ardent defenders of the free market," he asserts, "acknowledge the need to limit freedom to avoid monopolistic behavior" (Batchis 2007: 30). Yet while his analysis is critical of a system without contribution and expenditure limits, he omits any reference to disclosure requirements. Compelling candidates, committees, and donors to disclose their political activity would better inform the public and prevent secretive spending, thus ensuring that the marketplace of ideas remains both healthy and competitive.

Another argument put forth by Batchis (2007: 30) is that "more spending on speech can often mean less diversity of opinion and a diminished quality of ideas." Restrictions on political money, then, ought to promote political speech by giving more breathing room to hear from a greater diversity of speakers (Levinson 2013: 897). This reasoning sounds dangerously close to the principal of equalization, a suggestion that the Court has invariably refused to accept. As was plainly stated in *Buckley v. Valeo*, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" (424 U.S. at 48–49). That amendment was designed to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (424 U.S. at 49). Just because one speaker has a louder voice than another does not mean that the former must quiet down for the benefit of the latter. Competition, after all, is what makes the marketplace of ideas work; it should not be inhibited. Some may complain that an unequal playing field built on unlimited funds only results in attack ads devoid of substantive content, but "it is not the proper role of those who govern us to judge which campaign speech has 'substance' and 'depth' . . . and to abridge the rest" (540 U.S. at 261). An open and robust debate on public issues benefits everyone, large and small donors alike.

In his new book *Plutocrats United*, Professor Richard L. Hasen argues that, in lieu of justifying campaign finance restrictions in terms of the government's anticorruption interest, the courts should construe these restrictions as a means of promoting and preserving political equality. Citing the "inevitable tension between free economic markets and voter equality," he posits that democracy in America will soon be too far skewed toward the interests of the wealthy (Hasen 2016: 11). The accuracy of his prediction aside, the actions necessary to address Hasen's concerns ought to be taken in the political arena, not in the courtroom. Should citizens feel that their representatives are beholden to big donors and special interests, they can voice their feelings in the ballot box and elect better representatives. It is not the judiciary's duty, however, to ensure that all citizens exercise their free speech rights to the fullest extent possible.

The above arguments notwithstanding, there remains the frequently mentioned fear of "drowning out." The thinking is that with an unlimited amount of money entering the marketplace of ideas, well-funded speech is "capable of drowning out other voices and diminishing the likelihood that less generously financed ideas will have any reasonable chance of winning favor with the majority of voters" (Batchis 2007: 30). Justice Stevens gave voice to this concern in his dissent in *Citizens United*. Worried that the opinions of many will be marginalized by large campaign war chests, he believes that uninhibited money would "decrease the average listener's exposure to relevant viewpoints" and "diminish citizens' willingness and capacity to participate in the democratic process" (558 U.S. at 472). To him, there *is* such a thing as too much speech.

In making his arguments, Justice Stevens contradicts himself in two ways. First, he expresses his concern for the integrity of the electoral process and preserving the public's confidence in it, but at the same time he likens the American public to sheep who are unable to judge for themselves the quality and content of the speech they are listening to. Second, he emphasizes his concern that Americans do not have the time of day to sit down and think through all of the speech that is being thrown at them. At the same time, though, he feels the public would be better off if it could hear from a diverse group of speakers with varied perspectives. An ideal world for

Stevens, it seems, is one where everyone's voice can be heard, but in such a world there is a far less chance that Americans will be able to thoroughly contemplate everyone else's speech. Given these two contradictions, the reasoning of Justice Stevens proves rather weak and unconvincing.

Finally, regardless of whether one equates money with speech, there is the risk that more money being given and spent for campaign purposes will only lead to more corruption. "One would be blind to history to deny that unlimited money tempts people to spend it on whatever money can buy to influence an election" (424 U.S. at 265). What makes disclosure requirements so valuable, however, is their ability to root out corruption. "Money, like water, will always find an outlet" (540 U.S at 224). Instead of trying to plug all of the holes in contribution and expenditure limits, legislators should focus more on keeping track of where the money is coming from and where it is headed to. The American public would be much better off participating in a system with this information available than in a system rife with so-called "dark money."

Conclusion

Ending direct contribution limits and focusing on disclosure are concomitant ideas. A system without donation caps causes a number of potential problems, but compulsory disclosure readily answers them. Under this proposed scheme, Dora the donor would be able to give Carol the candidate her $25,000 so long as they properly disclose this transaction. That way, Dora can fully exercise her First Amendment right to political expression and the public can be fully informed about her political donation.

Ever since its landmark decision in *Buckley v. Valeo*, the Supreme Court's campaign finance jurisprudence has been in a state of flux. Several cases have reflected the Court's approval of government actions seeking to prevent corruption (e.g., *Austin* and *McConnell*). More recent cases, on the other hand, have demonstrated the Court's commitment to the First Amendment's protection of political expression (e.g., *Citizens United* and *McCutcheon*). If this current trend continues, direct contribution limits may soon be subject to deregulation. Taking the above comments into consideration, this would be a wise move for the Court to make.

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