CAMPAIGN FINANCE LIMITATIONS AS PROTECTIONS OF FREE SPEECH

by

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Honors Thesis

Appalachian State University

Submitted to the Department of Communication

and The Honors College

in partial fulfillment of the requirements of the degree of

Bachelor of Science

May, 2016

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Abstract

This paper analyzes the evolution of jurisprudence in cases regulating campaign finance in order to propose a lasting solution to increasingly deregulated campaign finance laws. The analysis considers legislation and rulings from the first federal campaign finance legislation passed in the U.S. in 1876 to the most recent holding in *McCutcheon, et al. v. Federal Election Comission* (2014). The Court's rulings remained somewhat inconsistent until the retirement of Justice Sandra Day O'Connor in 2006. After she was replaced by Justice Samuel Alito, the Court struck down most all campaign finance limitations. The recent decisions in *Citizens United v. Federal Election Commission* (2010), *SpeechNow.Org v. Federal Election Commission* (2010), and *McCutcheon* have focused so extensively on the conceptual right to speech that they have suppressed, not protected, it. The lack of limitations is an issue because political influence is shifting from the general public to wealthy individuals and groups. Legislation has proven ineffective, so I argue that a lasting solution will come from the Judicial rather than the Legislative Branch. The recent passing of Justice Antonin Scalia leaves a balanced bench and a chance for reform. I conclude that compelling interests considered in such cases are far too limited and that the Court must define a new compelling interest, political equality, if it is to establish lasting campaign finance reform.

Keywords: Bipartisan Campaign Reform Act, BCRA, exacting scrutiny, Federal Elections Campaign Act, FECA, hard money, soft money, strict scrutiny

Introduction

The 2016 primary elections, thus far, have been one of the most expensive in American history with regard to campaign contributions. By the end of March, candidates in the 2016 primary elections received over 73 percent more in campaign contributions than candidates had by the same point in the 2012 election (Federal Election Commission, 2012; 2016). This seems to be the result of recent landmark Supreme Court rulings regarding U.S. regulations on campaign finance limitations. In a society where corporations and unions can now spend unlimited sums of money on independent campaign contributions and expenditures, many worry that the voices of individual voters will be muted. Many fear for the fate of American democracy (Hasen, 2016).

Attempts by Congress to regulate campaign finance have failed in that they were either too ambiguous or too overreaching to be Constitutional such as the Federal Elections Campaign Act of 1971 or the Bipartisan Campaign Reform Act of 2002. Legislation regarding campaign finance has either been upheld or struck down in narrow decisions by the Supreme Court. The Court's holdings have depended on whether the bench leaned left or right at the time of the decision. The recent death of conservative Justice Antonin Scalia adds increased importance to the current state of campaign finance regulation, because his passing leaves a balanced bench in terms of findings on prior finance cases. The next justice to be appointed to the Supreme Court will likely face an opportunity to reverse or affirm recent decisions regarding campaign finance regulations. In order to establish a long-term solution to finance regulations, the Court must define political equality as a compelling interest for limiting protected speech.

Case and Legislation Analysis

The first Federal campaign finance legislation was passed in 1867. This law "prohibited Federal officers from requesting contributions from Navy Yard workers." Congress enacted a series of laws over the next 100 years intended to establish broader regulation of campaign finance. Together these laws outlined several primary objectives.

First, the Government sought to prevent wealthy individuals and groups from exercising a disproportionate influence on federal elections by limiting contributions. Second, the laws prohibited certain sources of funds for campaign purposes. In addition, the government expressed a desire to regulate campaign spending. Finally, the laws attempted to deter corruption by requiring campaign finance disclosures (Federal Election Commission, n.d.).

It was not until the Tillman Act of 1907 was enacted that the Government prohibited corporations from contributing to Federal campaigns. The Taft-Hartley Act of 1947 extended this limit, preventing both corporations and unions from contributing to federal campaigns and from making independent expenditures (Federal Election Commission, n.d.). All of the issues with which these early laws were concerned continued to influence the landmark cases that define current campaign finance regulations.

The Watergate scandal in the early 1970's brought national attention to the integrity of federal election campaigns (Epstein & Walker, 2016; Hasen, 2016). Congress decided to amend the Federal Election Campaign Act of 1971 (FECA) in order to reform presidential elections, establishing the first major campaign finance reform in U.S. history (Hasen, 2014). The amended law limited the amount of money individuals could contribute to candidates, parties, and political action committees, both to individual campaigns and in the aggregate. It also limited independent campaign expenditures. The 1974 amendments, however, did not stand long.

In *Buckley v. Valeo* (1976) the Supreme Court upheld some of the provisions of the 1974 amendments and struck down others. Specifically, the Court upheld limitations on campaign contributions and struck down those on independent expenditures. This was the result of the Court's application of two different levels of scrutiny to campaign contributions and independent expenditures.

In current jurisprudence, the Court uses two main forms of scrutiny tests, the "strict scrutiny test" and the "rational basis test". Strict scrutiny is applied when a law involves a "fundamental right" like free speech. It renders a law unconstitutional unless the law is "narrowly tailored" to fulfill a "compelling" government interest. Under the rational basis test, laws are upheld so long as they are "rationally related" to a "legitimate" government interest (Hasen, 2016). Strict scrutiny tends to favor the challengers of a law while rational basis tends to favor the Government.

The Court, however, did not apply the rational basis test in *Buckley*. The Court explained that expenditure limits "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached" (p. 19). For this reason, the Court applied "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression" (*Buckley v. Valeo*, 1976, p. 44). This "exacting scrutiny" is equivalent to strict scrutiny.

Conversely, the Court found that contribution limits do not hinder political speech to the same extent as independent expenditure limits because contribution limits "permit the symbolic expression of support evidenced by a contribution but do not in any way infringe the contributor's freedom to discuss candidates and issues." The Court applied a less exacting scrutiny to limitations on contributions, though it noted "contribution and expenditure limits operate in an area of the most fundamental First Amendment activities." This was odd because, prior to *Buckley*, any the Court applied strict scrutiny to all issues dealing with First Amendment rights. This lesser "but still rigorous" test means that a "significant interference" may be sustained if the government can demonstrate a "sufficiently important interest" and "means closely drawn to avoid abridgement of associational freedoms" (*Buckley v. Valeo*, 1976, p. 16, 25). The lesser exacting scrutiny that the Court applied to contributions serves as a more moderate form of scrutiny that falls between the strict scrutiny and rational basis tests and is rarely used outside of campaign finance cases (Hasen, 2016). The Court considered the act of contribution more important than the amount of contribution.

The Court considered only one measure as justification in regulating campaign finance in the case of *Buckley* - corruption or the appearance of corruption. The Court considered large contributions as creating an environment for corruption to the extent that they are provided to secure a "political *quid pro quo* from current or potential officeholders." It contended however, that such arrangements are difficult if contributions are truly independent and do not allow direct communication between the spender and politician. The Court found no evidence that such independent spending could corrupt (*Buckley v. Valeo*, 1976, p. 45). The Court provided a limited analysis as to how contributions could further lead to corruption.

In considering the ways in which corruption could extend beyond *quid pro quo* agreements, the Court only noted that concern went beyond bribery and could not be prevented solely by the disclosure of contributors' identities. For this reason, the Court acknowledged that Congress was entitled to impose contribution limits in order to prevent the "reality or appearance of corruption" (*Buckley v. Valeo,* 1976, p. 28). Though the Court linked the reality and appearance of corruption in this statement, it articulated another way in which the appearance of corruption must be considered.

The Court associated the appearance of corruption with the public's perception of government: "Of almost equal concern as the danger of actual corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions… Congress could legitimately conclude that the avoidance of the appearance of improper influence is… critical… if confidence in the system of representative Government is not to be eroded to a disastrous extent" (*Buckley v. Valeo*, 1976, p. 27). Here the Court asserts that the functionality of representative government hinges on the public's perception of its legitimacy.

The Court ultimately found that preventing corruption or the appearance of corruption served as a sufficient interest to limit campaign contributions but not campaign expenditures. However, after the Court found that the prevention of corruption did not provide a compelling government interest to limit independent expenditures, it considered the argument that spending limits were justified by "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" (*Buckley v. Valeo*, 1976, p. 48). This interest best aligns with the political equality interest advocated later in this paper.

The Court rejected the "relative ability" argument, explaining, "The concept that government may restrict the speech of some elements of our society in order to enhance the relative ability of others is wholly foreign to the First Amendment which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (*Buckley v. Valeo*, 1976, p. 49). This conclusion, the limited *quid pro quo* consideration of corruption, and the differing levels of scrutiny later proved troublesome for the court.

The years following FECA and *Buckley* were defined by circumvention of contribution limitations and the development of two different forms of contributions. Political strategists discovered a loophole in FECA that distinguished contributions to a candidate's political campaign from contributions to political party organizations. This created two different types of contributions, dubbed "hard money" and "soft money" (Epstein & Walker, 2016). While hard money still fell under FECA regulations, soft money was more pliable.

Hard money is defined as any money given directly to a campaign. Soft money, on the other hand, defines general contributions to a political party. Political parties used the unregulated soft money to fund advertisements that supported the election or defeat of specific candidates without using specific language. Similarly, the soft money loophole allowed for increased use of "issue campaigns". These often promoted or criticized policy issues associated with certain candidates. Like soft money ads, these campaigns fell outside FECA regulation so long as they did not use certain "trigger words" that expressly supported or condemned a candidate, because they did not use terms like "vote for" or "vote against" any specific candidate (Epstein & Walker, 2016; Hasen, 2016). Soft money essentially undermined the legal reach of FECA as it became more prominent throughout the 1990s.

Concerned with the limited ability of FECA to regulate soft money, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA). Title I of BCRA regulated soft money by barring political parties from raising or spending soft money, prevented federal candidates and officeholders from receiving soft money, and prohibited local party organizations from using soft money to promote or attack federal candidates (Bipartisan Campaign Reform Act, 2002). The legislation attempted to equate all money contributed to candidates, national political parties, and local political organizations with hard money regulated by federal election laws.

Title 2 prohibited labor unions and corporations from using their general funds to engage in “electioneering communication” or political advertising that refers to a specific candidate within sixty days of a general election or thirty days of a primary election. The advertisement must also have targeted the relevant constituency during that time period to be prohibited. Intended to prevent further issue advocacy, this section required thorough disclosure and recording of political advertisements. Media corporations and non-profit organizations that took no money from for-profit organizations were exempt from these restrictions (Bipartisan Campaign Reform Act, 2002).

Titles 1 and 2 drew the most criticism, but another portion of the law raised the limits on hard-money contributions in order to compensate for the loss of soft money contributions. It even included language allowing limits to be adjusted periodically for inflation. The law’s limits, however, were broad in that they regulated contributions to individual candidates, national political parties, and political action committees. In addition, the law imposed a limit on aggregate contributions (Bipartisan Campaign Reform Act, 2002). The law's provisions attempting to compensate for soft money losses did not prevent uproar from various organizations.

The BCRA survived backlash from numerous unrelated organizations, but only by a narrow 5-4 decision in *McConnell v. Federal Election Commission* (2003). Groups that rarely side together on public policy issues joined to challenge BCRA. These included the National Rifle Association, the National Right to Life Committee, the American Civil Liberties Union, the California Democratic Party, the Republican National Committee, and others (Epstein & Walker, 2016). The challengers stood behind claims that BCRA violated the First Amendment in its prohibitions on soft money and issue advertisements.

Senator Mitch McConnell, R-Ky., filed a lawsuit consolidating the challenges to the law. The Court upheld BCRA against arguments that the Congress had violated the First Amendment. The five more-liberal justices found that Congress had the authority to protect the integrity of the electoral process by imposing the restrictions in BCRA. Justice John Paul Stevens and Justice Sandra Day O'Connor provided the opinion of the Court in upholding Title I and II of BCRA, including restrictions on corporate independent expenditure. They cited *Austin v. Michigan Chamber of Commerce* (1990), noting, "We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas'" (*McConnell v. Federal Election Commission*, 2003, p. 99). Though Justice O'Connor dissented in *Austin*, she joined the opinion in *McConnell*. The case served as one of the final campaign finance cases in which she participated before her retirement from the bench, and it marks a major turning point in the evolution of campaign finance regulation.

Justice Samuel Alito replaced O'Connor in 2006. Only five months after his appointment to the bench, the Court considered the case of *Randall v. Sorrell* (2006). Justice Alito joined the more conservative justices in striking down a Vermont law that limited individual contributions to candidates for statewide office to $400 per two-year election cycle ($200 for some local offices) and restricted the amount of money candidates could spend. The Court reasoned that the Constitution is violated when contribution and spending limits are so severe they detract from free speech interests. This logic would become definitive of major cases in the following years like *Citizens United* and *McCutcheon*.

Two years later, Alito joined the majority in striking down the "millionaire's amendment" to the BCRA in *Davis v. Federal Election Commission* (2008). This provision applied to wealthy candidates who funded their own campaigns. It allowed supporters of the opponent of the self-financing candidate to contribute up to three times the normal contribution limits if the self-financing candidate used personal funds in excess of a threshold determined by a statistical formula, though the supporters of the self-financing candidate were limited by regular contribution ceilings. The amendment intended to prevent any advantage on the part of wealthy candidates, but the justices found that it violated the First Amendment rights of these candidates. These two smaller cases demonstrated that Alito differed from O'Connor in his views on campaign finance regulations. He soon ruled in one of the most prominent finance cases in U.S. judicial history.

Citizens United is a nonprofit corporation that receives some funding from for-profit organizations. In January 2008, it released *Hillary: The Movie*, a feature-length film which portrayed then-senator and Democratic presidential candidate Hillary Clinton in a negative light and as unfit for the presidency. Hoping to air the film on cable's video-on-demand service, Citizens United produced advertisements for cable and broadcast television that promoted the film.

Citizens United worried about civil and criminal penalties for violating the campaign finance laws established in BCRA since it accepted some money from for-profit corporations and intended to use general treasury funds to finance advertisements for *Hillary*. The organization filed a suit against the Federal Election Commission claiming that section 203 of BCRA is unconstitutional as applied to the film and that sections 201 and 311 are unconstitutional as applied to the film and its advertisements. Section 203 holds that corporations and unions cannot independently finance electioneering communications with general treasury funds, while sections 201 and 311 impose disclaimer, disclosure, and reporting requirements (Epstein & Walker, 2016; Hasen, 2016). After a three-judge district court ruled in favor of the FEC, Citizens United appealed its case to the Supreme Court.

Citizens United predicated its argument on several main points: government may not suppress political speech unless it is necessary to prevent corruption or the appearance thereof; *Hillary* is not express advocacy and the government has no compelling interest to prohibit video-on-demand distribution of the film; and *Austin v. Michigan State Chamber of Commerce* (1990) should be overruled because it defies the well-established principle that First Amendment protections do not depend on the identity of the speaker (Epstein & Walker, 2016).

The FEC reasoned: the Court had approved Congress' ability to prohibit corporations from using general treasury funds to finance express advocacy or its equivalent in *Austin* and since *Hillary* considers the character and candidacy of Clinton, falls under the functional equivalent of express advocacy and there is no exception for feature-length films or video-on-demand distribution (Epstein & Walker, 2016). The Court, now composed of a conservative majority ruled in favor of Citizens United, overruling prior opinions and using the case as a means to overrule both *Austin* and *McConnell*.

The case was settled by another narrow 5-4 decision. Justice Anthony Kennedy delivered the opinion of the court in which Chief Justice John Roberts and Justice Antonin Scalia concurred. Justice Stevens and Justice Clarence Thomas concurred in part and dissented in part. Justice Kennedy's opinion seemed to agree with nearly every claim of Citizens United's argument.

In considering the role of disclaimers and disclosure regulations, Justice Kennedy explained, "Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." He listed the ability of Government to impose disclosure requirements but agreed it did not apply in this case.

He considered legislation regarding the express advocacy questioned in the case but again held that it did not apply. He wrote, "Section 441b [of the U.S. code] makes it a felony for all corporations-including nonprofit advocacy corporations-either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications…" Instead of considering this a precedent by which to evaluate *Hillary*, he interpreted it as a "ban on speech". He cited *Buckley*'s language in the claim that by 'restriction on the amount of money a person or group can spend on political communication during a campaign,' that statute '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' (*Citizens United v. Federal Election Commission*, 2010, pp. 20, 22). Justice Kennedy demonstrated an interpretation of 441b and *Buckley* that differed significantly from past opinions of the Court.

With regards to *Austin*'s ruling on corporate identity*,* Justice Kennedy cited *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007) in describing the *Citizens United* decision as a significant departure from First Amendment principles. He cited *Montejo v. Louisiana* (2009) in claiming that *stare decisis* requires the continued acceptance of *Austin*, because one of the principles in determining whether or not to apply *stare decisis* is that the prior decision be well-reasoned. He found that *Austin* is not well-reasoned because the government defends it with reference to corruption and shareholder interests, not the antidistortion interests it specifically promotes. He even stepped beyond Citizens United's argument against *Austin* in claiming that the Court must also reconsider *McConnell* on the grounds that its decision rested upon that of *Austin* (*Citizens United v. Federal Election Commission*, (2010). The Court overruled both. In this final claim, Justice Kennedy exposes himself to serious critique by the dissenting justices.

Justice Kennedy also agreed thoroughly with the argument that First Amendment protections do not rely on the identity of the speaker. He cited eleven prior cases in which the Court upheld the First Amendment rights of corporations. He also cited *First National Bank of Boston v. Belotti* (1978), writing, "Under the rationale of these precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation'." He elaborated, "…Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice… The First Amendment protects speech and speaker, and the ideas that flow from each" (*Citizens United v. Federal Election Commission*, 2010, pp. 24, 26). This conceptual view of speech, however, does not consider that corporate spending might stifle the general population's ability to speak to more of an extent than limitations on spending might stifle the speech of large groups.

Justice Stevens was extremely critical in his dissent in *Citizens United*. He explained, "The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast Hillary at any time other than the 30 days before the last primary election." He continued noting that the only dispute between the parties was whether or not Citizens United had the right finance broadcasts in the 30-day period before the primary election with general treasury funds (*Citizens United v. Federal Election Commission*, 2010, p. 1). The ruling in the case far exceeded the parameters of Citizens United's argument.

Stevens saw the Court's decision as an extreme violation of prior restraint and *stare decisis*, given that the findings far exceeded the true dispute in the case. He criticized the Court majority for using the case as a medium for overturning to *Austin* and *McConnell*, noting that "nothing had changed except the composition of the Court." He continued, "Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by for-profit corporations and unions to decide this case…" (*Citizens United v. Federal Election Commission*, 2010, p. 1, 23). The Court's decision may or may not have overstepped its bounds in relation to judicial restraint. One certainty is that the decision fostered change.

SpeechNow.Org v. Federal Election Commission (2010) was a case that came on the heels of *Citizens United*. Its finding removed "federal contribution and spending limitations on organizations that use their funds only for political expenditures independent of candidates or political parties." Together with the decision in *Citizens United*, *SpeechNow.Org* created the "Super PAC," a new form of Political Action Committee that may receive and spend unlimited amounts of money on electioneering communications so long as it remains independent of any candidate and does not coordinate with any individual candidate's campaign (Epstein & Walker, 2016). The case allowed these organizations to spend money outside the campaign finance limitations imposed on candidates and political parties, allowing for even more money to be spent on political campaigns.

The most recent major case regulating campaign finance came in the form of *McCutcheon, et al. v. Federal Election Commission* (2014). FECA as amended by the BCRA limits campaign contributions in two ways. First, it places limitations on the amount an individual can donate to any particular candidate or organizations. Second, it imposes an aggregate limit on campaign donations to all individuals or organizations in a two-year election cycle. The base limits for the 2013-2014 election cycle limited individual donations to $5,200 to any one candidate, $2,600 for the primary election and $2,600 for the general election. It limited donations to a national party committee to $32,400 per year, $10,000 to a state or local party committee, and $5,000 per year to a PAC. The aggregate limits allowed a total of $48,600 to federal candidates and $74,600 to other political committees. Of the $74,600 only $48,600 could be contributed to state or local party committees and PACs, as opposed to national party committees.

Shaun McCutcheon, chief executive officer of an Alabama engineering company, contributed $33,088 to sixteen different candidates, adhering to the base limitations that an individual could donate to individual candidates. McCutcheon wanted to contribute to twelve other candidates, adhering again to the base limitations for individual candidate contributions, but he was prevented from doing so by the aggregate contribution limit. He claimed that aggregate limitations would also stifle his planned contributions for the 2013-2014 election cycle (Epstein & Walker, 2016). McCutcheon joined with the Republican National Committee and sued the Federal Elections Commission for violating the First Amendment by enforcing aggregate limitations.

When a three-judge circuit court upheld aggregate contribution limits on the grounds of preventing corruption or the appearance of corruption, McCutcheon appealed his case to the Supreme Court. His argument was based on several related points: aggregate limits are subject to rigorous scrutiny because they substantially burden First Amendment rights; there is no factual support showing that aggregate limits prevent corruption or the appearance thereof; and if the base contributions are deemed noncorrupting, then aggregate limits only restrict the number of candidates, parties, and organizations an individual may support.

The FEC limited the reasoning of its argument to precedent. The Commission argued only that it is inconsistent with *Buckley v. Valeo* (1976) in applying strict scrutiny to contribution limits and that the Court should consider aggregate limits as constitutionally valid measures to prevent corruption or the appearance of corruption (Epstein & Walker, 2016). The differing levels of scrutiny and narrow definition of corruption applied in *Buckley* worked against the FEC.

Chief Justice Roberts announced the judgement of the Court and delivered an opinion in which Justices Scalia, Kennedy, and Alito joined. He cited *Citizens United* in his explanation, "'Ingratiation and access… are not corruption.' They embody a central feature of democracy-that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsible to those concerns" (*McCutcheon v. Federal Election Commission*, 2014, p. 1). Instead, he warned that regulations must target the *quid pro quo* corruption defined previously by the Court.

The Court ultimately disagreed with the limitation finding in *Buckley*. Roberts explained that the *Buckley* opinion devoted only three sentences to analyzing the aggregate contribution limit and even noted that it "ha[d] not been separately addressed at length by the parties." The opinion noted two ways in which the First Amendment "safeguards an individual's right to public debate" – political expression and political association. Monetary contribution to a candidate fulfills both (*McCutcheon v. Federal Election Commission*, 2014, p. 11).

Buckley acknowledged that aggregate limits diminish the right to political association, holding that "the overall… ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support", but the Court disagreed with *Buckley*'s finding that such restrictions served as a "modest restraint" in that a donor must limit the number of candidates or policy issues he supports. Requiring one individual to contribute smaller donations in order to support more candidates "is to impose a special burden on broader participation in the democratic process." This defies the "robust exercise" of First Amendment rights protected in *Davis v. Federal Election Commission* (2008). After acknowledging issues within the FEC's argument, the majority considered the issues of the dissent's argument (*McCutcheon v. Federal Election Commission*, 2014, p. 17).

The opinion of the court listed three "compelling" reasons not to define the boundaries of the First Amendment by the dissent's claim of "the public's interest" in "collective speech". First, collective speech in the form of law is subject to the will of the majority. This is foreign to the First Amendment's protection of individuals against laws that restrict free speech. Second, the degree to which free speech is protected is not subject to legislative or judicial determination of whether or not it is useful to the democratic process. *United States v. Stevens* (2010) found that the First Amendment does not consider "ad hoc balancing of relative social costs and benefits." Finally, First Amendment analysis already considers "collective interest" as justification for restricting free speech. It falls under the "public interest" or "compelling government interest" considered in scrutiny tests.

The Court agreed with McCutcheon's argument that if limitations on the amount an individual can contribute to individual candidates or parties are sufficient to prevent corruption, then the government must prove that aggregate limitations prevent circumvention of those limitations. If it cannot, aggregate limitations serve no purpose but to limit the number of candidates or parties an individual can support. The Court found that there is no clear evidence that aggregate limits prevent such circumvention and so serve no compelling interest in limiting free speech.

In his concurrence with the Opinion of the Court, Justice Thomas explained the issue with the ruling in *Buckley*, writing, "…Contributions and expenditures are simply 'two sides of the same First Amendment coin,' and our efforts to distinguish the two have produced mere 'word games' rather than any cognizable principle of constitutional law. For that reason, I would overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny, which they would surely fail… I concur only in the judgment" (*McCutcheon v. Federal Election Commission*, 2014, p. 5).

Justice Stephen Breyer presented one of the best-articulated fears of continued deregulation of campaign finance in his dissent of *McCutcheon v. Federal Election Commission* (2014). He wrote, "[Corruption] derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point." Conservative justices' First Amendment rationale for deregulating campaign finance may actually diminish the general population's ability to practice free speech.

Discussion

Unregulated campaign finance is a detriment to the public. One recent study found that public policy across a range of issues is skewed toward the interests of the wealthy and that this trend will only accelerate with the latest developments in campaign finance regulation (Martin & Page, 2014). This is similar to Justice Breyer's dissent in *McCutcheon*, "…Where enough money calls the tune, the general public will not be heard." If democracy is to prevail, then campaign finance reform is necessary.

Some individuals have proposed that a constitutional amendment would provide the best means for reforming campaign finance. Justice Stevens, who wrote the dissent in *Citizens United*, retired soon after the Court's decision. In 2014, he published a book proposing six amendments to the Constitution. The third of the six amendments Stevens proposed provides, "Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns" (Stevens, 2014, p. 3). He proposes this amendment as an option for reversing the *Citizens United* decision, claiming that the Court's decision may allow entities not qualified to vote, whether they be corporations or non-residents, greater influence over elections than registered voters.

I share the opinion of political theorist Richard Hasen (2016, p. 11) that, even if it were to pass, "A constitutional amendment to overturn *Citizens United* is the most prominent wrong way to fix the problem…" and that "Such an amendment would likely be too damaging to robust political speech or too full of holes to be effective." Moreover, it is unlikely that any such amendment will be passed by elected officials, because members on both sides of the aisle benefit from unregulated campaign finance.

Republicans have united to push for completely unregulated campaign finance. John McCain no longer seeks bipartisan reform (Hudson, 2012). Mitch McConnell no longer fights for identity disclosure (McConnell's Hypocrisy, 2010). Ted Cruz accuses Democrats of seeking power to stifle free speech (Press Office of Senator Ted Cruz, 2014). It is unlikely that Republicans will sponsor reform.

The issue of sponsoring reform, however, does not apply only to conservatives. Democrats tend to benefit from unregulated campaign finance in two ways – securing votes by criticizing the conservative agenda of complete deregulation and receiving money through the same means as those they criticize. President Obama criticized the Supreme Court for its deregulation of campaign finance, but he reneged on his promise to fix the issue of public money in the general election. He even became the first president to turn his campaign committee into a "social welfare" group that can accept unlimited, undisclosed donations to promote his agenda (Hasen, 2014). The Democratic Party has also proven very successful in protecting the interests of Wall Street (Rivlin, 2013). Even if Republicans or Democrats chose to support an amendment regulating campaign reform, it would likely fail.

Forty-three Democratic senators co-sponsored a proposed constitutional amendment to "overturn" *Citizens United* in 2014. Democrats dismissed the questions of free speech raised by the amendment without providing a serious response (Senate Democrats, 2014). This effort lends further credence to the notion that members of Congress are likely to be unsuccessful in any attempt to reform campaign finance through an amendment.

History also defies the idea that legislation will secure lasting campaign reform. FECA and BCRA were considered the two most prominent attempts at campaign finance reform in U.S. history (Hasen, 2016). Each failed for different reasons. FECA failed to regulate campaign finance because a loophole distinguishing contributions to candidates and contributions to political parties allowed the development of soft money. Parties found a way to fund ads that supported or critiqued candidates without using specific language regulated under FECA (Hasen, 2016; Epstein & Walker 2016). BCRA failed to regulate campaign finance because it was too overreaching, and angered groups on both ends of the political spectrum. Though it was initially upheld in *McConnell*, it was later overturned in *Citizens United* and *McCutcheon* after a majority shift on the Supreme Court bench.

It stands to reason that, perhaps, the best way to reform campaign finance is within the only branch of government that fosters appointment rather than election. The Court decided to strike down the parts of BCRA, and it is likely that it will be asked to rule on campaign finance laws again.

Justice Antonin Scalia practiced the principle of "textualism", a method of considering only the literal text of a law rather than the intention of the writers or the context surrounding the law's origins. In speaking of the opposite principle of "legislative intent" he explained, "What I think is needed, however, is not rationalization of this process but abandonment of it. It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is" (Scalia, 1997, p. 97). Scalia's preference for this highly literal translation of law typically aligned him with the conservative faction of the Court in most cases.

In *Citizens United*, he provided a concurring opinion, explaining, "The First Amendment is written in terms of 'speech,' not speakers." He noted that in the absence of the inclusion of speakers, the Court was left only to consider whether or not the speech being considered is speech protected by the First Amendment. In applying this rationale, he agreed with the finding that government has no power to "impede" corporate speech, adding, "We should celebrate rather than condemn the addition of this speech to the public debate" (*Citizens United v. Federal Election* Commission, 2010, p. 9). Scalia's passing leaves an empty seat on a Supreme Court bench now balanced in terms of liberal and conservative justices. This provides the opportunity for a situation similar to that of Sandra Day O'Connor's retirement from the bench. Finance reform may come with the next appointment of a Supreme Court justice.

Appointment of a more liberal justice alone may not provide a lasting fix to campaign finance restrictions. That action might be consistent with the criticism Justice Stevens outlined in his *Citizens United* dissent. He cited *Vasquez v. Hillery* (1986) in his criticism of the conservative justices, noting, "Today's ruling thus strikes at the vitals of stare decisis, 'the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion' that 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals'" (*Citizens United v. Federal Election Commission*, 2010, p. 23). Lasting reform will require that the Court define a compelling interest which can be applied as consistently as the prevention of corruption but proves much more effective at regulating campaign finance.

The issue of whether or not the Court is justified in regulating campaign finance and, therefore, free speech, seems to rest, in part, on the reasoning it established and reaffirmed through precedent. More often than not, the Court only considers the prevention of corruption or the prevention of the appearance of corruption as justifiable means for limiting protected speech. In the major cases of *Buckley v. Valeo* (1976), *Citizens United v. Federal Election Commission* (2010), and *McCutcheon v. Federal Election Commission* (2014) the Court found that only prevention of corruption or the appearance of corruption satisfied the strict scrutiny tests applied in cases involving political speech.

The prevention of corruption or the appearance of corruption is not a substantial enough measure to justify campaign finance reform. Even in its current use, corruption is limited to the *quid pro quo* definition outlined by the Court. The majority in *Citizens United v. Federal Election Commission* (2010) made it clear that “Ingratiation and access… are not corruption.” The Opinion of the Court in *McCutcheon v. Federal Election Commission* (2014) held, “Any regulation must instead target what we have called ‘quid pro quo’ corruption or its appearance. That Latin phrase captures the notion of an official act for money” (*McCutcheon v. Federal Election Commission*, 2014, p. 2,3). This is almost impossible to prove, and it explains the consistent deregulation of campaign finance by the Court. Hasen (2016) explains the insufficiency of the *quid pro quo* designation. It requires that a politician be found to have provided political favors directly to an individual or organization that funded the politician’s campaign.

Corruption has not always been the only justification for limiting political speech. The idea was spawned by the finding in *Buckley v. Valeo* (1976). Even then, the Court considered another possibility. After ruling that the prevention of corruption was insufficient to limit independent expenditures, the Court considered “the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcomes of elections.” The Court, however, denied the argument on the grounds that “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (p. 48). This notion causes as much difficulty now as it did in the years preceding *Buckley*.

In the 109 years between the first federal campaign finance legislation to the *Buckley* decision, the government implemented a series of laws that attempted to address several concerns. Only one of those concerns considers the prevention of corruption. It is covered under the language of "deter abuse". Another concern on the list is "…to ensure that wealthy individuals and special interest groups did not have a disproportionate influence on Federal elections" (Federal Election Commission, n.d.). The Court might do well to reconsider a similar rationale as a compelling interest to limit political speech.

Establishing a new compelling interest for the regulation of campaign finance is not impossible. In *Austin v. Michigan Chamber of Commerce* (1990), the Court was able to bypass *Buckley* and *Belotti* by considering a new government interest: antidistortion. The Court found a compelling interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" (*Citizens United v. Federal Election Commission*, 2010, p. 31). This rationale was struck down in the Court's opinion in *Citizen's United* because it could also apply to media outlets. In order to avoid the same pitfall faced by that of the antidistortion interest in *Austin*, the Court will need to introduce well-reasoned, specific language that outlines the need for finance restrictions and adheres to the "compelling interest" component of strict scrutiny.

Conclusions

Increasingly deregulated campaign finance laws are a detriment to the general public, analysis of the constants in the evolution of the jurisprudence surrounding campaign finance regulation offers insights to a possible solution for lasting reform.

Reform has not come from elected officials since elected officials of both parties benefit from unregulated campaign finance. Past legislative attempts to regulate campaign finance have been unsuccessful in that they were either too full of loopholes or too overreaching to be effective.

Most regulations on campaign finance were settled by the Court in by narrow decisions that depended on the composition of the Court at the time of the decision. The Court evaluated most cases by considering whether or not corruption or the prevention of corruption served a compelling government interest to limit protected speech.

A new, more liberal Supreme Court will need to provide an unambiguous definition of political equality as a compelling interest in regulating campaign finance in order to establish lasting reform.

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