University of Michigan Journal of Law Reform

Volume 41

2008

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MONEY AS PROPERTY: THE EFFECTS OF DOCTRINAL MISALLOCATION ON CAMPAIGN FINANCE REFORM

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By applying First Amendment jurisprudence to campaign finance measures, this Note argues that the Supreme Court has misallocated campaign finance within its doctrinal scheme. This doctrinal misallocation has stymied the ability of legislatures to enact effective reforms to reduce the role of money in politics. This Note argues that money in the political process more closely resembles property than speech and should therefore be analyzed under a less stringent property review. This Note concludes by proposing a standard of review developed from the Court's property jurisprudence.

INTRODUCTION

"Money is property; it is not speech"[1]

Justice John Paul Stevens's simple statement in his concurring opinion in *Nixon v. Shrink Missouri* presented a bold and daring proposition.[2] Since its seminal decision in *Buckley v. Valeo*,[3] in which the Supreme Court struck down political campaign expenditure limits but allowed contribution limits, the Court has consistently applied a First Amendment analysis to campaign finance measures. The Court's doctrine is often summed up in a familiar catchphrase: "money equals speech."[4] Recently, the Court revitalized its *Buckley* rationale in *Randall v. Sorrell*.[5] Justice Stevens, however, argues that this analysis is wrong. For Justice Stevens, the use of money in the political process does not properly fit within First Amendment doctrine. Political contributions and expenditures

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The opinions and positions stated in this Note are those of the author alone and are not endorsed by the UAW.

1. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

2. Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1288 n.215 (2000) (describing Stevens concurrence as "advancing a daring argument").

3. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

4. E. JOSHUA ROSENKRANZ, *Buckley* STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM 32 (1998).

5. Randall v. Sorrell, 126 S. Ct. 2479 (2006) (invalidating Vermont's strict contribution and expenditure limits as too great a burden on First Amendment rights).

better resemble property than money, and Justice Stevens proposes that campaign finance regulations should be governed by the Court's property jurisprudence.[6] In effect, Justice Stevens argues that campaign finance issues have been doctrinally misallocated.

This Note argues that, by applying First Amendment doctrine to campaign finance measures, the Court has inserted itself into the core of campaign finance regulations, as opposed to merely setting the outer limits of regulation.[7] The Court's doctrinal misallocation of campaign finance issues is similar to its now-defunct economic substantive due process jurisprudence. The first Part of this Note will describe the concept of doctrinal misallocation, using economic due process as an example. The second Part of this Note will argue that the Court has incorrectly applied First Amendment doctrine to campaign finance cases, and that a property analysis is more appropriate. This Note will show that a shift in doctrinal application would reduce the level of scrutiny applied to campaign finance measures, allowing legislatures to more freely regulate money in politics. Finally, this Note will attempt to present a proper standard of review developed from property cases.

I. DOCTRINAL MISALLOCATION

Doctrinal misallocation occurs when the Supreme Court places an issue in the wrong doctrinal structure. In these situations, the Supreme Court applies an analysis that does not naturally fit the issue before it. In doing so, the Court often applies a doctrinal analysis that offers greater protection than the issue deserves. This misallocation has two major effects. First, it makes regulation of that issue by the politically responsive branches far harder. Second, it inserts the judiciary into the issue debate. It requires the judiciary to second-guess legislative decisions and forces proponents of reform to pass their proposals not just through a legislature but also through the courts. The courts begin to serve as a super-legislature, reanalyzing a reform with little to no deference to the legislature that passed it. This result can best be seen with an example, and the most illustrative example is the Court's decision in *Lochner v. New York*.[8]

In *Lochner*, one of the most condemned decisions in United States history,[9] the Supreme Court invalidated a New York state

6. *Shrink Mo.*, 528 U.S. at 399.
7. *See* ROSENKRANZ, *supra* note 4, at 9–10.
8. Lochner v. New York, 198 U.S. 45, 58 (1905).
9. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 750 (5th ed. 2005).

statute setting maximum working hours for bakery employees.[10] The Court discovered a liberty to contract within the liberty interests protected by the Due Process Clause of the Fourteenth Amendment.[11] The maximum hour statute unreasonably interfered with this right to contract, and was therefore an invalid use of the state's police powers.[12]

By finding the right to contract to be a fundamental right protected by the Due Process Clause, the Court brought its due process jurisprudence to bear on economic regulations. The question in *Lochner* was not just whether a state had the authority under its inherent police powers to pass this type of statute, but whether due process rights were violated by this particular exercise of police powers. Regulations of such essential economic relationships as prices, wages, and working hours were placed under a substantive economic due process analysis in the Court's doctrinal structure and were scrutinized to determine whether they unduly interfered with the liberty to contract.[13] In doing so, the Court rejected the application of a less demanding standard under its state police powers doctrine.[14]

The *Lochner* decision and its progeny garnered substantial criticism over their period of vitality. The economic due process doctrine, with its heightened degree of scrutiny, was widely criticized for allowing the Court to second-guess the legislatures and to enforce its preferred laissez-faire concept of governance.[15] As one commentator wrote, "[T]he only general rule which could be drawn from [*Lochner* and its progeny] was that types of regulation of which the Court sufficiently disapproved were unconstitutional."[16] Legislative decisions were given little to no deference; those statutory outcomes the courts approved survived, while those it did not approve were invalidated.

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10. *Lochner*, 198 U.S. at 58.

11. *Id.* at 53. ("The right to purchase or to sell labor is part of the liberty protected by [the Fourteenth Amendment] . . . .").

12. *Id.* at 58.

13. Robert L. Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 448 (1951).

14. Generally, an exercise of a state's police power must be reasonably related to the promotion of the safety, health, morals, and general welfare of the public. *See Lochner*, 198 U.S. at 53.

15. *Id.* Justice Holmes famously leveled this criticism against the *Lochner* majority when he wrote in dissent: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." *Id.* at 75 (Holmes, J., dissenting).

16. Stern, *supra* note 13, at 448.

Applying its substantive due process analysis to economic regulations, the Court invalidated nearly two hundred such statutes between 1905 and the mid-1930s.[17] But by the late 1930s, it became obvious that the economic theory the Court was vindicating was no longer sustainable.[18] Starting with its *West Coast Hotel Co. v. Parrish*[19] decision in 1937, the Supreme Court "thoroughly and quickly demolished" the constitutional doctrine of economic due process.[20] In upholding a state minimum wage statute as a valid exercise of police powers, the Court articulated a presumption of constitutionality for use of the police powers.[21] The Court did not discuss the liberty to contract as something that required any additional protections beyond those provided by the police powers analysis.[22] Once the Court removed the special protections of substantive due process from the analysis, the level of scrutiny applied to these regulations necessarily declined. Fundamental liberties no longer drove the analysis and economic regulations were no longer a substantive due process issue. The Court only concerned itself with the question of whether the regulation was a reasonable, and not arbitrary or discriminatory, use of the state's police powers.[23] Economic regulations were, in essence, relocated within the doctrinal scheme from a substantive due process analysis to a much more deferential analysis under its doctrine relating to the exercise of state police powers.

Now, the Court is not only more deferential to legislatures on economic regulations, it has "abdicated the field."[24] The Supreme Court has not invalidated an economic regulation on substantive due process grounds since 1937.[25] Understanding that legislatures, and not courts, are better suited to balance the pluralist needs of the community,[26] the Court has rejected the use of substantive due

17. *See* STONE ET AL., *supra* note 9, at 755.

18. *Id.*; *see also* Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 882 (1987) ("Once the Court's baseline shifted, its analysis became impossible to sustain.").

19. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

20. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36 (1962).

21. *West Coast Hotel*, 300 U.S. at 397.

22. *See id.* at 391. ("Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.").

23. *See* Nebbia v. New York, 291 U.S. 502, 537 (1934).

24. McCloskey, *supra* note 20, at 38. The Supreme Court's doctrine is now so deferential to legislatures on economic regulation, that it would uphold such regulations when the Court itself can hypothesize any reasonable set of facts and legislative purposes that would sustain the legislation. *See* Williamson v. Lee Optical Inc., 348 U.S. 483 (1955).

25. STONE ET AL., *supra* note 9, at 765.

26. *Nebbia*, 291 U.S. at 537.

process to impose the Court's own policy preferences. As the majority wrote in *Williamson v. Lee Optical Inc.*, "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[27]

The *Lochner* decision serves as a useful example of doctrinal misallocation.[28] By assigning economic regulations to an improper doctrinal analysis, the Court expanded its role in our democratic institutions. The use of substantive due process for economic regulations artificially inflated the interest impaired by the regulations—the liberty to contract—and allowed the Court to wield its strongest tools to invalidate reasonable reform measures. The Court set itself up as a barrier to effective legislative responses to the labor and workplace needs of its constituents. The Court's doctrinal misallocation hampered the attempts of legislators, organized labor, and workers' rights groups to change the power imbalance between employers and employees.[29] The Court became

27. *Williamson*, 348 U.S. at 488.

28. Economic due process is by no means the only example of doctrinal misallocation. Abortion rights may be another. *Roe v. Wade*, 410 U.S. 113 (1973), held that a woman has a fundamental right to an abortion through the Fourteenth Amendment's Due Process Clause. This fundamental right is anchored in the concepts of personal autonomy and privacy, all of which are somehow protected by the guarantee of due process. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 380 (1985). The *Roe* decision remains highly controversial. WHAT *Roe v. Wade* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005). By locating abortion rights within the substantive due process doctrine, the Court effectively removes the issue from the legislature and places itself directly into the heart of the debate. *See generally* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. MIAMI L. REV. 169 (2006). While the Court continues to apply this substantive due process for abortion rights, *see generally* Stenberg v. Carhart, 530 U.S. 914 (2000) (invalidating Nebraska's partial birth abortion ban as an undue burden on a woman seeking an abortion), many scholars argue that the right to abortion properly belongs under the Court's equal protection doctrine. *See* Ginsburg, *supra*; Kenneth L. Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) (authored by David A. Strauss and Cass R. Sunstein). Placing abortion rights under the equal protection doctrine would allow the courts to protect a woman's right to access abortion while removing the Court itself as the final arbiter of abortion legislation. Under equal protection, the Court protects the limits of legislative regulation while allowing the legislature to properly serve as the arena for competing communal values to be evaluated and weighed. *See* Ely, *supra*; Ginsburg, *supra*.

29. STONE ET AL., *supra* note 9, at 755.

the guardian of the status quo, at a time that the nation's market needs and demands required anything but the status quo.[30]

Doctrinal misallocation can do a great disservice. In those situations where the doctrinal analysis applied by the Court offers greater scrutiny than the issue actually deserves, the Court invariably will serve to protect the status quo. The Court then provides an unjustified special protection for the status quo. Doctrinal misallocation, in this context, precludes legislatures from social reorganizations to address constituent issues. Seen in light of the deleterious effects of doctrinal misallocation, *Buckley v. Valeo* is directly related to *Lochner*.[31]

II. CAMPAIGN FINANCE UNDER FIRST AMENDMENT DOCTRINE

A. Buckley's Doctrinal Misallocation of Campaign Finance Regulations

All modern campaign finance jurisprudence stems from *Buckley v. Valeo*.[32] The case involves a challenge to the 1974 Amendments to the Federal Election Campaign Act ("FECA").[33] In response to a substantial record of campaign finance abuses by federal candidates, mostly by the Nixon Administration, Congress amended FECA to create a more comprehensive and stringent campaign finance regulatory system.[34] These amendments included limits on contributions to federal candidates and limits on the amount that federal candidates could spend on their campaigns.[35] In a fractured decision, the Court struck down the expenditure limits while upholding the contribution limits.

The outcome in *Buckley* was largely determined by the level of scrutiny applied to the analysis by the Court.[36] The level of scrutiny,

30. *Id.*

31. Sunstein, *supra* note 18, at 883–84 (arguing that *Buckley* is a direct descendant of *Lochner*-type decisions to enforce the common law baseline over legislative regulations).

32. Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 887 (2005).

33. Buckley v. Valeo, 424 U.S. 1, 6 (1976).

34. *See* Bryan R. Whittaker, Note, *A Legislative Strategy Conditioned on Corruption: Regulating Campaign Financing After* McConnell v. FEC, 79 IND. L.J. 1063, 1069–70 (2004).

35. *Buckley*, 424 U.S. at 7. The limits included $1,000 contribution limits on individual donors, $1,000 expenditure limits on independent groups, and various candidate expenditure limits. *Id.*

36. *See* Overton, *supra* note 2, at 1244. The issues raised in *Buckley* were so novel that it was unclear what level of scrutiny the Court would apply when the case came before it. Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1053 (1985).

in turn, was determined by the Court's answer to the question of whether the expenditure and contribution limits directly burdened First Amendment liberties or only incidentally limited those liberties.[37] If the limitations directly burdened speech, the Court would apply its strictest level of scrutiny, invalidating any statute that failed to serve a compelling interest and was narrowly tailored to promote that interest.[38] If, however, the limitations only incidentally burdened speech interests, the Court would apply a less exacting standard, usually allowing a statute that is closely drawn to further a sufficiently important government interest.[39]

The Court wasted little time in answering this question. The per curium decision began its discussion with the statement that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. . . . The First Amendment affords the broadest protection to such political expression . . . ."[40] The Court entirely rejected the argument that the giving and spending of money for political communication was not a pure form of expression subject to something less than the exacting scrutiny required by the First Amendment.[41] The majority believed "that money is so strictly necessary to 'effective political speech' that a restriction on money effectively constitutes a restriction on speech."[42] In this modern era of mass-media driven campaigns, the raising and spending of large sums of money is "an ever more essential ingredient of an effective candidacy."[43] The Court found no regulable, non-speech component to political money, but instead determined that money and expression are so interwoven in the campaign context that money effectively amounts to speech.[44] The majority believed that campaign finance measures directly burden First Amendment liberties, falling squarely within the Court's First Amendment doctrine.

After accepting that contribution and expenditure limitations were fully First Amendment issues, the Court was required to

37. *Buckley*, 424 U.S. at 15.

38. Overton, *supra* note 2, at 1244; *see also* ROSENKRANZ, *supra* note 4, at 35 ("[O]nce a court decides that a speech regulation is subject to strict scrutiny, the prognosis is grim.").

39. Overton, *supra* note 2, at 1244.

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

41. *Id.* at 16–17.

42. Overton, *supra* note 2, at 1247.

43. *Buckley*, 424 U.S. at 26.

44. *Id.* at 16 (rejecting the argument accepted by the D.C. Circuit below, Buckley v. Valeo, 519 F.2d 821, 840–41 (D.C. Cir. 1975) (en banc)). The D.C. Circuit analogized this case to *United States v. O'Brien*, 391 U.S. 367 (1968), where the Court upheld a conviction for burning a draft card on the reasoning that the act was not pure speech and the government had strong interests in regulating the non-speech conduct of the defendant's action. Buckley v. Valeo, 519 F.2d 821, 840–41 (D.C. Cir. 1975).

analyze both sets of limitations under an exacting scrutiny. *Buckley* struck down each provision that placed a ceiling on spending, saying that a "primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates."[45] The majority applied the strictest level of scrutiny to these expenditure limits.[46] In rejecting the government's argument that there was a compelling interest in promoting political equity through these expenditure limits, the Court famously wrote, "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."[47]

The Court did, however, uphold the contribution limits of the 1974 Amendments.[48] While applying an exacting, yet less strict, level of scrutiny to these limits, the Court held that the burden on First Amendment rights was not as great for contribution limits.[49] As the contribution serves the symbolic interest of exhibiting support for a candidate, limits on the size of the contribution were found not to reduce the symbolism expressed by the donation.[50] The Court accepted the government's interest in reducing corruption and the appearance of corruption as sufficient justification for these limits on speech.[51] As long as the contribution limits were not set so low as to have a dramatically adverse effect on a candidate's ability to advocate her candidacy, contribution limits were held to be a justified impingement on First Amendment liberties.[52]

By applying the Court's First Amendment protections to campaign finance provisions, *Buckley* stands as "one of the most vilified" decisions in the Court's modern jurisprudence.[53] A close examination of the Court's majority opinion leaves the reader wholly unsatisfied with the reasoning. In place of a thorough examination of the relationship between money and speech, the decision is "marked more by reliance on the simple equation of money and speech."[54] The absolutist stance of its expenditure and contribution limitations discussion is even more striking when read next to the pragmatic approach to the other provisions under inspection in

45. *Buckley*, 424 U.S. at 39.
46. *Id.* at 41–42.
47. *Id.* at 48–49.
48. *Id.* at 58.
49. *Id.* at 26.
50. *Id.* at 21.
51. *Id.* at 26.
52. *See id.* at 21.
53. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1394 (1994) [hereinafter *Political Equality*].
54. Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 359 (1977).

the case.[55] With no in-depth discussion of the complicated relationship between money and speech, the Court leaves us with a "startlingly cavalier" decision.[56]

The *Buckley* decision would have benefited from a greater discussion of why First Amendment doctrine is properly applied to campaign finance provisions. The Court's decision seems particularly confused in its analysis. The Court focused its attention on what the money can buy, and not on the money itself.[57] But the regulations at issue were directed solely at the giving and spending of the money.[58] In essence, the Court asked the wrong question in the case. Instead of asking whether money can be regulated when there is an incidental effect on speech, the Court asked "whether *pure speech* can be regulated where there is some incidental effect on *money*."[59] The Court focused on the destination, while the regulation was directed at the mode of transportation.

Justice White, in dissent on these issues, was well aware of the majority's misplaced emphasis. Justice White was the lone justice to disagree with the position that these limitations violated First Amendment rights.[60] More notably, Justice White rejected the notion that money equals speech. Writing that the majority contends that "money talks," Justice White points out that "money is not always equivalent to or used for speech, even in the context of political campaigns."[61] In fact, most of the funds raised in a political campaign are used for non-communicative activities.[62] To Justice White, the dangers of political corruption, defined to include tacit agreements for political favors in return for contributions or expenditures, trump any incidental burden on First Amendment interests.[63] But the majority rejected taking this

55. *Id.* at 358.

56. *Political Equality*, *supra* note 53, at 1399.

57. *See* J. Skelly Wright, Comment, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1008 (1976) [hereinafter *Politics and the Constitution*].

58. *Id.* Judge Wright wrote that in short, "the Court turned the congressional telescope around and looked through the wrong end." *Id.*

59. *Id.* at 1007.

60. Buckley v. Valeo, 424 U.S. 1, 260 (1976) (White, J., concurring in part and dissenting in part); *see* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 612 (1982) [hereinafter *Money and the Pollution of Politics*].

61. *Buckley*, 424 U.S. at 263.

62. ROSENKRANZ, *supra* note 4, at 40–41 ("A campaign's next dollar is more likely to be spent on rent, transportation, or pizza than it is on a leaflet, a newspaper ad, or a television spot.").

63. *Buckley*, 424 U.S. at 259–60.

approach, and instead treated the First Amendment as a "near absolute in the sphere of political debate."[64]

Ironically, by expanding the First Amendment to cover campaign finance provisions,[65] the Court enunciated principles that are themselves "wholly foreign to the First Amendment."[66] While the majority cites all the usual First Amendment cases, as if there were no doubt about their applicability, in reality, campaign finance provisions do not properly fit in the Court's previous First Amendment jurisprudence.[67] Essentially, the Court says that the limitations on a candidate's use or receipt of money violate free speech interests because such limits reduce the distance the candidate's message may travel. With less money, the candidate can buy fewer television spots, leaflets, and newspaper ads.[68] But this reasoning confuses the intent of the First Amendment. The First Amendment is meant to prevent content discrimination,[69] not promote content amplification.

In one of his many celebrated passages, Justice Holmes expressed the principle of our "Free Speech Tradition"[70] while dissenting in *Abrams v. United States*[71]:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution.[72]

64. *Money and the Pollution of Politics*, *supra* note 60, at 611.

65. *See* Stephanie A. Sprague, Note, *The Restriction of Political Associational Rights Under Current Campaign Finance Reform First Amendment Jurisprudence*, 40 NEW ENG. L. REV. 947, 983 (2006) ("Until *Buckley*, money was not considered a form of protected political speech.").

66. *See Money and the Pollution of Politics*, *supra* note 60, at 613 (quoting *Buckley*, 424 U.S. at 48–49).

67. *See id.*

68. The reduction would primarily be in television advertising. As Senator Edward Kennedy once said, "Like a colossus of the ancient world, television stands astride our political system, demanding tribute from every candidate for public office . . . . Its appetite is insatiable . . . ." MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 37 (2005).

69. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408–09 (1986).

70. *Id.* at 1405 (crediting Harry Kalven with the label).

71. Abrams v. United States, 250 U.S. 616 (1919).

72. *Id.* at 630 (Holmes, J., dissenting).

This "marketplace of ideas" concept of the First Amendment, built on the influential writings of John Stuart Mill,[73] now sits as the core of First Amendment jurisprudence.

The First Amendment denies the state the ability to silence dissenting voices, and therefore its central principle is an equal opportunity for all voices to be heard.[74] As Professor Owen Fiss describes it, the Free Speech Tradition should be understood as a protection to the street corner speaker.[75] The street corner speaker cannot be arrested solely because the police officer does not like what the speaker is saying.[76] Government intervention "must not be based on the content of the speech, or on a desire to favor one set of ideas over another."[77]

Rigorous First Amendment scrutiny, then, is only employed to prevent discrimination against the message itself.[78] This understanding of the First Amendment runs throughout the Court's speech cases both before and after the *Buckley decision.* In *Roth v. United States,* the Court wrote, "[T]he First Amendment was not intended to protect every utterance. . . . The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[79] In one of its most celebrated free speech cases, the Supreme Court recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[80] In *Texas v. Johnson,* the Court wrote, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea

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73. *See generally* JOHN STUART MILL, ON LIBERTY (1859). Mill, in rejecting the idea that a democratic government could suppress particular opinions, famously wrote:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Id. at 33.

74. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment,* 43 U. CHI. L. REV. 20 (1975). Professor Karst writes, "The principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the central meaning of the First Amendment." *Id.* at 21 (quotations omitted).

75. Fiss, *supra* note 69, at 1408.

76. *Id.* at 1409.

77. *Id.*

78. *Politics and the Constitution, supra* note 57, at 1009.

79. Roth v. United States, 354 U.S. 476, 484 (1957).

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

simply because society finds the idea itself offensive or disagreeable."[81] In its fullest embrace of the equality principle underlying the First Amendment,[82] the Court announced:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.[83]

The First Amendment, therefore, is "not the guardian of unregulated talkativeness," and freedom of speech is not an unqualified right.[84] The First Amendment protects against government censorship and content discrimination, ensuring an "equality of status in the field of ideas."[85]

By applying its "blunderbuss formula that equates money and speech,"[86] *Buckley* ignores the distinction between regulating the content of speech and regulating the quantity of speech.[87] No showing was made that the expenditure and contribution limitations censored particular viewpoints.[88] The *Buckley* Court did state that these limitations reduce the number of issues discussed within the campaigns,[89] but the Court merely assumes this statement to be true. The opinion offers no evidence to support this conclusion, likely because there is none. In fact, studies show that increases in the amount of money spent in campaigns do not expand the number of issues discussed; they merely increase the repetition of a narrow number of issues.[90]

Thus, "*Buckley* transformed the traditional bar against censorship into something radically different: restrictive scrutiny of legislative action meant to protect the citizenry from abuse of the rights of

81. Texas v. Johnson, 491 U.S. 397, 414 (1989).

82. Karst, *supra* note 74, at 22.

83. Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972) (citations omitted).

84. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 25–26 (1960).

85. *Id.* at 27. Meikeljohn goes on to say that "[a]ny such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged." *Id.* at 28.

86. *Politics and the Constitution*, *supra* note 57, at 1010.

87. *See Money and the Pollution of Politics*, *supra* note 60, at 633.

88. *Politics and the Constitution*, *supra* note 57, at 1009.

89. Buckley v. Valeo, 424 U.S. 1, 19 (1976).

90. ROSENKRANZ, *supra* note 4, at 40.

property."[91] By assigning campaign finance measures to First Amendment scrutiny, the Court may in fact be defeating First Amendment purposes. Money in the political campaign process merely determines the amplitude of one's message in the current mass media society. In the name of protecting speech interests, the Court hands monopolistic rights to campaign speech to the moneyed elite.[92] Those with money speak, those without it are silenced, and those with little are drowned out. This result undermines the equality principle of the First Amendment, thereby harming our ability to self-govern. By allowing a small segment of society to dominate political discourse through their dollars, we lose alternative voices, ideas, and eventually, leaders.[93]

The greatest weakness of *Buckley* is that it ties the hands of Congress to deal with this speech monopoly. The Court applies First Amendment scrutiny to protect candidates' ability to effectively campaign in today's mass media society. But this reasoning assumes that expensive mass media campaigning is the natural, unchangeable state of politics.[94] The Court is right that expenditure and contribution limits reduce the amount of television ads, leaflets, fliers, newspaper ads, and other media that a candidate can purchase. But this result is precisely what Congress intended. Congress, with FECA and the 1974 Amendments, intended to move the political campaign process away from the mass media model, and towards a smaller scale, community-based model reliant on volunteers, word of mouth, and personal contact.[95] This shift does nothing to affect the content of the candidate's speech, but merely defines the process through which the speech will be

91. Brief of Amicus Curiae ReclaimDemocracy.Org in Support of Respondents at 5, Randall v. Sorrell, 126 S. Ct. 2479 (2006) (No. 04-1528), 2006 WL 325189.

92. *See* David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236 (1991) (arguing that the distortive effects of wealth in politics justifies campaign finance reform); *see also* Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949 (1995).

93. *See Money and the Pollution of Politics*, *supra* note 60, at 638.

94. *Politics and the Constitution*, *supra* note 57, at 1005.

95. *See id.* Again, it seems that only Justice White saw this point. In dissenting from the majority's conclusion that the expenditure limits were unconstitutional, Justice White wrote:

> The ceiling on candidate expenditures represents the considered judgment of Congress that elections are to be decided among candidates none of whom has overpowering advantage by reason of a huge campaign war chest. . . . This seems an acceptable purpose and the means chosen a common-sense way to achieve it. The Court nevertheless holds that a candidate has a constitutional right to spend unlimited amounts of money, mostly that of other people, in order to be elected.

Buckley v. Valeo, 424 U.S. 1, 265–66 (1976) (White, J., concurring in part and dissenting in part).

delivered. Why the First Amendment prevents Congress from defining the campaign process in this way is a question left unanswered by the decision.[96]

B. Effects of Doctrinal Misallocation of Campaign Finance Reform

Buckley's misallocation of campaign finance regulations within the Court's doctrinal scheme has a number of negative effects. Much like *Lochner*, the Court's misapplication of First Amendment doctrine to these regulations puts the judiciary in the position of overprotecting the status quo.[97] Due to the heightened scrutiny of campaign finance regulations, legislatures and reformers have little room for innovation, while the judiciary's own role in the debate is increased. Perhaps because of the uncomfortable fit of campaign finance measures in First Amendment doctrine, modern campaign finance jurisprudence is clunky and often incoherent.[98]

The judiciary now stands as a great roadblock to campaign finance reform measures.[99] Courts often reverse the long-fought-for measures pushed by reform-minded legislators and groups.[100] The courts are the final arbiters of campaign finance provisions, sitting as a super-legislature to second-guess the means chosen by the legislatures to deal with the growing amounts of money in politics, and even, on some occasions, to second-guess the ends of such regulations. The exacting standard of review allows courts to look over the shoulders of legislatures, inserting judges into campaign finance debates.[101] Courts do not merely set government's limits in reform efforts; they are the final decision-makers for the vitality of any campaign finance reform. Campaign finance legislation is im-

96. *Political Equality*, *supra* note 53, at 1399.

97. *See id.*; *see also* Brief of Amicus Curiae ReclaimDemocracy.Org, *supra* note 91, at 6–7.

98. *See* Richard Briffault, *Campaign Finance, the Parties and the Court: A Comment on* Colorado Republican Federal Campaign Committee v. Federal Elections Commission, 14 CONST. COMMENT. 91, 97–105 (1997); Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31 (2004) [hereinafter Buckley *is Dead*]; Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After* Randall v. Sorrell, 68 OHIO ST. L.J. 849 (2007) [hereinafter *The Newer Incoherence*]; Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Finance Reform*, 61 WASH. & LEE L. REV. 663, 666–67 (2004) [hereinafter *Restraint and Responsibility*].

99. One commentator describes the judiciary as a *Wizard of Oz*-style giant, dancing tree in center field, swaying back and forth to snatch home runs. E. Joshua Rosenkranz, *Introduction* to IF *Buckley* FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 4 (E. Joshua Rosenkranz ed., 1999) [hereinafter IF *Buckley* FELL].

100. *See id.*; *see also* ROSENKRANZ, *supra* note 4, at 9.

101. *See* ROSENKRANZ, *supra* note 4, at 10.

mediately challenged in court after passage.[102] Proponents must wait until judicial pronouncement to know whether the legislation is an acceptable reform measure.

Those provisions that have managed to survive judicial review have failed to alter the massively expensive political campaign process.[103] Money increasingly continues to flow into campaigns, especially from very wealthy donors.[104] Unlike most failed regulatory schemes, however, this failure is in large part due to constitutional doctrine.[105] By striking down expenditure limits for speech reasons but allowing contribution limits, the Court largely gutted FECA, which relied on the integrated system of both expenditure and contribution limitations.[106] The Court thus binds the hands of reformers and cuts down effective reform legislation, all in the name of a tortured application of its First Amendment doctrine.

The existing First Amendment analysis of campaign finance issues provides little guidance to judges of how much speech must be regulated for the court to invalidate laws.[107] Judges must thus rely on their own assumptions about politics.[108] Their decisions are then based on judges' own views on money in politics, though they are cloaked in First Amendment doctrine, which is unsuited for a discussion of democratic values.[109] This reliance on individual judges' assumptions of the effect of money inevitably leads to inconsistent holdings, as assumptions vary between judges.[110]

This state of affairs begs for a standard of review that is far more deferential to the legislature's judgments than First Amendment doctrine allows. Legislators are in a far better position to determine the dangers money creates for the political process, and clearly, legislators are closer to the nexus of money and politics than federal judges. But the Court has struggled with what level of

102. *Restraint and Responsibility*, *supra* note 98, at 665–66.

103. *See generally* UROFSKY, *supra* note 68, at 60–88 (outlining the failure of campaign finance reform since 1976); Frank J. Sorauf, *What* Buckley *Wrought*, *in* IF *Buckley* FELL, *supra* note 99, at 11, 11–62.

104. *See* Jeffrey H. Birnbaum, *A Growing Wariness About Money in Politics*, WASH. POST, Nov. 29, 2005, at A1.

105. Sarouf, *supra* note 103, at 12 ("In [the case of campaign finance reform], the failures of the regulatory structures in the nation and the states . . . are in many ways the results of First Amendment jurisprudence.").

106. BURT NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION: A CRITICAL LOOK AT *Buckley v. Valeo* 18 (1998), *available at* http://www.brennancenter.org/dynamic/subpages/cfr1.pdf.

107. *Restraint and Responsibility*, *supra* note 98, at 667.

108. *Id.* at 666.

109. *Id.* at 666–67.

110. *Id.* at 667.

deference to give the legislature under its campaign finance jurisprudence.[111] For example, while the *Buckley* Court could have deferred to Congress's judgment that independent expenditures posed as much, if not a greater, threat of corruption than contributions, it relied on its own "armchair empiricism" to invalidate that provision.[112]

On the other hand, until a recent shift, the Court seemed to be moving towards a more deferential standard in campaign finance cases. In what Richard Hasen had dubbed the "New Deference Quartet," the Court lowered the bar for constitutionally adequate legislation in four separate cases.[113] These cases combined to "(1) reduce[] the evidentiary burden that the government must meet to show that a law is necessary to combat corruption or its appearance [and] (2) relax[] the level of scrutiny applicable to reviewing campaign finance regulation."[114] For instance, in the *Shrink Missouri* decision, the Court, in upholding rather low state contribution limits, made clear that the standard of review for contributions was lower than that for expenditure limits,[115] the contribution limitations standard being more stringent than intermediate scrutiny but less stringent than strict scrutiny.[116] The Court in *Shrink Missouri* accepted a rather light record amassed by the State as sufficient evidence of the appearance of corruption to justify the low contribution limits.[117] The evidence was primarily an affidavit from a Missouri legislator who stated that there was a "real potential to buy votes" and newspaper accounts suggesting possible corruption.[118] With this level of deference, some commentators felt, after this decision, that almost all contributions limits would be upheld in the future.[119]

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111. Briffault, *supra* note 98, at 103.

112. *Id.*

113. Hasen, *supra* note 32, at 891. These cases were *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001), *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

114. Buckley *is Dead*, *supra* note 98, at 32.

115. *Shrink Mo.*, 528 U.S. at 388.

116. Overton, *supra* note 2, at 1248; *see also* Kenneth G. Potter, Note, Nixon v. Shrink Missouri Government PAC*: Political Speech of the Common Voter is Promoted Through Campaign Finance Reform*, 11 WIDENER J. PUB. L. 151, 172 (2002) ("[T]he Court utilized a review stricter than intermediate scrutiny.").

117. Hasen, *supra* note 32, at 892.

118. *Shrink Mo.*, 528 U.S. at 393.

119. *See* WRITING REFORM: A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS I-13 (Deborah Goldberg ed., rev. ed. 2004), *available at* http://www.brennancenter.org/dynamic/subpages/whole_manual_2004.pdf.

In *Randall v. Sorrell*, however, the Court snapped back from this deferential posture.[120] The Court reviewed a comprehensive campaign finance package passed in Vermont that included expenditure limits and strict contribution limits.[121] Applying stare decisis, the Court struck down the expenditure limits, presumably closing the door on that type of reform under First Amendment analysis.[122] Even more significantly, *Randall* additionally struck down the contribution limits.[123]

By holding the contribution limits too low to satisfy First Amendment concerns, the Court revitalized *Buckley*, and, most likely, killed the New Deference Quartet.[124] In fact, as Justice Souter's dissent points out, the contribution limit analysis relies entirely on *Buckley*, while distinguishing the case from *Shrink Missouri*.[125] Further, while *Shrink Missouri* clearly called for deference to the level of contribution limit set by the legislature, the plurality in *Randall* found it necessary to exercise "independent judicial judgment" to determine whether these limits were too low to allow a candidate to amass the necessary funds to effectively campaign for office.[126] Finding these limits were prohibitively low, the Court declared the limits unconstitutionally burdensome on First Amendment interests.[127]

With *Randall v. Sorrell*, the Court returns to its role of second-guessing the legislature's decisions on campaign finance regulatory needs, replacing the judgments of those who actually campaign with the assumptions of federal judges who do not. Throwing the decisions on campaign finance measures into the hands of unelected judges has a significant effect on legislatures. With no deference given to their judgments by judges, legislators are unclear as to what measures are constitutionally permissible.[128] Legislators may then lack the political will to pass reform-minded legislation.[129] Courts thus may not only second-guess legislation that has already been passed, but preclude legislation from passing in the first place.

Shifting campaign finance issues from a First Amendment analysis under the Court's doctrinal scheme to a property analysis may

120. Randall v. Sorrell, 126 S. Ct. 2479, 2485–87 (2006).
121. *Id.* at 2485–87.
122. *Id.* at 2484, 2489.
123. *Id.* at 2485.
124. *The Newer Incoherence*, *supra* note 98, at 10, 16–17.
125. *Randall*, 126 S. Ct. at 2512–13 (Souter, J., dissenting).
126. *Id.* at 2492.
127. *Id.* at 2499.
128. *Restraint and Responsibility*, *supra* note 98, at 667.
129. *Id.*

provide a way out of this judicially controlled campaign finance system. An irony created by the Court's doctrinal misallocation of campaign finance is that the Court actually allows campaign finance to be regulated by property interests. By inoculating elections based on existing "distributions of wealth and entitlements" from congressionally chosen regulations, the Court enforces a regulatory system governed by property rights.[130] The distribution of wealth is maintained by property law.[131] The Court thus wields its First Amendment doctrine as a sword to protect a political process regulated by the status quo distribution of property rights, thereby actually defeating the equality underpinnings of the First Amendment.[132] If the Court allows campaign finance to be regulated by property rights, it should apply a property rights analysis to campaign finance regulations.

III. CAMPAIGN FINANCE AS A PROPERTY ISSUE

For proposing such a large idea, Justice Stevens's concurring opinion in *Shrink Missouri* provides very little reasoning in support of his bold proposition. He states that "[s]peech has the power to inspire," while money empowers one to hire laborers to perform certain tasks.[133] As he writes, "[i]t does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results."[134] To Justice Stevens, the Constitution provides adequate protection to "the individual's interest in making decisions about the use of his or her property."[135] Justice Stevens sums up his position on campaign finance reform by saying that "[t]he right to use one's own money to hire gladiators, or to fund 'speech by proxy,' certainly merits significant constitutional

130. *Political Equality*, *supra* note 53, at 1399.

131. *See id.* ("[L]aw defines property interests; it specifies who owns what, and who may do what with what is owned.").

132. *See* Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2478–2479 (1997).

> A ceiling on expenditures by citizens, much like the one on contributions, would have placed the poor on the same footing as the wealthy: neither group would have any special ability to promote the candidate's electoral interests. In that sense, the limitation on expenditures, like the one on contributions, should have been understood to satisfy the First Amendment, indeed to further its democratic aspirations.

Id.

133. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

134. *Id.*

135. *Id.*

protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases."[136]

While light on the reasoning for why campaign money is better analyzed under the Court's property rights doctrine than its freedom of speech doctrine, the concurrence's proposition is insightful. Campaign finance regulations are more akin to regulations of property than to burdens on speech interests.

Property is defined by Black's Law dictionary as "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised."[137] The classical view defines property rights as "one person's full and exclusive right to use, enjoy, and transfer a tangible thing."[138] A more expansive view of property suggests that it can be understood as an "aspect of relations between people."[139] In this light, property consists of decision-making authority, where authority "refers to the role of property as a claim that other people ought to accede to the will of the owner."[140] Property rights assign something to one's control, resolving any competing claims over that thing. Property is scarce and unevenly distributed.[141] Due to competing inconsistencies of ownership, property rights only extend until they interfere with other owners' property interests.[142] As property involves decision-making authority, it may be alienated.[143]

Political money,[144] even with whatever connection to expressive communications it has, seems closer to property than speech. Political money clearly falls within the Black's Law definition of property, but it also fits the more expansive view of property. Political money is controlled by the owner, and the owner of the dollars, for the most part, has decision-making authority over the money that all others must accede to. There are no recognizable competing claims to an owner's possession of political money. Speech cannot be thought of as a similar decision-making liberty. Speech is expression, and the right to free speech is a right of self-expression. This right

136. *Id.* at 399.

137. BLACK'S LAW DICTIONARY 1252 (8th ed. 2004).

138. Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1079 (1997).

139. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742 (1986).

140. *Id.* at 742–43.

141. Overton, *supra* note 2, at 1259.

142. Joseph L. Sax, *Takings and the Police Powers*, 74 YALE L.J. 36, 61 (1964) (arguing that property "is the end result of a process of competition among inconsistent and contending economic values").

143. Baker, *supra* note 139, at 744.

144. Professor Overton uses this term to differentiate money within the political process from money generally. Overton, *supra* note 2, at 1243 n.26. I adopt the same term here.

of self-expression does not work to resolve competing claims in the same way property rights do.

Political money is also alienable. It is transferred from contributor to candidate and from candidate to advertiser. An owner may transfer her whole lot of political money to one candidate, or divide it among several. A speaker can do no such thing. Speech is not alienable; it cannot be transferred from one to another, even though *Buckley* seems to imply so. Furthermore, as discussed in greater detail below, political money is scarce and unevenly distributed. Speech is readily and equally available to all.

Property and speech rights are treated differently within the Court's doctrinal scheme.[145] Over the past century, judicial vigilance of First Amendment violations has increased in nearly parallel fashion to its deference to legislatures on property regulations.[146] The First Amendment now stands as a far greater bar to government intrusion than do the Property Clauses found in the Fifth Amendment. This differentiation is justified by the divergent natures of property and speech.

One major difference between property and speech that may justify the disparate judicial treatments is that property is scarce and unevenly distributed. At any given time, an individual only has access to a limited amount of personal property.[147] Speech, on the other hand, is not a finite commodity; people's ability to express themselves is generally easily accessible and unlimited.[148] Speech is naturally endowed to the speaker, and everyone naturally has an equal ability to speak.[149] Property, however, is not a natural endowment and is hence unequally distributed across society.[150]

Recognizing the issues of scarcity and distribution inherent in political money would greatly increase judicial deference to legislative decision-making.[151] Courts have competence to enforce First

145. *See generally* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 59–87 (1992); Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91 (1992).

146. Overton, *supra* note 2, at 1252.

147. *Id.* at 1259.

148. *Id.*; *see also* Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1143 (1993).

149. Overton, *supra* note 2, at 1259.

150. Baker, *supra* note 139, at 787 n.85 ("No holdings flow solely from people's natural assets. Holdings flow from, among other things, the exercise of natural assets within a specific cultural and legal structure.").

151. *See* Michelman, *supra* note 145, at 95 ("[Judges'] protection takes the form of more-or-less censorious review of laws infringing on liberties of one or another class. There should be no great surprise in finding variation in the forms and degrees of such review, depending on which classes of liberty are in question.").

Amendment rights, which are ubiquitous and evenly distributed,[152] and thus, deference to legislative decision-making is not necessary. Courts merely need to maintain the equality of First Amendment rights, ensuring that all viewpoints are heard and that legislation does not silence any voice. Additionally, a legislature may be ill-suited to properly balance First Amendment interests, as its majority tendencies often inadequately account for minority or unpopular viewpoints.[153] Strict scrutiny enables courts to closely examine legislation to ensure that the legislature has not devalued minority viewpoints.

Legislatures, however, are competent to regulate property that is scarce and unevenly distributed.[154] Decisions on regulations for scarce and unevenly distributed resources are policy based, requiring the balancing of competing needs of society. Also, property regulation is aided by the fact that property values are easily quantifiable, providing objective measurements for the legislature to employ in its decision-making.[155] Courts are then better served to defer to legislative decisions on property regulations, only stepping in when the legislature has overstepped its constitutional bounds.

Political money, like other property, is a finite commodity unevenly distributed within society. People are not naturally endowed with political money. To apply First Amendment protection to political money ignores the issues of scarcity and uneven distribution inherent with political money and assumes that the commodity is as freely available as speech.[156] Therefore, it makes little sense to apply First Amendment doctrine to political money. Removal, or restriction, of campaign finance regulation in an attempt to equalize the use of political money merely entrenches the monopoly the moneyed elite holds over the political process.

A second possible reason for the different treatment of property and speech under constitutional doctrine is that property rights are defined by the relation of the property to neighboring property. A property owner's "full enjoyment" of the use of his property is limited by the enjoyment of his neighbor's use of her property.[157] An owner's freedom of choice concerning the use of his property can only extend to the point where the use directly conflicts with

152. *See* Overton, *supra* note 2, at 1259.

153. *See id.* at 1260 ("[C]onventional wisdom holds that government cannot reliably, and therefore should not, measure the value of expression . . . .").

154. *Id.* at 1259.

155. *Id.* at 1259–60.

156. *Id.* at 1261.

157. Sax, *supra* note 142, at 61.

another owner's use of her property.[158] A fundamental function of law is to orderly resolve these conflicting interests.[159] Legal restrictions placed on the free use of one's property promote property ownership as a whole by preventing one property owner from dominating other people's property interests.[160] Regulation also prevents the use of one's property to the detriment of another's non-property interest.[161]

In resolving these conflicts, the state must choose the proper balance and decide which interest to favor.[162] Legislatures are better positioned than courts to strike this balance.[163] Legislatures, being democratically responsive, are suited to weigh the different interests of constituents, determine the value of each interest to society, and develop policy. Courts are not institutionally competent to balance conflicting interests in this way. Courts are effective at determining when a right is improperly infringed, but if a valid use of one's property conflicts with someone else's use of their property, or some greater societal interest, the courts are not the best venue to resolve these conflicts.[164] Judges, therefore, largely defer to legislative property regulations.[165]

The same concerns do not exist for speech. Speech interests do not carry the interference concerns that property rights do.[166] Conflicting speech interests do not have to be regulated by the state—in fact, these interests should be encouraged. The equality principle of the First Amendment promotes the airing of all viewpoints, and eventually, many of these viewpoints will conflict. But this conflict does no harm to the individual's speech interest, unlike interference in the property context. Speech interests similarly rarely interfere with non-speech interests.[167] Put simply, one's

158. Baker, *supra* note 139, at 780.

159. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972). With no legal framework to resolve these conflicts, regulation is left to "might makes right." *Id.*

160. *See* Overton, *supra* note 2, at 1263–64.

161. *Id.* Examples may include the shopkeeper's exclusion of patrons based on race, *id.*, the release of toxins into drinking water supplies, or other conservation interests, *see* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 942 (1985).

162. *See* Calabresi & Melamed, *supra* note 159, at 1090; *see also* Rose-Ackerman, *supra* note 161, at 951 ("Restrictions on ownership and use will sometimes be effective second-best substitutes for more flexible, incentive-based systems of externality control.").

163. *See* Overton, *supra* note 2, at 1264–65.

164. *See id.*

165. *Id.* at 1250.

166. *Id.* at 1264.

167. There are, of course, exceptions, such as speech meant to incite violence, hate speech, or libel, but these exceptions make up only a small segment of speech. Additionally,

speech interests are not limited by other people's speech interests. Hence, the interference of speech interests is not seen as unfair or illegitimate, as it is in the property analysis.[168] The courts, therefore, have no reason to defer to a legislature's judgment on speech regulation. In fact, speech regulations, which do not promote speech rights as a whole, should be viewed skeptically by the courts.[169] Speech regulations actually harm the speech interests of society at large, and the courts are therefore justified in applying strict scrutiny in these cases to ensure speech interests are not being regulated due to their content.

By contrast, political money does raise the interference concerns we see with property.[170] The influence of money in politics creates a substantial opportunity for political money to interfere with the interests of others. The interests of certain segments of society may be devalued, or others overvalued, by injecting large sums of money into the process. For example, a quid pro quo exchange of rent-seeking legislative favors for political money would unfairly and illegitimately interfere with larger societal interests. Due to these interference concerns, the use of political money is restricted by such regulations as bribery laws and contribution limits.[171] Therefore, control of political money is defined by outside interests, just as with property and unlike with speech.[172]

The preceding discussion shows that political money resembles property far more than speech, and as such, raises issues similar to those in property, justifying a more deferential standard of review by courts. But what standard should apply? Justice Stevens's concurrence provides little guidance.[173] Even Stevens acknowledges, however, that money in politics does in some way touch on political speech, and therefore requires greater protection by the courts than ordinarily given property interests.[174] The following Part will try to craft a possible standard from existing property doctrine.

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courts will often defer to legislative judgments on restrictions of these exceptions. See Sullivan, *supra* note 92, at 951.

168. Overton, *supra* note 2, at 1266–67.

169. *See id.* at 1265.

170. *Id.* at 1266.

171. *See id.* at 1268.

172. *Id.* at 1269 ("[O]ne cannot claim the same natural birthright to dominion over her political money as she might to her speech.").

173. *See* Eugene Volokh, *Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL'Y 47, 60 (2000).

174. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 n.* (2000) (Stevens, J., concurring); *see also* Overton, *supra* note 2, at 1285.

IV. A PROPERTY REVIEW OF CAMPAIGN FINANCE MEASURES

A shift in the doctrinal analysis of campaign finance measures from First Amendment to property jurisprudence raises valid concerns that the new standard of review would enhance the legislature's ability to regulate anyone who pays for communication, as opposed to speaking themselves,[175] though a property analysis would surely be more deferential than a First Amendment analysis.[176] Still, it does not necessarily have to be the case that the legislature's ability to regulate all sorts of other communications where money transfers are involved would expand so broadly. A standard may be crafted that allows for an analysis of political money as property that is properly deferential to legislatures without abdicating the field.

Two of Justice Stevens's opinions serve as helpful starting points. The first is his concurrence in *Moore v. City of East Cleveland*,[177] and in fact Justice Stevens cited to this opinion in his *Shrink Missouri* concurrence.[178] *Moore* involved a challenge to a single-family home zoning requirement that forbid a grandmother to house her two grandsons, who were first cousins but not brothers.[179] While the majority invalidated the zoning restriction under Due Process,[180] Justice Stevens, concurring in the judgment, believed the question presented by the case was whether the ordinance was a "permissible restriction on appellant's right to use her own property as she sees fit."[181] Justice Stevens, while recognizing that zoning ordinances diminished individual property rights, said that these ordinances did not extinguish those rights,[182] but the city was still required to show that the ordinance was "substantial[ly] relat[ed] to the public health, safety, morals, or general welfare[.]"[183] To Justice Stevens, this ordinance did not fulfill that requirement and

175. Volokh, *supra* note 173 at 58 (arguing that "the government would acquire broad power to control[,]" among other things, "newspapers, book publishers, [and] directors").

176. *See* Sprague, *supra* note 65, at 983 ("If the Supreme Court analyzed money spent on campaigns as a property issue, rather than a speech issue, the Court could more easily uphold campaign finance reform laws against constitutional attack."); *see also*, Stephanie Pestorich Manson, Note, *When Money Talks: Reconciling* Buckley, *the First Amendment, and Campaign Finance Reform*, 58 WASH. & LEE L. REV. 1109, 1114 (2001) ("This 'money is property, not speech' argument would permit a more lenient level of scrutiny for campaign reform measures than the *Buckley* standard.").

177. Moore v. City of E. Cleveland, 431 U.S. 494, 513–21 (1977) (Stevens, J., concurring).

178. *Shrink Mo.*, 528 U.S. at 398–99 (Stevens, J., concurring).

179. *Moore*, 431 U.S. at 496–97.

180. *Id.* at 498–506.

181. *Id.* at 513 (Stevens, J., concurring).

182. *Id.* at 513–14.

183. *Id.* at 520.

was therefore an unconstitutional taking.[184] This opinion is significant as it presents a model of review that still vigilantly protects property rights, at least in certain contexts. Property owners have a right to use their property as they see fit. The state's police powers do not allow the state to unquestionably restrict the free usage of one's property, as the restriction must promote a government interest. As Justice Stevens wrote in his *Shrink Missouri* concurrence, the ordinance in *East Cleveland* raised "important constitutional concerns."[185] He also wrote in *East Cleveland* that the interest had to be substantially related to promoting the general welfare.[186] For Stevens, it seems that the government interest must be more than just legitimate—somewhere closer to substantial.[187] This requirement, of course, cannot be the case for all zoning ordinances, or other restrictions on property, so more is needed for a comprehensive standard.[188]

The other important opinion by Justice Stevens is his majority opinion in *Young v. American Mini Theaters, Inc.*[189] *American Mini Theaters* involved Detroit zoning ordinances forbidding new adult movie theaters from operating within certain limits of other adult stores and residential areas.[190] Stevens, writing for the majority, upheld the ordinances in the face of a First Amendment challenge.[191] While ultimately accepting the validity of the ordinances, the majority opinion was sensitive to the First Amendment issues involved.

Stevens wrote that the zoning ordinances may not be motivated by displeasure with the content of the theaters' expression.[192] Justice Stevens found that the burden on First Amendment rights was not too great, since the ordinances only limited where adult films could be exhibited.[193] He did say, however, that the case would be very different if the ordinances "had the effect of suppressing, or greatly restricting access to, lawful speech."[194] Thus, the decision recognized that property regulations that touch on free speech rights cannot ignore that First Amendment aspect. The state cannot use its property regulations to eliminate certain speech

184. *Id.* at 521.

185. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 399 (2000) (Stevens, J., concurring).

186. *See Moore*, 431 U.S. at 514 (Stevens, J., concurring).

187. *See id.* at 515–21.

188. It seems as though Justice Stevens found this zoning ordinance to be particularly egregious, as it prevented a grandmother from sheltering her two grandsons, solely because they were cousins and not brothers. *See Shrink Mo.*, 528 U.S. at 399 (Stevens, J., concurring).

189. Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

190. *Id.* at 52.

191. *Id.* at 73.

192. *Id.* at 64.

193. *Id.* at 71.

194. *Id.* at 71 n.35.

interests. A property analysis of political money then would not allow the legislature to ban all expenditures and contributions, as this ban would greatly restrict access to lawful speech.

Another particularly important case for review is *Walters v. National Association of Radiation Survivors.*[195] In *Walters*, the Court upheld a $10 attorney fee limit for counsel representing claimants before the Veterans Affairs Administration, denying that such a limit deprived claimants of due process.[196] The majority said that the attorney fee limitation was justified in order to maintain the non-adversarial process that Congress established for the adjudication of veterans' benefits.[197] The use of one's property—here money—even when it implicates First Amendment issues, may be restricted to maintain a process that Congress has judged to be proper.[198] Congress determined that veterans' benefit disputes are best resolved non-adversarially,[199] and hired attorneys would distort this adjudicatory process by making the hearings more like trials. To prevent this distortion, Congress placed a limit on the amount of money a claimant may spend on an attorney.[200] The Court deferred to this judgment, in essence saying that Congress is better suited to determine what process is best.[201]

Some commentators have said that this ruling effectively undermined the logic of *Buckley.*[202] As Professor Baker wrote, "*Walters* puts a financial limit on a person's right to speak to the government within the context of an institution, like an electoral process, that is specifically designed and created by the government."[203] In fact, Justice Stevens, in dissent, even analogized the fee limitation to an expenditure limit.[204] The electoral process is designed, implemented, and regulated by the state. The state thus has an interest in maintaining an undistorted process, and it may set restrictions to do so.[205] These restrictions may include limits on the

195. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

196. *Id.* at 334.

197. *Id.*

198. *See id.* at 323, 334–35 (stating that whatever burdens are placed on claimants' First Amendment rights were outweighed by the Government's interest in maintaining the process).

199. *Id.* at 324.

200. *Id.* at 326.

201. *Id.*

202. *See* Baker, *supra* note 139, at 758 n.36.

203. *Id.*

204. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 364 n.13 (1985) (Stevens, J., dissenting).

205. *See Politics and the Constitution, supra* note 57, at 1004 (asking: "To what extent does [money] poison the political process? . . . [And] what may the people, acting through Congress, do about it?").

use of political money. The courts should apply a deferential standard to allow Congress to determine the best way to maintain the integrity of its process. But the courts may not be completely deferential, as they may not allow a ban on access to lawful speech or too great a restriction on that access.

The Court has actually already employed an analysis similar to the one just described in *Austin v. Michigan Chamber of Commerce*.[206] That case was a challenge to a Michigan statute prohibiting corporations from using corporate treasury money to make independent expenditures.[207] The Court upheld the restriction on corporate independent expenditures.[208] Though the decision stands as something of an anomaly, rarely discussed in contribution or expenditure limitations cases,[209] *Austin* not only upheld an expenditure limit for the first time, but it did so at a time when the Court was largely skeptical of campaign finance restrictions.[210] Even more striking was the Court's discussion of the compelling interest served by the statute. Campaign finance measures that have survived judicial scrutiny, both before and after *Austin*, have been held to serve the compelling interest of preventing corruption and the appearance of corruption, with corruption understood to be quid pro quo corruption.[211] But in *Austin*, Justice Marshall, writing for the majority, said:

> Regardless of whether this danger of 'financial *quid pro quo*' corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth . . . .[212]

This holding is a radical expansion of the Court's concept of corruption, both before and after the *Austin* decision. The quid pro quo concept of corruption is aimed at preventing individual

206. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

207. *Id.* at 654–55.

208. *Id.* at 660–61.

209. *See* Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after* Austin, 21 CAP. U. L. REV. 381, 383 (1992) (suggesting that *Austin* may be an aberration).

210. *See* Buckley *is Dead*, *supra* note 98, at 40–42.

211. *See generally*, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003); Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); Buckley v. Valeo, 424 U.S. 1 (1976).

212. *Austin*, 494 U.S. at 659–60 (citations omitted).

government actors from trading political favors for contributions.[213] *Buckley* actually struck down the independent expenditure provision of FECA partly because it claimed that quid pro quo corruption was not a concern with independent expenditures.[214] The concept of corruption articulated in *Austin* seems aimed not at the individual, but at the process itself. Immense aggregations of wealth do not have a corrosive and distorting effect on individuals, but on the electoral process as a whole. Seen this way, *Austin* is the same as *Walters*. *Austin* allows Congress to limit corporations' use of their own wealth within the electoral process to prevent the distortion of the process Congress created. We even see a similar level of deference. While the majority claims to apply strict scrutiny review, it actually uses something less stringent. The Court accepts Michigan's distorting effects of aggregated wealth as a compelling interest without any evidence of such an effect. It defers to the state's judgment that there was a potential for such corruption which warranted the restriction.[215] The Court also does not seem to closely examine whether the restriction is narrowly tailored (although it does state that the restriction is only aimed at corporations, which have particularly large aggregations of wealth that have the greatest potential for corruption).[216] Additionally, the Court seems satisfied that there are other avenues for corporations to influence elections, including setting up a segregated fund for political expenditures that can only accept contributions from individuals connected to the corporation.[217] But the Court makes no showing that these other avenues are adequate for effective advocacy. Unlike *Randall v. Sorrell*, for instance, where the Court looked to see whether the contribution limits were too low to allow for effective campaigning,[218] the *Austin* Court did not seem to look into whether the segregated funds were an *effective* alternative. The Court seemed content with the simple existence of the alternatives. The Court thus seemed to apply a more deferential standard of review, something akin to intermediate scrutiny.

As discussed, *Austin* and *Walters* provide a model of the proper standard of review for campaign finance reform measures under a property analysis. Campaign finance measures must promote the state's interest in preventing the distorting effects of aggregated wealth on the electoral process. The courts should ensure the

213. *See* Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).
214. *See Buckley*, 424 U.S. at 46–47.
215. *See Austin*, 494 U.S. at 661.
216. *Id.* at 660.
217. *Id.*
218. Randall v. Sorrell, 126 S. Ct. 2479, 2492 (2006).

means are adequately tailored to prevent too great a restriction on access to lawful speech, but the courts should be deferential to the judgment of the legislatures as the legislatures are more competent to set the restrictions on the use of political money. This standard would allow for fairly low contribution limits and also for moderately leveled expenditure limits for candidates. Expenditure ceilings set too low for effective campaigning would themselves distort the electoral process by eliminating competition. Independent expenditure ceilings could be set even lower, as they have a significantly smaller place in the electoral process than candidate expenditures.

Overall, this standard would allow legislatures to pass reforms to reduce escalating campaign costs. This standard would free elected officials to be more responsive to constituents, both by making the officials less dependent on big donors and by freeing them of time-consuming fundraising. Courts also would be able to extricate themselves from the midst of the campaign finance debates. Courts would no longer sit as superlegislatures, but would instead set the limits of campaign reform, stepping in when legislatures intruded too far into political money property interests. However, the courts would otherwise defer to the legislature's judgment on the electoral process. Doctrinal realignment of campaign finance issues to a property analysis would significantly improve the campaign finance system.

CONCLUSION

The doctrinal misallocation of campaign finance measures has hampered reform efforts for over thirty years now. The time has come for the Court to realize the effects of its over-protection of speech interests related to the money in politics. Political money is more akin to property that incidentally affects speech than vice versa. The Court has allowed the entrenchment of the moneyed elite through its bizarre equation of money and speech long enough. In the words of Justice Stevens, "[m]oney is property; it is not speech."[219]

219. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).