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## Mistaken Identity: Unveiling the Property Characteristics of Political Money

Spencer A. Overton

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# Mistaken Identity: Unveiling the Property Characteristics of Political Money

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Spencer A. Overton

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*This Article argues that money contributed to and spent on political campaigns ("political money") possesses many of the traits that explain judicial respect for regulation of property, and that courts reviewing restrictions on political money should consider doctrines associated with the Fifth and Fourteenth Amendment Property Clauses. As evidenced by the different degrees of respect afforded to regulations of property and speech, judicial treatment of a particular liberty interest can be explained by the presence and particular posturing of distinct functional issues such as distrust, scarcity, distribution, and interference with others' interests. Campaign finance jurisprudence, however, has categorized political money as warranting exacting judicial protection under the First Amendment, and this formalism causes courts to overlook the intersection of two different constitutional doctrines in the political money context. Instead, courts should glean lessons from both property and speech doctrines to determine the appropriate judicial approach in reviewing regulations of political money.*



# Mistaken Identity: Unveiling the Property Characteristics of Political Money

*Spencer A. Overton\**

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#### INTRODUCTION

"Money is property; it is not speech."<sup>1</sup> So wrote Justice John Paul Stevens in support of the Supreme Court's recent decision to uphold restrictions on campaign contributions in *Nixon v. Shrink Missouri Gov't PAC*.<sup>2</sup> This simple point, which attacks the theoretical underpinnings of the leading campaign finance case, *Buckley v. Valeo*,<sup>3</sup> is more than a meaningless semantic ploy. Rather, by shifting the debate, the language allows for a new analytical framework and provides fresh insights. A discussion of money in politics limited to speech principles, and overlooking property issues, necessarily leads to an incomplete resolution of the campaign finance dilemma. This Article proposes that courts consider both constitutional speech doc-

1. *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 910 (2000) (Stevens, J., concurring).

2. *Id.* at 897 (reversing an Eighth Circuit ruling that \$1075 state contribution limits violated the First Amendment).

3. *Buckley v. Valeo*, 424 U.S. 1 (1976); see discussion *infra* Part I.A.

trines and constitutional property doctrines in developing a new approach to judicial review of campaign finance restrictions.

In *Buckley*, the Supreme Court significantly curtailed the authority of the democratic decision-making process with regard to political money by applying high First Amendment scrutiny to provisions of the Federal Election Campaign Act Amendments of 1974.<sup>4</sup> The *Buckley* Court reasoned that money was a necessary ingredient of "effective" political speech, and that restrictions on political contributions and political expenditures ("political money") thus burdened political speech.<sup>5</sup> Employing high First Amendment scrutiny, the Court upheld a \$1000 contribution limit that it found satisfied a governmental interest in preventing corruption,<sup>6</sup> but invalidated restrictions on spending.<sup>7</sup> In rejecting as illegitimate the government's alleged interest in equalization of the ability of citizens to affect elections, the Court stated 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."<sup>8</sup>

*Buckley's* detractors have traditionally claimed that the case ignores the disparities in wealth among citizens and effectively magnifies the influence of affluence. Critics have insisted that the case erects a disastrous barrier to legislation aimed at enabling widespread, meaningful democratic participation, noting that almost eighty percent of political money raised originates from less than one percent of the population, while the remaining twenty percent comes from less than six percent of the population.<sup>9</sup> Some have emphasized *Buckley's* inconsistency with earlier rulings mandating that "each citizen [shall] have an equally effective voice"<sup>10</sup> in the election of political officials.<sup>11</sup> A number of *Buckley's* critics, apparently conceding that

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4. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (repealed 1976); *Buckley*, 424 U.S. at 44-45.

5. See *Buckley*, 424 U.S. at 16-20.

6. See *id.* at 26-29. In *Shrink*, the Court reviewed contribution limits using a standard of scrutiny that was more stringent than intermediate scrutiny but "different" from the strict scrutiny applied to expenditure limits. See *Shrink*, 120 S. Ct. at 903-04; *infra* note 71.

7. See *Buckley*, 424 U.S. at 47-48.

8. *Id.* at 48-49.

9. See Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1177 (1994); see also E. Joshua Rosenkranz, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 888 (1998) (noting that only four to six percent of Americans make any campaign contributions at all).

10. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

11. See, e.g., Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1211-13 (1994); Raskin & Bonifaz, *supra* note 9, at 1162 n.4.

spending is tantamount to speaking, have tried to shift attention to the concepts found in the Equal Protection Clause as special constitutional warrants for campaign finance reform. Specifically, these commentators have argued that constitutional concerns for equality allow for restrictions on the use of political money, and may even compel affirmative steps, such as public financing of elections, to ensure that citizens have equally effective voices.<sup>12</sup>

Although campaign finance scholarship is characterized by debate over whether the Constitution requires unrestrained freedom in its use or mandates some degree of equality in its use,<sup>13</sup> the dialogue is limited. By tying campaign financing to fixed constitutional principles that impair democratic responses to the issue, both positions aspire to a certainty that is inconsistent with fair and practical implementation. The pure libertarian perspective dismisses the real impact of loosely restricted political money on those with minimal resources and on the quality of American politics. The pure egalitarian position fails to appreciate that excessive restriction on the use of political money infringes upon the liberty of all, and deadens political participation to the detriment of society as a whole (e.g., a complete prohibition on the use of private funds for political purposes would outlaw even the purchase of a posterboard to make a sign criticizing the government). Many attempts to reconcile these two competing principles in concrete contexts have led to conceptual inconsistencies, such as the determination that "immense aggregations of wealth that are accumulated with the help of the corporate form"<sup>14</sup> corrupt the electoral system when they originate from a corporation's general treasury, but not when they come from the salary of the corporation's chief executive officer.<sup>15</sup> Such a myopic focus on individual rights (whether they be absolute or uniform rights) effectively overlooks important concerns that impact democratic structure. For example, incumbent political power can find significant opportunities for entrenchment both in a

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12. See, e.g., Foley, *supra* note 11, at 1215-18; Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 30 (1996); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 278-79 (1993); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625-31 (1982).

13. See Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance*, 10 STAN. L. & POL'Y REV. 23, 23 (1998) ("Two starkly different visions dominate contemporary debates about campaign finance reform. The egalitarian vision wants limits on the amount of money spent on election campaigns in an effort to equalize the financial influence of all voters in the electoral process. The libertarian vision opposes such limits on the ground that they would interfere with the freedom of voters to use their own money to publicize their political views.").

14. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

15. See *id.* at 665.

system with few limitations on political money and in a system mandating that the worth of political money be made uniform for every person.

Neither *Buckley's* emphasis on First Amendment liberty nor prominent alternatives that interpret the First Amendment to require equality in the use of political money effectively capture the complexity of the issues raised by political money. Recognizing these shortcomings, as well as the fact that unlike traditional speech, regulation of political money does not self-evidently fall under control of the First Amendment, alternative approaches in determining the appropriate judicial treatment of political money deserve exploration. In particular, it could be helpful to inquire whether there are any other liberty interests mentioned in constitutional provisions that may be applicable to political money. Another constitutionally protected liberty that is connected to political money (at least as clearly as speech appears to be) might implicate a standard of judicial review that is better suited to the characteristics of political money.

This Article proposes that the Due Process and Takings Clauses (together the "Property Clauses") of the Fifth and Fourteenth Amendments are at least as (if not more) applicable to political money as the First Amendment. Such an application would enhance the authority of Congress and state and local legislatures over political money, as courts, in interpreting the Property Clauses, generally allow for broad legislative regulation of property and economic transactions<sup>16</sup> in areas as varied as minimum wage,<sup>17</sup> antitrust,<sup>18</sup> zoning,<sup>19</sup> rent control,<sup>20</sup> and environmental law.<sup>21</sup> Political money possesses many of the traits that explain judicial doctrines that permit broad legislative authority over property, and lacks some of the traits that most strongly make the case for strict protection of speech. Doctrines equating political money regulation with speech regulation have failed to make these comparisons. The differences between our understandings of speech and property that have seemed to account for entrusting the legislature with a much wider discretion to regulate property

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16. *Economic liberties*, or freedom in "choices and modes of productive activity and investment," are sometimes distinguished from *proprietary liberties*, or freedom in "retention, use, and disposition of lawfully obtained holdings of wealth." Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 95 (1992). In this Article, however, unless explicitly provided, these terms will be used interchangeably.

17. *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

18. *See, e.g.*, *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 129 (1905).

19. *See, e.g.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-90 (1926).

20. *See, e.g.*, *Block v. Hirsh*, 256 U.S. 135, 154 (1921).

21. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

may similarly favor entrusting the legislature with a substantial amount of authority with regard to political money.

As opposed to committing the campaign finance question impractically to either fixed principles of liberty or equality within the constitutional sphere, treating political money more like property would allow legislatures to make informed policy judgments about political money tailored to real, context-specific problems without being committed to either a dogmatic and destructive absolutism or an impossible and dull uniformity. Thinking of political money as property-like in some respects could allow for a legal system that maintains due respect for both the liberties of those with political money and other weighty societal interests, such as widespread participation<sup>22</sup> and limiting the political influence of wealth. This approach resolves the inadequacies (whether through constitutional libertarian or egalitarian perspectives) of heavy-handed judicial constraints on the regulation of political money by moving the debate to the more suitable political arena.<sup>23</sup> Rather than supporting or condemning any particular strategy of reform, judicial treatment that appreciates the property characteristics of political money would provide greater respect for democratic debate and decisions with regard to political money.

As mentioned above, in his concurring opinion in *Shrink*, Justice Stevens agreed that constitutional property considerations are relevant when analyzing restrictions on political money, and that property is not entitled to the same protection as speech, stating:

Money is property; it is not speech . . . Our Constitution and our heritage properly protect the individual's interest in making decisions about the use of his or her own property. Governmental regulation of such decisions can sometimes be viewed either as "deprivations of liberty" or as "deprivations of property," . . . Telling a grandmother that she may not use her own property to provide shelter to a grandchild—or to hire mercenaries to work in that grandchild's campaign for public office—raises important constitutional concerns that are unrelated to the First Amendment . . . The right to use one's own money to hire gladiators, or to fund "speech by proxy," certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases.<sup>24</sup>

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22. See *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring, joined by Ginsburg, J.) ("[Contribution limitations] seek to build public confidence . . . and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.").

23. Cf. *Foley*, *supra* note 11, at 1210-11 (arguing, using a theory of majoritarian interpretation of the First Amendment, that the campaign finance egalitarian/libertarian debate is an issue for legislative resolution).

24. *Shrink*, 120 S. Ct. at 910 (Stevens, J., concurring) (citation omitted). The concurrence by Justice Stevens could also be read as resurrecting (or acknowledging a resurrection of)

While this Article acknowledges that judicial approaches toward political money regulations could benefit from borrowing concepts from property doctrines, the Article differs from the Stevens concurrence in that it does not simply categorize political money as property and propose that regulations of political money be treated like property regulations exclusively.<sup>25</sup> Rather, this Article contends that courts should consider both speech doctrine and property doctrine in developing a new way to look at campaign finance.

Showing that political money is no less appropriately regulated as property than as speech exposes larger concerns. If there are justifiable reasons for entrusting more of the boundary-drawing between individual liberties and societal interests to legislatures in some areas (such as property), but reserving that responsibility to courts in other areas (such as speech), how should matters in the intersection be resolved? Why, when constitutional categories and doctrines overlap in the political money context, should courts apply the most exacting scrutiny required by the First Amendment? Does a court oversimplify the matter when it ignores the intersection and selects as controlling the form of judicial treatment that more stringently scrutinizes legislative regulation? Why should the law choose to apply only one scheme rather than recognizing the intricacies of the issue at hand? This Article will sketch out one possible response to these questions and apply it in the campaign finance context.

In short, this Article challenges *Buckley's* limitation on legislative discretion that treats regulations of political money like regulations of speech. The Article acknowledges the speech/property distinc-

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heightened constitutional protection to certain exercises of property rights pursuant to substantive due process. Stevens writes that "property and liberty concerns adequately explain the Court's decision to invalidate the expenditure limitations in the 1974 Act. Reliance on the First Amendment to justify the invalidation of campaign finance regulations is the functional equivalent of the Court's candid reliance on the doctrine of substantive due process." *Id.* In support of this position, Stevens cites his concurrence in a 1977 case in which he argued that a single-family occupancy zoning ordinance prohibiting a woman from living with her two grandchildren (who were cousins rather than siblings) constituted a taking of property without due process. *See id.*; *Moore v. East Cleveland*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring) ("In my judgment the critical question . . . is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit."). This Article disagrees with Stevens insofar as he means to assert that *Buckley's* respect of contribution limits and invalidation of spending limitations would be warranted under judicial doctrine protecting generic property and liberty rights. This Article does not entertain heightened judicial protection for certain uses of property (e.g., political expenditures) under the Property Clauses, but rather accepts dominant norms regarding property and speech as background assumptions, and reconsiders the proper constitutional treatment of political money in the context of these background assumptions. *See infra* note 82.

25. *See infra* text accompanying notes 207-209 (explaining important differences between property and political money).

tion in constitutional legal doctrine, the reasons behind it, and the implications of these reasons upon the allocation of authority between courts and legislatures with regard to political money. Courts should acknowledge that political money has characteristics of both speech and property, and give greater respect to legislative decisions in this area by treating regulations of political money more like (but not exactly like) regulations of property.

Part I of this Article discusses *Buckley's* application of the First Amendment to political money, and describes the different judicial treatment accorded speech and property interests. Part II introduces the Article's framework for analyzing political money, and distinguishes it from those who argue that the marketplace of ideas is similar to the economic marketplace in ways that warrant a wider berth for speech regulation than the Court currently allows. Parts III and IV make two claims about political money's crucial similarities to property and differences from speech. First, judicial respect for legislative authority in regulating property is best accounted for by recognition of concerns about scarcity, distribution, and interference with others' interests that also appear in the political money context. Second, while the principle of distrust of incumbent power is applicable in both the speech and political money contexts, the protection of political money from regulation has consequences that differ from those that stem from the protection of speech from regulation. Judicial protection for speech effectively prevents incumbents and ruling political groups from using their authority to regulate speech in a manner that favors themselves and entrenches their own power. Immunization of political money from most restrictions is different, however, as it enhances the ability of entrenchment-minded ruling officials and groups to increase their political power by manipulating any lawmaking that has economic implications. Part V considers both property and speech doctrines in proposing a judicial approach that simultaneously respects democratic decision-making while guarding against unfair entrenchment by incumbent officials and ruling political groups.

## I. BUCKLEY AND JUDICIAL PROTECTION OF LIBERTY INTERESTS

A. *Judicial Protection of Expressive Liberties May Vary*

*Buckley*, the seminal case concerning political money,<sup>26</sup> involved a challenge to the Federal Election Campaign Act Amendments of 1974 (the "1974 Act").<sup>27</sup> The 1974 Act, although "technically a set of amendments to the 1971 Federal Election Campaign Act . . . stands as the most comprehensive reform of the campaign finance system ever adopted,"<sup>28</sup> and included limitations on campaign contributions and expenditures.<sup>29</sup> With regard to contributions, the 1974 Act prohibited an individual from giving more than \$1000<sup>30</sup> to a particular candidate

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26. Extensive debate has occurred regarding the validity of *Buckley's* distinction between restrictions on the act of spending money for political purposes and restrictions on the act of contributing money directly to a political candidate or committee. See *Buckley v. Valeo*, 424 U.S. 1, 45-47 (1976) (per curiam); *Shrink*, 120 S. Ct. at 903-05. For different perspectives of the debate, see, for example, *Buckley*, 424 U.S. at 261-62 (White, J., concurring in part and dissenting in part) (proposing that courts give greater deference to expenditure limits, treating them more like contribution limits), and *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 635-40 (1996) (Thomas, J., concurring in part and dissenting in part) (asserting that courts should apply greater scrutiny to contribution limits, treating them like expenditure limits). The analysis advanced in this Article applies to both the acts of contributing and spending, and thus employs the term "political money" to collectively refer to political contributions and expenditures. See *infra* note 74.

27. See *Buckley*, 424 U.S. 1; see also Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (repealed 1976).

28. CAMPAIGN FINANCE REFORM: A SOURCEBOOK 53 (Anthony Corrado et. al. eds., 1997). The Federal Election Campaign Act of 1971 "limited personal contributions [by candidates and their families], established specific ceilings for media expenditures, and required full public disclosure of campaign receipts and disbursements." *Id.* at 52. The 1974 Act "significantly strengthened the disclosure provisions of the 1971 law and enacted unprecedented limits on contributions and expenditures in federal elections. It introduced the first use of public financing at the national level . . . [and created] the Federal Election Commission." *Id.* at 53.

29. This Article is limited to a discussion of the portion of the 1974 Act concerning campaign contributions and expenditures. *Buckley* also invalidated regulatory provisions providing for the appointment of some FEC commissioners by congressional leaders (based on the separation of powers doctrine), see *Buckley*, 424 U.S. at 138-41, and upheld disclosure, see *id.* at 60-84, and public financing provisions, see *id.* at 85-109. For important literature providing additional information on *Buckley* and the campaign finance dilemma generally, see generally E. JOSHUA ROSENKRANZ, BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM (1998) (providing *Buckley's* holding, effects, and problems, and discussing strategies to overturn *Buckley*); CAMPAIGN FINANCE REFORM: A SOURCEBOOK, *supra* note 28 (providing a broad overview of campaign finance controversies, regulations, opinions, and reform proposals); SAMUEL ISSACHAROFF ET AL, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 616-64 (1998) (covering major campaign finance cases and issues); DANIEL HAYS LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS 507-44 (1995) (covering the contribution and expenditure limit holdings of *Buckley*); DANIEL H. LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: SUPPLEMENT 1999-2000, at 77-127 (1999) (discussing the Court's campaign finance jurisprudence).

30. See 18 U.S.C. § 608(b)(1) (Supp. IV 1974) (modified 1976, recodified at 2 U.S.C. § 441a(a)(1)(A) (1994)).

per election<sup>31</sup> and limited an individual's overall contributions to \$25,000 per year.<sup>32</sup> The expenditure limitation provisions were as follows: (1) a \$1000 annual ceiling on independent expenditures—expenditures by a non-candidate to promote the election or defeat of a clearly identified candidate;<sup>33</sup> (2) an annual ceiling on campaign expenditures from a candidate's personal or family funds;<sup>34</sup> and (3) a variable ceiling on total campaign expenditures from all sources.<sup>35</sup>

Lawyers defending the 1974 Act argued that three congressional objectives had motivated the law: (a) prevention of corruption and the appearance of corruption; (b) equalization of influence of citizens; and (c) reduction of barriers to participation in the political process by potential candidates.<sup>36</sup> Some commentators suggest that, in reality, incumbency self-preservation objectives motivated lawmakers to pass the 1974 Act.<sup>37</sup>

In *Buckley*, the primary question in determining the standard of scrutiny to apply to the 1974 Act was whether contribution and expenditure limitations directly burdened speech, or whether they had merely an incidental effect on speech.<sup>38</sup> Under established doctrine, a finding of a direct burden on speech would subject the 1974 Act to the most stringent scrutiny, which invalidates all laws that fail to serve compelling governmental interests by the least restrictive means.<sup>39</sup> Conversely, a determination that contribution and expenditure limitations only incidentally affected speech would mean that the 1974 Act would be constitutional if it contributed substantially to an important governmental interest unrelated to suppression of free expression and if its restriction on expression was no greater than essential to further the interest.<sup>40</sup> For example, laws directed at restricting conduct like

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31. An election may refer to either a primary or general election, and thus the 1974 Act limits contributions to \$1,000 for the primary election and \$1,000 for the general election. See *Buckley*, 424 U.S. at 24.

32. See 18 U.S.C. § 608(b)(3) (Supp. IV 1974) (modified 1976, recodified at 2 U.S.C. § 441a(a)(3)) (1994).

33. See *id.* § 608(e)(1) (Supp. IV 1974) (repealed 1976).

34. See *id.* § 608(a)(1) (Supp. IV 1974) (repealed 1976).

35. See *id.* § 608(c) (Supp. IV 1974) (repealed 1976).

36. See *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976) (per curiam).

37. See, e.g., Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1076-81 (1985); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1072-75 (1996).

38. See *Buckley*, 424 U.S. at 15.

39. See *id.* at 14-23, 44-45.

40. See *id.* at 16 (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)).

the burning of draft cards<sup>41</sup> and reasonable “time, place, and manner” limitations on picketing<sup>42</sup> or the use of a sound truck,<sup>43</sup> are not subject to strict scrutiny.<sup>44</sup>

Several commentators have argued that political money is incidentally related to speech, and thus the less demanding standard of scrutiny should be used in reviewing regulation of political money. They notably include Judge J. Skelly Wright, who served on the en banc panel of the U.S. Court of Appeals for the District of Columbia Circuit that considered the *Buckley* case prior to the Supreme Court hearing<sup>45</sup> and wrote a widely noticed article on the issue.<sup>46</sup> Judge Wright claimed that campaign money is a mere “vehicle for political expression,” and that “[r]estrictions on the use of money should be judged by the tests employed for vehicles—for speech-related conduct—and not by the tests developed for pure speech.”<sup>47</sup> He asserted that the 1974 Act was directed at the giving and spending itself, rather than the communication that could be bought with the money.<sup>48</sup> Congress, Judge Wright argued, wanted a “straightforward regulation of the excessive use of money as a blight on the political process,”<sup>49</sup> and “was unconcerned with the type or quantity of speech that might result”<sup>50</sup> under the new limits. Judge Wright further noted that a gift of money, by itself, does not express any ascertainable content or

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41. The speech/conduct distinction was introduced in *United States v. O'Brien*, 391 U.S. 367 (1968). *O'Brien* involved a war protester convicted for violating a statute that prohibited the burning of draft cards. See *id.* at 369. Despite the defendant's claims that he was engaging in political expression in burning his draft card, the Court sustained the conviction, holding that *O'Brien's* act was not pure speech and that an important governmental interest was advanced by the protection of draft cards. See *id.* at 377-81. The Court recognized that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important [as opposed to compelling] governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *Id.* at 376.

42. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965).

43. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949).

44. The Court in *Buckley* found this lower standard inapplicable to political money restrictions because the 1974 Act, rather than regulating the manner of speech, imposed “direct quantity restrictions” that limited the “extent” of political communication. *Buckley*, 424 U.S. at 18 & n.17.

45. The U.S. Court of Appeals for the District of Columbia held that restrictions on political giving and spending were constitutional. See *Buckley v. Valeo*, 519 F.2d 821, 831-32 (1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). Judge Wright wrote at least part of the per curiam opinion issued. See Wright, *supra* note 12, at 645.

46. See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

47. *Id.* at 1007.

48. See *id.* at 1008.

49. *Id.*

50. *Id.* at 1008 n.36.

viewpoint,<sup>51</sup> and is also an ineffective expression of intensity of support since contributors have varied economic standings in life, and those of differing wealth incur differing levels of sacrifice in making equal monetary contributions.<sup>52</sup> While Judge Wright acknowledged that there are "delicate links" between campaign money and speech that necessitate careful judicial review, he warned that it is a mistake to analyze the problem using a "blunderbuss formula that equates money and speech."<sup>53</sup>

In contrast, the *Buckley* Court strongly rejected the notion that giving and spending political money could be severed from the most urgent objectives of the First Amendment.<sup>54</sup> To the Court, the fact that a communication was produced by money did not alter its significance as a communication, or dilute a "pure form of expression."<sup>55</sup> The activity of supplying money to pay for the production or dissemination of political messages was too directly connected to First Amendment values and objectives to be described merely as incidental "conduct intertwined with expression."<sup>56</sup> The Court stated that:

Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.<sup>57</sup>

The Court reasoned that in modern society "television, radio, and other mass media" were "indispensable instruments of effective political speech"<sup>58</sup> and made "the raising of large sums of money an ever more essential ingredient of an effective candidacy."<sup>59</sup> In the Court's view, the 1974 Act did not merely burden speech incidentally as a time, place, and manner restriction or other regulation directed at conduct might because "the Act's dollar ceilings *restrict[ed]* the extent of the reasonable use of *virtually every means* of communicating information."<sup>60</sup> Contrary to popular opinion, *Buckley's* initial application of speech doctrine to regulations of political money is not based on the

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51. *See id.* at 1009.

52. *See id.* at 1014.

53. *Id.* at 1010.

54. *See Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam).

55. *Id.* at 17 (quoting *Cox v. Louisiana*, 379 U.S. 559, 564 (1965)).

56. *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 559, 563 (1965)).

57. *Id.* at 16.

58. *Id.* at 19.

59. *Id.* at 26.

60. *Id.* at 18 n.17 (emphasis added).

logic that “money is speech” (spending is *the same thing* as speaking).<sup>61</sup> Rather, *Buckley*’s application of speech doctrine was premised on the rationale that money is so strictly necessary to “effective political speech”<sup>62</sup> that a restriction on money effectively constitutes a restriction on speech.<sup>63</sup> By analogy, although consuming gas is a different activity than driving a car, a restriction on gas consumption necessarily limits how far one can drive.<sup>64</sup>

In applying “rigorous” First Amendment scrutiny, the Court upheld the \$1000 contribution limits, determining such limits had less of an effect on First Amendment liberties and adequately served governmental interests of preventing corruption and the appearance of corruption.<sup>65</sup> The Court invalidated the three expenditure limitation provisions, however, reasoning that they more directly burdened First Amendment liberties and that unlimited expenditures did not pose the same danger of corruption as contributions.<sup>66</sup>

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61. A number of commentators have interpreted *Buckley* as equating money with speech. See, e.g., Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1277 (1994); Debra Burke, *Twenty Years after the Federal Election Campaign Act Amendments of 1974: Look Who’s Running Now*, 99 DICK. L. REV. 357, 370 (1995); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 389 (1990); Alan B. Morrison, *What If . . . Buckley Were Overturned?*, 16 CONST. COMMENTARY 347, 369-70 (1999).

62. *Buckley*, 424 U.S. at 19.

63. See *id.* at 26; see also ROSENKRANZ, *supra* note 29, at 32.

64. See *Buckley*, 424 U.S. at 19 n.18 (“Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.”).

65. See *id.* at 26-29. There exists a split among the circuits regarding the appropriate judicial standard of review for contribution limits. One perspective interprets *Buckley* as requiring the application of strict scrutiny to both contribution and expenditure limits, and as finding that limits advanced the state’s compelling interest in preventing quid pro quo corruption in the contribution context but not in the expenditure context. See, e.g., *Russell v. Burris*, 146 F.3d 563, 567-68 (8th Cir.), *cert. denied*, 119 S. Ct. 510 (1998) (expressly rejecting a lower standard of review and applying strict scrutiny in analyzing contribution limits on contributions). The alternative perspective, relying upon *Buckley*’s statement that expenditure limits burden freedoms of political expression and association more extensively than contribution limits asserts that the *Buckley* Court applied a slightly lower standard of scrutiny to limitations on contributions. See, e.g., *Vannatta v. Keisling*, 151 F.3d 1215, 1220-21 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 870 (1999) (applying “rigorous, rather than strict, scrutiny” in reviewing contribution limits). This Article proposes a different analysis—specifically, that in reviewing the regulation of political money (whether contributions or expenditures), the Court should consider the purposes of judicial protection of speech and deference to property regulation, and take actions that are consistent with these purposes. In other words, courts should not mechanically protect political money from regulation simply because speech is protected from regulation, for the results of protecting political money may run counter to the objectives of immunizing speech. See *infra* Part II.A.

66. See *Buckley*, 424 U.S. at 47-48 (reasoning that expenditures involving quid pro quo would necessarily involve coordination with the candidate, and would thus be treated as contributions and limited to \$1000); see also *id.* at 39-59 (discussing and invalidating expenditure limitations). It is also worth noting that the Court in *Buckley* believed that contribution limits

Twenty-four years later in *Shrink*, the Court acknowledged that the *Buckley* opinion was unclear in articulating the standard of scrutiny to be applied in reviewing contribution limits.<sup>67</sup> The *Shrink* Court responded by interpreting *Buckley* as reviewing contribution limits with a standard more stringent than intermediate scrutiny but “different” from the strict scrutiny applied by expenditure limits.<sup>68</sup> The *Shrink* Court described “*Buckley*’s standard of scrutiny”<sup>69</sup> as requiring that a contribution restriction be “‘closely drawn’ to match a ‘sufficiently important interest.’”<sup>70</sup> After finding that the prevention of corruption and the appearance of corruption constituted govern-

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imposed special burdens upon the First Amendment freedom of political association. *See id.* at 24-25. According to the *Shrink* Court, *Buckley* did not “attempt to parse distinctions between the speech and association standards of scrutiny,” but “proceeded on the understanding that a contribution limitation surviving a claim of associational abridgement would survive a speech challenge as well.” *Shrink*, 120 S. Ct. at 904. This Article compares proprietary liberties to expressive liberties generally rather than associational liberties in particular. Many of the assertions advanced in this Article regarding expressive liberties, however, are applicable to associational liberties (e.g., a purpose of judicial protection of both is to prevent incumbent political power from entrenching itself by curtailing the exercise of these liberties), perhaps due to the close relation between First Amendment expressive and associational liberties. *See Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (“[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 88 (“To the Court, the freedom of association has meaning only when the association’s participants are attempting to accomplish an objective independently protected by the freedom of speech.”); Sally Frank, *The Key to Unlocking the Clubhouse Door*, 2 MICH. J. GENDER & L. 27, 59 n.146 (1994) (“The concept of freedom of association for expressive purposes derives from the freedom of speech and freedom of assembly clauses of the First Amendment of the Constitution.”).

67. *See Shrink*, 120 S. Ct. at 903 (“Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley* per curiam opinion.”). Prior to *Shrink*, there was a split among the circuits regarding the appropriate judicial standard of review for contribution limits. One perspective interpreted *Buckley* as requiring the application of strict scrutiny to both contribution and expenditure limits, and as finding that limits advanced the state’s compelling interest in preventing quid pro quo corruption in the contribution context but not in the expenditure context. *See, e.g., Russell v. Burris*, 146 F.3d 563, 567-68 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 510 (1998) (expressly rejecting a lower standard of review and applying strict scrutiny in analyzing contribution limits on contributions). The alternative perspective, relying upon *Buckley*’s statement that expenditure limits burden freedoms of political expression and association more extensively than contribution limits, *Buckley*, 424 U.S. at 23, asserts that the *Buckley* Court applied a slightly lower standard of scrutiny to limitations on contributions. *See, e.g., Vannatta v. Keisling*, 151 F.3d 1215, 1220-21 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 870 (1999) (applying “rigorous, rather than strict, scrutiny” in reviewing contribution limits).

68. *Shrink*, 120 S. Ct. at 903-04.

69. *Id.* at 904.

70. *Id.* at 904 (quoting *Buckley*, 424 U.S. at 25). Justice Thomas contended that the *Shrink* majority did not clarify *Buckley*’s standard for reviewing contribution limits, but diluted it. *See id.* at 924 (Thomas, J., dissenting, joined by Scalia, J.) (“In refashioning *Buckley*, the Court then goes on to weaken the requisite precision in tailoring, while at the same time representing that its fiat ‘do[es] not relax *Buckley*’s standard.’”).

ment interests that were sufficiently important to justify contribution limits,<sup>71</sup> the *Shrink* Court stated that contribution limits should be deemed too low if they “impede the ability of candidates to ‘amass the resources necessary for effective advocacy.’”<sup>72</sup>

Although the judicial standards applied to contribution limits and expenditure limits may differ, both involve upper levels of First Amendment scrutiny and focus on the effect of the limits on speech while ignoring relevant property doctrines. Consequently, this Article’s analysis applies to both political contributions as well as expenditures,<sup>73</sup> and to *Buckley* as well as its progeny (including *Shrink*, which interprets rather than overturns *Buckley*).

### B. Judicial Protection Varies From Speech to Property

While *Buckley* applied high standards of scrutiny to review restrictions on political money, legislative regulations of liberty interests generally warrant various types of judicial treatment. Lawyers classify various liberty interests “by function” for, as the liberty interests differ, the understanding of what a person should (or should not) be

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71. The *Shrink* Court did not define “corruption” as limited to quid pro quo arrangements, but also “extending to the broader threat from politicians too compliant with the wishes of large contributors.” *Shrink*, 120 S. Ct. at 905.

72. *Id.* at 909 (quoting *Buckley*, 424 U.S. at 21) (internal brackets omitted). The proper inquiry asks “whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” *Id.* at 909.

73. Despite the fact that contributions, unlike expenditures, can be limited, the analysis advanced in this Article is applicable to political contributions. Although the current application of First Amendment strict scrutiny to expenditure limits may be more absolute and unreasonable than the “rigorous” standard applied to contribution limits, both tests are confined to an upper level First Amendment framework that overlooks constitutional property doctrines and severely limits legislative discretion. The Court’s analysis of contribution limits continues to be focused on the effect the Court perceives the particular limit has upon speech, and fails to consider the property characteristics of contributions that justify judicial deference to restrictions (e.g., scarcity, uneven distribution, and interference). See *infra* Part III. Consequently, a \$250 contribution limitation that burdens the speech of the wealthy would be invalidated, even in the face of legislative findings suggesting that a \$250 limit is needed to address problems stemming from the uneven distribution of political money (e.g., absent a \$250 limit, officials would pander almost exclusively to the wealthy class of individuals who give most of the \$1,000 contributions). Rather than focusing solely on the effect on speech in either the contribution or expenditure limitation context, this Article proposes that in reviewing the regulation of political money (whether contributions or expenditures), the Court should consider the purposes of judicial protection of speech and deference to property regulation, and take actions that are consistent with these purposes. In other words, courts should not mechanically protect political money from regulation simply because speech is protected from regulation, for the results of protecting political money may run counter to the objectives of immunizing speech. See *infra* Part II.A.

free to do in her various field of application also differs.<sup>74</sup> For example, expressive liberties correspond to an individual's interest in "freedom from government control over what they say and over how, when, and where they say it."<sup>75</sup> Proprietary liberties, on the other hand, are commonly understood as an individual's interest in freedom from government control over her acquisition, "retention, use, and disposition of lawfully obtained holdings of wealth."<sup>76</sup>

It is also clear that, in contemplating lawmaking, the Constitution very purposefully "entrusts to lawmakers a range of legislative discretion" to secure and promote sundry public and common objectives, such as securing the social and economic conditions required for everyone's enjoyment of constitutionally recognized liberties.<sup>77</sup>

Recognizing the tension inherent in the Constitution's simultaneous concern for individual rights and contemplation of lawmaking, courts are charged with interpreting and implementing the Constitution's intentions about how the lines are to be drawn between these two classes of objectives.<sup>78</sup> Courts have devised various "tests" and "levels of scrutiny" to aid them in their implementation of what they believe the Constitution intends with regard to this balancing.<sup>79</sup> These tools have been created by courts to both constrain judicial power from infringing upon the discretion entrusted to the legislature by the Constitution, and give notice to society generally as to how courts will implement the Constitution. While these judicially created devices include standards of review (e.g., rational basis, intermediate, and strict scrutiny), they also include tools used to ascertain which standard of review to apply, such as the direct/incidental test discussed in *Buckley*.

In determining the proper standard of review to apply, courts also take into consideration their perception of the type of liberty interest to be regulated. For example, courts afford the public lawmaking process much more discretion in regulating property than in regulating speech.<sup>80</sup> Indeed, while speech is occasionally permissibly

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74. See Michelman, *supra* note 16, at 94.

75. *Id.* at 95.

76. *Id.*

77. *Id.* at 93.

78. See Richard H. Fallon, Jr., *Foreword: Implementing The Constitution*, 111 HARV. L. REV. 54, 57 (1997).

79. See *id.* at 67, 74-75.

80. In order to survive judicial scrutiny, direct restrictions of political speech must be narrowly tailored to achieve a compelling state interest, whereas the state's regulation of property interests must, at most, only substantially advance a legitimate state interest. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992) (suggesting that the public lawmaking process has broader regulatory discretion over personal property than real property

regulated (e.g., laws that incidentally burden speech) and regulation of property is occasionally deemed excessive (e.g., a regulatory taking), these instances only support the proposition that judicial treatment is somewhat situation-specific, and do not negate the existence of the broader dispositions with regard to judicial treatment of speech and property.<sup>81</sup> As Dean Kathleen Sullivan explains:

There are whole categories of speech that have been excluded from First Amendment protection—for example, incitement, obscenity, and fighting words. But the *Lochner* regime also carved out large exceptions, permitting regulation of transactions “affected with a public interest,” or of women’s hours at work. These exceptions did not obscure the libertarian tendency of the *Lochner* Court. True, too, the Court upholds many content-neutral laws against First Amendment challenge even though they may in practice decrease the amount or tilt the direction of speech. But the Court places far greater burdens on government to defend such laws than it does in the realm of economic regulation. Thus, these qualifications do not defeat the generalization that modern constitutional law employs opposite assumptions for the speech and economic orders.<sup>82</sup>

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under the Takings Clause); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that content-based restrictions on political speech must be subjected to the most exacting scrutiny); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 & n.3 (1987) (explaining that while economic regulations satisfy substantive due process if they are rationally related to a legitimate state interest, land-use property regulation must substantially advance legitimate state interests to comply with the Fifth Amendment Takings Clause); see also Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 950 (1995) (“Modern constitutional law . . . treats speech as presumptively immune from regulation that is broadly permitted in the economic sphere.”).

81. The framework employed in this Article uses dominant norms related to property and speech to examine the nature of political money, and thus mirrors *Buckley’s* understanding of a First Amendment that disfavors government regulation of political speech, as well as the common belief that the public lawmaking process has wide discretion with regard to regulating proprietary liberties. Commentators generally accept these propositions, but most would be inclined to qualify them (e.g., property is sometimes protected, speech is occasionally regulated). While the distinctions highlighted below may be too broad for some purposes (and may appear intentionally overstated), they are useful when employed for the specific task of examining political money in light of the functional similarities and distinctions between property and speech that may explain the disparate judicial treatment of those two liberty interests. Indeed, by taking into account both property and speech, this analysis is more comprehensive than a framework that simply compares political money to regulated types of speech and unregulated types of speech, or regulated property and unregulated property. Further, some commentators will probably strenuously object to the legitimacy of current judicial treatment of regulations of property and speech, arguing either for an escalation in the level of judicial protection for property, see, e.g., Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 41-43 (1992), or greater judicial respect of legislative authority in regulating speech, see, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986). Rather than engaging in extended debate as to whether existing jurisprudence regarding speech and property should be changed, this Article adopts these dominant norms as background assumptions. Cf. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 n.8 (1984) (defending the methodology of using dominant norms as tools in functional analysis).

82. Sullivan, *supra* note 80, at 951 (citations omitted).

## II. SPEECH VS. PROPERTY

The different degrees of protection given to speech and property have varied historically, with judicial protection of speech from regulation and judicial respect for property regulation simultaneously unfolding only within the last 65 years.<sup>83</sup> As evidenced by the evolving nature of the standards themselves, they are dictated not by the specific text of the Constitution,<sup>84</sup> but rather by judicial perceptions of the functions in society of the particular liberty interests regulated and of the distinct institutional capacities of the judicial and legislative branches.<sup>85</sup> Courts, noticing that exercises of different classes of liberties have different kinds of social consequences, find it prudent to respond to these functional differences by fitting the classes with customized "forms and degrees of protection."<sup>86</sup>

The particular functional differences that explain the disparate judicial treatment of property regulations and speech regulations can help determine the proper treatment for regulations of political money.<sup>87</sup> Specifically, issues of scarcity, distribution, and interference

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83. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 388-92 (discussing the academic and jurisprudential evolution toward the regulation of economic and property interests); Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1318-24 (1983) (addressing the jurisprudential evolution toward absolutism in the speech context).

84. See Sullivan, *supra* note 80, at 951 ("It cannot be that the two different constitutional regimes simply spring grammatically or logically from different pieces of constitutional text.").

85. See Fallon, *supra* note 78, at 62 (stating that "in shaping constitutional tests, the Supreme Court must take account of empirical, predictive, and institutional considerations that may vary from time to time."); cf. MARGARET JANE RADIN, REINTERPRETING PROPERTY 166-90 (1993) (explaining how cultural commitments and political theory structure courts' perceptions of interests). There is no sharp, conclusive definition of either speech or property, or how those possessing these liberty interests should be able to exercise them. Certainly, speech and property (and political money) are what courts consciously perceive them to be. These perceptions are not stagnant but fluid (even those currently outside of the jurisdiction of the legislature, such as speech), ever-changing, and based not only on "government action narrowly conceived," but also on the information obtained and the events occurring in the world, including legal changes. *Id.* at 168.

86. Michelman, *supra* note 16, at 95.

87. Others have argued that the differences in the judicial treatment of economic and expressive liberties are justified by their distinct functional characteristics. In particular, the argument has been used to criticize Professor Richard Epstein's proposal that judicial protection of property from regulation be escalated to the level of speech protection. See, e.g., *id.* at 95, 99-105 (responding to Epstein, *supra* note 81, at 41-43). Commentators have also employed the argument in objecting to calls for greater judicial respect of legislative authority in regulating speech. See, e.g., Sullivan, *supra* note 80, at 959-64; Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 213-14 (1994); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 266-80 (1996). While prior commentators have emphasized the functional differences between property and speech to critique those that call for a collapse in the

with others' interests explain judicial respect for legislative intervention in the property context and warrant similar judicial treatment of regulations of political money.<sup>88</sup> Further, judicial protection of speech is motivated in significant part by the threat of entrenchment by self-interested incumbent political powers, and this threat is not avoided by immunization of political money from legislative limits.<sup>89</sup>

### A. A Functional Framework

In comparing political money to any liberty interest, one must first identify the norm (or norms) explaining why courts treat laws affecting that liberty interest in a particular manner, for courts ought to treat political money similarly only if political money is similar to that liberty interest in the pertinent respects.<sup>90</sup> For example, in comparing speech and political money, one must ask why courts restrict legislative discretion in regulating speech, and approach laws regulating political money in the same manner only if political money is relevantly similar to speech in light of the purposes of restraining legislative discretion.<sup>91</sup> Similarly, in comparing political money to property, one must initially determine the reasons courts generally respect decisions of the public lawmaking process with regard to property, and should consider applying a similar analysis only if political money is relevantly similar to property.<sup>92</sup>

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distinct judicial treatment of property regulation and speech regulation, this Article accepts these functional distinctions and uses them to construct a framework in which to ascertain the proper judicial treatment of regulations of a third interest, political money. This methodology provides a new way of considering *Buckley*.

88. See *infra* Part III.

89. See *infra* Part IV.

90. See Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1332 (1994) (asserting that effective comparisons require a consideration of norms "encompassing both the central case and its putative extension"); cf. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Reasoning by Analogy*, 109 HARV. L. REV. 923, 994-96 (1996) (explaining that one must often look to the purposes of a rule to determine whether it is applicable); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 774 (1993) ("Everything is a little bit similar to, or different from, everything else . . . . At the very least one needs a set of criteria to engage in analogical reasoning. Otherwise one has no idea what is analogous to what.").

91. See Schauer, *supra* note 90, at 1332. Commentators have attempted to use the First Amendment to protect a wide range of activities outside of literal "speech." For example, Thomas Emerson explicitly displaces the term "speech" with the broader term "expression." See generally THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970). The linguistic shift, however, does not remove the need to explain why a particular activity is "entitled to absolute immunity from state control." Epstein, *supra* note 81, at 60-61.

92. One could certainly argue that there exists no need to compare political money and property, as case law has already established that money is property. See, e.g., *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998) (holding that interest earned in client trust accounts is private property for Takings Clause purposes). The observation that some cases have

Conversely, if there are normative differences between property and speech that are irrelevant to the reasons that courts approach regulations of property and speech with different degrees of respect, they are probably less helpful in determining which institution should have primary authority over political money.<sup>93</sup> For example, Thomas Emerson associates various values with speech, including: (1) the "attainment of truth" acquired "by considering all facts and arguments which can be put forth in behalf of or against any proposition;"<sup>94</sup> and (2) "participation in decision-making through a process of open discussion which is available to all members of the community."<sup>95</sup> While these values are central to the essence of speech, neither necessarily explains judicial protection of speech from regulation. Certainly, one could argue that Emerson's attainment of truth value is fully realized only when all of the facts (or as many as possible) are on the table, and that this goal can best be furthered by state restriction on the speech of those with loud voices so that the perspectives of those with faint voices may be heard. Similarly, one could argue that government should restrict the speech of those with loud voices so that those with faint voices can also meaningfully participate in democratic decision-making. The characteristics of speech and property that are unrelated to which institution should have primary authority over political money are not particularly helpful in this analysis.<sup>96</sup> On the

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treated money like property, however, does not cut to the heart of the question of judicial treatment of political money. Dicta that money is property does not, by itself, take into account the general characteristics of money that explain regulation, and the existence of these identical characteristics in the particular context of political money. In short, a judicial opinion stating that "money is property" is as deficient for the purposes of this Article as a case stating that "money is speech."

93. Cf. Schauer, *supra* note 90, at 1333-35. In addition to scarcity, uneven distribution, and unfair interference with others' interests, political money and property are connected by a number of other characteristics related to possession, exclusive control, and transferability. For example, an ownership interest enforced by government prevents non-owners from freely using political money and other types of property without the consent of owners (e.g. "money is speech" is unlikely to be a successful defense for one charged with embezzling \$50,000 from a corporate PAC), whereas there is generally no need for government to prevent others from using a speaker's speech (unless it is described as intellectual "property"). Additionally, the power associated with political money and other types of property can be meaningfully transferred from one person to another. A more extensive exploration of these similarities and differences may provide further insight into the proper judicial treatment of regulations of political money. This Article, however, focuses on the characteristics that appear to be the most relevant in explaining why courts give more respect to restrictions of property (scarcity, distribution, and interference).

94. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963).

95. *Id.* at 882. Professor Emerson's other values of speech are self-fulfillment and the maintenance of a stable community through interaction and exchange. See *id.* at 878-79.

96. As discussed throughout this Article, institutional considerations are relevant in resolving the question of whether the main control over political money belongs more appropriately

other hand, factors related to judicial protection of liberty interests from the public lawmaking process, such as special distrust of incumbent legislators and democratic majorities tempted to manipulate speech regulation to entrench their own political power, might be valuable in explaining judicial treatment that minimizes legislative authority over speech.

In short, the normative differences between speech and property that explain different judicial treatment of the two must be examined in order to gain meaningful insights into how courts should review regulations of political money. The observation that political money can be used to buy television commercials and other types of "effective" speech, by itself, insufficiently explains protection of political money from regulation. One of the shortcomings of *Buckley* is that the Court failed to adequately ascertain the reasons speech is protected and analyze whether the characteristics of political money were such that the protection of political money from regulation similarly furthered these objectives.

### B. Free Spending and Regulation of Speech

Others have argued that speech markets, like economic markets, occasionally malfunction and require regulation. Just as their predecessors rejected the existing distribution and formal judicial protection of economic and proprietary liberties during the *Lochner* era,<sup>97</sup> these commentators (hereinafter the "Speech Realists") reject the naturalness and near absolute judicial protection of expressive liberties.<sup>98</sup> In its place, they generally assert that the ideal of freedom of

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within the domain of majoritarian lawmaking (like property) or judicial interpretation of the Constitution (like speech). In determining the proper judicial treatment of regulations of political money, it is worthwhile to keep in mind the legitimacy of democratic decision-making, the independence of judicial decision-making, the fact-finding capacities particular to each institution, and other institutional considerations that might prompt the assignment of authority over speech to the courts and over property to the public lawmaking process. See Schauer, *supra* note 90, at 1337-39.

97. See *Lochner v. New York*, 198 U.S. 45, 57-58 (1905) (reasoning that an individual's right to enter into contracts was protected by the Fourteenth Amendment's Due Process Clause and was generally immune from interference by the state). Many *Lochner*-era scholars, most notably the legal realists, criticized the decision and its progeny, and it was effectively overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For an extensive discussion of legal realism, see generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 169-246 (1992); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 468-503 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

98. See, e.g., Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2481 (1997); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 914 (1987).

speech itself provides a substantial basis for the regulation of speech. Most of the Speech Realists concentrate not so much on campaign finance, but more so on First Amendment theory generally. They apply their provocative arguments to justify regulation of a variety of speakers, including pornographers, racists, influential corporations, unions, and broadcast media.<sup>99</sup> With regard to political money, the Speech Realists generally assert that the primary purpose of the First Amendment is to advance self-government through enlightened public exchange, and that such exchange necessitates legislative intervention to ensure that various speakers are heard with a certain amount of equality.<sup>100</sup>

Certainly, in looking at "state intervention in economic matters" and using "that historical experience to understand why the state might have a role to play in furthering free speech values,"<sup>101</sup> many of the Speech Realists are a conceptual step away from *Buckley's* libertarianism and toward the argument made in this Article. The fundamental approaches of this Article and of the Speech Realists, however, are very different, and lead to distinct results.<sup>102</sup>

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99. See, e.g., CATHARINE A. MACKINNON, *ONLY WORDS* (1993); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 167-240 (1993) (discussing discrimination in free expression); Balkin, *supra* note 83, at 414-28 (reviewing harassment and captive audiences); Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 171 (1994) (analyzing language and expression as instruments of positive harm); Fiss, *supra* note 81, at 1419-25 (addressing state intervention in public debate); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787-94 (discussing dominance of television networks) (1987) [hereinafter Fiss, *Why the State?*]; Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 449-57 (equating racist speech to fighting words); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1343-48 (1992) (arguing for compensation for costs of free speech); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263-300 (outlining "new Deal" for speech) (1992) [hereinafter Sunstein, *Free Speech Now*]; Sunstein, *supra* note 90, at 914 (providing look at regulation of powerful private speakers).

100. See, e.g., David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 240 (1991); Fiss, *supra* note 98, at 2481; Fiss, *Why the State?*, *supra* note 99, at 784-87; Sunstein, *Free Speech Now*, *supra* note 99, at 263.

101. Fiss, *Why the State?*, *supra* note 99, at 783.

102. The argument advanced in this Article also differs from those that compare the current system of financing campaigns to laws conditioning political participation on financial payment or property ownership. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (regulation conditioning the right to vote on payment of poll tax violates equal protection); Raskin & Bonifaz, *supra* note 9, at 1165-65 & n.11 (arguing that the logic of *Harper* compels a publicly financed electoral system). *But cf.* *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) (rejecting the argument that *Harper* allows Congress to regulate political money); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 726-30 (1973) (concluding that property-based scheme for electing governing board of water reclamation district does not violate equal protection).

Whereas the Speech Realists look to the evolution of jurisprudence governed by the Due Process Clause and argue for an analogous development of First Amendment jurisprudence,<sup>103</sup> this Article argues that, due to the nature of political money, it is unclear whether the First Amendment or the Property Clauses appropriately govern political money. Unlike the Speech Realists, this Article questions why judicial tests associated with the First Amendment automatically apply to political money to the exclusion of the Property Clauses, which generally are interpreted differently and implemented by courts using different tests and standards. This Article does not propose that the legislature be given unchecked regulatory authority over political money (a result that some might attribute to the Speech Realists),<sup>104</sup> as such a conclusion ignores important First Amendment issues and constitutes a form of mechanical categorization no better than the formalism exhibited in *Buckley*.<sup>105</sup> The judicial toleration for political money regulation under this Article's analysis results from appreciating the similar characteristics of political money and property while simultaneously honing presently diffuse judicial scrutiny so that it advances the particular concerns that animate protection of speech (such as prevention of the manipulation of rules of democratic en-

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103. See Sullivan, *supra* note 80, at 959 ("In sum, those who advocate a New Deal for speech see the 'marketplace of ideas' as analogous to the commercial marketplace"). See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 362 (1993) ("The First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the *Lochner* era."); Sunstein, *supra* note 98, at 914 ("[A] wholesale abandonment of *Lochner*-like premises, requiring courts to look at the content of speech, would wreak havoc with existing first amendment doctrine—as it did earlier in the century with private property under the due process clause.").

104. See Sullivan, *supra* note 80, at 954.

105. Both *Buckley* and the Speech Realists tend to overlook the distinctions between speech and property. While *Buckley* treats personal property spent on speech as so closely connected to speech as to call for a like form of judicial protection, the Speech Realists analogize the "speech market" to the economic market in calling for the regulation of various types of speech. For the most part, *Buckley* fails to value the importance of issues of scarcity, distribution, and interference with others' interests that account for the regulation of property, *see infra* Part III, and the Speech Realists have been criticized for not fully appreciating issues of institutional distrust that undergird protection for speech. Unlike the Speech Realists or *Buckley*, this Article does not downplay differences between speech and property, but rather concentrates on these differences to ascertain the proper treatment of political money. While this Article, like Judge Wright, proposes that political money is distinguishable from speech, it also argues that courts should consider constitutional doctrines other than the First Amendment in determining the judicial treatment of political money regulations. The Article agrees with the proposal by Justice Stevens that the Property Clauses are relevant, but departs from the Stevens logic by refusing to deny the concurrent applicability of the First Amendment. A complete analysis requires an examination of political money in relation to two different constitutionally governed areas—speech and property.

gagement by self-interested incumbents).<sup>106</sup> As opposed to lowering protection afforded by the First Amendment to further speech values, this Article uses the high scrutiny afforded under conventional speech doctrines and the lower scrutiny associated with the property doctrines to create a framework through which to examine the particular characteristics of political money and devise a more fitting judicial test. The fundamental differences in the approaches of this Article and the Speech Realists also trigger a number of other distinctions that are too numerous to discuss (e.g., whereas Parts IV and V of this Article discuss and appreciate the relevance of issues of distrust and entrenchment in both the speech and political money contexts, the Speech Realists have been criticized for failing to adequately appreciate these issues).<sup>107</sup>

### III. SCARCITY, DISTRIBUTION, AND INTERFERENCE

Perceptions of the ways in which a particular liberty interest functions in society and the values it serves or signifies may help explain judicial treatment of regulation of that liberty interest.<sup>108</sup> The starting point in this analysis, therefore, involves the consideration of characteristics of property that appear to explain judicial respect for the legislature's role in regulating property, and a comparison of these characteristics to those of political money.

#### A. *Scarcity and Distribution*

##### 1. Property is Scarce and Unevenly Distributed

Issues related to the scarcity and distribution of property contribute to judicial respect of the legislature's role with regard to the regulation of property, and the fact that courts do not perceive these characteristics in the same way in the speech context may explain, in part, judicial reluctance to provide a similar degree of deference to the regulation of speech.

Property is scarce. Real property is finite, and while opportunities to increase the total amount of personal property are being

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106. While the Speech Realists look to what they believe to be the primary purpose of speech itself to justify legislative intervention, this Article examines a primary purpose of protecting speech from regulation and argues that the purpose is not advanced by protecting political money from regulation.

107. See Gey, *supra* note 87, at 277; Sullivan, *supra* note 80, at 961-62.

108. See Michelman, *supra* note 16, at 114.

continuously discovered, individuals have access to, at any one time, a limited amount of personal property. Issues of scarcity are viewed differently in the speech context, however, as speech is not generally perceived as a tangible, finite commodity.<sup>109</sup> Rather, opportunities for people to express themselves appear to be easily accessible and unlimited.

While speech appears to be naturally available to speakers,<sup>110</sup> people are not naturally endowed with property, but depend upon others in acquiring it.<sup>111</sup> The poor, dispossessed, unemployed, and homeless are reminders that property is distributed unevenly, and that government protection of property interests often directly favors the interests or projects of some over those of others. In contrast, while some individuals may be more eloquent or have more influence than others, almost all are perceived as being able to meaningfully exercise expressive liberties and have an interest in government protection of expressive interests.

Judicial respect for legislative regulation of property may be explained not merely by courts' appreciation of the need for legislators to respond to the social problems that arise from the scarce nature and uneven distribution of property in a market economy, but also by legislative competence in regulating property. Specifically, in its restriction and reallocation of property, government can quantify and compare liberty interests with a certain degree of apparent objectivity unattainable in the speech context.<sup>112</sup> Property values are relatively easy (even necessary) to measure through the use of money and num-

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109. Cf. Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1143 (1993) (One descriptive premise of the First Amendment marketplace metaphor is that "enough members of society . . . have meaningful opportunity to speak" and that "powerless sectors of that population are in a meaningful position to offer ideas.").

110. A literalist could argue that individuals are dependent upon others to learn to communicate, and that none are naturally endowed with the ability to speak. While this point is noteworthy, it does not make the attainment of communicative skills persuasively analogous to the attainment of property.

111. Cf. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 787 n.85 (1986) ("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. These collective cultural and legal frameworks are crucial determinants of a person's holdings.").

112. Cf. Gey, *supra* note 87, at 267-68 ("When the government regulates economic activity, it is focusing on a concrete problem with a series of practical implications. . . . The interests involved will be concrete, and usually financial in nature. Thus, economic regulations will always be framed by the pragmatic limitations of the physical environment in which those regulations are implemented, and the equally practical constraints of economic efficiency and financial self-interest.").

bers (e.g., assessing real estate value for tax purposes).<sup>113</sup> Government can use its objective measurement of proprietary and economic interests to make comparative assessments of the situations of different individuals (e.g., examining incomes of different citizens) and act accordingly (e.g., establishing a minimum wage). Assessments of speech values, on the other hand, are limited to a few general categories (e.g., commercial, political),<sup>114</sup> and, beyond that, conventional wisdom holds that government cannot reliably, and therefore should not, measure the value of expression (based on its content, source, quantity, merit, persuasiveness, or other standard).<sup>115</sup> Comparative assessments about the content of speech by government to regulate speech are problematic, and the Court "has repeatedly held that each of us is our own best judge of the merits of speech: '[O]ne man's vulgarity is another's lyric,' and 'the tenets of one man may seem the rankest error to his neighbor.'"<sup>116</sup>

The scarcity and uneven distribution of property, and the relative fairness and competence of legislative regulation in response to these issues due to the quantifiable nature of property, all contribute to judicial respect for government regulation of property. In contrast, the perception of speech as an interest that is both easily exercised and widely distributed, combined with the amorphous characteristics of most speech, leads to the conclusion that regulation of speech in

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113. Admittedly, real property is considered unique, and some personal possessions, such as a wedding ring, have special value to particular persons. See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1882 n.120 (1994) (discussing common law conception of real property as unique); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (discussing relation of property to personhood). Appraisals, however, of even these types of property are routinely made to determine what property should be worth to private actors.

114. Speech is difficult to assess even when it is categorized broadly, as evidenced by Justice Potter Stewart's "I know it when I see it" guidance for determining "hard core obscenity." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Note that, hypothetically, a legislature could select some seemingly objective, quantitative standard for measuring speech and regulate it along these lines, such as the amount of time one speaks or the size of the audience. These measures, however, do not seem to get at the real, qualitative value of speech, and thus we do not bother with them.

115. Cf. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (discussing commercial speech, and stating that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented"); Gey, *supra* note 87, at 278 ("[C]ase reporters are filled with hundreds, if not thousands, of opinions illustrating how badly governments can misjudge the value and potential danger of antisocial speech."); Sullivan, *supra* note 87, at 213 ("[S]peech may be uniquely close to consciousness. Ideas can go underground more easily and intractably than goods and services. . . . Thus the enforcement of restrictions on speech might be inherently or structurally limited in a way that restrictions on other activities are not.")

116. Sullivan, *supra* note 80, at 950-51 (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

response to issues of scarcity and distribution is both unnecessary and unreliable.

## 2. Scarcity and Distribution in the Political Money Context

In a system of privately financed elections, the value of political money (and some would argue the advantage of being a contributor) reflects the fact that political money exhibits the same features of scarcity and uneven distribution exhibited by all other property. *Buckley* failed to adequately appreciate the importance of issues of scarcity and distribution, and treated political money, for all intents and purposes, the way speech is often conceptualized—an interest naturally available to all in unlimited amounts that, absent government regulation, can be exercised by all as much as they would like. Political money, however, like property, is a finite commodity, drastically uneven in its distribution. Unlike speech, political money is not something with which individuals are naturally endowed, but it is always acquired in some way (e.g., inherited or earned) from others. While there may be a sense of diminished need for government to reallocate speech values because everyone is thought to be able to speak as much as one likes, the same does not hold for the use of political money.<sup>117</sup>

An understanding of speech as naturally and freely available to all makes it a very appealing marker of democracy, and it is not surprising that a political system featuring speech as the primary medium of exchange is likely to aspire toward broad participation. Political money, however, is not generally perceived as freely available to all. If it were, it would lose most of its value to those who have it and give it. The seemingly widespread distribution of the ability to communicate makes government protection of expressive liberties valu-

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117. While on one hand problems caused by scarcity and uneven distribution in the property context prompt regulation, scarcity in and of itself “is a precondition for property, which is a precondition for markets.” Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 511 n.188 (1998). Property laws protecting ownership ensure the scarcity of property, and drive demand and provide the incentives that fuel markets. Redistributive regulations ease the most problematic consequences of legally created scarcity in the property context. With the exception of copyright and patent law designed to create scarcity by converting speech into intellectual property, legally created scarcity is not the norm in the speech context, and thus there exists less of a need for redistributive regulations. See Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 ECONOMICA 30, 31 (1934) (“Property rights in patents and copyrights make possible the creation of a scarcity of the products appropriated which could not otherwise be maintained.”), cited in Cohen, *supra*, at 511 n.188. As opposed to the unrestricted uses that often occur in the speech context, property laws protecting ownership and use ensure the scarcity and uneven distribution of political money. As in the property context, courts should respect regulatory attempts to respond to the most problematic consequences of the legally created scarcity of political money.

able to an expansive, diverse group of people, whereas government protection of liberties associated with political money is not roughly equally valuable to a large group of people.

While the amorphous nature of speech is likely to lead to arbitrary appraisals of speech, government can respond to issues of scarcity and distribution exhibited by political money with some semblance of objectivity due, in part, to the quantifiability of the interest. Government regulation presently assesses the value of political money using dollar amounts, as exhibited by requirements that all contributions over \$200<sup>118</sup> and independent expenditures over \$250<sup>119</sup> be reported to the FEC and by prohibitions on contributions by individuals in excess of \$1000.<sup>120</sup> Like property, political money can have particular uses, and although given amounts have different values at different times to various contributors, spenders, and recipients, political money nonetheless is quantifiable. One can also make comparative assessments of political money, and, absent this ability, the value of political money would be drastically reduced to many who have ample amounts of it to give. Consistent with the expectations and desires of many donors, incumbent politicians often keep track of those individuals who have contributed relatively large amounts of money.

Issues of scarcity and distribution that explain judicial respect for legislative regulations of property are glaring in the political money context. The scarcity and uneven distribution of political money, and the relative objectivity of measurement and valuation of legislative regulation in this area, all support the adoption of a judicial standard that provides for, as in the property context, a generous amount of respect for government regulation. Courts respect government redistribution of values in the property context not only through taxation and legislative financing of public programs,<sup>121</sup> but also through restricting liberties traditionally associated with property ownership (e.g., rent control).<sup>122</sup> With regard to property, redistribution

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118. See 2 U.S.C. § 434(b)(3)(A) (1998).

119. See *id.* § 434(c)(1).

120. See *id.* § 441a(a)(1)(A).

121. Cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.").

122. The Court has rejected the notion that control of "externalities" (i.e., interference with others' interests, see *supra* Part III.B) is the only rational reason for legislative restriction on property, and has recognized that other reasons (such as redistribution) are also rational. See

cannot always be achieved “by simple lump sum transfers but may require more intrusive policies.”<sup>123</sup> Similarly, courts should recognize that government redistribution in the political money context need not be limited simply to taxation and the public financing of campaigns, but may also include restrictions on the use of political money.

### B. Interference With Others' Interests

#### 1. Unfair Interference in the Property Context

One person's free exercise of property may (and often does) interfere with her neighbor's property interests, and there is often no obvious or natural way to resolve conflicts and allocate decision-making authority over property.<sup>124</sup> Consequently, the public law-making process enacts restrictions on the free use of property to resolve these conflicts, and such intervention can be interpreted as advancing individual autonomy related to property ownership as a whole (e.g., regulations of A's factory that limit toxic pollution enhance B's control over and enjoyment of her property).<sup>125</sup> This phenomenon is not limited to real property. For example, those with abundant economic interests may have bargaining power advantages that can be perceived as unfairly interfering with the economic interests of those with less property.<sup>126</sup> As a result, courts respect minimum wage and

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Pennell v. City of San Jose, 485 U.S. 1, 14-15 (1988) (upholding rent control ordinance despite recognition that “it is difficult to say that the landlord ‘causes’ the tenant's hardship”).

123. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 937 (1985). *But see* Richard A. Epstein, *Why Restrain Alienation*, 85 COLUM. L. REV. 970, 970 (1985) (arguing that restraints on alienation are legitimate to control externalities but not to “redress some asserted distributional weakness”).

124. Various commentators have discussed how courts should determine “unfair” interference with another's interests that justifies restriction on property use. Oliver Wendell Holmes “critiqued opinions that relied on the legal maxim *sic utere tuo ut alienum non laedas* (use your property in such a way as not to injure the property of others) as question begging.” DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 85, 386 n.19 (1997) (citing Oliver Wendell Holmes, *Privilege, Malice and Intent*, in *COLLECTED LEGAL PAPERS* 120 (1985) (originally appearing at 8 HARV. L. REV. 1, 3 (1894) (“[D]ecisions for or against the privilege, which really can stand only upon [policy] grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas* which teaches nothing but a benevolent yearning . . .”)); *cf.* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48-50 (1964) (noting that nuisance control rationale tends to be rejected on the conceptual grounds that it is often impossible to tell who has caused a nuisance and who has been a victim); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 161-69 (1971) (same).

125. *See* Baker, *supra* note 111, at 783.

126. *See* Pennell, 485 U.S. at 20 (1988) (Scalia, J., concurring in part and dissenting in part) (explaining that the externalities that justify land-use regulation can also be said to justify the regulation of economic affairs, as owners of commodities may bargain in a way that causes economic hardship to others); *Cf.* Baker, *supra* note 111, at 780 (“Implicit in the allocation of decision-making authority is the notion that a person's freedom of choice concerning the use of

antitrust laws that restrict the economic liberties of some employers and monopolistic companies in order to protect the economic interests of employees<sup>127</sup> and smaller competitor businesses.<sup>128</sup> For the past sixty years, American constitutional law has perceived the allocation of authority through regulation as necessary to secure the blessings of liberty in the property context.<sup>129</sup>

Regulation of speech, on the other hand, does not generally enhance the value and autonomy of expressive interests. One could perceive that the core of individual autonomy is control over one's own mind, body, and voice (which includes control over one's own expression and opinions about the expression of others), and that it is most convenient to set the boundaries of decision-making authority at an individual's responsibility for her own speech.<sup>130</sup> Under this theory, complete control over one's own speech is such a "natural" and superior allocation of decision-making authority that it almost always outweighs benefits derived from government reallocation or restriction of speech through regulation.<sup>131</sup> Courts do not perceive government regulation as enhancing the value of liberty interests or individual autonomy in the speech context to the same degree as it does in the property context.

Further, courts recognize that there exist situations in which property is used in a way that unfairly interferes with the non-proprietary interests of others, such as when a shopkeeper excludes patrons based on race or when a company profits from selling deodorant packaged in aerosol cans that excessively damage the ozone layer. Consequently, courts respect legislative regulation of uses of property

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resources can only extend to a point where the use directly conflicts with another person's authority. From this perspective, laws need not restrict liberty: those that only allocate and demarcate the boundaries of decision-making authority merely allocate liberty.").

127. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

128. See, e.g., *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 129 (1905).

129. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105 (1991).

130. See Baker, *supra* note 111, at 782. This concept is "deeply embedded in our political, ethical, and economic practices" and conceives "of a person as an agent who is normally responsible for her own actions and who should be permitted to make decisions for herself." *Id.* Such autonomy does not include free use of another person's body or property without consent. See *id.*

131. Some would assert that a person's excessive use of her expressive interests never interferes with another's use of her expressive interests. See, e.g., Michelman, *supra* note 16, at 102 (describing the philosophy that "in general everyone can talk as much as they choose, however they choose, about whatever they choose, to whomever they choose, without restricting or devaluing anyone else's freedom to communicate"). Rather than reading this assertion as an empirical truth, this Article interprets it as a legal observation by some that the existing allocation of speech interests in the absence of government regulation outweighs the benefits offered by government reallocation of speech. Therefore, although expressive interests may technically interfere with one another, these conflicts are not considered "unfair" interferences that warrant government intervention.

that unreasonably interfere with others' non-proprietary interests. In contrast, while courts recognize that a private actor's speech may interfere with others' non-expressive interests, this interference is not usually viewed as unfair or illegitimate.<sup>132</sup> To the contrary, the interference of one's speech with others' non-expressive interests is generally understood to be the essence of democracy and is encouraged. One can use speech to advocate for change that would infringe upon another's interests, whether it involves infringing upon a discriminatory shopkeeper's profits through organizing a boycott or infringing upon a deodorant company's profits by calling for tougher environmental restrictions on aerosol cans.

## 2. Political Money and Unfair Interference

Like both property and speech, political money can be used to interfere with the interests of others.<sup>133</sup> The real issue is whether such interference is generally a fair and legitimate component of democ-

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132. Cf. *Sullivan*, *supra* note 80, at 961 (proposing that the difficulty in predicting harm from speech might call into question the legislature's institutional competence in regulating speech).

133. Some argue that there exists no need to regulate political money because short of individual cases of quid pro quo corruption, there is no proof that one's contribution or expenditure of political money benefits her position or interferes with others' interests. See e.g., Smith, *supra* note 37, at 1067-72 (arguing that political money does not have any significant effect on legislative voting behavior). In response, reformers have attempted to establish interference with testimony of former elected officials, anecdotes about unpopular legislation that passed with support by monied interests, as well as reasoning that a law restricting political money does not infringe on a contributor's interests if no advantage is obtained by giving. See e.g., Rosenkranz, *supra* note 9, at 876-77 (citing statements of elected officials); Raskin & Bonifaz, *supra* note 9, at 1186 n.97 (describing the well-funded efforts of pharmaceutical companies to influence health care legislation). Additionally, direct interference is not only difficult, but also unnecessary to prove, for (1) it is unlikely that either a truth serum could be administered or politicians would voluntarily submit to a reliable lie detector test that would allow for the acquisition of accurate data; and (2) a causal link may exist absent a conscious decision made by a politician (e.g., the politician may be influenced by those with whom she spends the most time, such as those at fundraisers). Cf. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 311 (1981) (White, J., dissenting) ("Perhaps . . . neither the city of Berkeley nor the State of California can 'prove' that elections have been or can be unfairly won by special interest groups spending large sums of money, but there is a widespread conviction in legislative halls, as well as among citizens, that the danger is real. I regret that the Court continues to disregard that hazard."); Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994) (proposing that political money restrictions are necessary to protect the amount of time that officials have for the performance of their public duties). Rather than rehashing this debate, this Article accepts the position that political money can technically interfere with the interests of others. Just as property can be used to interfere with proprietary and non-proprietary interests, one can use political money to interfere with both another's use of political money (one's \$100,000 contribution can dwarf another's \$1000 contribution) and other interests (one's \$100,000 contribution may result in weaker environmental laws, and thus the breathing of others is impaired). The most pressing question is whether the law should view this interference as fair or unfair.

racy, like speech, or, as in the property context, is sometimes unfair and illegitimate. If the use of political money is perceived as a fair and legitimate interference with others' interests, then limits on contributions and expenditures could be perceived as unfairly burdening the liberties of those who use political money. On the other hand, in the event political money could be perceived, like property, as sometimes unfairly interfering with the interests of others, judicial respect for legislative limits on a private actor's use of political money (i.e., contribution and expenditure limits) might be in order.<sup>134</sup>

A hypothetical case might best illustrate the inquiry into whether the use of political money can sometimes unfairly interfere with the interests of others. Suppose that Charles serves as the CEO of Sandel, a company that invests the money of lenders. Due to misinvestment, however, Charles determines Sandel cannot cover \$2.6 billion in outstanding debts. Charles, consistent with his civic-minded nature, raises over \$1.3 million for five members of the U.S. Senate Banking Committee. Fortunately, legislation subsequently passes with a discrete rider attached that commits the government to pay off the debt of all companies like Sandel (legislators explain that the law will encourage investment and stimulate the economy). The cost to taxpayers of the bailout of all of the companies is \$10 billion.<sup>135</sup> As-

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134. Even those who warn against restrictions on property that force a few people to bear public burdens disproportionately (the *Armstrong* anti-discrimination principle) generally subscribe to the constitutionality of restrictions on uses of property that unfairly interfere with others' interests (the *proviso* principle). See *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960); Frank Michelman, *Tutelary Jurisprudence and Constitutional Property*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 127, 131 (Ellen Frankel Paul & Howard Dickman eds., 1990) (describing the *proviso* principle).

It is also worthwhile to note that the *Armstrong* anti-discrimination principle is essentially the inverse of John Rawls's notion of the fair value of liberties. See Rawls, *supra* note 103, at 326 (Lecture VIII, The Basic Liberties and Their Priority). The *Armstrong* principle views restrictions on the use of certain property as disproportionately burdening the liberties of the property owners, while fair value of liberty views freedom from restriction on the use of certain property as disproportionately benefiting those with the property, especially as it relates to political liberties. Facial neutrality appears in both situations (both restrictions and liberties appear to apply to all equally), but both restrictions and liberties have disparate impacts.

135. The highly publicized story of Charles Keating is slightly different than the hypothetical proposed. Due in large part to alleged fraud, Keating's Lincoln Savings & Loan failed, and \$2.6 billion in taxpayer funds were required to cover federally insured deposits at Lincoln. Regulators investigated Lincoln, and Keating raised \$1.3 million in political money for five U.S. Senators and their causes while simultaneously asking that the Senators persuade regulators to discontinue their audit of Lincoln. Keating's fraud was eventually discovered, and he was convicted, and the Senators were chastised (one was officially reprimanded). See James S. Granelli, *Keating, Son Guilty of Federal Charges*, L.A. TIMES, Jan. 7, 1993, at D1. While the actual story raises the same question of whether Keating's use of political money constitutes unfair interference, the hypothetical may illustrate the point more clearly because it focuses on whether the use of political money, rather than Keating's alleged fraud, is unfair.

suming that the \$1.3 million in political money caused the \$2.6 billion bailout of Sandel,<sup>136</sup> is Charles unfairly interfering with others' interests by using his access to political money to place a financial burden on society that would otherwise be borne by Sandel? If Charles were restricted to using \$100 in political money, would these restrictions unfairly saddle Charles with the burdens of a public problem<sup>137</sup> that should be borne by society as a whole? Is the public subsidizing Charles by allowing him to insert \$1.3 million into the political process that results in the \$2.6 billion bailout, or is Charles subsidizing the public when he is subjected to limitations on the use of his political money?<sup>138</sup>

In response to these inquiries, one could argue that in the political money context, "unfair" interference is properly limited by high First Amendment scrutiny to specific quid pro quo exchanges between a contributor and a candidate (corruption or the appearance thereof).<sup>139</sup> Following such a libertarian perspective, it could be argued that the

136. As mentioned above, this Article accepts the existence of interference of political money and focuses the analysis upon whether such interference is unfair. With regard to the influence of political money, Keating stated: "One question . . . had to do with whether my financial support in any way influenced several political figures to take up my cause. I want to say in the most forceful way I can: I certainly hope so." Michael Kranish, *Five Senators who Aided S&L Face Query on Gifts*, BOSTON GLOBE, Oct. 18, 1989, at 1,12.

137. The public problem would be the need to finance elections, and the use by government officials of the power of their public offices to facilitate the acquisition of private campaign contributions and expenditures.

138. Cf. Sunstein, *supra* note 98, at 876-77 (discussing the Court's shift from perceiving minimum wage legislation as "a subsidy to the public from an innocent employer" to the lack of minimum wage legislation as a subsidy "from the public to the employer").

139. In *Shrink*, Justice Thomas interpreted *Buckley* as limiting the meaning of corruption to quid pro quo, *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 923-24 (2000) (Thomas, J., dissenting, joined by Scalia, J.), whereas the majority interpreted corruption as "extending to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 905. In a case viewed as an anomaly by many commentators, *Austin v. Michigan State Chamber of Commerce*, the Court essentially stretched the meaning of corruption to include "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." *Austin*, 494 U.S. 652, 659 (1990). Although the Court did not extensively analyze unfair interference with the interests of others, it did hold that "[c]orporate wealth can unfairly influence elections." *Id.* at 660. A narrow definition of corruption that focuses on a corrupt public actor's quid pro quo (or interference with fair government decisions) could be contrasted with *Austin's* focus on a private actor's corrosive use of corporate wealth (or interference with a fair electoral process). Several commentators have participated in the debate regarding broad and narrow definitions of corruption. See, e.g., Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767 (1991); Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENTARY 127 (1997); Miriam Cytryn, Comment, *Defining the Specter of Corruption: Austin v. Michigan State Chamber of Commerce*, 57 BROOK. L. REV. 903 (1991); Paul S. Edwards, *Defining Political Corruption: The Supreme Court's Role*, 10 B.Y.U. J. PUB. L. 1 (1996); David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85 (1999); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994).

few instances of speech that constitute "unfair interference" and warrant direct restriction include the use of speech to facilitate fraud, of which, along with misrepresentation, defamation and insider trading, *quid pro quo* "corruption" is a species.<sup>140</sup> Otherwise, political money is simply another legitimate tool of democratic advocacy, like other activities protected by the First Amendment.<sup>141</sup> Despite these assertions, this understanding of "unfair" interference is too narrow, and a more expansive understanding, similar to the concept of unfair interference in the property context, is required.

While some might argue that it is most convenient to set the boundaries of decision-making authority at an individual's almost complete dominion over her own speech, and accept interference with others' interests as a permissible consequence, distinct factors arise in the political money context that should trigger a different analysis. Control over political money extends past decision-making authority over one's own voice and mind.<sup>142</sup> Further, the distribution of and privileges related to political money (the acquisition of and rules regarding the use of wealth) are determined in large part by the government and other private actors. The instability and fluctuation of the distribution of wealth shapes the allocation of political money, and, consequently, there is no "natural," fixed, or universal way to resolve conflicts and allocate decision-making authority over political

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140. *Cf.* Epstein, *supra* note 81, at 71-75 (explaining that under a libertarian view, speech restrictions may be justified on the basis of preventing private force and private fraud).

141. Other critics of the regulation of political money might argue that since the Constitution allows for taxation, redistribution, and wealth-equalization, the existing distribution of income and wealth reflects some public sense of justice in distribution, and thus it is unjust to restrict the use of political money. One response to these critics is that while the distribution may generally be just, the use is not always just. While the shopkeeper may be justly entitled to her store, she is not entitled to exclude people based on race. While a McDonald's restaurant may be justly entitled to its receipts, it is not entitled to pay its "crew" workers less than the minimum wage.

142. While some might justify protection for speech by asserting it is more integrally connected to our understanding of personhood than is property, this argument would call for finding an even wider gap between speech and political money. Unlike some types of property that have special meaning (e.g., a wedding ring), political money is generally considered fungible. *See* Baker, *supra* note 111, at 804-11. Certainly, political money may be related to thought and speech, but that does not make political money so personal that it deserves immunity from regulation. Indeed, a newscaster's income may be derived directly from her thought and speech and may also be used to facilitate speech opportunities, but these direct connections do not make the income immune from regulation or entitle a person to a job as a well-paid newscaster. *Cf.* *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 503 (1985) (White, J., dissenting) ("[E]xpenditures produce . . . speech; they are not speech itself. At least in these circumstances, I cannot accept the identification of speech with its antecedents. Such a house-that-Jack-built approach could equally be used to find a First Amendment right to a job or to a minimum wage to 'produce' the money to 'produce' the speech.").

money.<sup>143</sup> While the continued maintenance of exclusive and sovereign control over one's voice may suggest that speech should be generously privileged to interfere with others' interests, an identical justification for tolerance of extensive interference with others' interests through the use of political money is inapplicable because so many external factors (decisions by government and private actors regarding our acquisition of wealth) already dictate one's use of political money. Thus, one cannot claim the same natural birthright to dominion over her political money as she might to her speech.<sup>144</sup> Indeed, just as the external, contested nature of property compels its regulation to prevent interference and enhance the value of property to individuals (e.g., zoning regulations), regulation of political money often enhances, rather than offends, individual autonomy and value in the use of political money. For example, the political money of U.S. citizens has greater value when non-U.S. citizens are restricted from contributing or spending political money,<sup>145</sup> and the \$1000 contribution has greater value when others are restricted from contributing \$1,000,000.<sup>146</sup>

Courts should recognize that, as in the property context, issues of scarcity and distribution of political money may result in situations in which those with abundant political money unfairly interfere with the interests of those with less political money, and legislatures should be able to enact laws to prevent these harms. Just as some landlords and large companies may have unfair bargaining power over tenants, employees, and small competitors, those with abundant political money often have unfair bargaining power over those without political money.<sup>147</sup> If American democracy is a social contract, those

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143. Cf. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 809-10 (1978) (White, J., dissenting) ("Massachusetts could permissibly conclude that not to impose limits upon the political activities of corporations would have placed it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities.") (citation omitted).

144. Although this argument alone might not completely account for the regulation of political money, it is important to recognize that the rationale providing speech a broad privilege to interfere with others' interests based on control over one's body and mind plays out differently in the political money context.

145. See generally 2 U.S.C. § 441e (1998) (restricting contributions from non-U.S. citizens); 11 C.F.R. § 110.4(a) (1996) (same).

146. See generally 2 U.S.C. § 441a(a)(1)(A) (1998) (placing dollar limitations on political contributions).

147. Note that this argument is different than those calling for equality in campaign financing. Rather, the issue raised here is whether a legislature may determine that there exists a point at which some exercise their liberty interests in such an unreasonable manner that they unfairly interfere with others' interests. Just as antitrust law does not guarantee all companies an equal share of a particular market or equal resources, see Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1033-34 (1987), this

parties without political money are in danger of being exploited and bound by an unconscionable bargain.<sup>148</sup> At the very least, a legislature should be permitted to make determinations with regard to these empirical questions.

As mentioned above, the use of speech to interfere with others' interests is not looked upon as unfair but rather is accepted as the essence of democracy. The same, however, need not be true with regard to political money. Just as courts interpret and implement the Property Clauses so as to appreciate legislatures' entrusted responsibility to determine that certain uses of property pollute the environment and merit regulation, a similar interpretation and implementation is warranted that would give greater respect to legislative findings that some uses of political money unfairly interfere with the interests of others and warrant significant restriction.

#### IV. DISTRUST

The powers associated with a republican form of government are not established for the sole purpose of being limited. If a government cannot competently assume responsibility for particular matters, there is no point in establishing the government.<sup>149</sup> Indeed, the Constitution contemplates lawmaking very purposefully and "entrusts to lawmakers a range of legislative discretion" to secure and promote numerous public and common objectives.<sup>150</sup>

Constitutionalism generally trusts representative government, despite the existence of two primary reasons for distrust of any legislative decision—majoritarian factionalism and self-serving officials. Democracy is said to malfunction when an effective majority (either directly or through its representatives) systematically and unfairly uses the power of government to burden or disenfranchise a political minority,<sup>151</sup> and also when government officials place their own inter-

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argument is not that political money must be regulated so as to give all citizens equal political opportunities or even equal amounts of wealth for political purposes.

148. Cf. Jean-Jacques Rousseau, *The Social Contract*, in *SOCIAL CONTRACT* 167, 268 n.1 (E. Barker ed., 1952) ("[A] bad government serves only to keep the poor man confined within the limits of his poverty, and to maintain the rich in their usurpation.").

149. See Michelman, *supra* note 16, at 110.

150. *Id.* at 93.

151. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980); cf. *THE FEDERALIST* No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961) ("When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

ests above the conflicting interests of their constituents.<sup>152</sup> While courts generally harbor a healthy amount of skepticism when reviewing any legislation, distrust is not the sole factor relied upon in determining the extent of governmental discretion. For example, when it comes to property, courts obviously have good reason to be wary of government favoritism and abuse. There is the fear that those with political power, elected officials and numerical majorities, will use their power to benefit themselves at the expense of the property interests of those without political power.<sup>153</sup> Despite rational distrust of government power, however, courts appreciate the issues of scarcity, distribution, and interference inherent in property, and respect the authority entrusted to the public lawmaking process with regard to the enactment of minimum wage, antitrust, zoning, environmental, rent control, and other types of laws.<sup>154</sup>

Granted, distrust is a much more salient factor with regard to speech and motivates courts to prohibit most regulation of speech. The protection of speech alone, however, does not reveal whether distrust prevails to inhibit the regulation of political money, because political money is not speech. From a conceptual standpoint, a classification of political spending as “use, transfer, or exchange of property” is at least as intuitively compelling—probably more so—as classification of it as “speech” or “speaking.”<sup>155</sup> Rather, responsible interpretation requires the identification of some distinctive characteristic of speech that ac-

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152. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997); cf. THE FEDERALIST, *supra* note 151, No. 10, at 80 (James Madison) (“It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.”). As evidenced by the discussion above, the issues of scarcity, distribution, and interference with others’ interests in the speech and property contexts are intertwined with expectations about the institutional competence of the legislature to perform certain functions. In this section, the Article compares speech, property, and political money in the context of a discrete institutional concern—distrust of incumbent legislators and dominant political power. Whereas issues of scarcity, distribution, and interference include a focus on competing rights, issues of distrust emphasize the importance of a well-functioning process. Cf. Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644-46 (1998) (distinguishing article’s process orientation from past rights-based analyses in election law). Perhaps as reflected by the structure of this Article, analyses of both rights and process are not necessarily inconsistent or mutually exclusive. Cf. ELY, *supra* note 151, at 102 n.\* (“[F]reedoms are more secure to the extent that they find foundation in the theory that supports our entire government, rather than gaining protection because the judge deciding the case thinks they’re important.”).

153. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810); THE FEDERALIST, *supra* note 151, No. 10, at 80 (James Madison).

154. See *supra* Part III.

155. Cf. *Nixon v. Shrink Mo. Gov’t PAC*, 120 S. Ct. 897, 910 (2000) (Stevens, J., concurring) (“Money is property; it is not speech.”).

counts for the special dominance of distrust in the speech context and the corresponding protection of speech from regulation.<sup>156</sup>

Speech functions as a unique component of a democracy, and this special role is accompanied by a distinct brand of distrust sensitive to the propensity of the "ins" to manipulate speech rules to ensure that they will stay in and the "outs" will stay out.<sup>157</sup> The fear is that incumbent officials and powerful political factions will "rig debate"<sup>158</sup> by stifling dissent by those who challenge their substantive political agenda, thereby entrenching their own political power and sabotaging democracy.<sup>159</sup> In particular, the value of speech in self-government through checking the abuses of government officials with criticism would be diminished, as legislators would pass laws that either explicitly, or tacitly but effectively, silence criticism.<sup>160</sup> All of the objectives of speech, such as "attainment of truth"<sup>161</sup> and "participation in decision-making,"<sup>162</sup> would be warped by a lawmaker's primary objective of creating speech legislation that solidifies her power base and disadvantages her opponents.<sup>163</sup> Government decision-making, it is

156. See *supra* Part II.A.

157. See ELY, *supra* note 151, at 106-07; FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 86 (1982); Epstein, *supra* note 81, at 54; Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 334 (1988). The idea that distrust of the legislature is a significant principle behind the First Amendment is not inconsistent with the strong protection courts and many commentators reserve for political speech. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position."); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 92-107 (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-27 (1971).

158. Epstein, *supra* note 81, at 54.

159. See ELY, *supra* note 151, at 106; see also Sullivan, *supra* note 80, at 961 ("[G]overnment might suppress opposition simply in order to keep itself in power. Rent-seeking incumbents unfettered by term limits might stand united on one principle: suppress information or controversy that might lead voters to drive them from office."); cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("Recognizing the occasional tyrannies of governing majorities, [the founders] amended the Constitution so that free speech and assembly should be guaranteed.") (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring, joined by Holmes, J.)); Klarman, *supra* note 152, at 498 (describing the phenomenon of a temporary political majority attempting to "extend its hold on power into the future, when its members may no longer enjoy majority status" as "the problem of cross-temporal majorities").

160. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527, 529-38.

161. Emerson, *supra* note 94, at 881.

162. *Id.* at 882.

163. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1147 (1991) ("[T]he [First] Amendment's historical and structural core was to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress."); Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 14-17 (1989)

argued, is better when certain fundamental rights, such as the ability to speak, are guaranteed and not subject to political debate.<sup>164</sup>

Following this line of reasoning, many who defend judicial implementation of the First Amendment that applies high scrutiny to protect political money from regulation justify their position on distrust of the public lawmaking process. Just as in the speech context, the argument goes, government officials<sup>165</sup> and powerful political factions<sup>166</sup> have a tendency to want the ins to stay in and the outs to stay out, and there is a risk that they will design political money regulation to effectively disadvantage challengers and impair criticism of incumbent officials.<sup>167</sup> Although hypothetically a legislature could debate the merits of proposed political money legislation free of thoughts about how the regulation impacts substantive interests, and may even enact legislation that appears neutral, in practice restrictions would best serve legislators' personal political objectives.<sup>168</sup> Consequently, because so much speech depends on political money, it is important that political money be effectively immunized from those who would tinker with it to advance their own immediate political agendas.<sup>169</sup>

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("[T]he disabling of certain classes of decisionmakers from making certain kinds of decisions, does appear especially pertinent to thinking about freedom of speech as a rule."); cf. Klarman, *supra* note 152, at 498 (describing entrenchment by incumbents generally as the "'agency' problem of representative government").

164. Cf. Schauer, *supra* note 90, at 1337 ("All of the devices of democracy are antecedent to substantive democratic decisions, are likely to be misdecided if subject to actual and substantively influenced democratic processes, and merit the protections inherent in constitutionalization.").

165. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in the judgment and dissenting in part); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) ("The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition."); BeVier, *supra* note 37, at 1074-81.

166. Although, in the campaign finance context, concerns about distrust are generally directed at incumbent legislators rather than powerful factions. See *Austin*, 494 U.S. at 679 (Scalia, J., dissenting) ("[T]he Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe."). But see Foley, *supra* note 13, at 27 (arguing that the problem of tyranny of the majority is inapplicable because the regulation of campaign finance "does not concern the protection of a vulnerable minority from a hostile or indifferent majority").

167. See *Buckley v. Valeo*, 519 F.2d 821, 843 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) ("The need for exacting judicial scrutiny is underscored by the plaintiffs' contention that the legislation is a composite of measures that serve the interests of the 'ins'—members of Congress already elected—in resisting the incursions of the 'outs.' Such a contention, if substantial, is a warning signal that dilutes the deference courts give to legislatures, at least until the matter is painstakingly considered.").

168. See Smith, *supra* note 37, at 1072-75. But see Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1401-03 (1994).

169. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978) (observing that "[t]he fact that a particular kind of ballot question has been singled out for special treatment . . . suggests . . . that the legislature may have been concerned with silencing corporations on a particular subject"). One could respond to all of the assertions above by citing reasons that

The extension, however, of the special dominance of distrust in the speech context to prohibit the regulation of political money results in a paradox—the immunization of political money from meaningful restrictions actually facilitates entrenchment. While there may be similarities in the reasons to distrust legislative regulation of both speech and political money, the implementation of these reasons through the identical method of insulation from regulation produces vastly different results. For the most part, the protection of speech from regulation prevents lawmakers from enhancing their supporters' speech and stifling their critics' speech through regulating and reallocating speech values. Despite the impermissibility of most limitations on political money, however, entrenchment-minded lawmakers can still enhance their supporters' political money and temper their critics' political money by manipulating any lawmaking that has economic implications.<sup>170</sup> As described below, this orchestration is more than simply an annoying but inconsequential loophole, but rather enables entrenchment of both incumbent legislators and dominant political factions and is the core of the campaign finance dilemma.<sup>171</sup>

### A. *A Cycle of Entrenchment*

The same problems of entrenchment that arise from the direct regulation of traditional speech haunt a system that protects political money from most legislative restrictions while simultaneously allowing the regulation of economic affairs.<sup>172</sup> There are certain winners and

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courts should trust the public lawmaking process generally (e.g., political money regulation is adopted using the same process used in public lawmaking generally, judicial motives to expand power should prompt distrust of courts, and other issues, like apportionment, directly touch upon self-interest but are matters for legislative determination). See *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); Schauer, *supra* note 90, at 1337-38. The problem with all of these responses is that while they may be legitimate, they are just as applicable to speech as they are to political money (e.g., regulations on speech could be adopted through a normal political process by democratically elected officials). Because these responses fail to distinguish between speech and political money, they fail to explain why courts should deprive the legislature of authority over speech but not political money.

170. Lawmaking that has economic implications goes beyond taxes or government procurement, such as defense spending. Most legislative actions have economic implications to some degree, and some government officials are able to make cost/benefit assessments as to whether support and passage of certain legislation will enhance the fiscal status (and political money) of their supporters.

171. Cf. Klarman, *supra* note 152, at 523 (“[*Buckley*] arguably has had a greater entrenching effect than the campaign finance restrictions it invalidated.”).

172. Cf. Balkin, *supra* note 83, at 414 (“[C]ampaign finance reforms may be constitutional not because money is not speech, but because in a very important sense it is. The government is responsible for inequalities in access to the means of communication because it has created the

losers in lawmaking with economic implications, and the winners have a greater opportunity to “speak” through political money, whereas the losers may have less of an ability to “speak” through political money. If a politician’s supporter can afford to give only \$10 initially, but the politician can make a decision that will result in a \$1000 gain to the supporter, the supporter can afford to spend much more than \$10 in support of the politician in the future. Due to the special nature of money, this relationship can result in a self-perpetuating cycle that, over time, snowballs by growing deeper and more entrenched.<sup>173</sup>

Theoretically, legislators could debate about substantive lawmaking without regard to how their votes on particular issues will impact their own interests. In practice, however, according to a theory of distrust, lawmakers will serve their personal interests by enacting laws that will benefit their financial supporters, which, under the logic of *Buckley*, directly enhances the ability of the supporters to “speak.”<sup>174</sup> All of the objectives of speech, such as “attainment of truth”<sup>175</sup> and “participation in decision-making,”<sup>176</sup> become disfigured by the fact that lawmakers, in solidifying their power base, give more “speech” to financial supporters.<sup>177</sup> An incumbent lawmaker can use government decisions to discipline private actors who fail to contribute, do not contribute enough,<sup>178</sup> or are affirmatively critical of the incumbent. Pro-

system of property rights that makes such inequalities possible. . . . Government already regulates access to the political process—the first amendment simply demands that it do so fairly.”)

173. Others have touched upon this cycle of entrenchment. See DUNCAN KENNEDY, *SEXY DRESSING ETC.* 94 (1993) (originally appearing at Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 *LEGAL STUD. FOR.* 327 (1991)); Foley, *supra* note 13, at 29; Duncan Kennedy, *Legal Formality*, 2 *J. LEGAL STUD.* 351, 385 & n.55 (1973).

174. Admittedly, many understand political money is “speech” when discussed as political contributions or expenditures, but do not consider government regulation, distribution, and enforcement of laws regarding money as regulation of speech. See Weinberg, *supra* note 109, at 1143 n.189 (“[A]dherents of the marketplace metaphor . . . expect the government to enforce property rights in communications resources, [but do] not treat this as ‘real’ government regulation.”).

175. Emerson, *supra* note 94, at 881.

176. *Id.* at 882.

177. One could draw a parallel between shaping laws in an attempt to stimulate political contributions and conditional building permits in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). According to Justice Scalia, the government in *Nollan* used its regulatory power to deny and grant building permits to bargain for easements to which it would not otherwise be entitled absent just compensation. See *id.* at 836-37. In the political money context, legislators could be seen as using their legislative powers over an array of substantive issues to bargain for the allocation of political money that, under *Buckley*’s equation of money with speech, they would not otherwise be entitled to shape to their benefit. Note that incumbents have incentives not only to use their legislative authority to maximize supporters’ profits, but also to manipulate impending legislation so as to minimize donors’ losses.

178. Cf. Blasi, *supra* note 160, at 637-638 (“I believe a proponent of the checking value should have little difficulty upholding a ceiling on individual campaign contributions. . . . I would strike the balance in favor of upholding expenditure limitations, but I regard the issue as close.”). *But*

hibiting significant limitations on the use of political money empowers government officials to advance their interests through manipulating all lawmaking with economic implications, effectively expanding the issue of distrust particular to speech to most substantive issues.<sup>179</sup>

This cycle results not only in the entrenchment of incumbent legislators, but also dominant political factions that derive power from wealth.<sup>180</sup> No less than incumbent officials (and perhaps more so), many of these dominant political factions are "choking off the channels of political change to ensure that they will stay in and the outs will stay out."<sup>181</sup> In a system protecting political money as a primary tool of democratic exchange, there is a threat that those with a majority of the political money might entrench their own political power by self-interestedly spending political money on political issues that benefit them financially,<sup>182</sup> thus giving themselves greater opportunities to shape future legislation through the use of political money.<sup>183</sup> This type

*cf.* Lewis H. Larue, *Politics and the Constitution*, 86 YALE L.J. 1011 (1977) (focusing on the importance of the First Amendment in allowing citizens to use political money to censure officeholders). Note that a habitual donor who "cuts-off" an elected official for failure to support the donor's legislation can be described as advancing the checking value.

179. See, e.g., John Bresnahan, *Microsoft Uses Appropriations Bill to Fight Key Justice Department Official*, ROLL CALL, June 18, 1998, at 3 (reporting that during Justice Department investigations into alleged antitrust violations by Microsoft, the Republican National Committee accepted a \$100,000 soft-money donation from Microsoft, and many Republicans worked to block funding for the Justice Department's Antitrust Division).

180. Several commentators have observed that cohesive factions that are numerical minorities can wield a disproportionate amount of influence. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971); KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* (1997); JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718-22 (1985). Some have even suggested that minority factions govern democracy, and entrench themselves through factional opportunism. See THOMAS R. DYE & HARMON ZEIGLER, *THE IRONY OF DEMOCRACY: AN UNCOMMON INTRODUCTION TO AMERICAN POLITICS* 17-18 (4th ed. 1975).

181. ELY, *supra* note 151, at 103.

182. Such threats are comparable to concerns that the numerical majority may attempt to entrench itself by silencing the minority in a system in which political power is broadly distributed (i.e., pure speech is the tool for democratic exchange).

183. As opposed to serving as an authoritative statement on political choice theory, this part raises the issue of entrenchment simply to highlight a functional difference between traditional speech and political money. Public choice theorists generally characterize the legislative process as one in which self-serving legislators barter their votes on particular legislation in exchange for support from rent-seeking interest groups to enhance their probability of reelection. Whether or not one subscribes to public choice theory, the differences between pure speech and political money have significant consequences. In a system protecting political money as "speech," those who suffer adverse economic implications have fewer "speech" opportunities as a result of the legislation, even if the majority of the population "consents" to legislation proposed by a faction with political money. In a system in which political money is not protected as speech and significant restrictions exist, legislation does not have such an extreme impact on "speech opportunities." For comprehensive discussions on public choice theory, see generally ANTHONY

of abuse might resemble pro-apartheid South African numerical minorities entrenching their own political power by enacting laws that had the effect of limiting the political participation of anti-apartheid South African numerical majorities.<sup>184</sup>

This cycle is not prone to even out over time,<sup>185</sup> because legislators turn for support to the same donors that they helped with economically beneficial legislation in the previous legislative session,<sup>186</sup> and, because of the cycle, these donors generally have more political money to give than they had earlier.<sup>187</sup> Granted, politicians need support other than financial support, different contributors often have conflicting interests,<sup>186</sup> and people obtain resources from methods other than favorable government decisions. These observations, however, do not make the cycle insignificant or legitimate. As long as courts treat

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DOWNES, AN ECONOMIC THEORY OF DEMOCRACY (1957); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); WILLIAM RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982); MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997).

184. See Foley, *supra* note 13, at 27 (“[L]ibertarian campaign finance (which would permit wealthy donors to contribute as much of their wealth as they wish in their efforts to influence electoral outcomes) might have the effect of entrenching legislative power in the hands of an affluent minority, thereby frustrating the will of the majority.”).

185. Recognition of this exchange as a self-perpetuating cycle runs counter to claims of those who suggest that the difference between incumbent suppression of critics’ speech and promotion of supporters’ business interests might be that “[t]he temptation to suppress challengers’ speech . . . is systemic, cutting across other alliances[,]” whereas “the latter form of corruption will even out over time through political competition for support.” Sullivan, *supra* note 80, at 961.

186. In a random sample of more than 1100 contributors who donated more than \$200 to congressional campaigns in 1996, 80% said they are regularly “pressured by officeholders for contributions.” John Machacek, *Big Givers’ to Political Campaigns Support Finance Reform*, GANNETT NEWS SERVICE, June 9, 1998, available in LEXIS, News Library, Gns File.

187. Indeed, a donor may be more likely to give if the legislator was active in passing earlier legislation that generated greater financial gain for the donor than political money invested. In the interest of future financial support, legislators may have an incentive to ensure donors profit from legislation (or that donors’ losses resulting from legislation are minimized).

188. One might argue that multiple wealthy private actors empowered to use significant amounts of political money are able to “check” government officials and provide protection against centralized government oppression. Unlike public abuse, the argument goes, the competition between various private actors inures to the benefit of less powerful, potentially abused individuals because the private actors will not act in unison. See Epstein, *supra* note 81, at 55-56; Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1641-43 (1988) [hereinafter Epstein, *Modern Republicanism*]. These arguments are unsatisfying because the situations described are too context- and fact-specific to be productively generalized through a universal rule. See Baker, *supra* note 111, at 754. For example, while private actors may compete with one another, they may consistently act adverse to the interests of others (e.g., racism). Cf. James G. Wilson, *Noam Chomsky and Judicial Review*, 44 CLEV. ST. L. REV. 439, 468 (1996) (“It is also a ludicrous fiction to believe that money does not tend toward a point of view. Money likes capitalism very much. More particularly, most rich people love more money.”).

political money as protected "speech" while granting incumbents wide discretion to regulate the economy, the temptation of incumbents to suppress challengers' political money and enhance their supporters' political money through substantive regulation is systemic.

A simple hypothetical might best illustrate the entrenchment of incumbents and private interests through the use of money. Suppose Jack is a newly elected congressperson who sits on the House Telecommunications, Trade, & Consumer Protection Subcommittee. Jack has relatively few financial supporters, and his district is not "safe" (Jack won his race in 1998 by only 1500 votes). At one of Jack's fundraising receptions requiring a contribution of \$1000, Jack meets Abigail, who owns and operates Alpha, Inc., a small technology company that specializes in Type A encryption. Although Alpha is worth only \$2 million dollars, it is the largest encryption company in the U.S. because encryption is such a new technology. Jack and Abigail have a very substantive conversation about trade issues and technology at the reception, and Jack appreciates both Abigail's contribution of \$1000 as well as her offer to help him raise more money in the future.

A federal statute prohibits the export of all encryption technology due to national security concerns, but Congress is considering amending the law so that one type of encryption technology can be exported (there are five existing types of encryption, Types A, B, C, D, and E). A week after the reception, Abigail tells Jack that it is very important to Alpha that Type A encryption is exported (Ford Motor Company has promised to give Alpha, Inc. a \$15 million contract if the technology can be exported).

Jack really doesn't care one way or another about encryption, but since it is very important to Abigail's business, Jack wants her support in the future, and the makers of Types B, C, D, and E have failed to provide financial support to Jack's election committee, he helps Abigail. Jack introduces Abigail to other members on the Telecommunications, Trade, & Consumer Protection Subcommittee that Jack thinks might be receptive to Abigail's claims, and Abigail ends up giving \$1000 to each of the ten other members with whom Abigail meets. The ten other members thank Jack for introducing them to a new funder, and tell Jack they will introduce him to some of their friends who are funders. In voting on the measure, sixteen of the twenty-eight subcommittee members vote for Type A to be the sole encryption technology to be exported (despite Jack's efforts, twelve felt as though it was against national security interests). Jack works with the committee chair to get the bill to the floor, and after the bill proceeds through the entire legislative process, the statute is finally

amended. Consequently, Alpha, Inc. receives a \$15 million contract from Ford Motor Company, and Abigail is ecstatic that her company has grown (it is now worth \$10 million, and she has hired four new encryption specialists at \$200,000 a year).

In the 2000 election cycle, Abigail and her four encryption specialists give Jack a total of \$5000 in direct contributions. Perhaps even more important, they follow Jack's suggestion to give ten other subcommittee members each a total of \$5000, and, in appreciation, each of the ten subcommittee members have advised their friends to contribute money to Jack. Eventually Jack realizes a net gain of \$55,000 in "speech." Of the owners of the businesses that gave to Jack's competitors in the 1998 election, the makers of Type B encryption technology have gone out of business because their technology was not selected for export, and the makers of Types C, D, and E did not give to challengers in 2000 because they were afraid Jack would vote against them again if Jack were reelected. Jack wins his 2000 election by 20,000 votes, and because it appears that Jack's seat is safe, the makers of Type C encryption approach Jack with their financial support.

In the example above, the economic implications involved in Jack's decisions and efforts as a government official enabled Jack to give more "speech" to Abigail, his supporter, and silence his opponents so that he could progressively entrench himself. Jack turned Abigail's \$2 million company in 1998 into a \$10 million company in 2000, and, consequently, Abigail was able to turn a \$1000 contribution in 1998 into what resulted in \$55,000 in contributions to Jack in 2000. Jack was able to penalize non-supporters financially so that they either went out of business or eventually became his supporters. This cycle of entrenchment can continue as long as two things exist: (1) issues about which Jack and most of the voters in his district are ambivalent<sup>189</sup> and (2) individuals whose "speech" in support of Jack is less expensive than the gains they receive from Jack's decisions in their

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189. *But cf.* Smith, *supra* note 37, at 1070 (acknowledging that political money may have a significant impact on narrow issues arousing little public interest, but claiming that "such issues are few"). Recognizing the finite time that even the most civic-minded Americans have to focus on public affairs and the wide range of detailed issues that various congressional committees and subcommittees consider, the number of legislative issues that receive nominal public attention could reasonably be perceived as more than a "few." Also, note that all of the voters in Jack's district need not be ambivalent about an issue. For example, Jack may determine that even though a decision on a particular obscure issue may anger fifty of his constituents, the decision may attract contributions totaling \$40,000 from interests outside his district and result in a net gain of 5000 votes.

favor.<sup>190</sup> Certainly risk (the probability of Jack's support on a particular issue and reelection) is something these contributors must take into account. Fortunately, however, Jack can control the extent of his support for a particular issue, and the probability of Jack's reelection is influenced by his refined ability to "regulate speech" in this manner.

From Abigail's perspective, an initial investment of \$11,000 in contributions to members of the House Subcommittee enabled her to secure legislation that resulted in a \$15 million contract with Ford, and she and her four employees subsequently gave a total of \$55,000 to committee members. Abigail's newfound wealth gives her an opportunity to further entrench herself by investing even more political money in the future, perhaps through continued contributions or by hiring a lobbyist. Her objective through further entrenchment might involve preventing her smaller encryption competitors from securing a legislative export exemption and the opportunity to compete with her for a new \$25 million contract with General Motors.

### *B. Distinction Between Protection of Speech and Political Money*

Now, one may argue that the essence of democracy is, and should be, characterized by elected officials performing favors for their supporters, whether they be financial supporters or poverty-stricken volunteers who walk door-to-door. A critical difference, however, between speech and political money is that "it is possible to protect freedom of speech without at all confronting what is critical about economic affairs in . . . [society]."<sup>191</sup> In a system without significant limits on political money, most lawmaking distributes certain economic benefits that can be easily translated into political power.<sup>192</sup> The continuous cycle of giving political money and reaping economically beneficial regulation, and subsequently using larger amounts of political money and reaping more economically beneficial regulation, can en-

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190. See Edward A. Kangas, *Soft Money and Hard Bargains*, N.Y. TIMES, Oct. 22, 1999, at A27 (reporting comment regarding political money by the chairman of the global board of directors of Deloitte Touche Tohmatsu that "[y]ou must weigh whether you meet your responsibility to your shareholders better by investing the money in the company or by sending it to Washington").

191. Epstein, *supra* note 81, at 46.

192. Cf. Strauss, *supra* note 139, at 1384. Like voting rights:

property rights too are a creation of the state. Property rights are created to serve certain purposes, and they are limited (by tax laws and the law of nuisance, for example) in order to promote certain objectives. There is no necessary reason that they cannot be limited further to promote political equality. It would not be "wholly foreign," or even mildly questionable, to argue for a progressive income tax on the ground that disparities of wealth can undermine democracy.

*Id.* (footnote omitted).

trench political power.<sup>193</sup> By contrast, in a system that protects pure speech but has significant limits on political money, as the government does not routinely allocate and restrict pure speech interests, those who economically benefit from government regulation have not acquired a tool that they can use to further entrench their political power.<sup>194</sup> One is generally naturally endowed with pure speech (it is not an interest that the government regulates or redistributes), and thus the ability of a legislator's allies to exercise this activity is generally not amplified by the legislator's official government decisions.<sup>195</sup> Ironically, the public lawmaking process only enters the business of allocating and distributing "speech" when political money is treated as such.

Modifying the hypothetical presented above, if significant political money limitations made a financial contribution or expenditure by an individual less important, and Abigail simply volunteered to work on Jack's campaign, Jack may have attempted to persuade the members of the subcommittee in the first legislative session to give an export exemption to Type A technology. Jack may have been successful, and Alpha may have secured the \$15 million Ford contract. Subsequently, however, Abigail's ability to support Jack would not be magnified five times due to the legislative decision made earlier on her behalf. The government decision would not give Abigail any advantage as to future legislation in relation to her competitors, the owners of

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193. This situation is not unlike giving government the power to distribute property, and then giving to property holders an escalating advantage in influencing government decision-making that increases in conjunction with the amount of property they acquire.

194. Some commentators claim that no difference exists between political money and other tools of political power, such as "speaking and writing ability, good looks, personality, time and energy . . . organizational skills," celebrity, and "access to or control of the popular press." Smith, *supra* note 37, at 1077; see also ISSACHAROFF ET AL., *supra* note 29, at 657 ("[T]here is no clear point of demarcation that separates disparities in wealth from other differential distribution of resources that bear on the political process."). Government's ability, however, to directly impact the distribution of economic resources distinguishes political money from not only speech, but also the rest of these tools.

195. One could argue that the government allocates speaking opportunities in ways other than trading legislation for political money support. The celebrity and platform accorded an incumbent official simply by virtue of holding office breed various intangible speech benefits, and there are also specific tangible benefits (e.g., the franking privilege). The existence of these speaking opportunities, however, does not warrant the use of the First Amendment to protect the use of wealth allocated as a result of government decisions to influence future government allocations. Others might argue that legislators occasionally use their power to appoint supporters to high profile positions that effectively give the supporters "more speech." The opportunities, however, are much more limited and less systematic than the distribution of economic benefits that can be used as political money, and often the enhancements (e.g., an appointment to the federal bench or an ambassadorship) are not used to directly benefit an incumbent's reelection in the same way political money is used.

Types C, D, and E (as well as the former maker of Type B technology, who is currently destitute).

*C. Unrestricted Political Money Defeats First Amendment Objectives*

Judicial implementation of the First Amendment that protects speech from regulation is intended to prevent incumbent political power from entrenching itself by unfairly using the power of government to sabotage the political opportunities of opponents and critics.<sup>196</sup> The use by courts of high First Amendment scrutiny to prevent significant restrictions on the use of political money does not advance these goals, even in light of the arguments advanced by those against the regulation of political money.

For example, one could argue that if legislators and interest groups are too explicit and perverse in their economic regulation allocating "speech" to their supporters, the democratic majority without political money could step in and remove them from office.<sup>197</sup> Disclosure laws, the argument goes, are designed to facilitate the detection of this problem, and democracy can respond to it.<sup>198</sup> The weaknesses in this argument resemble shortcomings in arguments made in defense of the regulation of traditional speech (which, just like other laws, are disclosed to the public). First, what if the legislators are savvy enough to modulate their regulation of "speech" so that they entrench their power, but do not trigger majority outrage? Second, what if, by regulating and redistributing "speech," the legislature confused and disabled the democratic majority, manipulating the accepted tool of political mobilization to such an extent that the democratic majority was unable to effectively organize to challenge the incumbent lawmakers?

Others assert that the manipulation of lawmaking to enhance incumbent access to political money is caused not by the unregulated

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196. See ELY, *supra* note 151, at 106-07; *cf. id.* at 13 (stating that interpretivists must "identify the *sorts of evils* against which the provision was directed and . . . move against their contemporary counterparts").

197. *Cf.* THE FEDERALIST, *supra* note 151, No. 10, at 80 (James Madison) ("If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.").

198. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 643 (1996) (Thomas, J., concurring in the judgment and dissenting in part); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* 330-35 (1996); Ralph K. Winter, *Political Financing and the Constitution*, 486 ANNALS AM. ACAD. POL. & SOC. SCI. 34, 45 (1986).

nature of political money, but rather the compromised nature of other property. Specifically, Professor Richard Epstein states:

The only way to stop the power of special interest legislation is to limit the stakes of the political game, and this result in turn can be achieved only if the courts impose strict limitations on governmental taxation and regulation of private property and contract, limitations that are far more stringent than the highly deferential "rational basis" test now in vogue.<sup>199</sup>

According to Professor Epstein, reform comes through government limiting itself to the protection of strong individual property rights and minimal reallocation of property interests through restrictions and redistributive policies, and results in a reduction of interest group incentives to petition government for partisan advantage.<sup>200</sup>

Setting aside the suggestion that the ultimate goal of Professor Epstein's argument is to undermine the regulation of property rather than address the problem at hand,<sup>201</sup> and ignoring the practical costs of reestablishing the absolute nature of property as opposed to placing reasonable limits on political money to solve this problem, there are other concerns with his position. First of all, there are real reasons of scarcity, distribution, and interference with others' interests that cause courts to defer to legislative restrictions on property.<sup>202</sup> Responding to the problem of rent-seeking by disregarding issues of scarcity, distribution, and interference discards both the baby and the bath water. Such a solution is not unlike prohibiting criminal prosecutions of mafia figures in order to resolve the problem of bribery of judges by mafia defendants. Second, even in a system of relatively unregulated property rights, the distribution of economic power is not pre-political but results from government rules and regulations.<sup>203</sup> As shown by the hypothetical above, almost every law (not just taxes and redistributive subsidies) influences the allocation of economic interests, whether it involves exports, national security issues, opening a government park, regulating pharmaceuticals, or establishing class action procedures. Consequently, it seems likely that interested parties will always be ready to use political money if allowed to do so. Further, the decision to have fewer laws allocating economic interests only slows the use of political money when the few laws adversely and exclusively affect those who do not have expendable political money. For example, if there were few laws, and they all benefited those

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199. Epstein, *Modern Republicanism*, *supra* note 188, at 1645.

200. See Epstein, *supra* note 81, at 56; Epstein, *Modern Republicanism*, *supra* note 188, at 1645.

201. See Michelman, *supra* note 134, at 139.

202. See *supra* Part III.

203. See Singer, *supra* note 97, at 487-91.

without property to the detriment of those with property, it is probable that those with resources would use political money in an attempt to enact new laws to protect their property. Finally, from a purely theoretical perspective, Professor Epstein offers no reason to set the line of constitutionality at protection of existing distribution. Other positions could be just as easily constitutionalized and immunized from political debate (and political spending), such as a constitutionally guaranteed tax of forty-five percent and a guaranteed annual standard of living allowance for all of \$25,000.

As shown by the application of the speech test to political money, distrust is not "a universal solvent indifferent to substance,"<sup>204</sup> but calls for different judicial treatment based upon the nature of a particular liberty interest. Judicial protection of speech is intended to prevent incumbent political power from entrenching itself by unfairly using government devices to sabotage the political opportunities of opponents and critics. The use of high First Amendment scrutiny by courts to prevent significant restrictions on the use of political money does not advance these goals due to the differences between political money and speech. The only way to protect the rationality of the two-tier regime that preserves heightened protection for speech over property is to allow meaningful restrictions on political money. Otherwise, issues of distrust pervade substantive lawmaking generally. The very principle that motivates constitutional protection of speech from regulation—preventing the ins from manipulating laws to stay in—must be interpreted to entrust the public lawmaking process with enacting restrictions on political money to prevent this danger from spreading to all substantive lawmaking with economic implications.

## V. OBSERVATIONS AND POSSIBLE SOLUTIONS

Political money possesses a number of the characteristics that appear to explain judicial appreciation of the legislature's role in the field of property regulation. Moreover, the combination of relatively relaxed judicial review of property regulations with stringent review of political money regulations appears not to serve but rather to disserve First Amendment objectives related to preventing unfair incumbent entrenchment. Application of high First Amendment scrutiny to political money thus not only overlooks important characteristics that distinguish political money from speech and connect it to property, but

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204. Michelman, *supra* note 16, at 111 (footnote omitted).

is also a self-defeating strategy with regard to the purposes that animate First Amendment jurisprudence.

While it would be tempting, at this point, to embrace the arguments of Justice Stevens in his *Shrink* concurrence by surmising that courts should use the Property Clauses exclusively in considering regulations of political money, and proposing that the judiciary adopt a standard of review based solely upon the logic that "money is property," such a conclusion would be premature. Simply because political money differs from speech does not mean that courts should adopt identical treatment for both the regulation of political money and other types of property regulation. Political money differs from most property, and resembles speech, in some constitutionally relevant ways.

For example, even though the immunization of political money from regulation does not prevent entrenchment in the same way protection of speech does, political money shares with speech the special distrust of the "ins" manipulating regulation to keep themselves in and the "outs" out. Indeed, as this problem is presented both in the context of substantive lawmaking and direct regulation of political money, it may be even more vexing with regard to political money than speech. In contrast, judicial limitations on the regulation of property generally arise from distrust that government officials and majority factions might unfairly manipulate property laws to disproportionately saddle an individual or group with public burdens. Whereas courts are concerned about entrenchment-minded incumbent political power when considering regulations of both political money and speech, they focus on distributive fairness when evaluating restrictions on property.<sup>205</sup> Even a method of judicial review of political money regulation differing from review of speech regulation, therefore, should take into account and effectively respond to concerns of incumbent entrenchment.

There are other concerns with treating political money regulations exactly like property regulations. In the property context, courts often respond to a finding of distributional insensitivity by an overzealous legislature through the use of a takings device—if government regulation goes too far it results in a taking and just compensation is required.<sup>206</sup> Property's just compensation requirement does

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205. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Note, however, the regulation of political money not only poses issues of entrenchment, but also involves questions regarding allocation of burdens. See *supra* Part III.B.2.

206. See *Armstrong*, 364 U.S. at 49; *ELY*, *supra* note 151, at 97; *Epstein*, *supra* note 81, at 51-53. Note, however, that Justice Scalia has opined that because of the state's high degree of control over commercial activities, there may not be any regulatory taking of personal property

not appear to be an extremely promising device to check legislative excesses in either the political money or speech context. While courts might be able to define a manageable standard to determine when an otherwise publicly desirable regulatory scheme constitutes an excessive burden on either one's speech or one's political money,<sup>207</sup> it is unclear how those wronged would be adequately compensated.

*A. The Problem: An Intersection of Competing Liberties*

The unique functional characteristics of political money raise concerns about identical judicial treatment of regulations of political money and regulations of property generally. At the same time, however, squeezing political money into the confines of the First Amendment also results in a fairly uncomfortable fit. Clearly, the fact that courts would fail to consider all of the concerns that accompany political money in using a pure property standard does not detract from the failure of courts to consider the property-like characteristics of political money when applying high First Amendment scrutiny.

In exposing the property characteristics of political money, and distinguishing political money from speech, the issue of whether courts should look to property or speech doctrines in determining the proper treatment of political money should appear at least debatable. Indeed, a conclusion that political money is identical to other types of property and should be regulated as such would defeat the objectives of this Article. A certain degree of ambiguity is necessary here because only in acknowledging both the property and speech characteristics of political money can a court appropriately apply a constitution that addresses both.

*Buckley's* failure stems from its formalistic inability to appreciate and respond to the competing constitutional doctrines and different judicial treatment of property and speech. *Buckley* categorized political money as an interest warranting judicial treatment generally employed to protect speech interests without considering issues that

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(in contrast to real property). See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992) (stating that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings . . . [a] new regulation might even [constitutionally] render . . . property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)").

207. For example, one could assert that a political money limitation that "entirely forecloses a channel of communication" constitutes an excessive burden on the use of one's political money. *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 910 & n.\* (2000) (Stevens, J., concurring).

motivate different judicial treatment of property.<sup>208</sup> This type of formalism presents two problems that both transcend campaign finance law and are applicable to First Amendment interpretation generally, although the first issue is more commonly discussed than the second.

The first problem with *Buckley's* formalism is that it is inexact—it neglects key elements. Even though political money was clearly not speech (nor did the Court claim it to be), the Court in *Buckley*, in its formalist drive for clear categorization, applied to political money regulation the test generally reserved to determine the proper judicial treatment of regulation of speech.<sup>209</sup> As mentioned above, the Court stated that the presence of money did not dilute a “‘pure form of expression’”<sup>210</sup> or operate “to reduce the exacting scrutiny required by the First Amendment.”<sup>211</sup> Despite the fact that multiple constitutional values were implicated, and that the contested regulation arguably advanced or detracted from these constitutional values in different ways, *Buckley's* formalism keeps it simple: political money should be judicially protected like speech. Under *Buckley's* logic, the question essentially involves determining which prefabricated judicial category is more compellingly applicable to regulations of political money. The mutually exclusive nature of formalism artificially forces courts to choose sides and, by doing so, miss important issues of scarcity, distribution, and interference.<sup>212</sup> By playing the First Amendment card, *Buckley* “suppress[es] the complexities, the intersections and conflicts, of historic American constitutional values.”<sup>213</sup> This critique applies with equal force to the Stevens concurrence categorizing political

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208. Cf. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”); HORWITZ, *supra* note 97, at 10-19 (describing the tendency of nineteenth-century legal scholars to structure the law through abstract categories); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-06 (1908) (proposing that classical reasoning that attempts to order all particular facts into clearly defined, fixed, universal legal categories may be arbitrary and unworthy of public confidence).

209. Some, however, claiming that *Buckley* did not apply a strict scrutiny standard to contribution limits, might assert that the case did not formally categorize contributions as warranting protection by a traditional First Amendment standard. See *supra* Part I.A. Even accepting this perspective, the Court’s analysis was still completely within the framework of the First Amendment and failed to consider constitutional property doctrines allowing for less rigorous scrutiny.

210. *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (per curiam) (citing *Cox v. Louisiana*, 379 U.S. 559, 564 (1965)).

211. *Id.* at 16.

212. Cf. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991) (explaining how “the failure of antiracist and feminist discourses to address the intersection[] of race and gender” contributes to the subordination of women of color).

213. Michelman, *supra* note 134, at 155 (describing the effects of Cartesian formalism generally, rather than *Buckley* in particular).

money as exclusively warranting judicial treatment generally reserved for property.

The second problem with *Buckley's* formalism is a little different. Even though it was evident that political money involved property issues, the *Buckley* opinion did not even consider the application of judicial tests associated with traditional constitutional property doctrines.<sup>214</sup> The point is not that *Buckley* was an anomaly, blazing a trail in American law that had never been explored. Rather, there are certain issues that both *Buckley* and the formalist tradition generally seem to take for granted, and fail to adequately explain. Why, when constitutional categories and doctrines intersect in contexts like political money, should courts ritualistically apply the more exacting scrutiny required by the First Amendment? Why should American law choose to wholly embrace one scheme to the exclusion of the other? Does a court oversimplify the matter when it ignores the intersection and selects as controlling the one form of judicial treatment that most stringently scrutinizes legislative regulation?<sup>215</sup>

A number of defenses of the status quo can be imagined, and all are less than convincing. One might claim that if courts did not always err in one direction or another, cases involving intersecting liberties would be left up to the individual discretion of the judge, which would result in an unprincipled patchwork of doctrine. This argument, however, fails to explain why a rule requiring consistent

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214. Although the Supreme Court did not focus on the use of political money as an economic liberty, the Court of Appeals in *Buckley* considered and quickly discarded the suggestion that regulation of political money deserved the judicial protection generally afforded to economic regulation. *Buckley v. Valeo*, 519 F.2d 821, 843 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). As the appeals court stated:

Defendants go too far in saying that this is ordinary legislation, entitled to the conventional presumption of validity that would be applicable, say, to economic regulation. In view of the interests involved, both the compelling government interest needed to sustain such provisions, and the associational freedoms that are impinged, strict judicial scrutiny of the challenged provisions is appropriate.

*Id.*

215. Justice Stevens is not immune from this mutually exclusive formalism. After advancing a daring argument that political money is property and should be protected by the Property Clause rather than the First Amendment, he retreats to the exclusive application of First Amendment doctrine when a regulation of intersecting property and speech interests "entirely forecloses a channel of communication, such as the use of paid petition circulators." *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 910 n.\* (2000) (Stevens, J., concurring). Justice Stevens may have added this note in an attempt to distinguish his *Shrink* concurrence from an earlier majority opinion he authored invalidating prohibitions on paid petition circulators (*Meyer v. Grant*, 486 U.S. 414, 424 (1988)), and cited by Justice Thomas in criticizing the Stevens concurrence in *Shrink*. *Id.* at 919 n.4 (Thomas, J., dissenting). The note shows, however, that Justice Stevens assumes the supremacy of the First Amendment doctrine over the constitutional property doctrine when both doctrines are applicable, and that he does not focus on the particular characteristics of property that explain judicial deference to legislative decision-making.

error toward the highest form of protection provides more restraint on judicial power than a rule consistently erring toward the lowest protection. A second defender might claim that if we are going to err, we should consistently err on the side that gives the most protection to individual liberties. As articulated above, however, erring on the side of individual liberties is, in and of itself unclear, especially in cases like property and political money that, by their very nature, involve conflicts of liberty claims.<sup>216</sup> Finally, another conservator of the status quo might argue that if a regulation is sufficiently important, it will satisfy high First Amendment scrutiny, and therefore a legislature can prevent the most obnoxious uses of liberty interests even if judges generally use improper standards in protecting the liberty interests. If there are reasons that courts do not generally protect property with high First Amendment scrutiny, however, and those reasons are present in a given situation, should they be completely ignored?<sup>217</sup>

The question of whether other contexts exist in which other constitutional provisions starkly intersect and raise questions of appropriate judicial treatment, so aptly exhibited by *Buckley*, deserves further discussion in another forum, and may lead to a standardized approach to these conflicts generally.<sup>218</sup> The significance, however, of

216. See *supra* Part III.B; cf. *Shrink*, 120 S. Ct. at 911 (Breyer, J. concurring):

[T]his is a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.' Nor can we expect that mechanical application of the tests associated with 'strict scrutiny'—the tests of 'compelling interests' and 'least restrictive means'—will properly resolve the difficult constitutional problem that campaign finance statutes pose.

217. A related question recognizes that courts consciously abandoned strict protection of property rights from legislative pronouncements during the first half of the twentieth century, and asks why courts resurrect stringent protection once property moves into the political realm. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 260 (1990) ("Why has the judiciary virtually abandoned property in some forms, but not others? Why give up the overt formal limits with respect to economic regulation and social assistance, and enforce the power and privilege of property against the egalitarian measures of campaign finance laws?"); Frank I. Michelman, *Political Truth and the Rule of Law*, 8 TEL AVIV U. STUDIES IN L. 281, 288 (1988) ("For is it not, after all, a fair question why realism and relativism should have been such potent destroyers of juristic absolutism shielding the market manifestations of property rights against legislative control, but so impotent as the *Buckley* manifesto implies when it comes to their manifestations in the political sphere?"); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1344-45 (1987).

218. This Article does not propose that courts should never defer to the highest standard of protection when liberty interests intersect. Borrowing an example from the Equal Protection area, it makes sense that a law explicitly calling for "the forfeiture of property owned by any African American convicted of selling crack cocaine" should be subject to strict scrutiny. Even though property issues are involved, it is obvious that they are not the animating principles behind this law. On the other hand, however, it is not as clear that a law requiring "the forfeiture of property owned by anyone convicted of selling crack cocaine" should be subject to strict scrutiny, even though African Americans are disproportionately burdened by the law. In com-

political money with regard to the creation of substantive law generally, as well as the failure of formalism to consider constitutionally relevant issues, prompt a search for alternative methods of constitutional interpretation with regard to political money.

### *B. Navigating the Intersection*

Clearly, justifiable reasons exist for generally entrusting more of the boundary drawing between individual liberties and other societal interests to legislatures in some areas (such as property) but generally entrusting more of the work to courts in other areas (such as speech). Recognizing that the use of political money implicates both areas, a method for determining judicial treatment for matters in the intersection is needed that will consider competing constitutional concerns.

Before describing a judicial test to apply to the political money context, it may be worthwhile to briefly discuss other intersections of property doctrine and speech doctrine where courts have devised different tests and approaches for dealing with different intersections. On one hand, traditional speech doctrine governs many intersections of property and speech, such as regulations of flag burning and the content of newspapers.<sup>219</sup> On the other hand, traditional First Amendment doctrine has also tolerated several departures from formal prohibitions on the regulation of speech in other intersections. For example, both property and speech issues arise with regard to mall leafletting, Internet regulation, intellectual property, billboards, lawnsigns, nude dancing, adult movie theaters, consumer protection, commercial speech, antitrust (e.g., price-fixing), securities regulation (e.g., insider trading), labor, contract, and television airwaves. These different intersections of property and speech implicate a number of tests that

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paring the analogy to political money, this Article is in agreement with Judge Skelly Wright's argument that Congress wanted a "straightforward regulation of the excessive use of money as a blight on the political process," and "was unconcerned with the type or quantity of speech that might result" under the new limits. Wright, *supra* note 46, at 1008 & n.36 (emphasis removed). *But see* Buckley v. Valeo, 424 U.S. 1, 17 (1976) ("The interests served by the Act include restricting the voices of people and interest groups who have money to spend.").

219. *See* United States v. Eichman, 496 U.S. 310, 318-19 (1990) (striking down federal prohibition of flag burning); Texas v. Johnson, 491 U.S. 397, 420 (1989) (striking down Texas law prohibiting flag burning); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256-58 (1974) (striking down statute requiring newspapers to provide political candidates "right of reply"); *see also* Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 52-63 (1997) (observing that private property interests enhance expression).

depart from formal prohibitions on regulation of speech.<sup>220</sup> The different tests show that courts have been somewhat situation-specific in applying First Amendment doctrine in the property context, and deflates the claims of those critics who suggest that a “one-size fits all” First Amendment doctrine must be applied to every instance implicating expression, including the use of political money.<sup>221</sup>

Just as a formal First Amendment rule does not address the particular characteristics of political money, the creation of a general single rule or guiding principle that connects all of the intersections of property and speech listed above to the regulation of political money is likely to be imprecise.<sup>222</sup> Instead, the various intersections raise a few important issues that are relevant to the political money context.

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220. Cf. Epstein, *supra* note 81, at 57 (“[The Court] has to police the undeniable friction that takes place at the property/speech frontier. Otherwise, the Court is in danger of indirectly undoing all forms of property regulation in the name of free speech.”); Michelman, *supra* note 16, at 110 (“Yet, whatever faults one may find with the Court’s handling of the direct/incidental distinction, it is hard to withstand the inevitability of the distinction itself. The distinction is plainly designed to preserve lawmaker discretion against the otherwise boundless, trumping power of free expression rights.”).

221. See *Shrink*, 120 S. Ct. at 919 n.4 (2000) (Thomas, J., dissenting, joined by Sotomayor, J.) (citing cases supporting a formal application of the First Amendment in cases involving property and speech to criticize the claim by Justice Stevens that money is property rather than speech). Dean Kathleen Sullivan asserts that “[a]ny blanket reversal of Buckley’s premise that restrictions on political money implicate the First Amendment . . . would bring down a great deal of law in its wake.” Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 317. The creation of a judicial test that acknowledges that restrictions on political money implicate the First Amendment as well as other constitutional doctrines application does not constitute a “blanket” reversal of *Buckley*. Indeed, one could argue that an expansion of *Buckley*’s focus on First Amendment formalism to the exclusion of other interests would bring down a great deal of law in its wake, including but not limited to regulations currently permissible under the direct/incidental test. For example, the Court found that “a state may not force a publisher to escrow the proceeds of confessional crime books for possible payout in restitution to victims, reasoning that such a financial disincentive to publication is no less suspect than a ban.” *Id.* at 317 (footnotes omitted) (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117, 121 (1991)). A formal interpretation of the First Amendment viciously guarding the supremacy of the expressive liberties in relation to other interests, however, would exempt the publishing company from antitrust and compulsory bargaining labor laws because they could siphon off money that might be spent on publishing more crime books. Cf. *Buckley*, 424 U.S. at 263 (White, J., concurring in part and dissenting in part) (arguing that taxation and antitrust laws as applied to newspapers are not invalid simply because they “prevent the accumulation of large sums that would otherwise be available for communicative activities”).

222. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689-90 (1976) (claiming that “the wider the scope of the rule, the more serious the imprecision becomes”). Imprecision arises from both a general, single rule equating political money with other regulated intersections of property and speech (e.g., billboards, commercial speech) as well as an application to political money of a general rule prohibiting regulation of intersections of property and speech (e.g., flag burning and newspapers). Allowing for more regulation of political money does not necessitate a doctrinal change that allows for the regulation of flag burning, newspapers, and other property/speech intersections, or the regulation of

First, there are several situations in which state interference with attributes of property ownership directly affect speech rights. For example, in *Pruneyard Shopping Center v. Robins*,<sup>223</sup> the Court held that a state grant to individuals of the freedom to enter a privately owned shopping mall and gather petitions, effectively burdening a property owner's right to exclude,<sup>224</sup> did not violate the property owner's First and Fifth Amendment rights under the U.S. Constitution.<sup>225</sup>

Granted, there are instances in which the Court has recognized that property owners have the right to place their property at the service of some ideologies and not others.<sup>226</sup> *Pruneyard*, however, shows that there are some situations in which a state may constrain property rights in a way that affects the owner's property and speech interests.<sup>227</sup> Given judicial respect for legislative restrictions on a property owner's right to exclude in the shopping mall context, it is not implausible to propose that courts give greater respect to legislative restrictions on the right to transfer property in the campaign finance

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property holdings used in pursuit of other constitutionally protected interests (e.g., abortion, legal defense, religion). Political money is different for a number of reasons, including but not limited to the entrenching impact of the existing uneven distribution of property on future allocations of property (through lawmaking).

223. *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980).

224. *Id.* at 82-83.

225. *Id.* at 84, 88 (1980). In *Pruneyard*, the Court held that the California State Constitution's grant to individuals of the freedom to gather petitions in a privately owned shopping mall did not violate the property owner's First and Fifth Amendment rights. *Id.* The California Constitution provided that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2. Note that in the absence of a specific state action altering the rights of property owners, the First and Fourteenth Amendments do not prevent a property owner from excluding demonstrators. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

226. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) (holding that a State may not require that a person "contribute to the support of an ideological cause he may oppose"); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (invalidating New Hampshire's compelled display of the state's "Live Free or Die" motto on automobile license plates).

227. Public accommodations laws also involve legislative infringement upon the First Amendment rights of property owners. See *New York State Club Ass'n. v. City of New York*, 487 U.S. 1, 13 (1988) (upholding local public accommodations laws against First Amendment associational rights challenge). Similarly, the time, place, and manner doctrine may allow the legislature the discretion to prevent a property owner from freely using his or her property to advance his or her expressive interests. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-68 (1991) (plurality opinion) (upholding the regulation of nude dancing); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515-17 (1981) (plurality opinion) (upholding billboard regulation); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (upholding restrictions on adult movie theatres locations).

context, especially recognizing that many consider the right to exclude as more central to property than the right to transfer.<sup>228</sup>

Second, courts have recognized that “function” is often an important question in navigating many of the intersections of property and speech. For example, in *Marsh v. Alabama*, the Court determined that a company-owned town functioned no differently than a municipally incorporated town.<sup>229</sup> Consequently, on First Amendment grounds the Court reversed a state conviction of criminal trespass for distributing religious literature on a company town sidewalk. Similarly, the law recognizes that certain types of speech possess the functional characteristics of property. As an exception to First Amendment formalism, copyright law recognizes that some speech functions like property, and provides intellectual property real protection from infringement by others (like property) which eventually expires to promote a free exchange in ideas (like speech).<sup>230</sup> In the campaign finance context, courts should recognize and respond to the observation that political money shares functional characteristics with both property and speech.

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228. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734-35 (1998) (discussing the philosophy espoused by a number of scholars, including William Blackstone, Jeremy Bentham, and Felix Cohen, that “the right to exclude is the irreducible core attribute of property”).

229. *Marsh v. Alabama*, 326 U.S. 501, 503 (1946) (“[T]he town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.”); see also *Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (plurality opinion) (holding that the private Jaybird Democratic Association functioned as a state actor and thus the exclusion of blacks from the organization’s pre-primary elections violated the Fifteenth Amendment); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 780 (N.J. 1994) (considering expressive rights of mall patrons, and holding that “regional shopping centers are, in all significant respects, the functional equivalent of a downtown business district”).

230. See U.S. CONST. art. I, § 8, cl. 8; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). As Justice Brandeis has stated:

The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery.

*International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

Courts have also analyzed traditional functional understandings of speech and property in resolving conflicts in cyberspace. See, e.g., *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1027-28 (S.D. Ohio 1997) (issuing a preliminary injunction enjoining Cyber Promotions from sending unsolicited advertisements to e-mail addresses maintained by CompuServe, reasoning that advertisements constitute a trespass to chattels on the property of CompuServe unprotected by the First Amendment).

Third, deference to government restraints on intersections of property and speech may reflect an attempt, to some degree, to respond to the increasing privatization of democracy. For example, in *Red Lion Broadcasting Co.*, the Supreme Court upheld the "fairness doctrine," which required that broadcasters address public issues and allow equal time for opposing viewpoints.<sup>231</sup> While they may be considered anomalies, both *Pruneyard* and *Red Lion* involve the recognition that states and Congress may have a role in limiting the exercise of liberties by certain property owners in order to secure the relative expressive liberties of others.<sup>232</sup> Courts should allow legislatures to respond to the increasing privatization of democracy by allowing meaningful restrictions on the use of political money.

While the three observations above do not provide any determinative conclusions, they do provide general insights related to the numerous exceptions courts have made regarding other intersections of property and speech that may be relevant in reconsidering judicial treatment of regulations of political money.

In turning toward devising a better judicial approach in the political money context in particular, there are a few other issues to consider. First of all, the problem is not simply a matter of levels and degrees of judicial "scrutiny." In the proliferation of fairly generic tests demanding government interests that are legitimate, important and compelling, courts occasionally ignore the specific reasons that the doctrine allows, or protects a liberty interest from, legislative intervention. Application of a rational basis or intermediate standard of scrutiny to political money does not, in and of itself, take into account the relevant issues surrounding entrenchment, scarcity, distribution, and interference with others' interests in the political money context. A proper negotiation of the intersection with regard to political money calls not for an intermediate standard of review that falls "in between" existing standards of review for property and speech, but rather a *sui generis* standard for a *sui generis* case. A bottle-nosed dolphin, for example, shares some distinct traits with fish and others with chimpanzees. As opposed to housing the marine mammal in a swampy

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231. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388-90, 400-01 (1969). But see *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (striking down a "right of reply" statute that required a privately-owned newspaper to provide space to political candidates to reply to criticism previously published in the newspaper).

232. Cf. *New Jersey Coalition Against War*, 650 A.2d at 780 (arguing that private property owners, such as shopping mall owners "who have so transformed the life of society for their profit (and in the process, so diminished its free speech) must be held to have relinquished a part of their right of free speech. They have relinquished that part which they would now use to defeat the real and substantial need of society for free speech at their centers").

tank of mud, a good zookeeper is mindful of the dolphin's likeness to fish with regard to mobility, but also recognizes the dolphin's similarities to chimpanzees with regard to breathing and giving birth. Political money does not simply fall "in between" property and speech, but has important functional characteristics of each,<sup>233</sup> and courts should not be only "half" as concerned about these characteristics when they are manifested in the political money context.

Second, courts should not dismiss, but rather should consult, existing doctrines in devising a new test for political money. Recognizing that the motivating factor for displacing the status quo involves an effort at improved negotiation of two competing judicial doctrines, courts should draw upon both doctrines in contemplating the appropriate treatment for political money. Further, these well-established doctrinal structures probably reflect some of the most basic set of values and principles that Americans by and large ascribe to the Constitution. Drawing on both of these existing constitutional doctrines as interpreted by courts for guidance provides the flexibility needed to ensure that our judicial treatment addresses important elements of competing constitutional concerns, while at the same time providing judges with clear and doctrinally based parameters.<sup>234</sup>

Third, individuals are likely to debate the core elements of speech and property that explain how courts protect each, and may harbor reasons that are different from those described in this Article. Such debate is inevitable, and is likely to result in principled clarity and direction rather than the frustration that presently arises from mechanically applying high First Amendment scrutiny to political money.

### *C. Reconciling the Intersection in the Campaign Finance Context*

The preceding discussion identified the problem of an intersection of liberty interests generally, and provided some broad principles

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233. *Cf. Fiss, supra* note 98, at 2477:

In ordinary parlance, money is not speech, and so it may be difficult to understand how Congress's effort to regulate political expenditures may have been deemed to violate this provision. But, as in all matters legal, the proper guide for interpretation is not ordinary usage, that is, whether in everyday conversation we treat money as speech. The Court should instead take a more functional approach, in which it identifies the fundamental purposes of freedom of speech and then construes the text to effectuate those purposes.

234. A defender of the status quo might argue that if courts respond to the intersection in the most glaring cases, like campaign finance, judges will subsequently find an intersection in every matter (e.g., flag burning), and select the liberty interest that gives the most discretion to the state. The Court's articulation of clear principles limited to particular activities that truly exhibit intersecting constitutional liberties, as well as the doctrine of *stare decisis*, would limit such a slippery-slope progression. *See infra* Part V.C.

to consider in navigating the intersection. This Article now turns from the abstract discussion of different constitutional liberties to the concrete question of how courts should respond to both expressive and proprietary liberties in reviewing campaign finance regulation.

Perhaps the best vehicle for considering both proprietary and expressive liberties in the campaign finance context would be a judicial standard that simultaneously gives the public lawmaking process broad discretion in regulating political money generally, but closely scrutinizes the regulation for political entrenchment.<sup>235</sup> Such a standard would give the legislature the opportunity to take into consideration the issues of scarcity, distribution, and interference with others' interests common to both property and political money, while addressing judicial concerns about entrenchment of incumbent political power shared by both speech and political money.<sup>236</sup>

One concern that might be raised with judicial oversight of political money regulation for entrenchment involves the claim that principled judicial review in the political context is impossible—that

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235. While anti-entrenchment is most commonly understood as an Equal Protection issue, it has also been recognized as a First Amendment principle. See *Williams v. Rhodes*, 393 U.S. 23, 30-32 (1968); ELY, *supra* note 151, at 106-07; Amar, *supra* note 163, at 1147. It is also important to acknowledge that, unfortunately, the Court has failed to vigorously defend an anti-entrenchment principle in recent years. See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 736-40 (1998) (analyzing the "Court's weakening commitment to an anti-entrenchment principle"); Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship That Defends It*, 14 J. L. & POL. 591, 615 (1998) (criticizing the fact that "the Court is completely nonchalant about accepting incumbent and partisan self-entrenchment as legitimate state interests"); see, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (finding that it is reasonable for a state to enact regulations "that may, in practice, favor the traditional two-party system . . . and that temper the destabilizing effects of party-splintering and excessive factionalism"). Although the Supreme Court has recently tolerated entrenchment rather than explicitly rejecting it as a constitutionally impermissible value, entrenchment continues to be recognized as a problem that warrants redress in other contexts, such as corporate law. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 953-54 (Del. 1985) ("Delaware corporation may deal selectively with its stockholders, provided the directors have not acted out of a sole or primary purpose to entrench themselves in office."); Steven G. Bradbury, Note, *Corporate Auctions and Directors' Fiduciary Duties: A Third-Generation Business Judgment Rule*, 87 MICH. L. REV. 276, 284 (1988) (analyzing *Unocal* and explaining that "[d]irectors lack good faith when they act for the purpose of entrenching themselves in office and without the honest belief that their actions are in the company's best interest").

236. Cf. *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 913 (2000) (Breyer, J., concurring, joined by Ginsburg, J.) ("We should defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process. But we should not defer in respect to whether its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge.").

courts should not enter the “political thicket.”<sup>237</sup> The thought is that in the absence of simple, objectively determinate standards for resolving questions that are heavily charged with partisan political interests, judicial intervention leads only to confusion and ad hoc adjudication. It is particularly difficult to apply an anti-entrenchment test in the campaign finance context, the argument goes, because there exists no settled or neutral measure of the optimal campaign finance system,<sup>238</sup> and thus no “baseline standard against which to measure impermissible entrenchment.”<sup>239</sup> In other words, it is often unclear whether particular campaign finance reform entrenches incumbents. For example, while some would say that a \$100,000 spending limitation for all congressional candidates levels the playing field, others would say that the \$100,000 spending limitation entrenches incumbents because it prevents challengers with low name recognition from spending enough money to introduce themselves and their ideas to the public.<sup>240</sup> Critics might claim that the difficulty in ascertaining a clear definition of entrenchment would result in activist judges employing their own private, political philosophies in reviewing all political money regulation.<sup>241</sup> While the status quo’s reliance upon the economic and speech markets may be imperfect, the argument goes, it at least provides a workable baseline for determining judicial protection of political money.<sup>242</sup>

Courts have, however, struggled with challenges of judicial manageability in the development of other areas of the law, such as

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237. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., writing for a three-Justice plurality) (holding redistricting claims to be nonjusticiable, reasoning that “[c]ourts ought not to enter this political thicket.”). *Colegrove* was effectively overruled by *Baker v. Carr*, 369 U.S. 186 (1962).

238. *Cf. Shrink*, 120 S. Ct. at 925 (Thomas, J., dissenting, joined by Scalia, J.) (“[C]ourts have no yardstick by which to judge the proper amount and effectiveness of campaign speech.”).

239. Klarman, *supra* note 152, at 537.

240. *See, e.g., Smith*, *supra* note 37, at 1072-73 (“Contribution limits tend to favor incumbents by making it harder for challengers to raise money. . . . The consequent need to raise campaign cash from a large number of small contributors benefits those candidates who have in place a database of past contributors, an intact campaign organization, and the ability to raise funds on an ongoing basis from PACs.”) (footnote omitted).

241. *See Abram Chayes, Nicaragua, The United States, and the World Court*, 85 COLUM. L. REV. 1445, 1462 (1985) (citing *Baker v. Carr*, 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting)). An objective of formal categorization of the law by scholars in the late nineteenth century was to “create a sharp distinction between law and politics and to portray law as neutral, natural, and apolitical.” HORWITZ, *supra* note 97, at 170.

242. *See Strauss*, *supra* note 139, at 1386 (“The market ordering may be far from optimal in a theoretical sense. . . . The only thing to be said for that system is that the alternative—a legislative rearrangement of political participation rights according to an unenforceable criterion of equality—is likely to be worse.”).

regulatory takings<sup>243</sup> and reapportionment of voting districts,<sup>244</sup> because they understand the importance of the issues at stake. Recognizing the important issues raised by money in politics, as well as the importance of checking legislative abuses, the manageability issue is worth addressing with regard to an anti-entrenchment test, rather than being a reason to give up on this alternative form of judicial review of campaign finance regulations.

Admittedly, there exists no single, fixed, universal definition of entrenchment, as one could argue that almost all regulation of political money has the effect of advantaging certain groups.<sup>245</sup> The lack of a seemingly "natural" baseline, however, does not end the inquiry. Rather than aspiring toward a "goal" such as equality (as is done in the one person, one vote reapportionment context),<sup>246</sup> an anti-entrenchment test can aspire to prevent an identifiable evil. For example, Voting Rights Act § 5 requires that officials in certain jurisdictions submit proposed changes to voting laws to the Justice Department or a special three-judge panel of the U.S. District Court for the District of Columbia for preclearance in an attempt to prevent the identifiable evil of state officials manipulating electoral rules to dilute the voting strength of racial minorities.<sup>247</sup> By analogy, the objective of an anti-entrenchment test would be to prevent lawmakers from using their official powers to manipulate political advantages in the course of restricting political money, thereby entrenching incumbent officials or particular parties, messages, or ideological viewpoints.<sup>248</sup>

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243. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

244. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964); *Baker v. Carr*, 369 U.S. 186, 234-37 (1962); *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

245. Indeed, the fact that entrenchment is not a universal principle supports the use of an anti-entrenchment standard. Some assert that the objective of government regulation of political money is to silence individuals, presumably so as to entrench political power. See, e.g., Kathleen Sullivan, *supra* note 221, at 316 ("Campaign finance limits are surely aimed at the communicative impact of speech."). This statement is too broad to adequately address this context-specific issue, and the dangers of loosely regulated political money (unlike those of loosely regulated speech) are too problematic to blindly accept the statement. While it is important to be aware of the threat of entrenchment associated with all political money regulation, entrenchment should not be universalized and taken away from courts. Rather, the issue of whether a law is entrenching should be treated as an empirical question for judicial determination on a statute-by-statute basis.

246. See *Reynolds*, 377 U.S. at 558.

247. See 42 U.S.C. § 1973c (1994).

248. As anti-entrenchment involves the prevention of a legislatively enacted evil rather than aspiration toward a defined goal, the anti-entrenchment principle would be limited to striking down entrenching legislation, and would not mandate the creation of a particular type of non-entrenching campaign finance reform legislation.

There are two possible sets of legal guidelines that could be judicially created to review campaign finance laws for entrenchment. These different sets of guidelines operate differently in the context of the dual goals of preventing entrenchment and protecting courts from seeming to take sides in partisan politics. On one hand, courts could adopt a few bright line anti-entrenchment rules, but in exchange for clarity and certainty, the rules would sacrifice precision, especially recognizing the complexity of various campaign finance reforms.<sup>249</sup> On the other hand, courts could adopt a more flexible anti-entrenchment standard that considered all the underlying facts and circumstances. The problem, however, is that a standard is likely to provoke claims that courts are unbounded and inconsistently overreach into the political thicket.<sup>250</sup>

While these claims can never be completely silenced, perhaps the best form of an anti-entrenchment test enhances clarity and consistency through defined factors and compromises as little as possible with regard to accuracy. Under one possible test, the campaign finance statute is subjected to high scrutiny only if it is deemed entrenching,<sup>251</sup> and subjected to rational basis scrutiny if it is not deemed

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249. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689-90 (1976); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577-78 (1988); see generally Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992) (criticizing rules as "suppress[ing] relevant similarities and differences"). There are other problems with the crystalline rule. The clear entrenchment rule tells the entrenching legislator the precise limits within which she can get away with her entrenchment schemes, and invites legislators to ride the line. A more flexible entrenchment standard may "chill" legislative attempts at entrenchment through campaign finance regulation (because they are uncertain that they will be able to get away with it), and may even compel legislators to go out of their way to create campaign finance reform that is clearly non-entrenching for political fear that a court will label them "entrenchers." The clear entrenchment rule also provokes claims that courts are engaging in a legislative function (e.g., a judicial rule deeming contribution limits under \$50 as entrenching establishes the lowest possible contribution limit in a legislative fashion).

250. Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989) (arguing that judicial rules promote judicial restraint). Instead of a clear allocation of the boundaries between the judiciary and the legislature, the standard raises concerns about judges manipulating the standard to support their own political outlooks, the development of an unstable doctrine comprised of inconsistent holdings, and well-endowed political causes impacted by particular campaign finance reform making courts their new political battleground. A standard could also breed a false sense of security among the electorate, who might feel as though they need not scrutinize campaign finance through democracy because the task is done by courts. Further, an anti-entrenchment standard might discourage honest legislators from passing campaign finance reform due to the uncertain possibility that a court will invalidate the legislation and implicitly label the legislator "entrenchment-minded."

251. One might argue that corruption and entrenchment are inconsistent (e.g., a \$150 contribution limitation that prevents corruption may be entrenching), or at least inquire into the relationship between corruption and entrenchment. In the event a campaign finance regulation is deemed entrenching under the anti-entrenchment test articulated below, the regulation will be

entrenching. The test has three steps. Each step represents a distinct way in which a court may find entrenchment.

First, a court automatically deems a statute entrenching if the law, on its face, classifies by individual qualifications other than challenger status,<sup>252</sup> or classifies by party affiliations, message content, or ideological viewpoint.<sup>253</sup> For example, a law that explicitly restricted the spending of only Reform Party candidates to \$300,000 would be deemed entrenching.

Under the second step, judges would determine entrenchment by considering whether the statute burdens challengers as a class more than incumbents as a class. A court would make this determination based upon the following two factors: (a) whether the new plan is likely to increase incumbent advantages in any disparity between incumbents and challengers in raising or spending political money; and (b) whether the new plan is likely to create greater barriers to entry into politics, minimize competition, and decrease the frequency of entry and success by challengers.<sup>254</sup> For example, a \$300,000 spending limit on all candidates for governor in California, where media costs are very high, could prevent challengers from de-

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subject to high scrutiny. A restriction on expenditures will be upheld if it is necessary to achieve a compelling state interest, and a restriction on contributions will be upheld if it is closely drawn to match a sufficiently important state interest.

252. This exception to the facial neutrality of the test recognizes the unique problems faced by many challengers, and permits lawmakers to enact regulations that would give challengers advantages to compensate for these problems. For example, the spending limit for the campaigns of incumbents might be 80% of what it is for challengers. Note that the second part of the test would prevent lawmakers from enacting restrictions that advantaged incumbents (e.g., limiting spending by challengers to 80% of the limit on incumbents).

253. Whereas courts permit legislatures to discriminate against different classes of people in making decisions about economic affairs, they are particularly distrustful of legislative discrimination against different classes of people in the speech context. While any campaign finance plan discriminates against some individuals (high or no limits may discriminate against the poor, low limits may discriminate against the rich), an objective in judicial review is to work to minimize the manipulation of campaign finance regulations to discriminate against particular speech, speakers, or perspectives. Insisting upon some degree of facial neutrality may be the most expedient way to accomplish this goal.

254. The manageability of the anti-entrenchment test is furthered by the fact that it invalidates political money legislation that has an entrenching impact as opposed to invalidating legislation only when a legislative purpose of entrenchment is conclusively established. A particular piece of campaign finance legislation is likely to result from both illegitimate entrenchment motives and defensible non-entrenchment considerations, and a court might have difficulty in determining which "caused" the enactment of the legislation. See Klarman, *supra* note 152, at 529. Further, legislators could hide their entrenchment strategies behind the guise of a relatively "benign" motive, such as the need for incumbents (but not challengers) to receive public funding so that they can spend time working on official business rather than raising money.

veloping public recognition, and thus might decrease the frequency of success by challengers.

The third step would allow courts to declare entrenching certain statutes that technically pass the first two steps, but are *undoubtedly* inconsistent with the purpose of the test, which is to minimize lawmakers from using their official powers to manipulate political advantages in the course of restricting political money.<sup>255</sup> For example, a law that restricted spending to \$300,000 for all candidates, but allowed unlimited spending for any candidate whose party had garnered at least 30% of the vote in the previous election, would not disadvantage the Reform Party on its face and it might not disadvantage challengers as a class. The plan would, however, undoubtedly entrench Democrats and Republicans.

This factored test effectively deals with incumbent official entrenchment and the most obvious attempts to disadvantage certain individuals or the content of speech. It implements the primary principles underlying both regulation of property and protection of speech. Admittedly, the test will miss non-facial entrenchment by majorities and others who hope to exclude certain groups or the content of speech in covert ways that involve doubt as to entrenchment. This line, however, may be necessary to draw. In all but the most glaring cases, it is difficult for a court to determine with any appearance of objectivity which groups are “outs” that should be given advantages, and which groups are “ins” that are attempting to entrench themselves. Further, some campaign finance reforms that increase opportunities for challengers in most districts and that a court determines are not entrenching on the whole may, in a few individual races in particular districts, have the effect of advantaging particular incumbent officials.<sup>256</sup> These exceptions should not be troubling recognizing that almost any type of reform generally enhancing competition will benefit a few incumbents,<sup>257</sup> and that reform that disadvantages a majority of

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255. Like “beyond a reasonable doubt” or “reasonable suspicion,” “undoubtedly” is a necessarily flexible term. While courts should not pick winners and losers when it is a close call as to whether a law is entrenching, courts should not be so mechanical that they fail to invalidate laws that are clearly entrenching, but designed to be just outside the scope of the language of a judicial test. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339, 346-48 (1960) (finding that legislative redefinition of city borders of Tuskegee, Alabama so that all but a few of its 400 black voters were denied the right to vote in municipal elections violated the Fifteenth Amendment, despite the fact that legislation did not explicitly mention race).

256. *Cf. Sunstein, supra* note 168, at 1403 (“Whether campaign finance limits in general do entrench incumbents is an empirical question. . . . Probably the fairest generalization is that campaign finance limits in general do not entrench incumbents, but that there are important individual cases in which such limits prevent challengers from mounting serious efforts.”).

257. *Cf. Nixon v. Shrink Mo. Gov’t PAC*, 120 S. Ct. 897, 909 (2000) (“[A] showing of one affected individual does not point up a system of suppressed political advocacy that would be

incumbent officials in relation to challengers is unlikely to be motivated by unfair self-interest.

As with most judicial tests, courts will need to hone a number of details of anti-entrenchment doctrine over time. For example, it is questionable whether the anti-entrenchment doctrine should allow for a direct legal challenge to substantive legislation based on the argument that the lawmakers enacted the law attempting to obtain more money from special interest contributors.<sup>258</sup> While the anti-entrenchment standard is a crucial tool for thoroughly scrutinizing campaign finance regulation, it might become unwieldy and burdensome if available as a weapon to challenge the validity of every substantive law.<sup>259</sup> Similarly, doctrinal development will need to resolve whether claims can be brought against restrictions that were not entrenching when passed but have become so due to changed circumstances, as well as how to evaluate restrictions on political money used in support of referenda and initiatives.

With regard to judicial manageability, the anti-entrenchment test falls somewhere along the gamut between bright lines and vague standards that courts presently use in navigating the political thicket. On one extreme, the mechanical one person, one vote rule in the reapportionment context exists.<sup>260</sup> The more flexible Section Two Voting Rights Act claim requires that a court take several concrete factors into consideration and make a decision based on a "totality of the circumstances" standard.<sup>261</sup> On the more nebulous end of the spectrum, the Supreme Court has adopted a vague standard that finds a partisan gerrymandering violation when "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively."<sup>262</sup>

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unconstitutional"); *id.* at 913 (Breyer, J., concurring, joined by Ginsburg, J.) ("[A]ny contribution statute . . . will narrow the field of conceivable challengers to some degree. Undue insulation is a practical matter, and it cannot be inferred automatically from the fact that the limit makes ballot access more difficult for one previously unsuccessful candidate.").

258. In other words, it is questionable whether Beta, Inc. should be allowed to bring an action to invalidate legislation giving its competitor, Alpha, Inc., a special encryption export exemption based on the claim that legislators passed the law hoping to attract financial contributions from Alpha, Inc.

259. Cf. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 48-66 (1991) (criticizing improper influence challenges to substantive laws based on the difficulty in determining what constitutes the baseline for appropriate influence and effective limitations on intrusive judicial review).

260. See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gay v. Sanders*, 372 U.S. 368, 381 (1963)).

261. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

262. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986).

In considering the factored anti-entrenchment test, it is also important to note that, in *Buckley*, the Court entered the political thicket in reviewing campaign finance regulations. While the Court was able to use First Amendment doctrine as guidance, the First Amendment says nothing about prevention of corruption being a compelling governmental interest, or the distinction between contributions and expenditures. At a certain point, the Court had to develop some standards and rules in this highly political context, and in doing so, the Court's decision had profound implications with regard to "winners and losers" in the distribution of political power in society. Indeed, by giving the legislature more authority with regard to political money than the current standard under *Buckley*, the factored anti-entrenchment test would, to some degree, represent a retreat from the political thicket.

Not only did the Court in *Buckley* enter the political thicket, but it also applied relatively vague standards in determining whether regulations are too incumbent friendly. For example, in a section of the opinion that is not heavily cited, the Court found that the contribution limits of \$1000 did not disadvantage challengers.<sup>263</sup> In analyzing whether the \$1000 contribution limits tended to benefit incumbents as a class, the court examined a wide range of nebulous factors, such as how often challengers defeat incumbents, the extent of incumbents being able to attract very large contributions, and the effect of contribution limits on minor party and independent candidates.<sup>264</sup> In the campaign finance context, courts apply similarly vague standards in determining whether contribution limits are too low,<sup>265</sup> and whether conditions for participating in public financing are so coercive that they infringe upon the First Amendment rights of candidates.<sup>266</sup>

Courts are in the business of articulating standards and interpreting them, even in the absence of bright lines and fixed categories. The proposed entrenchment test to determine when the legislature

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263. See *Buckley v. Valeo*, 424 U.S. 1, 32-35 (1976).

264. See *id.*

265. See *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 909 (2000) (analyzing whether the contribution limits at issue differed "in degree" or "in kind" from those upheld in *Buckley*, and adopting a nebulous inquiry that asks "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless"); *Buckley*, 424 U.S. at 30 (acknowledging the absence of bright lines by explaining that "a court has no scalpel to probe" the precise dollar amount at which a contribution limit becomes too low).

266. See *Voto Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (stating that "voluntariness has proven to be an important factor in judicial ratification" of public financing systems and that "there is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive").

overextends its authority in regulating political money is no more nebulous, or difficult to ascertain, than assessing the precise point at which a regulation becomes so disproportionately burdensome on a property owner that a taking of her property exists.<sup>267</sup> Despite the issues associated with determining entrenchment, there is no excuse for exacerbation of the entrenchment problem through continued immunization of political money from meaningful legislative restrictions.<sup>268</sup>

In using the anti-entrenchment standard to reexamine the validity of the 1974 Act originally examined in *Buckley*, a court would not automatically apply high scrutiny simply because the 1974 Act involves restrictions on political money (as the court did in *Buckley* and its progeny), but would apply high scrutiny only upon a finding that the provisions of the 1974 Act were entrenching. It does not appear that the 1974 Act, on its face, classifies by individual qualifications, party affiliations, message content, or ideological viewpoint, and therefore the 1974 Act cannot be said to be entrenching under the first step of the anti-entrenchment test.<sup>269</sup>

Under the second step, a court would determine entrenchment by considering whether the statute burdens challengers as a class more than incumbents as a class. A court would make decisions based upon the credibility of testimony of the parties' experts (e.g., political scientists, economists), as well as any additional experts the court may want to appoint. In evaluating the 1974 Act, the experts would look to see whether its provisions, as a whole, are likely to increase incum-

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267. In determining whether a taking exists, a court may use a three-factor balancing test that considers: (a) the character of the government action; (b) the magnitude of the diminution of value; and (c) the effect on "distinct investment-backed expectations." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

268. Courts in other countries have successfully administered an anti-entrenchment review of political money regulation. For example, the highest court in Germany invoked anti-entrenchment principles in invalidating tax deductions for campaign contributions that unfairly "favor[ed] those parties whose programs and activities appeal to wealthy circles." DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 203 (2d ed. 1997) (translated from Party Finance Case II, 8 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] [Federal Constitutional Court] 51 (1958)); see also Issacharoff & Pildes, *supra* note 152, at 695-97 (discussing anti-entrenchment review of campaign finance regulations in various cases by German courts).

269. One might argue that by placing certain prerequisites upon the receipt of public financing for candidates in presidential elections, the 1974 Act classifies by individual qualifications, and is thus entrenching. See 26 U.S.C. § 9002(6)-(8) (1994) (defining major, minor, and new parties); *id.* § 9004(a) (distinguishing the amount given to candidates in major, minor, and new parties). While reasonable minds may differ, it is plausible that credible judicial interpretation would recognize that Congress should be allowed to institute minimal qualifying requirements for the receipt of public funds, and would find these classifications entrenching only upon a determination that they undoubtedly entrenched particular political groups (e.g., Democrats and Republicans, see *infra* text accompanying notes 270-74).

bent advantages in raising or spending political money, and create greater barriers to entry into politics, minimize competition, and decrease the frequency of entry and success by challengers. In other words, the expert would not look to a particular provision in isolation to determine entrenchment, but would look to the 1974 Act as a whole in the context of electoral realities such as the cost of media, printing, and staff support, and the impact of news media coverage. While some might claim that the 1974 Act is entrenching,<sup>270</sup> a cursory review suggests that the 1974 Act would not be entrenching under the second test.<sup>271</sup> Most incumbents spend more than most challengers, and have a greater ability to attract large contributions and independent expenditures. Further, the spending and contribution limits are high enough so that challengers would be able to raise and spend enough money to develop name recognition. Additionally, the public financing provisions do not seem to benefit a particular incumbent president more than individual insurgent presidential candidates.

With regard to the third step, one might argue that the presidential public financing provisions make the 1974 Act entrenching because they are undoubtedly inconsistent with the purposes of the test. Incumbent lawmakers from the Democratic and Republican parties have used their official powers to advantage their own parties and disadvantage other political parties, one would argue, by giving a set amount to "major" party candidates and a lesser amount to "minor" party candidates.<sup>272</sup> Entrenchment, however, is not as undoubted when one considers the following points: (1) it may be impracticable for Congress to give public financing to every single person who has the inclination to run for president regardless of popular support (i.e., quali-

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270. In *Buckley*, appellants unsuccessfully argued that the restrictions on political money invidiously discriminated against challengers. *Buckley*, 424 U.S. at 30-35. The Court addressed "only the argument that the contribution limits alone impermissibly discriminate[d] against non-incumbents" but speculated that "[w]here the incumbent has the support of major special-interest groups . . . and is further supported by the media, the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge." *Id.* at 31 n.33. It ruled that in the absence of expenditure limits, however, the contribution limits alone did not unconstitutionally discriminate against challengers. *See id.* at 35, 39.

271. *Cf.* Fiss, *supra* note 98, at 2475 (discusses possible self-dealing in creating FECA and does not find any).

272. *See* Issacharoff & Pildes, *supra* note 152, at 688-90 (explaining how current public financing laws provide certain funding exclusively for the two major parties, and suggesting that courts police campaign finance regulation to ensure it does not "further entrench bipartisan political lockups"). Note that *Buckley* did not analyze public financing under the same "rigorous" or "strict" scrutiny used to analyze restrictions on political contributions and spending. *Buckley*, 424 U.S. at 90-91. For entrenchment purposes, however, government allocations are as problematic as government restrictions, and therefore it is logical to include public financing in the analysis of the entrenchment impact of campaign finance legislation.

fyng lines must be drawn at some point); (2) by receiving at least 25% of the votes in an election, a minor party can become a major party in a subsequent election;<sup>273</sup> and (3) the minor party receives a portion of the major party entitlement determined by the ratio of the votes received by the minor party's candidate in the last election in relation to the average of the votes received by the major parties' candidates.<sup>274</sup> In short, while the anti-entrenchment test would come to some different results than *Buckley*, it would maintain respect for constitutional speech values, but also acknowledge the relevance of constitutional property doctrines.

### CONCLUSION

Rather than proficiently navigating the intersection of the First Amendment and the Property Clauses, the *Buckley* Court ignored the juncture and applied high First Amendment scrutiny in reviewing limitations on political money. As a result, the Court overlooked and failed to accommodate constitutionally relevant issues. When constitutional doctrines intersect in the political money context, there is no good reason courts must mechanically apply the higher standard of scrutiny. The issues that motivate courts to respect legislative regulation of property do not necessarily disappear in the political sphere, and need not be disregarded due to the reasons courts protect speech. The functional similarities between property and political money, and the functional differences between speech and political money, should raise questions about automatically applying the traditional First Amendment formula to the regulation of political money. While the concurrence by Justice Stevens in *Shrink* highlighted important issues previously unaddressed by the Court, this critique also applies to the use of constitutional property doctrine in the political money context to the exclusion of First Amendment doctrine.

Indeed, the formalist aspiration for neatness, transparency, and clear discipline cannot rationally be carried to the extreme of insisting, for purposes of legal doctrines, that everything in the world be "fitted" into a prefabricated legal category. Rather than being confined to a mutually exclusive selection of either property or speech analysis, courts should be able to draw upon both. A better method of ascertaining the most appropriate judicial treatment of political money

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<sup>273</sup> See 26 U.S.C. § 9002(6) (1994).

<sup>274</sup> See *id.* § 9004(a)(2)(A).

would consider the functional purposes explaining judicial protection of speech from regulation, as well as the functional purposes of judicial respect for property regulation.

An anti-entrenchment standard of review for campaign finance regulation is one example of the implementation of such a methodology. This tool should be employed by judges looking for the best possible way for the judiciary to play its proper role, in relation to the legislature, of securing and effectuating the objectives of both the First Amendment and the Property Clauses. An anti-entrenchment standard would, as in the property context, allow the legislature to consider issues of scarcity and distribution in determining substantive values with regard to political money, and identify boundaries of individual interests and uses that unfairly interfere with others' interests. In making these assessments, the legislature would not be limited to examining individual rights in isolation (e.g., whether an individual's \$1000 contribution is likely to result in quid pro quo), but could, as with environmental regulations of property, consider the impact of activities cumulatively (e.g., whether undesirable implications arise from a political system financed predominantly by less than one percent of the population). At the same time, the judiciary would review the procedural fairness of the democratic process by scrutinizing possible entrenchment effects of the regulation consistent with objectives advanced by judicial protection of speech.<sup>275</sup> In preventing incumbent political forces from using the power of government to establish campaign finance rules that disenfranchise dissenters,<sup>276</sup> an anti-entrenchment standard would complement a constitution that is not limited to the protection of absolute or uniform individual rights, but also contemplates the structural stability of democracy as a whole.

Those favoring the reform of campaign finance laws might note that the application of an anti-entrenchment standard of review does not compel the creation of campaign finance regulation that enhances democratic participation, and that the public lawmaking process may determine that additional regulation of political money is not needed. While the anti-entrenchment standard does not compel campaign finance reform, there is good reason to believe the legislature would enact such laws if the standard were adopted by courts.

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275. See *ELY*, *supra* note 151, at 103; *Issacharoff & Pildes*, *supra* note 152, at 670.

276. *Cf. Larue*, *supra* note 178, at 1011-14 (focusing on the importance of the First Amendment in allowing citizens to censure officeholders).

Legislative institutions often glean lessons from judicial pronouncements.<sup>277</sup> For example, the holding of *Brown v. Board of Education*<sup>278</sup> provided a new cultural understanding that resulted in later civil rights legislation.<sup>279</sup> Currently, courts apply conventional speech tests to determine the appropriate protection for political money, and this application teaches our collective conscience that any campaign finance reform, even reform technically consistent with *Buckley* as it was originally decided, runs counter to the spirit of the First Amendment. If this lesson were changed, and courts acknowledged and responded to the property characteristics of political money in their constitutional pronouncements (or at least acknowledged the tension), public lawmaking may take away a different lesson.

Further, although lawmakers (even in light of the current obstructionary presence of *Buckley*) could more effectively regulate campaign finance through devices such as public financing for congressional and senatorial candidates, perhaps they do not do so as a result of their dependency on those with political money. If given more discretion than presently afforded, legislators might be able to enact reasonable but meaningful restrictions on political money without fear of discipline from the small percentage of the population that presently controls the distribution of political money.<sup>280</sup> While the anti-entrenchment standard does not compel campaign finance reform or guarantee the resolution of all problems related to political money, it does give the legislature the discretion to respond to identified needs and problems as they arise, consistent with conventional understandings of the appropriate function of the public lawmaking

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277. Cf. Michelman, *supra* note 134, at 135 (suggesting that Madison may have understood judicial enforcement of the Takings Clause as teaching a lesson of respect for negative property which would "carry over into a spirit of popular and legislative moderation when it came to the exercise of regulatory and taxing powers . . .").

278. *Brown v. Board of Ed.*, 347 U.S. 483, 493-95 (1954).

279. See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 12 (1994); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 178-79 (1994). But see Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 13 (1994); Michael J. Klarman, *Civil Rights Law: Who Made It And How Much Did It Matter?*, 83 GEO. L.J. 433, 452-53 (1994); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 49-57 (1991).

280. See Raskin & Bonifaz, *supra* note 12, at 1177 ("Less than one percent of the nation's population contributed seventy-seven percent of all campaign funds raised in the 1992 election cycle."); Jonathan Alter & Michael Isikoff, *The Real Scandal Is What's Legal*, NEWSWEEK, Oct. 28, 1996, at 30 ("99.97 percent of Americans don't make political contributions of more than \$200."); Michael Kranish, *Whites Give Most in Political Funding*, BOSTON GLOBE, Sept. 23, 1998, at A3 ("80 percent of federal campaign contributions come from about 0.50 percent of the population.").

process.<sup>281</sup> Comparisons between legislative opposition to campaign finance reform and legislative opposition to term limitations are imperfect,<sup>282</sup> for unlike term limitations, meaningful campaign finance reform is not necessarily terminal to an incumbent legislator's career.<sup>283</sup> In short, it is possible that in light of the flexibility granted by an anti-entrenchment standard of review, a legislature might pass lower contribution limits, limits on independent and candidate expenditures, and public financing for campaigns for all elected positions.<sup>284</sup>

Despite the enhanced possibility of campaign finance reform associated with judicial application of an anti-entrenchment standard, the legislature might make the policy determination that political money regulation is not needed at this time. While one might, as a private citizen, disagree with the legislature on substantive grounds, the role of the legislature in making that policy determination is legitimate. Adoption of judicial tests that give greater respect to democratic decisions should not serve as a pretext to promote a particular type of campaign finance reform. Rather, the debate by constitutionalists over issues of political money, as well as the quality of democracy itself, would benefit by shifting more of the decision-making authority to the legislative sphere, thus opening discussion of the issue to all citizens.

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281. One might argue that even if the legislature obtained the political will to enact non-entrenching campaign finance reform that initially improved the political process, politicians will inevitably search for, and eventually find, loopholes so that they can gain advantages over a competitor. See ISSACHAROFF ET AL., *supra* note 29, at 660 (observing that the unintended consequence of public financing of presidential campaigns and party conventions is that public money is used in addition to, as opposed to instead of, private political money raised through party soft money and convention host-city funds). While one could interpret ever-evolving attempts to circumvent political money regulation as a sign that political money is unregulable, a better conclusion may be that the public lawmaking process should be given more flexibility to regulate political money. More flexibility would give the public lawmaking process additional tools to prevent circumvention in the first place, and greater flexibility to close a loophole once it is detected.

282. See Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1539 (1999) (claiming that "[d]irect democracy is often the only outlet for such groups that advocate reforms presenting conflicts of interest for representatives—reforms like term limits [and] campaign finance reform").

283. Cf. Klarman, *supra* note 152, at 504 (recognizing an entrenchment continuum, at which one pole term limits exist that "may guarantee that [legislators] will not be reelected" where as other issues along the continuum, such as reapportionment, "may simply reduce their chances of being reelected").

284. Additionally, the fact that legislatures and citizens supporting ballot initiatives have attempted to enact meaningful reform since *Buckley* (much of which has been invalidated by courts applying *Buckley's* principles) suggests that legislatures and citizens would enact reform if liberated from *Buckley's* constraints. See, e.g., *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-92 (1978); *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995); *Day v. Holahan*, 34 F.3d 1356, 1359 (8th Cir. 1994); *Vannatta v. Keisling*, 899 F. Supp. 488, 497 (D. Or. 1995).

Individuals will surely dispute the specifics of the anti-entrenchment standard, and some may favor a different strategy. Whatever one thinks of the particulars, the central issue is that political money resides within an intersection of competing constitutional doctrines, and courts need to cultivate a more discerning methodology for negotiating that intersection. Abandoning *Buckley's* extreme formalism and acknowledging that political money is both a property and speech question not only expands judicial perception to permit a more complete understanding of the nature of political money. Our republic is best served through democratic deliberation and decision-making regarding campaign financing that is reviewed using judicial tools tailored to the intricacies of political money. Such devices would allow for courts to take into account the respect for public lawmaking found in property jurisprudence, and simultaneously scrutinize political money regulations in ways that advance the specific objectives that explain protection of speech.

Although Justice Stevens does not address or resolve all issues associated with the campaign finance dilemma, his reminder that "[m]oney is property" makes a profound contribution by challenging flawed assumptions. Language shapes the world, we are told. If so, Justice Stevens helps construct a more accurate definition of political money that allows us to envision a more equitable society. "Property" describes political money just as precisely as "speech" describes political money, and there is no reason that courts should not take into consideration both speech doctrine and property doctrine in developing a new way to look at campaign finance.