THE FIRST AMENDMENT TO THE U.S. CONSTITUTION [1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
Passed by Congress September 25, 1789. Ratified December 15, 1791.

To understand the current framework of campaign finance in the U.S. requires a basic understanding of the First Amendment, which protects freedom of speech, the press, and association. The First Amendment guarantees citizens' right to express and to be exposed to a wide range of opinions and views. It was intended to ensure a free exchange of ideas, whether spoken or written, even if the ideas are unpopular. It covers all kinds of expression (including non-verbal communications, such as sit-ins, art, and advertisements). The media, including print, television, radio and Internet, is free to distribute a wide range of news, facts, opinions and pictures. The amendment protects not only the speaker, but also the recipient of the information. The right to read, hear, see and obtain different points of view is a First Amendment right as well.[2]

In our nation's early years, freedom of speech might be exemplified by someone on a soapbox speaking in a public square; press freedom involved printed speech; freedom of association allowed people to gather in the same location. Today's communication environment differs dramatically from the one that existed at our nation's founding. If someone today expresses an opinion in a blog or on social media, is it freedom of speech, press or association? And today's vast media environment has increased both the opportunities and cost to get out one's message. Media outlets may be owned by corporations. Both the individual blogger and the *New York Times* are protected by the First Amendment, even though the *Times* is a corporation. And when corporations own media outlets, are First Amendment protections changed? Should lines be drawn? Issues like these are part of the Supreme Court's consideration of limits on campaign financing.

Limits on Free Speech

The right to free speech is not absolute. The U.S. Supreme Court has ruled that the government sometimes may be allowed to limit speech. Historically, a fundamental distinction arose between the **content** of speech and the **means** whereby that speech is expressed.

Speech is given the greatest level of protection and the highest level of scrutiny by the Court under the First Amendment. But even the **content** of speech can be limited if it is an incitement to violence or obscene and without any redeeming social value. Although not subject to "prior restraint," libel, slander, wrongful use of copyright material and fraudulent commercial speech are examples of speech that crosses the boundary of protection and can be enjoined and/or result in an award for damages.

Limits to freedom of speech have also been made with regard to content-neutral regulation of the **means** of expression. Means used to exercise freedom of speech have been subjected to "reasonable" limits with respect to time, place and manner of expression. Regulations like noise

ordinances, anti-littering laws, and rules limiting occupation of public spaces like sidewalks, streets or the Mall in Washington, D.C., have been upheld when deemed to be reasonable.

Nor is free speech always popular. Protection of persons who make racist or sexist opinions can be misinterpreted as support of the statements. One federal judge stated that tolerating hateful speech is "the best protection we have against any Nazi-type regime in this country."[3] To not restrict such speech has been interpreted as a valid governmental interest; but it would be in the government's interest to limit that speech if it incites violence.

Political Speech and Money

A critical question of the last forty years is the issue of money and speech. While some maintain that "money is speech" and argue that limitations on money in politics unconstitutionally limit free speech, others ridicule the notion that money and speech are synonymous – that a billion-dollar corporation spending unlimited amounts in political campaigns can be the same as a single person speaking at a public meeting. However, the relationship of money and speech is not so black and white -- in either direction.

In our current media-saturated society, it is clearly necessary to spend money to get one's views to the public for consideration. Thus government regulation of what a citizen running for political office can spend implicates the First Amendment in some fundamental way. On the other hand, it does seem strange to say that a special interest group can spend unlimited money buying a megaphone that drowns out the speech of others.

Recent Interpretation of the First Amendment

Today the Court asks three questions before deciding on any First Amendment restrictions: Is there significant or compelling governmental interest that justifies the limitation? Is the limitation appropriate or the least restrictive means of protecting that governmental interest? Does the limitation apply too broadly to situations where the governmental interest is not in play? The Court uses these tests when they consider limits to campaign financing.[4]

In *Buckley v. Valeo* (1974) the Supreme Court held that blocking "corruption or the appearance of corruption" is a fundamental governmental interest that justifies some limitations on First Amendment freedoms. The Court then examined whether the limitations passed by Congress in the Federal Election Campaign Act were the least restrictive or appropriate means.

In *Buckley* and subsequent cases, the Court set a number of fundamental holdings:

1. Spending limits on candidates are unconstitutional because there is no link between the spending of money by candidates and "quid pro quo" corruption.
2. Contribution limits are constitutional because the giving of money to political candidates can lead to corruption or the appearance of corruption.
3. Disclosure of both spending and contributions can be required because disclosure diminishes the opportunity for corruption and enables the public to evaluate candidates.
4. Independent, uncoordinated expenditures cannot be limited because there is no gift to the candidate that could be corrupting.

5. A variety of additional restrictions, such as contribution and solicitation limits on political parties, are acceptable as they prevent circumvention of contribution limits.

The Supreme Court under Chief Justice Roberts purports to apply the *Buckley* structure but has made far-reaching and fundamental changes in our campaign finance system by holding that:

1. The right of citizens to hear and the right of corporations to speak means that the ban on corporate participation in candidate elections is unconstitutional. Independent expenditures do not corrupt (*Citizens United* building on *Bellotti*).
2. The limit on the total amount an individual can give to candidates, political parties and political committees cannot be justified. There is no additional threat of corruption from a large number of contributions so long as the basic contribution limits are in place and the restriction is not the least restrictive means of preventing circumvention of those basic contribution limits (*McCutcheon*).
3. There is no place in campaign finance law for the rationale of fair competition, a level playing field, or protecting representative democracy – only corruption or the appearance of corruption justifies limits on the First Amendment (*Citizens United* overruling *Austin*; *McCutcheon*).
4. Quid pro quo corruption should be interpreted very narrowly so that gaining special access to an elected official, influencing an official's or a party's approach to an issue without vote buying, and soliciting million-dollar contributions don't give rise to corruption or the appearance of corruption (*Citizens United*; *McCutcheon*).

Questions for Consideration

A number of questions must be considered when looking at the First Amendment in the campaign finance context. By strictly applying First Amendment analysis, drastically limiting what constitutes a compelling governmental interest, and rigorously searching for less restrictive means, the Roberts Court has upended campaign finance law. While some may say that this exclusive focus on the right of individuals and associations to spend money on speech is a "pure" approach, as the ACLU would maintain, [5] others believe that this one-sided analysis ignores the fundamental role that the First Amendment should play in protecting a representative form of government under the Constitution.

In *Citizens United* and *McCutcheon*, the Court overruled the 1990 decision in *Austin v. Michigan Chamber of Commerce*, where that Supreme Court recognized a compelling state interest in combating a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." In rejecting that compelling state interest and in rejecting that form of corruption, some argue that the current Court has embarked on a dangerous path.

Freedom of speech normally includes not only the right to speak, but it also protects the right to hear. The rights or identity of the speaker is not the only relevant consideration -- the need for citizens in a democracy to hear full discussion of issues is also protected. Thus in *Citizens United*, as in previous decisions by a more liberal Court, the right to hear was included in the First Amendment reasoning. Even if corporations should not have full free speech rights to

spend unlimited sums in a candidate election, the right for the public to hear the views of corporations was constitutionally important.

Also, traditionally, freedom of the press and freedom of speech protect the same rights. These rights are not different based on the identity of the writer or the speaker. The lone blogger and the New York Times are protected by freedom of the press, even though one is a single individual and the other a large, for-profit corporation. Because campaign finance law has statutory exemptions for the press, allowing newspapers to spend money endorsing candidates, for example, constitutional law has not gone down the difficult path of defining "the press" that would be required if attempts were made to limit spending in the speech context but not limit freedom of the press. Should the press, however, defined, have different rights than individuals?

Another controversial issue is the question of corporate versus individual rights. Obviously, First Amendment freedoms belong to individuals; what are the limits of First Amendment rights when it comes to associations of individuals? After all, the First Amendment protects the right to associate as well as speech and press. Associations take many forms in American society; from political parties to religious organizations; from giant limited-liability, for-profit international corporations to local charitable organizations; from newspapers and media outlets owned by corporations to the League of Women Voters, with affiliated organizations in 50 states and more than 750 communities. Do all these associations or should all these associations have the same or different rights under the First Amendment, and how should they be differentiated in law?

Only relatively recently have limited-liability corporations created by state law had free speech rights to advertise their commercial products. But now they can "speak" and spend freely in candidate elections. Should the preacher of a tax-exempt church be allowed to urge parishioners to vote for a particular political party, and what is a "religious organization" anyway? What are the appropriate limits, if any, for a political party raising and spending funds to help its candidates in an election? Could the government set such limits too low?

Should there be limits on the quantity of speech? [6] Campaign finance limits are prohibited, the *Buckley* Court said, because they "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." The concept that "More money allows for more speech" might mean that more people hear the ideas or it could be that some people just hear the same idea over and over. Another argument against this is that large quantities of some speech may interfere or not allow for the speech of others. How much money is needed to provide ample opportunity for an idea to be heard?

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[1] This paper draws upon Lloyd Leonard, 2014. "The First Amendment" (Appendix B, *Money in Politics: Developing a Common Understanding to the Issues*, LWVUS).

[2] National Constitution Center, *Amendment 1, Freedom of Religion, Speech, Press, Assembly, and Petition,* http://constitutioncenter.org, accessed May 20, 2015.

[3] American Civil Liberties Union, January 2, 1997. *Freedom of Expression-ACLU Position Paper*, https://www.aclu.org/freedom-expression-aclu-position-paper, accessed May 20, 2015.

[4] See MIP Issue Paper "Historic Shifts in Supreme Court Opinion about Money in Politics."

[5] American Civil Liberties Union, March 27, 2012, *The ACLU and Citizens United*, https://www.aclu.org/aclu-and-citizens-united, accessed May 20, 2015.

[6] David Kairys, October 16, 2012. "Is Freedom of Speech at Risk in the Election?" American Constitution Society Blog, http://www.acslaw.org/acsblog/is-freedom-of-speech-at-risk-in-the-election, accessed May 20, 2015.