Saint Louis University Law Journal

Volume 55
Number 3 *(Spring 2011)*

Article 5

2011

Timing is Everything: A New Model for Countering Corruption Without Silencing Speech in Elections

Jessica A. Levinson
jalevinson@gmail.com

Follow this and additional works at: https://scholarship.law.slu.edu/lj

Part of the Law Commons

Recommended Citation
Levinson, Jessica A. (2011) "Timing is Everything: A New Model for Countering Corruption Without Silencing Speech in Elections," *Saint Louis University Law Journal*: Vol. 55 : No. 3 , Article 5.
Available at: https://scholarship.law.slu.edu/lj/vol55/iss3/5

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.

TIMING IS EVERYTHING: A NEW MODEL FOR COUNTERING CORRUPTION WITHOUT SILENCING SPEECH IN ELECTIONS

JESSICA A. LEVINSON*

TABLE OF CONTENTS

INTRODUCTION 855

I. TEMPORAL LIMITS 856

II. BIFURCATED *BUCKLEY*: CONTRIBUTION AND EXPENDITURE LIMITS 858

III. AN EXAMINATION OF THE COURTS' TREATMENT OF TEMPORAL RESTRICTIONS 860

A. Non-Election Year Restrictions 860

B. Legislative Session Bans 865

C. Post-Election Bans 870

IV. CRITIQUING THE COURTS' TREATMENT OF TEMPORAL CONTRIBUTION RESTRICTIONS 871

A. The Effect of Temporal Restrictions on the Government, Contributors, and Candidates 872

1. The Government's Interest in Imposing Temporal Contribution Restrictions 872
2. The Burdens that Temporal Contribution Restrictions Place on Contributors 873
3. The Burdens that Temporal Contribution Restrictions Place on Candidates 873

B. The Over - and Under - Inclusiveness of Temporal Contribution Restrictions 875

* Jessica Levinson is a visiting Associate Clinical Professor of Loyola Law School, Los Angeles. She clerked in the Central District of California for the Honorable James V. Selna. She received her J.D. from Loyola Law School, where she graduated cum laude and Order of the Coif, and her B.A. in English and Economics from Loyola Marymount University, where she graduated magna cum laude and as the class valedictorian. The author would like to thank Professor Allan Ides, for his always sage guidance and support. Special thanks to Provost Elizabeth Garrett, Professor Richard L. Hasen, Liriel Higa, Christie Bahna, and Tara Weinstein for their invaluable editorial comments.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

C. Temporal Contribution Restrictions and Time, Place, and Manner Restrictions 876

V. VARIABLE CONTRIBUTION LIMITS 878

A. Variable Contribution Limits Based on Speaker 879

B. Variable Contribution Limits: Publicly v. Privately Funded Candidates 882

VI. THE INAPPLICABILITY OF *DAVIS V. FEC* 883

CONCLUSION 884

INTRODUCTION

After the Supreme Court's sweeping decision in *Citizens United v. FEC*,[1] scholars and reformers are scrambling to find new ways to limit the influence of money in politics. In striking down prohibitions on corporations' use of general treasury funds to make independent expenditures, the *Citizens United* Court eliminated one of the major avenues used to limit the potentially corrupting influence of money in campaigns.[2] One area of the law left open by the *Citizens United* decision is that of temporal restrictions on campaign contributions. This Article examines limits on when during campaigns money may be given and received, critiques the courts' approach to this issue, and proposes a new solution to efforts to limit the influence of money in politics.

Temporal limits on campaign contributions prohibit contributions during certain time periods.[3] Temporal limits may take the form of pre-election, legislative-session, off-year, or post-election bans on contributions.[4] These restrictions are ostensibly enacted to prevent the flow of money to candidates during time periods when contributions pose a unique threat of actual or apparent corruption.[5] Some courts have viewed these bans as contribution limits, limiting the time when contributions may be made rather than the size of contributions.[6] Other courts, however, have categorized these restrictions as expenditure limits, preventing a candidate from spending money by prohibiting that candidate from raising money during a certain time period.[7] This Article examines the courts' varying approaches to temporal restrictions on campaign contributions and analyzes the benefits and burdens that different types of temporal restrictions place on the three players in any campaign finance question: the contributor, the candidate, and the government.

Because courts have found that the most effective temporal restrictions stand on constitutionally infirm grounds,[8] this Article presents a different solution to the problem of restrictions on when contributions can be made and received. While the legislative model proposed by this Article is novel, it draws on existing systems, found to be constitutional, which seek to limit the influence of money in politics for support.

1. 130 S. Ct. 876 (2010).
2. *Id.*
3. *See, e.g.*, State v. Alaska Civil Liberties Union, 978 P.2d 597, 626–27 (Alaska 1999).
4. *See id.* at 628–30.
5. *See id.* at 619.
6. *See, e.g.*, Zeller v. Fla. Bar, 909 F. Supp. 1518, 1527 (N.D. Fla. 1995) (citing Op. of the Justices to the House of Representatives, 637 N.E.2d 213, 213 (Mass. 1994)); *Alaska Civil Liberties Union*, 978 P.2d at 629.
7. *See, e.g.*, *Zeller*, 909 F. Supp. at 1527–28.
8. Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Part I of this Article provides a brief introduction to temporal contribution restrictions. Part II of this Article discusses the campaign finance framework elucidated in *Buckley v. Valeo*.[9] Part III of this Article examines the purposes behind temporal limitations on campaign contributions and details the courts' treatment of non-election (or off-year) bans, legislative session bans, and post-election bans. Part IV of this Article critiques the courts' varying approaches to temporal contribution restrictions. Part V argues in favor of variable contribution limits based on the time contributions are made and received and analyzes pertinent cases dealing with variable contribution programs. This section of the article examines cases ruling on contribution bans based on the identity of the contributor, and then reviews cases dealing with variable contribution limits based on whether a candidate opts into a public campaign financing program. Part VI of this Article briefly explains why the Supreme Court's 2008 decision in *Davis v. FEC*,[10] striking down the so-called "Millionaire's Amendment" to the Federal Election Campaign Act (FECA), has no bearing on the analysis of variable campaign contribution limitations discussed in this Article. This Article concludes by summarizing the critiques of the courts' varying approaches to temporal contribution restrictions and reiterating the merits of the new model for campaign finance legislation proposed in this piece.

I. TEMPORAL LIMITS

States,[11] the federal government, and the courts have long recognized that the use of money in campaigns can be limited because money may have a detrimental effect on electoral processes.[12] Money may, for instance, give—or appear to give—large contributors unfair access to and influence over candidates and office holders.[13] Elected officials should serve the interests of

9. *See generally id.*

10. 554 U.S. 724 (2008).

11. As used in this Article, the word "state(s)" refers to states and local jurisdictions, including counties and cities.

12. *See, e.g.*, *Buckley*, 424 U.S. at 26–27.

13. In *Buckley*, the Supreme Court held that:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. at 26–27. *See also* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.").

all of their constituents, not just those who can and do give or spend money in support of their candidacies. In order to stem the tide of actual or apparent corruption, the government has endeavored to curb the influence of money over politics—most commonly by limiting the size of contributions and less frequently by prohibiting the making and receiving of contributions during certain time periods.[14]

The majority of states and the federal government have concluded that contributions over a certain dollar amount may give rise to actual or apparent corruption and, hence, can be limited.[15] Most limits on the size of campaign contributions take the form of per-election limits, such that contributors are prohibited from giving contributions over a certain dollar amount each election cycle.[16]

Some jurisdictions have found that contributions made and received during certain time periods give rise to increased fears of actual or apparent corruption; those jurisdictions limit not the size of contributions but when contributions may be given and received.[17] For instance, off-year and post-election restrictions are enacted based on the belief that contributions given in years when there is no election—or after the election is over—are more readily seen as being given to gain access or influence, rather than for the election of the candidate.[18] States have enacted bans on contributions during legislative sessions[19] based on the belief that corruption or its appearance are more likely to result when a contributor gives a candidate money while that candidate is voting on an issue, which may directly affect that contributor.[20] Temporal contribution restrictions, therefore, shift the time when contributions can be made or received, but do not affect per-election limits on the size of campaign contributions.

---

14. *See* State v. Alaska Civil Liberties Union, 978 P.2d 597, 628–30 (Alaska 1999); Ferre v. State *ex rel.* Reno, 478 So. 2d 1077, 1079–80 (Fla. Dist. Ct. App. 1985).

15. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES (2010), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf.

16. Some states have imposed calendar-year, as opposed to per-election, contribution limitations. *See id.*

17. *See Alaska Civil Liberties Union*, 978 P.2d at 626–27 (citing ALASKA STAT. §§ 15.13.072(c), 13.074(c)(4) (1998)); *Ferre*, 478 So. 2d at 1079–80.

18. *See Alaska Civil Liberties Union*, 978 P.2d at 628; *Ferre*, 478 So. 2d 1077 at 1079–80.

19. Some legislative session contribution bans cover both incumbent and non-incumbent candidates; others apply only to incumbents. *See, e.g.*, Emison v. Catalano, 951 F. Supp. 714, 722–23 (E.D. Tenn. 1996) (enjoining application of ban against non-incumbents). For further discussion of session bans, see Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 121 (2008).

20. *See, e.g.*, N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 715–16 (4th Cir. 1999).

II. BIFURCATED *BUCKLEY*: CONTRIBUTION AND EXPENDITURE LIMITS

Every type of campaign finance restriction, including temporal restrictions on campaign contributions, is analyzed under the Supreme Court's seminal 1976 decision, *Buckley v. Valeo*.[21] *Buckley* laid the framework for more than thirty years of campaign finance jurisprudence. The courts have understood the clear message of *Buckley* and its progeny to be that while contribution limits are subject to a less exacting standard of review, expenditure limits are subject to the strictest scrutiny.[22] The level of scrutiny often determines the validity of a challenged restriction.

The *Buckley* Court analyzed provisions in the Federal Election Campaign Act (FECA) and held that both campaign contributions and expenditures are speech.[23] Hence, any restrictions on the ability to give or spend campaign funds must pass muster under a relatively stringent First Amendment analysis.[24] *Buckley*, however, did not treat contribution and expenditure restrictions in the same way.

The *Buckley* Court held that contribution limits, in contrast to expenditure limits, present "only a marginal restriction upon the contributor's ability to engage in free communication."[25] The Court continued, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[26] Put another way, a contribution only says, "I support John Smith for City Council," but does not explain why. Contributions are seen as one link in the chain removed from expenditures—the Court reasoned that contributions must, by definition, be spent by someone else before they become pure speech.[27]

The Court held that a contribution limit "involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."[28] In other words, supporters remain free to voice their support of a candidate without contributing money.

---

21. 424 U.S. 1, 20–21, 44–45 (1976) (per curiam); *see also* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 486–87 (2007).

22. *See Buckley*, 424 U.S. at 74–75; Zeller v. Fla. Bar, 909 F. Supp. 1518, 1524 (N.D. Fla. 1995) (suggesting looser standards for contributions).

23. *See Buckley*, 424 U.S. at 16.

24. The *Buckley* Court stated, "[T]his 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." *Id.* (citations omitted).

25. *Id.* at 20–21.

26. *Id.* at 21.

27. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

28. *Buckley*, 424 U.S. at 21.

However, with respect to a candidate's right to receive contributions (as opposed to a contributor's right to give contributions), the Court held that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."[29] Contribution limits must therefore be high enough to allow candidates to raise the funds needed to competitively seek office.

Because contribution limits are seen as less burdensome on First Amendment rights than expenditure limits, courts have subjected limits on the size of campaign contributions to a standard of review less searching than strict scrutiny. Contribution limits are upheld "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[30] Courts have consistently held that preventing corruption or the appearance of corruption is an important governmental interest sufficient to uphold contribution limits.[31]

In contrast to contribution limits, the *Buckley* Court stated that because "virtually every means of communicating ideas in today's mass society requires the expenditure of money," an expenditure limit on campaign funds "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[32] The Court stated that expenditure limits, as opposed to contribution limits, present "substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[33]

Hence, courts have subjected expenditure limits to strict scrutiny, such that a limitation is upheld only if it is narrowly tailored to serve a compelling governmental interest.[34] Given this heightened level of scrutiny, expenditure limits are almost universally struck down on First Amendment grounds.[35]

In sum, *Buckley* held expenditure limits to be unconstitutional, finding that they infringe on a candidate's First Amendment rights without sufficiently

29. *Id.*

30. *Id.* at 25.

31. *See, e.g.*, Anderson v. Spear, 356 F.3d 651, 670 (6th Cir. 2004) (citing *Buckley*, 424 U.S. at 26–27); N.C. Right to Life, Inc., v. Bartlett, 168 F.3d 705, 717 (4th Cir. 1999) (citing *Buckley*, 424 U.S. at 33); Zeller v. Fla. Bar, 909 F. Supp. 1518, 1525 (N.D. Fla. 1995); State v. Dodd, 561 So. 2d 263, 265 (Fla. 1990) (citing FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)); Ferre v. State *ex rel.* Reno, 478 So. 2d 1077, 1081 (Fla. Dist. Ct. App. 1985).

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

33. *Id.* The *Buckley* Court additionally found that expenditure limits do not serve to prevent actual or apparent corruption the way contribution limits do. *Id.* at 53.

34. *See id.* at 45.

35. Expenditure limits have been upheld for candidates who accept them as a condition for receiving public financing. *Id.* at 57 n.65.

supporting the government's interest in preventing corruption or its appearance.[36] The Court, however, upheld contribution limits under a First Amendment challenge, finding that those limits directly support the government's interest in preserving the integrity of electoral processes and did not unconstitutionally infringe on a contributor's First Amendment rights.[37]

III. AN EXAMINATION OF THE COURTS' TREATMENT OF TEMPORAL RESTRICTIONS

Pursuant to *Buckley*, cases analyzing campaign finance restrictions—whether they be contribution limits (either on the size of contributions or when they may be given) or expenditure limits—require the balancing of three distinct interests: the government's interest in preventing corruption or its appearance,[38] a candidate's supporter's interest in demonstrating their endorsement of a candidate by giving that candidate money,[39] and a candidate's interest in raising and spending the funds necessary to effectively advocate for herself in a campaign.[40]

This section of the article details key cases addressing temporal restrictions on campaign contributions and explains how courts balance the pertinent interests at issue.

A. Non-Election Year Restrictions

Non-election-year or off-year fundraising restrictions prohibit or limit campaign contributions during years in which there are no elections. Typically, contributions are permitted starting approximately one year prior to an election.[41]

Non-election-year campaign contribution restrictions are enacted for a number of reasons. First, and perhaps most importantly, non-election-year limitations seek to decrease actual or apparent corruption.[42] Contributions

36. *Id.* at 51.

37. *See Buckley*, 424 U.S. at 26–28.

38. *See, e.g.*, *id.* at 39; *Zeller*, 909 F. Supp. at 1528.

39. As discussed in depth below, the Supreme Court has held that restrictions on campaign contributions are permissible, in part because they only present "a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20–21. The *Buckley* Court recognized that a more intrusive limitation on supporters' rights might be impermissible under the First Amendment. *See id.* at 20–21.

40. Acceptable contribution restrictions allow candidates to "amass[] the resources necessary for effective advocacy." *See id.* at 21.

41. *See, e.g.*, Op. of the Justices to the House of Representatives, 637 N.E.2d 213, 214 (Mass. 1994).

42. *See Zeller*, 909 F. Supp. at 1525; *Op. of the Justices to the House of Representatives*, 637 N.E.2d at 217 (citing FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)).

given during non-election years can be, or at least can appear to be, made in order to gain access or influence to the public official and not to help the official get elected because the election is still far away.[43]

Second, these restrictions arguably reduce the natural advantages that incumbents enjoy in an election. Research shows that incumbents, not challengers, raise the vast majority of campaign funds in non-election years.[44] This is partly the case because non-incumbent challengers generally do not decide to run and start raising money until closer to the election.[45] For this reason, some scholars have argued that "[s]tudies documenting the advantage that incumbents receive from prolonged fundraising seasons might be used to breathe new life into off-year limits on contributions."[46]

Third, off-year contribution limits can help candidates without a pre-existing network of financial support to competitively run for open seats.[47] When there is not an incumbent (in an open seat race), candidates typically begin fundraising earlier in the election cycle than when there is an incumbent running.[48] This can create a disadvantage for those candidates who do not have a pre-existing donor base;[49] "candidates for open seats who have pre-existing netwoks of financial support will retain considerable advantages."[50]

Fourth, non-election year limitations allow publicly-elected officials to focus on governing, rather than fundraising during the first portion of their

43. *See* State v. Alaska Civil Liberties Union, 978 P.2d 597, 628 (Alaska 1999) (reciting statistics showing incumbents receive a majority of non-election-year contributions and finding this discrepancy "may imply a desire by those contributors to purchase access or influence").

44. *See, e.g.*, FEC, TABLE 1: OFF YEAR ACTIVITY OF 2008 CONGRESSIONAL CAMPAIGNS (2008), *available at* http://www.fec.gov/press/press2008/20080407candidate/can2007sum.pdf.

45. *Cf.* Serv. Emps. Int'l Union v. Fair Political Practices Comm'n, 747 F. Supp. 580, 588 (E.D. Cal. 1990) ("[F]ew non-incumbents will decide to run for a particular office years in advance of the election.").

46. Deborah Goldberg & Brenda Wright, *Defending Campaign Contribution Limits After* Randall v. Sorrell, 63 N.Y.U. ANN. SURV. AM. L. 661, 690 (2008). Deborah Goldberg and Brenda Wright have argued that the Supreme Court's rationale in *Randall v. Sorrell*, 548 U.S. 230 (2006), where the Court struck down contribution limitations as unconstitutionally low, provides hope for proponents of contribution bans during nonelection years. *Id.* "The reasoning of the plurality concerning the importance of electoral competition might, for example, provide ammunition for spend-down provisions that restrict the war chests amassed by incumbents in one election year to ward off electoral challenges in the next." *Id.*

47. *See* Steven F. Huefner, *Term Limits in State Legislative Elections: Less for More Money?*, 79 IND. L.J. 427, 446 (2004).

48. *Cf. id.* at 446 & n.115 (proposing that potential candidates fundraise earlier when incumbents reach term limits).

49. *Id.* at 481.

50. *Id*. at 473.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

terms.[51] Elected officials should be serving the interests of their constituents, not dialing for dollars during years when there is no election.

Non-election year bans are typically struck down on First Amendment grounds.[52] While courts find that these restrictions serve a compelling or important governmental interest[53]—the government's interest in reducing corruption or its appearance is routinely held to be the only interest sufficient to uphold campaign finance restrictions—courts find that these restrictions are not properly tailored to serve that purpose.[54]

For instance, in *Zeller v. Florida Bar*, a federal district court found that there was not a "sufficient nexus" between a provision of the Florida Code of Judicial Conduct, which barred solicitations for and contributions to judicial candidates until one year before the election, and the government's interest in

---

51. The current *Buckley* framework means that candidates must spend seemingly endless amounts of time fundraising. *See* Vincent Blasi, Essay, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1281 (1994). *See also* Randall v. Sorrell, 548 U.S. 230, 245 (2006) ("Increased campaign costs, together with the fear of a better-funded opponent, mean that, without expenditure limits, a candidate must spend too much time raising money instead of meeting the voters and engaging in public debate."); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) ("I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising."); John C. Bonifaz et al., *Challenging* Buckley v. Valeo*: A Legal Strategy*, 33 AKRON L. REV. 39, 52 n.50 (1999) (recounting anecdotes about fundraising).

52. As discussed *infra*, in June 2011, the Ninth Circuit affirmed a federal district court's denial of Plaintiff's request for a preliminary injunction to bar the enforcement of a provision of the City of San Diego's campaign-finance ordinance that prohibited the making and accepting of contributions prior to one year before the election. Thalheimer v. City of San Diego, D.C. No. 3:09-cv-02862-IEG-WMC, slip op. at 4 (9th Cir. June 9, 2011), *aff'g* 706 F. Supp. 2d 1065 (S.D. Cal. 2010). The district court explained that "[w]hile temporal limits do burden free speech and association, there is no evidence that the City's limit is more than a minimal burden." Thalheimer v. City of San Diego, 706 F. Supp. 2d at 1079. In addition, it should be noted that in 1982, the Supreme Court of Arkansas clarified a previous per curiam order relating to provisions of the Code of Judicial Conduct. *In re* Code of Judicial Conduct, 627 S.W.2d 1, 2 (Ark. 1982). In that previous order "no definite time limit was set within which a committee on behalf of a judicial candidate could solicit and accept campaign contributions." *Id.* The court found that "definite time limits are required by the Code of Judicial Conduct and are necessary in order to provide assurance of compliance with the per curiam order and the Code." *Id.* The court held that "campaign funds may be solicited and accepted on behalf of a judicial candidate beginning 180 days prior to the first election in which he is a candidate." *Id.* However, this case does not address the constitutionality of off-year bans, but rather merely clarified an order and should not be read as standing for any broad constitutional principles.

53. *See, e.g.*, Zeller v. Fla. Bar, 909 F. Supp. 1518, 1525 (N.D. Fla. 1995) (citing FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)).

54. *See, e.g.*, *id.* at 1526.

preventing actual or apparent corruption.[55] The court's rationale hinged on the fact that contributors could donate to judicial candidates within one year before the election, but they could not give the same amount to candidates more than one year prior to the election.[56]

The court additionally found that even if defendants were able to demonstrate a nexus between the compelling state interest and the means used to achieve that interest, the prohibition was not "narrowly tailored to avoid abridgement of associational rights" because "blanket prohibitions on all groups or individuals from making solicitations for and contributions to campaigns are disfavored."[57] In other words, the court stated that it was suspicious of the restriction at issue because it included a temporal *ban*, rather than a temporal *limitation*.[58] This is a theme that runs throughout many courts' treatment of temporal restrictions.[59] Courts are leery of provisions which ban fundraising during a certain period of time, rather than merely limiting a candidate's ability to fundraise.[60] This issue is addressed in the new temporal contribution limit framework proposed in this Article in Part V.

The *Zeller* Court concluded that the prohibition on solicitations and contributions to judicial candidates acted as an impermissible expenditure limitation.[61] Alaska viewed solicitations and contributions in a different light.

In 1999, in *Alaska v. Alaska Civil Liberties Union*, the Alaska Supreme Court struck down two statutes banning "non-election year" contributions.[62] The court, while acknowledging that the limits would affect a candidate's ability to spend money in non-election years, explicitly stated that the limits at issue were contribution limits, not expenditure limits.[63] In a footnote, the court stated that "[u]ntil contributions are received, they are unavailable to expend."[64] Hence, the *Alaska Civil Liberties Union* Court came to the opposite conclusion as the *Zeller* Court on the issue of whether to treat temporal contribution limits like limits on the size of contributions or limits on expenditures.

55. *Id.* at 1525.

56. *Id.* The court distinguished another case, *Ferre v. State*, 478 So. 2d 1077 (Fla. Dist. Ct. App. 1985), on the grounds that the statute at issue in that case dealt with post-election contributions. *Zeller*, 909 F. Supp. at 1525 n.11. *Ferre* is discussed later in this Article. *See infra* Part III.C.

57. *Id.* at 1526 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790–93 (1978)).

58. *See Zeller*, 909 F. Supp. at 1526.

59. *See, e.g.*, Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1418 (E.D. Mo. 1996).

60. *See id.* at 1419.

61. *Zeller*, 909 F. Supp. at 1527–28.

62. 978 P.2d 597, 634 (Alaska 1999). Depending on the office sought, one statute prohibited contributions prior to January 1 of the election year, and another statute prohibited contributions prior to nine months before the election. *Id.* at 627.

63. *Id.* at 629.

64. *Id.* at 629 n.188.

The Alaska Supreme Court acknowledged that incumbents who received non-election year contributions had a fundraising advantage over challengers.[65] The court cited to Alaska Public Offices Commission reports, which showed that from 1989 to 1995, 80% of nonelection year contributions were made to incumbents, 3% were made to challengers, and 17% were made to candidates for open seats.[66] But, the court found that the evidence did not "rebut the possibility that incumbents, whom voters had previously favored, and whose political platform was previously successful, were more in tune with the electorate or better organized than their challengers."[67]

The *Alaska Civil Liberties Union* Court further acknowledged that the fact that contributors in off years overwhelmingly gave to incumbents, as opposed to challengers, "may imply a desire by those contributors to purchase access or influence."[68] The court, however, required evidence that pre-election year contributions far exceeded a candidate's fundraising needs before it would infer actual or apparent corruption.[69] Put another way, the court required more than a contributor's desire to buy access or influence in order to find that the contribution ban addressed corruption or its appearance. The court required that the government show that incumbents were amenable to the desires of contributors.

Not all courts, however, strike down such bans. In *Thalheimer v. City of San Diego*, the Ninth Circuit affirmed a lower court's denial of a preliminary injunction to prohibit enforcement of a ban on non-election year fundraising, which applied to non-partisan candidates.[70] The court recognized the "special character of early campaign contributions," acknowledging that such contributions can gave rise to fears of actual or apparent corruption in a way that contributions made near an election do not.[71] Further, the court rightly found that the temporal ban was merely a "minimal burden," and burdened speech rights less than the size limitations upheld in *Buckley*.[72] The Ninth Circuit correctly noted that the restriction did no more than ask candidates and contributors to "rearrange their fundraising."[73] The court's ruling also seemed to hinge, at least in part, on deference to legislative judgments and "Plaintiffs' scant evidence of harm."[74]

65. *Id.* at 628.

66. *Id.*

67. *Alaska Civil Liberties Union*, 978 P.2d at 628.

68. *Id.*

69. *Id.*

70. Thalheimer v. City of San Diego, D.C. No. 3:09-cv-02862-IEG-WMC, slip op. at 4 (9th Cir. June 9, 2011), *aff'g* 706 F. Supp. 2d 1065 (S.D. Cal. 2010).

71. *Id.* at 23.

72. *Id.* at 25–26.

73. *Id.* at 26–27.

74. *Id.* at 29.

B. Legislative Session Bans

Campaign contributions have been banned during legislative sessions in an effort to curb the actuality or appearance of money for votes.[75] Proponents of these bans contend that contributions during legislative sessions are more likely to lead to corruption or its appearance than contributions given when legislators are not making decisions that could affect their campaign contributors.[76] Some bans cover only contributions from certain contributors, such as lobbyists or government contractors, during legislative sessions.[77] Political contributions from these individuals are seen to pose a unique risk of actual or apparent corruption.[78] Courts uphold only those legislative session bans that apply to contributions from lobbyists and PACs, and not all contributors.[79]

Courts generally apply strict scrutiny to legislative session bans and strike them down as not narrowly tailored to serve the compelling governmental interest of preventing corruption or its appearance.[80] Courts find legislative session bans to be particularly intrusive, limiting the ability of candidates to effectively advocate for themselves.[81] For instance, legislatures are often in session in election years, when it is most important for candidates to be able to raise campaign funds.[82]

Courts have also found that these restrictions are not narrowly tailored because they are purportedly both over- and under-inclusive. First, some courts have found these restrictions to be over-inclusive because they apply to all contributions, both large and small, while courts have generally held that only large contributions raise the possibility of actual or apparent corruption.[83] Second, courts have found legislative session bans to be over-inclusive because they sometimes apply not just to incumbent legislators, but also to non-incumbent challengers or candidates for statewide office, who arguably have little influence over the legislative process.[84] On the other hand, courts have

75. *See, e.g.*, Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1420 (E.D. Mo. 1996) (overturning such a ban).

76. *See, e.g.*, *id.* at 1420 & n.10; Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995).

77. *See, e.g.*, N.C. Right to Life Inc., v. Bartlett, 168 F.3d 705, 716 (4th Cir. 1999).

78. Ciara Torres-Spelliscy & Ari Weisbard, *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action*, 1 ALB. GOV'T. L. REV. 194, 218 (2008).

79. *See Bartlett*, 168 F.3d at 717 (citing FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)); *Kimbell*, 164 A.2d at 46.

80. *See, e.g.*, Emison v. Catalona, 951 F. Supp. 714, 722–23 (E.D. Tenn. 1996); *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1419–20; State v. Dodd, 561 So. 2d 263, 265 (Fla. 1990).

81. *See, e.g.*, *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1419; *Dodd*, 561 So. 2d at 264.

82. *Cf. Dodd*, 561 So. 2d at 266.

83. *See, e.g.*, *id.* at 266 (distinguishing Buckley v. Valeo, 424 U.S. 1 (1976)).

84. *Id.* at 267.

found contribution bans during legislative sessions to be under-inclusive because corruption can occur whether or not the legislature is in session.[85]

In addition, courts striking down legislative session bans have often held that such bans unduly benefit incumbents, to the detriment of challengers.[86] Incumbents have many natural advantages such as name recognition, access to the media, and a pre-existing network of financial support.[87] Courts have found that in order to counter-balance those natural advantages, challengers should not be prevented from fundraising during legislative sessions.[88]

In reviewing legislative session bans, some courts have added a step to the strict scrutiny analysis. In addition to requiring that restrictions are narrowly tailored to serve a compelling governmental interest, these courts require the government to prove that the restrictions address a real harm.[89] Generally speaking, these courts seem to require the government to come forward with evidence of behavior sufficient to obtain a conviction for corruption.

In *State of Florida v. Dodd*, a frequently relied-upon 1990 case, the Supreme Court of Florida struck down a ban on contributions to candidates for legislative or statewide office during regular or special legislative sessions.[90] In analyzing the temporal ban on contributions, the court began its analysis with the oft-quoted conclusion that, with respect to certain temporal contribution limits, the "governmental intrusion upon free speech and association occurring in this instance is particularly grave."[91] Because the court found the restriction to be particularly intrusive, it applied the heightened standard of review applicable to expenditure limits.[92]

The Florida Supreme Court was particularly concerned with the candidates' ability to raise the funds necessary to run effective campaigns.[93] The court concluded that the restriction at issue was not narrowly tailored because the ban "prohibit[ed] *all* contributions and solicitations during a crucial portion of [the] *election year*."[94]

---

85. Briffault, *supra* note 19, at 122.

86. *See, e.g.*, Emison v. Catalona, 951 F. Supp. 714, 723 (E.D. Tenn. 1996); *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1419; State v. Alaska Civil Liberties Union, 978 P.2d 587, 631 (Alaska 1999); *Dodd*, 561 So. 2d at 265.

87. *Emison*, 951 F. Supp. at 723; *Dodd*, 561 So. 2d at 267.

88. *See, e.g.*, *Emison*, 951 F. Supp. at 723; *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1419.

89. *See, e.g.*, Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 551 (W.D. Ark. 1998); *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1420 (citing United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 475 (1995)).

90. 561 So. 2d 263, 267 (Fla. 1990). The restriction did not apply to candidates for a vacant office being filled by special election. *Id.* at 263 (citing FLA. STAT. § 106.08(8) (1989)).

91. *Id.* at 264.

92. *Id.* at 264–65.

93. *Id.* at 264 (citing Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

94. *Id.* at 266 (second emphasis added).

The court found the ban on contributions during legislative sessions was not narrowly tailored to advance the government's interest in preventing corruption or its appearance for five reasons. First, the court noted that the restriction applied to *all* candidates, including incumbents and non-incumbents and candidates for legislative, executive, and judicial offices, while candidates for non-legislative office, such as cabinet offices and the judiciary, could not affect the legislative process.[95] Second, the court noted that the restriction could be extreme, because the legislature could be called into special sessions lasting virtually the entire year.[96] Third, the court stated that even assuming legislative sessions lasted only two months per year, during this period challengers would be severely prejudiced because incumbents would have access to the press and free publicity, and challengers would be prohibited from raising funds as a way of "counterbalancing" those advantages.[97] Fourth, the court found that corrupt campaign practices can occur at anytime, regardless of whether the legislature is in session.[98] The court noted that legislative committees meet throughout the year and that lobbyists and other special interests are often involved in those meetings.[99] Fifth, the court found the statute to be over inclusive because it banned candidates from spending money on their own campaigns, an activity which the court stated could not give rise to actual or apparent corruption.[100]

Hence, the *Dodd* Court likely would have looked more favorably on a ban on contributions during legislative sessions if the ban: 1) only covered incumbent legislators; 2) only pertained to regular legislative sessions and not indefinite special sessions; and 3) allowed a candidate to spend money in support of her or his own campaign.

The court stated that a "less-restrictive" means of achieving the same goals existed and suggested that the ban apply only to certain organizations or entities, such as lobbyists or government contractors.[101] It is worth noting that

95. *Dodd*, 561 So. 2d at 265.

96. *Id.*

97. *Id.* The court later noted that under the restriction, "underdog candidates dependent on a steady trickle of small campaign contributions from private individuals may be choked out of electoral campaigns for one-sixth or more of an election year." *Id.* at 267.

98. *Id.* at 265–66.

99. *Id.*

100. *Dodd*, 561 So. 2d at 266.

101. *Id.* The court additionally noted that even if focusing a legislator's attention on legislative matters was viewed as a compelling interest (one of the arguments put forth by appellants), there were less-restrictive means of achieving that goal, such as "punitive measures that can be imposed upon inattentive legislators." *Id.* The court further posited that "the political process itself will tend to punish a legislator who fails to adequately represent the concerns of constituents during a legislative session." *Id.* Since *Dodd* was decided, it is close to universally accepted that preventing corruption or its appearance is the only compelling governmental interest sufficient to justify limits on the use of campaign funds, and that the government's

the court specifically recognized that there could be instances in which a state law "prohibiting all kinds of campaign contributions for narrowly defined periods of time in an election year" could be upheld as constitutional.[102] This may indicate that the court would have upheld a narrowly tailored non-election-year ban.

In *North Carolina Right to Life, Inc. v. Bartlett*, the Fourth Circuit upheld a legislative-session ban on contributions by lobbyists and PACs to incumbent legislators and challengers.[103] The court noted that pursuant to *Buckley*, contribution limitations are "constitutionally less problematic than are, for instance, restrictions on independent expenditures."[104] The court explained that the restrictions "do nothing more than place a temporary hold on appellees' ability to contribute during the General Assembly session, leaving them free to contribute during the rest of the calendar year and to engage in political speech for the entire year."[105]

The court found that the restrictions passed muster under strict scrutiny.[106] With respect to the government's interest in preventing corruption or its appearance, the court held that corruption is not limited to that which "results from the large contributions of individuals" but rather that "[c]orruption, either petty or massive, is a compelling state interest because it distorts both the concept of popular sovereignty and the theory of representative government."[107] The restrictions addressed the risk of actual corruption, the court found, because "[i]f lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange 'dollars for political favors' can be powerful."[108] The court additionally stated that the restrictions

---

interest in focusing a legislator's attention on legislative matters is not sufficient to uphold contribution limits. *See* N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 715 (4th Cir. 1999) (quoting FEC v. Nat'l Conserv. Political Action Comm., 470 U.S. 480, 496–97 (1985)).

102. *Dodd*, 561 So. 2d at 265.

103. *Bartlett*, 168 F.3d at 718. It is important to note that courts have upheld complete bans on contributions by lobbyists. *See, e.g.*, Preston v. Leake, 743 F. Supp. 2d 501 (E.D.N.C. 2010) (upholding statute prohibiting registered lobbyist from making campaign contributions to candidates for statewide office).

104. *Bartlett*, 168 F.3d at 715 (citing Buckley v. Valeo, 424 U.S. 1, 20–21 (1976)).

105. *Id.*

106. *Id.*

107. *Id.* The court stated, "Legislative action which is procured directly through gifts, or even campaign contributions, too often fails to reflect what is in the public interest, what enjoys public support, or what represents a legislator's own conscientious assessment of the merits of a proposal." *Id.*

108. *Id.* at 716 (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)). The court elaborated:

> While lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

addressed the risk of apparent corruption because contributions from PACs and lobbyists during legislative sessions could be particularly corrosive.[109]

The *Bartlett* Court held that the restrictions were narrowly tailored for two reasons. First, they were "limited to lobbyists and the political committees that employ them—the two most ubiquitous and powerful players in the political arena."[110] Indeed, "the heart of *Bartlett*'s reasoning, which is directly relevant to any campaign finance restriction targeted at lobbyists, is that lobbyists present a special threat to the integrity of the political process, a threat which is compounded while the legislature is in session."[111] Second, the restrictions were applied only during legislative sessions, which typically covered only a portion of the year.[112]

Further, the court found unpersuasive Appellees' three primary arguments as to why the statute should fail. First, with respect to the contention that the limitations were not narrowly tailored because they cover both large and small contributions, the court responded, quoting *Buckley*, that a "'court has no scalpel to probe' such fine distinctions."[113] Regardless of the size of a contribution, the court found, "the appearance of corruption may persist whenever a favorable legislative outcome follows closely on the heels of a financial contribution."[114] Second, with respect to Appellees' argument that the restrictions were not narrowly tailored because they covered non-incumbent candidates who cannot "sell legislative outcomes," the court responded that contributions to incumbents are not the only way to gain beneficial treatment, that "sticks can work as well as carrots," and that threatened contributions to an incumbent's challenger could produce the same effect as a direct contribution to an incumbent.[115] Third, with respect to Appellees' argument that the restrictions are particularly harmful for challengers because they cut off a funding source in the months leading up to a primary or general election, the court said that this argument had been rejected

> which can cause both legislators and lobbyists to cross the line. State governments need not await the onset of scandal before taking action.

Id.

109. *Bartlett*, 168 F.3d at 716. The court further provided that it was well within North Carolina's power to take measures to make sure the appearance of corruption "does not undermine public confidence in the integrity of representative democracy." *Id.*

110. *Id.* "[C]ontributions by lobbyists directly involved in the legislative process to legislators while the legislature is actively considering legislation may create a particularly acute appearance problem." Briffault, *supra* note 19, at 124.

111. Briffault, *supra* note 19, at 122.

112. *Bartlett*, 168 F.3d at 716.

113. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 30 (1976)).

114. *Id.*

115. *Id.*

in *Buckley*, where, as in *Bartlett*, limits applied equally to incumbents and challengers.[116]

C. Post-Election Bans

States and the federal government enact post-election contribution limitations for the same reasons that they enact other temporal contribution limitations—to decrease actual or apparent corruption.[117] Contributions given right after an election (at least those contributions given to successful candidates) are, or may appear to be, given in order to obtain access and influence more than contributions given before an election, which are needed for a candidate to raise the funds necessary to run a competitive campaign.[118] Some courts have also found that post-election bans allow the public to know the source of a candidate's campaign funds before the election.[119] Further, right after an election, elected officials should be governing, not running for election. Post-election bans are generally upheld against First Amendment challenges.

In 1985, in *Ferre v. State of Florida* ex rel. *Reno*, the Florida Court of Appeals upheld a statute banning the acceptance and requiring the return of post-election contributions under a First Amendment challenge.[120] The court employed the lower level of review generally applicable to contribution limits.[121] The court found two sufficiently important interests advanced by the statute: 1) preventing corruption or its appearance; and 2) informing the public of the identity of campaign contributors before an election.[122] The provision

116. *Id.* at 716–17 (citing *Buckley*, 424 U.S. at 31). The *Buckley* Court also disagreed with Plaintiffs' claim that fundraising is always more difficult for challengers, stating that "'major-party challengers as well as incumbents are capable of raising large sums for campaigning' and that 'a small but nonetheless significant number of challengers have in recent elections outspent their incumbent rivals.'" *Id.* at 717 (quoting *Buckley*, 424 U.S. at 32). The *Buckley* Court additionally noted that legislators would be weary of passing campaign finance reforms if they treated incumbents and challengers differently. *Id.* (citing *Buckley*, 424 U.S. at 33).

117. *See, e.g.*, Anderson v. Spear, 356 F.3d 651, 670 (6th Cir. 2004); State v. Alaska Civil Liberties Union, 978 P.2d 597, 630 (Alaska 1999); Ferre v. State *ex rel.* Reno, 478 So. 2d 1077, 1081 (Fla. Dist. Ct. App. 1985).

118. *See Ferre*, 478 So. 2d at 1079–80. It should be noted that some post-election campaign contributions are given to help candidates pay off debts from previous elections.

119. *Id.* at 1080.

120. *Id.* at 1081.

121. *Id.* at 1079 (citing *Buckley*, 424 U.S. at 25).

122. *Id.* at 1081. It is important to note that the *Ferre* opinion is a relatively old case in the area of campaign finance law, twenty-five years old, and arguably preventing corruption or its appearance is now viewed as the only sufficiently important and/or compelling interest sufficient to uphold contribution restrictions. *See* N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 715 (4th Cir. 1999) (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)). Therefore, it is not entirely clear how the *Ferre* Court would address Plaintiffs'

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

was designed to prevent candidates from being able to hide the identity of their contributors by waiting to make large expenditures until right before the election with the knowledge that potentially unpopular contributors would give post-election contributions to pay for those expenditures.[123]

IV. CRITIQUING THE COURTS' TREATMENT OF TEMPORAL CONTRIBUTION RESTRICTIONS

Based on the Supreme Court's reasoning in *Buckley*, limitations on the time when campaign contributions can be made or received should be subject to the same level of scrutiny as limitations on the size of campaign contributions. Courts should ask only if a temporal restriction is closely drawn to achieve a substantial state interest, rather than demanding that the restriction be narrowly tailored to further a compelling state interest.[124] Some temporal contribution limitations may be overly restrictive and fail under this standard; others will properly be upheld under this more lenient standard of review. Some temporal contribution limitations, for instance, should be upheld because they are not as restrictive on the First Amendment rights of candidates and contributors as expenditure limits, and they strongly support the government's interest in preventing corruption or its appearance.

While courts have faithfully applied *Buckley* to limitations on the size of campaign contributions, subjecting those limits to the lower level of review, some courts have viewed restrictions on when contributions can be made and received as expenditure limits in disguise and, hence, have subjected those restrictions to strict scrutiny.[125] Recent Supreme Court precedent,[126] discussed below, supports the argument in this Article that all contribution restrictions, whether limits or bans and whether limiting the size of contributions or the time when they can be given and received, should be subject to a lower level of scrutiny.

In *FEC v. Beaumont*, the Supreme Court rejected the argument that a ban on contributions should be subject to strict scrutiny because the statute limited

argument that there were less restrictive ways to prevent actual or apparent corruption. However, there is evidence to suggest that the court's opinion would be the same, as it specifically stated that the statute was "reasonably" designed to serve *both* governmental interests, and the statute caused only a "minimal" affect on First Amendment rights.

123. *See Ferre*, 478 So. 2d at 1080 n.10.

124. As discussed in this Article, despite the contention of some that limitations on when contributions can be made are reasonable "time, place or manner" restrictions, this Article explains that, pursuant to *Buckley*, it is settled law that such limitations are analyzed under the "closely drawn" standard of review.

125. *See, e.g.*, Zeller v. Fla. Bar, 909 F. Supp. 1518, 1527 (N.D. Fla. 1995); Op. of the Justices to the House of Reps., 637 N.E.2d 213, 219 (Mass. 1994).

126. FEC v. Beaumont, 539 U.S. 146 (2003).

contributions based on their source.[127] The Court held that "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association,"[128] and contributions are subject to a lower level of scrutiny because they result in political expression only if spent by someone else.[129] Significantly, the Court stated that "[i]t is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself."[130] The Court upheld the ban, partly because corporations remained free to establish separate segregated funds (also known as PACs) to make contributions and expenditures in connection with elections.[131] Similarly, with respect to temporal bans, contributors remain free to give contributions when the temporal bans are not in place.

A. *The Effect of Temporal Restrictions on the Government, Contributors, and Candidates*

By viewing temporal restrictions on campaign contributions as expenditure limits, courts misperceive the benefits and burdens that these restrictions place on the government, contributors, and candidates. Courts overemphasize the burden these restrictions place on candidates and contributors and underestimate the government's interest in preventing corruption or its appearance.

1. The Government's Interest in Imposing Temporal Contribution Restrictions

When analyzing temporal contribution restrictions, courts should recognize that when elections are years away, for instance, more than half an election cycle away, the government's interest in preventing corruption or its appearance trumps a candidate's right to raise campaign funds.[132] As the election approaches, however, the candidate's need to raise campaign funds increases, and the government's interest in preventing corruption or its

127. *Id.* at 161.

128. *Id.* (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 259 (1986)).

129. *Id.* 160–62 (citing Buckley v. Valeo, 424 U.S. 1, 20–21 (1976)).

130. *Id.* at 162.

131. *See id.* While the Court's ultimate conclusion in *Beaumont* may be called into question, as a result of the Court's decision in *Citizens United*, 130 S. Ct. 876 (2010), there is no reason to question the Court's reasoning concerning the proper level of review to be applied to campaign finance restrictions.

132. *Cf.* State v. Alaska Civil Liberties Union, 978 P.2d 587, 628 (Alaska 1999) (examining the argument that contributions "remote in time" to an election are more susceptible to the appearance that they were made to "purchase influence"); Ferre v. State *ex rel.* Reno, 478 So. 2d 1077, 1079 (Fla. Dist. App. Ct. 1994) (recognizing that government interests outweighed candidates' opposition to post-election bans).

appearance decreases proportionately;[133] contributions made closer in time to an election are more clearly made to support a candidate's election, rather than to gain access or influence over an incumbent, or punish an incumbent by giving to a challenger.[134]

2. The Burdens that Temporal Contribution Restrictions Place on Contributors

Many courts have overestimated the burden that temporal restrictions place on a candidate's supporters. Contributors are not prohibited from supporting their favorite candidate under statutes imposing temporal contribution bans, they are merely asked to postpone direct campaign contributions until those bans are lifted, generally until closer to the election. Supporters remain free to show support for candidates through means that do not require the use of money, such as by creating websites that extol a candidate's virtues. In addition, supporters can use funds to make independent expenditures supporting or opposing candidates at any time,[135] although such expenditures are typically made later in election cycles.

3. The Burdens that Temporal Contribution Restrictions Place on Candidates

Courts view temporal bans on campaign contributions, as opposed to limits on the size of contributions, as particularly grave because they cut off a candidate's primary (or only) source of funding during a certain time period.[136] However, it is not the case that all temporal contribution bans unduly burden the speech rights of political candidates. At the outset, when analyzing the free speech rights of a candidate, whose aim is by definition to win an election, the pertinent time period is the entire election cycle and not a small snapshot of that cycle. With that time period in mind, it is important to note that a temporal ban on campaign contributions could actually reduce the total amount of funds that a candidate can raise each election cycle *less* than limits on the size of individual contributions could reduce that total amount.[137] Put another way, depending on the length of the temporal ban, such a ban could pose less

133. *Cf. Alaska Civil Liberties Union*, 978 P.2d at 628.

134. *Cf. id.*

135. Briffault, *supra* note 19, at 123–24. These expenditures include, inter alia, electioneering communications and issue advertisements.

136. *See, e.g.*, Zeller v. Fla. Bar, 909 F. Supp. 1518, 1526 (N.D. Fla. 1995).

137. *See* Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995) (holding that a legislative session ban on lobbyists to legislators was less restrictive than the dollar limits upheld in *Buckley*). *See also* Briffault, *supra* note 19, at 124. ("Depending on the length of the legislative session, a temporal restriction could be less burdensome to both lobbyist-donors and the candidates they would support than the monetary ceilings on contributions . . . .").

of a burden to candidates (and contributors) than a monetary limit on individual contributions.

Limitations on the size of campaign contributions, however, are routinely upheld, while limitations on when contributions can be made or received are often struck down.[138] Courts have found that limits on the size of contributions do not restrict what candidates can spend, but merely force candidates to seek out more donors to be able to spend the same amount of money.[139] There is little reason to believe that the genuine supporter of a candidate would not wait to give a campaign contribution until close in time to the election. In this way, temporal bans on campaign contributions may merely shift the time when funds are given and may not reduce the overall funds that candidates can raise each election cycle.

Candidates should, by definition of their status as candidates, be allowed to raise those funds necessary to run competitive campaigns for office.[140] Candidates need not, however, be allowed to raise the funds necessary to amass large campaign war chests early in an election cycle. Courts have worried that temporal campaign contribution limits discriminate against non-incumbent challengers because incumbents possess natural advantages like name recognition, free access to the media, and a pre-existing network of financial support, whereas challengers purportedly need to raise funds early in the election cycle to counteract those advantages.[141] In reality, however, most challengers do not decide to run for office and, hence, do not begin raising campaign funds until later in the election cycle than incumbents do.[142] In this

138. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 29 (1976) (upholding contribution limits); *Zeller*, 909 F. Supp. at 1525 (striking temporal limits).

139. *Buckley*, 424 U.S. at 26 n.27.

140. Wealthy self-funded candidates may possess the funds necessary to run competitive campaigns without the need to raise any campaign contributions.

141. Briffault, *supra* note 19, at 122 (citing Emison v. Catalano, 951 F. Supp. 714, 723 (E.D. Tenn. 1996); State v. Dodd, 561 So. 2d 263, 265–66 (Fla. 1990)).

142. In *Service Employees International Union*, a federal district court found that "few non-incumbents will decide to run for a particular office years in advance of the election. Even if they do, they will have significant trouble in raising money early in the election cycle." Serv. Emps. Int'l Union v. Fair Political Practices Comm'n, 747 F. Supp. 580, 588 (E.D. Cal. 1990). The court elaborated:

> In state races in the off-years 1983, 1985, and 1987, all incumbents, but very few challengers, engaged in fundraising. The average incumbent also substantially outraised the challengers who did raise money in the off-year. In statewide constitutional office races in the off-years 1983 and 1985, incumbents outraised challengers by an average of almost 9 to 1. In State Senate races in the off-years . . . , incumbents outraised challengers by an average of more than 40 to 1. In State Assembly races in the off-years . . . , incumbents outraised challengers by an average of more than 70 to 1.

Id. at 588 n.17 (omissions in original). In a given election cycle, incumbents will typically raise significantly more funds than non-incumbents. *See, e.g.*, FEC, *supra* note 44.

way, temporal limitations on campaign contributions could actually benefit challengers because challengers will not face incumbents who have amassed large campaign funds early in the election cycle.[143] In addition, while some courts have found that challengers should not be subject to temporal campaign contributions limits because they wield little power over governmental processes, a campaign contribution to an incumbent's opponent could conceivably affect an incumbent as much as a contribution made directly to that incumbent.[144] A carrot may, indeed, be as effective as a stick.[145]

B. The Over- and Under- Inclusiveness of Temporal Contribution Restrictions

Arguably as a result of the fact that some courts categorize temporal restrictions on campaign contributions as expenditure limits in disguise and, therefore, apply strict scrutiny to those restrictions, courts have found that temporal contribution limits are not properly tailored to achieve the goal of preventing corruption or its appearance and are both over- and under-inclusive.[146] Courts find such restrictions to be over-inclusive because they apply to both small and large contributions, while purportedly only large contributions have been found to give rise to actual or apparent corruption,[147] and because they apply to non-incumbents,[148] who arguably have little control over governmental decisions. Courts have also found temporal restrictions to be under-inclusive because "corruption can occur at any time."[149] The answer to all of these assumptions is essentially the same. Contributions given during certain time periods (whether big or small and whether given to challengers or incumbents)—for instance in the first half of an official's term—give rise to increased fears of corruption, and therefore, the government has a strong interest in limiting those contributions.

Temporal contribution limits are not necessarily over- or under-inclusive. First, even small contributions may, in some instances, be banned. As the Fourth Circuit stated when upholding a contribution ban on lobbyists during

143. It is possible, however, that incumbents could carry over funds from a previous election cycle. For this reason, this Article suggests that candidates be prohibited from carrying over funds raised in past elections.

144. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 716 (4th Cir. 1999).

145. *Id.*

146. *See, e.g.*, Zeller v. Fla. Bar, 909 F. Supp. 1518, 1527–28 (N.D. Fla. 1995).

147. *See* Buckley v. Valeo, 424 U.S. 1, 26–27 (1976). As discussed in more depth later in this Article, and as one anti-reform advocate has argued, "Temporal bans also restrict both large and small contributions and are therefore constitutionally suspect." James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235, 265 (1998).

148. *See, e.g.*, Emison v. Catalano, 951 F. Supp. 714 (E.D. Tenn. 1996).

149. Bopp, *supra* note 147, at 265 n.167 (quoting Ark. Right to Life State PAC v. Butler, 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

legislative sessions, "corruption, either petty or massive, is a compelling state interest."[150] The Fourth Circuit correctly found that the appearance of corruption can arise from small contributions "when[] a favorable legislative outcome follows closely on the heels of a financial contribution."[151] Nor is it the role of the courts to parse through a statute, discarding certain limits as too low and approving other limits as just high enough.[152] Courts owe the legislature some level of deference in this area. Second, contributions to an incumbent's opponent may affect that incumbent, although arguably not as much as a direct contribution to that incumbent.[153] The mere threat of donations to non-incumbent challengers could cast the same pallor of corruption.

Third, it is no answer to the fact that corruption can occur at any time to say that contributions cannot be more severely restricted or even banned during times when the fear of corruption is at its height; "Of course, legislation is not rendered unconstitutional merely because it proscribes more narrowly rather than more broadly."[154] Further, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective."[155]

C. Temporal Contribution Restrictions and Time, Place, and Manner Restrictions

While some courts have erroneously categorized temporal contribution restrictions as expenditure limits in disguise and, hence, have subjected those limits to a standard of review more searching than the standard typically applied to limits on the size of contributions, courts should not further lower the level of scrutiny to match the one applied to "time, place, and manner" restrictions.[156] This argument that any type of campaign contribution limit

150. *Bartlett*, 168 F.3d at 716.

151. *Id.*

152. *Cf. id.* (quoting *Buckley*, 424 U.S. at 30).

153. *Id.*

154. Ferre v. State *ex rel.* Reno, 478 So. 2d 1077, 1080 n.9 (Fla. Dist. Ct. App. 1985).

155. Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995).

156. Some have even argued that certain campaign contribution limits, whether temporal or not, should be subject to scrutiny under the time, place, and manner analysis. Courts have generally rejected such arguments. In 1993, in *Barker*, the court reviewed a law preventing lobbyists from volunteering personal services to candidates. Barker v. Wis. Ethics Bd., 841 F. Supp. 255, 256 (W.D. Wis. 1993). The law prevented lobbyists from giving, aside from money, "any other thing of pecuniary value." *Id.* at 258. Defendants argued that the court should use the standard applied to time, place, and manner restrictions. *Id.* The court specifically stated, "this case is not about a time, place or manner restriction. It addresses a direct prohibition on a protected activity . . . ." *Id.* at 259. Similarly, in *Kruse*, the court reviewed an ordinance imposing expenditure limits by city council candidates and rejected Cincinatti's argument that the ordinance was justified as a reasonable time, place, or manner restriction. Kruse v. City of

could be subject to that lower level of review was explicitly rejected by the Supreme Court in *Buckley*.[157] Since *Buckley*, it is settled law that restrictions on campaign contributions and expenditures (whether in amount or by time) "impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner restrictions otherwise imposed."[158] The *Buckley* Court contrasted time, place, and manner restrictions—such as a volume restriction on sound trucks—with contribution and expenditure limits.[159] Whereas the sound truck could still deliver its message, contribution and expenditure caps impermissibly "restrict the extent of the reasonable use" of virtually every communication medium.[160]

Courts have consistently avoided applying the the standard of review applicable to time, place, and manner restrictions to temporal contribution restrictions. In *Ferre v. State ex rel. Reno*,[161] the Florida Court of Appeals reviewed statutes banning post-election contributions. The court assumed that the statutes imposed a heavier burden on First Amendment rights than time, place, and manner restrictions.[162] The state argued that the statute merely limited the time when contributions could be made.[163] Appellee countered that the laws banned, rather than delayed, speech.[164]

Similarly, in *Gable v. Patton*, the Sixth Circuit cited *Buckley* for the proposition that a restriction was not merely a reasonable time, place, or manner restriction, because "[i]t [could not] be seriously argued that the prohibition at issue does not restrict the *quantity* of political speech."[165] The statute at issue prevented candidates who did not participate in a public financing program from spending their own funds to support their campaigns twenty-eight days before an election.[166]

In sum, courts have failed to properly balance the interests of the government, contributors, and candidates when analyzing temporal restrictions on campaign contributions. Some courts have erroneously applied strict scrutiny, applicable to expenditure limitations, to temporal restrictions. In

Cincinnati, 142 F.3d 907, 909, 918 (6th Cir. 1998). *But see* Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1253–54 (6th Cir. 1997) (upholding consent provision under intermediate scrutiny standard).

157. Buckley v. Valeo, 424 U.S. 1, 17–18 (1976).
158. *Id.* at 18.
159. *Id.*
160. *Id.* at 18 n.17.
161. Ferre v. State *ex rel.* Reno, 478 So. 2d 1077, 1078–79 (Fla. Dist. Ct. App. 1985).
162. *Id.* at 1079.
163. *Id.* at 1079 n.7.
164. *Id.*
165. 142 F.3d 940, 953 (6th Cir. 1998) (citation omitted).
166. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

addition, and perhaps as a result, some courts have incorrectly viewed these restrictions as under- or over-inclusive.

V. VARIABLE CONTRIBUTION LIMITS

Recognizing that courts may not change the way they analyze temporal contribution bans, this Article presents an alternative solution to the problem of limiting the flow of money to candidates during certain time periods. This Article posits that because courts are more likely to uphold temporal contribution *limits* rather than *bans*, instead of prohibiting fundraising during certain periods of time, contribution limits should be lowered during those periods to allow for limited fundraising. States and the federal government should enact campaign finance programs that contain variable contribution limits, allowing for higher limits right before an election, when candidates need more funds to advocate effectively for themselves and lower contribution limits when elections are years away and the risk of actual or apparent corruption from contributions may be higher. Specifically, this Article suggests that contributions be lowered to a third of normal levels for the first half of an election cycle. Overall election cycle limits would remain the same, but contributors would be able to give less in the first years of the election cycle. For instance, if a candidate for a four-year term in elected office was subject to a $2400 per election individual contribution limit, contributors could give that candidate up to $800 in the first half of the election cycle and the remaining $1600 in the second half of the cycle. Alternatively, contributors could wait until the last two years of the election cycle and give $2400 at that time.

Very few variable contribution limits based on time currently exist. Legislators often enact and courts routinely uphold two other types of variable contribution limits based on: 1) the identity of the contributor (such as lobbyists, government contractors or PACs);[167] and 2) whether the candidate accepts public financing or opts out of such a system.[168] In both cases, contributions of varying sizes are justified based on increased or decreased fears of corruption.[169]

The same logic, employed to justify variable contribution limits based on the identity of the contributor or whether the candidate accepts public

167. *See, e.g.*, State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999). Under most laws which place different restrictions on certain contributors based on increased fears of corruption, those contributors are prohibited from giving any money at all, while the rest of the public can give up to the applicable contribution limit. Hence, those contribution limits vary from $0 to whatever the contribution cap is.

168. *See, e.g.*, Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 37 n.13 (1st Cir. 1993) (discussing Rhode Island laws).

169. *Id.* at 39; *Alaska Civil Liberties Union*, 978 P.2d at 614.

financing, applies to variable contribution limits based on when contributions are given and received. Contributions in the first half of an election cycle pose special risks to the integrity of the political system that give rise to actual or apparent corruption, while contributions given later in election cycles are more easily seen as intended for the election or defeat of a candidate and are necessary for candidates to be able to wage competitive campaigns.

At least one statute setting different contribution limits for election and non-election years has been upheld.[170] In 2005, in *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, the Eighth Circuit ruled on a challenge to such a statute.[171] Appellants challenged the statute on the grounds that it gave incumbents an advantage violative of the First Amendment.[172] The court explicitly applied the lower level of scrutiny generally applicable to contribution limits and found that Appellants did not present any evidence that the limitation disadvantaged challengers, because challengers could decide to run for office and raise campaign funds "years in advance of any election."[173] The court found that the fact that challengers may decide to run later in the election cycle was not a result of the restriction at issue.[174] The same logic applies to the variable contribution limits proposed in this Article.

A. Variable Contribution Limits Based on Speaker

Just as contributions given and received in the first half of election cycles can more clearly give rise to corruption or its appearance than contributions given in the second half of election cycles, states, the federal government, and

170. In Minnesota, candidates were limited to the following contribution limits: governor and lieutenant governor together, $2,000 in an election year and $500 in other years; attorney general, $1,000 in an election year and $200 in other years; secretary of state or state auditor, $500 in an election year and $100 in other years; state senator, $500 in an election year and $100 in other years; and state representative, $500 in an election year and $100 in the other year. MINN. STAT. § 10A.27 (2005).

171. 427 F.3d 1106 (8th Cir. 2005).

172. *Id.* at 1113.

173. *Id.* at 1114. The *Kelley* Court relied on the Ninth Circuit's prior ruling which upheld Montana's campaign finance program, under which the contribution limit doubled if a candidate ran in a contested primary. *Id.* (citing Mont. Right to Life Ass'n v. Eddelman, 343 F.3d 1085, 1094, 1096 (9th Cir. 2003)). The Ninth Circuit had rejected the argument that variable contribution limits impermissibly discriminated against challengers for two reasons. *Eddleman*, 343 F.3d at 1096. First, the state law prevented incumbents from using leftover funds from one campaign in a future campaign. *Id.* at 1095. Second, the court held that "without a record of 'invidious discrimination against challengers as a class,' there is 'no support for the proposition that an incumbent's advantages [are] leveraged into something significantly more powerful by contribution limitations applicable to all candidates, whether veterans or upstarts.'" *Id.* at 1096 (alteration in original) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, at 389 n.4 (2000)).

174. *Eddleman*, 343 F.3d at 1096.

the courts have recognized that contributions from certain contributors may pose a unique threat to the integrity of electoral and governmental processes. Therefore, some jurisdictions have imposed contribution limits that vary based on the identity of the contributor. Government contractors, lobbyists, members of regulated industries, and political committees have been either barred from giving contributions or subject to lower contributions limits that the rest of the public.[175] In most cases, these contributors are prohibited from giving any contributions, while the rest of the public remains free to give up to the contribution limit.[176]

For instance, many states have imposed outright bans on contributions from or solicitations to lobbyists or state contractors.[177] Lobbyists are hired to persuade public officials to make governmental decisions favorable to the lobbyists' clients.[178] The risk for corruption is great, since the lobbyists' clients—government contractors—depend on government decisions for their livelihood.[179]

Over a dozen states impose campaign finance restrictions aimed at lobbyists.[180] The most common, a ban on lobbyists' contributions while the legislature is in session, frequently faces constitutional challenge.[181] Many courts uphold campaign contribution restrictions which focus only on lobbyists, such as bans on lobbyist contributions during legislative sessions.[182]

175. *See, e.g.*, Inst. of Governmental Advocates v. Fair Political Practices Comm'n, 164 F. Supp. 2d 1183, 1194 (E.D. Cal. 2001) (upholding statute governing lobbyists); Gwinn v. State Ethics Comm'n, 426 S.E.2d 890, 893 (Ga. 1993) (upholding statute governing insurers); *In re* Earle Asphalt Co., 950 A.2d 918, 920 (N.J. Super. Ct. App. Div. 2008) (upholding statute prohibiting state agencies from awarding contracts for more than $17,500 to businesses that contributed more than $300 to a campaign); Gard v. Wis. State Elections Bd., 456 N.W.2d 809, 812 (Wis. 1990) (upholding statute capping the amount of funding a candidate may receive from all committees).

176. *See, e.g.*, *Inst. of Governmental Advocates*, 164 F. Supp. 2d at 1194 (lobbyists); *Gwinn*, 426 S.E.2d at 891 n.1 (insurers); *In re Earle Asphalt Co.*, 950 A.2d at 920 (businesses); *Gard*, 456 N.W.2d at 812 (political committees).

177. Torres-Spelliscy & Weisbard, *supra* note 78, at 218–19 (listing examples).

178. *See* Jason D. Kaune, Note, *Exporting Ethics: Lessons from Russia's Attempt to Regulate Federal Lobbying*, 20 HASTINGS INT'L & COMP. L. REV. 815, 820–21 (1997) ("[B]usiness lobbyists routinely contribute to campaign coffers in order to gain access to public officials. In other words, while the essence of the lobbyist's job is to convince, not contribute, many lobbyists perceive that they must pay to play an effective role in the policymaking process.") (citation omitted).

179. *See* FEC v. Weinsten, 462 F. Supp. 243, 249 (S.D.N.Y. 1978) (upholding a section of the FECA that prohibited government contractors from making certain political contributions).

180. Briffault, *supra* note 19, at 120.

181. *Id.* at 121 (citing cases from Alaska, Arkansas, Florida, and Missouri).

182. *See* Rebecca L. Anderson, *The Rules in the Owners' Box: Lobbying Regulations in State Legislatures*, 40 URB. LAW 375, 396–97 (2008).

For instance, such prohibitions were upheld in *Bartlett*,[183] *Alaska Civil Liberties Union*,[184] and *Kimbell v. Hooper*.[185] Instead of imposing outright bans, however, legislatures could limit the influence of lobbyists and state contractors by setting lower contribution limits for those individuals.[186]

In *Institute of Governmental Advocates v. Fair Political Practices Commission*, for instance, a federal district court in California upheld a prohibition on contributions by lobbyists to both non-incumbent and incumbent candidates.[187] The court explicitly applied the lower standard of review applicable to restrictions on contributions.[188] Significantly, the court declared that:

> [A] ban on contributions is *not* per se illegal. . . . [T]he test for determining the validity of the amount of a limitation (here a complete ban) is whether the limit is "so low as to impede the ability of candidates to amass the resources necessary for effective advocacy."[189]

The court found no evidence demonstrating that candidates had trouble seeking office without personal contributions from registered lobbyists.[190]

Some states also place special limitations on political committees, both the size of the contributions they can receive and the size of the contributions they can give to candidates.[191] Contribution limits or bans are placed on political committees as a way to limit the influence of special interests who routinely contribute both directly to candidates and indirectly to political committees, which then make donations to candidates.[192] Hence, placing limits on political committees prevents special interest groups from being able to make an end run around contribution limits to candidates.

In addition, some states prohibit only certain contributors, such as members of a regulated industry (i.e. insurance companies), from giving to certain candidates, such as the regulators of that industry (i.e. Commissioners

183. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 718 (4th Cir. 1999).

184. State v. Alaska Civil Liberties Union, 978 P.2d 587, 620 (Alaska 1999).

185. 665 A.2d 41, 45 (Vt. 1995).

186. Torres-Spelliscy & Weisbard, *supra* note 78, at 219.

187. 164 F. Supp. 2d 1183, 1194 (E.D. Cal. 2001). The law in question specifically applies to lobbyists registered to lobby the governmental agency for which the officeholder works or for which the candidate seeks election. *Id.* at 1190.

188. *Id.* at 1191.

189. *Id.* (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000) (emphasis in original).

190. *Id.*

191. *See, e.g.*, ARK. CODE ANN. § 7-6-203(e) (2007). *But see* Russell v. Burris, 146 F.3d 563 (8th Cir. 1998) (holding previous version of Arkansas law unconstitutional).

192. Gard v. Wis. State Elections Bd., 456 N.W.2d 809, 823 (Wis. 1990).

of Insurance).[193] Courts have generally upheld narrow prohibitions on contributions by a regulated entity to the regulator.[194]

The same logic which has led courts to uphold complete prohibitions on contributions from certain contributors, applies with equal force to what is arguably a lesser restriction on First Amendment rights—variable contribution limit systems. Those systems impose lower contribution limits when elections are far away, candidates need less money to effectively advocate for themselves, and the government's interest in preventing corruption or its appearance is at its height. Candidates can competitively run for office under the variable contribution limits proposed in this Article.

B. Variable Contribution Limits: Publicly v. Privately Funded Candidates

Under some campaign finance systems, contribution limits applicable to candidates who accept public financing are higher than those limits applicable to privately financed candidates. Candidates who accept public funding to run for office are seen as less susceptible to corruption than candidates who are completely funded from private contributions.[195] In a sense, the more private money a candidate receives, the more risk there is of corrupting that candidate. For this reason, and as an incentive to opt into public financing programs, publicly financed candidates are sometimes subject to higher individual contribution limits than their privately financed opponents.[196]

For instance, in *Vote Choice, Inc. v. DiStefano*,[197] the First Circuit upheld a challenge to a contribution "cap gap," under which contributions to privately financed candidates were limited to $1,000 per donor, but contributions to publicly financed candidates were permissible up to $2,000 per donor.[198] The court rejected two challenges to the "cap gap": first, that the disparity was *per se* impermissible; and second that the "cap gap" impermissibly burdened the First Amendment rights of privately financed candidates, as it failed to serve a compelling governmental interest.[199]

The court found that even if the "cap gap" did burden a privately financed candidate's First Amendment rights, it would survive strict scrutiny.[200] Citing to *Buckley*, the court found that public financing programs "'facilitate

193. *See, e.g.*, Gwinn v. State Ethics Comm'n, 426 S.E.2d 890, 891 n.1 (Ga. 1993).

194. *See id. See also* Blount v. SEC, 61 F.3d 938, 939–40 (D.C. Cir. 1995) (upholding provision governing securities regulators); Casino Ass'n of La. v. State *ex rel.* Foster, 820 So. 2d 494, 509 (La. 2002) (upholding provision governing donations to casino regulators).

195. *Cf.* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993).

196. *See, e.g.*, *id.* at 37 n.13.

197. *Id.* at 26.

198. *Id.* at 37 n.13, 39–40.

199. *Id.* at 39.

200. *Vote Choice, Inc.*, 4 F.3d at 39.

communication by candidates with the electorate,' free candidates from the pressures of fundraising, and, relatedly, tend to combat corruption."[201]

VI. THE INAPPLICABILITY OF *DAVIS V. FEC*

Even though the Supreme Court's 2008 decision in *Davis v. FEC*[202] dealt with variable contribution limits, that decision does not address the issue discussed in this Article. In *Davis*, the Court struck down a portion of the FECA, known as the "Millionaire's Amendment," as invalid under the First Amendment.[203] The "Millionaire's Amendment" tripled the contribution limit applicable to a candidate who did not self-finance her own campaign—going from $2300 to $6900—if that candidate ran against a candidate who did self-finance his campaign and spent at least $350,000 of her own funds on the campaign.[204] The non-self-financing candidate could enjoy the less-stringent individual contribution limits until she raised $350,000—at which point the lower contribution limits were revived.[205]

The Court found that this program violated the self-financed candidate's First Amendment rights, acting as an impermissible limit on a candidate's expenditure of his own funds in support of his campaign.[206] Specifically, the Court held that a wealthy self-financed candidate might not want to continue spending his own money above the triggering threshold because it would provide a benefit to that candidate's opponent.[207]

Under the proposal discussed in this Article, candidates competing against each other would be treated the same. There would be no "asymmetrical"

201. *Id.* (citations omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 91 (1976)).

202. 554 U.S. 724, 728 (2008).

203. *Id.* at 729, 744–45.

204. *Id.* at 729.

205. *Id.*

206. *Id.* at 738. The Court held that while the statute did not cap a candidate's use of his own funds, "it impose[d] an unprecedented penalty on any candidate who robustly exercise[d] that First Amendment right." *Id.* at 739.

207. The statute at issue

> require[d] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations. Many candidates who [could] afford to make large personal expenditures to support their campaigns may choose to do so despite [the statute], but they [would] shoulder a special and potentially significant burden if they [made] that choice . . . .
>
> . . . [A] candidate who wishe[d] to exercise that right [to self-finance had] two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits.

Id. at 739–40.

scheme at play, as there was in *Davis*.[208] As noted in at least one court, the *Davis* decision concerned situations in which *candidates* for one election, and not their *contributors*, subjected to different limits.[209] The *Davis* Court's decision takes nothing away from this Article's discussion of variable contribution limits based on the speaker's identity or whether the candidates opts into a public financing program as lending support to the constitutionality of temporal variable contribution limits.

CONCLUSION

With the mistaken belief that temporal bans on campaign contributions are expenditure limits in disguise, many courts have erroneously applied strict scrutiny to such limits.[210] Some temporal limits on campaign contributions pose too severe of a burden on First Amendment rights and should be struck down, others are closely drawn to serve the important governmental interest of preventing corruption or its appearance and should be upheld. Whether such bans should be upheld or invalidated, however, courts must be intellectually honest and apply the lower level of scrutiny applicable to restrictions on the size of campaign contributions, when analyzing temporal restrictions on campaign contributions.

When applying this lower level of scrutiny, courts must refrain from overestimating the burden these restrictions place on the First Amendment rights of candidates and contributors, as well as underestimating the government's interest. Many temporal restrictions on campaign contributions still allow candidates to amass the resources necessary to effectively advocate for themselves. Further, when temporal restrictions are in place, supporters remain free to support candidates through means that do not require the use of money or through the use of independent expenditures which support or oppose a candidate. Finally, temporal bans can serve the government's interest in preserving the integrity of electoral and governmental processes by preventing money from flowing directly to candidates during time periods seen to be uniquely susceptible to corruption or its appearance.

Some things remain clear. Off-year contribution bans are typically struck down. Legislative session bans are struck down, with the exception of some

208. *See Davis*, 554 U.S. at 729. The Court noted that if the statute at issue had "simply raised the contribution limits for all candidates, Davis' argument would [have] plainly fail[ed]." *Id.* at 737.

209. *See* Ognibene v. Parkes, 599 F. Supp. 2d 434, 450 (S.D.N.Y. 2009) (quoting *Davis*, 544 U.S. at 738) ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other."). The *Ognibene* Court distinguished *Davis* from other cases upholding disparate contribution limits on contributors. *Id.* (citing *In re* Earle Asphalt, 950 A.2d 918, 927 (N.J. Super. Ct. App. Div. 2008); Blount v. SEC, 61 F.3d 938, 944 (D.C. Cir. 1995)).

210. *See* Zeller v. Fla. Bar, 909 F. Supp. 1518, 1524–25 (N.D. Fla. 1995).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

bans which only limit contributions by lobbyists and PACs. Post-election bans are generally upheld. Restrictions that cover non-incumbent challengers may raise increased concerns about the burden that these restrictions place on First Amendment rights. Bans (unless targeted at certain contributors) are more constitutionally problematic than limits.

Recognizing that the courts may not change the way they analyze current temporal contribution restrictions, this Article also proposes a different way to limit the influence of money in campaigns and argues that states and the federal government should enact, and courts should uphold, variable contribution limits based on the time when contributions are made and received. Under the program proposed in this Article, per election contribution limits would remain the same, but contribution limits during the first half of an election cycle would be lowered to one third of the total limit. For instance, if the overall contribution limit for a four year cycle is $2400, a contributor could give a candidate no more than $800 in the first two years of the election cycle. The contributor could then give $1600 in the last two years of the cycle. This proposal would limit political fundraising when it is least needed, in the beginning of an election cycle, and when it is most likely to result in actual or apparent corruption. Candidates would remain free to accept, and contributors would remain free to give, the same per election contributions that they otherwise could. The only change would be a shift in when campaign contributions could be made and received. The proposal set forth in this Article would serve the government's interests with minimal infringement on the First Amendment rights of candidates and contributors.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW