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## **THE WAR CHEST PROBLEM: WHY TRANSFERRING UNSPENT CAMPAIGN FUNDS VIOLATES THE FIRST AMENDMENT**

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### ABSTRACT

*In an ideal world, political candidates would raise the exact amount of funds they would need to mount a winning campaign in the current election and spend every penny. Campaign finance jurisprudence implicitly assumes that candidates will do just that. In reality, incumbents raise funds even when they have no serious opponents and no real need to spend. After an election, those unspent funds must go somewhere, and every state has a policy allowing candidates to transfer some or all of these “war chests” to the next election cycle. When states have attempted to eliminate the inherent unfairness of this war chest problem by capping transfers or banning them outright, courts have invalidated the attempts to level the playing field as limits on campaign expenditures that violate the First Amendment. But a closer look at recent Supreme Court cases actually shows that the policies allowing transfers violate the First Amendment’s prohibition on speaker discrimination by amplifying the voices of incumbents at the expense of challengers. I argue that courts must resolve the war chest problem by banning transfers so that campaign finance laws treat all candidates equally.*

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## I. INTRODUCTION

A. *The Problem of Money in Politics*

In most elections, incumbents<sup>1</sup> and candidates with the most money<sup>2</sup> win. Not coincidentally, those candidates are often one and the same.<sup>3</sup> When no challengers enter the race, incumbents are free to keep fundraising even if

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1. In 2016, just 123 incumbent state legislators were defeated in primary elections and just 226 were defeated in general elections. *Incumbents Defeated in 2016's State Legislative Elections*, BALLOTPEdia, [https://ballotpedia.org/Incumbents\\_defeated\\_in\\_2016's\\_state\\_legislative\\_elections](https://ballotpedia.org/Incumbents_defeated_in_2016's_state_legislative_elections) [https://perma.cc/HAF2-5CB8].

Out of the 4,895 incumbents who ran for re-election in 2016, 349 losses indicate a re-election rate of 93%. *See id.*

2. *See generally* Anthony Gierzynski & David Breaux, *Money and Votes in State Legislative Elections*, 16 LEGIS. STUD. Q. 203 (1991).

3. *See id.* at 204 (noting that money, party, and incumbency are all correlated with electoral success).

they spend nothing on their re-election campaigns.<sup>4</sup> The ability of incumbent state legislators<sup>5</sup> to amass enormous war chests across election cycles poses a substantial deterrent effect on potential challengers, who must spend significant sums to defeat an incumbent.<sup>6</sup>

### *1. Federal and State Elections by the Numbers*

Given the importance of presidential and congressional elections for the nation as a whole, those races draw the vast majority of attention from the public and, correspondingly, from scholars.<sup>7</sup> Yet on a national scale, Americans elect just two executive officials<sup>8</sup> and 535 legislators.<sup>9</sup>

At the state level,<sup>10</sup> the country's fifty gubernatorial races can also attract media attention, particularly in populous states whose economies have a significant impact on the nation's economy as a whole.<sup>11</sup> Few, if any, of the

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4. Of course, incumbents cannot be sure they will be unopposed until after all filing deadlines have passed.

5. In this Note, I primarily focus on legislative and executive officials. Although judicial elections are common, they differ vastly by jurisdiction and involve ethical concerns not present for candidates in the political branches. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015) [hereinafter *Williams-Yulee*] (prohibiting the personal solicitation of campaign funds); *see also Caperton v. A.T. Massey Coal Co.* 556 U.S. 868 (2009) (requiring recusal based on campaign contributions). *But cf. Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (striking down an ethical canon barring judicial candidates from announcing their views on certain subjects).

6. Robert E. Hogan, *Campaign War Chests and Challenger Emergence in State Legislative Elections*, 54 POL. RSCH. Q. 815, 827 (2001) ("The size of an incumbent's treasury prior to the beginning of a campaign has a negative impact on the probability that a challenge will occur in both primary and general elections."); Gierzynski & Breaux, *supra* note 2, at 213 ("Unquestionably, a person hopeful of winning a legislative seat needs to spend significant amounts of money in order to attain a level of competitiveness that will allow him (or her) to win.")

7. *See infra* Section I.A.2.

8. Each candidate for Vice President invariably runs on the same ticket as a candidate for President, but the Constitution requires presidential electors to cast "distinct ballots" for the two offices. U.S. CONST. amend. XII.

9. That is, 100 Senators and 435 Representatives.

10. In this Note, I do not include the District of Columbia and other federal territories in the definition of "state."

11. Every state grants its governor some form of veto power, so each governor wields significant influence over policymaking in addition to their role as chief of the executive branch. *See The Veto Process*, in *INSIDE THE LEGISLATIVE PROCESS* 6–29 (2008), <https://www.ncsl.org/documents/legismgt/ILP/98Tab6Pt3.pdf> [<https://perma.cc/NM7D-5S76>].

remaining 699 races for statewide executive office<sup>12</sup> come up in national news stories.<sup>13</sup>

Except for an extreme faux pas by a candidate,<sup>14</sup> the 7,383 legislative elections<sup>15</sup> across the country are almost entirely ignored.<sup>16</sup> Given the amount of effort required to follow state and local politics, it is no surprise that less than twenty percent of Americans can name their state legislators.<sup>17</sup> Voters are less likely to turn out for legislative elections<sup>18</sup> and more likely to skip over state legislative races on their ballots when they do turn out,<sup>19</sup> even though the vast majority of lawmaking—including on subjects beyond federal control—is carried out by elected officials at the state level or lower.<sup>20</sup>

This multitude of differences between federal and state elections suggests that scholars should take care before applying conclusions about congressional campaigns to state legislative campaigns.<sup>21</sup>

12. See *Chart of State Executive Officers*, BALLOTEDIA, [https://ballotpedia.org/Chart\\_of\\_state\\_executive\\_officers](https://ballotpedia.org/Chart_of_state_executive_officers) [<https://perma.cc/T97K-R4BZ>] (showing 749 state executive offices).

13. But see, e.g., *Pennsylvania Is Set to Elect Its First Person of Color to Statewide Executive Office*, KEYSTONE (June 18, 2020, 11:00 AM), <https://keystoneroom.com/story/pennsylvania-is-set-to-elect-its-first-person-of-color-to-statewide-executive-office/> [<https://perma.cc/QN37-AFTD>] (state auditor general).

14. See, e.g., Trip Gabriel, *A G.O.P. Lawmaker Had the Virus. Nobody Told Democrats Exposed to Him*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/us/politics/andrew-lewis-brian-sims-pa-house-coronavirus.html> [<https://perma.cc/333R-7JAT>]; Sarah Rahal & Beth LeBlanc, *Detroit Democrats Unanimously Censure Lawmaker Who Credited Trump for COVID-19 Recovery*, DETROIT NEWS (Apr. 25, 2020, 1:20 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2020/04/25/detroit-democrats-unanimously-censure-lawmaker-karen-whitsett-who-credited-trump-covid-19-recovery/3025907001/> [<https://perma.cc/R4LD-7Q55>].

15. *Legislatures at a Glance*, NAT'L CONF. ST. LEGISLATURES (Apr. 30, 2019), <https://www.ncsl.org/research/about-state-legislatures/legislatures-at-a-glance.aspx> [<https://perma.cc/H2MK-DCPA>]. This includes 1,972 seats in upper chambers and 5,411 seats in lower chambers. *Id.*

16. See generally Last Week Tonight with John Oliver, *State Legislatures and ALEC*, YOUTUBE (Nov. 2, 2014), <https://www.youtube.com/watch?v=aIMgfBZrrZ8> [<https://perma.cc/7MCW-GYMT>].

17. *JHU Survey: Americans Don't Know Much About State Government*, JOHNS HOPKINS U. (Dec. 11, 2018), <https://releases.jhu.edu/2018/12/11/jhu-survey-americans-dont-know-much-about-state-government/> [<https://perma.cc/92LF-LHZX>].

18. Gierzynski & Breaux, *supra* note 2, at 203. See generally Gregory A. Caldeira & Samuel C. Patterson, *Contextual Influences on Participation in U.S. State Legislative Elections*, 7 LEGIS. STUD. Q. 359 (1982).

19. See, e.g., Martin P. Wattenberg, Ian McAllister & Anthony Salvanto, *How Voting Is Like Taking an SAT Test: An Analysis of American Voter Rolloff*, 28 AM. POL. Q. 234, 237 tbl.1 (2000) (8% of voters who cast votes in gubernatorial race skipped state assembly race).

20. U.S. CONST. amend. X. Under the Constitution, states remain supremely sovereign over local governments. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1904).

21. For instance, analyses that suggest deterrent effect of war chests is minimal or nonexistent generally focus on congressional races, neglecting to acknowledge that “these high level offices are greatly prized and challengers emerge even when the possibility of incumbent defeat is extremely remote.” Hogan, *supra* note 6, at 827; see also Jay Goodliffe, *When Do War Chests Deter?*, 17 J.

## 2. *Congressional Versus State Campaign Finance*

For political contributors, the Federal Election Campaign Act<sup>22</sup> is a worthwhile target. The Act applies to all congressional elections<sup>23</sup> and provides for expedited en banc review before the federal circuit courts of appeals when its constitutionality is attacked.<sup>24</sup> When the Supreme Court rules on the Act's constitutionality, it tells an entire country of special interests how they can spend—in federal races.<sup>25</sup>

On the other hand, potential litigants must further analyze the costs and benefits of a lawsuit before attacking the constitutionality of state-level campaign finance regulations.<sup>26</sup> For individual candidates, lawsuits are likely to cost more time and money than elections,<sup>27</sup> so most such suits have been filed by special interests seeking to make a large number of contributions,<sup>28</sup> with individual candidates, if any are joined, as ancillary plaintiffs.<sup>29</sup> Each state has a unique campaign finance system,<sup>30</sup> so even a victory at the Supreme Court will have an immediate impact in only one state,<sup>31</sup> and the relief granted may have little to no practical effect on campaigns.<sup>32</sup>

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THEORETICAL POL. 249, 250 (2005) (collecting studies); Christopher F. Kulesza, *The Effects of Campaign Finance Law on Donations to State Legislative Campaigns 15–17* (2018) (Ph.D. dissertation, Purdue University) (ProQuest), <https://docs.lib.purdue.edu/dissertations/AAI10843561/>.

22 . 52 U.S.C. §§ 30101–30146.

23 . *Id.* § 30101(3).

24 . *Id.* § 30110.

25 . See *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (determining constitutionality of major reform to the Act); *McConnell v. FEC*, 540 U.S. 93 (2003) (same), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

26 . Even state campaign finance laws that clearly violate the Constitution remain in effect until they are enjoined or invalidated in court. See *Ex parte Endo*, 323 U.S. 283, 299 (1944); see also *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion) (“Legislatures are ordinarily assumed to have acted constitutionally.”).

27 . The exception that proves this rule at the federal level was brought by a wealthy candidate attacking a provision that penalized wealthy candidates seeking to fund their own campaigns. *Davis v. FEC*, 554 U.S. 724 (2008).

28 . Contributors have standing to assert their own interests in contributing to candidates, even if no candidate is a party. See *SEIU v. Fair Pol. Pracs. Comm’n*, 955 F.2d 1312, 1316 (9th Cir. 1992).

29 . See, e.g., *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 733 (2011) (noting that “candidates and independent expenditure groups” filed the lawsuit).

30 . *State Limits on Contributions to Candidates: 2019–2020 Election Cycle*, NAT’L CONF. ST. LEGISLATURES (Oct. 2, 2019), <https://www.ncsl.org/Portals/1/Documents/Elections/Contribution-Limits-to-Candidates-2019-2020.pdf> [<https://perma.cc/S58G-H42R>].

31 . See *Randall v. Sorrell*, 548 U.S. 230, 253–262 (2006) (plurality opinion) (invalidating contribution limit based on its effect in one state); see also *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (per curiam) (directing lower court to apply *Randall*).

32 . For instance, a contribution cap might be unconstitutionally low yet constrain only a few contributors from making larger contributions.

Because judicial review of state campaign finance regulations rests on these strategic considerations, the presence of a regulation in a state's statute books does not guarantee its constitutionality, even when the same provision has been invalidated in another state or at the federal level.<sup>33</sup>

## B. Definitions

To properly analyze campaign finance statutes from different jurisdictions, a uniform vocabulary is necessary.

### 1. General Terms

An “incumbent” is a candidate who holds an elected office and is running for re-election to that same office.<sup>34</sup> A “challenger” is any nonincumbent candidate running for an elected office for the first time.<sup>35</sup> An “election cycle” includes the entire period from one Election Day to the next Election Day, where each Election Day conclusively determines which candidate will actually take office.<sup>36</sup> In this Note, I assume that an election cycle has one primary election, one general election, and no vacancies or special elections; these assumptions apply to the vast majority of campaigns.<sup>37</sup>

“Receipts” are any liquid assets deposited into a candidate's campaign account. Most receipts are contributions, but self-contributions and transfers also qualify. “Disbursements” are any liquid assets withdrawn from a candidate's campaign account. Most disbursements are expenditures, but transfers, taxes, filing fees, and refunds to contributors also qualify, as well

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33 . Other concerns like circuit splits can also arise. *Compare* Gable v. Patton, 142 F.3d 940, 951 (6th Cir. 1998) (upholding pre-election blackout period on contributions), *with* Jones v. Jegley, 947 F.3d 1100 (8th Cir. 2020) (striking down such a blackout period).

34 . I disregard the unusual situation where a newly redrawn legislative district may have more than one incumbent running for re-election.

35 . This definition includes challengers who hold a *different* elected office but excludes perennial candidates and former incumbents who left office after losing an election or reaching a term limit.

36 . This timeframe sometimes includes a wrap-up period after the election date where the candidate can continue to receive contributions for that election, but it has no practical effect on this analysis. *E.g.*, KAN. STAT. ANN. §§ 25-4148(a)(3), 25-4149(a) (2020) (general election period ends on December 31). *Contra* 52 U.S.C. § 30101(25) (any election cycle ends on the election date).

37 . Although other candidates can certainly run, only thirty-two state legislators nationwide are neither Republicans nor Democrats. *See* NAT'L CONF. ST. LEGISLATURES, 2020 *State & Legislative Partisan Composition* (Apr. 1, 2020), [https://www.ncsl.org/Portals/1/Documents/Elections/Legis\\_Control\\_2020\\_April1.pdf](https://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2020_April1.pdf) [<https://perma.cc/PU9D-JXGU>] (excluding twenty-six vacancies and Nebraska's forty-nine member nonpartisan legislature). Courts do sometimes distinguish “major-party” challengers from other challengers. *See* Buckley, 424 U.S. at 97 (per curiam). Apart from assuming that all candidates run in primaries, my analysis does not rely on any particular candidate's party affiliation.

as some expenses of holding public office.<sup>38</sup> Contributions and expenditures are defined more fully in the next Section.

“Campaign funds” are all liquid assets in a candidate’s campaign account. “Unspent campaign funds” are any campaign funds remaining after an election cycle, defined recursively, that is, the amount by which receipts exceeded disbursements in the current election cycle, plus any unspent campaign funds from the previous election cycle. By definition, a challenger has no unspent campaign funds. An incumbent could have unspent campaign funds dating back to when the incumbent was a challenger.

A “transfer” occurs when a candidate has unspent campaign funds at the end of an election cycle and carries those funds over to the candidate’s campaign account for the next election cycle.<sup>39</sup>

A “transfer concession” is a combination of state constitutional provisions, statutes, legislative silence, administrative regulations, advisory opinions, and occasional court cases establishing that *unlimited* transfers are permissible.<sup>40</sup> The federal government<sup>41</sup> and most states have a transfer concession.<sup>42</sup> In many cases, a campaign account is simply assumed to persist across election cycles, meaning that a transfer need not be recorded as a transaction as long as the candidate’s running balance is reported.<sup>43</sup> Transfer concessions may still require candidates to fulfill their existing debt obligations before incurring new obligations in the next election cycle.<sup>44</sup>

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38. See, e.g., 52 U.S.C. § 30114(a)(2)–(6) (listing permitted disbursements other than expenditures); 11 C.F.R. § 113.2 (2020) (same); KAN. STAT. ANN. § 25-4157a(a)(2)–(7) (2020) (same).

39. The fact that an incumbent must be running for the same office is critical because different rules may apply when an incumbent runs for another office. KY. REV. STAT. ANN. § 121.180(10) (West 2020) (prohibiting such transfers); see *Suster v. Marshall*, 149 F.3d 523, 534 (6th Cir. 1998) (prohibiting judicial candidates from using unspent funds from nonjudicial campaign). Compare CAL. GOV’T CODE § 85306(a) (West 2020) (requiring such transfers to “be attributed to specific contributors” to comply with contribution caps), with TEX. ELEC. CODE ANN. §§ 251.001(1), 254.203(b) (West 2019) (not requiring attribution).

40. See, e.g., *Cole v. Mayans*, 80 P.3d 384, 393 (Kan. 2003) (“We conclude that [the statute and regulation] may be read together harmoniously to permit the transfer of campaign funds between candidacies when the candidate is running for reelection to the same office.”) (first citing KAN. STAT. ANN. § 25-4157a(c) (2000) (amended 2015); and then citing KAN. ADMIN. REGS. § 19-22-1 (2002) (amended 2011)).

41. See 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(4) (2020). However, FEC regulations do enable contributors to “designate” their funds for a particular election in writing. 11 C.F.R. § 110.1(b)(2)(i), (b)(4) (2020). Candidates cannot transfer designated funds to future elections without permission from the contributor. *Id.* § 110.1(b)(3).

42. See, e.g., *Cole*, 80 P.3d at 393.

43. See, e.g., KAN. STAT. ANN. § 25-4148(b)(1) (2020) (requiring candidates to report “[c]ash on hand on the first day of the reporting period”).

44. See, e.g., 11 C.F.R. §§ 110.1(b)(3), 110.3(c)(4) (2020). States can also restrict the permissible

A “transfer cap” is a statute or regulation that allows candidates to transfer *some* unspent campaign funds but requires disbursement of all other unspent campaign funds,<sup>45</sup> a process that is charmingly called “disgorgement.”<sup>46</sup> Some transfer caps have not been attacked in court.<sup>47</sup>

A “transfer ban” disallows transfers altogether and requires disgorgement of all unspent campaign funds.<sup>48</sup> No state has a transfer ban.

## 2. Contributions and Expenditures

The terms “contribution” and “expenditure” are exhaustively defined in statute,<sup>49</sup> and the definitions are often gerrymandered around specific transactions that incumbents enjoy.<sup>50</sup> Critically, contributions and expenditures must be made with the purpose of influencing an election, although statutes often do not specify *which* election.<sup>51</sup> Despite the detailed statutory language, cases generally gloss over the distinctions between receipts and contributions and disbursements and expenditures. For instance, the statutory definitions from *Buckley* have been superseded,<sup>52</sup> but those changes have not altered the Court’s analysis, nor have the differences between federal and state definitions.<sup>53</sup>

A “contribution cap” is the maximum dollar amount that any one person can contribute to a single recipient in a given time period.<sup>54</sup> Contribution

non-transfer uses of unspent campaign funds, usually by requiring campaigns to satisfy their outstanding debts and disallowing disbursements for personal use. *See, e.g.*, KAN. STAT. ANN. § 25-4157a(d) (2020).

45 . A transfer cap can be a fixed dollar amount, *e.g.*, FLA. STAT. ANN. § 106.141(4) (West 2020), or determined in some other way, *e.g.*, ARK. CODE ANN. § 7-6-201(3) (West 2020) (equivalent to office’s annual salary), *repealed by* 2021 Ark. Acts 737, § 1.

46 . Disgorgement is sometimes also called mandatory spend-down instead because “candidates will most likely choose to spend all of their funds during the last days of the campaign rather than return[] funds to contributors or turn[] them over to the state.” *Shrink Mo. Gov’t PAC v. Maupin*, 71 F.3d 1422, 1427 (8th Cir. 1995).

47 . *See, e.g.*, statutes cited *supra* note 45.

48 . A transfer ban is functionally equivalent to a transfer cap of \$0.

49 . *See, e.g.*, 52 U.S.C. § 30101(8)–(9); KAN. STAT. ANN. § 25-4143(e), (g) (2020). I will often cite to the federal statute as an example because its definitions are typical, nationally applicable, and frequently litigated.

50 . The exhaustive take on security systems that once appeared on every Californian’s ballot is one example. CAL. GOV’T CODE § 89519(c) (West 2020).

51 . *See, e.g.*, 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i) (“*any* election for [f]ederal office”) (emphasis added); KAN. STAT. ANN. § 25-4143(e)(1)(A), (g)(1)(A) (2020) (“nominating, electing or defeating *a* clearly identified candidate”) (emphasis added). The FEC has crafted a more detailed definition for federal races. 11 C.F.R. § 110.1(b)(2) (2020).

52 . *Compare* 2 U.S.C. § 431 (Supp. IV 1974), *reprinted in* *Buckley v. Valeo*, 424 U.S. 1, 144–50 (1976), *with* 52 U.S.C. § 30101 (current version).

53 . *See* *Citizens United v. FEC*, 558 U.S. 310 (2010) (analyzing contributions and expenditures without citing statutory definitions); *Randall v. Sorrell*, 548 U.S. 230, 245 (2006) (plurality opinion) (“[Vermont’s] expenditure limits are not substantially different from those at issue in *Buckley*.”).

54 . *See* *Holmes v. FEC*, 875 F.3d 1153, 1161 (D.C. Cir. 2017) (en banc).

caps usually apply on a per-election basis.<sup>55</sup> In this Note, I focus solely on contribution caps for individual candidates, although the government can impose similar limits on political parties and party committees.<sup>56</sup>

When a person spends money *on behalf of* a candidate, rather than contributing directly *to* the candidate, the transaction is called an “independent expenditure” and is subject to the constitutional analysis for expenditures, not contributions.<sup>57</sup> Similarly, receipts from a candidate’s personal funds, or “self-contributions,” are treated differently from other contributions<sup>58</sup> and are usually considered expenditures.<sup>59</sup>

### C. Argument Summary

When attacked by incumbents, transfer caps and bans have nearly always been invalidated under the First Amendment, a conclusion that I argue is constitutionally infirm.<sup>60</sup> Although no challenger appears to have attacked a transfer cap or concession, recent Supreme Court precedent strongly suggests that transfer concessions violate the First Amendment.<sup>61</sup> Because these conflicting holdings cannot be reconciled, I argue that courts must impose *de facto* transfer bans to remedy unconstitutional transfer concessions, or strike down contribution caps altogether.<sup>62</sup>

## II. LEGAL BACKGROUND

### A. Constitutional Standards for Financial Transactions

Although the spending of money is generally regarded as conduct, First Amendment jurisprudence<sup>63</sup> recognizes that spending sometimes has a free

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55. See *id.* at 1162 (noting that most states take this approach); accord *State Limits on Contributions to Candidates*, *supra* note 30.

56. See, e.g., 52 U.S.C. § 30116(a); KAN. STAT. ANN. § 25-4153(d) (2020).

57. *Buckley*, 424 U.S. at 39–40 (per curiam). Independent expenditures are “communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Id.* at 44; accord 52 U.S.C. § 30101(17)(A).

58. See, e.g., KAN. STAT. ANN. § 25-4153(a) (2020) (excluding “the candidate or the candidate’s spouse” from contribution caps). The Court has invalidated direct and indirect limits on self-contributions. *Buckley*, 424 U.S. at 54; *Davis v. FEC*, 554 U.S. 724, 743–44 (2008).

59. *Buckley*, 424 U.S. at 54; accord *Anderson v. Spear*, 356 F.3d 651, 672 (6th Cir. 2004).

60. See *infra* Section III.A.

61. See *infra* Section III.B.

62. See *infra* Section III.C.

63. The First Amendment’s free speech guarantee has been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925); see *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (political subdivisions of states). The same

speech component.<sup>64</sup> When freedom of speech is implicated, governmental restrictions on spending must satisfy either strict scrutiny or an intermediate level of review called exacting scrutiny; otherwise, a restriction on spending is subject to rational-basis review like other regulations of conduct.<sup>65</sup> Each standard requires a reviewing court to weigh the governmental interest behind the regulation against the accompanying abridgement of First Amendment rights.<sup>66</sup> The applicable standard is usually outcome-determinative, because laws are almost always upheld under rational-basis review,<sup>67</sup> usually upheld under exacting scrutiny,<sup>68</sup> and essentially never upheld under strict scrutiny.<sup>69</sup>

### 1. *When Money Is a Proxy for Speech*

One of the most salient criticisms of contemporary campaign finance jurisprudence is that money has become a proxy for speech.<sup>70</sup> In the Supreme Court's seminal case on campaign finance, *Buckley v. Valeo*,<sup>71</sup> the

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constitutional analysis therefore applies to all campaign finance schemes. *Buckley*, 424 U.S. at 1; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (states); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (political subdivisions of states).

64. *Buckley*, 424 U.S. at 16–17 (1976) (per curiam). This principle arises most frequently in campaign finance cases but is not restricted to an electoral context. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018) (collecting cases).

65. See *Janus*, 138 S. Ct. at 2464–65 (describing “levels of scrutiny” and noting that “rational-basis review . . . is foreign to our free-speech jurisprudence”); cf. *Romer v. Evans*, 517 U.S. 620 (1996) (finding no rational basis under the Equal Protection Clause for disfavoring citizens based on homosexual conduct). Despite *Janus*'s unequivocal statement to the contrary, the Court does apply rational-basis review to free-speech issues in some circumstances. See *Citizens United v. FEC*, 558 U.S. 310, 420–21 (2010) (Stevens, J., concurring in part and dissenting in part) (collecting cases).

66. See *Janus*, 138 S. Ct. at 2464–65. Although the allocation of the burden of proof rarely makes a difference in First Amendment cases, laws are presumptively unconstitutional under strict or exacting scrutiny and presumptively constitutional under rational-basis review. *Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014) (citing *Nixon*, 528 U.S. at 387–88) (noting that “state officials . . . bear the burden of proof” of constitutionality under both standards).

67. E.g., *Turner v. Safley*, 482 U.S. 78, 89, 91 (1987) (upholding restriction on inmates' correspondence as “reasonably related to legitimate security interests”).

68. See *Citizens United*, 558 U.S. at 369 (adhering to precedent upholding campaign finance disclosure requirements).

69. *But see Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (“This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.”).

70. *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond: Hearing Before the S. Comm. on Rules and Administration*, 113th Cong. 330–31 (2014) [hereinafter Stevens Testimony] (statement of John Paul Stevens, former Associate Justice, U.S. Supreme Court) (“[W]hile money is used to finance speech, money is not speech. . . . [F]inancial activities should not receive precisely the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries, actions that clearly were not protected by the First Amendment.”); MOLLY IVINS & LOU DUBOSE, *BUSHWHACKED!* 294 (Vintage Books 2004) (2003) (“Actually, money is the green stuff you use to buy things with; free speech is what comes out of your mouth, hopefully after some thought.”).

71. 424 U.S. 1 (1976) (per curiam).

Court recognized that “[s]ome forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two.”<sup>72</sup> The Court went on to describe political spending in lofty terms,<sup>73</sup> but despite the Court’s appeal to broad principles of free expression, the implication was clear: “the amount of money” and “the quantity of expression” are functionally synonymous,<sup>74</sup> so more money means more speech.<sup>75</sup>

The Supreme Court has found just one governmental interest that permits First Amendment restrictions on political spending: “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions.”<sup>76</sup> Recent decisions have clarified that only “‘*quid pro quo*’ corruption or its appearance” satisfies this standard.<sup>77</sup> Preventing favoritism, influence, or access is not enough; the government must target “dollars for political favors.”<sup>78</sup> By insisting that the quantity of political speech take precedence over these principles of democratic self-governance,<sup>79</sup> the Court has rejected

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72 . *Id.* at 16.

73 . *Id.* at 19.

74 . *See id.* Justice Scalia wholeheartedly adopted this position, suggesting that separating speech and money is “utterly impossible.” Matt Vasilogambros, Sarah Mimms & National Journal, *Scalia Defends Citizens United Decision, Reflects on Term in Rare TV Appearance*, THE ATLANTIC (July 18, 2012), <https://www.theatlantic.com/politics/archive/2012/07/scalia-defends-citizens-united-decision-reflects-on-term-in-rare-tv-appearance/437268/>, <https://perma.cc/DLU8-BKKE>. *See generally* *McConnell*, 540 U.S. at 247–64 (Scalia, J., concurring in part).

75 . For example, the Court has invalidated contribution caps for being too low, never for being too high. *Davis v. FEC*, 554 U.S. 724, 737 (2008); *see, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (plurality opinion); *see also* *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (per curiam) (vacating a decision for reconsideration in light of *Randall*). Indeed, the purpose of contributions is for candidates to “amass[] the resources necessary for effective advocacy,” a phrase that inevitably leads to quantitative comparisons. *Buckley*, 424 U.S. at 21 (1976).

76 . *Buckley*, 424 U.S. at 25; *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296–97 (1981) (“*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment.”); *see Buckley*, 424 U.S. at 25–26 (declining “to look beyond the Act’s primary purpose . . . to find a constitutionally sufficient justification for the . . . contribution limitation”); *see also* *Citizens United v. FEC*, 558 U.S. 310, 348 (2010) (finding no “compelling governmental interest in preventing ‘the corrosive and distorting effects of immense aggregations of wealth’” (quoting *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 558 U.S. at 365)); *cf.* *Janus v. AFSCME*, 138 S. Ct. 2448, 2466 (2018) (holding that “labor peace” and “avoiding free riders” are not compelling governmental interests), *overruling* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

77 . *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion) (citing *Citizens United*, 558 U.S. at 359).

78 . *Citizens United*, 558 U.S. at 359 (quoting *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 498 (1985)).

79 . *See McCutcheon*, 572 U.S. at 207 (describing campaign finance regulations as “attempts to suppress campaign speech”).

an antisubordinating view of the First Amendment in favor of formalistic equality.<sup>80</sup>

*a. Strict Scrutiny for Expenditures*

The Supreme Court has established a straightforward rule for expenditures: any quantitative limit violates the First Amendment.<sup>81</sup> This is because “expenditures are at the very core of political speech”<sup>82</sup> and are thus the most deserving of the First Amendment’s protections, requiring a strict scrutiny analysis to justify the “direct and substantial restraints on the quantity of political speech.”<sup>83</sup>

Under strict scrutiny, the regulation must “further[] a compelling interest and [be] narrowly tailored to achieve that interest.”<sup>84</sup> When weighed against the government’s interest in preventing corruption or the appearance of corruption, quantitative limits on expenditures cannot be narrowly tailored and invariably violate the First Amendment.<sup>85</sup> This includes caps on total and candidate-specific expenditures by candidates, party committees, political action committees, and independent entities.<sup>86</sup> Indeed, any regulation that penalizes a candidate after they spend a certain amount of funds is also subject to strict scrutiny as an indirect burden on expenditures.<sup>87</sup>

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80 . See Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2130 (2018).

81 . *Buckley*, 424 U.S. at 39–59; *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (plurality opinion).

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

83 . *Id.* at 39.

84 . *Citizens United*, 558 U.S. at 340 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (controlling opinion)). The Court occasionally suggests instead that the regulation must be “the least restrictive means” of achieving the interest but has not drawn a meaningful distinction between the phrases. See, e.g., *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452 (2015); *McCutcheon*, 572 U.S. at 197.

85 . *Buckley*, 424 U.S. at 55 (“No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by . . . campaign expenditure limitations.”).

86 . *Id.* at 39. When candidates finance their campaigns with public funds, the government may impose expenditure caps on those funds based on the theory that the candidate accepts the caps along with the funds. *Id.* at 95.

87 . *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 736–37 (2011) (citing *Davis v. FEC*, 554 U.S. 724, 739 (2008)); see *Zimmerman v. City of Austin*, 881 F.3d 378, 385 (5th Cir. 2018).

*b. Exacting Scrutiny for Contributions*

For quantitative limits on contributions,<sup>88</sup> the Court has crafted “a rigorous standard of review”<sup>89</sup> with many ambiguities and many names.<sup>90</sup> Nomenclature aside, the exacting scrutiny standard requires limitations on contributions be “closely drawn” and serve a compelling governmental interest.<sup>91</sup> Contribution caps can be closely drawn but can also be too low.<sup>92</sup> Further limitations “layered on top” of per-candidate contribution caps are even more suspect.<sup>93</sup>

The Court has justified the exacting scrutiny approach because contribution caps “permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor’s freedom to discuss candidates and issues.”<sup>94</sup> This also means that spending in a political context is different from other forms of expressive conduct, which are analyzed under the symbolic speech doctrine of *United States v. O’Brien*.<sup>95</sup>

The Court has noted that there is “no scalpel to probe” when a contribution cap is closely drawn and that courts should defer to the legislature’s judgment on what quantitative limit is appropriate.<sup>96</sup> This deference is not absolute and can be overcome when the party challenging the contribution cap shows that it prevents candidates from “amassing the resources necessary for effective advocacy.”<sup>97</sup> The Court has provided little guidance for lower courts to implement this standard, and its own

88 . The same standard of review applies to disclosure requirements, which are beyond the scope of this Note. *Citizens United*, 558 U.S. at 366–67.

89 . *Buckley*, 424 U.S. at 29.

90 . See *Citizens United*, 558 U.S. at 366 (“exacting scrutiny”); *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (“heightened scrutiny”); *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (citing *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (“intermediate scrutiny”)); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387, 389 n.4 (2000) (“*Buckley*’s standard of scrutiny” and “the *Buckley* standard”); *McCutcheon*, 572 U.S. at 199 (the “closely drawn” test). I use the phrase “exacting scrutiny” in this note because it also applies to other public subsidies of private speech. Cf. *Janus v. AFSCME*, 138 S. Ct. 2448, 2464–65 (2018).

91 . *McCutcheon*, 572 U.S. at 218.

92 . Compare *Buckley*, 424 U.S. at 35 (upholding cap of \$1000 per election), with *Randall v. Sorrell*, 548 U.S. 230, 250 (2006) (plurality opinion) (striking down cap of \$200 per election).

93 . The Court struck down one such restriction because it failed under both exacting and strict scrutiny. *McCutcheon*, 572 U.S. at 199, 221.

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

95 . 391 U.S. 367 (1968); see also *infra* Section II.A.2. The idea that spending money can be regulated as speech, rather than conduct, also finds considerable support in the Court’s recent decision in *Janus*, 138 S. Ct. 2448.

96 . *Buckley*, 424 U.S. at 30.

97 . *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 396 (2000) (quoting *Buckley*, 424 U.S. at 21).

precedents rarely examine the facts on the ground in any detail.<sup>98</sup> When a contribution cap is too low, the remedy is for the court to strike it down altogether, allowing unlimited contributions to each candidate.<sup>99</sup>

Finally, the First Amendment forbids any campaign finance regime that adjusts contribution limits for one candidate based on the quantity of money that an opposing candidate spends, strongly suggesting that the only contribution caps that satisfy exacting scrutiny must apply uniformly to all candidates.<sup>100</sup>

## 2. *When Money Is Not a Proxy for Speech*

Even the most zealous business interests have rarely convinced the Court that spending is speech in a commercial context.<sup>101</sup> For instance, price controls do not implicate the First Amendment,<sup>102</sup> and compelled spending in the form of taxes is not compelled speech.<sup>103</sup> In some circumstances, the Court's as-applied analysis of statutes regulating economic conduct with an expressive component could still apply,<sup>104</sup> but only when the spending is intended to convey a message.<sup>105</sup> In all other cases, rational-basis review merely requires a rational relation to a legitimate governmental interest, an

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98 . See *id.* at 394 (noting that a need for a “more extensive evidentiary documentation” may arise in some cases); *Randall v. Sorrell*, 548 U.S. 230, 248–253 (2006) (plurality opinion) (analyzing dollar amounts without citing to the record); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (per curiam) (same).

99 . *Randall*, 548 U.S. at 262.

100 . *Davis v. FEC*, 554 U.S. 724, 742 (2008); see *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 749 (2011).

101 . See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (finding “no element of protected expression”); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (explaining when “conduct can be labeled ‘speech’”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O’Connor, J., concurring in part and concurring in the judgment) (“[T]he State is free to impose any rational regulation on the commercial transaction itself.”).

102 . *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150 (2017).

103 . *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (“We have generally assumed . . . that compelled funding of *government* speech does not alone raise First Amendment concerns.”) (emphasis added). *But see Janus v. AFSCME*, 138 S. Ct. 2448, 2477 (2018) (invalidating government-compelled union dues as coercing nonmembers to endorse *private* speech); *cf. Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (allowing taxpayers to attack constitutionality of government spending that subsidizes religion in violation of the Establishment Clause).

104 . See *O’Brien*, 391 U.S. at 367; *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (distinguishing *O’Brien* in a campaign finance case); *Expressions Hair Design*, 137 S. Ct. at 1150 n.2 (noting that *O’Brien* may have applied); see also *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 470 (1997) (“The fact that an economic regulation may indirectly lead to a reduction in a[n] . . . advertising budget does not itself amount to a restriction on speech.”).

105 . *Cf. Spence v. Washington*, 418 U.S. 405, 409 (1974) (discussing displaying the flag upside down as speech).

extremely low bar.<sup>106</sup> This is especially so because the legislature need not articulate the interest as long as the reviewing court can imagine one.<sup>107</sup>

The question of whether a governmental interest in promoting electoral fairness is legitimate enough to satisfy rational-basis review is unclear, but states have a strong interest in fairly administering elections, even when their actions jeopardize fundamental rights like the right to vote.<sup>108</sup> In short, a campaign finance regulation that rests solely on general principles of commerce rather than speech is likely constitutional unless the government is clearly “singl[ing] out money used to fund speech as its legislative object.”<sup>109</sup>

## *B. Unequal Treatment of Incumbents and Challengers*

### *1. Speaker and Viewpoint Discrimination*

The First Amendment implicitly suggests that speakers must be treated equally by the law.<sup>110</sup> In the early twentieth century, the right of nearly unfettered access to public forums embodied the principle that equal voices could compete on a level playing field that was equally available to all.<sup>111</sup> Over time, the Court articulated the doctrine of “viewpoint” discrimination,

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106. *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (1938) (applying rational-basis review under the Fifth Amendment).

107. *See id.* at 153–54 (finding that legislatures have a rational basis for legislation when “any state of facts either known or which could reasonably be assumed” supports their legislative judgment). The same rule does not apply for restrictions on speech. *See, e.g.*, *Day v. Holahan*, 34 F.3d 1356, 1361 (8th Cir. 1994) (“One hardly could be faulted for concluding that this ‘compelling’ state interest was contrived for purposes of this litigation.”).

108. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (plurality opinion) (upholding an “evenhanded restriction[] that protect[ed] the integrity and reliability of the electoral process itself” (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983))). *But see Lubin v. Panish*, 415 U.S. 709, 718 (1974) (finding no rational basis for conditioning ballot access “solely on the basis of [the] ability to pay a fixed fee”).

109. *McConnell v. FEC*, 540 U.S. 93, 252 (Scalia, J., concurring in part and dissenting in part); *id.* (“The government may apply general commercial regulations to those who use money for speech if it applies them evenhandedly to those who use money for other purposes.”). However, the Court has also “prohibit[ed] the selective taxation of the press . . . whether the tax was the product of illicit motive or not.” *Id.* at 253 (citing *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 592 (1983)).

110. *See generally* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975).

111. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“Freedom to publish means freedom for all and not for some.”); *see also* Lakier, *supra* note 80, at 2119 (“Since the New Deal period, the Court has recognized that . . . freedom of speech means not only the right to speak but the right to speak on equal terms as other speakers.”).

striking down regulations that preferred or disfavored certain viewpoints.<sup>112</sup> In the twenty-first century, the Court has further zeroed in on “speaker” or “identity” discrimination, invalidating regulations that preferred or disfavored particular speakers or kinds of speakers, such as corporations, media outlets, and labor unions.<sup>113</sup> This shift from an aspiration to an enforceable right has drawn significant criticism.<sup>114</sup>

A statute need not discriminate on its face to qualify as speaker discrimination, particularly if it is “gerrymandered” in such a way that it will harm only disfavored speakers.<sup>115</sup> Speaker discrimination also bypasses the thorny problems of an equal protection analysis<sup>116</sup> and seems to require strict scrutiny regardless of how the statute classifies speakers.<sup>117</sup> Whereas the government nearly always has a rational basis for discriminating

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112. See e.g., *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). The Court did not completely disregard the speaker’s identity, particularly “when the legislature’s speaker preference reflect[ed] a content preference.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994); see also *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) (“The inherent worth of the speech . . . does not depend upon the identity of its source . . .”).

113. See *Citizens United v. FEC*, 558 U.S. 310, 364–65 (2010); *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (considering “distinctions drawn based on the message a speaker conveys”); cf. *Minneapolis Star & Trib.*, 460 U.S. at 585 (“[D]ifferential treatment [of newspapers], unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression . . .”).

114. See, e.g., *Citizens United*, 558 U.S. at 474 n.75 (Stevens, J., concurring in part and dissenting in part) (criticizing “the newly minted First Amendment rule against identity-based distinctions” as effectively requiring “no regulations whatsoever”).

115. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 802 (2011) (finding that “wildly underinclusive” statute indicated that the legislature “disfavor[ed] a particular speaker or viewpoint”); *NIFLA v. Becerra*, 138 S. Ct. 2361, 2374–75 (2018) (same); cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (invalidating city ordinance as “gerrymandered with care” to disfavor particular religious practices).

116. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985). Interestingly, the Court’s campaign finance cases have nearly always eschewed an equal protection analysis as unnecessary. See *Buckley v. Valeo*, 424 U.S. 1, 293 (1976) (Rehnquist, J., concurring in part and dissenting in part) (“[T]he First Amendment overtones of the appellants’ Fifth Amendment equal protection claim something more than a merely rational basis for the difference in treatment must be shown.”); *Davis v. FEC*, 554 U.S. 724, 744 n.9 (2008) (declining to address Fifth Amendment claim); see also *Riddle v. Hickenlooper*, 742 F.3d 922, 930 (10th Cir. 2014) (Gorsuch, J., concurring) (noting a lack of guidance from the Supreme Court). In this Note, I disregard the few cases in which lower courts decided campaign finance cases on Fourteenth Amendment grounds. See *Wagner v. FEC*, 793 F.3d 1, 33 (D.C. Cir. 2015) (en banc) (noting that no court has reached different conclusions when applying free speech and equal protection principles).

117. See, e.g., *NIFLA*, 138 S. Ct. at 2377–78 (applying strict scrutiny to statute classifying facilities as “pregnancy-related”). In a commercial context, the level of scrutiny is unclear because a majority of the Court has not resolved the issue. Compare *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2347 (2020) (plurality opinion) (applying strict scrutiny), and *id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part) (same), with *id.* at 2356 (Sotomayor, J., concurring in the judgment) (applying intermediate scrutiny), and *id.* at 2362 (Breyer, J., concurring in the judgment in part and dissenting in part) (same).

between the spending of natural persons and corporations,<sup>118</sup> the same discrimination is invalid when spending becomes speech.<sup>119</sup> Viewed through this lens, *Citizens United* essentially holds that when money is speech, corporations are people. This logical leap from a dubious proposition to a dubious conclusion may be why *Citizens United* has been so widely criticized.<sup>120</sup>

The remedy for unconstitutional speaker discrimination is for the reviewing court to sever the discriminatory portions of the law in such a way that the face of the statute will treat all speakers equally,<sup>121</sup> or, if severability is improper, to invalidate the entire statute.<sup>122</sup> This requirement of “formally equal treatment at the government’s hands”<sup>123</sup> has been described as contrary to other First Amendment principles such as the promotion of democratic self-governance.<sup>124</sup> Nevertheless, formalistic equality is the standard the Court demands.<sup>125</sup>

Although the Court has yet to squarely address the question, speaker discrimination is likely implicated when a campaign finance statute explicitly discriminates between incumbents and challengers. The fact that the Court has invalidated statutes that disfavored millionaires<sup>126</sup> and privately financed candidates<sup>127</sup> strongly supports the notion that campaign finance schemes must be formalistically neutral with respect to

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118 . *Cf. City of Cleburne*, 473 U.S. at 441–42 (“[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the [s]tate has the authority to implement, . . . the Equal Protection Clause requires only a rational means to serve a legitimate end.”).

119 . *See* First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978); *Citizens United*, 558 U.S. at 365; *accord* Protect My Check, Inc. v. Dilger, 176 F. Supp. 3d 685, 692 (E.D. Ky. 2016).

120 . As many commentators have noted, neither the proposition nor the conclusion actually originated with *Citizens United*. *See, e.g.*, Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 346 (2017).

121 . *See* Barr, 140 S. Ct. at 2355 (plurality opinion).

122 . *Citizens United*, 558 U.S. at 329 (“[T]he Court cannot resolve this case on a narrower ground without chilling political speech . . .”).

123 . Lakier, *supra* note 80, at 2120.

124 . *See id.* at 2126.

125 . An extremely recent Free Exercise Clause case suggests that formalistic equality under the First Amendment may be so important that it trumps even laws where the party attacking the law receives favorable treatment. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 80 (2020) (Sotomayor, J., dissenting) (“Surely the Diocese cannot demand laxer restrictions by pointing out that it is already being treated better than comparable secular institutions.” (emphasis added)); *see also* SEIU v. Fair Pol. Pracs. Comm’n, 955 F.2d 1312, 1324 (9th Cir. 1992) (Wiggins, J., dissenting) (questioning the role of factfinding in First Amendment discrimination case); *Citizens United*, 558 U.S. at 474 n.75 (Stevens, J., concurring in part and dissenting in part) (arguing that speaker discrimination effectively requires “no regulations whatsoever”).

126 . *Davis v. FEC*, 554 U.S. 724, 741–42 (2008).

127 . *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 737 (2011).

incumbency.<sup>128</sup> Concerns that policies might primarily benefit incumbents have always lurked in the background of campaign finance cases,<sup>129</sup> and in one instance, justified the invalidation of an annual contribution cap that favored incumbents.<sup>130</sup> Because transfer concessions grant incumbents access to additional funds without curtailing their ability to raise even more funds, they clearly favor incumbents over challengers and would violate this principle.<sup>131</sup>

## 2. *Beggar Thy Neighbor*—*Favoritism by Amplification*

Speaker discrimination, though relatively new, has several clear contours.<sup>132</sup> First, the government may not directly limit the speech of a given class of speakers.<sup>133</sup> This is the strongest and most defensible application, and the most consistent with traditional notions of viewpoint discrimination.<sup>134</sup> Similarly, the government may not choose to protect speech by a given class of speakers and decline to protect speech by another class of speakers.<sup>135</sup> In *Citizens United*, the limitation on spending by all corporations except “media corporations” violated this principle.<sup>136</sup> Finally, the government may not subsidize or amplify the speech of a given class of speakers at the expense of another class.<sup>137</sup> This proposition may be the most controversial given that the government can constitutionally subsidize speech in some situations.<sup>138</sup>

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128 . This would transform *Buckley*’s preference for “evenhanded restrictions” of all candidates to a command. *See Buckley v. Valeo*, 424 U.S. 1, 31 (1976) (per curiam).

129 . *See id.* at 32; *SEIU*, 955 F.2d at 1323–27 (Wiggins, J., dissenting).

130 . Specifically, the district court found at trial that most challengers decided to run for office toward the end of an election cycle and could not match the significant resources that incumbents could raise in earlier years. *SEIU v. Fair Pol. Pracs. Comm’n*, 747 F. Supp. 580, 587–88 (E.D. Cal. 1990), *aff’d*, *SEIU*, 955 F.2d 1312; *see also* *Kopp v. Fair Pol. Pracs. Comm’n*, 905 P.2d 1248, 1286–90 (Cal. 1995). *Contra* *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1114 (8th Cir. 2005).

131 . *See Buckley*, 424 U.S. at 19 (finding that greater spending enables a greater degree of communication).

132 . The doctrine is significantly less clear when speech is compelled by the government. *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) (questioning the case’s impact on mandatory disclosure laws).

133 . *See id.* at 2377–78 (majority opinion).

134 . *See id.* at 2376 (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 802 (2011)) (considering speaker and viewpoint discrimination simultaneously); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011) (same).

135 . *Sorrell*, 564 U.S. at 580 (“[T]he [s]tate cannot . . . le[ave] unburdened those speakers whose messages are in accord with its own views”).

136 . *Citizens United v. FEC*, 558 U.S. 310, 352 (2010); *cf.* *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 692 (E.D. Ky. 2016) (invalidating statute that “treat[ed] corporations differently from LLCs and unions”).

137 . *See Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 737 (2011).

138 . *See Buckley v. Valeo*, 424 U.S. 1, 85–108 (1976) (per curiam) (upholding public financing

The Court, through Chief Justice Roberts, referred to this third form of speaker discrimination as a “beggar thy neighbor” approach to free speech.<sup>139</sup> The vice of this approach is that it drowns out the disfavored speaker by amplifying the speech of the preferred speaker.<sup>140</sup> The problem is unusual in that the government is actually *increasing* the overall level of private speech, albeit in a lopsided fashion.<sup>141</sup> A campaign finance regulation that directly provides more resources to one candidate and not another clearly violates this principle, even when the subsidy is triggered by the other candidate’s activity.<sup>142</sup> Any regulation that enables the other candidate greater access to resources by increasing their contribution cap is likewise unconstitutional.<sup>143</sup> Although drawing the line between an incumbent’s public and political functions is difficult,<sup>144</sup> any financial benefit to incumbents that “operates *only* in an electoral context,”<sup>145</sup> such as a transfer concession, likely discriminates against challengers in violation of the First Amendment.

### III. ANALYSIS

Like all campaign finance regulations, the constitutionality of transfer policies depends on how they should be evaluated under the First Amendment.<sup>146</sup> Because each campaign finance system forms its own “comprehensive, integrated statutory scheme,”<sup>147</sup> courts must evaluate a system as a whole to determine its constitutionality,<sup>148</sup> and each system must address transfers with a concession, cap, or ban.<sup>149</sup>

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of political campaigns); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 563 (2005) (upholding subsidized speech when “subject to political safeguards”).

139 . *Bennett*, 564 U.S. at 741.

140 . *See id.*

141 . *See id.*; *see also id.* at 763 (Kagan, J., dissenting) (“The law . . . subsidizes and so produces *more* political speech.”).

142 . *Id.* at 737 (majority opinion) (noting the “heav[y] burden” caused by the “direct and automatic release of public money” to a candidate’s opponent).

143 . *Id.* at 736–37 (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)).

144 . *See Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982) (three-judge court), *aff’d mem.*, 461 U.S. 911 (1983).

145 . *See Coal. to End the Permanent Cong. v. Runyon*, 979 F.2d 219, 223 (D.C. Cir. 1992) (Silberman, J., dissenting) (emphasis added) (addressing use of the congressional franking privilege to contact voters who were not constituents).

146 . *See supra* Section II.A.

147 . *Buckley v. Valeo*, 424 U.S. 1, 255 (1976) (Burger, C.J., concurring in part and dissenting in part).

148 . *Compare id.* at 108–09 (per curiam) (finding portions of statute severable), *with Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (plurality opinion) (finding statute inseverable).

149 . In other words, the system must allow unlimited transfers, no transfers, or something in between.

If the state enacts a transfer cap or ban, an incumbent can attack the policy under the traditional *Buckley* framework as a restriction on campaign spending.<sup>150</sup> If the state cannot justify the policy under whichever standard of review applies, the remedy has been to strike the policy down and allow unlimited transfers, creating a de facto transfer concession.<sup>151</sup>

If the state enacts a transfer concession (or even a cap), a challenger could attack the policy as speaker discrimination under *Bennett*'s "beggar thy neighbor" principle.<sup>152</sup> In such a case, the preference for incumbents would have to be stricken in favor of some kind of formalistic equality.<sup>153</sup> Merely reframing legislative silence as formalistic equality does not resolve the problem because there is no state of nature with respect to transfers—unspent campaign funds could easily be presumed to live on with a candidate or die along with an election.<sup>154</sup>

A campaign finance scheme's constitutionality cannot truly depend on who attacks it in court,<sup>155</sup> especially where a remedy for one party inflicts harm on another party.<sup>156</sup> To break this deadlock, courts evaluating a transfer concession must decide "whether it is appropriate to extend benefits or burdens . . . [or] nullify[] . . . benefits or burdens."<sup>157</sup>

One option would be to nullify the benefit of unspent campaign funds by imposing a de facto transfer ban. This option would be formalistically equal because all candidates would begin an election cycle with the same amount

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150 . *See* *Zimmerman v. City of Austin*, 881 F.3d 378, 393–94 (5th Cir. 2018) (finding a former incumbent had standing to attack the constitutionality of a transfer cap).

151 . *E.g., id.* at 395.

152 . *See* *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 741 (2011).

153 . *Cf.* *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2354 (plurality opinion). For significant examples where the Court took an antisubordinating approach instead of insisting on formalistic equality, see *Lakier*, *supra* note 80, at 2119–20.

154 . In other words, funds could "attach" to a specific election cycle or merely to a specific candidate. Even though transfer concessions have become the default, the relevant statutory definitions are ambiguous at best. *See supra* note 51 and accompanying text.

155 . Candidates might not be the only parties who could attack these policies in court. *See, e.g., SEIU v. Fair Pol. Praes. Comm'n*, 955 F.2d 1312, 1316 (9th Cir. 1992) (finding that some litigants "ha[d] standing to assert their own rights as contributors"). For instance, past contributors to an incumbent might protest that a transfer concession compels them to endorse the incumbent in future election cycles against their wishes. *See* 11 C.F.R. § 110.1(b)(3)(i) (2020). Joining additional plaintiffs and pleading these additional attacks by contributors might be an effective litigation strategy, *see Bennett*, 564 U.S. at 733 (suit filed by "candidates and independent expenditure groups"), but attacks by candidates are sufficient for the purposes of this note, *Davis v. FEC*, 554 U.S. 724, 732–36 (2008) (finding that candidate had standing and case was not moot).

156 . *See* *Platt v. Bd. of Comm'rs on Grievances & Discipline*, 894 F.3d 235, 264–67 (6th Cir. 2018) (describing this result as "a game of constitutional whack-a-mole"); *Barr*, 140 S. Ct. at 2356 (rejecting Justice Gorsuch's suggestion for litigant-specific relief).

157 . *Barr*, 140 S. Ct. at 2354; *cf.* *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 920–21 (M.D. Pa.) (explaining the similar Equal Protection analysis of "leveling up" or "leveling down"), *aff'd*, 830 F. App'x 377 (3d Cir. 2020).

of funds: none.<sup>158</sup> Furthermore, it would advance the First Amendment principle of democratic self-governance by preventing incumbents from skewing the marketplace of ideas by using unspent campaign funds.<sup>159</sup>

Alternatively, courts could decide that the real burden arises from the disparate impact of contribution caps—given that challengers cannot counteract incumbents’ “contribution” of unspent campaign funds—and nullify contribution caps.<sup>160</sup> This option would be formalistically equal because it would nullify the skewed burden of the currently uniform contribution caps and theoretically enable challengers to raise more funds. However, it does not advance democratic self-governance because the incumbent’s transfer of funds will likely not be outweighed by a challenger’s increased ability to receive contributions.<sup>161</sup>

#### A. Attacks on Transfer Caps and Bans by Incumbents

Only one transfer ban has ever been enacted; it was promptly stricken down as unconstitutional.<sup>162</sup> Every statutory transfer ban or cap to be attacked in court was adopted by popular initiative or passed in response to one.<sup>163</sup> Incumbent lawmakers clearly prefer not to voluntarily prevent themselves from using their unspent campaign funds in future elections.

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158 . No campaign finance regime can fully address the fact that “[i]ncumbents by virtue of their offices hold advantages over potential challengers in securing campaign funds,” which is incumbent in the nature of fundraising. Philip L. Hersch & Gerald S. McDougall, *Campaign War Chests as a Barrier to Entry in Congressional Races*, 32 ECON. INQUIRY 630, 631 (1994).

159 . See Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 571–72 (2018) (describing “the government’s duty to . . . promote an environment conducive to political debate”).

160 . Justice Thomas has strenuously advocated such an approach, arguing the Court should “overrule *Buckley* and subject [contribution caps] to strict scrutiny, which they would surely fail.” *McCutcheon v. FEC*, 572 U.S. 185, 232 (2014) (Thomas, J., concurring in the judgment). Although Justice Scalia joined the plurality in *McCutcheon*, he previously expressed similar distaste for exacting scrutiny as “frustrat[ing] the fundamental purpose of the First Amendment.” *McConnell v. FEC*, 540 U.S. 93, 251 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010) (Scalia, J., concurring in part and dissenting in part). Justice Scalia’s concern that “incumbents would have an enormous advantage” under completely evenhanded restrictions did not seem to impact this conclusion. See *id.* at 249.

161 . See *supra* note 158.

162 . *SEIU v. Fair Pol. Pracs. Comm’n*, 955 F.2d 1312, 1322 (9th Cir. 1992), *aff’g* 747 F. Supp. 580, 591 (E.D. Cal. 1990). The transfer ban was included in a California statute adopted by ballot initiative in 1988. *Id.* at 1314, 1321 n.15. A 1992 Kentucky transfer ban that applied only to slates of candidates was invalidated as an uncompensated per se taking under the Fifth and Fourteenth Amendments. *Anderson v. Spear*, 356 F.3d 651, 669–70 (6th Cir. 2004) (invalidating KY. REV. STAT. ANN. § 121A.080(6) (West 1992) (repealed 2005)).

163 . However, Kentucky’s statute governing slates of candidates was enacted in response to two major campaign finance scandals. Act of Apr. 9, 1992, ch. 288, 1992 Ky. Acts 809, 816; see Jennifer A. Moore, Note, *Campaign Finance Reform in Kentucky: The Race for Governor*, 85 KY. L.J. 723, 723–25 (1997).

In 1994, the Missouri Legislature enacted a transfer cap in response to a then-upcoming ballot initiative that proposed an even more restrictive cap.<sup>164</sup> The ballot initiative passed<sup>165</sup> and was subsequently struck down.<sup>166</sup> Both versions were repealed by the legislature in 1997.<sup>167</sup>

Following Missouri's lead, the Alaska Legislature preempted a ballot initiative by enacting a transfer cap in 1996.<sup>168</sup> Against all odds, Alaska's transfer cap was upheld by the Alaska Supreme Court in 1999 and remains in force—for now.<sup>169</sup>

Also in 1996, a Colorado initiative including a transfer cap reached the ballot and was adopted.<sup>170</sup> Although an incumbent attacked one part of the law on other grounds, that attack was dismissed on technical grounds.<sup>171</sup> After the Colorado Legislature tinkered with the statute while the litigation was pending,<sup>172</sup> Colorado citizens adopted a second ballot initiative in 2002 enshrining the transfer cap and other campaign finance reforms in the state constitution.<sup>173</sup> The constitutional provision and its implementing statute<sup>174</sup> have not been attacked on the merits.

“In 1997, voters in the city of Austin, Texas, approved a ballot initiative” that included a transfer cap.<sup>175</sup> More than two decades later, the Fifth Circuit struck it down.<sup>176</sup>

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164 . Act of July 7, 1994, S.B. No. 650, 1994 Mo. Laws 424, 448 (codified as MO. ANN. STAT. § 130.038 (West Supp. 1995) (repealed 1997)).

165 . MO. ANN. STAT. § 130.130 (West Supp. 1995) (repealed 1997).

166 . *Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1427–29 (8th Cir. 1995). The candidates who sued in *Maupin* did not attack the legislature's version. *Id.* at 1427 n.5.

167 . Act of July 7, 1997, S.B. No. 16, § A, 1997 Mo. Laws 435, 436.

168 . Act of May 30, 1996, S.B. No. 191, 1996 Alaska Sess. Laws ch. 48, § 19 (codified as amended at ALASKA STAT. § 15.13.116(a)(7) (2020)). Unlike in Missouri, the Alaska Legislature's act prevented the initiative petition from reaching the ballot. *See Alaska Att'y Gen., Op. No. 883-96-0048* (May 21, 1996), [http://law.alaska.gov/pdf/opinions/opinions\\_1996/96-019\\_883960048.pdf](http://law.alaska.gov/pdf/opinions/opinions_1996/96-019_883960048.pdf) [<https://perma.cc/K7ZF-QZJM>] (comparing initiative and legislation).

169 . *State v. Alaska C.L. Union*, 978 P.2d 597, 631–32 (Alaska 1999) [hereinafter *ACLU*], *cert. denied*, 528 U.S. 1153 (2000). On remand from *Thompson v. Hebdon*, 140 S. Ct. 348 (2019), the Ninth Circuit found that the contribution caps upheld in *ACLU*, 978 P.2d at 624–26, were unconstitutionally low. *Thompson v. Hebdon*, 7 F.4th 811 (9th Cir. 2021). This holding undermines the Alaska Supreme Court's primary rationale for distinguishing *Maupin* and *SEIU*, *see ACLU*, 978 P.2d at 632 n.201, but did not address the constitutionality of the transfer cap.

170 . *See Citizens for Responsible Gov't State PAC v. Buckley*, 60 F. Supp. 2d 1066, 1072–73 (D. Colo. 1999), *rev'd in part, vacated in part sub nom. Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).

171 . *Davidson*, 236 F.3d at 1186 (dismissing unpreserved attack on another provision of the statute).

172 . *See generally Davidson*, 236 F.3d 1174.

173 . COLO. CONST. art. XXVIII, § 3(3)(e).

174 . COLO. REV. STAT. § 1-45-106(1)(a)(I)(B) (2020).

175 . *Zimmerman v. City of Austin*, 881 F.3d 378, 382 (5th Cir. 2018).

176 . *Id.* at 395.

### 1. *Transfers Are Not Expenditures*

In all three cases where a circuit court of appeals has invalidated a transfer cap or ban, the court applied strict scrutiny without providing a convincing justification for doing so. In *SEIU v. Fair Political Practices Commission*, the Ninth Circuit spent just one sentence on the question.<sup>177</sup> In *Zimmerman v. City of Austin*, the Fifth Circuit, relying on *Shrink Missouri Government PAC v. Maupin*, failed to specify by name the level of scrutiny it applied,<sup>178</sup> but seems to have applied strict scrutiny.<sup>179</sup> The Eighth Circuit in *Maupin* provided the most extensive analysis, which it still limited to a single paragraph.<sup>180</sup> In each case, the application of strict scrutiny proved fatal due to the government's lack of a sufficiently compelling state interest.<sup>181</sup> Even the Alaska Supreme Court applied strict scrutiny when it *upheld* a transfer cap, also spending just one paragraph on the question.<sup>182</sup>

In deciding to apply strict scrutiny, the *Maupin* court considered two potential characterizations of the transfer ban.<sup>183</sup> The government's characterization was that "the provision [wa]s intended to require the candidate to speak in the current election."<sup>184</sup> The candidates' characterization was that "the provision limit[ed] the quantity of a candidate's speech in future elections" and was effectively an expenditure cap with its "impact . . . postponed to future elections."<sup>185</sup> The court held that the transfer ban was a restriction on expenditures under either characterization,<sup>186</sup> a conclusion resting on three untenable propositions that can be refuted as follows: First, not all disbursements are expenditures. Second, some burdens on expenditures, particularly non-quantitative

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177 . *SEIU v. Fair Pol. Pracs. Comm'n*, 955 F.2d 1312, 1322 n.17 (9th Cir. 1992) ("Appellants do not appear to dispute that the intra-candidate transfer ban operates as an expenditure limitation."). The court examined the other provisions of the law in much greater detail, over a vigorous dissent. *Id.* at 1314–23; *see also id.* at 1323–27 (Wiggins, J., dissenting).

178 . *See Zimmerman*, 881 F.3d at 395 (using the phrases "heightened scrutiny" and "sufficiently tailored").

179 . *See id.* (citing *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (plurality opinion)) ("The candidate's expenditure of [a contributor's] money to engage in political speech is then afforded its own constitutional protection."). The district court expressly applied strict scrutiny. *Zimmerman v. City of Austin*, No. 15-CV-628, slip op. at 16 (W.D. Tex. July 20, 2016), *aff'd*, *Zimmerman*, 881 F.3d 378.

180 . *Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1427–28 (8th Cir. 1995).

181 . *Id.* at 1428 ("While strict scrutiny may not always be fatal to a challenged restriction on speech, it is in this case.").

182 . *State v. Alaska C.L. Union*, 978 P.2d 597, 631 & n.199 (Alaska 1999) (finding, based on *Maupin* and *SEIU*, that the transfer ban "directly limited expenditures").

183 . *Maupin*, 71 F.3d at 1428.

184 . *Id.*

185 . *Id.*

186 . *Id.*

restrictions, do not trigger strict scrutiny. Third, the notion of “postponed impact” actually describes a necessary component of campaign finance regulation, not a burden on expenditures.

*a. Expenditures v. Disbursements*

By definition, disbursements include transactions other than expenditures.<sup>187</sup> The government can constitutionally mandate or forbid disbursements in some circumstances, so courts should not reflexively invoke the First Amendment whenever money leaves a campaign account, much less apply strict scrutiny to the transaction.<sup>188</sup> The question of whether a given disbursement can be forbidden is more frequently legislated and litigated,<sup>189</sup> but mandatory disbursements have also been upheld.

As a simple example, if a candidate’s bank mistakenly deposited another person’s money into the candidate’s campaign account, then the government could require the candidate to return the receipt to the bank. This kind of compelled spending is not speech under any rational view of the First Amendment. The question is closer when the receipt is an illegal contribution, but the government can still require an innocent candidate to refund the contribution.<sup>190</sup> When a candidate violates a campaign finance law, the government can require the candidate to surrender the wrongfully acquired funds.<sup>191</sup> States can also require candidates to pay a filing fee to access the ballot if they cannot otherwise “demonstrat[e] the existence of some reasonable quantum of voter support.”<sup>192</sup>

If a transfer is a disbursement, rather than an expenditure, then it should not be subject to strict scrutiny.

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187. See sources cited *supra* note 38.

188. Setting the First Amendment aside, it is unclear whether candidates have a property interest in their campaign accounts that would implicate Justice Stevens’s perplexing substantive due process analysis. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398–99 (2000) at 398–99 (2000) (Stevens, J., concurring); cf. *Anderson v. Spear*, 356 F.3d 651, 669–70 (6th Cir. 2004).

189. See generally *FEC v. Craig for U.S. Senate*, 816 F.3d 829 (D.C. Cir. 2016) (examining FEC’s “reasonableness” inquiry for disbursements).

190. See *Fireman v. United States*, 44 Fed. Cl. 528, 538–39 (1999) (suggesting that 11 C.F.R. § 103.3(b)(2) (2020) “confers a right of recovery” of contributor’s “illegal campaign money”).

191. E.g., 52 U.S.C. § 30109(a)(5)–(6); see *Craig for U.S. Senate*, 816 F.3d at 850.

192. *Lubin v. Panish*, 415 U.S. 709, 718 (1974); accord *Belitskus v. Pizzingrilli*, 343 F.3d 632, 647 (3d Cir. 2003).

*b. Burdening Expenditures*

Even if a disbursement is properly categorized as an expenditure, it can still be subjected to some burdens.<sup>193</sup> For instance, the applicability of employment laws to political committees remains an open question.<sup>194</sup> Similarly, a 6.5% tax on leafleting would be unthinkable as a direct burden on campaign expenditures but is allowable as part of the government's taxing power on paper.<sup>195</sup> The fact that these policies indirectly burden expenditures is not enough for a court to invalidate them, and even then, strict scrutiny would probably not be the appropriate standard.<sup>196</sup>

Although the Court has not specified what qualifies as an “indirect burden” on expenditures, the only indirect burdens the Court has invalidated would have been triggered after a candidate's expenditures exceeded some quantitative cap.<sup>197</sup> In other words, an indirect burden must penalize a candidate for “robustly exercis[ing] . . . First Amendment right[s].”<sup>198</sup> Transfer bans do not penalize an incumbent for spending a certain amount of money or engaging in a certain amount of speech.<sup>199</sup> On the contrary, a transfer ban affects only *unspent* funds and produces the same result whether the incumbent spent one dollar or one million. Although contributors may *prefer* for candidates to spend contributions rather than disgorge them, contributors have no enforceable right to dictate how candidates use contributions.<sup>200</sup> The fact that transfers do not penalize

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193 . The financing of the Watergate burglaries is a notable example of an illegal expenditure. *See* Stevens Testimony, *supra* note 70.

194 . *See* Katz v. DNC Servs. Corp., No. CV 16-5800, 2019 WL 4752056, at \*8 (E.D. Pa. Sept. 27, 2019) (finding Pennsylvania Democratic Party a covered employer under the Fair Labor Standards Act, 29 U.S.C. §§ 206(a), 207(a)), *perm. app. denied*, No. 19-8043 (3d Cir. Jan. 2, 2020). The district court did not apply strict scrutiny in reaching its conclusion.

195 . *E.g.*, KAN. STAT. ANN. §§ 79-3603, -3606 (2020) (political committees not exempt from 6.5% sales tax).

196 . *See* McConnell v. FEC, 540 U.S. 93, 252 (Scalia, J., concurring in part and dissenting in part) (endorsing “evenhanded” commercial regulations); *see* Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue, 460 U.S. 575, 585 (1983) (applying strict scrutiny solely because state imposed “[d]ifferential taxation” on newspapers).

197 . *Davis v. FEC*, 554 U.S. 724, 736 (2008) (\$350,000 in self-contributions); *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 731 (2011) (private contributions, self-contributions, and independent expenditures exceeding publicly funded opponent's allocation of funds).

198 . *Davis*, 554 U.S. at 739; *accord Bennett*, 564 U.S. at 736.

199 . It is probable, but not inevitable, that the candidate with more unspent funds engaged in more fundraising speech, which is also constitutionally protected. *See* Village of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 632 (1980).

200 . *See* Cal. Med. Ass’n v. FEC, 453 U.S. 182, 196 (1981) (plurality opinion) (finding contributions not “entitled to full First Amendment protection”). Contributors may have some statutory rights, however. *See, e.g.*, 11 C.F.R. §§ 103.3(b)(2), 110.1(b)(3) (2020).

anyone's exercise of First Amendment rights strongly suggests that they should not be subject to strict scrutiny.

*c. Postponement*

*Maupin's* holding that a transfer cap is an expenditure cap with a "postponed impact"<sup>201</sup> disregards the fact that all campaign finance regulations rest on the assumption that expenditures will relate to the current election cycle.<sup>202</sup>

First, contribution caps must relate to the current election cycle or they become meaningless. If a candidate can receive and spend contributions in the current election cycle but credit them toward every future election cycle until the end of time, then there is effectively no contribution cap.<sup>203</sup> If candidates could raise funds for future election cycles and spend them only when those election cycles arrive,<sup>204</sup> then the government would have to ensure the funds were segregated from current funds to prevent circumvention of a contribution cap, a restriction that strongly resembles a transfer ban.<sup>205</sup>

Second, it is not clear that the First Amendment protects the right to raise funds from others in the current election solely to fund a campaign in a future election cycle.<sup>206</sup> If contribution caps force candidates to begin fundraising in an earlier election cycle, then the Court seems to prefer for the candidate to attack those caps in court.<sup>207</sup> The additional step of allowing advance contributions may go too far.<sup>208</sup>

Finally, the assumption that transfers are the "default" disposition of unspent campaign funds oversimplifies the situation. Suppose that Smith

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201 . *Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422,1428 (8th Cir. 1995).

202 . Indeed, the end of an election cycle can moot pending litigation. *See, e.g., Davis*, 554 U.S. at 735–36; *Platt v. Bd. of Comm'rs on Grievances & Discipline*, 894 F.3d 235, 243 (6th Cir. 2018).

203 . Of course, it would likely be fraudulent for a candidate to tell contributors that they are raising funds to mount a political campaign in the twenty-second century.

204 . *Cf. Jones v. Jegley*, 947 F.3d 1100, 1107 (8th Cir. 2020) (examining this potential problem with respect to pre-election blackout periods).

205 . It also mirrors the "anticircumvention" rationale that justified Alaska's transfer caps in *State v. Alaska C.L. Union*, 978 P.2d 597, 631–32 (Alaska 1999).

206 . The right to save one's own money and spend it in a later election cycle, however, is protected. *See Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam).

207 . *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 262–63 (2006); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (per curiam). The government's intention that candidates should spend their funds on the current election comports with this approach. *See Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1428 (8th Cir. 1995).

208 . The Eighth Circuit very recently struck down a prohibition on accepting contributions more than two years before the election but did not explain how the decision would affect the state's existing per-election contribution caps. *Jones*, 947 F.3d at 1100. In contrast, the Sixth Circuit upheld a blackout period for the twenty-eight days preceding a gubernatorial election, although that holding is dubious in light of *McCutcheon*. *Gable v. Patton*, 142 F.3d 940, 951 (6th Cir. 1998).

defeats Jones in 2020, Smith retains unspent funds, Jones dies in 2021, and Smith runs for re-election in 2022 against Anderson. Smith can, and often must, cover all the expenses of defeating Jones in 2020 before transferring any unspent funds.<sup>209</sup> Whether or not Smith's unspent funds can be transferred, Smith can unquestionably continue to spend them to defeat Jones in 2020, a purpose that has become doubly pointless given Smith's victory and Jones's death.<sup>210</sup>

The circuit courts of appeals have effectively assumed that Smith's unspent funds from 2020 were contributed so Smith could win any election—not just the 2020 election—implying that the funds could obviously be used to advocate Smith's re-election in 2022.<sup>211</sup> If the courts instead assumed that Smith's unspent funds were contributed so Smith could defeat Jones, then the propriety of a transfer is not so obvious. Jones cannot possibly be defeated in 2022, and the unspent funds were not contributed to defeat Anderson, so Smith's use of those funds to defeat Anderson in 2022 is a completely different purpose. From this angle, the restriction on transfers seems more like a restriction on disbursements than a quantitative cap.

## 2. *Transfers Are Contributions or Ordinary Disbursements*

Appellate courts' reflexive characterization of transfers as expenditures should not have been a foregone conclusion.<sup>212</sup> Because the incumbent is both disbursing and receiving funds, the transaction has features of both an expenditure and a contribution,<sup>213</sup> but more closely resembles a contribution or a disbursement, suggesting exacting scrutiny or rational-basis review, respectively.<sup>214</sup> In either case, democratic attempts to limit transfers should be upheld.

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209 . See 11 C.F.R. §§ 110.1(b)(3), 110.3(c)(4) (2020).

210 . Though absurd, the idea that one might try to win a past election is not that much more irrational than an unqualified candidate soliciting donations to win the next election after the next election, twelve years hence. See *infra* Section III.B; see also Josh Dawsey & Michelle Ye Hee Lee, *Trump Raises More Than \$170 Million Appealing on False Election Claims*, WASH. POST (Dec. 1, 2020, 4:27 PM), [https://www.washingtonpost.com/politics/trump-raises-more-than-150-million-appealing-to-false-election-claims/2020/11/30/82e922e6-3347-11eb-afe6-e4dbee9689f8\\_story.html](https://www.washingtonpost.com/politics/trump-raises-more-than-150-million-appealing-to-false-election-claims/2020/11/30/82e922e6-3347-11eb-afe6-e4dbee9689f8_story.html) [<https://perma.cc/44P4-82BW>].

211 . See *Maupin*, 71 F.3d at 1428 (assuming that contributors intend to provide such “blind support”); see also *Zimmerman v. City of Austin*, 881 F.3d 378, 395 (5th Cir. 2018).

212 . See *supra* notes 177–182 and accompanying text.

213 . A transfer certainly could not satisfy the definition of an independent expenditure, which must be a “communication.” See *Buckley*, 424 U.S. 1, 44 (1976) (per curiam); accord 52 U.S.C. § 30101(17)(A). Incumbents who transfer funds are not talking to themselves when doing so.

214 . See *supra* Section II.A.1.

*a. Transfers as Contributions*

All expenditures and contributions must relate to *some* election to acquire First Amendment protections.<sup>215</sup> Although a contributor may be expressing blind support for a candidate, their contribution was almost certainly intended to influence the current election cycle.<sup>216</sup> In contrast, a candidate’s transfer—assuming no outstanding debt remains<sup>217</sup>—is intended to influence the next election cycle.<sup>218</sup> This new purpose strongly suggests that the transaction should be evaluated from the perspective of the new campaign as incoming funds—that is, a contribution.<sup>219</sup>

The government can cap contributions to candidates from any source, including political committees,<sup>220</sup> which suggests that a transfer cap is really a contribution cap subject to exacting scrutiny.<sup>221</sup> The government can also ban contributions to candidates in some circumstances, such as the century-old ban on “hard money” from corporations and labor unions,<sup>222</sup> a restriction that even *Citizens United* left intact.<sup>223</sup> Laws banning transfers *between* different candidates have been evaluated under exacting scrutiny<sup>224</sup> and occasionally upheld.<sup>225</sup>

*b. Transfers as Disbursements*

The *SEIU* court claimed that a transfer ban “operates as an expenditure limitation because it limits the purposes for which money raised by a candidate may be spent.”<sup>226</sup> Although there is a lack of authority on the

215 . See, e.g., 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i).

216 . See *Maupin*, 71 F.3d at 1428.

217 . Although the government can restrict transfers when candidates have outstanding debt, see, e.g., 11 C.F.R. §§ 110.1(b)(3), 110.3(c)(4) (2020), the government is not required to do so, see *Zimmerman v. City of Austin*, 881 F.3d 378, 394–95 (5th Cir. 2018).

218 . This change in intent recalls the Court’s occasional “speech by proxy” approach to contributions. See *Cal. Med. Ass’n v. Fed. Election Com’n*, 453 U.S. 182, 196 (1981) (plurality opinion).

219 . See generally 52 U.S.C. § 30101(8)(A)(i).

220 . See *id.* § 30116(a).

221 . Colorado’s unchallenged transfer cap takes this approach. COLO. CONST. art. XXVIII, § 3(3)(e). Exacting scrutiny would not guarantee that a transfer cap would be upheld, however. *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (plurality opinion).

222 . Tillman Act, ch. 420, 34 Stat. 864 (1907) (current version at 52 U.S.C. § 30118(a)); see also *Cal. Med. Ass’n*, 453 U.S. at 201 (upholding the Tillman Act under the First Amendment).

223 . The *Citizens United* majority “disavowed” *California Medical Association*, but the Court has not explicitly overruled it. See *Citizens United v. FEC*, 558 U.S. 310, 395 (2010) (Stevens, J., concurring in part and dissenting in part).

224 . See, e.g., *SEIU v. Fair Pol. Pracs. Comm’n*, 955 F.2d 1312, 1322 (9th Cir. 1992).

225 . See *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1113 (8th Cir. 2005); *Suster v. Marshall*, 149 F.3d 523, 534 (6th Cir. 1998) (distinguishing “cases that have allowed [inter-candidate] transfers of funds” because “none have involved judicial elections”).

226 . *SEIU*, 955 F.2d at 1322. No party disputed this proposition. *Id.* at 1322 n.17.

issue, states can generally limit such purposes as they regulate other conduct,<sup>227</sup> particularly given that disgorgement is a content-neutral remedy that only compels spending without specifying how the funds must be spent.<sup>228</sup>

#### A. *Potential Attacks on Transfer Concessions by Challengers*

No court appears to have ruled on a challenger's attack on a transfer concession. The closest analogue is a recent Sixth Circuit case where a first-time judicial candidate attacked, on equal protection grounds, a rule of judicial conduct that allowed incumbents to transfer funds from previous campaigns.<sup>229</sup>

The court found there was no state action because the "candidates' actions, not the rule itself, accounted for fundraising advantages or disadvantages."<sup>230</sup> The court noted that the same policy "would engender far graver constitutional concerns" "in[] the legislative election context,"<sup>231</sup> as opposed to judicial elections, where restrictions on campaign speech have withstood strict scrutiny.<sup>232</sup> Finally, the court determined that even an equal protection violation, if one had existed, would not enable them to remedy the disparity with disgorgement, which would effectively "tread on the First Amendment in order to honor the Fourteenth."<sup>233</sup> By its own terms, the decision provides ample grounds for distinguishing legislative transfer concessions in a future case,<sup>234</sup> but its reasoning illustrates why transfer concessions violate the First Amendment.

First, *Platt's* stance that the disparity was attributable to the candidates' actions rather than the rule is in direct conflict with *Bennett*, where the unfavorable treatment for privately funded candidates resulted from an

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227 . See *supra* Section II.A.2.

228 . *Maupin's* conclusion that candidates cannot "refrain from speaking" is incorrect because candidates may disburse their funds without making expenditures. See *Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1428 (8th Cir. 1995) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

229 . See *Platt v. Bd. of Comm'rs on Grievances & Discipline*, 894 F.3d 235, 264–67 (6th Cir. 2018); *Platt v. Bd. of Comm'rs on Grievances & Discipline*, 769 F.3d 447, 454–55 (6th Cir. 2014) (finding no likelihood of success on the merits at the preliminary injunction stage and anticipating the pending *Williams-Yulee* decision); see also *O'Toole v. O'Connor*, 802 F.3d 783, 791 (6th Cir. 2015) (declining to address the same law's disparate impact on challengers when all candidates were "sitting judges who ha[d] previously stood for election").

230 . *Platt*, 894 F.3d at 265 (citing *O'Toole*, 802 F.3d at 791).

231 . *Id.* at 267.

232 . *Id.* (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015)).

233 . *Id.* at 266.

234 . See *id.* at 267; accord *Williams-Yulee*, 575 U.S. at 447.

opponent's choice to accept public funding.<sup>235</sup> *Platt's* suggestion that challengers could also "rais[e] money in successive election cycles, sav[e] much of it, and concentrate[e] their resources in one particular race"<sup>236</sup> also disregards *Bennett*, where the privately funded candidate could easily have accepted public funds—and all the accompanying benefits and burdens—to avoid the "beggar thy neighbor" problem.<sup>237</sup>

But even more fundamentally, this "let them eat cake" argument ignores the realities of running for office, particularly a challenger's eligibility and motivation.<sup>238</sup> Many challengers choose to run in the election cycle when they first become eligible—for instance when they reach a particular age, reside in the jurisdiction for a sufficient length of time, become an American citizen,<sup>239</sup> or satisfy some other requirement based on credentials<sup>240</sup> or experience.<sup>241</sup> It would be irrational to require challengers to begin fundraising when they cannot legally be elected, and might open them up to allegations of defrauding contributors if they were raising funds for a purpose other than an election in that particular election cycle.<sup>242</sup>

Although a challenger's motivation to run may not be as ironclad of a barrier as a constitutional or statutory qualification, it should not be disregarded as a relevant factor in deciding whether a campaign finance scheme is constitutional. Ultimately, if candidates are motivated to run for office but cannot possibly "amass[] the resources necessary for effective advocacy" in that same election cycle, then the scheme is constitutionally suspect regardless of whether the challenger could transfer funds and win in the following election cycle.<sup>243</sup>

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235 . See *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 737 (2011); see also *Davis v. FEC*, 554 U.S. 724, 739 (2008) ("The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice.").

236 . *Platt*, 894 F.3d at 265.

237 . See *Bennett*, 564 U.S. at 728–29 (describing the public financing system).

238 . Joseph Platt was a former incumbent who was obviously eligible for re-election and clearly unmotivated to run again. *Platt*, 894 F.3d at 243 (noting that Platt had not run in the past three election cycles); *Platt v. Bd. of Comm'rs on Grievances & Discipline*, 769 F.3d 447, 451, 455 (6th Cir. 2014) (denying preliminary injunction in part because Platt failed to file a declaration of intent to run). The fact that Platt was an unsympathetic challenger and the case seemed academic may have factored into the Sixth Circuit's "eager[ness] to resolve th[e] case" and presumption that any challenger could simply have run in previous election cycles. *Platt*, 894 F.3d at 243, 264–65, 264 n.14.

239 . See, generally U.S. CONST. art. I, § 2, cl. 2, § 3, cl. 3 (prescribing these qualifications for congressional offices).

240 . See, e.g., KAN. STAT. ANN. § 25-101a(d) (candidate for attorney general must be licensed to practice law).

241 . See, e.g., *id.* § 20-334(a)(3) (candidate for district judge must "have engaged in the active practice of law" for at least five years).

242 . Unlike an eligible challenger, an ineligible challenger cannot claim in good faith to have been exploring a potential run for office when such a campaign would result in the illegal election of an unqualified candidate.

243 . See *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam). (per curiam).

Setting aside these fairness concerns, as the Supreme Court often does, transfer concessions must still satisfy the Court's most critical requirement: formalistic equality.<sup>244</sup> Even though transfer concessions rarely refer to incumbents as such, the clear preference for prior candidates probably satisfies the Court's low bar for finding speaker discrimination.<sup>245</sup> In situations like *Platt*, where the transfer concession rests on some degree of legislative silence, the presence of the necessary state action is less clear.<sup>246</sup> However, in a First Amendment case involving speaker discrimination, the government must show that its approach is constitutional, even if that approach relies on legislative silence.<sup>247</sup>

Ultimately, courts are responsible for ensuring the state's campaign finance regulations function in a neutral fashion,<sup>248</sup> and disgorgement of unspent funds is one possible remedy.<sup>249</sup> Although the Court has frowned upon majoritarian efforts to use campaign finance regulations to ensure elections are fair,<sup>250</sup> the Court must still employ its own counter-majoritarian concept of fairness and equal treatment—that is, formalistic equality.<sup>251</sup> Other than a transfer ban, the only remedy that clearly satisfies this requirement is an abolition of contribution caps altogether, a direction the court may ultimately pursue.<sup>252</sup>

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244 . The rule in *Platt* was silent on the issue of transfers, which were presumed to persist as part of a judicial candidate's campaign committee. *See Platt v. Bd. of Comm'rs on Grievances & Discipline*, 894 F.3d 235, 265 (6th Cir. 2018) (citing OHIO CODE OF JUD. CONDUCT r. 4.4 (OHIO SUP. CT. 2020)).

245 . *See* cases cited *supra* note 115. *Platt*'s holding that the relevant rule constituted a "parallel restriction[]" for sitting judges and nonjudges," clearly disregarded the fact that most nonjudges do not have campaign committees. *Platt*, 894 F.3d at 265 (quoting *Wolfson v. Concannon*, 811 F.3d 1176, 1191 (9th Cir. 2016) (Berzon, J., concurring)).

246 . Even in *Platt*, the definition of "contribution" was incorporated by reference from a statute. OHIO CODE OF JUD. CONDUCT r. 4.6(B) (OHIO SUP. CT. 2020) (citing OHIO REV. CODE ANN. § 3517.01(C)(5) (West 2020)).

247 . *See Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014). In *Platt*, the Sixth Circuit failed to explain why it placed the burden on the non-governmental party. *Compare Riddle*, 742 F.3d 922, 928 (10th Cir. 2014) (placing the burden on the government), *with Platt*, 894 F.3d at 265–66 (placing the burden on the nongovernmental party).

248 . *See, e.g., Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2355, 2355 (2020) (plurality opinion) (striking down provision of a statute to "cure[] the unequal treatment").

249 . *See Platt*, 894 F.3d at 266–67.

250 . "No matter how desirable it may seem, it is not an acceptable governmental objective to level the playing field, or to level electoral opportunities, or to equalize the financial resources of candidates. The First Amendment prohibits such legislative attempts to fine-tune the electoral process, no matter how well intentioned." *Id.* at 266 (emphasis added) (quoting *McCutcheon*, 572 U.S. 185, 207 (2014) (plurality opinion)).

251 . *See Barr*, 140 S. Ct. at 2355.

252 . *See McCutcheon*, 572 U.S. at 232 (Thomas, J., concurring in the judgment). Other efforts risk "a game of constitutional whack-a-mole." *Platt*, 894 F.3d at 267.

### *B. Resolving the Deadlock*

When a state democratically enacts a transfer cap or ban and an incumbent attacks its constitutionality, the reviewing court should uphold the law as a valid restriction on contributions or disbursements. In addition to satisfying exacting scrutiny, a transfer cap or ban is formalistically equal because its impact on all candidates, including incumbents and challengers, is the same: they begin the election cycle with no funds. Even if “strict” transfer caps or bans violate the First Amendment, courts should still uphold weaker versions that require attribution of transferred funds to particular contributors from the previous election cycle or require candidates to obtain express permission from contributors before using their contributions in a future election cycle.<sup>253</sup>

However, legislative remedies cannot solve the war chest problem, given that incumbents control the legislative process and are unlikely to enact transfer caps or bans that would disadvantage them in future elections. In jurisdictions without an initiative process, citizens cannot directly enact a transfer ban or threaten to enact one as a means of spurring legislators to act. The only universal option to achieve a legislative remedy is for challengers to campaign on the issue and get elected, the very process that the war chest problem frustrates.

When a challenger attacks the constitutionality of a transfer concession, the reviewing court should invalidate the policy as unconstitutional speaker discrimination that amplifies incumbents’ voices at the expense of challengers’ voices. In addition to being formalistically equal with respect to incumbency, the resulting transfer ban would advance basic considerations of fairness, particularly for challengers who were ineligible or uninterested in running before the current election cycle. If the consequences of a transfer ban are too unpalatable, the Supreme Court should acknowledge that the existing system is broken and overrule *Buckley*.

Even if the Court adopts my preferred approach of banning transfers, three practical considerations remain.

First, candidates should be able to spend any contributions received during an election cycle on any later election in that same cycle unless the contributor expressly directs otherwise. It is highly unlikely that a contributor supports a candidate in the primary election but not the general

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253 . See sources cited *supra* notes 39, 41.

election, and there will be no speaker discrimination as long as non-major-party challengers have an equivalent opportunity to raise funds.<sup>254</sup>

Second, courts should not compel the destruction of tangible property. Legitimate expenditures and in-kind contributions often result in campaign inventory that is unused or reusable, like surplus business cards or sturdy yard signs. Unless the transaction was clearly made to circumvent a transfer ban, campaigns should be allowed to use the inventory in future elections. Examples of prohibited inventory include tangible assets like gold that are essentially liquid and any inventory that advocates the election or defeat of a candidate in a *future* election cycle, as opposed to the current election cycle or a nonspecific election cycle. Even then, the appropriate remedy would be to impose a fine, disgorgement, or some other penalty rather than requiring destruction of inventory.

Third and finally, no ruling that establishes a transfer ban should take effect immediately, given the potential impact that disgorgement would have on pending elections. On the other hand, incumbents with unspent campaign funds at the time of the ruling should have to disgorge those funds before the beginning of their next election cycle or else the ruling will provide insufficient relief to too many challengers.<sup>255</sup>

#### CONCLUSION

The advantage that incumbents' war chests provide them over challengers and the deterrent effect on potential challengers seems inherently unfair, which is why so many citizens and groups have tried to restrict transfers using initiative petitions. Although the Court has held that democratic attempts to make elections fair can violate the First Amendment, transfer caps and bans fit within the Court's existing exception for political contributions. But even if that exception does not apply, the policies that make transfers possible violate the Court's own concept of fairness and equal treatment under the First Amendment, which the Court must judicially enforce, even in the face of democratic opposition, by banning transfers altogether.

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254 . See, e.g., *Riddle*, 742 F.3d at 929 (invalidating contribution cap that was twice as high for major-party candidates as for write-in candidates).

255 . See generally *SEIU v. Fair Pol. Pracs. Comm'n*, 721 F. Supp. 1172 (E.D. Cal. 1989) (grandfathering unspent campaign funds that were acquired before an initiative statute took effect), *aff'd*, *SEIU*, 955 F.2d 1312 (9th Cir. 1992).