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Lobbyists Are People Too, And They Should be Free to Contribute to Their Local Legislative Races

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Comments

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I. INTRODUCTION

The question is straightforward: does California's ban on campaign contributions from lobbyists violate the First Amendment?[1] The answer is not straightforward. The purpose of this Comment is to assess the validity of California's ban on the changes made to campaign finance law by the Supreme Court under Chief Justice John Roberts.[2] The Chief Justice has authored several decisions that diverted the course of campaign finance law through constitutional interpretations that will likely overwhelm California's justifications for the ban.[3]

In 2000, California enacted Government Code § 85702, barring lobbyists from contributing to an elected state officer or candidate for state office if the lobbyist is registered to lobby the officer's government agency.[4] In 2001, the only time § 85702 was litigated, the District Court for the Eastern District of California found the ban to be constitutional on First Amendment grounds.[5] The plaintiffs did not appeal the decision, and the court's ruling remains the only case law on the ban.[6]

Questioning the vitality of the ban is important because unrestricted political speech is an indispensable element of democratic self-governance.[7] At the end of California's 2015 legislative session, the state had nearly 1,800 registered lobbyists.[8] If the ban was challenged today, the outcome may be markedly different.[9] Since Chief Justice John Roberts joined the Supreme Court in 2005, campaign finance limitations have been dramatically struck down as unconstitutional.[10] California's voters enacted the ban near the end of the Rehnquist Court, when decisions like *Austin v. Michigan Chamber of Commerce*

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1. CAL. GOV'T CODE § 85702 (West 2015).

2. *Infra* Part I.

3. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 310 (2010); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1434 (2014).

4. CAL. GOV'T CODE § 85702 (West 2015).

5. Inst. of Governmental Advocates v. Fair Political Practices Comm'n, 164 F. Supp. 2d 1183, 1194 (E.D. CA 2001).

6. *Id.*

7. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

8. Jim Miller, *Number of California Lobbyists Grows Over Past Decade*, SACRAMENTO BEE (Sept. 11, 2015, 5:02 PM), *available at* http://www.sacbee.com/news/politics-government/capitol-alert/article34953855.html (on file with *The University of the Pacific Law Review*).

9. *Infra* Part V.

10. *See* Ann Southworth, *The Support Structure for Campaign Finance Litigation in the Roberts Court: A Research Agenda*, 86 U. COLO. L. REV. 1221, 1223 (2015) (describing the precedent-upsetting impact of *Citizens United* and the less-appreciated holding of *McCutcheon*).

and *McConnell v. Federal Elections Committee* stymied a broad threat of corporate influence in elections and upheld restrictions on the political speech of corporations.[11] However, the Roberts Court overturned parts of *Austin* and *McConnell* in *Citizens United v. Federal Elections Committee* and *McCutcheon v. Federal Elections Committee*, downplaying the threat of potential corruption caused by corporate monies in elections.[12] If challenged today, California's ban on lobbyist campaign contributions would likely be held unconstitutional as an overbroad restriction that neither respects lobbyists' personal political interests, nor responds to threats of actual or perceived corruption.[13]

Part II of this Comment presents background information on campaign contribution bans.[14] Part II opens with a review of different forms of absolute bans and why the bans were upheld or struck down.[15] Decisions addressing bans on contributions from federal contractors, minors, and foreign nationals are used as illustrations.[16] Part II discusses the background on lobbyist contribution bans.[17] A descriptive legislative history of California's ban is provided, as well as brief surveys about similar bans in other states.[18] The other states' bans and related case law are provided as a comparative study for best (and worst) practices.[19] Finally, Part II concludes with a review of Alaska's ban on campaign contributions by lobbyists except for contributions to candidates that the lobbyist may vote for.[20] Alaska's model is proposed as a possible alternative to California's current ban.[21]

Part III of the Comment surveys the shifting judicial precedent of campaign finance challenges.[22] Prior to Chief Justice Roberts, the Court tended to vote 5-4 in favor of contribution limitations; however, the Court shifted under Roberts, tending to vote 5-4 against limitations.[23] The first section of Part III reviews

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11. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (finding the state's authority to regulate a corporation's independent expenditures was justified because the corporate structure allowing wealth accumulation was conferred by the state), *and* McConnell v. Fed. Elections Comm'n, 540 U.S. 93, 137-42, 153–54 (2003) (applying the "closely drawn" standard of review, the Court found Congress' conclusion that corruption is broader than *quid pro quo* transactions).

12. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 310 (2010); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1434 (2014).

13. *Infra* Part V.

14. *Infra* Part II.

15. *Infra* Part II.

16. *Infra* Part II.

17. *Infra* Part II.

18. *Infra* Part II.

19. *Infra* Part II.

20. *Infra* Part II.

21. *Infra* Part II.

22. *Infra* Part III.

23. Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, UC Irvine School of Law Research Paper No. 2015-70 at 5, http://ssrn.com/abstract=2639902 (on file with *The University of the Pacific Law Review*).

relevant pre-Roberts Supreme Court authority.[24] This section includes an analysis of the standards of review applied by the Court in *Buckley v. Valeo* and what factors influence the Court's level of scrutiny.[25] The second section of Part III assesses the current trend against campaign finance limitations promulgated by the Roberts' court.[26] The third section of Part III explores the Roberts Court's use of the avoidance doctrine and how the Court seems to offer "one last chance" before issuing a significant change of law.[27] The fourth and final section of Part III reviews relevant campaign finance decisions from the 9th Circuit and focuses on the Circuit's adoption and interpretation of *Citizens United*.[28]

Part IV analyzes limits on nonresident campaign contributions.[29] This Part is relatively short due to the dearth of scholarship on the issue.[30] Case law suggests that limiting nonresident campaign contributions is only appropriate when non-geographic factors increase the likelihood that the contribution may be corruptive.[31]

Part V proposes to revise California's ban on lobbyist contributions.[32] This Part opens by exposing constitutional and practical infirmities with the ban's current implementation.[33] The ban will be highlighted as an ineffective prophylactic because of an ironic development—lobbyists *prefer* the ban because elected officials do not hassle them for contributions.[34] This Part proposes to reform the ban to be more similar to Alaska's limitation.[35] Prohibiting lobbyists from contributing to any candidate except those the lobbyist may vote for is a respectful balance between preventing corruption and protecting First Amendment rights.[36]

II. BACKGROUND ON CAMPAIGN CONTRIBUTION LIMITS & BANS

Political operatives are using the perceived negative effects of *Citizens United* on California's campaign finance regulations to drive electoral turnout.[37]

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24. *Infra* Part III.

25. *Infra* Part III.

26. *Infra* Part III.

27. *Infra* Part III.

28. *Infra* Part III.

29. *Infra* Part IV.

30. *Infra* Part IV.

31. Vannatta v. Keisling, 151 F.3d 1215, 1221 (9th Cir. 1998); Landell v. Sorrell, 382 F.3d 91, 157–58 (2d Cir. 2002).

32. *Infra* Part V.

33. *Infra* Part V.

34. State v. Alaska Civil Liberties Union, 978 P.2d 597, 618 (Alaska 1999).

35. *Infra* Part V.

36. *Infra* Part V.

37. *See, e.g.,* Maura Dolan, *'Citizens United' advisory measure can go on ballot, California high court says*, LOS ANGELES TIMES (Jan. 4, 2016), *available at* http://www.latimes.com/local/lanow/la-me-ln-california-supreme-court-ballot-20160104-story.html (on file with *The University of the Pacific Law Review*) (reporting

Even Justice Anthony Kennedy, the author of *Citizens United*, lamented that the campaign finance reform anticipated by the Court is "not working the way it should."[38] The corruptive influence of money in politics prompted limitations to campaign contributions.[39] And these limits are constitutionally-justified as a legitimate means to combat actual and perceived *quid pro quo* corruption.[40] This Part is divided into four sections: the first covers absolute bans; the second, temporal bans; the third surveys state-level bans on lobbyist contributions; and the fourth is an in-depth analysis of Alaska's lobbyist contribution ban. [41] Alaska's ban serves as the model for the revisions to California's ban.[42]

A. Absolute Bans on Campaign Contributions

The Supreme Court's vigorous protection of free speech principles extends to campaign contributions.[43] The Court is more likely to strike down absolute bans on contributions than it is to strike down a mitigated contribution limitation.[44] In *McConnell*, the Court found a ban on contributions from minors to be unconstitutional.[45] The Court did not accept the government's assertions that minors should not be allowed to contribute simply because minors could serve as a conduit for parents to circumvent contributions limits.[46] Absolute bans are generally upheld when matters of sovereign importance are at stake.[47]

B. Temporal Bans on Campaign Contributions

To reduce the occurrence or appearance of corruption, a dozen states have banned legislators and candidates from receiving campaign contributions while the state legislature is in session.[48] These bans typically prohibit legislators from

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that a *Citizens United*-specific ballot measure would fan Democratic voter turnout because of the opinion's polarizing effect).

38. Supreme Court Associate Justice Anthony Kennedy visits HLS, YOUTUBE (Oct. 26, 2015), https://www.youtube.com/watch?v=ZHbMPnA5n0Q (on file with *The University of the Pacific Law Review*).

39. Buckley v. Valeo, 424 U.S. 1, 27 (1976).

40. *Id.*

41. *Infra* Part II.A–C.

42. *Infra* Part II.D.

43. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014).

44. McConnell v. Fed. Elections Comm'n, 540 U.S. 93, 126–27 (2003).

45. *Id.* at 231–33.

46. *Id.*

47. *See, e.g.*, Wagner v. Fed. Election Comm'n, 793 F.3d 1, 22 (D.C. Cir. 2015) (upholding ban on contributions from federal contractors on the basis that the government's administration needs to be seen as impartial); Bluman v. Fed. Election Comm'n, 800 F. Supp.2d 281, 292 (D.D.C. 2011) (upholding a ban on contributions from foreign nationals).

48. ALA. CODE § 17-5-7(b)(2) (2015); GA. CODE ANN. § 21-5-35 (2015); 5 ILL. COMP. STAT. ANN. 430/5-40 (2015); IND. CODE ANN. § 3-9-2-12 (2015); LA. STAT. ANN. § 18:1505.2(Q) (2015); MD. CODE ANN., ELEC. LAW § 13-235 (2015); NEV. REV. STAT. ANN. § 294A.300 (2015); N.M. STAT. ANN. § 1-19-34.1 (2015); TEX.

accepting contributions during the legislative session, as well as thirty to sixty days before and after the legislative session.[49]

These temporal bans are easily subverted in practice and difficult to defend in litigation.[50] State-level bans are preempted by the Federal Election Campaign Act (FECA) and do not apply to federal elections held in the state.[51] FECA's preemptive force causes a conundrum—during a legislative session, a state legislator cannot accept contributions for reelection, but the legislator can accept contributions for Congressional election.[52] When litigated, the temporal bans are typically found to be unconstitutional on First Amendment grounds.[53] The restriction on free speech caused by temporal bans has been deemed unconstitutional when the ban is applied to both incumbents and candidates[54] and also when applied only to incumbents.[55] Temporal bans are upheld when the ban is limited to a qualified group of contributors.[56] Thus, the narrowness of a ban directly correlates with the likelihood that the ban will be upheld.[57]

C. Bans on Lobbyist Contributions

Over a dozen states implemented limits on campaign contributions from lobbyists to public officials.[58] These limits are designed to stave corruption, and

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ELEC. CODE ANN. § 253.034 (2015); UTAH CODE ANN. § 36-11-305 (2015); VA. CODE ANN. § 24.2-954 (2015); WASH. REV. CODE § 42.17A.560 (2015).

49. *See, e.g.,* NEV. REV. STAT. ANN. § 294A.300 (2015) (barring contributions and solicitations from 30 days before to 30 days after a regular session).

50. *See* Emison v. Catalano, 951 F. Supp. 714, 722 (E.D. Tenn. 1996) (finding a temporal ban equally affecting legislators and non-incumbent challengers to be unconstitutional as a method that was not the least restrictive means of preventing corruption or its appearance), *and* Arkansas Right to Life State PAC v. Butler, 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998) (finding a temporal ban to be unconstitutional because it barred small and large contributions alike despite "only large contributions pos[ing] a threat of corruption.").

51. 52 U2.S.C. § 30143 (2015).

52. *See, e.g.,* Teper v. Miller, 82 F.3d 989, 999 (11th Cir. 1996) (holding that FECA preempts state law on the matter of campaign contributions to federal campaigns), *and* Op. Fed. Election Comm'n 1992-43 (Jan. 28, 1993) (explaining the FEC's opinion that FEC regulation on FECA preempts state law on the matter of contributions to federal campaigns).

53. Trout v. State, 231 S.W.3d 140, 140 (Mo. 2007).

54. Emison v. Catalano, 951 F. Supp. 714, 722–23 (E.D. Tenn. 1996).

55. Arkansas Right to Life State PAC v. Butler, 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998).

56. North Carolina Right to Life v. Bartlett, 168 F.3d 705, 716 (4th. Cir 1999).

57. *Id.*

58. ARIZ. REV. STAT. ANN. § 41-1234.01 (2015); CAL. GOV'T CODE § 85702 (West 2015); COLO. REV. STAT. ANN. § 1-45-105.5 (2015); CONN. GEN. STAT. ANN. § 9-610 (2015); IOWA CODE ANN. § 68A.504 (2015); KAN. STAT. ANN. § 25-4153a (2015); KY. REV. STAT. ANN. § 6.767 (2015); ME. REV. STAT. ANN. tit.1 § 1015(3) (2015); MINN. STAT. ANN. § 10A.273 (2015); N.C. GEN. STAT. ANN. § 163-278.13B (2015); OKLA. STAT. ANN. tit. 21 §187.1; S.C. CODE ANN. § 2-17-80 (2015); VT. STAT. ANN. tit. 2 § 266(3) (2015); WIS. STAT. ANN. § 13.625 (2015).

they benefit lobbyists and legislators alike.[59] In states that allow lobbyists to contribute to legislators, lobbyists believe that failing to make contributions adversely affects their performance.[60] Their performance is affected by their potential loss of access to the legislator.[61] Legislators benefit from the ban if the public's perception of a corrupt atmosphere in the legislature is diminished.[62]

Most states that ban lobbyist contributions to legislators and other public officials temporally limit the ban to apply only during the legislative session.[63] Temporal lobbyist contribution bans from Vermont[64] and North Carolina were both upheld.[65] These bans were upheld specifically because the temporal limits did not absolutely prohibit lobbyists from contributing to legislators and public officials.[66] The bans were found to be constitutional because their impact was narrowed to "avoid a serious appearance of impropriety"[67] and covered only "that period during which the risk of an actual *quid pro quo* or the appearance of one runs highest."[68]

Other states, however, do not temporally limit the lobbyist contribution ban.[69] Like California, lobbyists in Kentucky and South Carolina are completely barred from making contributions to legislators.[70] However, unlike California's ban, the bans in Kentucky and South Carolina have not been litigated. The 2nd Circuit held Connecticut's statute banning lobbyist contributions unconstitutional in 2010.[71] The 2nd Circuit found that fear of the prospect of *quid pro quo* corruption was not a sufficient state interest to abridge First Amendment rights.[72]

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59. *See, e.g.,* State v. Alaska Civil Liberties Union, 978 P.2d 597, 618 (Alaska 1999) (explaining why lobbyists are pressured to contribute), *and* Green Party v. Garfield, 648 F. Supp. 2d. 298, 308 (D. Conn. 2009) (explaining why the legislature's optics are improved by a ban on lobbyist contributions).

60. *Alaska Civil Liberties Union*, 978 P.2d at 618.

61. *Id.*

62. *Green Party v. Garfield,* 648 F.Supp.2d at 308.

63. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1234.01 (2015) (barring the acceptance of contributions during the regular legislative session except for those received during the first three days of the session postmarked before the first day of the session), *and* ME. REV. STAT. ANN. tit.1 § 1015(3) (2015) (barring contributions "during any period of time in which the Legislature is convened before final adjournment," except for contributions relating to special elections).

64. Kimbell v. Hooper, 164 Vt. 80, 80 (1995).

65. North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 716 (4th Cir. 1999).

66. *Kimbell v. Hooper*, 164 Vt. at 91 (1995); North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 716 (1999).

67. *Kimbell v. Hooper*, 164 Vt. at 91.

68. *North Carolina Right to Life, Inc.,* 168 F.3d at 716.

69. *See, e.g.,* KY. REV. STAT. ANN. § 6.767 (2015) (barring the acceptance of contributions from lobbyists, but allowing the legislator a complete defense if the legislator returns the donation within 30 days of acceptance and then duly informs the Kentucky Legislative Research Commission), and S.C. CODE ANN. § 2-17-80 (2015) (barring lobbyists from giving campaign contributions to legislators, except for "emergency assistance given gratuitously and in good faith" and "anything of value given to a family member for love and affection.").

70. KY. REV. STAT. ANN. § 6.767 (2015); S.C. CODE ANN. § 2-17-80 (2015).

71. Green Party of Conn. v. Garfield, 616 F.3d 189, 206 (2d Cir. 2010).

72. *Id.* at 207 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)).

D. Alaska Model

Alaska bans lobbyists from making campaign contributions except to those candidates the lobbyist could vote for in the relevant state election.[73] For example, a lobbyist living in downtown Juneau, who is represented by Alaska House of Representatives District 33 and Senate District Q,[74] could contribute only to candidates of those two districts.[75] Theoretically, if the lobbyist planned to move and reside in a new district before an election, the lobbyist could contribute to the candidates in both the current and anticipated districts.[76]

Alaska's ban became effective in 1997, and the Alaska Civil Liberties Union (AKCLU) promptly challenged it as an unconstitutional infringement of associational freedoms under the First Amendment.[77] The AKCLU argued that a lobbyist could not corrupt a legislator with a contribution because individual contributions were limited at no more than $500 for legislative campaigns.[78] The AKCLU did not challenge the ban on equal protection grounds.[79]

In upholding the ban, the Supreme Court of Alaska found it to be "a logical compromise between lobbyists' private rights and their professional obligations."[80] The Court emphasized how the "special role" of lobbyists in the legislative process gives rise to perceived corruption when lobbyists contribute to a large number of legislators.[81] Lobbyists, the Court reasoned, must contribute broadly to protect their professional interests.[82]

But, the Court also reasoned that lobbyists are people too, with private rights and political interests deserving of protection.[83] Alaska's Supreme Court upheld the ban because it found the allowance for in-district contributions to be a tailored recognition that the perception of corruption ends when professional interests fail to outweigh personal interests.[84] The Supreme Court of the United States denied the petition for a *writ of certiorari* for this case.[85]

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73. Alaska Stat. Ann. § 15.13.074(g) (West 2015).

74. Alaska Division of Elections, Proclamation of Redistricting (July 14, 2013).

75. Alaska Stat. Ann. § 15.13.074(g) (West 2015).

76. *Id.* ("[T]he individual may make a contribution under this section to a candidate for the legislature in a district in which the individual is eligible to vote or will be eligible to vote on the date of the election.").

77. State v. Alaska Civil Liberties Union, 978 P.2d 597, 618 (Alaska 1999).

78. *Id.*

79. *Id.*

80. *Id.* at 619.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 619–620.

85. Alaska Civil Liberties Union v. Alaska, 528 U.S. 1153, 1157 (2000).

III. STANDARD OF REVIEW AND SUPREME COURT PRECEDENT

Litigation involving campaign contribution bans and First Amendment questions are generally reviewed under the "closely drawn" standard promulgated in *Buckley v. Valeo*.[86] Contribution bans and limitations are evaluated under different levels of scrutiny within the "closely drawn" standard.[87] In one case involving California's ban on lobbyist contributions, the Court found the ban narrowly tailored because the prohibition only applied if the lobbyist was registered to lobby the office of the candidate or incumbent.[88]

The Court's analyses of First Amendment challenges to campaign finance restrictions are rooted in *Buckley*. *Buckley*'s import cannot be dismissed despite vocal opposition that *Buckley* "denigrates core First Amendment speech and should be overruled."[89] *Buckley* established different levels of review for independent expenditures and contributions, a distinction akin to "two sides of the same First Amendment coin."[90] The Roberts Court slowly narrowed the distinction by preserving the protections afforded to expenditures and reviewing contribution limitations with a greater level of scrutiny.[91]

A. Pre-Roberts Precedent

Buckley's effect on the lobbyist contribution ban is found in a gradient of distinctions.[92] Campaign expenditures are the most protected form of campaign speech because they represent "the quantity of expression."[93] Campaign contributions are less protected because the speech is a symbolic gesture of support.[94] The Roberts Court is aware that the symbolic nature of contributions dampers the constitutional concerns raised by contribution Limitations.[95] Contribution limits that jeopardize a person's associational freedoms are more likely to withstand First Amendment scrutiny than content-based restrictions.[96]

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86. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

87. Federal Election Comm'n v. Beaumont, 539 US 146, 162 (2003).

88. Inst. of Governmental Advocates v. Fair Political Practices Comm'n, 164 F. Supp. 2d 1183, 1190–91 (E.D. CA 2001).

89. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1462 (2014) (Thomas, J., concurring).

90. Buckley v. Valeo, 424 U.S. 1, 241 (1976) (Burger, C.J., concurring in part and dissenting in part).

91. Richard L. Hasen, *Die Another Day - The Supreme Court takes a big step closer to gutting the last bits of campaign finance reform*, SLATE (Apr. 2, 2014), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html (on file with *The University of the Pacific Law Review*).

92. *Infra* Part III.A.

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

94. *Id.* at 21.

95. Federal Election Comm'n v. Beaumont, 539 US 146, 162-63 (2003).

96. *Id.*

Because contribution limits affect associational freedoms, a more lenient "closely drawn" standard of review is employed to assess contribution limits.[97] The Roberts Court invited interpretations that general characteristics of the affected contributors may inform the "closely drawn" standard.[98] As an initial inquiry, the contributor's person must be examined for suspect characteristics that justify a ban.[99] That is, is the ban in place because of a threatening characteristic of the lobbyist as a person, or because the lobbyist is compensated for direct advocacy?[100] Once the relational aspect of the ban and the lobbyist is confirmed, then the ban must be assessed under the appropriate level of judicial scrutiny.[101]

The contributor's personhood is a crucial threshold inquiry when determining the constitutionality of campaign contribution bans.[102] If the person has a compromising characteristic that allows the government more leeway to restrict the person's rights, then it is more likely that a ban will be upheld.[103] For example, in *Bluman v. Federal Elections Commission*, the Supreme Court affirmed the district court's decision, which found bans on contributions from foreign nationals to be constitutional.[104] The district court in *Bluman* emphasized that foreign citizens may be denied privileges granted to U.S. citizens, especially those privileges "intimately related to the processes of democratic self-government."[105] And in *Wagner v. Federal Elections Commission*, the D.C. Court of Appeals found a ban on contributions from U.S. citizens hired as federal contractors to be constitutional.[106] The Court in *Wagner* relied on precedent, which permitted greater restriction of speech for government employees than the public at large.[107]

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97. McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2015).

98. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1456–57 (2014) (vacillating on whether fit should be reasonable or perfect and admitting that the appropriate scope depends on the interest served).

99. *See, e.g,* Bluman v. Fed. Elections Comm'n, 800 F.Supp.2d 281, 283–285 (D.D.C. 2011) (upholding a ban on federal contributions from foreign nationals), *and* Wagner v. Fed. Elections Comm'n, 793 F.3d 1, 10–12 (D.C. Cir. 2015) (upholding a ban on federal contributions from federal contractors).

100. *See McCutcheon*, 134 S. Ct. at 1456–57 (noting how the ends may justify the means if the end is appropriate).

101. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345–346 (1995) (detailing how the issue being litigated must be assessed to determine the appropriate level of scrutiny).

102. *See Bluman*, 800 F.Supp.2d at 283–85 (explaining why contributions from foreign nationals to election campaigns are barred by federal statute while those same persons may contribute to issue advocacy causes).

103. *See Wagner*, 793 F.3d at 10–12 (explaining the history of federal employment-based campaign contribution limits and bans).

104. Bluman v. Fed. Elections Comm'n, 132 S.Ct. 1087, 1087 (2015).

105. Bluman v. Fed. Elections Comm'n, 800 F.Supp.2d 281, 287–88 (D.D.C. 2011).

106. Wagner v. Fed. Elections Comm'n, 793 F.3d 1, 20 (D.C. Cir. 2015).

107. *Id.*

B. Roberts Court's Granular Scrutiny for Contributions

In 2003's *FEC v. Beaumont*, the last major campaign finance case before Roberts joined the Court, the Court articulated that both contribution bans and limitations were scrutinized at the same "closely drawn" standard of review.[108] The Court held that bans and limitations are not treated differently because they both address the same political activity—campaign contributions.[109] Justice Thomas, writing in dissent and joined by Justice Scalia, flatly argued that any campaign finance law should be subject to strict scrutiny and any "broad prophylactic caps" on contributions are unconstitutional.[110]

In 2005, during Roberts' confirmation hearings, Senator Sam Brownback pointedly asked Roberts whether it was odd that some campaign contribution restrictions were upheld as unconstitutional and others were not.[111] Roberts demurred, " . . . political speech is generally regarded as at the core of what the First Amendment was designed to protect, and some of the other speeches is not. . . . [W]hether the particular cases were correctly decided or not is not something I feel is appropriate for me to discuss."[112] Now that Roberts is on the Court, he has made it clear that he believes some cases were wrongly decided.[113]

In 2010, in *Citizens United*, the Court refused to conflate expenditures and contributions.[114] The Court also refused to "reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."[115] However, the rationales in *Citizens United* undercut *Beaumont*'s strong holding.[116] For example, *Citizens United* incorporated part of Justice Scalia's dissent from *Austin,*[117] holding that the state's act of conferring advantages to persons or corporations does not then allow the state to prohibit speech of that person or corporation.[118]

Additionally, *Citizens United* clarified and narrowed the sufficient government interest in *quid pro quo* arrangements.[119] The government's interest lies in preventing corruption or the appearance of corruption, not in preventing the appearance of influence or access to elected officials.[120] Although *Citizens United* seemingly undercut the strong holding in *Beaumont*, the Court has denied

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108. Federal Election Comm'n v. Beaumont, 539 US 146, 162–63 (2003).
109. *Id.* at 161.
110. *Id.* at 165.
111. S. HRG. 109–158, 395 (2005).
112. *Id.*
113. Hasen, *supra* note 23, at 6.
114. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357 (2010).
115. *Id.* at 359.
116. Minnesota Citizens Concerned for Life v. Swanson, 692 F. 3d 864, n.12 (8th Cir. 2012).
117. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 680 (1990).
118. *Citizens United*, 558 U.S. at 351.
119. US v. Danielczyk, 683 F. 3d 611, 618 (4th Cir. 2012).
120. *Citizens United*, 558 U.S. at 360.

certiorari for two cases attempting to overturn *Beaumont* by way of *Citizens United*.[121]

In 2014, the Supreme Court's *McCutcheon* decision came close to eviscerating *Beaumont* by requiring a more rigorous standard of review, but Justice Thomas concurred only in judgment and did not join Roberts' opinion, leading to a 4-1-4 decision.[122] *McCutcheon* sidestepped resolving the different standards of review for expenditures and contributions; instead, it focused on the law's fit relative to the government's stated objective.[123] The Court reframed the appropriate fit and effectively gave rise to a more demanding level of review: "if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights it cannot survive 'rigorous' review."[124] *McCutcheon*'s emphasis on fit strikes directly at *Beaumont*'s holding that a contributor "cannot prevail, then, simply by arguing that a ban . . . is bad tailoring."[125] The Court later admitted to deliberately avoiding the question of the proper standard of review in *McCutcheon*.[126] The Court chose to "assume, without deciding, that a law is subject to a less stringent level of scrutiny. . . ."[127] The Roberts Court's decision to purposely avoid deciding the proper standard of review in *McCutcheon* is perplexing but not surprising.[128] As explained in the next section, the Roberts Court seems to prefer legislative fixes over judicial activism.[129]

C. Would the Roberts Court Avoid a Decision on the Constitutionality of California's Ban on Lobbyist Contributions?

The "avoidance canon" is a traditional interpretative canon that "encourages a court to adopt one of several plausible interpretations of a statute in order to avoid deciding a tough constitutional question."[130] The Supreme Court used the canon as a diplomatic tool to allow Congress to fix a problematic statute through the legislative process rather than finding the statute to be technically

121. Iowa Right to Life v. Tooker, 717 F.3d 576 (8th Cir. 2013), cert. denied, 134 S.Ct. 1787, (2014); U.S. v. Danielczyk, 683 F.3d 611 (4th Cir. 2011), cert. denied, 133 S.Ct. 1459 (2013).

122. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1464 (2014).

123. *Id.* at 1445–46.

124. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

125. Federal Election Comm'n v. Beaumont, 539 U.S. 146, 161 (2003).

126. McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2015).

127. *Id.*

128. *Infra* Part II.C.

129. *Infra* Part II.C.

130. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance By the Roberts Court*, 1 SUP. CT. REV. 181, 181–82 (2009).

unconstitutional.[131] The Court's willingness to engage—rather than provoke—Congress is consistent with the Court's stated disfavor of facial challenges.[132]

An emerging pattern of the Roberts Court shows the Chief's willingness to tackle facial challenges *after* the Court signals a "one last chance" to fix the constitutional infirmity.[133] Relevant here, for example, is the downfall of § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended FECA § 316(b)(2) to ban corporate entities from using general treasury funds for independent expenditures and electioneering communications.[134] In the 2003 *McConnell* decision, the pre-Roberts Court upheld the facial constitutionality of FECA § 316(b)(2) as amended by BCRA § 203.[135] The Court deferred to Congress's discretion, relying on the legislative history of § 203 to find that Congress knew "corporations and unions used soft money to finance a virtual torrent of [ads] . . . and that remedial legislation was needed to stanch that flow of money."[136] However, the *McConnell* decision did not foreclose as-applied challenges to the constitutionality of BCRA § 203.[137]

In 2006, BCRA § 203 came under attack again, but this time before the Roberts Court in *FEC v. Wis. Right to Life, Inc.* (*WRTL II*).[138] *WRTL II* involved another challenge to the constitutionality of BCRA § 203 and the holding in *McConnell*. [139] Rather than upsetting BCRA and the precedent in *McConnell*, the Court avoided a facial constitutional challenge by finding that BCRA § 203 was unconstitutional as applied.[140] The 5-4 opinion examples the "one last chance" doctrine of the Roberts Court, hinting that *McConnell* may be overturned if BCRA § 203 is subject to another facial challenge.[141]

The 2010 *Citizens United* decision addressed the facial challenge to BCRA § 203 four years after *McConnell*.[142] The *Citizens United* decision overruled the basis for *McConnell* and, thus, found BCRA § 203 could not be upheld.[143] The

131. Neal Devins, *Constitutional Avoidance and The Roberts Court*, 32 DAYTON L. REV. 339, 339 (2007).

132. *See* Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008) (explaining that facial challenges usually rest on speculation, are contrary to judicial restraint, and frustrate the democratic process); *see also* Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 329 (2006) (explaining the frustration caused by facial invalidation and why partial invalidation better respects the intent of elected representatives).

133. Richard Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 174–175 (2014).

134. Bipartisan Campaign Reform Act, Pub. L. No. 107-155 (2002).

135. McConnell v. Fed. Elections Comm'n, 540 U.S. 93, 203–09 (2003).

136. *Id.* at 207.

137. Wis. Right to Life, Inc. v. FEC, 546 U.S. 410, 411–12 (2006) (per curiam).

138. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 449–50 (2006).

139. *Id.*

140. *Id.* at 481.

141. *Id.* at 482.

142. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 324 (2010).

143. *Id.* at 365–66.

ominous warnings in *WRTL II* spelled certain doom for *McConnell* and BCRA § 203.[144]

As discussed earlier, the Court in *McCutcheon* chose to "assume, without deciding, that a law is subject to a less stringent level of scrutiny. . . ."[145] Viewed through the lens of "one last chance," the Court's purposeful and avowed avoidance of deciding the necessity of a higher level of scrutiny is telling.[146] Justice Scalia, no fan of giving Congress one last chance to fix infirm legislation, called the practice "faux judicial restraint."[147]

But if the Court was primed to require a higher level of scrutiny for contribution limits, Justice Scalia's unexpected passing may have stopped the momentum.[148] Justice Scalia's notorious originalist principles are apparent in his campaign finance opinions where he distinguished himself as a thought leader for reformers and opponents because of his opposition to campaign finance deregulation and his support of enhanced campaign disclosures.[149] A stalwart for deregulating campaign finance limits, Justice Scalia believed that the First Amendment does not discriminate against speakers or types of speech.[150] As a champion of campaign finance disclosures, he intimated that the only thing better than more speech was more truthful speech.[151] Justice Scalia joined the majority in *McConnell*, *WRTL II*, and *Citizens United*, and the plurality in *McCutcheon*, four decisions that primed the Court to apply strict scrutiny for campaign contributions.[152]

D. 9th Circuit Precedent

The Roberts Court slowly moved campaign finance law to the right, and the shift in policy is being embraced by California and the 9th Circuit.[153] The 9th

144. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. at 482–83 (Alito, J., concurring), *and FEC v. Wis. Right to Life, Inc.*, 551 U.S. at 498–99 (Scalia, J., concurring); *also* Re, *supra* note 133, at 176.

145. McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2015).

146. Re, *supra* note 133, at 176.

147. *FEC v. Wis. Right to Life, Inc*., 551 U.S. at n.7.

148. Bob Bauer, *Justice Scalia and Campaign Finance: A Puzzle*, MORE SOFT MONEY HARD LAW (Feb. 17, 2016), *available at* http://www.moresoftmoneyhardlaw.com/2016/02/justice-scalia-campaign-finance-one-puzzle/ (on file with *The University of the Pacific Law Review*).

149. *Id.*

150. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 392–93 (2010).

151. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 382 (1995).

152. McConnell v. Fed. Elections Comm'n, 540 U.S. 93 (2003); FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2006); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), *and* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).

153. *See, e.g.,* Lair v. Bullock, 787 F.3d 989, 999 (9th Cir. 2015) (adopting the *Citizens United* holding); Maura Dolan, *California's high court appears ready to allow voters to weigh in on Citizens United,* L.A. TIMES (Oct. 6, 2015), *available at* http://www.latimes.com/local/lanow/la-me-ln-california-citizens-united-ballot-20151006-story.html (on file with *The University of the Pacific Law Review*) (California's legislature recognizes the import of *Citizens United* and requested a ballot initiative to gauge voters' opinion of a constitutional amendment to overturn *Citizens United*).

Circuit employs a synthesized test to gauge the validity of campaign contribution limits.[154] Using the Court's precedent from *Buckley* and its progeny, the 9th Circuit developed the *Eddleman* test in 2003:

> "[S]tate campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are closely drawn—i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign."[155]

Per *Eddleman*, the only sufficiently important state interests are the prevention of corruption or the appearance of corruption.[156] *Eddleman* allows the interests to be broadly manifested, including the appearance of officials being "too compliant with the wishes of large contributors."[157] The improper compliance could be demonstrated by the contributors' access to or influence over the politician.[158]

Finding corruption where access and influence are prevalent is problematic because there is no way to quantify how much access or influence is improper.[159] In *Citizens United*, the Court held that only the prevention of *quid pro quo* corruption was a sufficiently important state interest in preventing corruption or its appearance.[160] The Court expressly rejected the proposition that the First Amendment would allow a contribution limitation to further the state's interest in limiting a contributor's access or influence.[161]

Citizens United is squarely at odds with the *Eddleman* standard of allowing a limitation of access or influence as a sufficiently important state interest.[162] The effect of *Citizens United* on *Eddleman*'s campaign contribution analysis is apparent in light of *Citizens United*'s effect on independent expenditure limitations.[163] The 9th Circuit and other circuit courts recognized *Citizens United*'s narrowing effect on the analysis for a sufficiently important state interest in the context of independent expenditures.[164] Independent expenditures

154. Mont. Right to Life Ass'n v. Eddleman, 343 F.3d 1085, 1092 (9th Cir. 2003).

155. *Id.* at 1092.

156. *Id.*

157. *Id.* (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)).

158. *Id.* at 1096.

159. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010).

160. *Id.*

161. *Id.* at 360.

162. *Compare Citizens United*, 558 U.S. at 360, *with Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d at 1096.

163. Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 694 (9th Cir. 2010).

164. Thalheimer v. City of San Diego, 645 F.3d 1109, 1119 (9th Cir. 2011); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 694 (9th Cir. 2010); SpeechNow.org v. FEC, 599 F.3d 686, 694–95 (D.C. Cir. 2010).

are purportedly not corrupting because they are neither given to nor controlled by the candidate.[165] A tenuous link between independent expenditures and candidates makes it less likely that corruption would arise from the expenditure.[166]

Campaign contributions are a far more direct way to influence candidates than independent expenditures because candidates may direct the expenditure of campaign funds.[167] The 9th Circuit found *Citizens United* abrogated *Eddleman*'s "important state interest" analysis because hampering influence was no longer recognized as a sufficient state interest.[168] Although decreasing the influence of donors cannot be a sufficient state interest to justify a contribution limitation, a sufficient interest can be found by reframing a limitation as a means to prevent corruption.[169]

IV. THE NARROW CONSTITUTIONAL BASIS FOR LIMITING NONRESIDENT CAMPAIGN CONTRIBUTIONS

Limiting nonresident campaign contributions is acceptable in narrow circumstances where non-geographic factors increase the likelihood that the nonresident's contribution may be corruptive.[170] This section presents a current dispute over nonresident limitations in Austin, Texas, and then explains how the loss of the anti-distortion rationale severely jeopardizes nonresident limitations.[171]

The City of Austin restricts the aggregate amount of campaign contributions to city council candidates from persons living in a postal zip code outside of city limits.[172] Austin's restriction on nonresident contributions has been challenged as an unconstitutional burden on associational freedom that fails to advance a cognizable *quid pro quo* interest.[173] The case, *Zimmerman v. City of Austin*, went to trial in December 2015 and is awaiting a decision.[174] Austin's defense of the nonresident restriction relies on oblique reasoning: the city cites to a finding in the voting rights case *Holt Civic Club v. Tuscaloosa* that, "our cases have

165. *Thalheimer*, 645 F.3d at 1119.

166. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d at 696.

167. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1450–51 (2014).

168. Lair v. Bullock, 798 F.3d 736, 746 (9th Cir. 2015).

169. Thalheimer v. City of San Diego, 645 F.3d 1109, 1121 (9th Cir. 2011).

170. Vannatta v. Keisling, 151 F.3d 1215, 1221 (9th Cir. 1998), Landell v. Sorrell, 382 F.3d 91, 157–158 (2d Cir. 2002).

171. *Infra* Part IV.

172. Austin City Charter, art. III § 8(A)(3).

173. Complaint, Zimmerman v. Austin, 24–25, July 27, 2015 (Civ. Case No. 15-628) (W.D. Tex.).

174. Lilly Rockwell, *Zimmerman's lawsuit over Austin fundraising rules heads to court*, THE AMERICAN STATESMAN (Dec. 13, 2015, 12:00 AM), http://www.mystatesman.com/news/news/local/zimmermans-lawsuit-over-austin-fundraising-rules-h/nphy6/ (on file with *The University of the Pacific Law Review*).

uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."[175]

But the justification for the finding in *Holt Civic Club* undermines its benefit as a defense in *Zimmerman*.[176] The Court premised its finding in *Holt Civic Club* on the need for a bright line rule to determine when voters could be enfranchised in a municipal election.[177] The Court found that predictable boundaries better served the public's interest than voting rights for nonresidents potentially affected by municipal elections.[178] In *Zimmerman*, the City of Austin's failure to absolutely prohibit nonresident contributions effectively favored earlier contributors whose contributions fall below the aggregate cap.[179] Additionally, at dispute in *Holt Civic Club* were Fourteenth Amendment voter disenfranchisement concerns—the "talismanic significance" of geographic boundaries in voting cases has no direct bearing on First Amendment disputes.[180]

The City of Austin may have cited to *Holt Civic Club* because, based on more analogous cases, it is unlikely that the City of Austin's geographic ban will withstand constitutional scrutiny because such bans are usually justified on anti-distortion grounds.[181] In *Whitmore v. FEC*, a Green Party congressional candidate claimed that her competitors' acceptance of out-of-state contributions endangered the home state's republican government.[182] The 9th Circuit found no sufficient state interest in insulating a state government from out-of-state interests because the First Amendment does not allow tempering the speech of one faction to enhance the speech of a competing faction.[183] A few years later, the 9th Circuit confirmed that protecting a republican form of government is an insufficient state interest.[184]

In *Vannatta v. Keisling*, Oregon used this interest to justify a ban on out-of-district contributions.[185] Oregon also justified the ban as a necessary means to prevent corruption.[186] Importantly, the 9th Circuit failed to find that out-of-district contributions could *not* be adequately corrupting to give rise to a sufficient state interest.[187] Bans on out-of-district contributions may be found sufficiently

175. Defendant's Post Trial-Response Brief, (No. 1:15-cv-628-LY) (Feb. 1, 2016), citing Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 68–69 (1978).

176. Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 69–70 (1978).

177. *Id.*

178. *Id.*

179. Austin City Charter, art. III § 8(A)(3).

180. *Holt Civic Club*, 439 U.S. at 81.

181. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010) (concluding the anti-distortion rationale to be an "unconvincing and insufficient" state interest).

182. Whitmore v. Fed. Election Comm'n, 68 F.3d 1212, 1313 (9th Cir. 1995).

183. *Id.* at 1216.

184. Vannatta v. Keisling, 151 F.3d 1215, 1216 (9th Cir. 1998).

185. *Id.*

186. *Id.* at 1221.

187. *Id.*

"closely drawn to advance the goal of preventing corruption" if the contributions can be distinguished by a "factor that would tend to indicate corruption."[188] The 9th Circuit struck down Oregon's ban because the ban's prevention of corrupt and non-corrupt contributions was too broad.[189]

Vermont also attempted to damper the influence of out-of-state contributions, but did so by limiting the total amount of such contributions to 25 percent of a campaign's total contributions.[190] Vermont's use of a limitation rather than a ban followed the finding in *Vannatta v. Keisling* that geographic bans must be narrowed by a factor indicative of corruption.[191] Vermont claimed the 25 percent limitation was a necessary prophylactic against excessively large out-of-state contributions inundating state campaigns.[192] And the state's interest in limiting the size of large contributions is a bedrock defense against corruption.[193] But Vermont's ban did not necessarily limit large out-of-state contributions.[194] Once the 25 percent was met, all additional contributions were banned, including small, non-corrupt out-of-state contributions.[195] The ban on over-the-threshold contributions was held unconstitutional because it did nothing to prevent actual or perceived corruption.[196]

Interestingly, similar to Vermont, Alaska limits out-of-state contributions to 10 percent of total contributions.[197] The Alaska Supreme Court upheld Alaska's nonresident limitation in the same 1999 case that upheld Alaska's lobbyist contribution ban.[198] The nonresident limitation was explicitly upheld using anti-distortion principles alone.[199] Alaska's limitation may be in jeopardy since anti-distortion principles are no longer recognized as a sufficient basis for contribution limitations.[200] The First Amendment does not protect contribution limits that discriminate based on geography alone.[201] However, a state may permissibly limit nonresident contributions if such limits are adequately justified on an additional, corruptive characteristic.[202]

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188. *Id.*
189. *Id.*
190. Landell v. Sorrell, 382 F.3d 91, 99 (2d Cir. 2002).
191. *Id.* at 147.
192. *Id.* at 146.
193. Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).
194. *Landell*, 382 F.3d at 157–58.
195. *Id.* at 158.
196. *Id.* at 160.
197. Alaska Stat. Ann. § 15.13.072(e) (West 2015).
198. State v. Alaska Civil Liberties Union, 978 P.2d 597, 617 (Alaska 1999).
199. *Id.*
200. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010).
201. Vannatta v. Keisling, 151 F.3d 1215, 1221 (9th Cir. 1998).
202. Landell v. Sorrell, 382 F.3d 91, 157–58 (2d Cir. 2002).

V. TAILORING CALIFORNIA'S LOBBYIST BAN TO SURVIVE A CONSTITUTIONAL CHALLENGE

California's voters passed a large political reform package with 2000's Proposition 34 that included the ban on lobbyist contributions.[203] The proponents of Proposition 34 declared an objective "[t]o reduce the influence of large contributors with an interest in matters before state government by prohibiting lobbyist contributions."[204] The ban on lobbyist contributions was not the hallmark of Proposition 34,[205] and the Proposition was not introduced to combat a spate of *quid pro quo* scandals.[206] But the district court's decision to uphold the ban echoed the expressed purpose of diminishing lobbyist's influence over politicians.[207] The ban's oblique inclusion in the proposition and the over-emphasis on reducing lobbyist influence severely weaken the ban's constitutional defenses.[208]

A. Constitutional and Practical Infirmities of the Ban

California's ban suffers from constitutional and practical infirmities.[209] The ban lacks a sufficient state interest to justify its enforcement.[210] And it's woeful tailoring leaves it vulnerable to attack.[211] In some circumstances, corruption can seep in through the ban's porous loopholes.[212] The three infirmities are discussed in the following sections.[213]

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203. Text of Proposed Law—Proposition 34, California Secretary of State, *available at* http://vigarchive.sos.ca.gov/2000/general/text/text-proposed-law-34.htm (on file with *The University of the Pacific Law Review*).

204. *Id.*

205. Harllee Branch, *Proposition 34: Limits on Campaign Contributions and Expenditures*, MCGEORGE CALIFORNIA INITIATIVE REVIEW (2000), *available at* http://www.mcgeorge.edu/Publications/California_Initiative_Review/Past_Initiatives_(Before_November_2005)/2000_November_Initiatives/Proposition_34.htm) (on file with *The University of the Pacific Law Review*).

206. George Skelton, *Proposition 34 Offers Merely a Whiff of Reform,* L.A. TIMES (Oct. 2, 2000), *available at* http://articles.latimes.com/2000/oct/02/news/mn-30083 (on file with *The University of the Pacific Law Review*).

207. Inst. of Governmental Advocates v. Fair Political Practices Comm'n, 164 F. Supp. 2d 1183, 1195 (E.D. CA 2001).

208. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010).

209. *Infra* Part V.A.

210. *Infra* Part V.A.1.

211. *Infra* Part V.A.2.

212. *Infra* Part V.A.3.

213. *Infra* Part V.A.

1. Insufficient State Interest

California's interest in banning lobbyist contributions was stated in the text of Proposition 34: "[t]o reduce the influence of large contributors."[214] But reducing influence alone is an insufficient state interest to support a contribution limitation.[215] California's interest in the ban would have to specifically target acts of *quid pro quo* corruption perpetuated by lobbyists to qualify as a sufficient state interest.[216] But the voters did not pass the ban in response to a corruption scandal or any other actual or apparent acts of corruption by lobbyists.[217]

Regardless, California's lobbyists have failed to comply with the ban.[218] Former lawmakers-turned-lobbyists violated the ban,[219] as have lobbyists for simply purchasing refreshments for a political fundraiser.[220] Most notably, the Fair Political Practices Commission (FPPC) fined a lobbyist over $100,000 for repeatedly violating the ban by hosting fundraisers for elected state officials.[221] Despite the ban being violated a handful of times, none of the offending acts involved actual or apparent *quid pro quo* corruption.[222] At best, the offending acts involved attempts to influence or access elected officials.[223]

The constitutional infirmity of the ban is underscored when its history and its outcomes are compared.[224] The fear of improper influence or access does not give

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214. Text of Proposed Law—Proposition 34, *supra* note 203.

215. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1450–51 (2014); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010); Lair v. Bullock, 798 F.3d 736, 746 (9th Cir. 2015).

216. Green Party of Conn. v. Garfield, 616 F.3d 189, 206 (2d Cir. 2010).

217. Skelton, *supra* note 206.

218. *See* FPPC Summary of Enforcement Decisions (2014) (on file with *The University of the Pacific Law Review*) (detailing two violations of the ban, FPPC enforcement actions 2011/1119 and 2005/0881, neither of which involved corruption).

219. Laurel Rosenhall, *FPPC Fines Ex-Lawmaker Mike Roos for Improper Contributions*, SACRAMENTO BEE (Nov. 4, 2013), http://blogs.sacbee.com/capitolalertlatest/2013/11/fppc-fines-california-mike-roos-for-improper-campaign-contributions.html (on file with *The University of the Pacific Law Review*).

220. In the Matter of McKay Carney, Stipulation, Decision, and Order, FPPC No. 13/1128 (2014).

221. Laurel Rosenhall, *Sacramento Lobbyist Kevin Sloat Faces $133,500 FPPC Fine*, SACRAMENTO BEE (Feb. 10, 2014), *available at http://blogs.sacbee.com/capitolalertlatest/2014/02/sacramento-lobbyist-kevin-sloat-faces-133500-fppc-fine.html* (on file with *The University of the Pacific Law Review*), *and* In the Matter of Kevin Sloat and Sloat Higgins Jensen & Associates, Stipulation, Decision, and Order, FPPC No. 13/1201 (2014).

222. *See, e.g.,* FPPC Summary of Enforcement Decisions (2014) (on file with *The University of the Pacific Law Review*) (detailing two violations of the ban, FPPC enforcement actions 2011/1119 and 2005/0881, neither of which involved corruption); Rosenhall, *FPPC Fines Ex-Lawmaker Mike Roos for Improper Contributions*, *supra* note 219 (detailing a violation of the ban); In the Matter of McKay Carney, Stipulation, Decision, and Order, *supra* note 220 (lobbyist fined for improperly purchasing supplies for a fundraiser); *and* In the Matter of Kevin Sloat and Sloat Higgins Jensen & Associates, Stipulation, Decision, and Order, FPPC No. 13/1201 (2014) (lobbyist hosted fundraisers at his home for elected officials but no corruption was found).

223. Rosenhall, *Sacramento Lobbyist Kevin Sloat Faces $133,500 FPPC Fine*, *supra* note 221.

224. "That speakers may have influence over or access to elected officials does not mean that those officials are corrupt." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 314 (2010).

rise to a sufficient state interest to properly limit campaign contributions.[225] The glaring absence of bribery scandals coupled with the statutory purpose to curb the influence of lobbyists leaves the ban vulnerable to attack.[226]

2. The Ban is Insufficiently Tailored

California's ban was upheld as narrowly tailored because it allowed contributions to all candidates except those whom the lobbyist is registered to lobby, and it could not be temporally-limited due to the year-round nature of the California legislature.[227] The Court found the ban sufficiently narrow even though it could be "more narrowly tailored."[228] Assuming that California can sufficiently demonstrate the need to ban lobbyist contributions,[229] the ban must not unnecessarily restrict non-corrupt contributions.[230] Contributions that may be political expressions of personal belief are far less likely to be corrupting than expressions made for professional gain.[231]

The ban's insufficient tailoring is apparent in its underinclusiveness because the California Senate adopted additional measures to stymy the influence of lobbyist employers.[232] The Senate adopted a rule that prohibits "[m]embers of the Senate from soliciting or accepting campaign contributions from lobbyist employers for the period immediately preceding the passage of the state budget and a 30-day period preceding the end of the legislative session each year."[233] The Senate's rule seems to be working better than the simple ban on lobbyist contributions.[234] During the last 30 days of the 2015 session, the members of the Assembly accepted over $2.4 million in contributions.[235] Members of the Senate

225. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1451 (2014).

226. Lair v. Bullock, 787 F.3d 736, 747–48 (9th Cir. 2015).

227. Inst. of Governmental Advocates v. Fair Political Practices Comm'n, 164 F. Supp. 2d 1183, 1190, 1192 (E.D. CA 2001).

228. *Id.* at 1192 n.12 ("Plaintiffs also argued that Section 85702 should have provided an exception permitting lobbyists to contribute to the candidate for whom the lobbyist is entitled to vote. The court does not find any support for this proposal in the relevant case law.").

229. *Supra* Part V.A.1.

230. Vannatta v. Keisling, 151 F.3d 1215, 1221 (9th Cir. 1998).

231. State v. Alaska Civil Liberties Union, 978 P.2d 597, 619–20 (Alaska 1999).

232. *See* Patrick McGreevy, *California Senate approves blackout period for campaign fundraising*, L.A. TIMES (June 16, 2014), *available at* http://www.latimes.com/local/political/la-me-pc-calif-senate-approves-blackout-period-for-campaign-fundraising-20140616-story.html (on file with *The University of the Pacific Law Review*) (explaining the blackout), *and* Memorandum From Senate Rules Committee To All Senate Members and Staff, *Senate Rule 56 "Blackout" Hypotheticals* (July 7, 2014) (on file with *The University of the Pacific Law Review*) (providing examples of the blackout's effects).

233. Memorandum From Senate Rules Committee To All Senate Members and Staff, *Senate Rule 56 "Blackout" Hypotheticals* (July 7, 2014) (on file with *The University of the Pacific Law Review*).

234. Jim Millller, *Data Tracker: California lawmakers—even senators—took campaign cash at session's hectic finish*, SACRAMENTO BEE (Feb. 5, 2016), *available at* http://www.sacbee.com/news/politicsgovernment/capitolalert/article58789163.html (on file with *The University of the Pacific Law Review*).

235. *Id.*

accepted only $91,000 during the same period (however, they also accepted over $280,000 in the week following the session's end).[236]

3. The Ban Has Loopholes

California's ban suffers from a common practical infirmity—loopholes allowing state officeholders to accept contributions for federal elections.[237] State law on campaign contributions does not control contributions to federal campaigns.[238] And there is no ban on lobbyist contributions to federal campaigns.[239] Thus, California's lobbyists are free to contribute to federal campaigns of state legislators and officials, even if the lobbyist could not contribute to the legislators' or officials' state campaigns.[240] Exploiting the loophole is not merely an academic exercise.[241]

While serving in the Assembly, former Assemblymember Brian Nestande ran for Congress in 2014 and accepted contributions from lobbyists registered to lobby the Assembly.[242] The same occurred when former Assemblymember Jared Huffman ran for Congress in 2012.[243] As California's Attorney General, Kamala

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236. *Id.*

237. 52 U.S.C. § 30143 (2015).

238. *Id.*

239. Tom Hamburger & Paul Kane, *DNC rolls back Obama ban on contributions from federal lobbyists*, WASHINGTON POST (Feb. 12, 2016). *available at* https://www.washingtonpost.com/politics/dnc-allowing-donations-from-federal-lobbyists-and-pacs/2016/02/12/22b1c38c-d196-11e5-88cd-753e80cd29ad_story.html) (on file with *The University of the Pacific Law Review*).

240. Advice Letter I-12-016 from Zackery P. Morazzini, General Counsel, Fair Political Practices Commission to Laura Adams, Simonelli & Associates (Feb. 15, 2012), *available at* http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2012/12016.pdf (on file with *The University of the Pacific Law Review*).

241. *See e.g.*, Advice Letter A-05-150 from Luisa Menchaca, General Counsel Fair Political Practices Commission to Kelli Medina, Finance Director, Friends of Juan Vargas (Aug. 9, 2005), *available at* http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2005/05150.doc (on file with *The University of the Pacific Law Review*) (explaining that lobbyists may contribute to a state legislator's federal campaign), *and* Advice Letter A-04-177 from Luisa Menchaca, General Counsel Fair Political Practices Commission to Jonathan Dickinson, Ashburn for Congress Committee (Aug. 20, 2004) *available at* http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2004/04177.doc (on file with *The University of the Pacific Law Review*) (explaining that lobbyists may contribute to a state legislator's federal campaign).

242. *Compare* D.A. Lobbyist Certification Statement FPPC Form 604 for 2013-14 (June 20, 2013), *available at* http://cal-access.sos.ca.gov/Misc/pdf.aspx?filingid=1719536&amendid=1 (on file with *The University of the Pacific Law Review*), *with Contributions to NESTANDE, BRIAN in elections in 2014 (within federal data)*, FOLLOWTHEMONEY.ORG (last visited Mar. 30, 2016), *available at* http://www.followthemoney.org/show-me?f-core=1&f-fc=1&c-t-eid=13008655&y=2014#[{1lgro=d-id,c-r-id (on file with *The University of the Pacific Law Review*) (D.A. was registered to lobby Nestande at the same time D.A. contributed to Nestande's federal campaign).

242. *Compare* M.C. FPPC Form 604 for 2011-12 (June 10, 2011), *available at* http://cal-access.ss.ca.gov/Misc/pdf.aspx?filingid=1551839&amendid=1 (on file with *The University of the Pacific Law Review*), *with Contributions to HUFFMAN, JARED in elections in 2012 (within federal data)*, FOLLOWTHEMONEY.ORG (last visited Mar. 30, 2016) *available at* http://www.followthemoney.org/show-

Harris is an elected state officer.[244] Attorney General Harris is running for U.S. Senate in 2016 and has accepted contributions from registered lobbyists.[245] Due to FECA's preemptive force, there is no way California can prevent state officials who are candidates for federal office from accepting contributions from state lobbyists.[246]

B. Correcting the Problems of California's Ban on Lobbyist Contributions

The district court's rationale for upholding the ban has been eroded by the shifting tides of the Roberts Court.[247] Following the "one last chance" doctrine, the Roberts Court could be preparing to refine—and heighten—the scrutiny standard for campaign contribution limits as intimated in *McCutcheon*.[248] If the Court heightens the scrutiny standard for campaign contribution limits, then California's ban would likely be struck down.

California's ban on lobbyist contributions has constitutional infirmities and practical infirmities.[249] First, an insufficient state interest justified the ban's enactment.[250] Second, the ban is not narrowly tailored—it is both overbroad and underinclusive.[251] Finally, the ban is preempted by FECA in some instances, causing quirky loopholes.[252] The first two problems can be corrected by amending the statute,[253] and the third must be corrected by Congress.[254]

Using the revised *Eddleman* test as a guide, California's ban on lobbyist campaign contributions could be slightly amended and still pass constitutional muster.[255] Primarily, the state's interest must be limited to preventing actual or

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244. CAL. CONST., art. V § 11.

245. *Compare* R.A. FPPC Form 604 for 2015-16 (Oct. 20, 2014), *available at* http://cal-access.ss.ca.gov/PDFGen/pdfgen.prg?filingid=1942260&amendid=0 (on file with *The University of the Pacific Law Review*), *with Kamala Harris For Senate (United States Senate)*, ELECTIONTRACK.ORG (last accessed Mar. 30, 2016), *available at* http://www.electiontrack.com/federallookup.html?committee=C00571919 (on file with *The University of the Pacific Law Review*) (R.A. was registered to lobby Harris when R.A. contributed to Harris's federal campaign).

246. *See, e.g.*, Teper v. Miller, 82 F.3d 989, 999 (11th Cir. 1996) (holding that FECA preempts state law on the matter of campaign contributions to federal campaigns), *and* Op. Fed. Election Comm'n 1992-43 (Jan. 28, 1993) (explaining the FEC's opinion that FEC regulation on FECA preempts state law on the matter of contributions to federal campaigns).

247. Lair v. Bullock, 787 F.3d 736, 747–48 (9th Cir. 2015).

248. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1458 (2014).

249. *Supra* Part V.A.

250. *Supra* Part V.A.1.

251. *Supra* Part V.A.2.

252. *Supra* Part V.A.3.

253. *Supra* Part V.A.1–2.

254. Amending FECA is beyond the scope of this Comment, so it will not be addressed.

255. Lair v. Bullock, 787 F.3d 736, 747–48 (9th Cir. 2015).

apparent *quid pro quo* corruption.[256] Fortunately and unfortunately, California is not plagued by bribery scandals involving lobbyists.[257] The stated purpose of the ban as passed in Proposition 34 is, therefore, constitutionally infirm.[258]

Additionally, the ban must be more narrowly tailored to not to prevent lobbyists from engaging in political associations that would not give rise to appearances of corruption.[259] The ban is so ineffective that the Senate had to adopt additional rules to lessen the influence of special interests.[260] The ban currently covers registered lobbyists, but it could be expanded to include owners or managers of lobbying firms who are not registered as lobbyists or lobbyists' family members.[261] The ban could also be expanded to prevent lobbyists from contributing to officials' campaigns for non-statewide or non-legislative positions.[262]

Specifically, the ban should follow Alaska's model and include an exception allowing lobbyists to contribute to any candidate for legislative office for which the lobbyist is eligible to vote.[263] The exception should not include popularly-elected state officers (e.g., the governor, attorney general, etc.).[264] Allowing contributions to the legislative candidates in the lobbyists' home districts is a sensible balance between the states' interest and the lobbyists' freedoms of personal association.[265]

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256. *Id.*

257. *See, e.g.*, Alexei Koseff, *Former state Sen. Leland Yee pleads guilty to corruption charge*, SACRAMENTO BEE (July 1, 2015), *available at* http://www.sacbee.com/news/politics-government/capitol-alert/article25986487.htm (on file with *The University of the Pacific Law Review*) (chronicling the events leading to Senator Yee's corruption charges), *and* Dale Kasler, *California to collect $20 million in CalPERS bribery settlement*, SACRAMENTO BEE (Mar. 15, 2016), *available at* http://www.sacbee.com/news/business/article66202527.html (on file with *The University of the Pacific Law Review*) (providing an overview of a corruption scheme involving CalPERS officials).

258. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1451 (2014).

259. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357 (2010).

260. *See* Patrick McGreevy, *California Senate approves blackout period for campaign fundraising*, L.A. TIMES, (June 16, 2014), *available at* http://www.latimes.com/local/political/la-me-pc-calif-senate-approves-blackout-period-for-campaign-fundraising-20140616-story.html (on file with *The University of the Pacific Law Review*) (detailing how to comply with the blackout) (providing background on the blackout), *and* Memorandum From Senate Rules Committee To All Senate Members and Staff, *Senate Rule 56 "Blackout" Hypotheticals* (July 7, 2014) (on file with *The University of the Pacific Law Review*) (detailing how to comply with the blackout).

261. CAL. GOV'T CODE § 85702 (West 2015).

262. *See, e.g.*, Shoemaker v. Myers, 52 Cal. 3d 1, 22 (1990) (finding, "We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous.").

263. Alaska Stat. Ann. § 15.13.074(g) (West 2015).

264. Mont. Right to Life Ass'n v. Eddleman, 343 F.3d 1085, 1099–1100 (9th Cir. 2003).

265. State v. Alaska Civil Liberties Union, 978 P.2d 597, 618–19 (Alaska 1999).

VI. CONCLUSION

California has a reputation as a national leader in campaign finance ethics reform.[266] But, as zealous good intentions sometimes want to do, California's reforms go too far and impede individual constitutional rights.[267] California's ban on lobbyist contributions goes too far by prohibiting personal political expressions in exchange for a fictitious reduction of special interest influence.[268] Amending the ban to allow in-district contributions preserves the lobbyist's opportunity to express personal political speech.[269] The State Senate's self-imposed blackout on contributions from lobbyist employers shows that the idea of lobbyists-as-corruptors is a red herring.[270] The real corruptors are us, we the people, who hire lobbyists to express our political beliefs[271] and then congratulate ourselves when we deny lobbyists the opportunity to express their own beliefs.[272]

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266. Jodi Remke, *California's landmark campaign finance law needs an update*, SACRAMENTO BEE (Feb. 9, 2016), *available at* http://www.sacbee.com/opinion/op-ed/soapbox/article59377723.html (on file with *The University of the Pacific Law Review*).

267. *See* Fair Political Practices Commission, History of the Political Reform Act, *available at* http://www.fppc.ca.gov/about-fppc/about-the-political-reform-act.html) ("[The Act imposed] mandatory spending limits on candidates for statewide offices and statewide ballot measure committees. However, in the landmark case, *Buckley v. Valeo*, the United States Supreme Court held that mandatory spending limits were unconstitutional.").

268. *Compare* Public Policy Institute of California, *PPIC Statewide Survey: Californians & Their Government*, at 26 (Dec. 2015), *available at* http://www.ppic.org/main/publication.asp?i=1171) (on file with *The University of the Pacific Law Review*), *with* Public Policy Institute of California, *PPIC Statewide Survey: Californians & Their* Government, at 33 (January 2001), *available at* http://www.ppic.org/content/pubs/survey/S_101MBS.pdf (on file with *The University of the Pacific Law Review*) (in 2001, 52% of Californians believed special interests had too much influence over the initiative process, and 55% believed the same in 2015).

269. State v. Alaska Civil Liberties Union, 978 P.2d 597, 618 (Alaska 1999).

270. Press Release from State Senator Kevin De León, *Fundraising Blackout Periods - Senate Rules Committee Passes New Ethics House Rule* (May 21, 2014), *available at* http://sd24.senate.ca.gov/news/2014-05-21-release-fundraising-blackout-periods-senate-rules-committee-passes-new-ethics-house-#sthash.1RjvBPfC.dpuf (on file with *The University of the Pacific Law Review*).

271. *See, e.g.,* Lobbyist Employers, CALIFORNIA SECRETARY OF STATE (last accessed Mar. 20, 2016), *available at* http://cal-access.ss.ca.gov/Lobbying/Employers/ (on file with *The University of the Pacific Law Review*) (listing current and historical employers of California lobbyists).

272. Taryn Luna, *FPPC adds reporting rules for California lobbyists*, SACRAMENTO BEE (Jan. 21, 2016), *available at* http://www.sacbee.com/news/politics-government/capitol-alert/article55865710.html (on file with *The University of the Pacific Law Review*).

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