

DROWNING OUT DEMOCRACY

Money in politics. It's an old problem, seemingly overwritten and unsolvable. Campaigns grow more expensive. Politicians genuflect to large corporate donors. And after *Citizens United v. FEC*,¹ laws designed to stem political money's flow seem destined for the Supreme Court's dustbin. Although these difficulties feel familiar, the risks of campaign money are evolving — and so too is the need for regulation.

One such risk surfaced on November 3, 2020. That date is often remembered for one thing: the election pitting President Donald Trump against then-candidate Joe Biden. However, in California, that Tuesday also witnessed another stunning electoral event. Voters passed Proposition 22, quashing a years-long effort to require gig companies like Uber and Lyft to reclassify their workers as employees.²

Proposition 22's passage was remarkable. California ballot initiatives usually fail,³ this one overturned Assembly Bill 5, state legislation recently passed by a wide margin;⁴ and early autumn polling had shown Proposition 22 headed for defeat.⁵ Money played a role in the surprising outcome. The fight cost \$200 million⁶ — roughly seven times the cost of the 2022 California gubernatorial campaign⁷ and eleven times the cost of the 2016 senatorial campaign.⁸ And the spending was starkly lopsided. The “yes” side expended more than \$180 million, money secured from a few corporate coffers: Uber donated \$52 million, Lyft \$49 million, and DoorDash \$48 million.⁹

More startling than the sheer volume of spending is the *way* the Proposition 22 campaign was waged. The companies did not spend

¹ 558 U.S. 310 (2010).

² Kellen Browning, *California Court Mostly Upholds Prop. 22 in Win for Uber and Other Gig Companies*, N.Y. TIMES (Mar. 13, 2023), <https://www.nytimes.com/2023/03/13/business/prop-22-upheld-california.html> [<https://perma.cc/ZM54-94YY>].

³ See Miriam A. Cherry, *Proposition 22: A Vote on Gig Worker Status in California*, COMPAR. LAB. L. & POL'Y J. DISPATCHES 2–3 (Feb. 2021), <https://cllpj.law.illinois.edu/content/dispatches/2021/February-Dispatch-2021.pdf> [<https://perma.cc/88AP-723J>].

⁴ See Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html> [<https://perma.cc/M8MY-WW7E>].

⁵ See Jeremy B. White, *Gig Companies Break \$200M Barrier in California Ballot Fight*, POLITICO (Oct. 29, 2020, 8:15 PM), <https://www.politico.com/states/california/story/2020/10/29/gig-companies-break-200m-barrier-in-california-ballot-fight-9424580> [<https://perma.cc/SC4U-458C>].

⁶ See *id.*

⁷ See Gabrielle LaMarr LeMee et al., *Track the Money Flowing into the Race for Governor*, L.A. TIMES (Apr. 3, 2023), <https://www.latimes.com/projects/2022-california-election-governor-money-tracker> [<https://perma.cc/T6W8-PTMR>].

⁸ See *California Senate 2016 Race*, OPENSECRETS, <https://www.opensecrets.org/races/summary?cycle=2016&id=CAS1> [<https://perma.cc/BD7D-8TUN>].

⁹ See George Skelton, *It's No Wonder Hundreds of Millions Have Been Spent on Prop. 22. A Lot Is at Stake.*, L.A. TIMES (Oct. 16, 2020, 12:00 AM), <https://www.latimes.com/california/story/2020-10-16/skelton-proposition-22-uber-lyft-independent-contractors> [<https://perma.cc/LG25-3UG6>].

merely to voice their ideas more vigorously and persuade voters.¹⁰ Instead, they inundated voters with endless text messages and swarmed app users with deceptive information, drowning out labor unions' opposing view.¹¹ The strategy succeeded. Later, many Californians regretted their votes, feeling they lacked access to the full array of arguments.¹² In fact, up to forty percent of "yes" voters incorrectly believed their vote *supported* gig workers' labor rights.¹³ The companies' victory was won not by outperforming others in the marketplace of ideas, but by drowning out the other side. In short, it was a silencing via spending.

This Note confronts the emergent problem of silencing via spending — what it will call the new risk of "drowning out."¹⁴ Just as sufficiently loud spoken speech can overwhelm others' capacity to speak and be heard, money can also generate an expressive inundation, newly possible in our internet era. Campaign money may now purchase targeted and destructive communicative tools. At high enough spending levels, these tools could be used to entirely block opposing views and saturate voters' informational environments with a single perspective. Thus, under certain conditions, unchecked political spending may now permit one side to effectively end debate before it begins.

This novel "drowning out" problem differs from the familiar twin difficulties of campaign finance¹⁵: the challenges of corruption and distortion.¹⁶ A "drowning out" is not troubling because it corrupts politicians, making them less representative, nor because it skews political debate in favor of the wealthy, distorting political outcomes. A "drowning out" is troubling because it eliminates debate altogether, rupturing the participatory debate framework undergirding our democracy.

Earlier generations of scholars gestured at a potential for "drowning out."¹⁷ Although the risk has taken on a new and dangerous shape in

¹⁰ The companies saw Proposition 22's outcome as existential and deployed hardball tactics; for example, when a court ordered them to reclassify workers, the companies threatened to shut down entirely until the election. See Sasha Lekach, *Future of Uber, Lyft on the Line in Fight to Keep Drivers from Becoming Employees*, MASHABLE (Oct. 24, 2020), <https://mashable.com/article/uber-lyft-california-prop-22-gig-workers> [<https://perma.cc/45Z3-5MU3>].

¹¹ See Faiz Siddiqui & Nitasha Tiku, *Uber and Lyft Used Sneaky Tactics to Avoid Making Drivers Employees in California, Voters Say. Now, They're Going National.*, WASH. POST (Nov. 17, 2020, 7:00 AM), <https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/> [<https://perma.cc/3HN4-SMQQ>].

¹² See *id.*

¹³ See *id.*

¹⁴ Importantly, the "drowning out" mentioned here is not quite the same as the "drowning out" in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). See *infra* section I.C, pp. 2392–94.

¹⁵ See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1369 (1994).

¹⁶ Another view of speech emphasizes the import of equality. See generally, *e.g.*, *id.* Although this Note's normative goals run parallel to those of the equality view, out of practical necessity, this Note's approach does not follow that theoretical line.

¹⁷ See *infra* section I.C, pp. 2392–94.

our twenty-first-century speech environment, recent scholarship has rarely attended to it.¹⁸ This Note fills that gap. It outlines the dimensions of a novel iteration of the “drowning out” problem and charts means of addressing it. Part I describes the rise of the new “drowning out” difficulty. Part II theorizes the difficulty, articulating how money, like speech, can be understood as having “sound” and thus can enact a “drowning out.” Finally, Part III outlines paths forward. If states enact new spending caps designed to prevent “drowning outs,” they will face significant legal obstacles. But there may be avenues for justifying such regulations, despite inhospitable doctrine.

This project is nascent, as the “drowning out” phenomenon is still taking shape. This project is also theoretical. The offered solutions deliberately stretch the existing doctrinal apparatus and are not ready-made for a Ninth Circuit brief. Nor is a menu of constitutionally permissible regulations provided. Nonetheless, to be theoretical is not to be meaningless. Given the urgency of the forthcoming “drowning out” problem, private entities ought to begin considering self-regulation, and cities and states ought to begin considering potential legislation. Using an approach rooted in but not confined by doctrine, this Note offers tools for those actors. However, in doing so, this Note neither joins in critiques of the Court’s post-*Citizens United* deregulatory jurisprudence,¹⁹ nor counsels overruling of precedent. Instead, it attempts to grapple with our doctrinal reality, and follows scholars who have sought new methods of²⁰ or justifications for²¹ campaign finance regulation — offering paths forward that are creative but that ultimately accept, tinker with, and build from the current doctrine’s premises.

I. THE RISE OF POLITICAL MONEY’S “DROWNING OUT” PROBLEM

Commentators often emphasize two categories of concern with unchecked political money: its corrupting influence on elected officials, and its distorting effect on political debates.²² However, money now operates in a different, online discursive environment — one marked by information overload, partisan speech silos, and a lesser commitment to

¹⁸ *But see, e.g.*, Mark C. Alexander, *Citizens United and Equality Forgotten*, 35 N.Y.U. REV. L. & SOC. CHANGE 499, 511–12 (2011); Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era*, 40 FORDHAM URB. L.J. 723, 730–32 (2012).

¹⁹ *See, e.g.*, Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 604–05 (2011); Deborah Hellman, *Money Talks but It Isn’t Speech*, 95 MINN. L. REV. 953, 954–55, 981 (2011).

²⁰ *See, e.g.*, Nicholas Almendares & Catherine Hafer, *Beyond Citizens United*, 84 FORDHAM L. REV. 2755, 2758 (2016); *see also* Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 533 (2016).

²¹ *See, e.g.*, Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1428 (2015).

²² *See* Strauss, *supra* note 15, at 1369.

truth. Under these conditions, money's influence on politics poses a new set of risks. Now, deregulated political spending may result not only in the distortion of debate, but also in total silencing of that debate. Large enough sums may enable campaigns to completely inundate listeners. Others, who attempt to speak using their words or by spending smaller sums, cannot break through. Their speech is deliberately or incidentally blocked because the marketplace for ideas is already saturated by one party's targeted and ever-present messaging. This risk of saturation is just now emerging but will likely become more apparent and more pressing as time passes.

This Part traces the origins of the “drowning out” risk. It first discusses how larger sums of political money interact with a new speech environment. It then describes where “drowning outs” may already be occurring and why they may become more common. Finally, it explores the new and distinct threat posed by one-sided and outsized spending.

A. *New Difficulties in a New Discursive Environment*

When it decided *Citizens United* in 2010, the Court released unprecedented quantities of money into campaigns. It did so by striking down limits on independent expenditures (including spending by so-called Super PACs).²³ The Court found that expenditure regulations burdened core “political speech”²⁴ — the speech most essential to “our electoral process,” which receives heightened scrutiny protection.²⁵ In conducting its strict scrutiny analysis, the Court also implied that most campaign finance regulations could be justified only where they were narrowly tailored to a specific set of compelling interests related to so-called “*quid pro quo* corruption.”²⁶ “Taken to its logical extreme,” that framework “may limit campaign finance restrictions to not much beyond the regulation of contributions to candidates and officeholders.”²⁷ *Citizens United*'s reasoning has since felled many more regulations.²⁸ Campaign money then ballooned. The most expensive presidential election before the ruling cost about \$1.8 billion;²⁹ the 2020 presidential election cost \$14 billion.³⁰

²³ *Citizens United v. FEC*, 558 U.S. 310, 355–56, 372 (2010).

²⁴ *Id.* at 329, 339–41.

²⁵ *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (quoting *Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976)).

²⁶ See *Citizens United*, 558 U.S. at 359.

²⁷ Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 250 (2010).

²⁸ See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010); *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014).

²⁹ See Press Release, FEC, 2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total (June 8, 2009), <https://www.fec.gov/updates/2008-presidential-campaign-financial-activity-summarized-receipts-nearly-double-2004-total> [<https://perma.cc/H63S-KXR2>].

³⁰ See Karl Evers-Hillstrom, *Biden Campaign Becomes First to Raise \$1 Billion from Donors*, OPENSECRETS (Dec. 7, 2020, 12:07 PM), <https://www.opensecrets.org/news/2020/12/biden-campaign-1billion-from-donors> [<https://perma.cc/LZ6Y-G9QG>]. Additionally, spending by

This money enters a discursive environment unlike the one that existed ten or twenty years ago. More people now get news from social media than from print newspapers,³¹ and most Americans primarily obtain news online.³² Online news sources are different in kind: they are diverse and numerous, constantly available, and virtually uncontrolled. Voters are each awash in information, but nonetheless consume a less diverse array of perspectives, as information is narrowly tailored to individual preferences via “profit-maximizing algorithms seeking to capture the largest number of ‘eyeballs’ and advertising dollars.”³³

This media environment sets the stage for “drowning outs” in at least three ways. First, the tailoring of information generates personalized and partisan information silos,³⁴ making it much more difficult for any voter to ever see, much less assess, the full scope of the marketplace of ideas.³⁵ Even a voter who seeks to escape her silo may encounter difficulty doing so, as the algorithm may only tend to feed her more of what she has already consumed.³⁶ As such, citizens can be more easily inundated with a single perspective, and other views more easily silenced, becoming undetectable in the sea of voices. While “it was once hard to speak,” instead, “it is now hard to be heard.”³⁷ Second, attention is commodified. Speech has become “less the circulation of ideas and opinions among autonomous individuals and more a collection of measurable data” that wealthy entities may “use to predict social behavior” and “influence” readers.³⁸ Third, information is now less rigorously fact-checked, and the “ideal” of journalistic “objectivity” is eroded.³⁹ This new media landscape strains and then shuts many traditional news outlets that once performed these functions,⁴⁰ and misinformation spreads, undermining trust in *all* sources of information.⁴¹

“non-party independent groups” multiplied from \$750 million between 1990 and 2010 to \$4.5 billion between 2010 and 2020. Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United*, OPENSECRETS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united> [https://perma.cc/Z3TB-GBP4].

³¹ See Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/short-reads/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source> [https://perma.cc/C638-HF4B].

³² See *News Platform Fact Sheet*, PEW RSCH. CTR. (Nov. 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet> [https://perma.cc/8YZ8-WAWY].

³³ MARTHA MINOW, *SAVING THE NEWS* 20 (2021).

³⁴ See CASS R. SUNSTEIN, #REPUBLIC 2–6 (2018).

³⁵ Cf. *id.* at 2–3, 6–8.

³⁶ See, e.g., Wen Chen et al., *Neutral Bots Probe Political Bias on Social Media*, 12 NATURE COMM'NS, Sept. 2021, art. 5580, at 1, 6.

³⁷ Tim Wu, Essay, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 554 (2018).

³⁸ Jack M. Balkin, *Free Speech Versus the First Amendment*, 70 UCLA L. REV. 1206, 1214 (2023).

³⁹ See MINOW, *supra* note 33, at 13, 22.

⁴⁰ See *id.* at 10–11.

⁴¹ See Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357, 375–76 (2020).

Well-financed campaigns may exploit this increasingly siloed and factless environment by investing in tools that block competing messages, via the “flooding” of platforms or the deployment of “troll armies,”⁴² or by spending to target voters. Where radio or television ads could reach only general populations, online advertising is precise and individualized.⁴³ And while radios or televisions could be turned off, our phones and computers are rarely set aside. Targeted campaign messaging can follow voters across platforms,⁴⁴ and could make an idea nearly inescapable.⁴⁵ New tools are likely on the horizon, too, as our speech environment continues to evolve in unforeseeable ways — for example, via the proliferation of artificial intelligence,⁴⁶ a development largely unforeseeable just a few years ago.

At sufficiently high levels of spending, a campaign can use blocking and targeting tools to blitz select voters, fully saturating their personalized media environments and preventing an opponent’s messaging from breaking through. Thus, changes to campaign finance law and changes to our speech environment have coincided to generate a perfect storm. Although well-financed entities cannot literally silence every opposing speaker, they may soon be able to prevent the relevant subset of listeners from hearing the other side. And by doing so, they may effectuate a new kind of “drowning out” — eliminating the deliberative political reflection at the heart of each voter’s democratic citizenship.

B. *The Emergent Risk of “Drowning Outs”*

Admittedly, total silencings do not yet abound. And there are some kinds of elections where “drowning outs” are relatively unlikely to ever occur. Presidential elections and other major national campaigns seep into our culture and conversations, making the silencing of either side more difficult. Similarly, where the two major parties are highly active, their relatively equibalanced media campaigns might tend to prevent one side from fully obliterating the other’s communicative capabilities. But hundreds of other campaigns waged each year, particularly at the local or state level and via ballot initiative, remain highly susceptible to

⁴² Wu, *supra* note 37, at 548.

⁴³ See MINOW, *supra* note 33, at 24.

⁴⁴ See SUNSTEIN, *supra* note 34, at 33; see also Louise Matsakis, *The WIRED Guide to Your Personal Data (and Who Is Using It)*, WIRED (Feb. 15, 2019, 7:00 AM), <https://www.wired.com/story/wired-guide-personal-data-collection> [<https://perma.cc/ZHQ7-AD6V>].

⁴⁵ Neuroscience’s documentation of the “illusory truth effect” also demonstrates that we are more likely to believe information the more it is repeated. See Valentina Vellani et al., *The Illusory Truth Effect Leads to the Spread of Misinformation*, COGNITION, July 2023, at 1, 1. Such targeting may therefore prove incredibly effective, as sheer repetition may at times substitute for truth.

⁴⁶ See, e.g., Norman Eisen et al., *AI Can Strengthen U.S. Democracy — and Weaken It*, BROOKINGS INST. (Nov. 21, 2023), <https://www.brookings.edu/articles/ai-can-strengthen-u-s-democracy-and-weaken-it> [<https://perma.cc/3HHS-BP8Y>].

the new “drowning out” phenomenon — particularly given the hyper-nationalization of our politics⁴⁷ and the diminution of local news.⁴⁸

Partial “drowning outs” are already proliferating, as suggested by the Proposition 22 campaign discussed in the introduction.⁴⁹ And Proposition 22 is not alone. For example, in a similar race in 2018, a Washington State ballot initiative designed to enact a carbon tax was defeated after opponents spent \$31 million in money raised mostly from the oil industry, a record in that smaller media market.⁵⁰ The initiative’s failure “seemed improbable,”⁵¹ but it lost by a wide margin.⁵² Tactics similar to those used in the Proposition 22 campaign — deceptive advertising and media inundation — helped corporations win this campaign, too.⁵³

“Drowning outs” may also reach candidate elections. Massive spending already floods these campaigns.⁵⁴ And indications of inundation are appearing. For instance, in Boston’s 2023 city council election, PACs spent tens of thousands in one month before the election — thirty times one candidate’s budget for that month — to bombard voters with calls, messages, and ads opposing two sitting councilors.⁵⁵ The targeted incumbents did not advance, becoming the first “sitting councilor[s]” in “over four decades” to fail “to advance past the preliminary.”⁵⁶

C. *The Risk Posed by Money’s “Drowning Out” Potential*

The risk posed by a “drowning out” differs from the other risks of unchecked political money that scholars and jurists have long recognized.⁵⁷ Most clearly, the “drowning out” risk bears little resemblance

⁴⁷ See DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES* 1–2 (2018).

⁴⁸ See MINOW, *supra* note 33, at 10.

⁴⁹ See *supra* text accompanying notes 2–13.

⁵⁰ See Hal Bernton, *Washington State Voters Reject Carbon-Fee Initiative*, SEATTLE TIMES (Nov. 7, 2018, 5:48 PM), <https://www.seattletimes.com/seattle-news/politics/voters-rejecting-carbon-fee-in-first-day-returns> [<https://perma.cc/HH6E-2PF5>].

⁵¹ Kate Schimel, *What Killed Washington’s Carbon Tax?*, HIGH COUNTRY NEWS (Jan. 21, 2019), <https://www.hcn.org/issues/51-1/energy-and-industry-what-killed-washingtons-carbon-tax> [<https://perma.cc/2Z9Q-T3S4>].

⁵² See Bernton, *supra* note 50.

⁵³ See Jeff Goodell, *Big Oil Kills Carbon Initiative in Washington State*, ROLLING STONE (Nov. 7, 2018), <https://www.rollingstone.com/politics/politics-news/washington-state-carbon-initiative-vote-752961> [<https://perma.cc/6N25-RH39>]; Natalie Brand, *Fact Check: Ad Takes Aim at Carbon Fee Initiative 1631*, KING 5 (Sept. 19, 2018, 9:07 AM), <https://www.king5.com/article/news/local/fact-check-ad-takes-aim-at-carbon-fee-initiative-1631/281-596001673> [<https://perma.cc/E5NL-YQTD>].

⁵⁴ See, e.g., Taylor Giorno, *Walker-Warnock U.S. Senate Race in Georgia Most Expensive in 2022 Cycle as Runoff Intensifies*, OPENSECRETS (Nov. 30, 2022, 12:50 PM), <https://www.opensecrets.org/news/2022/11/walker-warnock-u-s-senate-race-in-georgia-most-expensive-in-2022-cycle-as-runoff-intensifies> [<https://perma.cc/AE99-MGBB>].

⁵⁵ See Walter Wuthmann, *Deep-Pocketed Super PACs Showered Cash on Boston City Council Races*, WBUR (Sept. 15, 2023), <https://www.wbur.org/news/2023/09/14/boston-massachusetts-preliminary-races-political-money> [<https://perma.cc/Z7PA-H9CC>].

⁵⁶ *Id.*

⁵⁷ See, e.g., Lawrence Lessig, *Corrupt and Unequal, Both*, 84 *FORDHAM L. REV.* 445, 445 (2015).

to concerns over corruption: that as larger sums are needed to run successful campaigns, politicians may become beholden to the moneyed interests to whose trough they must return.⁵⁸

At first glance, the concern with “drowning out” more closely resembles the other traditional concern: distortion — the worry that unlimited spending will allow the wealthiest voices to unfairly skew opinion, shifting electoral outcomes away from baseline democratic preferences.⁵⁹ This distortion risk formed the basis for the Court’s opinion in *Austin v. Michigan State Chamber of Commerce*,⁶⁰ a concern subsequently rejected in *Citizens United*.⁶¹

However, “drowning outs” differ from distortions not just in scale, but also in kind. The danger posed by a “drowning out” is not that political outcomes may be skewed away from some equitable ideological distribution, but rather that no political debate will occur *at all*.

This concern with a “drowning out” by corporate money is not entirely novel. In 1978, the appellee in *First National Bank of Boston v. Bellotti*⁶² worried that “corporations . . . [would] drown out other points of view.”⁶³ The *Bellotti* Court rejected that argument, finding it unsupported by the record.⁶⁴ A brief burst of post-*Bellotti* scholarship explored corporate money’s potential to “drown out,”⁶⁵ but the argument faded in significance, as it was folded into the antidistortion rationale in *Austin*.⁶⁶ This Note draws from that earlier “drowning out” discussion, but addresses a new version of the problem. Whatever risk of “drowning out” existed in *Bellotti*’s era of print journalism fundamentally differs from the risk posed in our internet era; now, it seems that a true silencing of all alternative perspectives may soon be possible.

That risk is becoming real at a particularly troubling moment, as American hyperpolarization rises⁶⁷ and democracy backslides.⁶⁸ In the

⁵⁸ See Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 55 (1997); Samuel Issacharoff, *The Supreme Court, 2009 Term — Comment: On Political Corruption*, 124 HARV. L. REV. 118, 126–27, 130 (2010).

⁵⁹ See Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 992 (2011); Stephanopoulos, *supra* note 21, at 1459–60.

⁶⁰ 494 U.S. 652 (1990). There, the Court affirmed Michigan’s concern with the “distorting effects of immense aggregations of wealth . . . that have little or no correlation to the public’s support for . . . political ideas.” *Id.* at 660.

⁶¹ See *Citizens United v. FEC*, 558 U.S. 310, 363 (2010).

⁶² 435 U.S. 765 (1978).

⁶³ *Id.* at 789.

⁶⁴ See *id.*

⁶⁵ See, e.g., Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 22; Gerald G. Ashdown, *Buying Speech: Campaign Spending, the New Politics, and Election Law Reform*, 23 NEW ENG. L. REV. 397, 401–02 (1988).

⁶⁶ For the trajectory of the “drowning out” principle, see, for example, Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 107–08 (1991).

⁶⁷ See generally, e.g., Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411 (2014).

⁶⁸ See STEVEN LEVITSKY & DANIEL ZIBLATT, *TYRANNY OF THE MINORITY* 2 (2023).

face of democratic fragility, “drowning outs” only further erode the discourse that sustains democracy and may be required for its restoration. “Drowning outs” contribute to the sense that politics amounts to a war of all against all, incentivizing the stretching of democratic norms for partisan advantage.⁶⁹ Money may contribute to the failings of our new discursive reality, or simply accelerate dynamics already at play. In either case, money’s role in the political environment has changed. And as campaigns veer closer and closer to effectuating total “drowning outs,” we are urgently in need of a remedy.

II. THE SOUND OF MONEY

Addressing the new “drowning out” difficulty requires having the tools to speak about it. This Part begins to conceptualize such tools. It first explores how the doctrine understands money. Although the public generally believes that *Citizens United* held that money *is* speech,⁷⁰ that proposition remains open to debate as a doctrinal matter.⁷¹ Money might merely serve as an amplifier of political speech — and thus be more susceptible to regulation. This Part considers the more difficult of these possibilities: that certain forms of campaign money *are* political speech. It demonstrates that grounds for regulation might be developed even under this unfriendly reading of the doctrine — for even if such money is core political speech, such speech can still be regulated. However, beginning to regulate “money as speech” requires developing more precise analogies linking money to existing speech frameworks.

Linking money to existing speech frameworks can also help us fashion tools to describe how political spending silences. As noted above, campaign spending’s “drowning out” is analogous to a verbal “drowning out.” Money, in other words, has “sound” and can be too “loud.”⁷² This Part demonstrates how money might be understood as having “sound,” developing a framework for political money’s “drowning out” capacity.

A. Understanding Money as Speech

It remains unclear whether the doctrine holds that campaign money really *is* political speech. On the one hand, the Court’s reasoning might suggest merely that campaign money “facilitates” speech, enabling amplification.⁷³ That reading would make regulation based on the risk of “drowning out” easier to support legally; regulators would not need to

⁶⁹ For a description of recent stretching of constitutional norms, see Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 929–38 (2018).

⁷⁰ See Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 31 (2012) (noting that in “popular perception,” *Citizens United* “added to *Buckley*’s debatable equation that ‘money is speech’”).

⁷¹ For a contrary view, see, for example, Hellman, *supra* note 19, at 956.

⁷² This conceptualization builds on a small set of other work. See, e.g., Erin L. Miller, *Amplified Speech*, 43 CARDOZO L. REV. 1, 23 (2021).

⁷³ See Hellman, *supra* note 19, at 953.

contend with the argument that their newly imposed limits burdened speech itself, but would merely need to justify regulation of one amplificatory tool. Similarly, if campaign giving and spending are expressive conduct, equivalent to the *Tinker* armband⁷⁴ or *O'Brien* draft card,⁷⁵ then regulation might be more possible; such symbolic speech receives First Amendment protection of a thinner kind,⁷⁶ leaving regulations potentially subject to less destructive legal challenges.

However, the doctrine might hold that political money does not only amplify a message, but that political money *is* the speech — a proposition first clearly suggested in 1976 in *Buckley v. Valeo*,⁷⁷ and further developed since.⁷⁸ If so, such spending is not just any kind of speech, but the most protected sort — core political speech.⁷⁹ This last reading is more difficult to contend with, but even if money is speech, regulation remains possible, if we regulate money *as* speech.

Understanding the bounds of permissible regulation, though, requires understanding the expressive function that money would purportedly perform. But at a granular level, articulating the expressive function of campaign money is difficult. Consider donations. Giving money to a candidate might indicate endorsement of their ideas. Yet pinning down the meaning may prove challenging, as campaigns represent an amalgamation of ever-changing beliefs. For example, did giving money to President Barack Obama in 2008 equate to an endorsement of his view that *District of Columbia v. Heller*⁸⁰ was rightly decided?⁸¹ Alternatively, a donation might express an endorsement of the candidate. But what view is expressed by those who donate to multiple candidates competing for the same position, as corporations often do?⁸²

Also consider campaign expenditures. Most of the time, spending expresses one message: “We want candidate X to win.” That clarity, though, may dissolve in the face of campaign budgets. Campaigns may spend to convey tangential ideas, from arguing deregulation spurred the 2008 recession, to suggesting Taylor Swift is a robot built by the Biden

⁷⁴ See Smith, *supra* note 58, at 49 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969)).

⁷⁵ See *id.* at 50 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

⁷⁶ See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1006 (1976).

⁷⁷ 424 U.S. 1, 143 (1976) (per curiam).

⁷⁸ See, e.g., Eugene Volokh, *Why Buckley v. Valeo Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1095–96 (2002); *FEC v. Nat'l Org. for Women*, 713 F. Supp. 428, 429 (D.D.C. 1989).

⁷⁹ See *Buckley*, 424 U.S. at 39.

⁸⁰ 554 U.S. 570 (2008).

⁸¹ See Austin Sarat, *Why Is Obama Agreeing with the NRA?*, POLITICO (Jan. 6, 2016), <https://www.politico.com/magazine/story/2016/01/obama-guns-executive-action-213507> [https://perma.cc/V58N-YG2R].

⁸² See, e.g., Spencer MacColl, *Democrats and Republicans Sharing Big-Dollar Donors, DCCC's Million-Dollar Pay-Off and More in Capital Eye Opener: November 10*, OPENSECRETS (Nov. 10, 2010, 11:15 AM), <https://www.opensecrets.org/news/2010/11/democrats-and-republicans-sharing-b> [https://perma.cc/S9YH-8VQ7].

campaign. Even more difficult to understand are independent expenditures, which need not be directly associated with any one campaign.

Thinking about money as speech raises these practical questions because money does not share the expressive features of other speech modes.⁸³ The same disconnect also poses legal and doctrinal questions. While plugging campaign spending into existing First Amendment frameworks has appeared workable in leading cases, the facts of those cases may obscure harder aspects of translation. For example, where certain speakers are categorically targeted, as was the case in *Citizens United*,⁸⁴ the question of viewpoint discrimination is relatively easily resolved. Yet there are otherwise few means of deducing the viewpoint expressed by money, or whether regulations target money's viewpoint. Similarly, where categories of spending are banned or nearly so,⁸⁵ courts may more easily assess the degree to which money's speech was burdened by regulation. However, in other contexts, toggling between more and less restrictive limitations may prove trickier.

To make sense of money as speech, then, may require articulating how features of money are analogous to features of core political speech. Drawing such analogies can clarify some doctrinal puzzles, because courts have long used the traits that make speech expressive — its noise, its tone, its character — to navigate the doctrine. Expressive characteristics may help determine the degree of First Amendment protection that the speech receives.⁸⁶ In deciding whether an act qualifies as core speech, a court might evaluate the persuasive methods deployed,⁸⁷ or tone used — whether humorous, satirical, or informative.⁸⁸ And distinguishing expressive from nonexpressive features of speech may help courts determine whether a regulation is content based.⁸⁹

B. How Money Has Sound

Developing one aspect of money's "speechiness" also clarifies the impacts of political money, including its new "drowning out" effect. Loud sound is typically the operative mechanism of a verbal drowning out. But in the "drowning out" effectuated by spending, spending *quantity* is the operative mechanism. Thus, money now operates "as speech" insofar as dollars function like the decibels of spoken speech.

The idea of money's "sound" may seem strained. However, it has long been part of campaign finance scholarship, albeit in conceptually underdeveloped form.⁹⁰ This section builds out the analogy between

⁸³ For the difficulties of conceiving of money as speech, see Hellman, *supra* note 19, at 962–66.

⁸⁴ See *Citizens United v. FEC*, 558 U.S. 310, 354 (2010).

⁸⁵ See, e.g., *id.* at 355–56.

⁸⁶ See, e.g., *Bible Believers v. Wayne County*, 805 F.3d 228, 243–46 (6th Cir. 2015).

⁸⁷ See, e.g., *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988).

⁸⁸ Cf. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996).

⁸⁹ See, e.g., *Klein v. City of Laguna Beach*, 533 F. App'x 772, 775 (9th Cir. 2013).

⁹⁰ See *Buckley v. Valeo*, 424 U.S. 1, 18 n.17 (1976) (per curiam).

dollars and decibels. It first explains the role of “sound” in speech doctrine; next explores how a “sound” analogy might function; and finally justifies the appropriateness of the analogy to spoken speech.

I. Sound and Speech. — Sound (and its volume) matters to speech doctrine in at least two ways. First, speech’s volume indicates its *loudness* — the sheer rate at which sound waves might vibrate an ear drum. In some cases, that loudness is relevant because it captures the “reach” of speech, indicating the potential size of a message’s audience.⁹¹ In other cases, courts weigh whether the volume of speech is appropriate to its context.⁹² For example, in *Hess v. Indiana*,⁹³ the Court, as it assessed whether Mr. Hess “incite[d] further lawless action,”⁹⁴ noted that his voice, “although loud, was no louder than that of the other people in the area.”⁹⁵ Second, volume indicates tone; shouting conveys different emotional atmospherics than whispering. As a trite example, take Justice Holmes’s shouting of “fire” in a crowded theater.⁹⁶ While the claim’s falseness is essential, so is the speaker’s *shouting*. It matters that he can raise alarm to rile others.

Multiple dimensions of speech, then, may be understood via sound. The noisiness of speech can also matter to holdings. For example, it helps courts sort out whether a regulation is designed as a limited and content-neutral rule; courts may uphold restrictions on noise amplification in certain contexts,⁹⁷ but strike down such rules when they are disparately applied to different speakers.⁹⁸ Similarly, limits on very loud amplifications might be permitted, but regulations of activities making contextually reasonable levels of noise may be struck down.⁹⁹

2. The Sound of Money. — Just as the doctrine filters speech via sound, campaign money, too, may be cognized via sound. To understand how political spending can be understood as having “sound,” we can draw an analogy between dollars and decibels. Just as the sound generated by the spoken word can be measured in decibels, the “sound” of money can be measured in dollars spent. Dollars are also a measure of money’s expressive intensity — how far the message can reach and how potently it is delivered. And although money has no form of words, it too can convey a tone. The sheer quantity of money one puts behind a message helps indicate one’s relative degree of fervor.

⁹¹ See Miller, *supra* note 72, at 3.

⁹² See, e.g., Saia v. New York, 334 U.S. 558, 560 (1948).

⁹³ 414 U.S. 105 (1973) (per curiam).

⁹⁴ *Id.* at 108 (quoting *Hess v. State*, 297 N.E.2d 413, 415 (Ind. 1973)).

⁹⁵ *Id.* at 107.

⁹⁶ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁹⁷ See, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (plurality opinion).

⁹⁸ See, e.g., *Klein v. City of Laguna Beach*, 533 F. App’x 772, 775 (9th Cir. 2013).

⁹⁹ See, e.g., *Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006); *United States v. Doe*, 968 F.2d 86, 90–91 (D.C. Cir. 1992).

This conception of money's "sound" aligns with the doctrine's understanding of the connection between campaign spending and political speech. If money is not only an amplifier of speech, but constitutive of speech, then different levels of spending should carry different tones and meanings. The *Buckley* Court famously articulated that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."¹⁰⁰ A less vehicular analogy might hold that such restrictions permit speaking as much as one likes, but only at a whisper. Volume provides a foothold for this aspect of money's "speechiness": that the amount spent changes the nature of the message.

3. *Written Speech and Money*. — One difficulty with the money-as-sound framework is that it primarily conceives of speech as the *spoken* word, rather than the written word. Why should money be given attributes primarily of spoken speech? Three reasons. First, sound-based analogies are not the *only* analogies that might be used to understand money as speech; others could also be developed. But whatever analogies are generated will necessarily be imperfect, as we can neither hear nor read money. Amongst many possible analogies, the sound analogy is likely the most workable and is the most useful here — appropriate to naming the "drowning out" effect.

Second, regulations of the written word may substantially mirror regulations of the spoken word. For instance, measures of tone and intensity also apply to writing. When Justice Harlan in *Cohen v. California*¹⁰¹ famously wrote that "one man's vulgarity is another's lyric,"¹⁰² he emphasized the "emotive" value of the "f" word, and the importance of the "inexpressible emotions" it conveyed.¹⁰³ Written words are imbued with life, capable of conveying emotional tone, in the register of spoken speech. How to measure these elements of the written word, though, is much harder to pin down in categorical fashion. Measuring decibels of sound is simpler; that elementariness makes sound a better measure of money, the most unnuanced of speech forms.

Third, practical considerations counsel analogizing to the spoken word. The written word is everywhere in the cases,¹⁰⁴ but "speech" is still mainly understood through the prism of the spoken word. For instance, Justice Harlan in *Cohen* called the readers of that "scurrilous epithet" the "listeners."¹⁰⁵ "The freedom to speak and the freedom to hear" form "two sides of the same coin"¹⁰⁶ — not the freedoms to write and to read. Courts still imagine discursive exchange in public fora or

¹⁰⁰ *Buckley v. Valeo*, 424 U.S. 1, 19 n.18 (1976) (per curiam).

¹⁰¹ 403 U.S. 15 (1971).

¹⁰² *Id.* at 25.

¹⁰³ *Id.* at 26.

¹⁰⁴ See, e.g., *Schenck v. United States*, 249 U.S. 47, 49 (1919).

¹⁰⁵ *Cohen*, 403 U.S. at 22.

¹⁰⁶ *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting).

the Greek agora¹⁰⁷ and try to understand internet platforms by terming them the new “town square.”¹⁰⁸ As a result, our notion of the written word often operates via analogy to spoken speech. Directly analogizing money to spoken speech cuts through a layer of conceptual translation.

In short, as a theoretical matter, to speak and listen in the First Amendment context is often to convey or hear something expressed at a particular volume, or with a particular tone. To treat money as political speech is consistent with treating it as partially analogous to spoken speech and sharing features of spoken speech, including having “sound.”

III. TOWARD REGULATING MONEY’S VOLUME

Confronting the “drowning out” difficulty requires better campaign finance regulation. This Note does not prescribe the precise form of such regulation. But we can sketch a likely example: states could enact spending caps designed to prevent “drowning outs.”¹⁰⁹ Take California. There, campaigns are subject only to *voluntary* “expenditure ceilings.”¹¹⁰ A new law might impose a mandatory spending cap on campaigns and add limits on independent expenditures. These caps would be set very high — only at the level at which spending is so immense that it risks silencing an opponent and corrupting the informational environment. Additionally, *who* donated would not matter much; whether the money was derived from corporations, individuals, or unions, any spending that wholly drowned out opponents — and thus effectively prevented voters from accessing the marketplace of ideas — would be targeted.

However, if a state or city passed legislation preventing “drowning outs,” courts would likely strike it down. A court might find the regulation burdens political speech, is subject to strict scrutiny, but is not connected to the one interest clearly found compelling: prevention of corruption.¹¹¹ This Part addresses that looming legal obstacle.

Existing doctrinal principles might be adapted to justify regulation. This Part sketches two doctrinal sources. First, in some instances, very loud speech may be checked. Those same approaches could support regulation of “loud” money. Most notably, the Court’s doctrine allowing

¹⁰⁷ See, e.g., *Ams. United for Separation of Church & State v. City of Grand Rapids*, Nos. 90-2337, 91-1391 & 91-1448, 1992 WL 77643, at *20 (6th Cir. Apr. 21), *vacated en banc* 980 F.2d 1538 (6th Cir. 1992).

¹⁰⁸ See, e.g., Transcript of Oral Argument at 73, *NetChoice, LLC v. Paxton*, No. 22-555 (U.S. Feb. 26, 2024) (Justice Jackson questioning whether platforms are the new “public square”).

¹⁰⁹ More creative solutions are also possible. Some localities’ inventive regulations have so far survived legal challenges, such as the Seattle Democracy Voucher program. See Erin Kesler & Corey Goldstone, *Supreme Court Leaves Seattle’s Democracy Voucher System in Place*, CAMPAIGN LEGAL CTR. (Mar. 30, 2020), <https://campaignlegal.org/update/supreme-court-leaves-seattles-democracy-voucher-system-place> [<https://perma.cc/JY7G-A3G5>].

¹¹⁰ See *State Contribution Limits and Voluntary Expenditure Ceilings*, CAL. FAIR POL. PRACS. COMM’N (2024), <https://www.fppc.ca.gov/learn/campaign-rules/state-contribution-limits.html> [<https://perma.cc/MB2P-WFQC>].

¹¹¹ See Kang, *supra* note 27, at 250; Stephanopoulos, *supra* note 21, at 1427.

time, place, and manner restrictions could be applied to campaign spending. Second, the campaign finance cases suggest one noncorruption interest that might be found compelling: an interest in participation. Even if strict scrutiny is applied, states could argue that their regulations were narrowly tailored to a compelling “participation” interest.

A. *The Speech Doctrine of Sound*

There is not yet a First Amendment “drowning out” doctrine, but courts do permit regulation of the loudness of speech. Those cases suggest three ways “drowning out” regulations might be upheld. First, the Court could reconsider framing campaign finance regulations as time, place, and manner restrictions. Second, regulation of money’s “sound” could be premised on listeners’ rights, drawing on the Court’s *Red Lion Broadcasting Co. v. FCC*¹¹² precedent. Third, and most tenuously, regulations of “drowning outs” could rest on a “reverse” heckler’s veto.

i. Neutral “Manner” Restrictions. — Courts uphold neutral restrictions on the time, place, and manner of speech — including the volume of the spoken word. For example, regulations of noise amplification may be permissible when justified on apolitical grounds,¹¹³ limiting even assertedly expressive and political conduct.¹¹⁴ If money is understood merely as an amplifier of speech, applying time, place, and manner restrictions would be particularly fruitful. Regulating spending would be much the same as regulating use of a megaphone.

However, neutral time, place, and manner restrictions might also prove useful, if more difficult to apply, even if political money *is* political “speech.” A court could uphold campaign spending limits as neutral restrictions on the volume of money’s “sound” — permitting capping of the dollar amounts spent, much like it would permit capping of decibels. Similarly, a litigator could frame the “drowning out” phenomenon as a secondary effect emanating from high spending. So long as the government does not target the underlying speech, socially damaging secondary effects may be regulated via time, place, and manner restrictions. For example, in *City of Renton v. Playtime Theatres, Inc.*,¹¹⁵ the Court upheld a zoning ordinance limiting where adult videos could be shown.¹¹⁶ The Court found the ordinance permissible, as the city focused its regulation on the films’ secondary effects on the community.¹¹⁷ Similarly, atypically high spending arguably creates a spill-over

¹¹² 395 U.S. 367 (1969).

¹¹³ See *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

¹¹⁴ See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹¹⁵ 475 U.S. 41 (1986).

¹¹⁶ *Id.* at 48, 54–55.

¹¹⁷ *Id.* at 48.

“drowning out” effect — and regulations merely address these secondary effects, not the content of the speech expressed.¹¹⁸

However, there is a clear obstacle to applying this framework: many commentators argue that *Buckley* rejected the idea that campaign finance regulations can be understood as time, place, and manner restrictions.¹¹⁹ The *Buckley* Court suggested as much after considering a similar analogy between dollars and decibels.¹²⁰ The Court wrote that limits on amplification devices were not analogous to dollar limits, because the sound limits governed only the amplification devices’ “manner of operating,” while the campaign finance regulations “restrict[ed] the extent of the reasonable use of virtually every means of communicating information.”¹²¹ Maybe the *particular* Federal Election Campaign Act¹²² (FECA) restrictions considered in *Buckley* limited the “reasonable use” of “every means of communication.” But new, less restrictive limits might not so limit *every* “reasonable use.” The *Buckley* Court’s rejection of the analogy could be read as resting more on the disanalogous severity of the restriction imposed by FECA, rather than as a quibble with the comparison itself. More reasonable caps on dollars — caps set only so low as necessary to prevent total “drowning outs” — might begin to look more like a mere restriction on the “manner of operating.”

More centrally, the *Buckley* Court also indicated that campaign finance regulations could not qualify as neutral time, place, and manner restrictions because they restricted the “quantity” of communication.¹²³ However, that they limit the quantity of speech does not inherently prevent time, place, and manner restrictions from being applicable — so long as the restrictions are justified in appropriately neutral ways. Time, place, and manner restrictions *often* regulate the quantity of speech. Restricting when and where someone can speak always and necessarily cuts off some quantity of potential speech. For related reasons, both Justice Stevens and Justice White have written that *Buckley* misapprehended the applicability of time, place, and manner restrictions.¹²⁴ Given that a new breed of “drowning out” regulation would likely involve higher caps on spending and would rest on more neutral and fact-supported justifications, *Buckley*’s analysis may be worth revisiting.

¹¹⁸ This Note argues a “drowning out” is better framed as a secondary effect emanating from high spending, rather than a reactionary effect like that in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). See *id.* at 394.

¹¹⁹ See, e.g., Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo Is Wrong*, 47 U. RICH. L. REV. 881, 895 (2013).

¹²⁰ See *Buckley v. Valeo*, 424 U.S. 1, 18 & n.17 (1976) (per curiam).

¹²¹ *Id.* at 18 n.17.

¹²² 52 U.S.C. §§ 30101–30126, 30141–30145.

¹²³ See *Buckley*, 424 U.S. at 18.

¹²⁴ See, e.g., *Davis v. FEC*, 554 U.S. 724, 750–51 (2008) (Stevens, J., concurring in part and dissenting in part) (citing *Buckley*, 424 U.S. at 264 (White, J., concurring in part and dissenting in part)); *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 507–12 (1985) (White, J., dissenting); *Randall v. Sorrell*, 548 U.S. 230, 274, 280–81 (2006) (Stevens, J., dissenting)).

2. *A Listeners' Rights Model.* — Alternatively, a prohibition on “drowning out” could rest on listeners’ rights. Listeners have rights to hear speech of their choice¹²⁵ and to receive information.¹²⁶ These rights often appear in dicta, or in very different contexts,¹²⁷ but occasionally crop up when the Court considers political speech.¹²⁸ If listeners’ rights were more fully developed, they might imply a right to hear vindicated only where no voices are entirely “drowned out.”

Certainly, a right to listen does not inherently command a corresponding limitation on others’ speech. Nonetheless, scholars suggest a basis for that equivalence; for instance, the government might regulate false information based on Kantian principles — because “falsehoods interfere with listeners’ abilities to freely make rational, informed decisions.”¹²⁹ In dicta, the Court has also come close to commanding government action to protect listeners. For instance, in *Red Lion*, the Court proclaimed that the “right of the viewers and listeners” was “paramount”; the government could therefore constrain broadcasting time, distributing it across ideas to ensure listeners could hear multiple perspectives (a policy called the “fairness doctrine”).¹³⁰

Red Lion has been “acknowledged” as “flawed” by “a generation” of observers¹³¹ and survives only in narrow form.¹³² And superficially, *Red Lion* seems inapplicable to contemporary forums, in which information is endless, rather than constrained. But as discussed above, given targeting and tailoring tools and the limits of our attention spans, our communicative era may be counterintuitively approaching the limited informational conditions that justified the Court’s support for the fairness doctrine. Some have therefore argued that *Red Lion*’s lingering precedent could come back into “season,” offering a foothold to permit regulation of social media platforms, with the goal of enhancing diversity of viewpoints.¹³³ If so, regulations designed to prevent silencing via spending might be justified on the same grounds.

3. *The Reverse Heckler’s Veto.* — Talking heads like to declare that “[t]here is no reverse heckler’s veto.”¹³⁴ But such a “veto” may not be so implausible. The existing heckler’s veto doctrine provides only a

¹²⁵ See James Grimmelmann, *Listeners’ Choices*, 90 U. COLO. L. REV. 365, 366 (2019).

¹²⁶ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972).

¹²⁷ See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (commercial speech context); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (obscenity context).

¹²⁸ Cf., e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306–07 (1965).

¹²⁹ See Daniela C. Manzi, Note, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2640 (2019).

¹³⁰ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369, 390 (1969).

¹³¹ Thomas W. Hazlett et al., *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 51 (2010).

¹³² See Wu, *supra* note 37, at 577 (citing *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

¹³³ See *id.* at 577–78.

¹³⁴ See, e.g., Rick Esenberg (@RickEsenberg), X (Nov. 28, 2023, 11:10 AM), <https://twitter.com/RickEsenberg/status/1729533267710218597> [<https://perma.cc/8FZH-HEBP>].

negative right: state actors cannot ban speech because it might be unpopular and invite heckling.¹³⁵ Regulation of “drowning outs” would need to be grounded in a reoriented and more *affirmative* version of the right: state actors can protect unpopular speakers from heckling that amounts to a veto. Thus, a “reverse heckler’s veto” would provide a *justification* for, rather than a limit on, government action.

A “reverse heckler’s veto” might be derived from a background notion that the state must protect, rather than suppress, unpopular speakers. Heckler’s veto cases have occasionally implied such a duty, even if their holdings do not enforce it. For example, in his semiprecedential dissent in *Feiner v. New York*,¹³⁶ Justice Black argued that the state may be obliged to protect speakers from being shouted down or assaulted, writing that if the state “ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him.”¹³⁷

Translating that reasoning into an affirmative constitutional *requirement* to protect speakers might prove thorny.¹³⁸ However, a bold lawyer could gesture at such dicta to argue that the government can at least assert a compelling interest in protecting speakers, and is therefore justified in enacting limits narrowly tailored to that goal. This view has been partially outlined by others, mainly in the context of unpopular speakers on college campuses who have been “shouted down.”¹³⁹ Some works in the law and technology literature also take this approach. Professor Tim Wu argues for a government “duty to protect speakers and listeners,” given “it is no longer speech itself that is scarce, but the attention of listeners.”¹⁴⁰ Thus, while a full-blown “reverse heckler’s veto” may not be precedentially derivable, assertion of a *compelling government interest* in protecting speakers from a “drowning out” may not be entirely orthogonal to precedent, either.

B. The Participation Interest in Campaign Finance

When read against the grain, campaign finance doctrine offers another potential justification for regulation of “drowning outs.” The leading cases struck down spending regulations based on a libertarian view of the First Amendment, assertedly committed to permitting unfettered political speech. However, that commitment to maximizing unbridled

¹³⁵ See JD Hsin, *Defending the Public’s Forum: Theory and Doctrine in the Problem of Provocative Speech*, 69 HASTINGS L.J. 1099, 1101 (2018).

¹³⁶ 340 U.S. 315 (1951).

¹³⁷ *Id.* at 326 (Black, J., dissenting); see also Timothy E.D. Horley, Essay, *Rethinking the Heckler’s Veto After Charlottesville*, 104 VA. L. REV. ONLINE 8, 17 (2018).

¹³⁸ However, for a compelling argument for related constitutional obligations to act, see Martha Minow, *Does the First Amendment Forbid, Permit, or Require Government Support of News Industries?*, in CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? 85, 94–96 (Vicki C. Jackson & Yasmin Dawood eds., 2022).

¹³⁹ See, e.g., Charles S. Nary, Comment, *The New Heckler’s Veto: Shouting Down Speech on University Campuses*, 21 U. PA. J. CONST. L. 305, 306 (2018).

¹⁴⁰ Wu, *supra* note 37, at 548, 571.

political speech rests on a desire to ensure no such speech is restrained, which implicitly but necessarily requires that no core political speech be entirely silenced. Undergirding these holdings, then, is an implied view that all speakers must be able to participate at some basic level. Corporations, for example, cannot have their ability to speak so burdened that they become effectively unable to participate in political discourse.

This reading may be at odds with the view given in *Buckley* (and recently reiterated by Justice Kavanaugh) that “the concept that the government may restrict the speech of some . . . to enhance the relative voice of others is wholly foreign to the First Amendment.”¹⁴¹ But even if unintended, the logic of a “participation interest” is discernible, waiting for those who might one day collect these forgotten seeds and replant them. For now, that same reasoning might be extracted and repurposed, to support an argument that the government has a compelling interest in protecting participation. This section briefly describes where the doctrine implies this participation interest. It then articulates how that interest can be used to justify regulation of money’s “sound.”

I. The Participation Interest. — Speech doctrine is defined not only by black letter law, but also by theorization of democratic principles. Much law and democracy literature charts how political *participation* forms the core of democratic discourse.¹⁴² For example, one “primary purpose of the First Amendment” may be to “facilitate collective self-determination,”¹⁴³ a project that could be said to require collective participation.¹⁴⁴ Others embrace participation from a different angle. For example, Professor C. Edwin Baker rejects the “marketplace of ideas,” takes a more romantic approach, and seeks to allow citizens to “break . . . bureaucratic domination” through “broad” protections for “expressive activity” that center a speaker’s ability to participate.¹⁴⁵

Whatever speech framework one prefers,¹⁴⁶ most views of the First Amendment take an even more basic premise for granted — that protecting free speech generally means ensuring that everyone *can* speak, at least within political forums and when expressing core political ideas. That statement may seem tautological: the right to free speech requires that everyone be able to speak freely. However, it suggests something fundamental and easily missed. While there may be no guarantee of

¹⁴¹ Transcript of Oral Argument at 21, *Moody v. NetChoice, LLC*, No. 22-277 (U.S. Feb. 26, 2024) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam)).

¹⁴² See, e.g., ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1–2 (1971).

¹⁴³ See Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1521 (1997) (book review).

¹⁴⁴ Cf. Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1110 (1993).

¹⁴⁵ See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 12–22, 47, 118 (1989); see also Jordan M. Steiker, *Creating a Community of Liberals*, 69 TEX. L. REV. 795, 798–801 (1991) (book review).

¹⁴⁶ For some potential framings of free speech, see Steiker, *supra* note 145, at 795–801.

wide reception, nor of persuasion, a speech right is only meaningful if each citizen can *potentially express* the most protected form of speech.¹⁴⁷ Similarly, any democratic or discursive goals of the First Amendment are achieved only where listeners have the opportunity to hear. Thus, most views of free speech imply a bare participation requirement.¹⁴⁸

2. *Justifications for Bare Participation in Current Doctrine.* — Current campaign finance doctrine could be read as implicitly (and counterintuitively) supporting this participation requirement. Consider *Citizens United*. There, the Court characterized the Free Speech Clause as aimed at encouraging unconstrained discourse to improve democratic ends. Justice Kennedy wrote that “[f]actions should be checked by permitting them all to speak.”¹⁴⁹ Fostering democracy requires each speaker be able to contribute, as “[t]he right of citizens to inquire, to hear, to speak, and . . . to reach consensus is a precondition to enlightened self-government.”¹⁵⁰ As such, no one’s individual speech right ought to be excessively burdened. The Court then found that corporations had been unduly burdened; the burden on corporations’ ability to *participate* was the wrong *Citizens United* aimed to remedy, as even merely “inadvertent[t]” suppression of voices cuts against free speech.¹⁵¹ Justice Kennedy also partially endorsed a right to listen, writing that “voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”¹⁵² In sum, the Court’s determination that core speech was burdened implicitly rests on a speech framework that is enhanced where speakers’ and listeners’ bare participation rights are protected.

The same conceptual framework is echoed elsewhere. In *Buckley*, the Court extolled the “unfettered interchange of ideas” and articulated a vision of discursive democracy that rests on a universal opportunity to participate.¹⁵³ This interest in “unfettered exchange” is why expenditure limitations that may “reduce[] the quantity of expression” proved so troubling.¹⁵⁴ The Court also wanted to increase the “quantity and diversity” of expression.¹⁵⁵ Doing so may involve maximizing the number of speakers. Thus, the Court bemoaned that regulations would

¹⁴⁷ This is not identical to the affirmative “right to be heard.” See Floyd Abrams, *In Defense of Tornillo*, 86 YALE L.J. 361, 361–62 (1976) (book review).

¹⁴⁸ Other scholars posit more expansive “participation interests” than what is suggested here. See, e.g., Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1273–74 (2012).

¹⁴⁹ *Citizens United v. FEC*, 558 U.S. 310, 355 (2010).

¹⁵⁰ *Id.* at 339.

¹⁵¹ *Id.* at 340.

¹⁵² *Id.* at 341.

¹⁵³ See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

¹⁵⁴ *Id.* at 19.

¹⁵⁵ *Id.*

prevent many groups (outside of “candidates” and the “institutional press”) from communicating their messages.¹⁵⁶

The Court in *McCutcheon v. FEC*¹⁵⁷ spoke of participation even more expansively. It began by referencing the many ways citizens can participate in democracy,¹⁵⁸ reasoning that FECA’s aggregate limits should be eliminated to “safeguard[] an individual’s right to participate.”¹⁵⁹ It is the individual’s ability to *participate* that must be protected, to ensure that “individual citizens” do not pay “significant First Amendment costs” to serve a “generalized” notion of “public good.”¹⁶⁰

3. *Repurposing the Participation Interest.* — This implied participation interest appeared only in discussions of the burden placed on speech; the Justices have never suggested that governments have an *affirmative* responsibility to protect and vindicate a participation right. However, the logic on which the participatory burden analysis rests could be extracted from that context and leveraged for other goals.

Justifying new campaign finance regulation requires developing government interests that the Court will find compelling, outside of the narrow corruption interest. A “participation interest” might be found compelling. Although that interest does not directly follow from the doctrine, it emanates from reasoning the Justices have relied upon, even in pursuing a deregulatory agenda. Governments can claim to act on the very goal the Court implicitly endorses: the maximization of individuals’ and entities’ ability to participate. And if persuasively developed, such a participatory interest could provide grounds for regulations of “drowning outs” to survive strict scrutiny.

In sum, multiple paths can be charted toward regulations of “drowning outs.” At least four such paths have been outlined here: reworked time, place, and manner restrictions; a listeners’ rights model; a reverse heckler’s veto; and a compelling “participation interest.” However, each faces obstacles. The idea that money has a “sound” may prove unpalatable. Frameworks for regulating “money as speech” remain underdeveloped. And then there are the usual political considerations: a conservative judiciary is unlikely to cut into *Citizens United*.

On top of the legal troubles, implementation difficulties might beset “drowning out” regulations. How low should spending caps be set? To what sorts of speech should limits apply? Enforcement is another obstacle. Consider the hypothetical, raised in *McCutcheon*, of one person donating money through one hundred different PACs.¹⁶¹ How could new limits be enforced without disclosure and tracking? Such questions of legislative design abound but are not worked out here.

¹⁵⁶ *Id.* at 19–20.

¹⁵⁷ 572 U.S. 185 (2014).

¹⁵⁸ *Id.* at 191 (plurality opinion).

¹⁵⁹ *Id.* at 203.

¹⁶⁰ *Id.* at 205–06.

¹⁶¹ *See id.* at 212.

However, thus far we have only glimpsed the new “drowning out.” As this threat matures, so too should the means of addressing it. For now, though, there are several practical lessons to derive. First, developing language is crucial; as more elections like the Proposition 22 campaign transpire, advocates might use the idea of a “drowning out” and money’s “sound” to name the new difficulty. Second, advocates can bite off pieces of the principles theorized here. If listeners’ rights and reverse heckler’s veto models are developed in other speech contexts, litigators might apply those doctrines to campaign finance. Similarly, states or cities considering campaign finance regulations might add language indicating the legislation was motivated by a “participatory” interest; those additions might better equip them for a future court challenge, where they could argue for a compelling interest in “participation” (rather than from the disowned posture of “antidistortion”).

CONCLUSION

Today’s campaign finance doctrine might be summed up in three words: money is speech. To some, that triplet spells doom; campaign finance regulation is at its end. But declaring that money is speech invites another question: *How* is money speech? This Note begins to answer. It does so by interrogating one novel and dire consequence of campaign finance’s deregulation: the “drowning out” risk. It shows that, via creative readings of precedent, the risk might be cognized within our current deregulatory doctrine, and perhaps regulated despite it.

We are at an inflection point. Our democracy teeters in the background. In the foreground, courts struggle to recalibrate outdated First Amendment doctrine to fit new media environments, while cascades of money churn through campaigns. This Note thus gestures at a place for appellate lawyers and ordinance drafters to start, in a longer journey still unfolding. Given the nature of this moment, this project embraces conceptual creativity in charting a path forward. As Justice Brennan once remarked: “It is the American habit, extraordinary to other democracies, to resolve many of our social, economic, philosophical, and political questions in lawsuits.”¹⁶² Better democracy will not be built with litigation. But inflexible doctrine that thwarts democratizing experimentation must be reimaged. Thus, lawyers must remain willing to raise ideas scattered in dicta and revive concepts the decades have buried. Such creativity may be the only salve for these strange times.

¹⁶² William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 2 (1965).