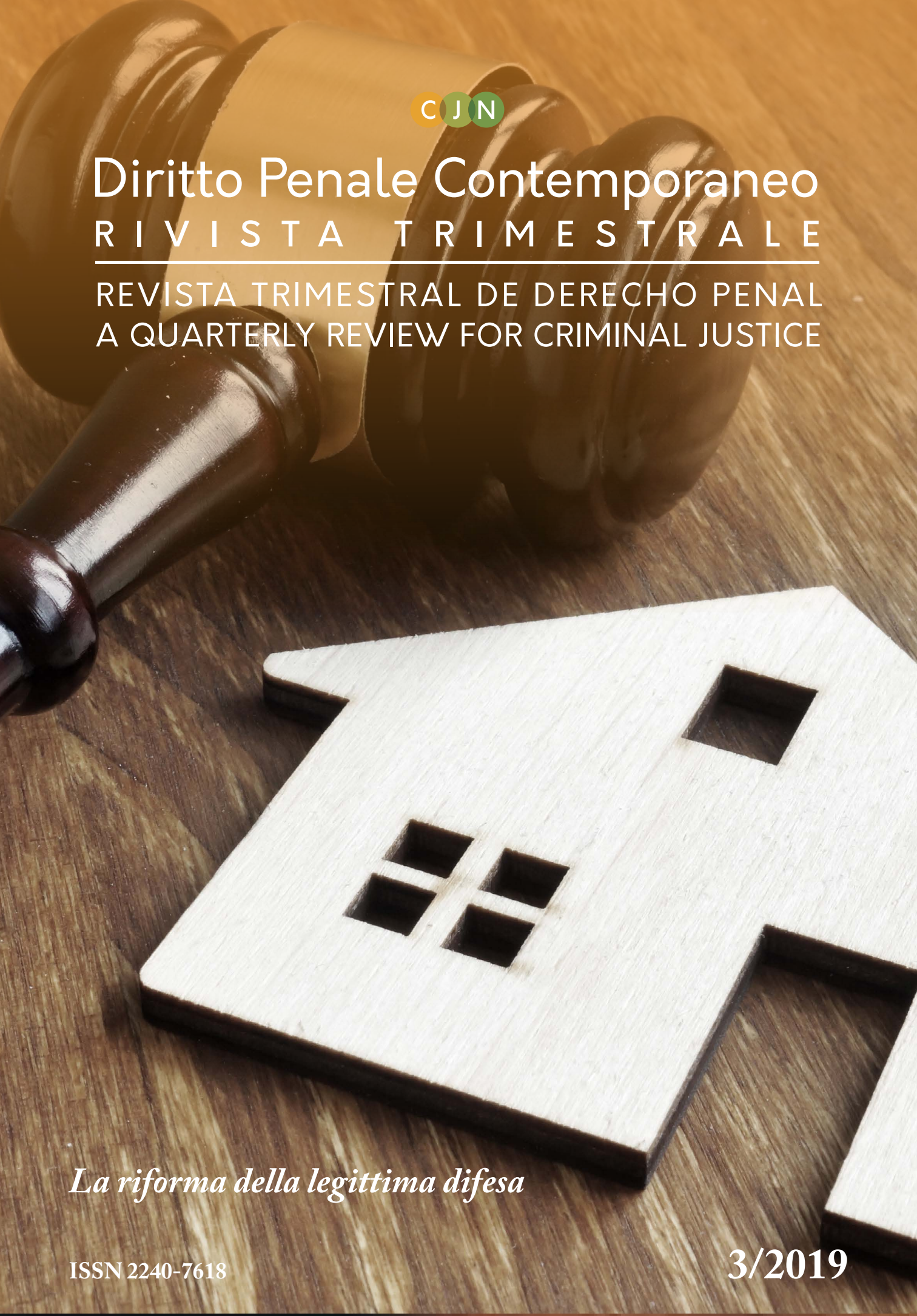

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Corruption, Freedom of expression
Corruzione, Libertà di espressione
Corrupción, Libertad de expresión

Abstracts

Within the US legal system, freedom of speech and corruption show an interesting point of tangency in the area of the campaign finance regulation. The crucial issue is whether limits imposed on campaign spending represent a restriction on the constitutionally protected political speech, and, thus, whether they violate the US Constitution. This article surveys the most significant US Supreme Court case law about the interactions between freedom of speech and corruption. In particular, analyzing the equation given by the Supreme Court between money spending for political purposes and political speech, this essay criticizes the use of the strong shield of the First Amendment for protecting actions that – as explained – may fall (far) outside the freedom of speech zone.

All'interno dell'area della regolamentazione del finanziamento delle campagne elettorali, libertà di parola e corruzione presentano un interessante punto di contatto. Punto essenziale è stabilire se la regolamentazione nel senso della restrizione dei contributi privati alle campagne elettorali sia anche limitativa della libertà di parola e se, quindi, le restrizioni suddette si po ngano in frizione con il First Amendment della Costituzione degli Stati Uniti. Il presente articolo esamina la più significativa giurisprudenza della Suprema Corte degli Stati Uniti riguardante l'interazione tra libertà di espressione e corruzione. In particolare, analizzando l'equazione elaborata dalla Suprema Corte che identifica i contributi dati alle campagne elettorali e l'espressione politica, questo articolo critica l'utilizzo dello scudo del First Amendment per proteggere azioni che, come si spiega, non rientrano nell'area della libertà di espressione..

En el sistema legal de los Estados Unidos la libertad de expresión y la corrupción muestran un interesante punto de contacto en el área de la regulación financiera de las campañas políticas. La cuestión crucial es si los límites impuestos al gasto electoral representan una restricción a la libertad de expresión constitucional protegido, y por lo tanto violan la Constitución de los Estados Unidos. El artículo revisa la jurisprudencia más relevante de la Corte Suprema de los Estados Unidos sobre interacción entre libertad de expresión y corrupción. En particular, analizando la ecuación dada por la Core Suprema entre gasto electoral y libertad de expresión, el ensayo critica la utilización del robusto escudo de la Primera Enmienda para proteger acciones que, como se explica, pueden caer fuera de la zona de la libertad de expresión.

*This article is a revised form of my presentation at the Anti-corruption International Forum (17-19 November 2017), Henan University, Kaifeng, China "The Interaction Between Freedom of Speech and Corruption within the United States Legal System".

Sommario

1. Background

Freedom of speech and corruption find an interesting point of contact within the legal regulation of the Campaign finance. Similarly to the Constitutional Emolument Clause, which prohibits people holding public offices from accepting any gifts from "any King, Prince, or foreign State,"[1] limitations imposed on the amount of money directed to finance political campaign identify specific categories of persons, amount of money, and timeframes before elections.[2] The crucial point, considering that the legislation regulating the campaign finance mainly aims at avoiding corruption, consists in whether limits on campaign spending represent a restriction on the constitutionally protected political speech.

Before entering the main subject of this contribution, two observations are needed.

The first is intended to highlight how freedom of speech, in the US, has a far wider content (or maybe more undefined contour) 3 than in other western countries. In this sense, calling into play freedom of speech in the area of limitation of money spending should not appear as surprising as it may sound in other western legal systems. In the United States, freedom of speech is a fundamental right, protected by the First Amendment, which specifies that "Congress shall make no law… abridging the freedom of speech, or of the press…".

Although freedom of speech enjoys a broad and strong protection, this right is not absolute and certain types of speech may be entirely prohibited. The Brandenburg v. Ohio incitement test, for instance, provides that speech can be restricted if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[4] The jurisprudence of the Supreme Court allowed other restrictions upon freedom of speech, such as child pornography and obscenity.[5]

Limitations on freedom of speech, when involving political speech, are analyzed by the Supreme Court using the strict scrutiny, which is the most rigorous evaluation consisting in a three-factors test.[6] Through strict scrutiny, the restriction is legitimate if it follows three specific parameters.[7] More in particular, the limitation to political speech is constitutional if:

[1] According to the US Constitution "*No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State*" (Article I, Section 9, Clause 8.

[2] Robertson, Winkelman, Bergstrand e Modzelewski, (2016), p. 377.

[3] Under this point of view, for example, it may be useful considering that while European countries, Canada, and Australia, incriminate the so called "hate speech", the United States protect such form of expression. For a recent decision of the US Supreme Court stating the protection of hate speech see Matal v. Tam, 583 U.S. (2017). In this case, a rock band tried to register its name as "The Slants" – a denigratory term for Asians – with the U.S. trademark office. The application for registration of the abovementioned name was rejected by the office under the Lanham Act's disparagement clause (15 U.S.C. 1052(a)), which prohibits to register trademarks that "[consist] of or [comprise] immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" (Disparagement clause). After appealing the decision before the administrative authority, the government's denial of the registration was confirmed in the administrative appeals process. The Plaintiff took the case to federal court, where the Federal Circuit court found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause. The Government appealed to the Supreme Court, that ruled – unanimously – the unconstitutionality of the abovementioned clause. In particular, the Supreme Court, highlighting the absence of the hate speech exception, as a limit to the freedom of speech, stated that the "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." '[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (For the relationship between trademark laws and freedom of speech see LaFrance Mary (2007) Levy (2006). For a survey on free speech challenges of trademark law after Matal v. Tam see Ramsey (2018), p. 401 ss).

[4] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[5] Galloway (1991), p. 883.

[6] The other two types of scrutiny are intermediate and rational basis. Under intermediate scrutiny, a law is upheld if: 1. it is substantially related to an important government purpose; 2. the means used need not be necessary, but must have a 'substantial relationship' to the end being sought. The intermediate scrutiny is used in regard to commercial speech, to which is given less protection than other forms of private speech. See also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (stating that in commercial speech cases the intermediate scrutiny is sufficient)

[7] United States v. O'Brien, 391 U.S. 367 (1968).

1. It serves a *compelling* interest of the government; 2. It is the *least restrictive means* of protecting the governmental interest; 3. It is *narrowly tailored* to the governmental scope. If the limitation meets the abovementioned criterion of this strict scrutiny, the restriction can be considered a legitimate one[8].

Another consideration is essential and warns about the different meaning of the terms corruption and bribery. The word "corruption" – as widely explored by the scholarship – has a broader meaning, as it describes more in general the "perversion of an institution, custom, etc. from its primitive purity."[9] In this particular context "corruption" is intended as an *action that breaks the democratic integrity*. In particular, the term corruption describes all kind of moral decay, and has a more specific meaning in the context of politics.[10] In this sense, corruption would not be confined to bribery of public officials, but extends to a broader threat to the democratic integrity, such as the potential inclination of politicians to be compliant with the wishes of large contributors.[11] On the other hand, bribery is, more specifically, a felony incriminated by federal and state laws[12]. In general, public bribery involves a breach of public trust

[8] Chemerinsky (2011, p. ,695.
[9] The Oxford English Dictionary 973-74 (2d ed. 1989); Cf. Arnold J. Heidenheimer, Michael Johnston, Political Corruption, Concepts and Context, Third Edition, (2002).
[10] Teachout (2009), 373; Underkuffler (2005).
[11] Teachout (2009), 389.
[12] See for example, 18 U.S. Code § 201 - Bribery of public officials and witnesses (a) For the purpose of this section:
(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;
(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and
(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.
(b) Whoever—
(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
(A) to influence any official act; or
(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;
(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
(A) being influenced in the performance of any official act;
(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
(C) being induced to do or omit to do any act in violation of the official duty of such official or person;
(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;
(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;
shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.
(c) Whoever—
(1) otherwise than as provided by law for the proper discharge of official duty—
(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or
(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;
(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;
(3) directly or indirectly, demands, seeks, receives, accepts, directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

and/or abuse of position by federal, state, or local officials and their private sector accomplices. By definition, a government official, whether elected, appointed or hired, commits bribery when he or she demands, solicits, accepts, or agrees to receive anything of value in return for being influenced[13] in the performance of their official duties. The essential feature of bribery is the specific intent to give or receive something of value in exchange for an official action.[14] In this sense bribery is qualified as *quid pro quo*[15] form of corruption, and, in other words, it represents a specific form of corruption. The difference in the meaning of corruption and bribery constitutes one of the focal and critical points in the jurisprudence of the Supreme Court scrutinizing legislative actions limiting campaign spending. In particular, the jurisprudential and scholarly debate focuses on what counts as the kind of corruption – or better, the extension of the meaning of corruption – that, serving as a compelling interest of the government, is suitable to limit campaign money.[16]

What follows aims at explaining the core of this debate. In particular, this paper will examine how the two different currents within the jurisprudence of the US Supreme Court intend the corruption as an interest suitable to outweigh freedom of speech.

2. Corruption as a *quid pro quo* arrangement

2.1. *Buckley v. Valeo*

In the late 1960s and early 1970s, the public sentiment that money was influencing politics on a large scale[17] lead the Congress to pass, in 1971, the Federal Election Campaign Act[18] (hereinafter FECA). The main features of the FECA, amended in 1974 in the wake of the Watergate scandal, consisted of imposing extensive limits on campaign spending. More in particular, the abovementioned legislation required an expanded system of disclosure, created the Federal Elections Commission, established the presidential public finance program and banned a large scale of candidates' campaign funding. One of the clear goal of the reform was the reduction of corruption, intended as "the implicit exchange of campaign contribution for legislators' voters or other government action."[19]

The constitutionality of FECA was challenged, for the first time, before the US Supreme Court in Buckley v. Valeo.[20] In that decision, rendered in 1976, the Supreme Court confronted the issues of whether the amount of money that candidates receive for their political campaign may be regulated by Congress[21]; whether Congress may limit the amount of money

shall be fined under this title or imprisoned for not more than two years, or both.
(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.
(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

[13] As it appears, the US conception of bribery, which literally refers to any form of influence of a government official, includes the so called "improvised bribery" of the Italian criminal law system, which at art 318 c.p. punishes the government official who fulfils his/her own duties receiving the payment of anything of value.

[14] U.S. vs. Sun-Diamond Growers of California, 526 U.S. 398, 404 (1976).

[15] It should be noted that the Latin phrase "*quid pro quo*" is used in common law to refer to an exchange of good or services, indicating that an item or a service has been traded for something of value ("something for something"). The phrase has been in use in this sense since the 16th century. An early testimony of this use can be found in Erasmus of Rotterdam, "*Poticaries and phisions do more greuously offende, than do these persones now rehersed, which haue a prouerbe amonge them, quid pro quo, one thynge for another*" (*Lytle Treatise of the Maner and Forme of Confession*, 1535). In civil law instead the locution "*quid pro quo*" keeps its original meaning of "something instead than another thing", sometimes understood as misunderstanding. This use derives from a section of some pharmaceutical compilation of the late middle age, including drugs that could be traded with others.

[16] Briffault (2011), 644.

[17] McNulty (2007), p. 153.

[18] 2 U.S.C par. 431 et seq.

[19] Strauss (1994), p. 1369.

[20] 424 U.S. 1 (1976).

[21] Teachout (2009), p. 383.

they spend[22]; whether the legislator may require disclosure of campaign contributors.[23] The relevance of the abovementioned issues was more directly related to the constitutional doubt of whether limits on the amount of money received by candidates for their political campaigns violated the First Amendment. The core of the problem, in other words, was whether money used in the political arena represented a form of protected speech.

The essential part of the decision in Buckley is the recognition of the protection of the First Amendment to the area of finance campaign. In particular, the Supreme Court highlighted how "virtually all meaningful political communications in the modern setting involves the expenditure of money." In this sense – as stated by the Court – the First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people" so that "a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression."

After establishing the relevance of freedom of speech in the area of campaign finance, the court analyzed the legitimacy of the limitation posed by FECA, using the strict standard of analysis[24]. In this frame, the Supreme Court recognized the goal of limiting corruption and appearance of corruption as "sufficiently important" governmental interest. In particular, according to the Court, such limits were intended to prevent that large contributions would be given "to secure a political *quid pro quo* from current and potential office holders,"[25] jeopardizing the integrity of the system of representative democracy.

Once explained the relationship between corruption and campaign money spending, the Supreme Court draw a distinction between contributions constitutionally banned and expenditures which cannot be capped by the legislator. More in particular, the Court argued as "contributions", i.e. money donated to the campaign[26], imply the existence of dependence between the party who is financing the campaign and the campaign itself; therefore, legal caps on this form of money spending are constitutional, because of the existence of the interest of a governmental anticorruption interest. In this sense, the Court held the constitutionality of the restrictions on money used to support a "clearly identified candidate", identifying such contributions with those expenditures address to *expressly* advocating the election or defeat of a specific candidate.[27]

Eventually, the Court in Buckley distinguished the abovementioned "contributions" from money used not for the abovementioned scope (i.e. expressly advocating the election of an identified candidate), made independently from the candidate's campaign. These expenditures directed to finance an activity referred to as "issue advocacy" do not pose any danger in terms of improper commitments from candidates.[28] Therefore, the Supreme Court concluded that this form of "independent expenditures", involving the freedom of speech principle and, on the other hand, not posing any anticorruption concern, cannot be capped by the law.

On the base of this reasoning, the Court held the constitutionality of limitation on contributions and disclosure measures, as serving directly the government's goal of limiting corruption in politics. Contrarily, highlighting the universal agreement on the major purpose of the First Amendment, i.e. protecting the free discussion of governmental affairs, including discussion of candidates, the Supreme Court held the unconstitutionality of independent expenditures. However, the Court in Buckley did not preclude the possibility that independent spending could be regulated by the legislator, under the anti-corruption limit[29], when the danger may be proved as concrete[30].

[22] Teachout (2009), p. 383.
[23] Teachout (2009), p. 383.
[24] For the language used by the Court in Buckley, a part of the scholarship suggested that the Court used a fourth different level of scrutiny between the strict and the intermediate standard. McNulty (2007), p. 154, (arguing that *Buckley* was unclear as to whether the Court considered the closest scrutiny standard as intermediate or strict scrutiny, or something in between).
[25] Buckley v. Valeo, 424 U.S. 1, 26 (1976) (also stating that "Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one").
[26] See Gerken (2015), p. 6 (describing contribution as "money given to a campaign").
[27] In the Buckley v. Valeo opinion, the Court mentioned eight examples that constituted "express words of advocacy", such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." This test was referred to as the "magic words" test or standard. See Holman-Claybrook (2004), 240.
[28] Buckley v. Valeo, 424 US at 47.
[29] Briffault (2011), p. 659.
[30] Buckley v. Valeo, 424 US a 47 (finding that independent expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not

The principle to be drawn from Buckley, as for the interest of the present essay, is that all the limitations to financial contributions directed to the political campaign area, if not aimed to serve directly the anticorruption interest, intended as a *quid pro quo* form of corruption, do not outweigh the damage done to freedom of speech and, therefore, are unconstitutional.

3. First National Bank of Boston v. Bellotti

An interesting side of the relationship between limits to contributions to political campaigns and corruption concerns contributions coming from corporations. Considering the peculiar juridical nature of these subjects, it may be questioned whether they enjoy the protection of the First Amendment. The issue was confronted by the Supreme Court in First National Bank of Boston v. Bellotti.

In Bellotti the Supreme Court was called to verify the constitutionality of a Massachusetts criminal statute,[31] which prohibited corporations from making expenditures directed to influence the outcome of a vote, in matters not affecting corporations' interests, assets and holdings. More in particular, the National Bank of Boston, along with other national banks and corporations, wished to spend money to publicize their opposition to a ballot initiative that would permit Massachusetts to implement a graduated income tax. After the Attorney General of Massachusetts informed the organizations his intention to enforce the abovementioned criminal statute, the organizations argued that the statute violated their First Amendment rights. While the Supreme Court of Massachusetts upheld the constitutionality of the statutes, the Supreme Court, in the case First National Bank of Boston v. Bellotti stated, instead, the violation of the First Amendment.

In Bellotti the Court posed at the core of its decision the object of the first amendment, stressing the principle that in the area of campaign finance regulation, the speech and not the speaker is the referent to be considered for constitutional purposes.[32] What was stated in Bellotti is that freedom of speech is independent from the identity of the speaker and that electioneering[33] "is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation than from an individual."[34]

In Bellotti, the Supreme Court stated that a corporation enjoys the protection offered by the First Amendment[35] and that, as a result, all restrictions on corporate speech should be subject to strict scrutiny,[36] with the necessity that they must be justified by a "compelling" interest.

4. Austin v. Michigan Chamber of Commerce

A minority part of the jurisprudence gives a different meaning to corruption, broader than corruption as mere *quid pro quo* given from Buckley on. In this sense, particularly worth of attention is the decision rendered by the Supreme Court in Austin v. Michigan. In that decision the object of scrutiny was a state law, the Michigan Campaign Finance Act, prohibiting corporations from using treasury money for independent expenditures to support or oppose candidates in elections for state offices. However, this statute allowed corporations to make such expenditures, setting up an independent fund intended solely for political purposes. The

only undermines the value of the expenditure with the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments for the candidate").

[31] Mass. Gen. Laws Ann. ch. 55, West 1978.

[32] Bellotti, 435 US at 776 (affirming that "The proper question therefore is not whether corporations have First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether the challenged law abridges expression that the First Amendment was meant to protect. We hold that it does").

[33] Bellotti, 435 US at 777: "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual".

[34] Bellotti, 435 US at 777.

[35] It is worthy of attention that the outcome of the decision in Bellotti was opposed by 4 members of the Court. In particular justice White and Rehnquist wrote their dissent opinion. While Justice White, among other points, argued that the statute did not prevent individuals of corporations from communicating their views to the public on an individual basis, Justice Rehnquist pointed out that corporations are, and had always been, considered artificial persons under the law, and therefore not granted the rights of natural persons, even considering that the right of expression is not functionally necessary to pursue their economic interests.

[36] First Amendment-Corporate Free Speech, 69 J. Crim. L. & Criminology, 544, 548, (1978)

rational of the law was avoiding corruption or the appearance of corruption, keeping into account the "unique legal and economic characteristics of corporations".

The Supreme Court in Austin held the legitimacy of the Michigan Campaign Act, supporting the existence of the anti-corruption interest of the government, intended to regulate the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[37] In this sense, the Court broadened the meaning of corruption. In fact, while in Buckley the *quid pro quo* was at the heart of the corruption concern, in Austin the Supreme Court considered that "wealth can unfairly influence elections". The sense of the reasoning in Austin can be summed as follows: the disproportion of means to access to political speech leads out of the area of political protected speech[38]; indeed, inequality has the power to transform public speech into nonpublic speech.

Moreover, in Austin the Supreme court confirmed also that, although freedom of speech applies to corporations as well, corporations can be treated differently than individuals when it comes to candidate elections.

As noted by the scholarship, Austin in particular is opposed to Bellotti[39]. In fact, while Bellotti is concerned with the protection of freedom of speech, which does not tolerate distinctions in terms of identity of source,[40] the Court in Austin is more focused on the need to control the role of private wealth and power, intended as a possible form of *corruption* of the democratic integrity. More in particular, what it is central in Austin is a different concept of corruption: Austin suggests that where political speech does not meet proportionality ("little or no correlation"), it ceases to be political and, as such, protected speech, becoming corrupted speech.[41]

5. McConnell v. Federal Election Commission

In 2002 the Congress enacted the Bipartisan Campaign Reform Act (hereinafter BCRA), aiming to further regulate campaign money spending, with particular reference to the so called soft money, the money not donated in support of a specific candidate but to their party[42] and the newly defined "electioneering communications"[43]. To these scope the BCRA prohibited any broadcast, cable or satellite communication that refers to a clearly identified federal candidate, publicly distributed within 30 days of a primary or 60 days of a general election and is targeted to the relevant electorate. The BCRA also widened the range of hypothesis in which a

[37] 494 U.S. 652 (1990), 652
[38] Teachout (2009), p. 393.
[39] Briffault (2011), p. 652 (arguing that Austin and Bellotti do not easily fit in the same jurisprudential space).
[40] Bellotti, 435 U.S. 777 (stating that "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of the source, whether corporation, association, union or individual").
[41] Teachout (2009), p. 393.
[42] Soft money is opposed to hard money. Under the FEC Act, money given directly to candidates for federal elective office qualified as "hard money". Under the abovementioned legislation, hard money is also money given directly to political parties for the purpose of supporting candidates for a federal office. Unlikely, soft money refers to contributions for the general promotion of a political party's message, must be deposited in a party's non-federal (state-level) bank accounts, and cannot be used in connection with presidential or congressional elections.
[43] Congress passed the BCRA in order to eliminate soft money donations to national parties and to ensure that electioneering communications immediately before election day are financed with regulated money and properly disclosed to the public.
The BCRA, among other things:

- Bans national party committees from raising or spending money outside the limits and prohibitions of the Federal Election Campaign Act (FECA);
- Limits state and local party committees' use of such funds for activities affecting federal elections;
- Prohibits solicitations and donations by national, state and local party committees for §501(c) tax exempt organizations that make expenditures in connection with federal elections and §527 organizations that are not federal political committees or state or local party or candidates' committees;
- Prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring or spending soft money in connection with federal elections and limits their ability to do so in connection with state elections;
- Bans state and local candidates and officers from raising and spending nonfederal funds for public communications that promote, attack, support or oppose a federal candidate;
- Defines and regulates "electioneering communications;"
- Implements the party "choice provision;"
- Increases the hard money contribution limits;
- Permits even higher contribution limits for candidates opposed by "millionaires" who use their own funds for campaign expenditures;
- Defines coordination with a candidate or party committee; and
- Bans minors from making contributions to federal candidates and political party committees. (See McConnel v. Fec, Case Summary).

communication made by an entity has to be considered coordinated with the candidate, in fact imposing restrictions on the use of soft money. The BCRA was constitutionally challenged in McConnel v. FEC, with particular reference to the prohibition on corporate and union campaign expenditures.

In McConnel v. FEC the Court upheld the provision at issue, stating that while restriction on free speech was minimal, it was justified by the government's legitimate interest in preventing "both the actual corruption threatened by large financial contributions and... the appearance of corruption".[44]

The "fairly capacious definition of corruption" given by the Court in McConnell deserves particular attention for this contribution's purposes[45]. The majority opinion, in upholding the challenged provision, concluded that Congress could regulate not only hard money, but also soft money. In particular, the Court considered *quid pro quo* corruption as overlapping with the undue influence on officeholders deriving from large contributions, [46] conceived in itself a danger for democracy and, as such, a compelling interest of the government suitable to imposing limits on freedom of speech.

6. Citizens United v. Federal Election Commission

The BCRA was further scrutinized by the Supreme Court in Citizens United v. Federal Election Commission[47]. Citizens United, a conservative nonprofit organization, released a harshly critical documentary[48] about the Democratic party's candidate, wishing to distribute it through video-on-demand services to cable television subscribers within a 30-day period before the start of the 2008 Democratic primary elections, and to advertise it in three specially produced television commercials. In order to do so without imposition of penalties, Citizens United sought an injunction before the US District Court of Washington DC to prevent the Federal Election Commission from the application of the Bipartisan Campaign Reform Act and, in particular, of section 203 of BCRA. According to this provision, corporations and unions were prevented from financing, using their treasury money, "electioneering communications," defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and made within 60 days before a general election or 30 days before primary elections. The District Court refused the injunction citing McConnel vs FEC, stating the constitutionality of section 203 of BCRA.

The case was reargued before the Supreme Court that reconsidered what stated in McConnel v. FEC. In this sense the Supreme Court struck down the abovementioned provision, finding that all independent expenditures, *including those made by corporations*, do not give rise to corruption or appearance of corruption. In fact, according to the Supreme Court, "the fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt", since "ingratiation and access, in any event, are not corruption." [49] As it is easy to draw, according to the Court in Citizen United, the "corruption" interest suitable to impose limitations on freedom of speech is only *quid pro quo* arrangement.[50] In other terms and to the ends of this contribution, the Court distinguished undue influence, special access, or favoritism, from the corruption that justifies campaign restrictions.[51]

The Court held that independent expenditures, even when made by corporations, never generate the danger of corruption, because only arrangement with candidates create the dan-

[44] McConnel v. FEC, 45-145.
[45] Briffault, (2011), p. 644.
[46] McConnell, 540 US at 153 (stating "Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation").
[47] Citizens United v. FEC, 130 S. Ct. 876, (2010)
[48] The documentary named "Hillary: The movie" concerned the candidate Hillary Clinton.
[49] Citizen United v. FEC, 130 S. Ct. 876, 910
[50] Id.
[51] Briffault (2011), p. 661.

ger for actual or apparent corruption.[52]

The majority's vision was forcefully opposed by the dissenting opinion that highlights, instead, how in the vision of the Framers corruption had a broader meaning, encompassing dependency of public officers on private interest.[53]

7. Conclusive Considerations: Is Limiting Money Spending on Political Campaign a Limitation on Free Speech?

The jurisprudential evolution of the US Supreme Court in the area of campaign money focuses on the delicate balance between freedom of speech and the anticorruption interest. In particular, *quid pro quo* corruption as an interest suitable to balance restrictions imposed on the First Amendment seems to be prevalent.

However, a part of the academic community and a minoritarian Supreme Court jurisprudence found the inequality concept is at the core of the problem of freedom of speech and campaign financing. In particular, the inequality concept, intended as unequal access to political life and political power, has been often called into play when it comes to the regulation of campaign financing. According to this view, as argued by the Supreme Court in Austin, corruption encompasses the "unfair deployment of wealth for political purposes" that creates unequal voice or political expression. In this frame, as effectively pointed out by David Straus, corruption becomes a "derivative problem,"[54] and the concern about corruption overlaps with the nature of democratic politics. In this sense, political actors are influenced directly by the high pressure deriving from campaign contributions that, eventually, affects their decisions.[55]

However, further considerations lead to think that other interests, beyond anticorruption, should be able to outweigh limitation of campaign spending within the US legal system.

The first considers inequality as a circumstance of fact that in itself jeopardizes the First Amendment. In fact, disproportion in terms of allocation of economic resources will effectively silence the voice of those who have limited economic means.[56] In this sense, what should be considered is how an effective protection of freedom of speech, which takes into account the fact that resources are not equally distributed, would require limits on campaign spending, instead than conflicting with it. What should come into consideration, when evaluating the legitimacy of the campaign finance, may be of First Amendment values:[57] the equal possibility of different voices to have the same influence on the electoral campaign[58]. From this point of view, it should be stressed that democracy is strongly qualified by the actual and equal possibility of its members to express opinions and affect other people opinions.[59] ,

On the other hand, what should be questioned is the equation, given from Buckley on, between money spending for political purposes and political speech. In fact, the considera-

[52] In the wake of Citizens United, the United States Court of Appeals for the District of Columbia Circuit, in SpeechNow.org v. FEC will find that "independent expenditures do not corrupt or give the appearance of corruption as a matter of law".

[53] Citizen United, at 994 (Stevens, J. concurring in part and dissenting in part).

[54] Strauss, p. 1370. According to Strauss, "it is far from clear that campaign finance reform is about the elimination of corruption at all. That is because corruption understood as the implicit or explicit exchange of campaign contributions for official action-is a derivative problem. Those who say they are concerned about corruption are actually concerned about two other things: inequality, and the nature of democratic politics. If somehow an appropriate level of equality were achieved, much of the reason to be concerned about corruption would no longer exist. And to the extent the concern about corruption would persist under conditions of equality, it is actually a concern about certain tendencies, inherent in any system of representative gov- ernment, that are at most only heightened by quid pro quo campaign contributions-specifically, the tendency for democratic politics to be- come a struggle among interest groups".

[55] Teachout (2009), p. 392.

[56] Teachout, (2009), p. 394 (referring to "suppressed speech").

[57] Teachout, (2009), p. 394.

[58] On the value of equality within the political liberties see the analysis of Rawls (1993). ("The first principle of justice [should include] the guarantee … that the worth of the political liberties to all citizens, whatever their social or economic position, [is] approximately equal."). More specifically on the campaign financing regulation see for example at p. 359 "public financing of political campaigns and election expenditures, limits on contributions and other regulations are essential to maintain the fair value of the political liberties."

[59] In this sense see Sustain (1994), p. 1392 ("People who are able to organize themselves in such a way as to spend large amounts of cash should not be able to influence politics more than people who are not similarly able. Certainly economic equality is not required in a democracy; but it is most troublesome if people with a good deal of money are allowed to translate their wealth into political influence. It is equally troublesome if the electoral process translates poverty into an absence of political influence. Of course economic inequalities cannot be made altogether irrelevant for politics. But the link can be diminished between wealth or poverty on the one hand and political influence on the other. The 'one person-one vote' rule exemplifies the commitment to political equality. Limits on campaign expenditures are continuous with that rule").

tion that "virtually every means of communicating ideas in today's mass society requires the expenditure of money" - made by the majority part in Buckley - so that "a restriction of the amount of money a person or a group can spend on political communication during a campaign necessarily reduces the quantity of expression," lacks of the logic consequentiality that the Court implies as necessary. As the dissenting opinion affirmed in Buckley, "money is not always equivalent to or used for speech, even in the context of political campaigns". In fact, as observed by Justice White, "there are… many expensive campaign activities that are not themselves communicative or remotely related to speech"[60]. In this sense, the equation of money on campaign speech with political speech does not consider sufficiently that not all money spending in a campaign are connected to the communication of an idea. Therefore, declaring the unconstitutionality of a legal act meant to regulate the with the strong shield of the First Amendment, may lead, at least in some case, to shield actions that are far out from the area of freedom of speech and expression. The First Amendment, especially when seenreferred as a corporations' right, may be used to foster merely economic interests. The risk is that the marketplace of ideas[61] may therefore survive only as a market,[62] where the economic power, instead than individuals, the people addressed by the US Constitution, will dictate the rules of the game.

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[60] Buckley, at 263 (White dissenting in part).

[61] The concept of the marketplace of ideas as referred to a democracy was introduced into the American jurisprudence by justice Holmes, who dissented in Abrams v. United States (250 U.S. 616 (1919) (arguing "the best test of truth is the power of thought to get itself accepted in the competition of the market."). According to the "marketplace of ideas" theory developed by Judge Holmes, it is the process of robust debate, not limited by any governmental interference, that will lead, ultimately, to the best perspectives or solutions for societal problems, and, in turn, to the proper evolution of society.

[62] Applying the distinction between ends and means it is possible to say that property rights, even when used to serve freedom of speech, are distinguishable from freedom of speech itself, and, thus, they may be entitled to a different protection. As effectively pointed out by Justice Steven, who did not take part to Buckley, in Nixon v. Shrink Missouri, Government Pac PAC 528 U.S. 377 (2000) "speech has the power to inspire volunteers to perform a multitude of tasks on on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measures of protection to the use of money to accomplish such goal as it provides to the use of ideas to achieve the same results."

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