

CHAPTER THREE

THE FINANCING OF CANDIDATES' CAMPAIGNS

Almost all jurisdictions impose some restrictions on how candidates finance their campaigns.¹ This chapter addresses the different types of regulations imposed on the private financing of candidate campaigns, focusing on the limits imposed on the amounts of contributions and restrictions on the sources of those contributions. The public funding of candidate campaigns is discussed in Chapter Nine.

I. Financial Limits on Contributions

A limit on the amount that can be contributed to a candidate is one of the most common measures adopted to curb the undue influence of big money on politics. This section focuses on the contribution limits applicable to individuals, political action committees (“PACs”), and political parties. A meaningful regulatory system will include limits from all three sources.

Different jurisdictions define “contributions” differently.² Some jurisdictions include loans in their definitions. We discuss that approach separately below.

A. Limits on Contributions from Individuals

The federal government and numerous states and localities impose limits on the amount that individuals may contribute to candidates. The amounts vary widely, reflecting different legislative judgments about the risks of private campaign financing and the benefits of well-funded campaigns. For instance, for 2009-10, the federal limit

¹ States lacking contribution limits include Utah, Virginia, Oregon and Missouri. Recently New Mexico and Illinois added contribution limits for the first time.

² For example, the Federal Election Campaign Act provides a multi-page definition, explaining exactly what the term does and does not include. Under the federal statute, the term “contribution” includes:

- (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal Office; or
- (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. § 431(8)(A). For an explanation of what does *not* count as a “contribution” under federal law, see 2 U.S.C. § 431(8)(B). Michigan’s definition has received repeated attention in court. See *Dep’t of State Compliance & Rules Div. v. Mich. Educ. Ass’n-NEA*, 650 N.W.2d 120 (Mich. Ct. App. 2002) (holding that including “forbearance” in definition of contribution did not make definition unconstitutionally vague); *Mich. Educ. Ass’n v. Sec’y of State*, 616 N.W.2d 234, 240 (Mich. Ct. App. 2000) (relying on the intent to influence an election in holding that money given to finance a recount qualified as a contribution under Michigan law). Kentucky’s definition of “contribution” was struck down in a poorly reasoned opinion holding that the definition impermissibly applied to the spending of self-financed candidates. *Anderson v. Spear*, 356 F.3d 651, 667 (6th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004). In addition, the federal government and some states treat certain coordinated expenditures by individuals or groups as contributions subject to limits. For a more detailed description of coordination, see Chapter Six.

on contributions from individuals is \$2,400 per election, or \$4,800 per election cycle (for the primary and general elections combined). The National Conference of State Legislatures has a chart with state limits on contributions to candidates, which may be viewed at http://www.ncsl.org/print/legismgt/limits_candidates.pdf.

Tips

Tip: *Before upholding individual contribution limits, courts may require some evidence of corruption or the appearance of corruption in your state.* In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Supreme Court made it clear that state legislatures could rely for this purpose, at least in part and perhaps entirely, on the evidence and findings accepted in *Buckley v. Valeo*, 424 U.S. 1 (1976).³ In addition, the *Shrink Missouri* Court determined that the following types of evidence, taken together, would be sufficient to establish a governmental interest in combating perceived corruption:

- an affidavit from a legislator about the real and perceived influence of money on politics and its role in persuading the legislature to adopt the challenged limits;
- newspaper articles and opinion pieces about the influence of money on politics;
- judicial opinions from prior cases citing evidence of corruption related to campaign contributions; and
- prior passage of a campaign finance initiative (which effectively acts as a public opinion poll).

Examples of additional evidence that might be presented in court include:

- opinion polls about public attitudes toward money and politics;
- direct mail or other advertising produced in support of candidates, which suggests that their opponents are improperly influenced by contributors;
- invitations to fundraisers promising special access to public officials for major donors;
- data about suspect patterns of giving, such as contributions to both candidates in a general election, contributions to all members of a significant legislative committee, contributions to the losing candidate before a general election and promptly afterward to the winning candidate, contributions timed to coincide with votes on bills affecting the contributor, etc.;
- data about the effects of limits on competition between candidates, and data about the competitiveness of elections in that jurisdiction;
- official documents from enforcement actions related to campaign contributions or other illegal payments to candidates or elected officials; or
- statements from both current and former politicians and contributors who can comment on the influence of money on the legislature and who are willing to testify in court.

³ Courts are likely to be even more demanding of a legislative record after *Randall v. Sorrell*.

Tip: *Do not starve the system.* Candidates do need some money to run campaigns. If contribution limits are so low that candidates cannot amass the resources needed for effective advocacy, the limits will be struck down.⁴ The types of evidence that the Supreme Court has considered in deciding whether limits were unconstitutionally low have included:

- how much was given to candidates in recent pre-reform elections in amounts over the limits you propose;
- comparisons of limits with other states' limits and the federal limits;
- how many contributions under the proposed limits would be required to replicate the amounts raised without the limits;
- what fundraising techniques have been used in your jurisdiction and what additional techniques exist;
- how much pre-reform *competitive* campaigns have been costing, for both incumbents and challengers;
- how much money raised by challengers in competitive campaigns would have been reduced under the new limits;
- how pre-reform campaigns have been run in your jurisdiction and what techniques are available to keep costs down;
- examples of innovative candidates who were able to run effective campaigns for less money than their opponents;
- studies or testimony showing that purchasing significant television time is not the key to an effective campaign;
- technological advances that may reduce campaign costs;
- whether contribution limits in other jurisdictions or at other times in your jurisdiction have had a severely detrimental effect on the amounts candidates can raise.

Note that data and anecdotal information drawn exclusively from experience under the pre-reform campaign finance system cannot serve as a basis for predicting post-reform fundraising success without raising serious methodological problems. But courts do not always follow good social science practice, and may, therefore, consider the evidence anyway.

In jurisdictions that have already implemented contributions limits, courts may also consider the following types of evidence:

- amounts actually raised by the candidates in comparison with pre-limit elections;
- factors other than contribution limits that could account for any reductions in the amounts raised; and
- features of the jurisdiction's electoral system that keep elections competitive notwithstanding reduced spending.

⁴ See, e.g., *Foster v. Dilger*, 2010 WL 3620238 (E.D. Ky. Sept. 9, 2010) (preliminarily enjoining enforcement of Kentucky statute limiting contributions to board of education candidates to \$100 each on associational rights grounds).

Tip: Consider introducing public funding to make up for private money taken out of the system. Doing so tempers claims that the limits are too low for competitive races. See Chapter Nine for a discussion of public funding.

Tip: Consider graduated limits. *Buckley* did not require that contribution limits be graduated to reflect the size of electoral districts, but the Supreme Court recognized that such limits would be more finely tuned than one flat limit for all candidates.

Tip: Limits that apply per election, rather than per year or per cycle (including both the primary and general elections), have better prospects of survival. Limits that apply per year are more likely to precipitate claims of discrimination against challengers, because incumbents are usually the only candidates who engage in substantial off-year fundraising. Limits that apply per election cycle may also give an advantage to incumbents, who are less likely to face challengers in a primary.

Tip: Limits that are indexed for inflation may be more likely to withstand challenge. In *Randall v. Sorrell*, the plurality found that the failure to index the limits for inflation “means that limits which are already suspiciously low . . . will almost inevitably become too low over time.” 548 U.S. 230, 261 (2006). The current federal limits are indexed for inflation.

Legal Analysis

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), is the leading case on contribution limits. Since *Buckley*, the Supreme Court has twice considered constitutional challenges to such limits. We discuss the evolving case law below, beginning with *Buckley*. The cases establish that contribution limits pass constitutional scrutiny if they are crafted to combat the reality and appearance of corruption, while permitting candidates to amass the resources necessary for competitive campaigns.

In *Buckley*, the Supreme Court upheld a limit on contributions from individuals of \$1,000 per candidate per election.⁵ 424 U.S. at 23-35. With minor exceptions, the ceiling applied whether the contribution was given directly to the candidate or a committee authorized by the candidate to accept contributions in support of his or her campaign or through an intermediary to either of those recipients in funds earmarked for the campaign. *Id.* at 23-24 & n.24. The Court held that the \$1,000 limit did not unjustifiably burden First Amendment freedoms,

⁵ Self-financing candidates might be regarded as making contributions to their own campaign committees. See *Shrink Missouri*, 529 U.S. at 405 (Breyer, J., joined by Ginsburg, J., concurring); *Buckley*, 424 U.S. at 287 (Marshall, J., concurring in part and dissenting in part); see also *Buckley v. Valeo*, 519 F.2d 821, 854 (D.C. Cir. 1975), *rev'd*, 424 U.S. 1 (1976). But the Supreme Court in *Buckley* viewed self-financing strictly as an issue of *expenditures* for one’s own campaign and struck down FECA’s limit on such speech. See 424 U.S. at 51-54. Since then, lower courts have uniformly interpreted *Buckley* to preclude any limit on self-financing. Without any limit on self-financing, wealthy candidates have an enormous advantage over candidates who must rely on outside sources of funds to finance their campaigns, and there is now no lawful way to wholly eliminate that advantage. The advantage can be reduced by encouraging wealthy candidates to accept voluntary spending limits and by providing public financing to qualifying competing candidates. See Chapter Nine for further discussion of public financing and Chapter Five, section II(A), for further discussion of candidate self-financing. Congress attempted to address the advantage of self-funding candidates with the so-called “Millionaires’ Amendment” in BCRA and some states have adopted similar provisions. However, the Millionaires’ Amendment was struck down as unconstitutional in *Davis v. FEC*, 128 S. Ct. 2759 (2008).

was not unconstitutionally overbroad, and did not unlawfully discriminate against challengers or minor-party candidates.⁶

1. *First Amendment Analysis*

Before focusing on the specific contribution limits challenged in *Buckley*, the Court sought to determine the extent of the burden that limits generally would impose on contributors' First Amendment freedoms and thus to determine the applicable standard of review. The Court concluded that "a limitation upon the amount that any one person or group may contribute to a candidate . . . entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. According to the Court, a contribution served only as a "symbolic expression of support," which did not change materially with the size of the contribution. *Id.* at 21. Because the contributor's right to discuss candidates and issues remained otherwise unimpaired, the contribution limit "involve[d] little direct restraint on his political communication." *Id.*

Buckley also determined that contribution limits would not have a dramatic effect on the recipients' speech rights. On the record in that case, only 5.1% of money raised by candidates in 1974 was contributed in amounts greater than \$1,000. *Id.* at 21 n.23. Under those circumstances, the *Buckley* Court inferred:

The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression. *Id.* at 21-22. Because FECA's contribution limits would not "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy," the Court determined that the limits would not have a severe impact on political dialogue. *Id.* at 21.

In *Shrink Missouri*, the Court reaffirmed *Buckley's* assessment of the First Amendment impact of contribution limits. 528 U.S. at 387 ("We thus said, in effect, that limiting contributions left communication significantly unimpaired."). The Court also found that, notwithstanding the effects of inflation over nearly a quarter of century, a limit of approximately \$1,000 would not prevent Missouri statewide candidates from amassing the resources needed for effective advocacy. *See id.* at 395-96. The Court reached this conclusion even though more than 25% of the pre-reform funds raised by candidates for one statewide office were collected in amounts over the Missouri limit, *see* Brief of Senator Mitch McConnell, *et al.*, *Amici Curiae* in Support of Respondents, 1999 WL 367218, at *28, *Shrink Missouri*, 528 U.S. 377, and even though total expenditures in the post-reform 1998 post-reform statewide primary elections actually dropped by approximately 89%, *see* 528 U.S. at 426 n.10 (Thomas, J., joined by Scalia, J., dissenting).

⁶ BCRA raised the individual contribution limits from \$1,000 per election to \$2,000 per election and indexed them for inflation. The FEC has a chart with current contribution limits, which may be viewed at <http://www.fec.gov/pages/brochures/contriblimits.shtml>.

The *Buckley* Court also recognized that the contribution caps limited “one important means of associating with a candidate or committee,” by reducing the amount of funds that a contributor could pool with others in furtherance of common political goals. 424 U.S. at 22; *see id.* at 24 (“[T]he primary First Amendment problem raised by the Act’s contribution limitations is their restriction of one aspect of the contributor’s freedom of political association.”). Nevertheless, contributors remained free to join political associations and to assist personally with a candidate’s campaign, and the limits “permit[ted] associations and candidates to aggregate large sums of money to promote effective advocacy.” *Id.* at 22. The contribution limits thus did not infringe upon associational rights nearly to the extent of expenditure ceilings, which the Court found to preclude associations from amplifying the voices of their adherents. *Id.* Contribution limits could therefore be upheld “if the State demonstrate[d] a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms.” *Id.* at 25.

Over time, the *Buckley* Court’s articulation of the standard of review for First Amendment challenges to contribution limits generated considerable confusion and controversy. Until the Court decided *Shrink Missouri*, opponents of campaign finance reform had been arguing that such limits should be subject to the most strict scrutiny. But in *Shrink Missouri*, the Court expressly confirmed that contribution limits require a less compelling justification than restrictions on expenditures. *See* 528 U.S. at 387.

Having recognized that contribution limits implicate First Amendment rights to some extent, *Buckley* continued its analysis with a review of the three governmental interests proffered in support of the \$1,000 cap: (1) preventing the reality and appearance of corruption; (2) equalizing “the relative ability of all citizens to affect the outcome of elections;” and (3) putting a brake on the skyrocketing costs of campaigns. 424 U.S. at 25-26. The Court determined without hesitation that the first interest sufficed as a constitutional justification for the contribution ceiling and that it thus did not need to decide whether the other two interests were adequate rationales for that restriction.⁷ As a consequence, “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”⁸ *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (“*NCPAC*”).

⁷ Although the Court did not formally rule on the legitimacy of the latter two rationales, *Buckley* dropped two footnotes casting considerable doubt on them. *See* 424 U.S. at 26 nn.26-27. The Court noted that contribution limits alone would not have an equalizing effect as long as unlimited independent expenditures were permitted, *see id.* at 26 n.26, and that such caps would only indirectly affect overall costs of campaigning, by “making it relatively more difficult for candidates to raise large sums of money,” *id.* at 26 n.27. The Court considered, and rejected, all three rationales in examining FECA’s expenditure limits. *See* Chapters One, Five, and Six.

⁸ But several Justices have indicated a willingness to consider alternative rationales for campaign finance regulation. *See Shrink Missouri*, 528 U.S. at 401 (Breyer, J., joined by Ginsburg, J., concurring) (focusing on the values of fairness and democracy); *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 649 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) (arguing that campaign finance regulations tend to protect “equal access to the political arena”). The joint opinion authored by Justices Stevens and O’Connor in *McConnell v. FEC*, favorably cites Justice Breyer’s concurrence in *Shrink Missouri* in noting that “measures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate.” 540 U.S. 93, 137. For a discussion of the relationship between corruption and inequality, see David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994). *But see Citizens United v. FEC*, 130 S.Ct. at 909 (“When *Buckley* identified a sufficiently important government interest in preventing corruption of the appearance of corruption, that interest was limited to *quid pro quo* corruption.”).

The Supreme Court’s campaign finance cases have offered no consistent definition of “corruption” or the “appearance of corruption.”⁹ Under *Buckley*, actual exchanges of money for political favors are clearly within the purview of “corruption.” See 424 U.S. at 26-27 (“To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”); see also *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) (“*Colorado Republican I*”) (recognizing “the Government’s interest in preventing exchanges of large financial contributions for political favors”). But the *Shrink Missouri* Court explained clearly that the concern about corruption is “not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors.” 528 U.S. at 389; cf. *NCPAC*, 470 U.S. at 497 (“Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.”). It is clear after *Shrink Missouri* that contribution limits may be used to “address the power of money ‘to influence governmental action’ in ways less ‘blatant and specific’ than bribery.” 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (“*Colorado Republican II*”) (acknowledging that corruption extends beyond explicit cash-for-votes agreements to “undue influence on an officeholder’s judgment”).

McConnell v. FEC confirmed that “corruption” means more than outright trades of votes for money. 540 U.S. 93, 145-47 (2003) (favorably citing *Shrink Missouri* and *Colorado Republican II*) *overruled in part by Citizens United*, 130 S. Ct. 876 (2010). Finding that the *McConnell* plaintiffs “conceive[d] of corruption too narrowly,” the Court commented: “Many of the ‘deeply disturbing examples’ of corruption cited by this Court in *Buckley* to justify FECA’s contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials.” *Id.* at 150 (citations omitted). The *McConnell* Court chided Justice Kennedy for a “crabbed view of corruption, and particularly of the appearance of corruption, [that] ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.” *Id.* at 152. According to the Court:

Justice Kennedy’s interpretation of the First Amendment would render Congress powerless to address more subtle but equally dispiriting forms of corruption. 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 the 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.

⁹ See Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 342 (2009) (arguing the Constitution carries within it an anti-corruption principle); Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comment 127 (1997) (arguing that three conceptions of corruption have been confused in campaign finance jurisprudence); Paul S. Edwards, *Defining Political Corruption: The Supreme Court’s Role*, 10 B.Y.U. J. Pub. L. 1 (1996) (analyzing influences on the evolution of the concept).

Id. at 153. The broad conception of corruption applies equally when analyzing the “appearance of corruption.” *Id.* at 153-54.

Citizens United, 130 S. Ct. 876 (2010), however, indicates that the Court has backtracked somewhat on what it finds to be corruption. Justice Kennedy explained:

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption. . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

Reliance on a generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.

Citizens United, 130 S. Ct. at 909-10 (internal citations & quotation marks omitted). The precise reach of the *Citizens United* decision, in light of previous precedents, is still unknown and subject to interpretation by the lower courts and further interpretation by the Supreme Court. The effect may be limited by the fact that *Citizens United* was reviewing a ban of a particular source of funds for independent expenditures as opposed to a nominal limit on contributions.

Buckley equated the “appearance of corruption” with the appearance of “improper influence” or “impropriety” and the “potential for corruption.” 424 U.S. at 27-30. *Buckley* was quite clear that avoiding that appearance is “critical,” *id.* at 27 (quotation and citation omitted), even if the appearance is grounded not in evidence of actual corruption, but only in “the opportunity for abuse inherent in the process of raising large monetary contributions.” *Id.* at 30. The state may legitimately address the demoralizing effect of both the real and the “*imagined*” coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.” *Id.* at 25 (emphasis added).

Shrink Missouri confirmed that the state’s interest in preventing the appearance of corruption was sufficient to justify contribution limits, stating:

While neither law nor morals equate all political contributions, without more, with bribes, we spoke in *Buckley* of the perception of corruption “inherent in a regime of large individual financial contributions” to candidates for public office . . . as a source of concern “almost equal” to *quid pro quo* improbity . . . Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works “only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.”

528 U.S. at 390 (internal citations omitted). In *McConnell*, the Court specifically held that the sale of access to office-holders gives rise to the appearance of corruption. 540 U.S. at 153-54.

Proving a state interest in preventing real or perceived corruption was considerably easier after *Shrink Missouri*. 528 U.S. at 391 (“The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”). The idea that combating corruption justifies limits on large contributions is “neither novel nor implausible.” *McConnell*, 540 U.S. at 165. The Supreme Court has made it clear that states may rely on the evidence in *Buckley* to justify the adoption of state campaign finance laws. See *Shrink Missouri*, 528 U.S. at 391. Whether or not states may rely exclusively on that evidence is not clear from the opinion, however, so wise reformers will collect additional evidence before enacting (or reducing) contribution limits. *Randall* made it clear that special justification is needed if contribution limits raise the danger signs identified in that case. 548 U.S. at 244.

Proof of actual corruption may be possible in some states, where scandals have erupted or officials have been indicted for bribery, extortion, or other illegal exploitation of their official power to obtain campaign contributions. If a court will not accept that the appearance of corruption is “inherent” in a particular system, proponents of reform can introduce evidence of various kinds to establish that the problem is “not an illusory one.” *Buckley*, 424 U.S. at 27. The types of evidence that should be considered by the courts are listed in the *TIPS* section above. *McConnell* provides good insight into the range of evidence found persuasive by the Supreme Court.¹⁰

¹⁰ In *Randall*, the plurality did not find evidence from Vermont legislators about their responsiveness to contributors persuasive enough to justify the very low contribution limits at issue in that case. See 548 U.S. at 278 (Souter, J., dissenting) (discussing evidence of corruption).

Having established that preventing the reality and appearance of corruption is a “constitutionally sufficient justification for the \$1,000 contribution limitation,” *id.* at 26, the *Buckley* Court rapidly disposed of the question whether the limit was “closely drawn.” The Court stated:

The Act’s \$1,000 contribution limitation focuses precisely on the problem of large campaign contributions the narrow aspect of political association where the actuality and potential for corruption have been identified while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

Id. at 28. The limit therefore did not unjustifiably burden First Amendment freedoms.

Buckley separately discussed two overbreadth claims raised against the contribution limit, rather than treating them as part of the tailoring analysis. The Court recognized that “most large contributors do not seek improper influence over a candidate’s position or an officeholder’s action,” but held that “the truth of that proposition . . . does not undercut the validity of the \$1,000 contribution limitation.” *Id.* at 29-30. The Court simply deferred to Congress’s determination that the limit was necessary to safeguard against the appearance of impropriety.

Likewise, the Court rejected the claim that the limit was too low, because \$1,000 was far less than the amount required to exercise actual undue influence over candidates and officeholders. The Court rejected the need for congressional “fine tuning” of contribution limits, stating:

[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind.

Id. at 30 (quotation and citation omitted).

The *Buckley* Court did not explain what it meant by a “difference in kind” between various levels of contribution caps, but *Shrink Missouri* did. Rejecting the claim that Missouri’s \$1,075 limit was different in kind from the \$1,000 limit upheld in *Buckley*, the Court stated:

In *Buckley*, we specifically rejected the contention that \$1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate. . . . [W]e referred instead to the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to “amas[s] the resources necessary for effective advocacy” We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.

528 U.S. at 397 (internal citations omitted). This test for an unconstitutionally low contribution limit has proven to be difficult to satisfy.

Before the decision in *Shrink Missouri*, many lower courts invalidated limits on individual contributions to candidates that were lower than \$1,000 per election.¹¹ Since none of those courts understood just how rigorous the test for an unconstitutionally low contribution limit really was, and certainly none of them applied the specific test articulated by the Supreme Court in *Shrink Missouri*, the authority of those cases is questionable at best. In contrast, between the decision in *Shrink Missouri* and the decision in *Randall*, no court invalidated any individual contribution limit.¹²

In *Randall*, the plurality employed a two-step analysis in determining that Vermont's limits reached the "lower bound" of constitutionality. 548 U.S. at 248-49 (quoting *McConnell*, 540 U.S. at 137). The plurality first asked whether, despite the usual rule of deference to the legislature as to where to set contribution limits, there were "danger signs" suggesting that the limits might "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 249. Those danger signs, the plurality said, were present because: (a) Vermont's limits applied per election cycle, instead of separately to the primary and general election; (b) Vermont's limits were, overall, the lowest in the nation; and (c) Vermont's limits were well below the lowest limit this Court has previously upheld, a per election limit of \$1,075 (adjusted bi-annually for inflation). *Id.* at 251.¹³

¹¹ See *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 523 (8th Cir. 1998) (invalidating Missouri's \$275, \$525, and \$1,075 limits on contributions to state legislative and statewide candidates), *rev'd sub nom. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377; *Russell v. Burris*, 146 F.3d 563, 573 (8th Cir. 1998) (invalidating Arkansas's \$100 and \$300 limits on contributions to legislative and statewide candidates); *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995) (invalidating Missouri's \$100, \$200, and \$300 limits on contributions to legislative and statewide candidates); *Citizens for Responsible Gov't State Political Action Comm. v. Buckley*, 60 F. Supp. 2d 1066, 1099 (D. Colo. 1999) (invalidating Colorado's \$100 and \$500 limits on contributions to legislative and statewide candidates), *vacated as moot sub nom. Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Cal. Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1297 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999); *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 924 F. Supp. 270, 281 (D.D.C. 1996) (invalidating Washington DC's \$50 and \$100 limits on contributions to City Council and mayoral candidates), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997). *But see Daggett v. Webster*, 81 F. Supp. 2d 128 (D. Me.), *aff'd sub nom. Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 634 (Alaska 1999) (upholding Alaska's \$500 annual limit on contributions to all candidates).

¹² See *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092-96 (9th Cir. 2003) (upholding Montana's \$100, \$200, and \$400 limits on contributions to legislative candidates, statewide candidates other than governor and lieutenant governor, and candidates jointly filed for the offices of governor and lieutenant governor); *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002) (upholding Akron's \$100 limits on contributions to ward council members and \$300 limits on contributions to at-large members or Mayor); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 461-62 (1st Cir. 2000) (upholding Maine's \$250 limit on contributions to legislative candidates); *Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838, 840 (8th Cir. 2000) (upholding Missouri's \$275, \$525, and \$1,075 limits on contributions to House, Senate, and statewide candidates); *Fla. Right to Life, Inc. v. Mortham*, 2000 WL 33733256, at *4-6 (M.D. Fla. Mar. 20, 2000) (upholding Florida's \$500 limit "even though candidates in Florida are raising fewer funds than they are capable of raising and fewer funds than were actually raised under previous limits"). In November 2000, California voters approved a ballot measure with contributions limits higher than those preliminarily enjoined in *California Prolife Council PAC*, 989 F. Supp. 1282 (E.D. Cal. 1998).

¹³ Vermont's campaign finance law imposed contribution limits of \$200 per election cycle for candidates for state representative, \$300 for candidates for state senate, and \$400 for gubernatorial candidates and other candidates for statewide office. Vt. Stat. Ann.

Because of those danger signs, the plurality went on to the second part of its test, considering five factors that, in its view, cumulatively justified invalidation of Vermont’s contribution limits. *Id.* at 252-53. These factors included:

- the significant restriction on “the amount of funding available for challengers to run competitive campaigns” against incumbents, particularly the funds supplied by political parties;
- the same dollar limit on party contributions to candidates as on individual contributions to candidates;
- the absence of exceptions for some kinds of volunteer expenses;
- the absence of an automatic adjustment for inflation; and
- the absence of a special justification for the lower Vermont contribution limits.

Under the plurality’s decision, it was the combined effect of all these factors, taken together, that rendered Vermont’s contribution limits unconstitutional. *Id.* at 253.

Because the Supreme Court’s plurality opinion in *Randall* is so limited by the particular facts of that case, the Court’s opinion in *Shrink Missouri* and the subsequent lower court decisions upholding contribution limits should continue to provide significant guidance as to how courts will review contribution limits. For example, where there are “instances where innovative candidates were able to run very ‘effective’ campaigns for less money than their opponents,” or evidence that expensive media is not cost effective, courts should be able to conclude that contribution limits will not lead to a system of suppressed political advocacy. *Fla. Right to Life, Inc. v. Mortham*, 2000 WL 33733256, at *5 & n.12 (M.D. Fla. Mar. 20, 2000). Evidence that candidates raised more money under the limits than before they existed or that they won with substantial surpluses persuaded the Ninth Circuit that complaints about Montana’s limits were misplaced. *Mont. Right to Life Ass’n v. Eddleman*, 343 F.3d 1085, 1095 (9th Cir. 2003).

Shrink Missouri had the benefit of post-reform data, as did the *Mortham* and *Eddleman* courts. Until *Randall*, when little or no such data were available, baleful predictions about the effects of contribution limits were received with pointed skepticism. See *Daggett v. Comm’n on Governmental Ethics*, 205 F.3d 445, 460 (1st Cir. 2000) (noting that “‘worst-case’ scenario statistics, which consider the historical funding pattern and discount any contribution made over the limit,” over-predict the loss of contributions). “It is the statistics distilled from experience”—such as cross-jurisdictional studies or studies of campaign finance systems over time—“that, far more than worst-case scenarios, should inform decisions as to proper contribution limits.” *Id.* at 462. In *Randall*, however, the plurality gave significant weight to testimony that the limits would have a substantial impact on the ability of challengers to raise money for hotly contested campaigns. 548 U.S. at 253-54 (relying heavily on evidence about the effect of limits on party contributions to challenger candidates).¹⁴ Post-reform data are now available for all states with contribution limits under \$1,000 per election.

tit. 17, § 2805(a) (2007). It also imposed the same limits on political party contributions to candidates that it applied to individual contributions to candidates. Vt. Stat. Ann. tit. 17, § 2805(b).

¹⁴ A subsequent study conducted after *Randall* casts grave doubt on the incumbency protection hypothesis. See Ciara Torres-Spelliscy, Kahlil Williams and Thomas Stratmann, “Electoral Competition and Low Contribution Limits” (Brennan Center 2009)

2. *Equal Protection Analysis*

In *Buckley*, opponents of reform also argued that the \$1,000 contribution limit would discriminate against challengers and minor parties. The Court recommended caution when considering a facial equal protection challenge of a statute that applies the same restrictions to all candidates. “Absent record evidence of invidious discrimination against challengers as a class,” the Court stated, “a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.” *Buckley*, 424 U.S. at 31; *see also Shrink Missouri*, 528 U.S. at 389 n.4 (rejecting a similar claim, noting that “nothing in the record here gives respondents a stronger argument than the *Buckley* petitioners made”).

In *Buckley*, the Court treated the discrimination claim with respect to major-party challengers separately from the claim of minor-party candidates. In the case of major-party challengers, the Court recognized that the contribution limits might have an adverse effect in some cases, where the amounts that would have been raised over the limits would be important to the challenger’s potential for success, but concluded that “the record provide[d] no basis for predicting that such adventitious factors will invariably and invidiously benefit incumbents as a class.”¹⁵ 424 U.S. at 33; *see Cal. Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1291 (E.D. Cal. 1998) (“The commanded hesitancy, and the absence of evidence of the invidious discrimination that *Buckley* also demands, defeats plaintiffs’ claim of discriminatory impact.”), *aff’d*, 164 F.3d 1189 (9th Cir. 1999); *Driver v. Distefano*, 914 F. Supp. 797, 803 (D.R.I. 1996) (“[T]here is no evidence that the ‘calendar year calculation’ . . . is responsible for incumbents receiving more from individual donors than challengers receive.”).

The Court found the minor-party candidates’ claim more troubling, but concluded that the record was “virtually devoid of support” for their allegation that the limitation would have a serious effect on the initiation and scope of their candidacies. *Buckley*, 424 U.S. at 34. The Court refused to speculate about the effect of the limits on the candidates’ ability to raise seed money before candidates had even tried to raise funds in small amounts. *See id.* at 34 n.40.

Where a record of class-wide discrimination *can* be established, equal protection claims may succeed. In *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312 (9th Cir. 1992) (“*SEIU*”), for example, plaintiffs alleged that contribution limits calculated on a fiscal year basis discriminated against challengers. Because the record showed that incumbents were essentially the only candidates to raise money in the off year, the Ninth Circuit found that measuring contribution limitations on a fiscal year basis invariably and invidiously discriminated against challengers as a class. *See id.* at 1316-18, 1321; *see also Shrink Missouri*, 528 U.S. at 404 (Breyer, J., joined by Ginsburg, J., concurring) (calling for scrutiny of contribution limits at levels that

(finding low contributions are linked with more competitive races).

¹⁵ The record evidence showed major-party challengers were generally well known in their community, that they were often incumbents in other offices, and that they were capable of raising large sums for campaigning. *See Buckley*, 424 U.S. at 32 & nn.34-36. The record also established that incumbents raised twice as much money as challengers in sums over the limits, so that FECA might actually have the “practical effect of benefiting challengers as a class.” *Id.* at 32 & n.37.

“insulate[] legislators from effective electoral challenge”); *but see Mont. Right to Life Ass’n v. Eddleman*, 343 F.3d 1085, 1091 n.2 (cautioning that *SEIU* “fails to recognize the impact of the Supreme Court’s superceding decision in *Shrink Missouri*”).

B. Limits on Contributions from PACs

Jurisdictions that impose monetary limits on contributions from individuals often impose such limits on contributions from PACs as well. The amount of the limit may or may not be the same as that imposed on individual contributions. Under federal law, for example, small PACs (ordinary “political committees”) are subject to the contribution limits applicable to individuals, whereas PACs that have numerous financial supporters and give to multiple candidates (“multicandidate political committees”) are permitted to make larger contributions.¹⁶ Campaign finance legislation should carefully define the PACs that are governed by its provisions.¹⁷

Tips

Tip: *Collect and analyze data about contributions from PACs to candidates.* Evidence of large contributions from PACs, and correlations between those contributions and subsequent legislative or administrative action in the PACs’ interests, can be useful to establish the reality or appearance of corruption.

Tip: *Consider structuring limits on PAC contributions to enhance the voices of small donors.* You may want to allow PACs that receive small amounts of money from numerous donors to make larger contributions than a single individual.

Legal Analysis

Buckley upheld a \$5,000 per election limit on contributions to candidates from “multicandidate political committees.” *See* 424 U.S. at 35-36 (sustaining 2 U.S.C. § 441a(a)(2)(A)). The *Buckley* plaintiffs had challenged the provision as discriminatory against *ad hoc* associations or small PACs, as opposed to established interest groups, because FECA defined a “multicandidate political committee” as a group that had been registered as such with the FEC for at least six months, received contributions from more than 50 persons, and (except for state political parties) contributed to at least five candidates for federal office. *See* 2 U.S.C. § 441a(a)(4). The Court brushed aside the claim, holding that the provision enhanced opportunities for group participation in the political process, rather than impairing freedom of association, and at the same time prevented circumvention of the limits

¹⁶ *But see* Chapter Four and *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (holding that federal PACs which only make independent expenditures may accept unlimited contributions).

¹⁷ Being a PAC need not be a stated purpose of a non-profit corporation, as set forth in its articles of incorporation, for the organization to qualify as a political committee. *See League of Women Voters v. Davidson*, 23 P.3d 1266, 1275 (Colo. App. 2001).

on individual contributions by ensuring that individuals would not just call themselves committees. See *Buckley*, 424 U.S. at 35; see also *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106 (8th Cir. 2005) (upholding provisions of Minnesota law limiting PAC contributions to candidates to \$500 in election years and \$100 in off years). *Daggett*, 205 F.3d at 462 (“[L]imitations on contributions from groups are a necessary adjunct if limits on individual contributions are to be effective.”); see also *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 625 (Alaska 1999) (upholding Alaska’s \$1,000 annual limit on PAC contributions to all candidates as not different in kind from *Buckley*’s \$5,000 PAC limit); *Fla. Police Benevolent Ass’n Political Action Comm. v. Fla. Elections Comm’n*, 430 So. 2d 483, 485 (Fla. Dist. Ct. App. 1983) (recognizing anti-evasion interest and interest in “preserving the integrity of the electoral process by encouraging the active, alert responsibility of individual citizens” in upholding \$1,000 limit on contributions by PACs).

The only lower courts to have struck down limits on contributions from PACs are those that also invalidated limits on individual contributions.¹⁸ The limit upheld in *Shrink Missouri* applied to both individuals and PACs; similarly, the limit struck down in *Randall* applied to individuals, PACs, and political parties.

In the late 1990s, some states (including California and Arkansas) enacted special provisions for “small donor PACs.” Colorado did the same in 2002. These provisions establish a system where both the amount contributors may give to PACs and the amount PACs may give to candidates are limited. The small donor PACs are required to collect their funds exclusively from individuals in small amounts well under the ordinary limit on contributions to PACs, but they are permitted to give more to candidates than ordinary PACs. The provisions reflect a legislative judgment that the increased potential for improper influence of candidates can be tolerated, because there is little risk of using the small donor PACs to circumvent individual contribution limits and because such PACs encourage grassroots participation in political campaigns.

Unfortunately, the only appellate court to decide a challenge to a small donor PAC provision was the Eighth Circuit. That court has never upheld a contribution limit unless the Supreme Court has given it no choice. In *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), the Eighth Circuit applied strict scrutiny to Arkansas’s small donor PAC rule and struck it down on First Amendment grounds. The court refused even to consider the state interest in promoting citizen participation and determined that the higher limit on contributions to candidates was not narrowly tailored to prevent the reality or appearance of corruption. *Id.* at 572. Under *Shrink Missouri*,

¹⁸ See section I(A)(1) of this chapter; *Shrink Missouri*, 161 F.3d at 523 (invalidating Missouri’s \$275, \$525, and \$1,075 limits on PAC contributions to House, Senate, and statewide candidates), *rev’d*, 528 U.S. 377; *Russell*, 146 F.3d at 566, 573 (invalidating Arkansas’s \$300 limits on PAC contributions to legislative and statewide candidates); *Carver*, 72 F.3d at 635, 643, 645 (invalidating Missouri’s \$100, \$200, and \$300 limits on PAC contributions to legislative and statewide candidates); *Citizens for Responsible Gov’t State PAC*, 60 F. Supp. 2d at 1084, 1087 (invalidating Colorado’s \$100 and \$500 limits on PAC contributions to legislative and statewide candidates), *vacated as moot sub nom. Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Cal. Prolife Council PAC*, 989 F. Supp. at 1297 (preliminarily enjoining California’s \$250/\$500 and \$500/\$1,000 variable contribution limits on PAC contributions to candidates); *Nat’l Black Police Ass’n*, 924 F. Supp. at 281 (invalidating Washington DC’s \$50 and \$100 limits on contributions to City Council and mayoral candidates).

the Eighth Circuit plainly applied the wrong standard of review, and *Russell's* reasoning is directly at odds with the Supreme Court's decision in *Buckley*, which upheld the differential limits applied to different kinds of PACs.¹⁹ See 424 U.S. at 35-36.

In a decision that did not raise any constitutional issues but relied on statutory interpretation, a New Jersey court found that PAC contribution limits of \$5,000 per election applied to primary as well as general elections. *In re Contest of the Democratic Primary Election*, 842 A.2d 820 (N.J. Super. App. Div. 2004). In a decision based on the interpretation of New Jersey's election law, the defendants in the case had argued that the "per election" limit applied only to the general election, leaving primaries basically unregulated. The court held that the "per election" PAC contribution limits outlined in state law are applicable to both the primary and general elections. *Id.* at 824.

C. Limits on Contributions from Political Parties

The major parties in the United States have national, state, and local committees that work actively to elect their nominees. Some jurisdictions limit the amount of money that political parties may contribute to candidates as a means of preventing evasion of individual limits.

Tips

Tip: Contributions from political parties, which represent pooled donations, typically should be set at levels higher than contributions from individuals.

Legal Analysis

Direct transfers of funds from political parties to federal candidates are considered contributions under FECA and are subject to its \$5,000 per election limit imposed on multi-candidate PACs.²⁰ See *Colorado Republican I*, 518 U.S. at 616-17 (citing 2 U.S.C. § 441a(a)(2), (8)). The national committee of a political party is also specially authorized under FECA to make expenditures of specified additional amounts in connection with the general election campaigns of candidates for federal office who are affiliated with the party. 2 U.S.C. § 441a(d)(2)-(3). The primary argument in favor of limiting both political party contributions and coordinated expenditures is that such limits are necessary to prevent evasion of the individual limits on contributions to candidates. Without limits

¹⁹ The district court in *Russell* upheld the law establishing small donor PACs, recognizing that "restricting small donor PACs to receiving no more than \$25 in annual contributions from only individuals greatly diminishes the potential for actual or perceived corruption that can accompany contributions from approved [large donor] PACs." 978 F. Supp. 1221, 1227 (E.D. Ark. 1997). The trial court also noted that the provisions applicable to the two kinds of PACs reflected "the judgment of the voters that these . . . PACs have 'differing structures and purposes,' and that different forms of regulation are permitted." *Id.* (citing *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981)).

²⁰ The federal \$5,000 party limits have been challenged again. *Cao v. FEC*, 619 F.3d 410 (5th Cir. 2010) (upholding the limit), cert. petition filed No. 10-776 (Dec. 8, 2010).

on such expenditures, federal candidates could solicit contributions of up to \$20,000 to political parties from contributors who had already donated the maximum amount to the candidate's campaign. The parties could in turn use the funds to support the candidate's campaign in full consultation with the candidate, who would then be indebted to the contributor not merely for a \$1,000 donation but for potentially much larger sums.

In June 2001, the U.S. Supreme Court confirmed its support for the anti-evasion rationale in *Colorado Republican II*, which upheld the federal limits on coordinated expenditures.²¹ The Court stated in no uncertain terms that “all Members of the Court agree that circumvention is a valid theory of corruption.” 533 U.S. at 456. The Court reasoned that, without the limit, wealthy donors would have an added incentive to evade existing contribution limits by channeling funds through the political parties. The Court noted that the “tally” system—whereby candidates get credit for funds they raise for the party, which in turn supports the candidates' campaigns—was already “a sign that contribution limits are being diluted and could be diluted further if the floodgates were open.” *Id.* at 459 n.22.

Colorado Republican II reaffirms earlier Supreme Court decisions upholding restrictions designed to prevent circumvention of other provisions of an integrated campaign finance scheme. *See, e.g., Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-99 (1981) (recognizing that Congress limited contributions to PACs “in part to prevent circumvention of the . . . limitations on contributions [to candidates]” and that “this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*”); *Buckley*, 424 U.S. at 38. Lower courts have also recognized the anti-evasion rationale in a variety of contexts. *See Ky. Right to Life v. Terry*, 108 F.3d 637, 649 (6th Cir. 1997) (acknowledging a “legislative determination that aggregate limitations are necessary to prevent manipulation of permanent committees in order to evade the Act's \$1,000 limitation on direct contributions to any one political candidate”); *Vote Choice v. DiStefano*, 4 F.3d 26, 35 (1st Cir. 1993) (recognizing “the state's interest in enforcing its contribution limits”); *SEIU*, 955 F.2d at 1322 (noting that a transfer ban can serve the state's interest in preventing circumvention of contribution limits only if the underlying limits are valid).

The *Colorado Republican II* Court also recognized that coordinated expenditures were the functional equivalent of contributions, *see* 533 U.S. at 443, leaving little doubt about the constitutionality of limits on contributions to political parties. Moreover, the decision rejected the idea that political parties are entitled to more constitutional protection from campaign finance regulations than are individuals and PACs. *See id.* at 454-55. Indeed, the Court recognized that the very closeness of parties to their candidates *increases* the efficacy of parties as “conduits for contributions meant to place candidates under obligation.” *Id.* at 452.

Some states have also limited the amounts that parties can give to candidates, and such caps have been upheld as a means of preventing evasion of individual contribution limits. *See Mo. Republican Party v. Lamb*, 270 F.3d 567, 570 (8th Cir. 2001) (“[I]t is not necessary for the state to show that circumvention is actually occurring in Missouri, for the factual record developed in *Colorado [Republican] II* suffices to justify Missouri's conclusion that

²¹ Plaintiffs in *Cao* also challenged the federal limits on coordinated party expenditures. Thus far, the Fifth Circuit has rejected this challenge. However, the plaintiffs have sought a writ of certiorari with the Supreme Court on December 8, 2010. *See Id.*

means other than its earmarking provision are necessary to prevent circumvention.”), *cert. denied sub nom. Mo. Republican Party v. Connor*, 535 U.S. 1112 (2002); *Citizens for Responsible Gov’t State PAC v. Buckley*, 60 F. Supp. 2d at 1095, *vacated as moot sub nom. Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Mo. Libertarian Party v. Conger*, 88 S.W.3d 446, 447-48 (Mo. 2002) (per curiam) (upholding Missouri’s limits under the state Constitution); *Alaska Civil Liberties Union*, 978 P.2d at 625-26. With respect to the numerical limits placed on contributions by political parties, the standard articulated in *Shrink Missouri* applies. See *Lamb*, 270 F.3d at 571 (citing the *Shrink Missouri* standard in upholding Missouri’s limits on political party contributions, even “though they are much lower than those upheld in *Colorado II*”).

In *Randall*, 548 U.S. 230, the Supreme Court struck down Vermont’s limits on party contributions to candidates in part because the individual limits and party limits were exactly the same and thus provided no anti-evasion justification for the limits. In addition, *Randall* found that the limits, both for parties and individuals, were so low as to “reduce the voice of political parties’ in Vermont to a ‘whisper.’” *Id.* at 259; see *Kermani v. N.Y. State Bd. of Elections*, 487 F. Supp. 2d 101 (N.D.N.Y. 2006) (striking down New York law that banned political parties from making contributions to candidates during a primary election, evaluating ban as a “zero dollar,” “in the dirt” limit).

In the wake of *Citizens United*, which did not directly impact the constitutionality of contribution limits, opponents of campaign finance reform are attempting extend its reach into the contribution realm. The question of whether political party contributions will be affected by the progeny of *Citizens United* is very much in its preliminary stages at this time. The most notable case to date on this issue is *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065 (S.D. Cal. 2010). In that case, plaintiffs sought preliminary injunctions against the enforcement of a number of San Diego’s campaign finance ordinances. One of those ordinances banned contributions by non-individuals to candidates in San Diego’s city elections, which includes political parties and corporations. *Id.* at 1080-81. Finding that “the City’s contribution limit threatens harm to the right to associate in a political party,” *id.* at 1082, the court preliminary enjoined enforcement of the ordinance with respect to political parties. *Id.* at 1087. The ban on contributions by corporations was left undisturbed. *Id.* Appeals by both parties on most of the issues in the case are currently pending before the Ninth Circuit.²²

D. Loans to Candidates

Candidates who cannot raise enough outright donations to pay for their campaigns as they proceed may obtain loans to finance the balance of the costs. The loans may come from third parties or the candidates may loan their own money to their campaigns, with the hope of paying back the loan with funds raised later.

Tips

Tip: Including loans in the definition of “contribution” will help to prevent evasion of the basic contribution limit.

²² See *Thalheimer v. City of San Diego*, No. 10-55322 (9th Cir. filed Mar. 9, 2010). Oral arguments were heard on October 4, 2010.

Tip: Loans from candidates to their campaigns may be limited, even though candidates' self-financing of their campaigns may not be.

Legal Analysis

For more than 20 years, FECA has treated loans as contributions from both the lender and any guarantor. *See* 2 U.S.C. § 431(8)(A) (defining a “contribution” to include a “subscription, loan, advance, or deposit of money”); 2 U.S.C. § 431(8)(B)(vii)(I) (defining a bank loan as “a loan by each endorser or guarantor”); *see also* *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1114-16 (9th Cir. 1988) (treating post-election guarantee of personal loan to candidate as a campaign contribution). Opponents of campaign finance reform have evidently recognized that the Supreme Court’s analysis of contribution limits in general applies equally to loans, loan guarantees, and extensions of credit, and they have not specifically challenged FECA as to those provisions.

Kentucky’s limitation on loans has been repeatedly subject to constitutional attack. In *Wilkinson v. Jones*, a trial court recognized that loans create indebtedness to the grantor and thus carry with them the potential for the appearance and reality of corruption. *See* 876 F. Supp. 916, 930 (W.D. Ky. 1995) (“[The] loan limit removes the appearance that heavily indebted candidates are easy bedfellows for *quid pro quo* contributors.”). Another trial court noted that even loans from the candidate to his or her own campaign carry that potential, because candidates who make themselves “financially vulnerable” experience serious post-election pressure to recoup the loan with funds from monied interests “seeking certain ‘favors’ from the successful candidate.” *Gable v. Jones*, No. 95-12, slip op. at 13 (E.D. Ky. Mar. 29, 1996) (“[T]he threat of becoming indebted to those who contribute, solicit contributions, or encourage contributions for a particular gubernatorial candidate is real and immediate without a limitation on loans.”). Regulating loans also eliminates opportunities for circumventing contribution limits, by ensuring that money in excess of those limits is not “loaned” to a candidate who is never required to repay the debt.

The Sixth Circuit invalidated Kentucky’s \$50,000 limits on loans by a candidate to his or her own campaign. *Anderson v. Spear*, 356 F.3d 651, 672-73 (6th Cir. 2004). The court concluded that such “loans are candidate expenditures, unless and until they are repaid. . . . [A]nd limitations on campaign expenditures are prohibited by *Buckley*.” *Id.* According to the Sixth Circuit, the vulnerability of the candidate to pressure by interested post-election contributors is mitigated by Kentucky’s contribution limits. *Id.* at 673. The court also found “not reasonable” any perception that the money would “line the pockets” of the candidate, even though the contributions would ultimately go to the candidate as an individual. *Id.* The State sought Supreme Court review of this decision, but its petition for writ of certiorari was denied.

II. Source Limits on Contributions

Source limits are restrictions on *who* may give to candidates, as distinguished from caps on the *amount* that may be contributed by any one donor. The permissible kinds of donors vary from jurisdiction to jurisdiction. Limits have been placed on contributions to candidates from individuals, PACs, political parties, corporations, unions,

and various other types of donors.²³ The rationales for different source limitations vary depending upon the different characteristics of the contributors in question.

Tips

Tip: *The only source limit on contributions to candidates explicitly upheld by the Supreme Court is a ban on contributions directly from the general treasuries of corporations.*²⁴ This is still the case in spite of *Citizens United*, as that case only permits corporations to make independent expenditures separate from candidates rather than allowing corporations to make contributions directly to candidates' campaigns. A ban on contributions from the treasuries of banks and labor unions would very likely be sustained as well. Under federal law, however, those entities may make contributions from separate segregated funds, which pool money from individuals with certain close connections to the organization.

Tip: *Consider carefully the cumulative impact of source limits and any other restrictions that may make it more difficult for candidates to raise sufficient funds for effective advocacy.* *Buckley* did not consider the cumulative impact of the various contribution limits challenged in that case. Once the individual contribution limits were sustained, the others were upheld as reasonable means of preventing evasion of the basic limits. But hostile courts may use the alleged cumulative impact of various limits as an excuse to invalidate campaign finance reform.

Legal Analysis

Buckley applied less than strict scrutiny to limits on the *amount* that may be contributed to candidates. The more lenient standard of review was appropriate, according to the Court, because those limits imposed only a marginal restriction on speech and did not severely burden free association. If source restrictions operate merely to limit the amount that may be contributed from certain donors, the limits may be reviewed under the relaxed standard articulated in *Buckley*: the state need show only a “sufficiently important interest . . . [with] means closely drawn to avoid unnecessary abridgment of [First Amendment] freedoms.” 424 U.S. at 25.

If campaign finance legislation completely bans contributions from particular categories of contributors, however, courts may regard the source limits as severe burdens on the contributors' speech and associational rights and subject the limits to strict scrutiny. In addition, courts may ask whether the source limits will allow candidates to raise sufficient money for effective advocacy. If the facts show that candidates will be unable to do so, the higher standard of review will likely be applied.

²³ Some jurisdictions define a class of “persons” whose contributions are similarly limited. For example, FECA provides: “The term ‘person’ includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.” 2 U.S.C. § 431(11). Campaign finance legislation should clearly define each category of contributors subject to regulation.

²⁴ *FEC v. Beaumont*, 539 U.S. 146 (2003) (direct contribution ban from nonprofit corporation is consistent with the First Amendment).

A. Geographic Limits on Contributions

Geographic limits restrict the amount of money a candidate may raise from particular geographic areas, usually those outside the candidate's district or state. Proponents of such restrictions ordinarily see them as a way to make office holders "more attuned to district interests" and thus to "enhance[] the perceived legitimacy of the political system." Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. Chi. Legal F. 111, 133 (noting that "there is no reason to think that disallowing out-of-district contributions is a sensible reform for every democracy"). Courts have split on the constitutionality of geographic limits on contributions.

Tips

Tip: *Geographic limits on contributions may deprive candidates with relatively poor in-jurisdiction supporters of important campaign resources.* Members of minority groups, including racial and ethnic minorities as well as minority political parties, may depend on like-minded supporters from outside their districts or even outside their states to provide contributions that in-jurisdiction constituents cannot afford. Imposing geographic limits on contributions may give an advantage to wealthy candidates or those with a wealthy in-jurisdiction base. Particularly in areas where voting is racially polarized, and voter mobilization is essential to electoral success, candidates may need funds from outside their districts to finance voter registration and get-out-the-vote drives in under-represented communities.

Tip: *Insist on evidence showing that out-of-district contributions (in the amounts subject to the proposed limits) have led to real or perceived preferential treatment of out-of-district interests, before agreeing to include limits on such contributions in campaign finance legislation.* Courts will almost certainly demand such evidence; and if there is none, the provision will be unlikely to survive challenge.

Legal Analysis

To date, three courts have decided constitutional challenges to bans on out-of-district contributions.²⁵ In *VanNatta v. Keisling*, the Ninth Circuit Court of Appeals applied less than strict scrutiny to an Oregon statute limiting out-of-district contributions to 10% of the candidate's funds, but nevertheless held it unconstitutional. *See* 151 F.3d 1215, 1220-21 & n.1 (9th Cir. 1998). The court held that the state could restrict out-of-district residents' right to *vote* in the district but could not restrict such residents' right to express themselves about the election, including by contributing money. *See id.* at 1218 (citing *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978)). The holding is consistent with the long-recognized independence of the right to vote from the right of political expression. *See* Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 Yale L. & Pol'y Rev. 503, 530-33 (1997) (noting the political speech and activism engaged in by women before they had the right to vote and by those under the voting age, especially when the minimum age was 21).

²⁵ In *Whitmore v. FEC*, 68 F.3d 1212, 1216 (9th Cir. 1996), the Ninth Circuit suggested that out-of-district limits might be unconstitutional but did not reach the question.

The *VanNatta* court also found that the Oregon measure was not closely enough drawn to withstand constitutional scrutiny, because it banned all out-of-district contributions “regardless of size or any other factor that would tend to indicate corruption.” 151 F.3d at 1221. Further, the state had not adequately demonstrated that out-of-district contributions, as opposed to in-district contributions, led to corruption. *Id.* The court therefore enjoined the out-of-district contribution restriction.

By contrast, in *Alaska Civil Liberties Union*, the Alaska Supreme Court pointed to facts peculiar to the state of Alaska—including its geographic isolation, its “100 years of experience” with attempts by outsiders “to remold Alaska,” and the ability of non-residents collectively to “overwhelm Alaskans’ political contributions” —as justification for monetary limits on contributions from non-residents. *See* 978 P.2d at 614-17. The court specifically distinguished the Alaska law from the Oregon limit on out-of-*district* contributions and declined to follow the reasoning of *VanNatta*.

Most recently, Vermont’s statute limiting out-of-state contributions to 25% of a candidate’s funds failed constitutional scrutiny for reasons similar to those articulated in *VanNatta*. The Vermont district court was not persuaded that the problem with out-of-state contributions was a matter of their source, rather than the size of the contributions. Moreover, the court recognized that “many people outside of Vermont have legitimate stakes in Vermont politics, and therefore have a right to participate in Vermont elections” and ruled that they must have some access to the political process there. *Landell v. Sorrell*, 382 F.3d 91, 147-49 (2d Cir. 2004), *rev’d on other grounds*, 548 U.S. 230 (2006).

B. Corporate and Union Contributions

The federal government bans corporations and unions from making contributions in connection with elections or political party processes for selecting candidates.²⁶ *See* 2 U.S.C. § 441b.²⁷ Many states have similar provisions. The purpose of such bans is to keep the large sums of money amassed with the regulatory assistance of the government from distorting the political process. *Citizens United* did not impact this prohibition on contributions; instead, it only allows for independent expenditures and electioneering communications, produced separately from candidates, by corporations and unions.

Tips

Tip: *Bans on contributions from for-profit corporations and labor unions are not constitutionally controversial.* But corporate employees and officers, and labor union members, should be allowed to exercise associational rights through separate segregated funds or PACs established for political spending.

²⁶ Regulations permitting corporate donations to non-partisan groups staging presidential debates have been upheld as a permissible construction of FECA, even though the debates arguably advance the candidacies of the candidates who participate. *See Becker v. FEC*, 230 F.3d 381, 397 (1st Cir. 2000).

²⁷ Section 441b also bans independent expenditures financed directly from bank, corporation, or union treasuries, but the ban on independent expenditures by corporations was held to be unconstitutional in *Citizens United*. For a discussion of independent expenditures, *see* Chapter Six.

Tip: Corporations and unions need not be governed by the same rules.

Legal Analysis

Since 1907, corporations have been prohibited from making contributions to candidates for federal office. That ban, as subsequently broadened, is now codified in FECA. *See* 2 U.S.C. § 441b(a) (banning contributions and expenditures by corporations, banks, and labor unions). A challenge to the federal ban on corporate contributions to candidates did not reach the Supreme Court until *FEC v. Beaumont*, 539 U.S. 146 (2003), which upheld the ban even as applied to nonprofit corporations. *See also* *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) (upholding the federal ban on corporate contributions). The federal ban on union contributions, enacted in 1947, has never been challenged directly, but *Beaumont* and *Mariani* would likely be extended to cover that restriction as well.

Even before *Beaumont*, the Supreme Court recognized that states have a compelling interest in seeing that the “substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization . . . not be converted into political ‘war chests’ which could be used to incur political debts from legislators.” *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207 (1982) (“*NRWC*”). Similar rhetoric appeared in the Court’s decision in *United States v. United Auto Workers*, 352 U.S. 567 (1957) (“*UAW*”), a case filed shortly after Congress also banned labor union contributions and expenditures.²⁸ *See id.* at 585 (describing the government’s effort “to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital”).²⁹ The Supreme Court has also acknowledged the need “to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.”³⁰ *NRWC*, 459 U.S. at 208.

Although federal law bans direct corporate and union contributions, FECA allows corporations and unions to establish “separate segregated funds,” which may solicit and collect money from specified corporate- or union-affiliated individuals and make contributions to candidates, much as PACs do. *See* 2 U.S.C. § 441b(b)(4). Availability of the funds preserves the individuals’ right to associate with each other in supporting political candidates.

²⁸ The Court declined to reach the constitutional claims raised against the ban in that case. *See UAW*, 352 U.S. at 590-92.

²⁹ States that do not ban corporate and union contributions outright could limit contributions by applying a single cap to all affiliates. *Edelman v. Wash. ex rel. Public Disclosure Comm’n*, 99 P.3d 386 (Wash. 2004) (upholding law that required entities to be “treated as a single entity” for the purpose of contribution limits if they are subsidiaries, local units, or affiliates; for instance, of a trade association, corporation, or union).

³⁰ Unionized workers receive separate protection under Supreme Court decisions that allow employees who do not want to support the union’s political activities to demand a refund of the portion of any mandatory union fee that is used for such purposes. *See Comm. Workers of Amer. v. Beck*, 487 U.S. 735 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). *See also* *Davenport v. Washington Educ. Ass’n*, 127 S. Ct. 2327 (2007) (state may require its public sector unions to receive affirmative authorization from a nonmember before spending the nonmember’s agency fees for election related purposes.)

The Court has recognized the First Amendment rights not only of individuals contributing to separate segregated funds but also of corporations and unions as separate entities. *See Austin*, 494 U.S. at 657 (“The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (noting that the value of speech entitled to First Amendment protection “does not depend upon the identity of its source, whether corporation, association, union, or individual”). Indeed, the Court has recognized that even requiring political activity to be conducted through such funds burdens corporate and union freedom of expression. *See Citizens United*, 130 S.Ct. at 897 (“PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulation.”); *Austin*, 494 U.S. at 657; *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 252 (1986) (“*MCFL*”) (plurality opinion).

Without the option of separate segregated funds, however, a ban becomes more constitutionally questionable. For Justice Brennan, for example, the availability of a separate segregated fund was clearly essential to the constitutionality of Michigan’s previous ban on independent expenditures by corporations. *See Austin*, 494 U.S. at 669 n.1 (Brennan, J., concurring) (distinguishing the mandatory use of separate funds from the complete foreclosure of any opportunity for political speech), *overruled by Citizens United*, 130 S.Ct. 876 (2010). In an unpublished decision, a federal district court invalidated a New Hampshire ban that did not allow for separate segregated funds. *See Kennedy v. Gardner*, No. CV 98-608-M, 1999 WL 814273, at *2-4 (D.N.H. Sept. 30, 1999).

Under federal law, non-profit corporations are generally treated like for-profit corporations in terms of campaign finance regulations. For example, the corporation at issue in *NRWC* was a non-profit, single issue, ideological corporation; yet the Court held it bound by the usual rules for the financing of separate segregated funds. *See* 459 U.S. at 208.

In *Beaumont*, the Supreme Court refused to apply the *MCFL* exception³¹ to non-profits that make *contributions* to candidates. 523 U.S. at 159-60 (“[C]oncern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations.”); *see also Ky. Right to Life*, 108 F.3d at 646 (“[A] distinction between nonprofit and for-profit corporations simply does not apply to regulation of direct corporate contributions.”). Following *Beaumont*, portions of the decisions in *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (invalidating North Carolina’s ban on corporate contributions and expenditures, because the ban applied equally to for-profit and nonprofit corporations), are no longer good law.

C. Contributions from Lobbyists, Contractors and Regulated Industries

Another common source limit is a ban on contributions from lobbyists to candidates. Contributions made by lobbyists, who meet directly with public officials about legislation or administrative action affecting the lobbyists’

³¹ *Citizens United* has overruled *MCFL sub rosa*. The *MCFL* exemption allowed certain ideological nonprofits to spend in federal elections so long as they were not conduits for for-profit money. *Citizens United* allows all non-profits that are otherwise legally allowed by the IRS to engage in political spend regardless of the for-profit source of funds. Contributions to federal candidates from corporations (both non-profit and for-profit) are still banned after *Citizens United*.

clients while also attending fundraisers at which they deliver campaign checks to the candidates, raise at least the appearance of corruption. For similar reasons, some states limit or ban contributions from state contractors or particular industries, especially regulated industries or government contractors. Such restrictions are sometimes known as “pay-to-play” regulations, because they seek to prevent deals whereby contributors “pay” officials for the opportunity to “play” with the government or in a government-regulated arena.

Tips

Tip: Consider limits on contributions only to government officials whom lobbyists actually lobby or who actually have regulatory authority over (or other special connection to) a prospective contributor’s business. Courts are more likely to uphold such limitations, because they focus most directly on the potential for corruption.

Tip: Consider reducing contribution limits for lobbyists or members of regulated industries, rather than banning them outright.³² The lower limits permit participation in the political process through the symbolic act of contributing, while combating the risk of corruption. Bans may be considered, however, when scandals provide special justification for them.

Tip: Pay-to-play regulations are generally effective only if accompanied by carefully crafted anti-evasion provisions. Regulated industries may try to funnel funds through employees, family members, or others if there are no means to guard against such circumvention of the law. If the anti-evasion provisions are drafted too broadly, however, they may raise First Amendment problems.

Legal Analysis

States have enacted campaign finance regulations that target a wide array of businesses that seek licenses or other benefits from the government—including lobbyists, the gambling and liquor industries, insurance companies, banks, railroads, real estate developers, the food services industry, and others. In each case, the specified industry is seen to present a special risk of corruption.

Two cases out of California resolved challenges to outright bans on lobbyists’ contributions. The law at issue in the first case, *Fair Political Practices Commission v. Superior Court of Los Angeles County*, banned all contributions from all lobbyists. 25 Cal. 3d 33 (1979). The California Supreme Court recognized that the state did have a compelling interest in “rid[ding] the political system of both apparent and actual corruption and improper influence” but struck down the statute as overbroad. *Id.* at 45 (1979) (“While either apparent or actual corruption might warrant some restriction of lobbyist associational freedom, it does not warrant total prohibition of all contributions by all lobbyists to all candidates.”).³³ The Court was concerned that the statute banned

³² For example, Massachusetts limits lobbyists to a \$200 individual contribution to candidates, as opposed to \$500 for non-lobbyists. See Mass. Gen. Laws Ann. ch. 55, § 7A (West 2010). See also *Earle Asphalt*, No. A-37-08 (NJ 2009) (upholding a \$300 limit for state contractors in New Jersey).

³³ Most bans on lobbyists’ contributions to candidates do not ban those contributions completely, but only while the legislature is

contributions even to candidates that lobbyists would have no occasion to lobby, too broadly defined who qualified as a lobbyist, and prohibited even small contributions by lobbyists to candidates.

More recently, a federal court upheld a more narrowly drawn law that banned lobbyist contributions only if the lobbyist was registered to lobby the office for which the candidate seeks election. See *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1195 (E.D. Cal. 2001). The *Institute of Governmental Advocates* court also noted that regulatory changes had limited the occasions when registration as a lobbyist was required. See *id.* at 1190. Finally, the Court noted that, under *Shrink Missouri*, the question to be asked was whether candidates would have enough funds for effective advocacy without the lobbyist contributions and found no evidence suggesting that candidates would be unable to seek office without those contributions. See *id.* at 1191.

The Alaska Supreme Court upheld a restriction that banned all contributions from registered lobbyists to legislators outside the district in which the lobbyist resided. The Alaska Supreme Court upheld the restriction on the ground that lobbyists' contributions are "especially susceptible to creating an appearance of corruption." *Alaska Civil Liberties Union*, 978 P.2d at 618-19 (internal quotation omitted).

A similar interest has been held to justify bans on political contributions from groups that contract with or are regulated by particular agencies or officers of the government. See, e.g., *Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making campaign contributions to politicians who award government underwriting contracts);³⁴ *Casino Ass'n of La. v. State*, 820 So. 2d 494 (La. 2002) (upholding ban on contributions from riverboat and land-based casinos); *Gwinn v. State Ethics Comm'n*, 426 S.E.2d 890 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance); *President Riverboat Casino-Missouri, Inc. v. Mo. Gaming Comm'n*, 142 S.W.3d 747, 748-49 (Mo. Ct. App. 2004) (upholding fine and discipline imposed on riverboat gambling company that violated local ordinance making it unlawful for any holder of a gambling license to make certain political contributions); *Soto v. State*, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees); *Schiller Park Colonial Inn v. Berz*, 349 N.E.2d 61 (Ill. 1976) (upholding ban on contributions from members of liquor industry). But courts have not spoken consistently on this type of regulation. Cf. *Penn. v. Foster*, 751 So. 2d 823 (La. 1999) (per curiam) (invalidating ban on contributions from members of the gambling industry), *cert. denied sub nom. Louisiana v. Penn*, 529 U.S. 1109 (2000), *but see Casino Ass'n of La. v. State* 820 So. 2d 494 (La. 2002) (upholding ban on contributions from members of the gambling industry) with *Lee v. Commonwealth*, 565 S.W.2d 634 (Ky. Ct. App. 1978)

in session. See, e.g., Conn. Gen. Stat. § 9-610(e) (2010). To that extent, the bans are really time limits on contributions and not restrictions on lobbyists *per se*, see *Kimbell v. Hooper*, 665 A.2d 44, 51 (Vt. 1995) (treating session ban on lobbyists' contributions as time limit); see also section III(A) ("Legislative Session Bans") below. *Barker v. Wisconsin Ethics Board*, 841 F. Supp. 255 (W.D. Wis. 1993), invalidated a ban on lobbyists volunteering for campaigns, finding that the ban impermissibly abridged the lobbyists' associational rights. *Id.* at 260. Contributions by lobbyists were not at issue; indeed, the statute that outlawed volunteering left lobbyists free to give financial contributions to campaigns. See *id.* at 257.

³⁴ In 2010, the Securities and Exchange Commission adopted a new anti-pay to play rule for investment advisors. SEC, "Political Contributions by Certain Investment Advisors," Release No. IA-3034 (2010).

(invalidating ban on property owner contributions to candidates for property tax assessor, based on state Constitution). A ban on donations from a regulated industry is more likely to be invalidated if courts perceive that a jurisdiction is attempting to keep a particular industry from expressing its viewpoint in the political process, *see Penn*, 751 So. 2d at 834 (Calogero, C.J., concurring), rather than addressing a documented history of corruption, *see id.* at 848-50 (Knoll, J., dissenting); *see also Blount*, 61 F.3d at 945; *Soto*, 565 A.2d at 1096-97.

Pay-to-play regulations are often enacted to supplement existing contribution provisions, and the regulations often target industries that are already well-regulated in other ways. Contributions from the target industry pose a real risk of corruption only if these other regulatory regimes are insufficient to ensure probity. Courts that have invalidated pay-to-play regulations have sometimes held that contribution caps already in place sufficed to deal with any threat of corruption from the target industry. *See Penn*, 751 So. 2d at 829 (Johnson, J., concurring), 834-35 (Calogero, C.J., concurring), 839 (Lemmon, J., concurring). Courts have also held that other regulations governing an industry, *e.g.*, professional licensing requirements, were enough to avoid the threat of corruption. *Lee*, 565 S.W.2d at 636 (holding that professional certification and regulation of property valuation assessors would stem the threat of corruption from property owners' contributions). Under *Buckley*, however, courts should be deferring to the judgments of legislatures on such matters. *See* 424 U.S. at 28 (permitting Congress to decide whether contribution limits were necessary in addition to disclosure provisions and bribery laws).

Where there is a documented history of corruption, implementing tighter restrictions or outright bans is possible. In *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010), the Second Circuit considered bans on contributions from contractors. In 2004, the Governor of Connecticut was accused of accepting over \$100,000 of gifts and benefits from contractors and resigned as a result of those allegations. *Id.* at 193. Similar corruption with other government officials was also documented, so much so that the state earned the nickname "Corrupticut." *Id.* In response to this, Connecticut enacted a ban on all contributions from state contractors, potential contractors, principals of the contractors, and children and spouses of the contractors. *Id.* at 194. The bans were "branch specific" in that if the contract in question only involved the executive branch, contributions to legislative candidates were permissible and vice versa. *Id.* A ban was also placed upon contributions by certain lobbyists, in addition to their children and spouses. *Id.*

The Second Circuit upheld the ban with respect to state contractors, prospective contractors, and their principals, finding in each case a "sufficiently important" government interest and "closely drawn" statutes based upon the history of corruption in the state. *Id.* at 199-205. This was true even though the legislation was considered a "drastic measure" because it was a ban rather than a limit. *Id.* at 205. The ban on lobbyists and their families, however, was held to be unconstitutional because lobbyists had nothing to do with the corruption scandal that pervaded Connecticut. *Id.* at 206. As a result, the Court held that a contribution limit, rather than a ban, was the more appropriate way to address lobbyist corruption concerns. *Id.* at 207. As can be seen from this case alone, robust legislative history and proper documentation can be the difference between a law that is upheld and one that is overturned.

D. Government Employees

The government may ban contributions from its own employees to candidates for office in that government. The bans help to protect against erosion of public confidence in the impartiality of provision of government services, protect the fairness of elections, and preserve the efficiency of governmental operations. They are also a means of protecting the employees from coercion by their candidate-employers.

Legal Analysis

The Supreme Court has repeatedly upheld restrictions on the participation of governmental employees in political campaigns, *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act prohibition against federal employees taking an active part in political management or in political campaigns), including through making contributions to other government employees who may be candidates for office, *Ex parte Curtis*, 106 U.S. 371 (1882). Most recently, the Eighth Circuit reaffirmed that a city could ban contributions to candidates for mayor or city council from certain city employees. *Int'l Association of Firefighters v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *see also Reeder v. Kan. City Bd. of Police Comm'rs*, 733 F.2d 543 (8th Cir. 1984) (upholding ban on contributions by officers or employees of the Police Department).

E. Inter-Candidate Transfers

Some campaign finance laws have banned transfers of funds from one candidate's campaign to that of another. One rationale for such bans is that, without them, a contributor who had given the maximum amount to candidate A could evade that limit by contributing to candidate B, who would then transfer the amount contributed to candidate A. Another concern with inter-candidate transfers is that they provide an incentive for large donations to legislative leaders, who exercise substantial control over legislative agendas. Donors then portray contributions actually designed to gain access to powerful legislators as innocent efforts to direct funds to leaders who can allocate the money effectively. In addition, the leaders often use contributions they receive as *quid pro quos* for obedience or political support from candidates who receive the transferred funds.

Tips

Tip: Consider allowing transfers of small amounts of funds between campaigns. One case has held that small transfers do not raise the same appearance of corruption as do large ones and thus cannot be banned.

Tip: Compile evidence that inter-candidate transfers in the relevant jurisdiction are used to extract *quid pro quos* from recipients. Such evidence could come through testimony from current or former elected officials.

Legal Analysis

Three cases recognize the state's interest in preventing evasion of contribution limits by limiting inter-candidate transfers. *See Minn. Citizens Concerned for Life*, 427 F.3d at 1112-14; *SEIU v. Fair Political Practices Comm'n*, 747

F. Supp. 580, 593 (E.D. Cal. 1990) (noting that this argument would have “significant weight” if only the jurisdiction had valid contribution limits, which were found lacking), *aff’d*, 955 F.2d 1312 (9th Cir. 1992); *Alaska Civil Liberties Union*, 978 P.2d at 633 (upholding contribution limits and ban on inter-candidate transfers). *SEIU* also recognized the possibility that inter-candidate transfers would be used by legislative leaders, or those wanting to become leaders, to secure the loyalty of recipients. *See* 747 F. Supp at 591 (“The evidence before the court has demonstrated that contributing to other candidates is a recognized means of seeking and maintaining leadership positions in California’s legislative bodies.”). On appeal, the Ninth Circuit assumed for the purposes of the case that “preventing corruption or the appearance of corruption by political power brokers” is an important state interest, but the court rejected the transfer ban as overbroad. 955 F.2d at 1323 (internal quotations omitted). Reasoning that “[t]he potential for corruption stems not from campaign contributions per se but from large campaign contributions,” the court invalidated the ban. *Id.*

In *Minnesota Citizens Concerned for Life*, the Eighth Circuit affirmed that a prohibition on the transfer of funds between candidates’ political committees, except when the contributing candidate’s committee is dissolving, was “closely drawn” to match the state’s interests in preventing circumvention of contribution/spending limits, avoiding the appearance of corruption and restricting “those in power from funneling money to those seeking power.” 427 F.3d at 1112-13. The regulation did not improperly infringe on candidates’ First Amendment rights because it still permitted a candidate to “personally contribute to another’s campaign, endorse another candidate, encourage contributors to another candidate and support another candidate in many legal ways.” *Id.*

F. Bundling

Bundling occurs when an intermediary, sometimes known as a “conduit,” gathers contributions from individuals and sends them to a candidate. The bundler takes credit for soliciting and delivering the funds, but because he or she is acting as an intermediary in passing on contributions from others, the contributions do not count against the bundler’s own contribution limit. Bundling therefore may be seen to raise the same risk of corruption or appearance of corruption as large campaign contributions do.

Bundlers, such as EMILY’s List (an organization that collects contributions for pro-choice Democratic women candidates for governor and Congress), have been very successful in encouraging individuals who otherwise might not make contributions to pool resources in support of candidates of their choice. Consequently, restrictions on bundling have implications for individual rights of speech and association. *See* Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 Colum. L. Rev. 1348, 1364 (1994) (“At the very least, such [bans] cut[] very close to the rights of association and political activity of many Americans.”). This concern counsels that reformers move cautiously in this area. Further, only one case has looked at bundling with any depth at all, and it will be considered below.

Tips

Tip: Consider instituting reporting requirements on bundling. Information that might be required includes the identity of the bundler; for what political or other interests they solicit; a list of the names, addresses, occupation, employer, and spouse’s employer of all individual contributors; and the total amount the bundler collects for each

candidate. This approach allows individuals to continue to use bundlers to convey political contributions, while disclosing to the public the interests to which the candidate might be indebted.

Legal Analysis

Reformers who seek to justify regulations on bundling by appealing to the interest in preventing bundlers from using large collections of funds to wield undue influence on candidates tend to regard bundling as an attempt to evade the spirit, if not the letter, of individual contribution limits. Although the anti-corruption rationale is firmly established, the anti-evasion rationale has so far been recognized only where actual evasion is a possibility. *See Cal. Med. Ass'n*, 453 U.S. at 197-99 (plurality opinion) (upholding limits on donations to PACs as a means to avoid circumvention of individual limits on contributions to candidates); *Buckley*, 424 U.S. at 38 (accepting the anti-evasion rationale in upholding \$25,000 aggregate annual limit on individual contributions). Reformers who seek to restrict bundling thus seek an extension of the anti-evasion rationale, when valid individual contribution limits are in place. *See* Fred Wertheimer & Susan W. Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1155 (1994) (“In order for contribution limits to work, it is essential to enact effective anti-bundling provisions.”).

Another oft-repeated complaint about bundling is that it is a hidden practice. Without any disclosure of bundling, a chief executive from a corporation can deliver a hundred checks from his employees and their spouses, in amounts just below the reportable limit, and no one—not the regulatory agency, not the press, not the voters—will be able to tell that these seemingly individual contributions are, in effect, one giant contribution from the corporation. *See* Geoffrey M. Wardle, Note, *Political Contributions and Conduits After Charles Keating and EMILY's List: An Incremental Approach to Reforming Federal Campaign Finance*, 46 Case W. Res. L. Rev. 531, 557-58 (1996) (“Bundling undermines the legitimacy of elections by enabling political committees and wealthy or well-connected individuals to exercise significant influence over elections without any notice of such influence to the electorate.”).³⁵ The only party certain to appreciate the connection is the recipient, because the bundler delivers the collected checks in such a way as to make the corporation’s involvement exceedingly clear. One could argue that the state has a compelling interest in exposing this practice, because undisclosed contributions are more likely to inspire preferential treatment than contributions subject to public scrutiny.

Although the state’s interests in regulating bundling are strong, they run headlong into the First Amendment speech and associational rights of those who respond to bundlers to express their support of a candidate. Any restrictions on bundling must therefore be carefully crafted to advance the state’s interests, while permitting individuals to respond to solicitations for contributions.

³⁵ The FEC currently has reporting requirements that call for “conduits or intermediaries” to report to the candidate and the FEC all contributions over \$200 by name, occupation, and employer. 11 C.F.R. § 110.6(c)(1)(iv)(A) (2010). A recipient has to list intermediaries who have handed over one or more contributions that exceed \$200 in a calendar year and must include the total amount received from such intermediaries. *See id.* § 110.6(c)(2)(i). Bundlers can get around current reporting requirements by soliciting contributions of only \$199, which still must be reported, *see id.* § 100.6(c)(1)(iv)(A), but without identifying the contributors’ occupation or employer, which often provide crucial links to the bundler. Further, even the \$200 reporting requirements are rarely followed. *See Wardle, supra*, at 561 n.189 (citing newspaper sources).

Reporting requirements for bundlers is one solution. Reasonable reporting requirements for contributions to candidates are constitutional. *See Buckley*, 424 U.S. 64-68; *see also* Chapter Eight, section I (“Reporting Requirements”). Information that could be required includes the identity of the bundler; what business, political, or other interests they work on behalf of; a list of the names, addresses, occupation, employer, and spouse’s employer of all individual contributors; and the total amount the bundler delivers to each candidate. This approach would expose corporate bundlers, who often ask employees to make contributions in their spouse’s name, so that the contribution does not appear to be coming from a source connected to corporation. *See Ky. Rev. Stat. Ann. § 121.180(3)(a)(2)* (West 2010) (requiring that all candidates for state-wide office list contributors’ names, employers, and spouse’s employers for contributions over \$100); *cf. Citizen’s Research Foundation, New Realities, New Thinking: Report of the Task Force on Campaign Finance Reform 23* (1997) (suggesting reporting requirements, including identification of the political interest the bundler seeks to advance). The relationship between bundlers and candidates could then be closely monitored, and if specific instances of corruption were noted, reformers could use this as evidence to institute stronger reforms.

Another way to tailor bundling restrictions is to ban or require disclosure of bundling from entities that also employ registered lobbyists or by individuals who are registered lobbyists. *See H.R. 3, 103d Cong. § 401* (1993). The theory here is that bundlers who have a legislative or executive agenda for which they will be lobbying present a greater appearance of corruption than those who are not engaged in lobbying, because only those who lobby will be asking for specific action from legislators or executive officials in exchange for the bundling. This approach has been criticized, perhaps rightly, for making an artificial distinction between bundlers. After all, whether they lobby or not, bundlers can be said to wield a certain influence as a result of the large sums of money they deliver to officeholders. *See Wardle, supra*, at 566-67 (arguing that even bundlers without express lobbying arms exert legislative influence on lawmakers, because the lawmakers know that the bundlers raised campaign contributions and know of the bundlers’ publicly announced agenda).

In *Green Party*, 616 F.3d 189, Connecticut banned contractors and lobbyists from soliciting funds for state candidates. *Id.* at 207. The justification offered for this ban was to combat corruption by preventing these individuals from bundling contributions together and then presenting them to candidates, in this way currying favor. *Id.* Using a strict scrutiny standard, the court struck down the solicitation ban. *Id.* at 210. In doing so, the court, which was concerned with impinging on other forms of political participating other than bundling, discussed more narrowly tailored alternatives to the across-the-board solicitation ban, such as simply banning bundling altogether. *Id.* at 209. The court made clear that it was not deciding whether such a ban would be constitutional, *id.* at 210, but left the door at least partially cracked open on the possibility of such a ban by simply discussing it.

G. Aggregate Limits on PACs or Special Interest Sources

Some campaign finance laws restrict the overall amount, or overall percentage, of money that a candidate may accept from a designated type of contributor, usually PACs. So far, such limits have been upheld.

Tips

Tip: Compile evidence that money from PACs buys access to legislators and that legislators are influenced by such PAC money. Evidence showing that PACs, or the organizations that sponsor PACs, are likely to have a related lobbying entity is relevant. Evidence of candidates receiving money from PACs, and then supporting a PAC's position on issues, by voting or by tactical maneuvering within committees, would also be helpful. The idea is to boost one of the arguments made in support of aggregate PAC limits—that there is something inherently corrupting about candidates receiving a large proportion of their campaign funds from PACs with a legislative or executive agenda.

Legal Analysis

Five cases have addressed aggregate PAC limits. See *Minn. Citizens Concerned for Life*, 427 F.3d at 1114-16; *Eddleman*, 343 F.3d 1085; *Citizens for Responsible Gov't*, 60 F. Supp. 2d at 1090-92; *Ky. Right to Life*, 108 F.3d 637; *Gard v. Wis. State Election Bd.*, 456 N.W.2d 809 (Wis. 1990). *Gard* contains the most extensive discussion of those limits and provides a useful review of potential state interests.

Gard recognized the anti-evasion rationale for aggregate PAC limits, finding them necessary to prevent a PAC that has reached its contribution limit from spawning new PACs and giving *ad infinitum*. See 456 N.W.2d at 820-24, 826; see also *Citizens for Responsible Gov't*, 60 F. Supp. 2d at 1090. But *Gard* took its concern with circumvention of PAC limits one step farther—upholding an overall 65% limit on all political committee contributions to candidates, including political party contributions.³⁶ Without such an overall limit, according to the court, PACs would send money to state party committees, which would then pass it on to the candidates in unlimited amounts.³⁷ See 456 N.W.2d at 824-26.

The Wisconsin Supreme Court also stated that: “The aggregate limit encourages candidates to seek a broad base of support by allowing many people to make smaller contributions. Encouraging smaller contributions from a greater number of contributors is a legitimate legislative goal.” *Id.* at 825. *Buckley* indirectly supported this goal in acknowledging that \$1,000 individual contribution limits force candidates to raise smaller amounts of money from greater numbers of contributors. See 424 U.S. at 21-22.

The *Gard* court accepted the overarching premise that collecting a large percentage of campaign funds from special interest groups, such as PACs, in itself raises the appearance of corruption. See 456 N.W.2d at 823; see also *Minn. Citizens Concerned for Life*, 427 F.3d at 1114-15 (noting that aggregate limit was in place to prevent both actual corruption and the threat to public confidence through the appearance of corruption); *Ky. Right to Life*, 108 F.3d at 650 (“Furthermore [the statute] attempts to eliminate perceived corruption in the political process by limiting the total amount of funds gubernatorial candidates may accept from groups with vested interests.”). The evidence of apparent corruption was the simple fact that candidates in Wisconsin were getting larger and larger

³⁶ But see *Thalheimer*, 706 F. Supp. 2d 1065, discussed above in section I(C), preliminarily enjoining a San Diego ordinance banning contributions by political parties.

³⁷ Wisconsin had no limit on how much money political parties could contribute to candidates. See 456 N.W. 2d at 822-23.

percentages of their contributions from PACs. *See Gard*, 456 N.W.2d at 822. The *Gard* court also accepted as evidence the legislative rationale for the limit, which was based on policy recommendations of a committee commissioned by the Wisconsin legislature to recommend changes in the law. *See id.* at 813-16.

Reformers should collect evidence of the undue influence of PAC contributions. The *Eddleman* court found “damning evidence” in a “letter from a state senator urging legislators to vote for a bill in order to keep insurance industry PAC money in the Republican camp.” 343 F.3d at 1096-97; *see also id.* at 1097 (citing testimony that “PACs funnel money into state legislative campaigns only when their interests are at stake in order to ‘get results’”). In *Minnesota Citizens Concerned for Life, Inc.* the court cited newspaper articles concerning perceived corruption, including one noting that “the 10 biggest-spending special interest contributors last election were rewarded in 1991 by winning 41 of the top 50 items on their legislative wish list.” 427 F.3d at 1115 (internal citations omitted). Another article described political power as having “shifted to those candidates in the best position to take advantage of large campaign contributions and well-organized groups with parochial interests.” *Id.* (internal citations omitted).

Statistical evidence that PAC money affects candidates’ voting has not been readily available, but there is evidence of PAC influence on tactical maneuvering within committees. *See* Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* 163-70 (1992) (noting that, when controlling for factors such as party affiliation, constituent interests, and ideology, there is little support for the notion that PAC contributions influence the roll-call votes of legislators; but acknowledging that PAC influence is strongest in narrow, less visible issues and can be seen to a certain extent in legislative maneuvering). Of course, legislators’ testimony about the deleterious effect of special interest money on legislative decision making would be helpful.

Gard dismissed the two major arguments made against implementation of aggregate limits: that they are covert spending limits³⁸ and that they burden the associational rights of PACs or political party committees who wish to give to candidates *after* the candidate has reached the aggregate limit. Aggregate political committee limits do not impermissibly cap spending, *Gard* held, because a candidate is free to spend unlimited amounts from individual contributions. *See* 456 N.W. 2d at 819. Further, the associational rights of late-giving PACs are not impinged because a candidate can always return some money to other political committees in order to receive a new donation. In essence, the choice is being given to the candidate whether he wishes to associate with a PAC.³⁹ *See id.* at 825; *see also Minn. Citizens Concerned for Life*, 427 F.3d at 1115 (describing importance of a candidates’ ability to return one PAC contribution in order to accept a contribution from a different PAC); *Eddleman*, 343 F.3d at 1098 (“What matters is that so long as a candidate wants a PAC involved in funding his campaign, Montana’s law does not infringe on the PAC’s associational freedoms.”). In any event, the court held, PACs and

³⁸ The percentage caps in the Wisconsin statute, as well as those in California’s 1996 Proposition 208, were percentages of the voluntary spending limits also set up by the reforms. The aggregate caps applied whether or not the candidate accepted the voluntary spending limits. These absolute aggregate limits became, so the argument went, *de facto* limits on how much a candidate could spend from PAC sources.

³⁹ In upholding FECA’s public financing scheme, the Supreme Court has implicitly acknowledged that contributors have no right to give money to a candidate who chooses not to accept the contribution.

parties always have the right to make unlimited independent expenditures in support of a candidate. *Eddleman*, 343 F.3d at 1098; *Gard*, 456 N.W.2d at 825.

III. Time Limits on Fundraising

Time limits on fundraising generally take one of two forms: (1) bans on fundraising while the legislature is in session (“session bans”) or (2) bans on soliciting or accepting contributions during delimited periods, usually immediately after or more than a year before elections (“post-election” or “off-year fundraising bans”).⁴⁰ The judicial reception to such limits has been mixed.

A. Legislative Session Bans

A “legislative session ban” prohibits fundraising by candidates while the relevant legislature (Congress, state assembly, city council) is in session. Existing state session bans govern either legislators alone or both legislators and state-wide officials.⁴¹ Sometimes the ban applies only to contributions from lobbyists. Reformers usually propose these bans for two reasons: first, to combat the appearance of corruption raised when legislators accept money from contributors *at the same time* that they are considering the contributors’ legislative agenda, and second, to free legislators from the rigors of fundraising during the time that they are supposed to be concentrating on legislating. *Only one session ban has ever survived challenge intact.*

Tips

Tip: *A session ban applicable only to officeholders may have a better chance of survival.* Some courts have struck down session bans that apply to challengers, because contributions given to persons who are not in office may not carry the same appearance of corruption as those given to sitting legislators. Further, there is no “time-saving” interest where challengers who are not holding office are concerned, because they have no official duties from which to be distracted by the demands of fundraising.

⁴⁰ In addition, Kentucky has imposed a 28-day ban on gubernatorial fundraising immediately before primary or general elections as a means of effectuating Kentucky’ trigger provisions. In *Gable v. Patton*, 142 F.3d 940, 949-51 (6th Cir. 1998), the Sixth Circuit upheld the time limit and compared its effect to that of caps on contributions:

Buckley sanctioned the fact that the Federal Act would force candidates to rearrange their fundraising by seeking out many small donors, instead of a few large ones. . . . The effect of the 28-Day Window . . . is similar. Candidates will be forced to rearrange their fundraising by concentrating it in the period before the 28-Day Window begins. That is not a trivial restriction, but we read *Buckley* to say that such a restriction is justified by Kentucky’s interest in combating corruption.

Id. at 951; see *Jackson v. Leake*, 476 F. Supp. 2d 515, 528 (E.D.N.C. 2006) (upholding North Carolina’s 21-day ban on contributions in judicial elections in order to make “trigger” provisions effective), *aff’d sub nom. N.C. Right to Life v. Leake*, 524 F.3d 427 (4th Cir. 2008). In *Anderson v. Spear*, the 6th Circuit struck down the 28-day window as applied to write-in candidates. 356 F.3d at 675.

⁴¹ See, e.g., Iowa Code Ann. § 68A.503 (West 2010) (“state officials, members of the general assembly, and candidates for state office”); N.C. Gen. Stat. Ann. § 163-278.13B (West 2010) (“member of or candidate for the Council of State, a member of or

Tip: Session bans in jurisdictions where the legislative session is short have a better chance of surviving challenge. Office holders must have plenty of time to raise money while the legislature is not in session.

Tip: Session bans should apply (if at all) only to contributors whose contributions during the legislative session create an appearance of corruption. For example, a session ban should not limit a candidate's ability to contribute to his or her own campaign during the legislative session, because such contributions have no impact on the appearance of corruption and may actually save the candidate time otherwise spent on fundraising.

Tip: Build a factual record documenting concerns about the appearance of corruption and time loss arising from fundraising during the legislative session. The evidence might include:

- correlations between contributions during the legislative session and action on legislation affecting the contributors;
- a poll disclosing public perceptions of fundraising by office holders during the legislative session; and
- testimony from legislators about the amount of time they spend fundraising during the session.

Legal Analysis

The Supreme Court has never decided a challenge to time limits on contributions and therefore has had no reason to consider the appropriate standard of review. But time limits arguably should be subject to the same reduced scrutiny as monetary contribution limits. See *Shrink Missouri*, 528 U.S. at 387 (noting that limitations on contributions required a “less compelling justification” than limits on expenditures) (internal quotation omitted); *Buckley*, 424 U.S. at 20-22 (same); *Kimbell v. Hooper*, 665 A.2d 44, 50-51 (Vt. 1995) (treating a session ban applicable to lobbyists as a contribution limit subject to less than strict scrutiny). Moreover, session bans merely defer fundraising; the time restriction does not completely cut off any contributions. Contributors remain free to make contributions when the legislature is not in session. See *Bartlett*, 168 F.3d at 715 (noting that a session ban places “nothing more than . . . a temporary hold” on donors’ ability to make contributions). Nevertheless, with the sole exception of *Kimbell*, courts have applied strict scrutiny to session bans. See *Bartlett*, 168 F.3d at 715; *Ark. Right to Life v. Butler*, 983 F. Supp. 1209, 1233 (W.D. Ark. 1997) (denying plaintiffs’ motion for summary judgment), *aff’d*, 146 F.3d 558 (8th Cir. 1998), *cert. denied*, 525 U.S. 1145 (1999); *Emison v. Catalano*, 951 F. Supp. 714, 723 (E.D. Tenn. 1996); *Shrink Mo. Gov’t PAC v. Maupin*, 922 F. Supp. 1413, 1424 (E.D. Mo. 1996) (“*Maupin II*”); *State v. Dodd*, 561 So. 2d 263, 264 (Fla. 1990).

If strict scrutiny is applied to a session ban, states defending such bans will have to demonstrate a “compelling” interest in implementing the restriction. The first interest that reformers typically advance is the one specifically sanctioned by *Buckley*: reduction of corruption or the appearance of corruption. Session bans advance this interest, because the temporal proximity between a contribution and a legislator’s acting on the contributor’s legislative agenda gives rise to a heightened perception of corruption. Courts that have considered session bans have recognized the legitimacy of this concern. See *Bartlett*, 168 F.3d at 715-16; *Ark. Right to Life*, 983 F. Supp. at

candidate for the General Assembly”). For simplicity’s sake, we will refer to all such bans as applying to legislators.

1234; *Emison*, 951 F. Supp. at 722-23; *Maupin II*, 922 F. Supp. at 1420; *Dodd*, 561 So. 2d at 267 (“We commend the legislature for making an effort to eliminate the problems or perceived problems associated with campaign contributions solicited or accepted by incumbents during a session.”).

Another state interest served by session bans is “time-saving”: freeing legislators from the distractions of fundraising during the legislative session, so they can concentrate on policy questions and legislation. Former legislators have openly complained that the constant demands of fundraising distracted them from the work at hand and made them less effective at developing and executing their legislative agendas. See Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* 37-46 (1995).

Courts have not yet accepted this rationale for imposition of session bans. See *Ark. Right to Life*, 983 F. Supp. at 1220 n.11 (“[W]e reject defendants['] submission of compelling state interests other than the one identified by the United States Supreme Court.”). But the Supreme Court’s statement that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests *thus far* identified for restricting campaign finances,” *NCPAC*, 470 U.S. at 496-97 (emphasis added), leaves open the possibility that the Court may, in the future, recognize compelling interests other than preventing corruption or the appearance of corruption. Reformers may therefore advance the time-saving interest as a supplement to (but not a substitute for) the traditional corruption-prevention rationales.⁴²

In addition to demonstrating a compelling state interest, the government must show that a challenged session ban is narrowly tailored to meet that interest. To date, this requirement has been the downfall of most session bans. In finding that session bans are not sufficiently narrowly tailored to serve the state’s interest, courts have considered three factors: (1) application of the ban to challengers, (2) the duration of the ban, and (3) the potential for corruption by certain classes of contributors.

Courts are split on the question whether session bans may be extended to challengers as well as incumbents. Some courts have reasoned that banning contributions to challengers does not address the heightened appearance of corruption caused by contributions to incumbents, because a challenger has no power to advance the contributor’s agenda when the contribution is made. See *Emison*, 951 F. Supp. at 723; *Maupin II*, 922 F. Supp. at 1422 (“What possible corrupting influence or arrangement can be prevented by prohibiting campaign contributions to persons with no power to interfere with the integrity of the legislative process?”). But, as the Fourth Circuit has recognized, “sticks can work as well as carrots, and the threat of contributing to a legislator’s challenger can supply as powerful an incentive as contributing to that legislator himself.” *Bartlett*, 168 F.3d at 716; see also *Winborne v. Easley*, 523 S.E.2d 149, 154 (N.C. Ct. App. 1999). As for the time-saving rationale, candidates who do not hold office do not have any governmental work from which to be diverted. It is the incumbents’ work to govern. It is the challengers’ job to mount campaigns against incumbents.

⁴² The Eighth Circuit has acknowledged the time-saving interest in upholding a state law providing for public financing of elections, but has not addressed the rationale in the context of session limits. See *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) (“[T]he State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and for campaigning. It is well settled that [this] government interest [is] compelling.”). There is academic support for the time-saving justification as well. See Vincent Blasi, *Spending Limits and the Squandering of Candidates’ Time*, 6 J. L. & Pol’y 123 (1997); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).

Bans that affect challengers are also almost invariably challenged on equal protection grounds as illegitimate attempts to bolster the well-known advantage that incumbents have in both fundraising and establishing a public profile. Even when courts decline to impugn the drafters' motive, however, the differential impact of universal session bans may serve as grounds for sustaining that claim. See *Emison*, 951 F. Supp. at 723 (“[A] black-out on political fundraising applicable to nonincumbent candidates accentuates the advantage enjoyed by incumbents with respect to name recognition . . . [which] is essential to political success . . .”); *Dodd*, 561 So. 2d at 266-67 (“[W]e cannot help but note that the [session ban] . . . gives these officeholders a significant advantage over nonincumbents.”). Most recently, however, the Fourth Circuit explicitly rejected such a challenge. See *Bartlett*, 168 F.3d at 716-17 (argument that North Carolina’s restriction on challengers was constitutionally impermissible was the “precise argument [that] was squarely rejected by the Supreme Court in *Buckley*.”).

Session bans that apply only to incumbents present different issues. On the one hand, they may have a better chance of being upheld in court. See *Emison*, 951 F. Supp. at 723 (enjoining a session ban’s application to challengers and declining to rule on its application to incumbents, because there were no incumbents challenging the ban).⁴³ On the other hand, as *Bartlett* noted, “if challengers and incumbents were required to play by different sets of campaign finance rules, few reforms would be likely to win legislative enactment.” 168 F.3d at 717.

To be found narrowly tailored, session bans must also leave enough time for legislators to raise the money necessary for effective advocacy and for contributors to associate financially with candidates. See *id.* at 714-18 (upholding a North Carolina ban, where the legislature was in session for one or two months during election years and for longer periods during off-years);⁴⁴ *Ark. Right to Life v. Butler*, 29 F. Supp. 2d 540, 551-553 (W.D. Ark. 1998) (invalidating ban on fundraising during any legislative session as well as 30 days before and after regular sessions); *Maupin II*, 922 F. Supp. at 1419 (invalidating a session ban that lasted four and a half months, because cutting off funds for a third of an election year prevented candidates from amassing the resources necessary for effective advocacy); *Alaska Civil Liberties Union*, 978 P.2d at 630-31 (invalidating a ban that allowed fundraising only two months before the primary and two and a half months before the general election); *Dodd*, 561 So. 2d at 264 (invalidating a session ban that applied to both regular and special sessions, which may be called at any time, because it imposed a “potentially . . . limitless” period of time during which money could not be raised). There is no bright-line test for determining which bans are too long or too indefinite, but long breaks between legislative sessions, or substantial reprieves from the ban prior to elections, may help to defuse concern about candidates’ ability to raise enough money to get their message across.

Whether a session ban will prevent candidates from raising necessary funds will also depend in no small part on the monetary contribution limits that govern the jurisdiction. Courts may be better disposed to approve session

⁴³ The court in *Arkansas Right to Life* initially denied the plaintiffs’ motion for summary judgment with respect to session limits applying only to incumbents. See 983 F. Supp. at 1234. But upon later renewal of the motion, the court determined that the session ban was nevertheless insufficiently tailored to prevent corruption because “it [did] not take into account the fact that corruption can occur any time, and that only large contributions pose a threat of corruption.” 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998).

⁴⁴ North Carolina prohibited lobbyists and political committees that employed lobbyists from making contributions when the General Assembly was in session.

bans if no contribution limits exist, or if the limits are relatively high, because raising money in large sums takes less time than raising it in small sums from a larger number of contributors. Where reformers are unable to secure contribution limits, session bans may offer a fallback position.

Finally, in considering whether a session ban is narrowly tailored, courts may question the assumption that all contributions to incumbents during the legislative session carry the same potential for corruption. To address that concern, reformers may wish to focus their session bans only on contributions by lobbyists, or entities that employ lobbyists, because those contributors are advocating their agenda directly to office holders.⁴⁵ Knowing that “[e]lected officials must ration their time among those who seek access to them and they commonly consider campaign contributions when deciding how to ration their time,” *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992), courts may concede that contributions from lobbyists during the legislative session buy—or at least appear to buy—disproportionate access and undue influence. See *Bartlett*, 168 F.3d at 716; *Kimbell*, 665 A.2d at 51 (upholding a ban on lobbyist contributions to sitting legislators while the legislature is in session).

B. Post-Election and Off-Year Fundraising Bans

Post-election and off-year fundraising bans are not nearly as common as session bans, perhaps because they raise difficult questions about exactly when campaigns begin or ought to begin.⁴⁶ How long before an election a campaign “naturally” begins depends upon the office sought, the strength of the incumbent, and the amount of money needed to run in that jurisdiction, among other things. Reformers should not limit the length of campaigns if the restriction affords candidates insufficient time for essential fundraising.

Tips

Tip: Before instituting an off-year fundraising ban, collect and analyze data showing when and how much money is raised by incumbents and challengers in the jurisdiction. Fundraising by incumbents right after an election, or during years without an election, contributes to the appearance of corruption. But if challengers also raise substantial funds during those periods, opponents of reform may argue that time limits will deprive newcomers of needed seed money.

Tip: Reformers should be prepared to rebut the claim that an off-year fundraising ban—especially when combined with monetary contribution limits—will increase, not reduce, the time elected officials must spend on fundraising during election years.

⁴⁵ See, e.g., Ariz. Rev. Stat. Ann. § 41-1234.01 (West 2010); Iowa Code Ann. § 68A.504 (West 2010); Minn. Stat. Ann. § 10A.273(1) (West 2010). For more on limits on contributions from lobbyists, see section II(C), *supra*.

⁴⁶ Florida has a law prohibiting solicitation or acceptance of contributions after an election. See Fla. Stat. Ann. § 106.08(3)(a) (West 2010) (banning contributions five days before an election or after an official is elected).

Tip: If the legislature is in session during election years, an off-year fundraising ban may increase, rather than reduce, the appearance of corruption, by forcing candidates to solicit and accept contributions when legislative decisions are being made.

Legal Analysis

Courts are split as to the standard of review for off-year or post-election fundraising limits. *Zeller v. Fla. Bar*, 909 F. Supp. 1518, 1525 (N.D. Fla. 1995), and *Alaska Civil Liberties Union*, 978 P.2d at 627-29, applied strict scrutiny to an off-year fundraising ban, whereas *Opinion of the Justices*, 637 N.E.2d 213, 217 (Mass. 1994), applied less than strict scrutiny. *Alaska Civil Liberties Union*, 978 P.2d at 630, also applied strict scrutiny to a post-election fundraising ban, but *Ferre v. State*, 478 So. 2d 1077, 1079-80 (Fla. Dist. Ct. App. 1985), *aff'd*, 494 So. 2d 214 (Fla. 1986) (per curiam), applied less than strict scrutiny, as did *Anderson v. Spear*, 356 F.3d at 670.

Under either standard of review, the interests discussed above with respect to session bans are the most plausible justifications for off-year and post-election fundraising bans. The off-year fundraising bans seek to combat the corruption or appearance of corruption that results when contributions far removed from the next election are, or are perceived to be, attempts to ingratiate the donors with elected officials. Post-election contribution bans prevent monied interests from waiting until the returns are in and then buying access to a newly elected official. Those bans may also serve the state's interest in preserving such officials' time for their duties (assuming that the limits do not simply double the fundraising pressure during the election year).

In any event, the variation in the standard of review applied by courts considering off-year and post-election fundraising bans has had no effect on the outcome of the cases. Irrespective of the standard, no court yet has upheld an off-year fundraising ban. *See Zeller*, 909 F. Supp. at 1525 (finding no "nexus" between the restriction and the state's anti-corruption interest); *Alaska Civil Liberties Union*, 978 P.2d at 627-29 (same), *Opinion of the Justices*, 637 N.E.2d at 217. On the other hand, both *Ferre* and *Anderson* applied less than strict scrutiny, but came to opposite conclusions about the constitutionality of a post-election fundraising ban. *Cf.* 478 So. 2d at 1079-80 ("Surely the Legislature could determine that a post-election contribution to a winning candidate could be a mere guise for paying the officeholder for a political favor. At the least, such a contribution, if not in fact corrupt, could be viewed by the public as corrupt."), *with* 356 F.3d at 670 ("While it may be that post-election contributions are more susceptible to the impression or appearance of corruption when those contributions are made to the *winning* candidate, the appearance of corruption all but disappears when that same contribution is made to a *losing* candidate.").

As with session bans, the asserted interests better support off-year fundraising restrictions on incumbents than on challengers. But challengers generally do not declare their candidacies far in advance of an election and thus tend to begin fundraising relatively late. As a result, off-year fundraising bans generally have a greater impact on incumbents than challengers, reducing rather than exacerbating the inherent advantages of incumbency.⁴⁷

⁴⁷ Because most off-year fundraising is conducted by incumbents, reformers may be tempted to introduce off-year fundraising bans as a means of "leveling the playing field" between incumbents and challengers. But efforts to equalize candidate resources, by cutting off funds to better financed candidates, are suspect under *Buckley*. On the other hand, in jurisdictions where incumbents

Whether this general rule will apply in the case of any particular off-year fundraising limit must be determined through empirical research in the affected jurisdiction.

The interests supporting post-election fundraising bans apply differently to winning and losing candidates. Contributions to a known loser are unlikely to be perceived as attempts to buy influence or access. For this reason, the *Anderson* court recently struck down Kentucky's post-election fundraising ban. 356 F.3d at 670. Rejecting *Ferre*, the Sixth Circuit also held that Kentucky's contribution limit was adequate to address any anti-corruption interest, even though supporters could deprive voters of meaningful disclosure by withholding contributions until after Election Day and then defraying a winner's costs (including the winner's loan to his or her own campaign). *Id.* at 671.

IV. Spend-Down Provisions

Reformers sometimes seek to promote more competitive elections by requiring elected officials to divest themselves of unspent campaign funds shortly after winning an election. The requirement is intended to discourage incumbents from amassing campaign war chests with which they can scare off challengers long before the next election. The provision is sometimes known as a "spend-down" provision, because candidates will generally choose to spend the funds in the last days of a campaign, rather than returning or relinquishing them after the election. The measure may also be known as a "turn over" or "carry forward" provision.

Tips

Tip: *The courts deciding challenges to spend-down provisions have split on their constitutionality.*

Legal Analysis

Spend-down provisions require candidates who do not spend funds raised for their campaigns to divest themselves of those funds after the election. Usually the requirement affects incumbents, who can raise large amounts of money while in office but generally need less than challengers to win an election. The provision is intended to deter incumbents from spending large amounts of time while in office raising funds that they do not need for re-election but can use to deter future challengers, thereby reducing the potential for corruption and encouraging greater electoral competition and voter choice.

The first case to consider a spend-down provision was *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995) ("*Maupin I*"). *Maupin I* held that Missouri's spend-down provision burdened candidates' First Amendment speech rights by forcing them to speak before an election or limiting their speech in future elections. *See id.* at 1428. The court then applied strict scrutiny to the provision and determined that it was not narrowly tailored to serve the state's three asserted interests in attacking corruption, preserving the integrity of the electoral process, and promoting speech and fairness. The court found that the provision was not narrowly tailored to

substantially out-raise challengers during off years, the different fundraising patterns can serve to defeat an equal protection claim

prevent the exchange of favors that occurs when money is given to candidates in uncontested races, or to open up elections to candidates who had not amassed war chests in noncompetitive races, because the spend-down requirement applied to funds raised in all campaigns. *See id.* The court also decided that the provision did not promote the speech rights of contributors, because candidates were forced to waste contributors' money before an election or forfeit the right to use it afterwards. *See id.*

By contrast, the Alaska Supreme Court upheld a 90-day “carry-forward” restriction, even under strict scrutiny, as a means of preventing candidates from using surplus campaign funds to circumvent contribution limits in the following election. *See Alaska Civil Liberties Union*, 978 P.2d at 632 (holding that the provision was “narrowly tailored” to serve the “compelling” interest in preventing avoidance of valid contribution limits).

Most recently, the Sixth Circuit invalidated a spend-down provision that required candidates to turn over unspent funds to the state. *Anderson*, 356 F.3d at 667-670. The right of the state to demand return of unspent public funds was not challenged. *Id.* at 668. But as applied to private funds, the provision was found to be a *per se* taking for public use without compensation, in violation of the Fifth Amendment. *Id.* at 669-670.

that the off-year fundraising ban discriminates against challengers.