CHAPTER THREE

THE FINANCING OF CANDIDATES' CAMPAIGNS

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 contribution limits applicable to individuals, political action committees ("PACs"), and political parties.

Different jurisdictions define "contributions" differently.[1] As is explained below, some jurisdictions include loans in their definitions, and we discuss that approach separately below.

[1]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 *id.* § 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. Secretary 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 recently 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), *petition for cert. filed sub nom Stumbo v. Anderson*, No. 04-103 (U.S. July 24, 2004).

A. 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.

TIPS

TIP: Before accepting the legitimacy of individual contribution limits, courts may require some evidence of corruption or the appearance of corruption in your state. The Supreme Court, in *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377 (2000), 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*. In addition, the *Shrink Missouri* Court determined that the following types of evidence collectively sufficed 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.*;

- 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.

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.

The Supreme Court in *Shrink Missouri* has made it very clear that limits must be *extremely* low not to pass constitutional muster, and *in the four years since that case* no court has invalidated an individual contribution limit. The types of evidence that courts have considered in deciding whether particular limits are unconstitutionally low include:

- how much was given to candidates in recent pre-reform elections in amounts over the limits you propose;

- 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 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.

Please 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 hostile 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.

TIP: Consider introducing public funding to make up for private money you take out of the system. By doing so, you may temper claims that you are starving the system. See section V of this chapter 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: Consider adopting a mechanism to allow for acquisition of seed money. For example, higher contribution limits could be permitted for 20% of voluntary spending limits during the early part of a campaign.

TIP: Limits that apply per election, rather than per year or per cycle, 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.

LEGAL ANALYSIS

In *Buckley v. Valeo*, the Supreme Court upheld a limit on contributions from individuals of $1,000 per candidate per election.[2] 424 U.S. 1, 23-35 (1976). 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, was not unconstitutionally overbroad, and did not unlawfully discriminate against challengers or minor-party candidates.

1. First Amendment

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

[2]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*, 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 wholly to 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 section V of this chapter 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 "millionaire's amendment" to the McCain-Feingold bill. The provision raises contribution limits for candidates facing high spending opponents.

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 20-21. 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.3. 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, *28, *Shrink Missouri*, 528 U.S. 377, and even though total expenditures in the 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).

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 contributions 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.[3] 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."[4] *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*").

[3]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.

[4]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." 124 S. Ct. 619, 656 (2003). 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).

The Supreme Court's campaign finance cases have offered no consistent definition of "corruption" or the "appearance of corruption."[5] 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) ("*Colo. 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.").[6] 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) ("*Colo. Republican II*") (acknowledging that corruption

[5]*See* 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).

[6]In *Austin v. Michigan Chamber of Commerce*, the Court identified "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. 652, 660 (1990); *see also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) (recognizing interest in limiting the "corrosive influence of concentrated corporate wealth"). To date, the Court has invoked this conception of corruption only when considering corporate spending on campaigns.

extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment").

McConnell confirms that "corruption" means more than outright trades of votes for money. 124 S. Ct. at 660 (favorably citing *Shrink Missouri* and *Colorado Republican II*). 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." 124 S. Ct. at 664 (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." 124 S. Ct. at 665. 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.

Id. at 666. The broad conception of corruption applies equally when interpreting the "appearance of corruption. *Id.*

Buckley equated the "appearance of corruption" with the appearance of "improper influence" or "impropriety"and the "potential for corruption." 424 U.S. at 27, 28, 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. 124 S. Ct. at 666 ("Implicit (and, as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence.").

Proving a state interest in preventing real or perceived corruption is 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*, 124 S. Ct. at 661. 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.

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, notwithstanding both *Buckley* and *Shrink Missouri*, 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.

Having established that preventing the reality and appearance of corruption is a "constitutionally sufficient justification for the $1,000 contribution limitation," *id.*, 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 exceedingly 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.[7] Since none of those courts

[7] *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

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. Since the decision in *Shrink Missouri*, no court has invalidated any individual contribution limit.[8] *See Landell v. Sorrell*, 382 F.3d 91, 137-39 (2d Cir. 2004) (upholding Vermont's limits of $200, $300, and $400 per two-year election cycle for candidates for state House, Senate, and statewide office); *Mont. Right to Life Ass'n, et al. 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 Gov'tal 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*

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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); *California 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. District of Columbia 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. Commission on Gov'tal 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).

[8]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.

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); *Florida Right to Life, Inc. v. Mortham*, 2000 WL 33733256, *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"). Limits at even lower levels may now be constitutional, and many of the caps that were struck down before *Shrink Missouri* was decided would almost certainly survive now.

Both the Supreme Court opinion in *Shrink Missouri* and the subsequent lower court decisions upholding contribution limits provide some guidance as to how the new standard should be interpreted. The Supreme Court upheld Missouri's limits even though the number of contested statewide primaries and the fundraising for all statewide primaries declined by approximately 90% in the first post-reform election cycle. *See Shrink Missouri*, 528 U.S. at 426 n.10 (Thomas, J., joined by Scalia, J., dissenting); *cf. Mortham*, 2000 WL 33733256, *4 (noting the nearly 20% decline in average amount raised in successful statewide cabinet campaigns and the more than 40% decline in average funds raised per voter). Even a very substantial reduction in the number of candidates running or the amount of funds raised is therefore plainly insufficient to defeat contribution limits, provided that the candidates who do run raise funds adequate for effective advocacy (and there is no evidence of systematic discrimination against any category of candidates). *See Shrink Missouri*, 528 U.S. at 396 (finding plausible the conclusion that "candidates . . . are still able to amass impressive campaign war chests") (citation omitted). Moreover, when 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. *Mortham*, 2000 WL

33733256, *5 & n.12. Evidence that candidates raise more money under the limits than before they existed or that they win with substantial surpluses persuaded the Ninth Circuit that complaints about Montana's limits were misplaced. *Eddleman*, 343 F.3d at 1095.

Shrink Missouri had the benefit of post-reform data, as did the *Mortham* and *Eddleman* courts. When little or no such data are available, however, baleful predictions about the effects of contribution limits should be received with pointed skepticism. *See Daggett*, 205 F.3d at 460 (noting that "'worst-case' scenario statistics, which consider the historical funding pattern and discount any contribution made over the limit," overpredict 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.

2. Equal Protection

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."[9] 424 U.S. at 33; *see California 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

[9]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 benefitting challengers as a class." *Id.* at 32 & n.37.

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 "insulate[] legislators from effective electoral challenge").

B. 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 (common "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. Campaign finance legislation should carefully define the PACs that are governed by its provisions.[10]

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

[10]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).

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 on individual contributions by ensuring that individuals would not just call themselves committees. *See Buckley*, 424 U.S. at 35; *see also 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 Landell*, 382 F.3d at 139-42 (upholding PAC limits identical to Vermont's individual limits); *Alaska Civil Liberties Union*, 978 P.2d at 625 (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); *Florida Police Benevolent Ass'n—Political Action Comm. v. Florida 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 under the pre-*Shrink Missouri* standard.[11] The limit upheld in *Shrink Missouri* applied to both individuals and PACs.

[11]*See* section I(A)(1) of this chapter; *Shrink Missouri*, 161 F.3d at 523 (invalidating

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*, the Eighth Circuit applied strict scrutiny to Arkansas' 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. *See Russell*, 146 F.3d at 572. Under *Shrink Missouri*, 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

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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); *California 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); *National 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).

Buckley, which upheld the differential limits applied to different kinds of PACs.[12] *See* 424 U.S. at 35-36.

C. 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 that political parties may contribute to candidates as a means of avoiding circumvention of individual limits.

TIPS

TIP: Contributions from political parties can sometimes make a difference for minority candidates and others who do not have wealthy supporters.

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. *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 on such expenditures, federal candidates could solicit

[12]The district court in *Russell* upheld the 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 *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981)).

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 *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado Republican II*"), which upheld the federal limits on coordinated expenditures. The Court stated in no uncertain terms that "all Members of the Court agree that circumvention is a valid theory of corruption." *Id.* 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.*, *Austin*, 494 U.S. at 664 (upholding a ban on independent expenditures directly from corporate treasuries, where corporations could otherwise "circumvent the Act's restriction [on corporate contributions] by funneling money" through each other's treasuries); *California Medical Ass'n*, 453 U.S. at 197-99 (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 Kentucky Right to Life, Inc. 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 put to bed 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 Missouri 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 means other than its earmarking provision are necessary to prevent circumvention."), *cert. denied sub nom. Missouri Republican Party v. Connor*, 122 S. Ct. 2329 (2002); *Citizens for Responsible Government State PAC*, 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); *Missouri 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 limit placed on contributions by political parties, the standard articulated in *Nixon* applies. *See Lamb*, 270 F.3d at 571 (citing the *Nixon* standard in upholding Missouri's limits on political party contributions, even "though they are much lower than those upheld in *Colorado II*").

D. Loans

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.

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"); *id.* § 431(8)(B)(vii)(I) (defining a bank loan as "a loan by each endorser or guarantor"); *see also FEC v. Ted Haley Congressional 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 recently 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), *petition for cert. filed sub nom. Stumbo v. Anderson*, No. 04-103 (U.S. July 24, 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 is seeking Supreme Court review of this decision.

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.[13] 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. 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.

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[13]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.

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.

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.[14] In *VanNatta v. Keisling*, the Ninth Circuit Court of Appeals applied less than strict

[14]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.

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).

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*, 382 F.3d at 147-49.

B. Corporations and Unions

The federal government bans corporations and unions from making contributions in connection with elections or political party processes for selecting candidates.[15] *See* 2 U.S.C. § 441b[16]. 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.

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.

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

[15]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).

[16]Section 441b also bans independent expenditures financed directly from bank, corporation, or union treasuries. For a discussion of independent expenditures, see Chapter Six.

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 on the federal ban on corporate contributions to candidates did not reach the Supreme Court until recently, when it was upheld in *FEC V. Beaumont*, 123 S. Ct. 2200 (2003) (upholding 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. National Right to Work Comm.*, 459 U.S. 197, 207 (1982) ("*NRWC*"). Similar rhetoric appeared in the Court's decision in *United States v. UAW*, 352 U.S. 567 (1957), a case filed shortly after Congress also banned labor union contributions and expenditures.[17] *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"). 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

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

candidates from having that money used to support political candidates to whom they may be opposed."[18] *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. At the same time, "[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support" for the views advanced with their money. *Austin*, 494 U.S. at 660.

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 Austin*, 494 U.S. at 657; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) ("*MCFL*") (plurality opinion). The *Austin* Court nevertheless found a ban on corporate independent expenditures narrowly tailored to serve the

[18]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 Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

government's anti-corruption interest, because it was "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." 494 U.S. at 660. There is no reason to believe that the Court would hold differently with respect to contributions by corporations and unions or union expenditures.

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 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). 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*, 1999 WL 814273, *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. The Court has, however, carved out a narrow exception for *expenditures* by certain non-profit organizations that do not accept contributions from business corporations. *Compare MCFL*, 479 U.S. at 263-64 (defining the exception), *with Austin*, 494 U.S. at 662-65 (applying ban on corporate expenditures to non-profit corporation that accepted for-profit corporate contributions).

In *Beaumont*, the Supreme Court refused to apply the *MCFL* exception to non-profits that make *contributions* to candidates. 123 S. Ct. at 2209-10 ("[C]oncern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations."); *see also*

Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 646 (6th Cir. 1997) ("[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, Inc. 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. Lobbyists 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' clients at the same time they are delivering checks to the candidates, raise at least the appearance of corruption. For similar reasons, some states have attempted to limit or ban contributions from 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 have occasion to lobby or who actually have regulatory authority over (or other special connection to) the contributor's business. Courts are more likely to uphold such limitations, because they focus more directly on the potential for corruption.

TIP: Consider reducing contribution limits for lobbyists or members of regulated industries, rather than banning them outright.[19] The lower limits permit participation in the political process through the symbolic act of contributing, while combating the risk of corruption.

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 have resolved challenges to outright bans on lobbyists' contributions. The law at issue in the first case, *Fair Political Practices Comm'n v. Superior Ct. of Los Angeles County*, banned all contributions from all lobbyists. 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. 25 Cal. 3d 33, 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.").[20] The Court was concerned that the statute banned contributions even

[19]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 2002).

[20] Most bans on lobbyists' contributions to candidates do not ban those contributions

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 law more narrowly drawn to ban lobbyist contributions only if the lobbyist is registered to lobby the office for which the candidate seeks election. *See Institute of Gov'tal Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1195 (E.D. Cal. 2001). The *Institute of Gov'tal 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 on lobbyists' contributions only slightly less sweeping than the California law. Alaska banned 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).

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completely, but only while the legislature is in session. *See, e.g.*, Conn. Gen. Stat. § 9-333*l*(e) (2002). 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 Bd., 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. *See 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.

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); *Casino Ass'n of Louisiana v. State*, 820 So. 2d 494 (La. 2002), *cert. denied*, 529 U.S. 1109 (2003) (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); *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, Inc. 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. Compare *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), *with Lee v. Commonwealth*, 565 S.W.2d 634 (Ky. Ct. App. 1978) (invalidating ban on property owner contributions to candidates for property tax assessor, based on state Constitution). The regulations are 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.

One additional issue that merits attention in this context arises because pay-to-play regulations are often enacted to supplement existing contribution provisions, and the regulations often target industries that are already subject to a high degree of non-election-related regulation.

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, sufficed to avoid the threat of corruption. *Lee*, 565 S.W.2d at 636 (holding that professional certification and regulation of property valuation assessors sufficed to 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).

D. Government Employees

The government may ban contributions from its own employees to candidates for office in that government. The bans are seen as a way to protect against erosion of public confidence in the impartiality of provision of government services, protecting the fairness of elections, and preserving 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. Civ. Serv. Comm'n v. Nat'l Ass'n 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 Ass'n of Firefighters v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *see also Reeder v. Kansas City Bd. of Police Comm'ners*, 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 for small transfers 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 the testimony of current or former elected officials.

LEGAL ANALYSIS

Two cases have now recognized the state's interest in preventing evasion of contribution limits by limiting inter-candidate transfers. *See SEIU*, 747 F. Supp. at 593 (noting that this argument would have "significant weight" if the jurisdiction already had valid contribution limits), *aff'd*, 955 F.2d 1312 (9th Cir. 1992); *Alaska Civil Liberties Union*, 978 P.2d at 633. In *SEIU*, however, the court had already struck down the statute's basic contribution limits, so there was no need to worry about contributors evading those limits through inter-candidate transfers. On that basis, the court overturned the inter-candidate transfer bans. The Alaska Supreme Court, which upheld Alaska's contribution limits, also upheld the inter-candidate ban.

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.*

F. Bundling

Bundling occurs when an intermediary, sometimes known as a "conduit," gathers contributions from individuals and sends them to a candidate in such a way as to identify the intermediary. The bundler can take credit for soliciting and delivering the funds, but because the intermediary is passing on contributions from others, the contributions do not count against the

intermediary's own contribution limit. Bundling therefore may be seen to raise the same appearance of corruption as large campaign contributions.

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, there are as yet no cases dealing with bundling, so we cannot be certain how courts will treat the practice.

TIPS

TIP: Consider instituting reporting requirements on bundling, in lieu of banning the practice altogether. 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 appeal 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 California Medical 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 27 (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 regulation 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.").[21] The only party certain to appreciate the connection is

[21]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) (2002). 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

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 non-public 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 use 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 bundlers' solicitations for contributions.

Reporting requirements for bundlers may well be a 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) (Baldwin 2000) (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

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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.)

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 only bundling from entities that also employ 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).

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 might go to this point. Evidence of candidates receiving money from PACs, and then helping a PAC position, 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

Four cases have addressed aggregate PAC limits. *See Montana Right to Life v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003); *Citizens for Responsible Government*, 60 F. Supp. 2d at 1090-92; *Kentucky Right to Life*, 108 F.3d 637; *Gard v. Wisconsin 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 Government*, 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*. Without such an overall limit, according to the court, PACs would send their money to state party committees, who would then pass it on to the candidates in unlimited amounts.[22] *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

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

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 Kentucky 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 Wisconsin Supreme Court was willing to accept as evidence of apparent corruption the simple fact that candidates in Wisconsin were getting larger and larger 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 may also wish to 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'"). 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 notion that PAC contributions influence the roll-call votes of legislators;[23] but acknowledging that PAC influence is

[23]Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex,*

strongest in narrow, less visible issues and can be seen to a certain extent in legislative maneuvering[24]). Of course, legislators' testimony about the deleterious effect of special interest money on legislative decision making, if available, would be helpful.

Gard dismissed the two major arguments made against implementation of aggregate limits: that they are covert spending limits,[25] 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 for such limits. 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.[26] *See id.* at 825; *see also 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 parties

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33 Am. J. Pol. Sci. 1 (1989); William P. Welch, *Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports*, 35 W. Pol. Q. 478 (1982).

[24]*See generally* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797 (1990) (discussing the influence of money on congressional committees and members' legislative involvement).

[25]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.

[26]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.

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").[27] 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.[28] 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*

[27]In addition, Kentucky has imposed a 28-day ban on gubernatorial fundraising immediately before primary or general elections as a means of effectuating Kentucky's 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. In *Anderson v. Spear*, the 6th Circuit struck down the 28-day window as applied to write-in candidates. 356 F.3d at 675.

[28]*See, e.g.*, Iowa Code Ann. § 56.15A (West 1999) (state legislators and officials elected statewide); N.C. Gen. Stat. Ann. § 163-278.13B (West 2002) (legislators). For simplicity's sake, we will refer to all such bans as applying to legislators.

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.

TIPS

TIP: Only one session ban has ever survived challenge intact.

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.

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 one exception, *see Kimbell*, 665 A.2d 44, courts have applied strict scrutiny to session bans. *See Bartlett*, 168 F.3d at 715; *Arkansas Right to Life State Political Action Comm. 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 Missouri 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).

Assuming conservatively that strict scrutiny will ordinarily be applied to session bans, 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; *Arkansas Right to Life*, 983 F. Supp. at 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 Arkansas 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 substitute for) the traditional corruption-prevention rationales.[29]

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;

[29]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).

see also Winborne v. Easley, 523 S.E.2d 149, 154 (N.C. 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.

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.

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).[30] On the other hand, as *Bartlett* noted, "if

[30]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).

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);[31] *Arkansas Right to Life State Political Action Comm. 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 4½ months, because cutting off funds for ⅓ 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 what monetary contribution limits govern the jurisdiction. Courts may be better disposed to session bans if no contribution limits exist, or if the limits are relatively high, because

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

raising money in large sums takes less time than raising it in small sums from a larger number of contributors.

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.[32] 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.[33] 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

[32]*See, e.g.*, Ariz. Rev. Stat. Ann. § 41-1234.01 (West 1999); Iowa Code Ann. § 56.15A (West 1999); Minn. Stat. Ann. § 10A.273(1) (West Supp. 2002). For more on limits on contributions from lobbyists, see section II(C), *supra*.

[33]Florida has a law prohibiting solicitation or acceptance of contributions after an election. *See* Fla. Stat. Ann. § 106.08(3)(b) (West Supp. 2002) (banning contributions five days before an election or after an official is elected).

other things. Reformers cannot 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.

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. Florida 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 ex rel. Reno*, 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 v. Spear* applied less than strict scrutiny, but came to opposite conclusions about the constitutionality of a post-election fundraising ban. *Compare* 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.[34] 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 v. Spear* 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. This analysis flies in the face of the Supreme Court's repeated and growing deference to the legislature about the need for measures to combat corruption.

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

[34]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 substantially out-raise challengers during off years, the different fundraising patterns can serve to defeat an equal protection claim that the off-year fundraising ban discriminates against challengers.

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 Gov't 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

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 v. Spear*, 356 F.3d at 667-70. 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 669-70.

V. Public Financing

Public funding is an important part of the state campaign finance landscape.[35] At least 26 states (down from 28 in 2001) and a dozen localities have some form of public subsidy for

[35]For a review of some of the common forms of public financing, see Elizabeth Daniel, *Subsidizing Political Campaigns: The Varieties & Values of Public Financing* (Brennan Center 2000). The entire policy paper may be downloaded from the Brennan Center's web site: www.brennancenter.org.

candidates or political committees (including parties).[36] Eight states authorize funding only for political committees or party organizations, 12 only for candidates, and six for both.[37]

This section discusses some of the more common mechanisms for infusing public funds into candidates' campaigns — full grants, matching funds, refunds and tax incentives for contributors, and free or reduced-fee television or radio time — which may be adopted with or without voluntary spending limits.[38] To date, lawsuits attempting to compel implementation of public funding systems have been dismissed by the courts without consideration of the merits.[39]

A. Full Public Funding

Five states — Arizona, Maine, New Mexico, North Carolina, and Vermont — have passed initiatives or statutes providing for full public financing of elections for some candidates (judicial candidates in the case of North Carolina) who accept spending limits.[40] Other full public funding bills and initiatives are being considered in states and localities across the country.

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[36]Center for Governmental Studies, *Public Financing of Elections: Where to Get the Money?* Appendix B (July 2003); Edward D. Feigenbaum & James A. Palmer, *Campaign Finance Law 2002: A Summary of State Campaign Finance Laws with Quick Reference Charts*, Chart 4 (FEC 2002). Since the publication of these reports, Massachusetts repealed its public funding program.

[37]States that fund parties are generally those that have the least overall regulation of their campaign finance systems, and the funding seems to be aimed at encouraging additional party involvement in the political system. *See* Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 52-53 (1998). On the other hand, the states that fund candidates tend to regulate private money in campaigns more rigorously and attempt to limit the role of parties in electoral politics. *Id.*

[38]Annotated model legislation for "Clean Money/Clean Elections Reform" is available on Public Campaign's website (http://www.publiccampaign.org/publications/2001modelbill.htm).

[39]See *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999); *Albanese v. FEC*, 78 F.3d 66 (2d Cir. 1996); *Royal v. North Carolina*, 570 S.E.2d 738 (N.C. Ct. App. 2002) (finding claim to be issue for the legislature), *appeal dismissed, review denied*, 576 S.E.2d 111 (N.C. 2003).

[40]Massachusetts passed an initiative in 1998, which the legislature first refused to fund

TIPS

TIP: Full public funding is made available only to candidates who agree to accept limits on the total amount of campaign spending.[41]

TIP: If full public funding is coupled with voluntary spending limits, the system must be structured to encourage participation. Factors that affect participation include the following:

- *The amount of public funding.* Candidates are unlikely to participate if public funding is not sufficiently generous. Study campaign finance data in your state to determine how much it would cost a challenger to win a competitive race in each affected election district. It may be possible to offer higher levels of funding for challengers. Solicit the opinions and take seriously the advice of elected officials and political consultants about the appropriate funding levels.

- *Availability of a "trigger" provision that allows spending above the voluntary limit if the opposition spends a certain amount.* Triggers may include spending by a non-participating candidate, independent spending, or both. See Chapter Five, section I(B)(3), for discussion of triggers.

TIP: Grants calculated district-by-district are more difficult to administer but better take into consideration geographic variation in the costs of campaigns.

TIP: A mechanism should be provided to ensure that the subsidy keeps pace with inflation.

TIP: If at all possible, funding should come from general revenues. The general treasury is the only fully reliable source of funds.

TIP: The source of public funds may affect the amount of funding available for distribution. Most states pay for their programs through an income tax check-off provision under which taxpayers do not increase their tax liability.[42] A handful of states rely on an income tax add-on in which

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notwithstanding a court order, *Bates v. Director of Office of Campaign & Political Finance*, 763 N.E.2d 6 (Mass. 2002), and then repealed in 2003.

[41]Chapter Five, section I ("Voluntary Spending Limits"), discusses legal issues that arise when voluntary spending limit schemes use public funding as an inducement for candidate participation.

[42]The Maine program is funded primarily by a $2 million appropriation from the state

participating taxpayers agree to increase their tax liability by a small amount. Check-off participation is declining in most states, but add-on programs have been consistently ineffective at producing sufficient funds.[43]

TIP: Taxes on lobbyist expenditures are not promising sources of revenues for public funding programs. Lobbying is constitutionally protected speech, and courts have ruled that it may not be taxed solely for the purpose of raising revenues – even for public financing programs.

TIP: The number of elections and offices funded should reflect the amount of funding available. If funds are spread too thin among too many elections and offices, the scheme may not allow candidates to get out their message. Among the criteria to consider in deciding which elections and races to fund are:

- *The impact of certain races on the public perception of electoral integrity*. Funding a few, high-priced statewide elections may go farther to eliminate perceived corruption than funding many, lower cost legislative races.

- *The level of and reasons for competition in different elections*. For instance, if most election campaigning takes place in the primaries, and there is rarely competition in the general election, the funding system may be structured so that candidates can receive much of their funding for the primary. On the other hand, if there has traditionally been little competition in the primary, you may wish to focus on the general election, unless the reason for the lack of competitive primaries is that the party's selected candidate is considered such a hands-down favorite that other candidates cannot raise the money to compete. You may also want to structure the program so that candidates in what are basically uncontested races do not qualify for the full grant otherwise provided.

TIP: Structure the system to require a showing of some public support before candidates qualify for public funds. Full subsidy programs risk losing public support and legitimacy if their thresholds for participation are so low that they appear to finance individuals who are not serious

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general fund and a $3 income tax check-off. *See* 21-A Me. Rev. Stat. Ann. § 1124(2) (West 2004).

[43]*See* Malbin & Gais, *The Day After Reform*, *supra* note 38, at 66.

candidates. On the other hand, if the threshold is too high, the requirements for qualification will function as a kind of proxy for fundraising ability. There are three principal mechanisms for identifying candidates entitled to funding:

- *Collection of signatures on a petition*.

- *Collection of a specified dollar amount of qualifying contributions*. This system generally includes a limit on the amount of each contribution that can count toward qualification (*e.g.*, $200 or less) and often restricts the source of contributions to individuals.[44] Limiting the size of qualifying contributions allows candidates without access to wealthy donors to raise the qualifying amount and ensures a showing of broad support.

- *Votes in a prior election.* Care must be taken in a vote-based system not to snare non-major party candidates in a Catch-22, where they need public funding to reach potential voters but are unable to qualify for public funding until they have won substantial votes in an election. In the federal system, for instance, minor party presidential candidates receive a reduced grant based on the percentage of the vote received in the previous election. They are, however, permitted to raise private money up to the spending limit placed on major party candidates who accept full public funding.[45] Candidates of new parties do not receive any money before the election.

TIP: Consider linking public financing with other mechanisms designed to increase and improve the quality of political speech during the campaign, such as a requirement that candidates who accept public money participate in debates.[46]

[44]Reformers sometimes propose allowing contributions only from registered voters. Such a limit raises concerns about the First Amendment rights of potential contributors who choose not to register or cannot vote. As a matter of policy, the restriction may cut off important sources of support for minority candidates from communities that include substantial numbers of non-citizens.

[45]*See* 26 U.S.C. § 9003(c).

[46]Where campaign finance systems use public funding as an incentive for candidates to accept spending limits, these additional conditions will help to balance the benefits and disadvantages of participation and thus improve the chances that the spending limit scheme will be found truly voluntary and therefore constitutional. *See* Chapter Five, section I.

TIP: Think seriously about the role of political parties and other political associations within a full public funding scheme. Some critics have argued that contributors seeking political influence under a full public funding system will simply shift their money from candidates' campaigns to political parties, PACs, or independent expenditures. On the other hand, you want to make sure that there is still room for grassroots participation in parties and advocacy groups under a full public funding system. Consider an exemption from the definition of "contribution" for certain kinds of grassroots activity.

LEGAL ANALYSIS

Because a full public funding plan will include an agreement by the candidate to abide by a spending limit and to decline (or limit) private contributions, these plans are subject to attack on the ground that they violate the First Amendment rights of contributors as well as candidates. *Buckley* determined, however, that public funding proposals offered in exchange for a candidate's agreement to abide by spending limits are constitutionally acceptable.[47] *See* 424 U.S. at 92-93; *see also Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 286 (S.D.N.Y.) (three-judge court) ("[S]ince the candidate has a legitimate choice whether to accept public funding and forego private contributions, the supporters may not complain that the government has deprived them of the right to contribute."), *aff'd*, 445 U.S. 955 (1980). Public funding of campaigns, the *Buckley* Court held, reflects a proper effort "to use public money to facilitate and enlarge discussion and participation . . . . [It] furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93. Additionally, public financing advances the substantial government interest in combating corruption and the appearance of corruption. *See id.* at 96.

[47]For a full discussion of legal issues involved in voluntary spending limits, see Chapter Five, section I.

Public funding statutes may also be subject to equal protection challenges of their method of allotting money to candidates. For instance, FECA — which provided less (or no) money to candidates of non-major parties, based on the vote in the prior election — was attacked on the ground that it "work[ed] invidious discrimination against minor and new parties in violation of the Fifth Amendment." *Id.* at 97. The *Buckley* Court applied a rational basis test to uphold FECA's allocation method, however, reasoning that "there are obvious differences . . . between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other."[48] *Id.* (internal quotation omitted). Moreover, because the major party candidates were subject to spending limits and a ban on private fundraising for general elections, while other candidates could raise private funds, the Court believed that the latter might well do better relative to the major party candidates under the public funding scheme than with universal private fundraising. *Id.* at 99. Finally, "Congress could properly regard [the vote-based eligibility system] as preferable" to petition drives or public opinion polls, which presented administrative and other problems. *Id.* at 100. In short, if the government has some reason for its allocation plan, it need not treat non-major parties identically to major parties. *See also Anderson v. Spear*, 356 F.3d at 676 (holding Kentucky's interest in "maintaining and managing scarce resources" justified its refusal to offer public funds to write-in candidates).

Aspects of the funding mechanisms for the Arizona and Vermont programs have also been challenged.[49] The Arizona law originally provided for funding from an income tax check-off, direct

[48]The Court also applied a rational basis test to a challenge of the partial funding of presidential primaries. *Buckley,* 424 U.S. at 105-08.

[49]Opponents of Maine's public funding system focused their constitutional challenge principally on the provision of matching funds for independent expenditures, which is discussed in Chapter Five, section I(B)(3). For now, suffice it to say that the Court of Appeals for the First Circuit resoundingly affirmed the constitutionality of the law, setting a crucial precedent for other

donations to the state campaign fund (for which donors may receive up to a $500 tax credit), a 10% surcharge on civil and criminal fines, and lobbyist fees. Vermont's program (which covers only the races for governor and lieutenant governor) provided for funding from a tax on expenditures by lobbyists, a percentage of the annual report fees paid by corporations, and allocations from the legislature. The Arizona surcharge on fines was found constitutional, *see May v. McNally*, 55 P.3d 768 (Ariz. 2002), *cert. denied sub nom. May v. Brewer*, 528 U.S. 923 (2003) ;[50] but the lobbyist fees in both Arizona and Vermont were invalidated under the First Amendment, *see Lavis v. Bayless*, No. CV 2001-006078, slip op. at 4-5 (Ariz. Super. Ct. Dec. 21, 2001); *Vermont Soc'y of Ass'n Executives v. Milne*, 779 A.2d 20, 31 (Vt. 2001).

B. Partial Grants and Matching Funds

In principle, it would be possible to provide candidates with a grant designed to cover many expenses of their campaigns, with no limit on the use of private funds. We know of no jurisdiction that has taken such a proposal seriously, but some civil libertarians continue to advocate this "floors without ceilings" approach. Jurisdictions that provide public funds as a partial substitute for private contributions do so only if candidates voluntarily limit their expenditures.

These partial public funding schemes can take the form of outright grants or matching funds. Matching funds programs typically cap the amount of a contribution that will be matched and provide funds only up to a specified total.

TIPS

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states and localities following the same model. *See Daggett*, 205 F.3d at 463-72.

[50]In an earlier case, the Arizona Supreme Court invalidated the statutory mechanism for appointment of the administering agency, but severed it from rest of the Act, leaving the public funding system intact. *See Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 712-13 (Ariz. 2000).

TIP: Many of the TIPS offered in the Full Public Funding section also apply to partial funding programs. See section V(A) above.

TIP: The lower the matched amount of each contribution (e.g., up to $100 or $200) and the more generous the match-ratio (e.g., 4-to-1, as in New York City), the greater the incentive to collect relatively small contributions from more people, and the more the subsidy reflects popular support rather than access to wealthy donors. The lower the matched amount, the greater the ratio of public to private funds should be, or the burdens of fundraising may deter potential candidates from running for office or from participating in the program if they decide to run.

TIP: Where matching funds are linked with voluntary spending limits, speedy distribution of funds is necessary to encourage candidate participation.

TIP: Matching fund programs carry ongoing administrative costs, but nevertheless may be less expensive than grant programs, depending upon the number of qualifying candidates, the amount of private funds raised, and the generosity of the match.

TIP: A generous matching fund program can help to open the political process to candidates who lack wealthy supporters without creating unintended incentives for increased independent expenditures.

LEGAL ANALYSIS

FECA includes a matching fund program for candidates who run in primary elections. *Buckley* upheld the program against claims that it discriminated against candidates who qualified for the ballot by means other than party primaries. *See* 424 U.S. at 105-06. In so doing, the Court recognized the legitimacy of requiring small contributions from numerous people. *See id.* at 106. The Court also permitted Congress to require some geographic dispersion of contributors to a

presidential campaign as a qualifying condition for matching funds.[51] *See id.* Finally, *Buckley* noted that the voluntary spending limit linked with the matching program, like that linked with the subsidy program for general presidential elections, made it possible for "candidates with little fundraising ability . . . to increase their spending relative to candidates capable of raising large amounts in private funds." *Id.* at 108.

Matching programs on the state level have been challenged in lawsuits contesting the constitutionality of voluntary spending limit schemes. For a discussion of those cases, see Chapter Five, section I(A), (B)(2).

C. Tax Deductions, Tax Credits, or Rebates for the Contributor

Some programs help to finance electoral campaigns by offering individuals monetary incentives to make contributions to candidates or political organizations (including PACs and political parties). The incentive may take the form of a tax deduction, a tax credit, or a rebate of the amount of the contribution up to a specified limit. These programs, like matching fund programs, ensure that the amount of public funds spent on campaigns is directly correlated with the level of the candidates' or organizations' private (financial) support.

TIPS

TIP: Rebates are more likely to encourage lower income people to contribute than are tax deductions or credits. The value of a tax deduction will vary with the contributor's tax bracket, increasing as income rises. The tax credit is of equal value to all taxpayers. A rebate will reimburse

[51] States or localities may also impose reasonable time limits in which to qualify for matching funds. *See Ostrom v. O'Hare*, 160 F. Supp. 2d 486, 495 (E.D.N.Y. 2001) (upholding a June 1 deadline for a November election); *Rogers v. New York City Bd. of Elections*, 988 F. Supp. 409 (S.D.N.Y. 1997) (upholding an April 30 deadline for a November election).

even those contributors whose income is so low that they have no tax liability. Very low income persons may nevertheless be unable to advance a contribution and wait for the rebate.

TIP: Incentive programs avoid the need for new administrative systems and personnel. The incentives can be administered by the taxing authority.

TIP: Consider linking tax incentives or rebates with other campaign finance reforms, such as contribution limits or voluntary spending limits. In Minnesota, for instance, the rebate is available only if the contribution is made to a candidate who agrees to abide by spending limits.

TIP: Incentive schemes that encourage small-donor fundrasing will increase fundraising costs. Voluntary spending limits should take into account the costs of fundraising.

TIP: Consider whether you want to fund parties or other political organizations. In some states, political parties have assisted competition and have provided funding and organization in a way that discourages corruption. For example, political parties will have an incentive to create small donor bases under the tax incentive or rebate programs, and the lists can be shared with the parties' candidates.

TIP: Tax incentives and rebates are available on an equal basis to those supporting third-party and independent candidates. The contributors decide which candidates are "serious," not the statutory funding scheme.

LEGAL ANALYSIS

Tax incentives and rebates offer a form of public funding that requires little new administration and is legally uncomplicated. Because those incentives simply provide donors with a no- or low-cost means of contributing to the candidate or political group of their choice, the government does not need to become involved with allocating funds to campaigns. Tax incentives or rebates may also encourage more people to make small contributions.

One of the more interesting financial incentive programs is Minnesota's, which gives a 100% refund for contributions up to $50 ($100 for joint filers) made to candidates who have accepted spending limitations. Similarly, Arkansas and Ohio have recently enacted 100% tax credits for contributions up to $50 for single filers and $100 for joint filers. The programs in Arkansas and Ohio are not linked with voluntary spending limits. These programs are generally aimed at increasing the participation of small donors, and reducing candidates' reliance on large donors, by making it easier to raise smaller donations.

Using a tax credit both as an inducement to encourage contributions to candidates and as an inducement to candidates to accept spending limits is constitutionally permissible; it is simply another kind of public subsidy. *See Buckley*, 424 U.S. at 107 n.146; *see also Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983) (tax credits and deductibility for contributions are a form of government subsidy to the entity receiving the contributions). In *Rosenstiel*, the Eighth Circuit upheld Minnesota's tax refund scheme against a challenge that it was coercive when used — along with trigger provisions and other public funding — to encourage candidates to accept spending limits. *See* 101 F.3d at 1551.

D. Free or Reduced-Rate Air Time on Television or Radio

TIPS

TIP: Consider providing candidates with vouchers for free air time on public television and radio stations and local access or government cable stations. Free broadcast or cable services can help candidates who do not have easy access to big money, by making available an otherwise costly campaign resource and thus reducing the amount of money that candidates must raise to be competitive. Where the air-time is not needed, the voucher could be transferred to the candidate's political party in exchange for other assistance.

TIP: Consider structuring a program where the state purchases air time on commercial stations and makes it available to candidates. Because the federal government has exclusive licensing and regulatory authority over broadcasting airwaves — both for radio and television — state governments cannot require commercial stations to give candidates free or reduced cost air time, unless the states compensate the stations.

TIP: Some commercial stations have been persuaded to provide free air-time as a voluntary public service.[52]

TIP: Consider linking the air time subsidy — on public or commercial stations — with a requirement that the candidate accept spending limits or abide by campaign advertising guidelines designed to improve the quality of political debate. Some reformers have recommended conditioning free or reduced-cost air time on the candidate's agreement to appear personally during part of the advertisement.

TIP: In addition to, or as an alternative to, providing air-time to candidates for their own advertisements, public television stations may be used for debates among the candidates. If a state convenes such debates, it must use reasonable and viewpoint-neutral standards to decide which candidates are entitled to participate.

LEGAL ANALYSIS

The drive to provide free television and radio time for candidates has been frustrated to some extent because states cannot regulate privately-owned broadcasting stations. Some states — Rhode Island, specifically — and a handful of local governments have responded to this limitation by crafting reforms that provide free time on public stations or government access cable stations.

[52]The Alliance for Better Campaigns can assist reformers seeking to provide free air-time for candidates in their states. See Appendix D for more information.

Rhode Island has provided free air time on community television stations and public broadcasting stations for candidates who agree to spending limits. *See* R.I. Gen. Laws § 17-25-30(1)-(2) (2003). In *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993), opponents of this law claimed that these provisions were preempted by the Federal Communications Act, which requires licensees to afford all candidates an equal opportunity to use their broadcast time. *See* 47 U.S.C. § 315(a), (c). In other words, the opponents argued that provisions barring a commercial station from allowing some candidates to buy advertising time while denying that opportunity to others, and from charging different rates for different candidates, precluded the state from offering free air time to candidates who accepted spending limits. The opponents also contended that Rhode Island's program created an excessive government entanglement in the operation of political campaigns in violation of the First Amendment.

The *Vote Choice* court rejected the preemption argument, but only by reading Rhode Island's law to allow candidates who refused spending limits to petition under federal law for equal time or equal treatment. By implication, *Vote Choice* seems to suggest that the Federal Communications Act would preempt a state campaign finance law that precluded candidates who declined spending limits from obtaining the same free air time afforded to participating candidates. The court determined that, even if Rhode Island were ultimately required to provide free air time to all candidates, the air time would constitute an incentive for participation in the voluntary spending limit scheme, because candidates who accepted the limits could be assured that their acceptance would not prevent them from getting their message to voters. *See* 4 F.3d at 42.

The *Vote Choice* court also found that the provision of free air time did not unduly entangle government in the internal conduct of political campaigns. *See id.* at 43. According to the court, free television time did result in a slight intrusion by the government, but "offering in-kind benefits

actually furthers first amendment values by increasing candidates' available choices and enhancing their ability to communicate." *Id.*

Another mechanism that can be used to enhance candidate communication with voters is a publicly subsidized debate among the candidates. The Supreme Court has held that states need not open such debates to every interested candidate, as long as the standards used to decide which candidates are entitled to participate are reasonable and viewpoint-neutral. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). No court has yet considered whether inclusion in such debates could be offered as one of the incentives to participate in a voluntary spending scheme. Several states and some major cities require participation in debates as a condition of receiving public funding.[53]

[53]*See, e.g.*, Ky. Rev. Stat. § 121A.100 (Baldwin 2004); N.J. Stat. Ann. § 19:44A-45 to 47 (West 2004); Los Angeles Mun. Code § 49.7.19C (2001).