

BRENNAN

CENTER

FOR JUSTICE

WRITING REFORM

2010 Revised Edition

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Editor of 2010 Revised Edition

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Editor of 1998-2008 Editions

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FOREWORD

Purpose. The Brennan Center for Justice at New York University School of Law has designed this manual for people who want to draft campaign finance reform legislation that is both appropriate for their community and sensitive to constitutional concerns. Because different laws may be appropriate in different states and localities, the handbook will not tell you what provisions to include in legislation you draft. In our view, people with ties to communities interested in reform are in the best position to determine what legislation is needed and achievable. We therefore do not provide model laws here, but we do identify organizations that can provide such models.

Rather than providing a blueprint for reform, we offer practical suggestions and legal analysis that will assist reformers in selecting and drafting appropriate campaign finance provisions. The handbook certainly should help drafters who wish to maximize the potential for avoiding a lawsuit or succeeding in court if their legislation is challenged, so that campaign finance reform can be implemented expeditiously. The manual also should be of use to activists who aim to push the envelope of permissible reform by drafting statutes or initiatives that can serve as the basis for test cases. Both groups of drafters must understand the state of current law to accomplish their purpose.

We focus primarily on the drafting of statutes or initiatives that will govern state elections. Our recommendations and analysis also apply, however, to local campaign finance laws. Special issues that must be faced when attempting to regulate municipal campaign finance are addressed briefly in the Epilogue.

Format. The main body of the handbook is divided into two Parts. Part One discusses areas of general concern to anyone who is engaged in drafting campaign finance laws. Part Two focuses on specific regulatory measures that are often considered by reformers at both the state and local level. We include four appendices—a chapter-by-chapter list of cases cited in the handbook; a table of the federal courts of appeals and the states within each circuit’s jurisdiction; a compilation of cited articles, books, and other resources; and a list of national organizations that collect data, provide assistance, or otherwise work on campaign finance issues.

For ease of use, the chapters in Part Two (Drafting Specific Campaign Finance Measures) separate our practical TIPS from our more technical LEGAL ANALYSIS. The TIPS are suggestions for drafters who do not necessarily have formal legal training. The LEGAL ANALYSIS section discusses the case law relevant to the provision at issue, and other legal considerations, for lawyers who are participating in the drafting process and others interested in understanding the relevant legal framework.

Warning. This handbook is only a beginning. Campaign finance is an extremely volatile area of the law. New initiatives and statutes are being drafted even as this book goes to print, and some, if not most, of those laws will be challenged in court. The decisions in those cases and others now pending throughout the nation could radically alter the legal framework for reform.

We have therefore dated each chapter in the footer. We will periodically update the handbook and revise chapters to reflect new judicial decisions and evolving practical experience under different campaign finance systems. If you are unsure whether you have the current version of a chapter, do not hesitate to inquire.

In addition, our analysis is limited to cases interpreting and applying federal constitutional law. In some states, the state constitution or state statutes may set additional limits on the types of reform that may be implemented. In addition, opinions published by state Attorneys General and existing state regulatory requirements will influence the reform landscape. A careful legal analysis of any applicable state (and, where appropriate, local) law should always be completed before proposing any new campaign finance legislation—whether by statute or initiative.

We therefore cannot emphasize too strongly how important it is to supplement this handbook with high quality legal advice. Look for attorneys who are experienced in the field, follow developments in the area, and can bring a critical perspective to proposals you may wish to consider. Even if lawyers in your community are helping you to draft legislation, it is advisable to invite outside counsel to review the proposal with a disinterested eye. Lawyers at the Brennan Center may be consulted by telephone: 646-292-8310 or via e-mail: brennan.center@nyu.edu. Please include “Campaign Finance Question” in the subject line.

CHAPTER ONE

THE CONSTITUTIONAL FRAMEWORK: *BUCKLEY V. VALEO*

Campaign finance reformers should not proceed without some understanding of the 1976 Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Supreme Court considered broad-based constitutional challenges to the Federal Election Campaign Act (“FECA”), as amended in 1974, 2 U.S.C. §§ 431 *et seq.* FECA’s opponents challenged the statute’s contribution and spending limits, reporting and disclosure requirements, the public financing system for presidential campaigns, and the legitimacy of the Federal Election Commission (“FEC”). Although FECA applies only to candidates for federal office, *Buckley* is the leading case on campaign finance regulation and the analytical starting point for all state and local campaign finance laws.

This chapter is designed to provide the lay reader with a rudimentary understanding of the structure, reasoning, and conclusions of *Buckley* with respect to the substantive campaign finance provisions in FECA. We have included citations to the official opinion for those interested, but we hope that the summary will stand on its own. Some overlap with later discussions of specific areas of campaign finance has been unavoidable. The legal analysis in Part Two of this book is more technical and should offer lawyers and aficionados of the law a more complete understanding of *Buckley*’s implications.

In 2000, 2003, 2006, 2007 and 2008 there were major Supreme Court decisions with important implications for the interpretation of *Buckley*. The first is *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the second is *McConnell v. FEC*, 540 U.S. 93 (2003),¹ the third is *Randall v. Sorrell*, 548 U.S. 230 (2006), the fourth is *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (“WRTL II), and the fifth is *Davis v. FEC*, 128 S. Ct. 2759 (2008). Because it is impossible to understand campaign finance law without also understanding these more recent cases, this chapter summarizes their analyses and holdings as well, with particular attention to their implications for *Buckley*. Finally, in 2010, the Supreme Court altered the landscape for campaign finance once more in its decision, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), by allowing corporations and unions to spend their treasury funds directly on political advertisements about candidates.

For those not familiar with constitutional analysis, the following preliminary remarks may be helpful. When a statute is challenged under the First Amendment, courts first ask whether the law really burdens protected rights. If there is no burden, the law is constitutional. But if there is some burden, courts must weigh the First Amendment right against the government’s interest in enforcing the law. Severely burdensome restrictions are subject to “strict scrutiny” and can be justified only when the law is narrowly tailored to serve a compelling state interest; less burdensome provisions are subject to less exacting review, sometimes called “intermediate scrutiny.” As a practical matter, laws are far more likely to survive intermediate scrutiny than strict judicial review.

¹ *McConnell* was overruled in part by *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

Over time, certain categories of restrictions have become identified with specific levels of constitutional scrutiny. For example, restrictions that are based on the viewpoint of the speaker are subject to strict scrutiny, while restrictions that merely regulate the time, place, or manner of First Amendment activity are subject to intermediate review. Where restrictions do not fit neatly into any recognized category, courts must analyze the impact of the restrictions to determine the appropriate level of scrutiny, as the Supreme Court did in *Buckley*.

I. Contribution and Expenditure Limitations

A. General Principles

Buckley began by recognizing that campaign finance regulation operates in an area of core First Amendment activities. Candidates and contributors express their political opinions and affiliate with like-minded persons by giving and spending money in connection with electoral campaigns. Under *Buckley*, limits on contributions and expenditures thus inescapably burden rights of free speech and association.

As a preliminary matter, *Buckley* rejected the argument that such limits are merely time, place, or manner regulations that would automatically be subject to intermediate scrutiny. The Court therefore proceeded to analyze the extent of the First Amendment burden.

The Court determined that limits on contributions and expenditures differ significantly in their impact on speech and association. According to the Court, expenditure limitations “represent substantial . . . restraints on the quantity and diversity of political speech” because “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” *Buckley*, 424 U.S. at 19.²

By contrast, the *Buckley* Court regarded a contribution largely as a “symbolic expression of support” for a candidate, *id.* at 21,³ which is not transformed into political debate until it is spent by the recipient to convey views to the voters. *Id.*⁴ Because the contributor’s right to discuss candidates and issues remains otherwise

² This point is sometimes (inaccurately) encapsulated in the phrase: “Money is speech.”

³ The Court thought that the expression involved in contributions was largely symbolic, because a contribution usually does not communicate the basis for the contributor’s support, and the size of the contribution is only a “very rough index” of the intensity of support. *Buckley*, 424 U.S. at 21.

⁴ Communication effected through someone other than the contributor is sometimes called “speech by proxy.” *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638 (1996) (Thomas, J., concurring in the judgment and dissenting in part); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 196 (1981).

unimpaired, contribution limits ordinarily involve “little direct restraint” on political communication. *Id.* The limits “could have a severe impact on political dialogue,” however, if they “prevented candidates and political committees from amassing the resources necessary for effective advocacy.” *Id.*

Buckley also distinguished contribution and expenditure limits with respect to their impact on freedom of association. Contribution caps were found to limit “one important means of associating,” because contributions serve to affiliate the contributor with the recipient and other persons who pool resources in support of common political goals. *Id.* at 22. Contribution limits leave open other avenues of association, however, and allow recipients to aggregate large sums for advocacy. Expenditure limits were seen to “impose significantly more severe restrictions” on freedom of association, because they cut off the ability of candidate organizations and political committees (“PACs”) to amplify the voices of their adherents. *Id.* at 23.⁵

B. Contribution Limitations

1. The \$1,000 Limit on Contributions to Candidates

First Amendment. FECA imposed a limit on contributions by individuals and certain PACs of \$1,000 per candidate, per election. *Buckley* noted that this limit primarily affected one aspect of the contributor’s freedom of association and determined that the limit could be sustained if the government showed “a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgement” of that right. *Id.* at 25.

In defense of the \$1,000 limit, the government had proffered three interests:

- preventing corruption and the appearance of corruption;
- equalizing the ability of citizens to affect elections, by muting the voices of wealthy contributors; and
- opening the process to more candidates, by curbing the costs of campaigns.

⁵ *Buckley* is an interpretation of federal law. Individual states can potentially determine that there is no free speech distinction between contributions and expenditures under state election laws. *See, e.g., Vannatta v. Keisling*, 931 P.2d 770 (Or. 1997); *but see Vannatta v. Or. Gov’t Ethics Comm’n*, 222 P.3d 1077, 1084-86 (Or. 2009).

The Court did not even discuss the latter two interests as applied to contribution limits, finding that the interest in preventing the reality and appearance of corruption was a “constitutionally sufficient justification” for the \$1,000 limit.⁶ *Id.* at 26.

Having identified the “sufficiently important interest,” *Buckley* proceeded to consider whether contribution limits were “closely drawn” to avoid unnecessary abridgement of First Amendment rights. The Court determined that the limits were indeed precisely focused on the problems of real and perceived corruption, “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. *Buckley* specifically rejected arguments seeking to prove that higher limits would alleviate those problems, stating that “[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind.” *Id.* at 30.⁷

Equal Protection. FECA’s opponents also raised an equal protection challenge to the contribution limits, claiming that the caps discriminated against major-party challengers and against minor-party and independent candidates. *Buckley* rejected this challenge, concluding that there was no basis in the record of invariable and invidious discrimination against these classes of candidates. *Id.* at 32-34.

2. *Other Contribution Limitations*

Buckley upheld three additional limitations on contributions:

- a \$5,000 limitation on contributions to candidates by certain PACs, *id.* at 35-36;⁸
- “[l]imitations on [v]olunteers’ [i]ncidental [e]xpenses, *id.* at 36-37; and
- a \$25,000 limit on total contributions from any one individual to all candidates, during any calendar year, *id.* at 38.

⁶ Although “the perception of corruption, not just actual corruption” is sufficient to enact contribution limits, the presence of both actual and perceived corruption creates the strongest rationale for such limits. See *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199-200 (2d Cir. 2010).

There is no longer a limit on contributions to organizations that make independent expenditures in federal elections, because the D.C. Circuit has found after *Citizens United* that “the government has no anti-corruption interest in limiting contributions to an independent expenditure group.” *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010), *cert. denied sub nom Keating v. FEC*, ___ S. Ct. ___, 2010 WL 4272775 (Nov. 1, 2010).

⁷ An example of contribution limitations that failed for not being “closely drawn” are restrictions on contributing after the date of the election, bans on contributing within 28 days of an election, and bans on contributing cash. See *Anderson v. Spear*, 356 F.3d 651, 671 (6th Cir. 2004).

⁸ The PACs at issue in *Buckley* were FECA’s “multicandidate political committees,” which are PACs that have 50 or more contributors and make contributions to five or more candidates, 2 U.S.C. § 431.

The Court held that these provisions encouraged participation in the political process, while preventing evasion of the basic \$1,000 limits. *Id.* at 35-38.

C. Expenditure Limitations

After upholding FECA’s caps on contributions, the Court turned its attention to a series of monetary limits on expenditures. *See id.* at 39-58. According to the Court, the expenditure limits imposed a severe burden on First Amendment rights and were therefore subject to the most rigorous standard of constitutional review—strict scrutiny—which requires proof that a challenged restriction is narrowly tailored to serve a compelling state interest. None of the expenditure limits survived that level of scrutiny.⁹

1. The \$1,000 Limitation on Independent Expenditures

FECA prohibited all persons from making total expenditures “relative to a clearly identified candidate” in excess of \$1,000 per year. 2 U.S.C. § 441a note 9. The statute defined “expenditures” to include only spending that was not coordinated with a candidate. Opponents argued that the statutory limit on such “independent” expenditures was both vague and unjustified.

The Court agreed that the phrase “relative to” did not clearly identify what candidate-related expenditures were subject to the statutory limit. Advertising meant to address important political issues, which is fully protected by the First Amendment, might be thought subject to the expenditure limit if the public identified the issue with a particular candidate. Consequently, the vague statute threatened to chill free expression guaranteed under the Constitution. To eliminate the vagueness problem, *Buckley* therefore determined that FECA’s expenditure limits covered only “communications that in express terms advocate[d] the election or defeat of a clearly identified candidate for federal office” (as opposed to those that merely discussed issues or candidates, without expressly advocating election or defeat of candidates). *Buckley*, 424 U.S. at 44. The distinction between “express advocacy” and “issue advocacy” originates here. *Id.*¹⁰

Notwithstanding the new clarity imparted to the statutory language, *Buckley* determined that FECA’s \$1,000 expenditure limit was unconstitutional. The Court considered but rejected two state interests proffered as justifications for the restriction:

- preventing actual and apparent corruption; and
- equalizing the relative ability of individuals and groups to affect the outcome of elections.

⁹ *See, e.g., Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 4 P.3d 808, 817 (Wash. 2000).

¹⁰ *See* later in this chapter and Chapter Seven for further discussions of this distinction and its implications for efforts to regulate campaign advertising.

The state interest in preventing the reality and appearance of corruption could not justify the expenditure limit for two reasons. First, the *Buckley* Court’s narrowing interpretation of “expenditures relative to a clearly defined candidate” undermined the ability of such limits to advance the anti-corruption interest. As the Court noted: “It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate’s campaign.” *Id.* at 45.¹¹

Second, the expenditure limits governed only “independent expenditures”—those not coordinated with a candidate. The Court believed that the absence of coordination made it less likely that independent expenditures would be an effective tool for buying influence. “Unlike contributions,” the Court said, “such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Id.* at 47.

Buckley also held that the asserted interest in equalizing the relative ability of individuals and groups to affect election outcomes could not justify the \$1,000 limit on independent expenditures. In rather hyperbolic terms, the Court stated: “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” *Id.* at 48-49. The Court therefore invalidated the limit on independent expenditures.

2. *Other Expenditure Limitations*

Continuing to apply strict scrutiny, *Buckley* struck down two additional expenditure limits, one on candidates’ spending from their personal or family resources and the other on overall campaign expenditures.¹² The Court reasoned that candidates could not be corrupted by spending their own money. With regard to spending limits on campaigns, *Buckley* held that contribution limits would be sufficient to address the perception and reality that large contributions were corrupting candidates.¹³ The Court also determined that the interest in equalizing candidates’ resources was insufficient to override the candidate’s interest in free speech.¹⁴ Moreover, the Court

¹¹ The millions of dollars spent on so-called “issue ads” during the 1996, 1998, and 2000 federal election campaigns cynically illustrate *Buckley*’s point. For an analysis of television advertising in the 1998 and 2000 campaigns, see Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000* (Brennan Center 2001); Jonathan S. Krasno & Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center 2000).

¹² However, campaign expenditure restrictions on governmental bodies are permissible. *Sweetman v. State Elections Enforcement Comm’n*, 732 A.2d 144, 162 (Conn. 1999).

¹³ See *State v. Brookins*, 844 A.2d 1162, 1180 (Md. 2004) (holding that a law preventing a candidate from hiring workers to distribute literature near polls on election day was unconstitutional because it neither combated the appearance of corruption nor was narrowly tailored).

¹⁴ However, expenditure limitations are permissible in limited forums, such as for college student office elections. See *Flint v. Dennison*, 488 F.3d 816, 819 (9th Cir. 2007) (holding that the educational interests outweighed the free speech interests in student elections).

noted, the “skyrocketing costs of political campaigns” did not in and of themselves justify restrictions on First Amendment activity, even if the spending were “wasteful, excessive, or unwise.”¹⁵ *Id.* at 57.

II. Reporting and Disclaimer Requirements

FECA imposed record-keeping and quarterly reporting requirements on PACs and candidates. The law also required reporting by individuals and groups other than PACs, who made independent expenditures or contributions to an entity other than a PAC or candidate of more than \$100 per year, and required certain disclosures on campaign advertising.¹⁶ Opponents challenged the general reporting requirements as overbroad and the independent expenditure reporting requirement as unconstitutionally vague.

The Court began by admitting that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”¹⁷ *Buckley*, 424 U.S. at 64. *Buckley* acknowledged, however, three categories of governmental interests that were “sufficiently important to outweigh the possibility of infringement”:

- “provid[ing] the electorate with information” about “where . . . money comes from and how it is spent,” to help voters place candidates on the political spectrum and identify the interests to which candidates are likely to be responsive;
- deterring the reality and “appearance of corruption by exposing large contributions and expenditures to the light of publicity,” to help the electorate detect post-election special favors; and
- providing the “essential means of gathering the data necessary to detect violations of contribution limits.”

Id. at 66-68 (citation & internal quotation marks omitted).

The Court recognized that mandatory reporting might deter some individuals who would otherwise contribute, but concluded that reporting was “the least restrictive means of curbing the evils of campaign ignorance and corruption.”¹⁸ *Id.* at 68. *Buckley* acknowledged, however, that if a group could show a reasonable probability that

¹⁵ It is also impermissible to restrict the failure to expend contributions by taking unexpended privately financed contributions. *See Anderson*, 356 F.3d at 669-70 (6th Cir. 2004) (holding that a statute that requires unexpended contributions to be given to the state violates the Fifth Amendment).

But see Homans v. City of Albuquerque, 160 F. Supp. 2d 1266, 1273 (D.N.M. 2001) (refusing to grant a preliminary injunction against an expenditure limit preventing a mayoral candidate from spending more than twice the mayor’s salary on the election because the limit met strict scrutiny).

¹⁶ The minimum amounts triggering the reporting requirement are now \$250 and \$200 per year, for independent expenditures and contributions, respectively. 2 U.S.C. § 434(c)(1), (c)(2)(C).

¹⁷ *See Perry v. Schwarzenegger*, 591 F.3d 1126, 1145 (9th Cir. 2009) (quashing a discovery request seeking internal communications and strategy of a pro-Proposition 8 organization on First Amendment grounds).

¹⁸ Disclosure requirements have also been explicitly held to an intermediate scrutiny standard. *Koerber v. FEC*, 583 F. Supp. 2d 740, 745 (E.D.N.C. 2008).

disclosure of its contributors would subject them to harassment or retaliation, an exception from the reporting requirements could be carved out to protect their First Amendment rights.¹⁹ *Id.* at 74.

The Court then turned to the vagueness claim asserted against the reporting requirements for independent expenditures. To ensure that only election-related spending was subject to those requirements, the Court construed them to apply only to independent expenditures that expressly advocated the election or defeat of candidates.²⁰ In addition, the Court interpreted the term “political committee” to include only those organizations “that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Id.* at 79. Thus, independent expenditures by political committees would be reportable, but the donations received and spending undertaken by organizations devoted primarily to issue discussion would remain outside the sweep of the reporting requirements.²¹

Finally, *Buckley* considered the monetary thresholds set for record-keeping (\$10) and reporting (\$100). *Buckley* acknowledged that “there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure.” *Id.* at 83. The Court determined, however, that such line-drawing is a matter for legislative judgment, unless the limits chosen are “wholly without rationality.” *Id.*

III. Public Financing of Presidential Election Campaigns

FECA established a fund, financed by an income tax check-off, whereby individuals would earmark payment of (then) \$1 of their taxes for presidential campaigns.²² The fund would pay for party nominating conventions, general election campaigns, and a portion of primary campaigns for those candidates who agreed to limit overall spending on their campaigns.

¹⁹ See *Nat'l Ass'n of Mfrs v. Taylor*, 582 F.3d 1, 22 (D.C. Cir. 2009) (upholding disclosure as applied to a trade association and holding that the fear of association with controversial speech is insufficient and does not rise to levels of harm in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (finding association led to economic reprisal, physical coercion, and other hostility toward members)). The Supreme Court has also carved out an exception for certain anonymous speech. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

²⁰ See *SpeechNow.org*, 599 F.3d at 698 (upholding reporting requirements for an organization engaged in supporting candidates with independent expenditures); *Broward Coal. of Condos., Homeowners Ass'ns. and Cmty. Orgs. Inc. v. Browning*, No. 4:08-cv-445, 2008 WL 4791004, at *8 (N.D. Fla. Oct. 29, 2008) (holding that disclosure can only be applied to electioneering communications, and not ballot issue communications), clarified by *Broward Coal. of Condos., Homeowners Ass'ns. and Cmty. Orgs. Inc. v. Browning*, No. 4:08-cv-445, 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008); *Nat'l Right to Work Legal Def. and Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1151 (D. Utah 2008) (finding a statute that regulated all political activity unconstitutional because it was not limited to election-related communications).

²¹ However, if an organization primarily concerned with an issue distributes voter guides, the organization can be subject to contributor reporting. See *Human Life of Wash. Inc. v. Brumsickle*, No. 09-35128, 2010 WL 3987316, at *2, *28 (9th Cir. Oct. 12, 2010).

States may require the reporting of contributions to groups concerning purely ballot initiatives. See *Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 206 (D. Me. 2009).

²² In 1993, the tax check-off was increased from \$1 to \$3.

Major parties (those whose presidential candidate received more than 25 percent of the vote in the previous election) and their candidates who accepted the voluntary spending limits were entitled to receive more funding than minor parties (whose candidate received 5-25 percent of the vote) and their candidates. Minor-party candidates who accepted voluntary spending limits could receive a reduced grant of public funds and could raise private funds to make up the difference between the amount of their grant and the major-parties' grant. "New" parties (whose candidate received less than 5 percent of the vote), independent candidates, and parties not holding a convention received no pre-election funding at all. However, minor and new party candidates could get post-election funds if they (or electors pledged to them) were on the ballot in at least 10 states, and their share of the popular vote exceeded certain percentages.

FECA also established a matching funds program for primary elections. Candidates could receive matching funds for the first \$250 of each private contribution, up to 50 percent of the overall expenditure ceiling, if they accepted the ceiling and raised at least \$5,000 in each of 20 states (counting only the first \$250 of each person's contributions).

FECA's opponents first claimed that the public funding scheme was unconstitutional because it did not promote the "general welfare" and was therefore outside the scope of Congress's legislative power. *Buckley* determined that "Congress was legislating for the 'general welfare' to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91.

Buckley also rejected the opponents' First Amendment challenge. Rather than abridging speech, the Court held, the public funding system helped "to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. *Buckley* therefore recognized that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."²³ *Id.* at 57 n.65.

Finally, *Buckley* held that the public funding scheme did not invidiously discriminate against non-major parties or their candidates. The Court attributed any difficulty minor-party candidates might have in waging effective campaigns to their inability to raise private contributions and thus, "presumably," to their general lack of public support. *Id.* at 94-96 & n.128. Congress could treat parties and candidates with broad public support (as measured by prior vote totals) differently than those without, to avoid "frivolous candidacies, . . . splintered parties, and . . . unrestrained factionalism." *Id.* at 97, 101.²⁴ Moreover, the Court was not persuaded, on the record available in *Buckley*, that non-major-party candidates would be worse off under the public financing scheme, with its voluntary expenditure limits for major-party candidates, than in an unlimited private funding system.

²³ State governments can condition the receipt of public funds on acceptance of expenditure limits by participating candidates. See *Daggett v. Comm'n on Gov't Ethics and Elections Practices*, 205 F.3d 445, 466 (1st Cir. 2000).

²⁴ See *Anderson*, 356 F.3d at 676 (holding that the government's substantial interest in allocating scarce resources permits the establishment of access requirements for public funds and is permissible under the Fourteenth Amendment).

**BUCKLEY REAFFIRMED:
NIXON V. SHRINK MISSOURI GOVERNMENT PAC**

On January 24, 2000, the Supreme Court decided *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), a case challenging the constitutionality of \$1,075 limits on contributions to statewide candidates in Missouri. Due to the fact the Missouri cap was virtually identical to FECA's, *Shrink Missouri* presented an opportunity for the Supreme Court to reconsider *Buckley*'s analysis of contribution limits, and opponents of campaign finance reform urged the Court to overrule *Buckley* and declare contribution limits unconstitutional.

Instead, in a 6-3 decision, the Court resoundingly reaffirmed the constitutionality of contribution limits at or even below the \$1,000 level.²⁵ In so doing, the Court also clarified several aspects of *Buckley* that had caused confusion and controversy in recent years, including:

- the standard of review: contribution limits are governed by a different, and less strict, standard of review than expenditure limits, *see Shrink Missouri*, 528 U.S. at 387-88;
- what counts as a state interest justifying contribution limits: contribution limits can be justified by the state's interests in combating not only the reality, but also the appearance, of corruption, *see id.* at 388;
- what "corruption" means: "corruption" is not confined to outright bribery but also extends to the "broader threat from politicians too compliant with the wishes of large contributors,"²⁶ *id.* at 389;
- what is needed to prove the state's interest: the state need not document actual corruption but may rely on the findings in *Buckley* and other types of evidence that tend to show an appearance of corruption, *see Shrink Missouri*, 528 U.S. at 378-79, 393-94;
- the significance of inflation since *Buckley*: none; neither \$1,000 nor any other amount is a constitutional minimum below which legislatures cannot regulate, *see Shrink Missouri*, 528 U.S. at 396-97.

Most importantly, *Shrink Missouri* articulated a new standard for the "outer limits of contribution regulation." *Id.* at 397. According to the Court, no limit is too low, unless it is "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." *Id.* This test raises the constitutional threshold so high that, in the future, contribution limits should be

²⁵ For example, a limit of \$250 in contributions per person for state legislative candidates has been upheld. *Daggett*, 205 F.3d at 459. Limits as low as \$100 have been upheld. *See, e.g., Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1087-88 (9th Cir. 2003).

These restrictions are permissible for political campaigns, but are not for ballot issue campaigns, which may include recall campaigns. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 654 (9th Cir. 2007).

²⁶ This includes not only limitations on contributions per person, but can also ban contributions from certain classes of organizations, such as casinos and riverboat gambling businesses. *See Casino Ass'n of La. v. State ex rel. Foster*, 820 So. 2d 494, 509 (La. 2002). Contributions between candidates' committees can also be banned. *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1113 (8th Cir. 2005). However, *Citizens United* may have limited what the Court considers to be "corruption." *See* 130 S. Ct. at 908-11.

upheld in all but the most extraordinary of circumstances. In more than eight years since the decision in *Shrink Missouri*, only one individual contribution limit has been held unconstitutional.²⁷

Shrink Missouri is also notable for the separate opinions written by Justices Stevens, Breyer, and Kennedy. Justice Thomas also wrote a dissenting opinion, joined by Justice Scalia, but there was little surprising in their criticism of campaign finance regulation.

For the first time in so many words, Justice Stevens stated: “Money is property; it is not speech.” *Id.* at 398 (Stevens, J., concurring); cf. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part) (“[T]he argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.”). Justice Stevens explicitly questioned the view that the First Amendment provides the same measure of protection to the use of money in politics as it does to the use of ideas. All the same, he recognized that the right to use one’s own money in political contexts does merit significant constitutional protection.

Justice Breyer wrote separately to emphasize that “constitutionally protected interests lie on both sides of the legal equation” in contribution limit cases. *Id.* at 400 (Breyer, J., joined by Ginsburg, J., concurring). In his view, legislatures may appropriately seek “to democratize the influence that money itself may bring to bear upon the electoral process,” *id.* at 401, notwithstanding *Buckley*’s comment that “the speech of some . . . [may not be restricted] to enhance the relative voice of others,” 424 U.S. at 48-49. According to Justice Breyer, “those words cannot be taken literally” because the Constitution often permits restrictions “to prevent a few from drowning out the many.” *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). He also endorsed a reading of *Buckley* that permits substantial campaign finance reform—including proposals to regulate soft money, to provide reduced-price media time, and even to limit some expenditures. *Id.* at 404-05. If *Buckley* could not be read to permit such reform, Justice Breyer concluded, “the Constitution would require us to reconsider *Buckley*.” *Id.* at 405.

Justice Kennedy dissented from the decision in *Shrink Missouri*. But his opinion was important because it recognized the serious problems plaguing the federal system—including soft money and “so-called issue advocacy.” *Id.* at 406-07 (Kennedy, J., dissenting). He would have overruled *Buckley*, but only in such a way as to leave a clean slate for new approaches to campaign finance reform. *Id.* at 409-10. Notably, he left open the possibility that expenditures as well as contributions could be limited constitutionally (although he expressed considerable skepticism on that score). *Id.* at 409.

Shrink Missouri was a huge win for campaign finance reform. The Court rejected every effort to cut back on *Buckley*’s analysis of contribution limits—and several Justices signaled openness to additional regulation of money in politics. Unfortunately, campaign finance decisions by the Supreme Court since the confirmation of Chief Justice Roberts and Justice Alito suggest that the tide has turned. Those cases will be discussed later.

²⁷ The Supreme Court invalidated Vermont’s contribution limits in *Randall v. Sorrell*, discussed below, with no discussion of the *Shrink Missouri* standard.

**GIANT LOOPHOLES SUCCESSFULLY CLOSED:
*McCONNELL V. FEC***

In 2002, Congress passed the Bipartisan Campaign Reform Act (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.), enacting into law what had been commonly known as the “McCain-Feingold Bill.” The principal purpose of BCRA was to close two huge loopholes that had opened in federal campaign finance law: the “soft money” loophole and the “sham issue advocacy” loophole. The soft money loophole allowed corporations, unions, and wealthy individuals to escape limitations on contributions to national political parties. Millions of dollars were funneled through the parties to federal candidate campaigns, in violation of the intent of FECA. The sham issue advocacy loophole allowed advertisers to escape regulation as long as their ads did not “expressly advocate” the election or defeat of a federal candidate. Much of the soft money was used for sham issue ads.

Before the President’s ink was dry on the McCain-Feingold Bill, opponents of the law filed eleven separate lawsuits challenging it on constitutional grounds. They challenged the provisions closing the soft money and sham issue advocacy loopholes, as well as a raft of other provisions, many of which had been added during the amendment process. Although Senator Mitch McConnell was not the first to file his lawsuit (the National Rifle Association filed first), when the cases were consolidated for trial, he insisted that his name appear as the lead plaintiff.

Senator McConnell is probably ruing that decision now. In December 2003, the Supreme Court upheld BCRA almost in its entirety. *See McConnell v. FEC*, 540 U.S. 93 (2003). The Supreme Court emphasized the authority of Congress to engage in incremental legislative change to adjust the campaign finance laws to changing circumstances and the most pressing problems. *See id.* at 158. Over 30 years the Court’s deference to the political judgments of Congress provided strong support for campaign finance laws at the state and local level that are designed to address problems similar to those addressed in BCRA. Recently, however, hostility by the Roberts Court to legislative judgments, as typified by the *Citizens United* decision in 2010, casts some doubt upon whether as much deference will be given in the future.

The first two sections of this overview of *McConnell* focus on the Court’s decisions upholding the loophole-closing provisions. At the end is a schematic summary with bullet points identifying the full scope of the decision.

I. Soft Money

The first major component of BCRA upheld in *McConnell* was the statute’s ban on “soft money” donations to national political parties.²⁸ A contribution to a party is “soft money” if it is not subject to restrictions as to source or amount. For example, although corporations have been banned from contributing to federal candidates for a century, they could freely give hundreds of thousands of dollars to the Republican and Democratic National

²⁸ Non-profits continue to be able to utilize soft money without restriction. *Emily’s List v. FEC*, 581 F.3d 1, 14 (D.C. Cir. 2009).

Committees before BCRA.²⁹ Now, as *McConnell* explains, BCRA “takes national parties out of the soft-money business.” 540 U.S. at 133.

With respect to the national parties, BCRA’s principal soft-money limitations are:

- the parties (and federal officials and candidates) are banned from “soliciting, receiving, directing, or spending any soft money,”³⁰ *id.*;
- corporations and labor unions cannot make donations to the parties; and
- individuals can contribute no more than \$25,000 to a party annually, and there are also limitations on contributions to and by PACs.

The soft money ban survived *Citizens United* where it was not at issue.³¹ Because FEC regulations gave the parties an incentive to funnel much of their federal electioneering activity through state and local party committees even when soft money was legal, BCRA tries to anticipate and prevent a similar end-run around the soft-money ban by imposing the following restrictions on state and local committees and candidates:

- if state and local committees raise soft money, they cannot use it for “federal election activities” as defined in the statute;
- state and local candidates cannot use soft money to run ads promoting or attacking federal candidates; and
- similar to national committees, state and local committees cannot solicit soft-money contributions from tax exempt organizations that engage in federal electioneering.

There is a minor exception to the ban on engaging in “federal election activities” with soft money: if state law authorizes them, state and local parties can maintain “Levin accounts” to finance get-out-the-vote drives and a handful of similar activities that affect both state and federal races.

²⁹ After *Citizens United*, corporations may now make unlimited independent expenditures on political speech, but are still banned from making direct contributions to federal candidates. 130 S. Ct. at 913. Unlimited independent expenditures can be made not just by corporations, but any “non-connected entities-including individuals, unincorporated associations, non-profit organizations, labor unions, and for-profit corporations.” *Republican Nat’l Comm. v. FEC*, No. 08-1953, 2010 WL 1140721, at *1 (D.D.C. Mar. 26, 2010).

³⁰ This has been held to cover both direct and indirect requests. *Shays v. FEC*, 414 F.3d 76, 107 (D.C. Cir. 2005). Initially, 527 groups emerged as a faction through which soft money may be funneled, but a court ordered the FEC to justify its “case-by-case adjudication or to promulgate a rule if necessary” covering 527 groups that are also political committees. *Shays v. FEC*, 424 F. Supp. 2d 100, 103 (D.D.C. 2006) (holding that the FEC’s Explanation and Justification was insufficient to justify case-by-case adjudication).

³¹ *Republican Nat. Comm., v. FEC*, No. 09-1287, 130 S. Ct. 3544 (Jun. 29, 2010) (summarily affirming lower court ruling upholding the soft money ban for political parties).

The Supreme Court upheld all of these provisions. After documenting the long history of banning corporate and union spending in federal elections, and the very good reasons for the ban, the Court turned to a discussion of soft money. The Court noted that soft money entered the campaign finance system through rulings by the FEC, rather than through FECA, and that soft money contributions were “dramatically larger” than “hard money” (regulated) contributions. *Id.* at 124. The Court also observed the fact that corporate contributions were often made to both political parties, demonstrating that the large contributions were made to secure access to candidates or to avoid retribution, rather than for ideological reasons. *Id.* at 124-25. Applying the reduced standard of review reaffirmed in *Shrink Missouri, McConnell*, 540 U.S. at 134, the *McConnell* Court held that the interests in combating real and apparent corruption fully justified the soft money ban and the measures enacted to prevent circumvention of the ban.³²

In so doing, the Court asserted that the “crabbed view of corruption”—which would limit the term to actual *quid pro quo* corruption—“ignores precedent, common sense, and the realities of political fundraising.” *Id.* at 152. The Court made it clear that Congress was entitled to consider historical evidence and the context in which a particular practice takes place when deciding how to limit campaign fundraising. *Id.* at 153. In particular, the Court recognized that “it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect.” *Id.* at 154-55.³³

II. Express Advocacy, Issue Advocacy, and Electioneering Communications

Earlier in this chapter when discussing *Buckley*, we introduced the distinction between “express advocacy” and “issue advocacy.” “Express advocacy” is advertising that explicitly urges voters to vote for or against a particular candidate. “Issue advocacy” refers to communications that take positions on issues. Most lower courts believed that express advocacy covered an extremely narrow category of communications—ads using so-called “magic words” such as “elect” or “vote against”—so that advertising that was clearly designed to tell voters how to vote, but did not use those terms, was usually categorized as issue advocacy and shielded from regulation. For example, a television advertisement that ran a week before the election, criticized the incumbent’s environmental record, and concluded, “Call Joe Incumbent and tell him to stop helping big polluters destroy our environment,” would have been considered issue advocacy in most of the country.

³² A district court recently noted that limiting actual and apparent corruption is the only justification that has been used to uphold contribution limitations. *Thalheimer v. City of San Diego*, No. 09-cv-2862, 2010 WL 596397, at *3 (S.D. Cal. Feb 16, 2010).

³³ In *Citizens United*, the Court held that the governmental interest in preventing corruption or the appearance of corruption was limited to *quid pro quo* corruption. 130 S. Ct. at 910. The Court reasoned that, in the context of independent expenditures, the fact that an elected official may be influenced by or grant access to certain speakers does not mean that the official is necessarily corrupt. *Id.*

Why did this matter? Because it was generally (but not universally) believed after *Buckley* that governments were precluded from almost any meaningful regulation of issue advocacy. For example, in candidate elections:

- corporations and unions could be prohibited from sponsoring express advocacy, but not issue advocacy;³⁴
- individuals could be required to disclose their spending on independent express advocacy, but not issue advocacy; and
- PACs that engaged in express advocacy had to disclose their funders, but groups that limited themselves to issue advocacy often did not.

Trying to avoid raising difficult constitutional questions, courts often interpreted broadly worded campaign finance reform laws to apply only to express advocacy. For example, disclosure laws in some jurisdictions were narrowed so that voters had no way of finding out who was paying for expensive media blitzes against various candidates, so long as the advertisers were careful not to use any of the “magic words” that would turn their messages into express advocacy. Avoiding express advocacy was easy, and the issue advocacy loophole was so large that effective regulation of independent advertising was virtually impossible.³⁵

McConnell changed all this by upholding provisions of BCRA that regulate “electioneering communications.” With some exceptions, BCRA defined “electioneering communications” as “any broadcast, cable, or satellite communication that . . . refers to a clearly identified candidate . . . within 60 days before a general election . . . or within 30 days before a primary . . . election . . . [and that] can be received by 50,000 or more persons [in the candidate’s constituency].” 2 U.S.C. § 434(f)(3)(A)-(C). The candidate is considered to be “clearly identified” if his or her name or picture appears in the communication or if his or her identity is “apparent by unambiguous reference.” 2 U.S.C. § 31(18)(C). Thus, a television commercial saying “The President is wonderful” or “The President is horrible” would be an electioneering communication if broadcast in October of an election year.

³⁴ The restriction on express advocacy was rescinded in *Citizens United*, which held that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.” 130 S. Ct. at 913.

³⁵ See, e.g., *Wash. State Republican Party*, 4 P.3d at 822 (holding that attacking a candidate’s stand on criminal law issues did not expressly tell people to vote for or against the candidate, and was thus issue advocacy).

“Electioneering communications” include many advertisements that are not express advocacy. The *McConnell* Court found that the distinction between “express advocacy” and “issue advocacy” as interpreted by most lower courts was “functionally meaningless.”³⁶ 540 U.S. at 193. The Court explained that the distinction was purely the product of statutory construction and not a constitutional requirement. *Id.* at 191-92. Because the electioneering communications provisions were neither vague nor overbroad, they were fully compliant with First Amendment requirements.³⁷

The Court upheld the following restrictions, among others:

- corporate and union money may not be used for electioneering communications;³⁸ and
- individuals, PACs, and other associations must disclose the source of funding for electioneering communications and the amount they spend on the ads.

These restrictions are quite similar to the restrictions on express advocacy upheld in *Buckley*. In addition, *McConnell* upheld a requirement that funders of electioneering communications disclose their expenditures when they sign contracts to produce or broadcast ads, even if they do not actually make payments until after the election. Thus, the information voters need will be available while it is still relevant.

³⁶ Even after *McConnell*, courts continued to distinguish between express and issue advocacy, but have since expanded express advocacy regulation to include both express advocacy and the functional equivalent of express advocacy. *See, e.g., Ohio Right to Life, Inc. v. Ohio Elections Comm’n*, No. 2:08-cv-00492, 2008 WL 4186312, at *6-7 (S.D. Ohio Sept. 5, 2008) (holding that a blackout period on “express advocacy or its functional equivalent” was constitutional, but that a blackout period on ads that are not “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” was not) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470), *overruled in part by Citizens United*, which found bans on the use of corporate treasury funds for electioneering communications and independent expenditures unconstitutional; *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 282 (4th Cir. 2008) (holding that the “functional equivalent of express advocacy” must be: (1) an electioneering communication, and (2) “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”). It should be noted that *Citizens United* rejected the functional equivalence test for disclosure requirements. *Citizens United*, 130 S. Ct. at 915-917.

³⁷ However, if the statute is vague, the statute may be limited to restricting express advocacy along *Buckley*’s line-drawing exercise. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) (citing *Anderson*, 356 F.3d at 664-65). Electioneering communications may be found to be overly broad if they are too expansive in geography or cover issue advocacy. *Anderson*, 356 F.3d at 666.

³⁸ In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (“*WRTL II*”), the Supreme Court created an exemption to this rule for ads that were not express advocacy or its functional equivalent. For a detailed discussion of *WRTL II*, see Chapter Seven. The exemption does not apply to disclosure requirements. *See* Chapter Eight.

III. Other Holdings in *McConnell*

In addition to upholding restrictions pertaining to soft money and electioneering communications, the Court addressed challenges to a number of additional provisions. The remaining holdings are listed below:

A. Coordination

Different rules apply depending upon whether spending is done independently or in coordination with candidates or parties.³⁹ It therefore becomes very important to have clear and enforceable rules concerning coordination. One of the things that BCRA did was to invalidate inadequate coordination rules that had been promulgated by the FEC.⁴⁰

With regard to BCRA's coordination provisions, the Supreme Court in *McConnell*:

- Upheld treating third-party expenditures coordinated with party committees as contributions to those committees.
- Struck down the requirement that parties choose between making expenditures coordinated with candidates and making uncoordinated expenditures of unlimited amounts. The Court did not hold that requiring parties to make the choice was inherently improper. The problem was that once a state or local party made the choice, its decision was binding on the national party and all of the other state and local affiliates. The Court left open the possibility that a revised version that did not give such power to one entity to bind dozens of others could survive constitutional review.
- Upheld the requirement that the FEC redraft its regulations and held that the specific regulations that the FEC has adopted in response were not yet reviewable.

³⁹ For example, there is no limit to the amount that a political party can spend independently, without coordination with any candidate *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 616.

For example, contributions by an affiliate to a lobbyist or a lobbyist's client must be disclosed if they exceed \$5,000 in a quarter and the affiliate actively participates in the planning, supervision, or control of activities. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 207, 121 Stat. 735 (codified as amended in scattered sections of 2 U.S.C.) (upheld as constitutional in *Nat'l Ass'n of Mfrs.*, 549 F. Supp. 2d at 68).

⁴⁰ Since the enactment of BCRA, the FEC has twice promulgated regulations defining coordination, and BCRA's congressional sponsors have twice successfully challenged them. *See* Chapter Six.

B. Miscellaneous

With regard to other provisions, the Supreme Court in *McConnell*:

- Upheld a requirement that the sponsor of an election-related ad (whether or not broadcast) identify itself in the ad.⁴¹
- Allowed the “Millionaire Provisions” to stand (held not yet reviewable).⁴²
- Allowed the higher contribution limits to stand (held not reviewable).
- Struck down a ban on contributions by minors. The Court’s decision focused on the breadth of the ban and the lack of any showing that it was narrowly tailored to a real problem, such as parents using their children as conduits to evade contribution limits.
- Upheld requirements for record-keeping and disclosure of information about broadcast ads.⁴³

TWO STEPS FORWARD, ONE STEP BACK: *RANDALL V. SORRELL*

After the victories in *Shrink Missouri* and *McConnell*, the composition of the Supreme Court changed. Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O’Connor. Campaign finance decisions since then have taken a decidedly deregulatory turn. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Roberts Court rejected an envelope-pushing lawsuit arising out of Vermont seeking to establish the constitutionality of mandatory spending limits, and it cut back on longstanding jurisprudence upholding contribution caps.

There were six different opinions in *Randall*, and the controlling opinion commanded the votes of only three Justices. Their opinion is known as a “plurality opinion,” and our discussion here will focus on it.

⁴¹ See also *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004) (upholding an Indiana law that required a disclosure of the sponsor of express advocacy literature if distributed to more than 100 people); but see *ACLU of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004) (holding that a statute that required a disclosure of the sponsor of “any material or information relating to an election, candidate or any question on a ballot” was unconstitutional).

⁴² The so-called Millionaires’ Amendment of the BCRA, 2 U.S.C. § 441a-1(a) (2006), came into play when a candidate spent more than a certain threshold in personal funds (\$350,000 for the House, and for the Senate, the sum of \$150,000 plus an amount equal to the voting age population of the State in question multiplied by \$0.04.). Once the threshold was reached, that candidate’s opponent could have qualified to receive additional individual contributions at triple the normal limit, including from individuals who have reached the normal aggregate contributions maximum, and unlimited coordinated party expenditures. The Millionaire’s Amendment has subsequently been held to violate the First Amendment. *Davis v. FEC*, 128 S. Ct. 2759, 2770 (2008).

⁴³ The requirements that a speaker identify itself in broadcast advertisements and that any speaker who spends more than \$10,000 in electioneering communications in a year must file a disclosure statement with the FEC were upheld in *Citizens United*, 130 S. Ct. at 916.

I. Spending Limits

In enacting spending limits, the Vermont legislature was well aware that it was setting the stage for reconsideration of the decision in *Buckley*, which held that all of the expenditure ceilings in FECA were unconstitutional. Since that decision, lower courts had consistently regarded mandatory spending caps as per se unlawful. *Randall*'s holding therefore was disappointing to reformers hoping to make new law, but it was not a big surprise.

In following *Buckley*, the plurality ruled that the evidence in *Randall* did not demonstrate the “special justification” required to overturn a long-established precedent. *Id.* at 244. The plurality rejected the argument that spending limits were necessary because experience since *Buckley* had shown that contribution limits and disclosure requirements alone were insufficient to deter the reality and appearance of corruption.⁴⁴ In addition, the plurality held that the new justification asserted in defense of Vermont’s spending limits—that such limits reduced the time that candidates had to spend on fundraising and left them more time to communicate with voters—was not weighty enough to preclude the constitutional challenge. *Id.* at 245.

II. Contribution Limits

Randall's decision holding Vermont’s contribution ceilings unconstitutionally low was the first time that the Supreme Court recognized a “lower bound” for such limits. *Id.* at 248-49. The plurality repeated *Buckley*'s statement that “we have no scalpel to probe each possible contribution level,” and it reaffirmed that “the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related to the costs and nature of running for office.” *Id.* at 248 (citation & internal quotation omitted). But the plurality ignored the approach to contribution limits it had taken in *Shrink Missouri* and instead applied a completely different two-step analysis to Vermont’s law.

The plurality first asks whether there are “danger signs” that suggest the limits may “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.” *Id.* at 249. Those danger signs, the plurality said, were present with respect to the Vermont limits because:

- Vermont’s limits applied across an entire election cycle, instead of applying separately to the primary and general election, *id.*;
- Vermont’s limits were, overall, the lowest in the nation, *id.* at 250; and
- “Vermont’s limit is well below the lowest limit this Court has previously upheld, the limit of \$1,075 per election (adjusted for inflation every two years),” *id.* at 251 (citation omitted).

⁴⁴ Another court has found that, even if restricting contributions from certain contractors may in some instances legitimately eliminate the appearance of impropriety, such restrictions are impermissibly overbroad if applied to all state and local offices. *Dallman v. Ritter*, 225 P.3d 610, 628 (Colo. 2010).

Because of those “danger signs,” the plurality went on to consider five factors that, in its view, cumulatively justified invalidation of Vermont’s contribution limits, *id.* at 253-62:

- contribution limits would significantly restrict the funding available to challengers seeking to mount competitive campaigns against incumbents;
- Vermont law placed the same dollar limit on contributions from political parties to candidates as on individual contributions to candidates;⁴⁵
- the law had no exceptions for some kinds of volunteer expenses;
- limits were not automatically adjusted for inflation; and
- there was no special justification for the lower Vermont contribution limits.⁴⁶

Under the plurality’s decision, it was the combined effect of all these factors, “*taken together*,” *id.* at 253 (emphasis in original), that rendered Vermont’s contribution limits unconstitutional, *id.* at 261-62.

In finding Vermont’s limits unconstitutional, the plurality’s approach contrasts with its analysis in *Shrink Missouri*. In 2000, the Court relied on evidence from elections held under the Missouri limits in finding that the limits did not preclude candidates from amassing sufficient funds for effective advocacy, but the *Randall* plurality gave no credence to similar evidence from the special election held under Vermont’s limits. The plurality also appeared to accept arguments that *Shrink Missouri* had rejected, using an inflation-adjusted figure to compare Vermont’s limits to those upheld in *Buckley*.

But the impact of *Randall* should not be overstated. The standard of review in challenges to contribution limits remains something less than strict scrutiny.⁴⁷ Moreover, the plurality’s danger signs and five factors do not apply to any other contribution limits in the country. Careful drafting of campaign finance laws should enable contribution limits to avoid the fate they suffered in *Randall*.

⁴⁵ The U.S. District Court for the Northern District of New York granted a temporary injunction stopping a complete ban on contributions by political parties in primary elections because the statute was not narrowly tailored enough, so that it was underinclusive. *Kermani v. N.Y. State Bd. of Elections*, 487 F. Supp. 2d 101, 113 (N.D.N.Y. 2006).

⁴⁶ A New Jersey court has since upheld a pay-to-play limit of \$300 on the “special justification” that there was a “danger that contractors’ campaign contributions may influence the discretionary decisions of State contracting officials or create a public perception of such influence.” *In re Earle Asphalt Co.*, 950 A.2d 918, 926-27 (N.J. Super. Ct. App. Div. 2008).

⁴⁷ See *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 691 (9th Cir. 2010) (distinguishing the “closely drawn” to match a “sufficiently important interest” standard for contribution limits in *Randall* from the strict scrutiny standard for expenditure limits), *cert. denied*, ___ S. Ct. ___, 2010 WL 3834471 (Oct. 4, 2010); *Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 650-51 (9th Cir. 2007) (referring to the *Randall* standard as “less rigorous” scrutiny); *Ex parte Ellis*, 279 S.W.3d 1, 16 (Tex. App. 2008) (holding that closely drawn scrutiny, not strict scrutiny, is the appropriate standard); *but see DePaul v. Commonwealth*, 969 A.2d 536, 548 (Pa. 2009) (“[W]e hold that the instant legislative restriction upon the expressive conduct represented by political donations is subject to strict scrutiny”).

**ANOTHER SETBACK:
*DAVIS v. FEC***

The Court dealt campaign finance reform another blow in *Davis v. FEC*, 128 S. Ct. 2759 (2008). Primarily at issue in the case was a portion of the “Millionaires’ Amendment” of BCRA which involved raising contribution limits for certain candidates when their opponents spent their own personal funds beyond a certain threshold. The Court found the law unconstitutional by a vote of 5-4.

At the time, under BCRA, a candidate could receive no more than \$2,300 in contributions from an individual. Additionally, individuals could not contribute more than \$42,700 in the aggregate to all candidates over a two-year period. However, if a House candidate (a “self-financing” candidate) spent more than \$350,000 of his own personal money on the campaign, then individual contributors to that candidate’s opponents (“non-self-financing” candidates) were permitted to give triple the normal amount (meaning, three times \$2,300, which is \$6,900), regardless of whether those individuals had reached their personal contribution maximum for that two year period. Additionally, non-self-financing candidates could receive unlimited coordinated party expenditures. Once a non-self-financing candidate’s receipts reached the same threshold as the self-financing candidate’s personal funds expenditure, the normal limits were put back in place. In order to determine whether a self-financing candidate had reached the \$350,000 threshold, he was required to make more extensive disclosures not required of non-self-financing candidates.

The Court explained that it had previously upheld limits on contributions and coordinated party expenditures. *Davis*, 128 S. Ct. at 2770. Such restrictions, however, are permissible only where they “are closely drawn to serve a sufficiently important interest, such as preventing corruption and the appearance of corruption.” *Id.* (citation & internal quotation marks omitted). The Court also reaffirmed its interest in providing some deference to the legislature. *Id.* at 2771.

The Court compared the *Buckley* Court’s treatment of an expenditure ceiling with the provision at issue in *Davis*. In *Buckley*, personal expenditure limits had been struck down as “substantial ...restraints on the quantity and diversity of political speech.” 424 U.S. at 19, 52-53. Similarly, the Court, objected to the imposition of “a scheme of discriminatory fundraising limitations” on self-financing candidates who exceeded to expenditure threshold. *Id.* at 2772. Accordingly, the Court held that this scheme “impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech . . . [which could not] stand unless it [was] justified by a compelling state interest.” *Id.* (citation & internal quotation marks omitted).⁴⁸

⁴⁸ In the wake of *Davis*, a series of lawsuits have challenged so-called “triggered matching funds” in public financing systems – which provide supplemental grants to publicly financed candidates facing high-spending opponents or hostile independent expenditures – arguing that such provisions create a burden analogous to that in *Davis*. See *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), cert. granted, No. 10-239 (Nov. 29, 2010); *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010); *Respect Maine PAC v. McKee*, No. 10-2119, 2010 WL 4263390 (1st Cir. Oct. 5, 2010), writ of injunction denied, (Oct. 22, 2010) (No. 10A362). However, the *Davis* Court had specifically distinguished public financing systems, noting that *Buckley* had held that public financing was constitutionally permissible in that “a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures.” *Id.* at 2771. Accordingly, the *Davis* Court distinguished *Buckley*, holding that the choice imposed by the Millionaire’s Amendment – either to refrain from spending in excess of the threshold or to be subject to asymmetrical fundraising limitations – “is not remotely parallel to that in *Buckley*.” *Id.* Whether the Supreme Court will extend the

There were three possible justifications for the law, all of which were rejected by the Court. First, a law could help eliminate corruption or the perception of corruption, a justification that has been previously approved by the Court. However, the Court had reasoned in *Buckley* that a candidate spending his or her own personal funds actually “reduces the threat of corruption,” *Davis*, 128 S. Ct. at 2773, by reducing dependence upon outside sources for campaign funding. Therefore, this justification was not available in this case.

Second, the FEC argued that the law “leveled the playing field” for candidates who were at a disadvantage because they were not personally wealthy and had no personal funds to spend. The Court was not persuaded, saying there is “no support for the proposition that this is a legitimate government objective.” *Id.* at 2773. Indeed, it would be ill-advised for reformers to attempt to assert a “level the playing field” rationale as a justification for campaign finance regulation, as the justification has repeatedly found little traction with the Justices.

Third, the FEC argued that the law “ameliorate[d] the deleterious effects that result from the tight limits that federal election law places on individual campaign contributions and coordinated party expenditures.” *Id.* at 2774. This justification was based on the idea that a wealthy candidate has a significant competitive advantage because he or she can circumvent the contribution limits through personal expenditures, thereby putting a less wealthy candidate at a disadvantage because he must fund most or all of his campaign through contributions that are statutorily limited. Dismissing this rationale, the Court reiterated the division drawn in *Buckley* between contributions and expenditures and counseled that if this is such a significant concern, contribution limits should be raised or eliminated entirely. *Id.*

Having rejected the above justifications, the Court found the law to be an unconstitutional burden upon First Amendment rights and struck it down. As a result of finding the campaign contribution scheme unconstitutional, the Court also struck down the Millionaires’ Amendment’s increased disclosure requirements.

In his dissent, which was joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens explained that, in contrast with *Buckley*, he believed that Congress could constitutionally impose maximum expenditure limits on all candidates. *Id.* at 2779. Additionally, he found that the Millionaire’s Amendment imposed no burden upon a self-financing candidate’s speech because it “quiets no speech at all.” *Id.* at 2780. Justice Stevens also explained that the Court has “long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.” *Id.* at 2781.

Davis reaffirmed that the Supreme Court has not budged from its initial distinction in *Buckley* between campaign expenditures and campaign contributions. This decision, coupled with additional deregulatory decisions over the last few years, suggest that reform in the area of candidate expenditures would face a very steep hill, at least in the immediate future.

logic of *Davis* to the arena of public financing – where the participating candidate is already entitled to benefits and subject to disadvantages not applicable to the privately-financed candidate -- will be determined in the *McComish* case.

**CITIZENS UNITED v. FEC:
THE LATEST DEREGULATION OF MONEY IN POLITICS**

On January 21, 2010, the Supreme Court, by a margin of 5-4, announced a landmark decision in *Citizens United v. FEC*, 130 S. Ct. 879 (2010), when it overruled *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and partially overruled *McConnell v. FEC*, 540 U.S. 93 (2003), to strike down federal restrictions on independent expenditures and electioneering communications from corporations and unions. Section 441(b) of the federal election code prohibited corporations and unions from using general treasury funds (1) to make independent expenditures that expressly advocated the election or defeat of a federal candidate through any form of media or (2) to broadcast electioneering communications (broadcast advertisements that mentioned a federal candidate within a set period before an election). 2 U.S.C. § 441b (2006). Instead, corporations and unions could fund such communications only through establishing a separate segregated fund, or political action committee (“PAC”), that was funded by officers, directors, or shareholders of a corporation or by members of a union.

Citizens United, a non-profit corporation that accepts a small portion of its funds from for-profit corporations, brought action seeking injunctive relief against the FEC. The FEC had signaled that Citizens United could be subject to civil and criminal penalties under § 441b of the BCRA if it distributed through video-on-demand *Hillary: The Movie (Hillary)*, a documentary critical of then-presidential primary candidate Senator Hillary Clinton, within thirty days of a primary election. The FEC argued that since a portion of the funds used to produce the film were raised from for-profit corporations, the film violated § 441b. *Id.* Citizens United initially challenged the FEC’s ruling on the basis that the documentary film did not constitute an electioneering communication and should not be regulated as such. *Citizens United*, 130 S. Ct. at 888. However, rather than ruling on this narrow statutory issue, the Court took the unusual step of requesting reargument, asking the parties to address the question whether Section 441(b) was unconstitutional and whether the Court’s precedents in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. FEC*, 540 U.S. 93 (2003) which had upheld Section 441(b), should be overruled. This request for reargument vastly expanded the scope of the case.

After a second oral argument and supplemental briefing, the Supreme Court in *Citizens United* overturned the ruling in *Austin*, thereby permitting corporations and unions to use their treasuries to spend directly on independent campaign expenditures for or against candidates, and thus bypass their Political Action Committees (“PACs”).⁴⁹ In justifying this sweeping opinion, Justice Kennedy writing for the majority in *Citizens United* argued that the question of whether § 441b applies to *Hillary* could not be resolved on narrower grounds because he “declin[ed] to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if [the Court is] convinced that, in the end, this corporation has a constitutional right to speak on this subject.” *Id.* at 892. In lifting the decades-old ban on corporate independent expenditures in federal campaigns,⁵⁰ the ruling shifted in favor of corporations the delicate balance between

⁴⁹ *Citizens United*, 130 S. Ct. at 913 (“[O]verruling *Austin* ‘effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b’s prohibition on the use of corporate treasury funds for express advocacy.’”).

⁵⁰ *Id.* at 930 (Stevens, J., dissenting) (“The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin*.; see also *id.* at 940 (“Today’s decision takes away a power

regulating special interest influence in politics and not stifling free speech. The Court's holding in *Citizens United* changed this balance by allowing corporations and union to draw directly from their treasuries for independent expenditures and electioneering communications. While *Citizens United* is primarily a deregulatory decision, however, the decision upheld federal campaign finance reporting and disclaimer requirements by a vote of eight-to-one.⁵¹

that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin*, for more than a century.”).

⁵¹ *Id.* at 915.

CHAPTER TWO

DRAFTING LAWS TO SURVIVE CHALLENGE

In today's political climate, virtually any new campaign finance law (and even some old ones) will be challenged in court. Some advocates seeking to press a reform agenda may tee up the challenge and accept the risk of defeat, hoping to push the envelope of permissible regulation. But others will prefer to meet current legal constraints, to maximize the chance of achieving durable reform.

In either case, reformers are far more likely to succeed if they keep the prospect of challenge in mind at all times. Even before drafting begins, there is much work that can and should be done in anticipation of litigation. If the work is done thoroughly, and publicized well, it may even forestall legal challenge or help to narrow the scope of any lawsuit. The *TIPS* offered in Part Two of this handbook will include suggestions for pre-drafting groundwork in addition to other practical advice.

Following certain basic guidelines for legislative drafting also can increase reformers' chances of success, whatever their goals. Careful drafting will enhance any law's likelihood of survival. Moreover, careful drafting will help to ensure that courts do not use sloppy draftsmanship as an excuse to avoid substantive issues in test cases. This chapter therefore flags some problem areas to which all drafters should be sensitive.

I. Legislative Findings

Many statutes begin with legislative Findings. The Findings recite facts that help to explain why the law has been enacted.

When a campaign finance law is constitutionally challenged, courts may look to the Findings for evidence of (i) a governmental interest that justifies the regulation and (ii) an appropriate fit between the particular measures adopted and the purpose to be achieved. The Findings should help to establish that the asserted interest is real and supported by empirical evidence (rather than illusory or merely a matter of conjecture) and that the measures adopted will promote the interest to a legally sufficient extent. For example, if the state asserts an interest in preventing corruption, the Findings could summarize evidence of corruption under the *status quo*.

To develop the facts that should be reflected in Findings, a state legislature can hold formal hearings on the need for a particular bill and the justification for its provisions. The legislature can also initiate formal investigations into issues of concern. These proceedings facilitate collection of at least some of the data the state will need to defend the new law, should it be challenged later.

Courts may look to Findings as proof that the drafters considered appropriate facts before enacting the challenged law. Although statutes can survive without Findings, the prospects for survival are enhanced if the

law includes them, and they are well supported. Courts may be more inclined to defer to the judgment of the legislature, for example, if the basis for that judgment is reflected in explicit and documented Findings.¹

We therefore recommend including a Findings section in campaign finance laws. Reform-minded legislators should be encouraged to hold the hearings and conduct the investigations that will help to build the factual case for the new law. When ballot initiatives are the only avenue for reform, the drafters (and those working with them) need to develop the facts that can be included in a Findings section. It also will be helpful if those facts are widely publicized before the initiative appears on the ballot, so an argument can be made that they influenced the electorate's decision in passing the new law.

Findings may, in fact, be even more important when reform is introduced through a ballot initiative. Some courts have been more willing to second-guess the judgment of the voters than the judgment of the legislature, in part because the referendum process does not provide for formal hearings or other formal fact-finding proceedings.² To the extent that a Findings section provides evidence of fact development akin to that accomplished by legislatures, initiative proponents are likely to improve their chances of judicial deference.

As a practical matter, Findings may be presented as a series of numbered sentences, each stating a separate fact that justifies legislative action (or passage of a ballot initiative). Drafters must balance the need for completeness with the need for simplicity. The point is to group facts into a reasonably short list of Findings that explains the basis for the reforms adopted.

Finally, Findings are far more useful if they are attuned to the specific jurisdiction in question. Boilerplate "findings" that could be made without any real factual investigation will not necessarily hurt an effort at reform, but they are likely to be of limited value. Drafting jurisdictionally specific Findings also provides an incentive to develop evidence that will be needed to defend the law if litigation ensues.

II. Statutory Purposes

Explicitly stating a statute's purposes may help to establish the governmental interest that the state seeks to advance in enacting a campaign finance law. Sometimes drafters include a separate section (usually following the Findings) with a statement of the statutory purposes. Sometimes the Findings section includes Declarations that identify the goals to be achieved with the law.

¹ See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985); *Rostker v. Goldberg*, 453 U.S. 57, 72-74 (1981).

² See *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995) ("The process of enactment . . . includes deliberation and an opportunity for compromise and amendment, and usually committee studies and hearings. These are substantial reasons for according deference to legislative enactments that do not exist with respect to proposals adopted by initiative.") (footnote omitted); *Cal. Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) ("[G]iven that the statutes at bar are the product of the initiative process, their adoption did not enjoy the fact gathering and evaluation process which in part justifies deference). But see *Daggett v. Webster*, 74 F. Supp. 2d 53, 63-64 (D. Me. 1999) (holding that an initiative is entitled to no more and no less deference than legislation).

The statement of purposes should be carefully matched to the provisions adopted in the body of a campaign finance law. As the overview of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in Chapter One indicated, the Supreme Court initially recognized only a limited range of state interests justifying common types of regulation. That list has not grown substantially in the subsequent three decades (as Part Two of this handbook shows), and the Supreme Court firmly rebuffed a recent argument that the time saved by candidates who were freed from fundraising burdens was a new justification for spending limits. *Randall v. Sorrell*, 548 U.S. 230, 245-46 (2006). Nothing in *Buckley* forecloses judicial recognition of additional justifications for reform, of course, but some courts reject the legitimacy of any purpose not explicitly blessed by the Supreme Court.³

Goals that galvanize reformers and voters may not necessarily be the purposes accepted by the Supreme Court. Focus groups tend to report high positive responses to statutes aimed at equality, fairness, or “leveling the playing field,” while *Buckley* rejected in no uncertain terms Congress’s effort to limit spending by monied interests to enhance the relative voice of others. Even though *Buckley* permits leveling of the playing field through public funding systems that do not mandatorily limit spending but rather provide resources to candidates who accept voluntary spending limits, opponents of reform invariably trot out every reference to “leveling the playing field” as proof of an impermissible state interest. Listing purposes that the Supreme Court has spurned is a recipe for disaster and there is some risk in listing even purposes that are technically open for judicial consideration but have not yet been explicitly endorsed by the Court. To the extent that drafters wish to identify state interests that the Supreme Court has not considered, the statement should be clear that those interests are ancillary to, and not substitutes for, recognized governmental purposes.

III. Clarity and Precision

A campaign finance law that is vague (difficult to understand) or ambiguous (subject to more than one interpretation) will be subject to constitutional attack. If individuals or groups cannot tell whether the law applies to them, or what types of conduct it covers, they may be deterred from engaging in certain activities that would actually be legal and in fact are safeguarded by the First Amendment.⁴ The deterrence factor will be most serious if the law includes provisions for criminal penalties. To prevent this “chill” of protected speech and association, statutes must be drafted so that they are clear and precise.

If statutes are not clear and unambiguous, courts have two choices. First, they may construe the offending term to eliminate the problem, as the Supreme Court did in *Buckley* with respect to the definition of “relative to” a clearly identified candidate. There is no guarantee, of course, that courts will interpret vague or ambiguous terms to provide the meaning the drafters intended. And courts may create new problems when they eliminate the vagueness or ambiguity, as *Buckley* did.

³ See *Cal. Prolife Council Political Action Comm.*, 989 F. Supp. at 1294.

⁴ See *Buckley*, 424 U.S. at 41 n.48 (“[V]ague laws may . . . inhibit protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”) (internal citations & quotations omitted).

The court's second option when statutory language is vague or ambiguous is simply to invalidate the affected provision. If the provision is not "severable" from the rest of the law, because the law would not have been enacted without the provision, the court may strike down the entire statute.

To avoid problems of vagueness or ambiguity, key statutory terms should be defined explicitly. Drafters should take care not to introduce definitions that are inconsistent with other statutes or, if different definitions are necessary, to make it clear that the new definitions govern only the new statutory provisions so as not to introduce problems in other parts of the law. The definitions should use plain English and should take care not to introduce new vague or ambiguous language. Minimizing the use of complex sentences can also help to improve the clarity of the statutory text.

IV. Scope

Obviously, the needs of each state should determine the scope of any campaign finance law governing its elections. But even when the system is deeply troubled, it is not necessarily a good idea to tackle everything at once. A simple, easily administered law that focuses on the state's most pressing problems has a better chance of withstanding assault than a long and complicated statute that seeks to close every conceivable loophole. If initial steps do not cure the problems, additional provisions can be added later.

Complicated statutes invite claims that the legal and bookkeeping costs groups must incur just to understand and comply with the law cuts substantially into their electoral activity. If the "practical effect on [a political organization] is to make engaging in protected speech a severely demanding task," the group may be entitled to an exception from the law on First Amendment grounds.⁵

V. Enforcement

If a campaign finance law is to have any teeth, it must include enforcement provisions to deter violations. Reformers may choose to impose civil liability, criminal penalties, or both. Here, again, pulling punches (at least initially) may be the better part of wisdom. If violations abound notwithstanding consistent and vigorous enforcement of meaningful civil penalties, more punitive measures can be considered later.

Although reformers outraged by the undue influence of money in politics may want to throw the book at violators of campaign finance requirements, a statute imposing criminal liability on violators will draw more intense judicial scrutiny. A criminal record is no laughing matter, and reformers cannot simply assume that governmental authorities will use criminal enforcement powers reasonably. Where criminal penalties are a possibility, courts will take concerns about vagueness or ambiguity very seriously and are likely to give every

⁵ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) ("Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs . . . [and] require a far more complex and formalized organization than many small groups could manage.").

benefit of the doubt to opponents of reform.⁶ A punitive approach therefore can be self-defeating. Be sure to include the sufficient *mens rea* by requiring knowing or willful violations before criminal liability attaches.

VI. Red Flags

Although the law of campaign finance is changing all the time, certain areas are better settled than others. In particular, there are some kinds of regulations that have been struck down, in whole or in part, either by the Supreme Court or by *every* lower court to consider them. Including such provisions in a new law, however attractive they may seem in principle, raises a red flag for opponents of reform.

To date, “red flag” provisions include the following:

- extremely low contribution limits that operate over an entire election cycle, are not indexed for inflation, and apply equally to individuals and groups (*see* Chapters One, Three);
- off-year fundraising bans (*see* Chapter Three);
- mandatory limits on spending by candidates or their campaigns (*see* Chapter Five);
- monetary limits on independent expenditures (*see* Chapter Six);⁷ and
- bans on the use of corporate or union treasury funds for independent advertising (*see* Chapter Seven).⁸

It is not *impossible* that a particular court could be induced to uphold such provisions, given compelling facts that distinguish the statute or initiative in question from others previously invalidated. But persuading a court to buck the clear legal trend (and perhaps to test the limits of a Supreme Court precedent) will mean a steep uphill battle. Challenges of such provisions, if unsuccessful in the lower courts, are especially likely to reach the Supreme Court, which is now far more hostile to campaign finance regulation than it has been since the enactment of the Federal Election Campaign Act in the 1970s. Moreover, including these measures in a larger reform package could undermine the entire statute, if a hostile judge treats them as evidence of insensitivity to constitutional concerns. Maximizing the chances of having your campaign finance law upheld therefore means avoiding these measures.

On the other hand, some jurisdictions may want to push the envelope of reform. In our first edition of *Writing Reform*, we identified a contribution limit of less than \$1,000 as a “red flag” provision. Until the decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), such limits—including Missouri’s contribution limits of \$275, \$550, and \$1,075—were routinely being invalidated by lower courts. But Missouri persevered in defending its limits, and won! As a result, Missouri’s limits were reinstated and

⁶ *See Buckley*, 424 U.S. at 40-41 (“Close examination of the specificity of the statutory limitation is required where . . . the legislation imposes criminal penalties in an area permeated by First Amendment interests.”).

⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) struck down restrictions on corporate and union independent expenditures and electioneering communications.

⁸ *Citizens United* also effectively invalidates 2 U.S.C. § 441b’s ban on the use of corporate or union treasury funds for express advocacy. 130 S. Ct. at 913.

other courts have upheld contribution limits of less than \$300 for legislative candidates in several states.⁹ Contribution limits under \$1,000 per election might not have come off our “red flag” list if states had not been willing to risk having such limits overturned. On the other hand, low contribution limits, like those enacted in Vermont and struck down in *Randall*, have gone back on the list because one state went too far in pushing the constitutional limits.

Disclosure statutes that were not limited to “express advocacy” were red flags until recently. With the decisions in *McConnell* and *Citizens United*, it is now clear that states can regulate campaign advertising in the pre-election period by requiring in-ad disclaimers and disclosure reports to the state, even if the ads do not use “magic words.”¹⁰ In *McConnell*, Congress took its new “electioneering communications” provisions to the Supreme Court and overturned adverse lower court decisions in most of the country.

Similarly, the State of Vermont and the City of Cincinnati adopted mandatory spending limits for candidates, knowing that the laws would almost certainly be invalidated by the lower courts, but hoping that the lawsuits would present an opportunity for the Supreme Court to reconsider *Buckley*’s ruling on expenditure caps. The Court did have that opportunity, and it struck down the limits in *Randall*, but the law does not progress if calculated risks are never taken.

VII. Severability Clauses

A severability clause will express the drafters’ intent to preserve parts of a campaign finance law that are constitutional even if other parts are invalidated. In deciding whether to include such a clause, or how it should be drafted, reformers should consider carefully the potential consequences of partial invalidation. Some critics of *Buckley* argue, for example, that the “arms race” created by contribution limits in the absence of expenditure limits is worse than no campaign finance regulation at all. Whether drafters want to implement any statutory provisions that survive scrutiny, or prefer instead to have certain provisions stand or fall together, the intent should be explicit in the text of the law.

⁹ Missouri, however, has since repealed its contribution limits.

¹⁰ *Citizens United* overturned *McConnell* to the extent it upheld bans on corporate independent expenditures; however, the Court “adhere[d] to the [*McConnell*] decision as it pertain[ed] to the disclosure provisions.” 130 S. Ct. at 915.

CHAPTER THREE

THE FINANCING OF CANDIDATES' CAMPAIGNS

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

I. Financial Limits on Contributions

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

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

A. Limits on Contributions from Individuals

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

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

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

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

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

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

Tips

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Legal Analysis

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

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

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

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

1. *First Amendment Analysis*

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

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

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

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

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

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

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

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

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

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

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

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

Justice Kennedy’s interpretation of the First Amendment would render Congress powerless to address more subtle but equally dispiriting forms of corruption. Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 30 (quotation and citation omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. *Equal Protection Analysis*

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

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

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

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

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

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

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

B. Limits on Contributions from PACs

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

Tips

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

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

Legal Analysis

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

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

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

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

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

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

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

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

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

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

C. Limits on Contributions from Political Parties

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

Tips

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

Legal Analysis

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

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

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

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

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

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

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

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

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

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

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

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

D. Loans to Candidates

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

Tips

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

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

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

Legal Analysis

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

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

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

II. Source Limits on Contributions

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

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

Tips

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

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

Legal Analysis

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

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

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

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

A. Geographic Limits on Contributions

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

Tips

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

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

Legal Analysis

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

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

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

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

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

B. Corporate and Union Contributions

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

Tips

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

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

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

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

Legal Analysis

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

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

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

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

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

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

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

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

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

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

C. Contributions from Lobbyists, Contractors and Regulated Industries

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

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

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

Tips

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

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

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

Legal Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Government Employees

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

Legal Analysis

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

E. Inter-Candidate Transfers

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

Tips

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

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

Legal Analysis

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

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

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

F. Bundling

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

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

Tips

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

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

Legal Analysis

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

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

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

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

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

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

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

G. Aggregate Limits on PACs or Special Interest Sources

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

Tips

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

Legal Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Time Limits on Fundraising

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

A. Legislative Session Bans

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

Tips

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

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

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

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

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

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

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

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

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

Legal Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Post-Election and Off-Year Fundraising Bans

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

Tips

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

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

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

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

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

Legal Analysis

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

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

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

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

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

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

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

IV. Spend-Down Provisions

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

Tips

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

Legal Analysis

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

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

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

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

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

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

that the off-year fundraising ban discriminates against challengers.

CHAPTER FOUR

THE FINANCING OF POLITICAL ORGANIZATIONS

Some jurisdictions, including the federal government, have placed limits not only on contributions to candidates' campaign committees, but also on contributions to other types of political organizations involved in electioneering. This chapter discusses some of the issues that arise when monetary limits are imposed on contributions to political action committees ("PACs"), independent expenditure committees, and political parties.¹

I. PACs

PACs are committees that collect money and then contribute it to candidates for elective office or spend it in coordination with the candidates. PACs also may spend some of their money on "independent expenditures" — expenditures that are made independently of candidates in an effort to influence elections. Committees that collect money exclusively for independent expenditures are treated separately from PACs in Section II of this chapter.

An organization's principal purpose can play a role in determining whether the group qualifies as a PAC subject to campaign finance restrictions, with a primary distinction being whether the entity engages in independent expenditures. For example, an organization financed by membership dues rather than contributions can still be a PAC if its primary purpose is to influence elections and that purpose is known to its members -- such as traditional 527 organizations.² Conversely, an organization may not qualify as a PAC

¹ All of these entities are engaged in "electioneering" activities. Organizations that do not engage in electioneering benefit from greater First Amendment protection. For more about the distinction between electioneering and protected "issue advocacy," see Chapter Seven. As that chapter explains, some courts formerly (and erroneously) believed that only so-called "express advocacy" could be regulated. The Supreme Court repudiated that view in *McConnell v. FEC*, 540 U.S. 93 (2003). Before *McConnell*, some courts ruled that the definition of a "political committee" in campaign finance laws could not encompass organizations that did not engage in express advocacy. See, e.g., *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (invalidating definition of "political committee" that covered groups not engaging in express advocacy); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 142 (Ind. 1999) (holding that Indiana's PAC definition should be narrowly construed to encompass only organizations that "in express terms" advocate an electoral outcome). The *Citizens United* case decided in 2010 made clear that express advocacy conducted independently of a candidate committee may not be regulated with respect to limits, but may be subject to disclosure and other requirements.

² A Washington Court of Appeals found that dues collected by unions do not count as contributions if collected from members who are unaware, and should not reasonably be expected to be aware, of their political use. *State ex. rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 49 P.3d 894, 904 (Wash. Ct. App. 2002) (holding that labor union was not a political committee subject to disclosure laws because its membership dues did not constitute contributions). Moreover, unions are not required affirmatively to obtain permission from members to use their dues for political purposes. *Sanger v. Dennis*, 148 P.3d 404, 414-19 (Colo. Ct. App. 2006) (affirming a preliminary injunction against a regulation requiring unions to obtain written permission before using a member's dues or contributions to fund political campaigns, reasoning that plaintiffs showed a reasonable probability of success on their claim that an "opt in" requirement violated the members' First Amendment freedom of association). However, the Supreme Court has held that such "opt in" requirements are constitutional when applied to agency-shop fees levied on public employees who are not union members. In such cases, those making payments are not union members; rather, they are government employees whose employment is conditioned upon contribution to the union. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007).

if electioneering is not its major purpose. See *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1152-55 (10th Cir. 2007); *Alliance for Colo.'s Families v. Gilbert*, 172 P.3d 964, 973 (Colo. App. 2007) (remanding case for determination whether electioneering was plaintiff's major purpose).

Tips

Tip: *Do not starve the PACs.* If constitutional limits are in place on individual contributions to candidates, limits on contributions to PACs should be upheld as an anti-evasion measure. With that said, limitations on contributions to independent expenditure committees are presumptively invalid following the *Citizens United* and *SpeechNow* cases. Nevertheless, courts in some jurisdictions may separately assess whether limits on contributions to PACs are so low that they make it difficult for PACs to raise money and participate in the political process. It is therefore advisable to set limits high enough to withstand such scrutiny – at least at the level of individual contribution limits, and usually somewhat higher, to reflect the PAC's role as a proxy for contributors who have pooled their funds.

Tip: *To enhance the voice of small contributors, consider creating a form of PAC that may accept only small contributions but is allowed to make larger contributions to candidates than ordinary PACs.* PACs can be a tool for grassroots organizing.³

Legal Analysis

The Supreme Court has upheld federal limits on contributions to PACs as a constitutionally permissible means of preventing individuals from circumventing the limits on contributions to candidates. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 199 (1981) (“*Cal. Med.*”) (plurality opinion); *id.* at 203-04 (Blackmun, J., concurring in part and concurring in the judgment).⁴ The *Cal. Med.* Court noted that, without a limit on contributions to PACs, individuals could evade the \$1,000 limit on contributions to federal candidates “by channeling funds” through PACs that could each give \$5,000 to each candidate. *Id.* at 198. In addition, individuals could easily circumvent the \$25,000 aggregate limit on contributions to candidates, because PACs were not limited in the overall amount they could contribute to candidates. *Id.* The limit on contributions to PACs thus functioned as “no more than a corollary of the basic individual contribution limitation[s].” *Buckley*, 424 U.S. at 38; *N.C. Right to Life Comm., Inc. v. Leake*, 108 F. Supp. 2d 498, 515-16 (E.D.N.C. 2000) (recognizing anti-evasion rationale in denying preliminary injunction against \$4,000 limit on contributions to PACs); *Fla. Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORL-19A, 2000 WL 33733256, at *6 (M.D. Fla. Mar. 20, 2000) (“[T]his Court’s determination that Florida’s limit on

³ For a discussion of the legal issues raised by the creation of small donor PACs, see Chapter Three, Section II(B) (*LEGAL ANALYSIS*).

⁴ *Cf. Buckley v. Valeo*, 424 U.S. 1, 38 (upholding the aggregate limit on contributions on the grounds that “this quite modest restraint upon protected political activity serves to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unmarked contributions to political committees likely to contribute to that candidate”).

contributions to candidates is permissible also resolves Plaintiffs' challenge to Florida's [\$500] limit on contributions to political committees.”⁵

If PAC contribution limits are justified only as a means of preventing circumvention of limits on direct contributions to candidates, the absence of valid direct contribution limits in a particular jurisdiction could undermine the validity of PAC contribution limits. During the 1990s, the Eighth Circuit voiced skepticism about the possibility that contributions to PACs, by themselves, could be corrupting. *Russell v. Burris*, 146 F.3d 563, 571 (8th Cir. 1998) (finding little risk of corruption from contributions to a “PAC that does not itself wield legislative power”); *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994) (same). But *Cal. Med.* noted that the limit on contributions to PACs prevented an individual or group from dominating the PAC's operations and dictating the use of PAC funds. 453 U.S. at 198 n.19. The limits thus addressed not only circumvention of other regulations, but also the risk that PACs would represent only one wealthy supporter and thus “influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee's operations would be able to do acting alone.” *Id.* This reasoning is more persuasive, of course, when PACs are entitled to make larger contributions to candidates than individuals are, as is the case under federal law.

The *Cal. Med.* Court also considered an equal protection challenge to the federal limit on contributions to PACs. 453 U.S. at 200-01. The plaintiffs alleged that federal law discriminated in favor of corporations and unions, because the statute permitted those entities to spend unlimited amounts for the establishment, administration, and solicitation expenses of the separate segregated funds used for political purposes, whereas unincorporated associations were limited in the contributions they could make to multi-candidate PACs. The Supreme Court rejected the claim, stating:

The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.

Id. at 201. The Court's hands-off approach is typical of the deference generally accorded to Congress where contribution limits are at issue.

II. Independent Expenditure Committees

A distinction has clearly been drawn between (i) PACs that make contributions to, or coordinate expenditures with, candidates (addressed in section I, *supra*) and (ii) “independent expenditure committees,” which collect funds to be spent *only* on *independent* advertising and other activities designed to affect candidate elections (the subject of this section).⁶

⁵ See also *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 625 (Alaska 1999) (upholding a \$500 limit).

⁶ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

Tips

Tip: The legal landscape created by *Citizens United* establishes uncertainty as to whether laws limiting contributions to PACs that engage in coordinated communications or hard dollar expenditures, but permitting unlimited funding inflows and outflows for “independent expenditure” PACs, are permitted. It is clear, however, that limits on independent expenditure committees as such are invalid.

Legal Analysis

When a committee is entitled to make both contributions and independent expenditures, a cap on contributions to the committee may be justified as a means of preventing the evasion of other contribution ceilings. *Cal. Med.*, 453 U.S. at 197-98 (plurality opinion) (noting that \$5,000 limit on contribution to federal multi-candidate political committee prevented circumvention of \$1,000 individual limit on contributions to candidates); *Ark. Right to Life State Political Action Comm. v. Butler*, 983 F. Supp. 1209, 1223 (W.D. Ark. 1997) (noting the possibility of evasion where a single entity registers as both a PAC and an independent expenditure committee), *aff'd*, 146 F.3d 558 (8th Cir. 1998). *SpeechNow*⁷ made clear the premise that committees making independent expenditures without engaging in coordinated activities or hard dollar contributions cannot legally be subject to contribution or expenditure limits.⁸ Reporting requirements in connection with those independent expenditures, however, are permissible.⁹ *See id.* at 696-98.

Despite the holdings in *Citizens United* and *SpeechNow*, it remains unclear whether the government may limit contributions to committees that are entitled to make contributions to candidates (or coordinated expenditures) but actually fund only independent expenditures. *SpeechNow* held that the “anti-circumvention rationale” simply does not apply to individuals’ contributions to committees that in turn make only independent expenditures. *See id.* at 694-95. This argument draws on Justice Blackmun’s concurring opinion in *Cal. Med.*, in which he agreed with the plurality that caps could be placed on contributions to PACs that in turn contributed to candidates but added that “a different result would follow if [the cap] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates.” *Cal. Med.*, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment).

Reformers in the states should be aware that the regulation of independent expenditure committees remains a very hot topic at the federal level even after these two decisions.¹⁰

⁷ *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 2010 WL 4272775 (U.S. Nov. 1, 2010).

⁸ Similar logic is employed in cases addressing ballot initiative committees, where courts allowed unlimited fundraising and expenditures because the government did not “provide evidence demonstrating a sufficiently important governmental interest, such as the risk of corruption” for limiting those contributions. *Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007).

⁹ *See* Chapter Eight for further discussion of reporting requirements.

¹⁰ FEC, “Final Rules and Explanation and Justification on Coordinated Communications” (2010) (effective Dec. 1, 2010).

III. Political Parties

As the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), clarified, the government may regulate all contributions to political parties. For a variety of reasons, however, existing regulations may vary depending on whether the party is raising money to use in support of specific candidates — either for contributions to the candidates or for direct expenditures by the parties — or for party-building and similar efforts. For example, until the passage of the Bipartisan Campaign Reform Act (“BCRA,” also known as the McCain-Feingold bill), Congress limited contributions for campaigning but permitted unregulated contributions for other political party activities. Federal law now regulates all contributions to national parties irrespective of the use to which the party intends to put the money, as well as contributions to state and local parties engaged in federal election activities, and *McConnell* upheld the new approach.¹¹ Some states continue to regulate only contributions made to parties for certain purposes, such as for subsequent transfer to candidate's campaign committees; in the wake of BCRA, however, states may limit all contributions to parties in order to close so-called “soft money” loopholes.

Tips

Tip: *The evidence of corruption and the appearance of corruption that supports limits on contributions to candidates may also support limits on contributions to parties.* Without such limits, parties and party committees may be used to evade individual contribution limits or to conceal contribution patterns.

Tip: *Evidence may sometimes be found of political party activity that contributes to the appearance of corruption.* For example, some political parties have published fundraising materials promising special access to elected officials in exchange for large donations to the party. The Supreme Court's opinion in *McConnell*, upholding BCRA's soft money ban, discusses at length evidence of parties' selling access in this manner.

Tip: *Limits on contributions to political parties should take into account the complex organization of political parties, specifying clearly whether the law limits aggregate contributions to certain party committees or treats each committee separately.* Some states treat certain party committees as PACs for the purpose of campaign regulation. It may also be desirable to treat all committees of each particular party (*i.e.*, the state committee and all county committees) as one entity for purposes of contribution limits. Otherwise, contribution limits could be circumvented by giving the maximum amount to the party's committee in each county and having county committees put their contributions at the state party's disposal.¹² Before BCRA, donors avoided federal contribution limits by giving to state and local party committees, which then used the money (in coordination with the national party) to support federal candidates.

¹¹ Indeed, the rationale of *McConnell* survived an even more recent challenge when the Court summarily upheld the “soft money” bans established in BCRA and upheld in *McConnell*. See *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3543 (2010).

Tip: *Do not starve the parties.* Parties need money to operate. They use money to recruit candidates and may support candidates with limited financial means of their own, thereby helping to expand and diversify the candidate pool. Parties also use the money to mobilize voters and to convey substantive messages to the electorate distinguishing their agenda from that of other parties. Because some courts reviewing limits on contributions to political parties may consider the following types of evidence relevant to their decision, you may wish to collect data on:

- how much money political parties have raised in the past;
- what percentage of funds raised in previous years would be affected by the new limits;
- what methods political parties have used to raise money in the past;
- what additional fundraising methods are available;
- the percentage of registered voters who contribute to the parties and the average amounts of their contributions;
- income and wealth of registered voters in the jurisdiction; and
- how parties have allocated funds among their various activities in the past.

Tip: *Consider public funding for limited purposes, such as party-building activities that encourage citizen participation.* A handful of jurisdictions provide limited public funding to parties. See Chapter Nine for a discussion of public funding. Party-building activities must be defined carefully to avoid misuse of the funds.

Tip: *Consider whether limits or other regulations hinder the development of third parties.*

Tip: *Consider whether you should include contributions to parties in an aggregate limit on individual political contributions.*

Tip: *Consider whether you want to limit the amount PACs may contribute to political parties.*

Legal Analysis

McConnell confirmed what earlier Supreme Court cases had seemed to imply but had never quite said: the federal government may limit all contributions to national political parties and state and local parties engaged in federal electioneering activities, and it can prohibit parties from accepting corporate and union money. *See* 540 U.S. 93, 155-56. After *McConnell*, states presumably may limit all contributions to state and local party committees, just as the federal government can limit all contributions to national committees. This rationale is bolstered even more by the Supreme Court's summary affirmance of the D.C. District Court's ruling in *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150. In that case, the RNC, along with state and local party committees, challenged the ban on soft money contributions to political parties in light of *Citizens United* and other cases. The court found that there was no evidence that the corrupting influence of soft money had

¹² The same purpose may be served by permitting all genuinely independent local parties to accept contributions and limiting intra-party transfers.

disappeared in the intervening five years since *McConnell* had been decided, and upheld the restrictions on such contributions. See *Republican Nat'l Comm.*, 698 F. Supp. 2d at 153.

Before BCRA, federal parties could take unlimited money from all sources. In theory, money that was received from corporations and unions, and money received from PACs and individuals in excess of contribution limits – so-called “soft money” – could be used only for limited purposes. Party activities designed to influence federal elections were supposed to be paid for with non-corporate, non-union money raised subject to contribution limits – “hard money.” But massive loopholes developed. What about activities that influenced both federal and state or local races, for example? The FEC permitted parties to use a mix of hard and soft money for those activities. National parties also could transfer soft money to state and local parties, which had even looser restrictions on using it for mixed-purpose activities. In addition, soft money could be used for “issue ads” that were in reality designed to influence federal elections. By the late 1990s, the national parties had become adept at raising and spending massive amounts of soft money, mostly from corporations, and spending it on federal electioneering, making a joke of federal limits on contributions to candidates and party committees. See *McConnell*, 540 U.S. at 122-25, 128-32.

Congress responded by “tak[ing] national parties out of the soft money business.” *Id.* at 132. The core of BCRA’s soft money provisions is section 323(a) of the Federal Election Campaign Act:

[N]ational committee[s] of a political party . . . may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

2 U.S.C. § 441i(a)(1). In simple terms, what this means is that corporations and unions may not give any money to national party committees for any purpose, individuals may not give more than \$25,000 (indexed for inflation) to a national party committee for any purpose, and PACs may not give more than \$15,000 to a national party committee for any purpose.¹³ (Individual contributions to national parties are indexed for inflation, but PAC donations are not. 2 U.S.C. § 441a(a)(1)(B), (a)(2)(B), (c)(1)(B)(i)). Other provisions of BCRA are aimed at preventing circumvention of the soft money ban; for example, federal elected officials may not solicit soft money contributions to state and local parties, and the state and local parties themselves are not permitted to use soft money for most activities affecting federal elections.¹⁴ This is the regime

¹³ Even before *McConnell*, lower courts had upheld limits on contributions to parties and bans on corporate soft money contributions. See *Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003) (upholding a \$5,000 limit on individual contributions and a ban on corporate soft money contributions, employing reasoning similar to *McConnell*’s, but striking down a limit of \$5,000 on the value of professional services that individual professionals could donate); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 625 (Alaska 1999) (upholding a \$5,000 limit under the anti-evasion rationale). After *McConnell*, the contrary decision of *Washington State Republican Party v. Washington State Public Disclosure Commission*, 4 P.3d 808 (Wash. 2000), which held that a corporate soft money ban was unconstitutional insofar as it applied to funds used for “issue advocacy,” cannot be regarded as good law.

¹⁴ The exact meaning of “solicit” for the purpose of BCRA is in dispute. In 2005, the D.C. Circuit struck down an FEC definition of the term requiring that federal party officials “ask” directly for soft money contributions, holding that the

McConnell upheld in 2003, which has been reaffirmed by *Republican Nat'l Comm. v. FEC* in 2010. See 698 F. Supp. 2d at 153.

The rationales supporting BCRA would likely support state laws placing source and amount restrictions on contributions to state and local party committees. It is accordingly important for advocates at the state level to understand why BCRA was upheld.

First, even though § 323(a) prohibits the parties from spending soft money, the Supreme Court recognized that the provision is really a limit on contributions, not on expenditures. The parties remain free to spend as much as they want, so long as they raise the money lawfully. *McConnell*, 540 U.S. at 139. This regime is analogous to restrictions on contributions to candidates upheld in *Buckley*: even though the government cannot impose mandatory spending limits on candidates, it can limit the sources and amounts of money they can raise. Accordingly, and critically, the soft money ban was subjected to the more deferential judicial scrutiny given to contribution regulations, not the strict scrutiny reserved for expenditure limits. *Id.* at 134-41; see also Chapters Five and Six.

Applying the appropriate standard of review, the Court found that the soft money ban properly aimed to combat corruption and the appearance of corruption in two ways. The simplest way was in preventing circumvention of limits on contributions to candidates. Given the extensive evidence that parties used soft money in close coordination with the candidate's campaigns, soft money contributions to the parties were an obvious way to get around contribution limits and curry favor with the candidates. See *McConnell*, 540 U.S. at 125-26, 144. The Court also noted substantial evidence that corporations and wealthy individuals "candidly admitted" making soft money contributions "for the express purpose of securing influence over federal officials." *Id.* at 146. The corrupting potential was especially obvious when the contributions were solicited by the candidates themselves and subsequently used by the party to support the candidates' campaigns.

Under this system, corporate, union, and wealthy individual donors have been free to contribute substantial sums of soft money to the national parties, which the parties can spend for the specific purpose of influencing a particular candidate's federal election. It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.

Id. at 144-46.

But even when soft money contributions do *not* directly benefit a particular candidate, the Court recognized a considerable potential for corruption – a potential that the record showed had been repeatedly realized. "The record in the present case is replete with similar examples of national party committees peddling access to

limitation was contrary to BCRA. *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). This and many other regulations implementing the requirements of BCRA are likely to be litigated for quite some time.

federal candidates and officeholders in exchange for large soft money donations.” *Id.* at 150. Corruption does not include only outright bribery, but extends to contributors’ exercising “undue influence on an officeholder’s judgment, and the appearance of such influence.” *Id.* (internal quotation marks omitted); *but see Citizens United*, 130 S. Ct. at 909-10 (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”). The parties’ peddling access to officeholders “certainly gave the appearance of such influence.” *Id.* (internal quotation marks omitted). Given the close connection between federal officeholders and national party committees, Congress was entitled to ban all soft money contributions to national parties, even if the contributions were to be used strictly for state and local election activities. *Id.* at 154-56.

Similar reasoning led the Court to uphold bans on national party committees, and on federal candidates and officeholders, from soliciting or directing soft money contributions to other organizations. *Id.* at 156-57, 181-82. Regardless of the ultimate use to which the money was put, donating large sums of money at the parties’, candidates’, or officeholders’ request was likely to give the donor special influence over elected officials. Thus, even if contributions were made to an entirely separate organization, they would have to be made within hard money limits or they would become vehicles to circumvent limits on contributions to candidates and parties.

Large soft money donations at a candidate’s or officeholder’s behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA’s contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities. As the record demonstrates, even before the passage of BCRA, federal candidates and officeholders had already begun soliciting donations to state and local parties, as well as tax-exempt organizations, in order to help their own, as well as their party’s, electoral cause.

Id. at 182.

In sum, *McConnell*’s main lessons for regulating parties’ financing are:

- All contributions to parties may be regulated and limited;
- Corporations and unions may be prohibited from giving any money to parties (stated another way, corporations and unions may be required to set up PACs to make contributions to parties); and
- Loopholes that could enable donors to evade restrictions on giving to parties and candidates may be closed on an anti-circumvention rationale.

But just as with BCRA’s electioneering communication regulations, state-level soft money rules modeled on BCRA could be challenged on the grounds that the state has not compiled an adequate record to prove that soft money has been a corrupting influence in that particular state. *See* Chapter Seven (discussing analogous

concern in electioneering context). The *McConnell* Court repeatedly cited the voluminous evidence of soft money's pernicious effects at the *federal* level compiled through Congressional hearings and in the trial court. 540 U.S. at 129, 147-48, 153.

Most courts, however, will probably not require extensive evidence to be gathered in each state that adopts soft money restrictions. For one thing, the evidence in *McConnell* showed how soft money was channeled through state and local parties to influence federal elections; it is therefore clear that state and local parties know how to exploit soft money loopholes and have been willing to do so in the past. Also, the Court often pointed out that it was a matter of simple common sense that preventing circumvention of valid hard money limits was necessary to prevent evisceration of those limits' anti-corruption function. *See, e.g., id.* at 144-46; *Jacobus v. Alaska*, 338 F.3d 1095, 1114 (9th Cir. 2003) ("Because a modern election campaign simply cannot be conducted without significant sums of money, candidates become beholden to the sources of any contributions that aid their campaign, whether given directly or indirectly [via a party]."); *Libertarian Party of Alaska, Inc. v. State*, 101 P.3d 616 (Alaska 2004) (holding that although the Alaska Campaign Disclosure Act expressly regulates only contributions given for the purpose of influencing the nomination or election of a candidate ("hard money" contributions), state Public Offices Commission regulations may also require political parties to disclose soft money contributions, to prevent evasion of hard money restrictions). To the extent that evidence targeted to a particular state is required, *McConnell* suggests that business leaders who feel pressured to give soft money to both major parties can provide especially useful testimony. *See, e.g.,* 540 U.S. at 124.

Just as BCRA places restrictions on state and local parties so that they cannot be used to circumvent the soft money ban on contributions to national parties, reformers at the state level should consider how to treat the various party committees at the statewide and county levels to prevent new loopholes from being exploited. Applying a single contribution limit collectively to all state and local parties may be risky, unless the limit is reasonably high. In *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion), the Supreme Court cited Vermont's treatment of all affiliated parties as if they were a single party for purposes of a low contribution limit in its decision holding that the contribution limits were unconstitutional. *Id.* at 238-39.

Finally, in setting contribution limits for parties, advocates must not reduce contributions below a level at which the parties can function effectively. It is not entirely clear what standard courts will use given *Randall's* failure to reaffirm the *Shrink Missouri* test. *Jacobus* upheld a \$5,000 limit on the simple ground that *Buckley* had permitted a \$5,000 limit on contributions to PACs. 338 F.3d at 1117.

IV. A Note on Candidate Contributions to Nonpolitical Organizations

It is not uncommon for candidates to make donations to organizations that are ostensibly established for religious, civic, or other charitable purposes. Some such organizations (or their affiliates) endorse candidates or otherwise promote the election of particular candidates through independent expenditures or sham issue advocacy. In an apparent attempt to forestall efforts by candidates to curry favor with such groups by means of donations from campaign funds, and to prevent evasion of campaign finance laws, Florida enacted a law

banning candidate contributions to such organizations. In *Florida Right to Life, Inc. v. Lamar*, the Eleventh Circuit Court of Appeals found the ban unconstitutional. 273 F.3d 1318, 1325-29; *see also Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1116-17 (8th Cir. 2005) (striking down a Minnesota law that prohibited religious, charitable, or educational organizations from requesting donations from candidates or committees). What is important to note is that the *Lamar* court struck down the law as written, because it broadly banned many genuinely charitable donations, even from personal funds. The court did not reach the question whether it would be permissible to ban contributions to ostensibly nonpolitical organizations when they were made for the purpose of securing electoral support. *Lamar*, 273 F.3d at 1326 n.10. *McConnell* upheld BCRA's limitations on the amounts federal candidates and office holders may solicit on behalf of charitable organizations. 540 U.S. at 181-83.

CHAPTER FIVE

LIMITS ON CANDIDATE SPENDING

The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), held that public financing could be conditioned upon candidates' voluntary acceptance of campaign spending limits.¹ But the Court invalidated a mandatory limit on candidate spending as an unconstitutional burden on candidate speech, and efforts to challenge that decision have so far proven unsuccessful.² As a result, reformers have turned to a variety of mechanisms that encourage candidates to accept voluntary spending limits, which curb the influence of big money on campaigns, preserve office holders' time for legislative duties (instead of fundraising), and encourage candidates who would otherwise be deterred by the high costs of campaigns to run for office, thereby increasing political dialogue.

I. Voluntary Spending Limits

Most jurisdictions adopting voluntary spending ceilings have used some form of public subsidy as an inducement for candidates to limit expenditures. The law governing voluntary spending limits therefore has developed principally within the context of challenges to public financing. A legal analysis of voluntary spending limits therefore is provided in Chapter Nine (Public Financing of Candidates' Campaigns), together with a discussion of the variety of subsidies that may be offered as incentives for acceptance of a spending limit and practical tips on setting such limits in public financing programs.

Other mechanisms for encouraging acceptance of a spending limit include “cap gaps”—under which candidates who agree to the limit are allowed to receive private contributions capped at higher levels than those who reject the limit—and publicity concerning whether a candidate has accepted spending limits, through “informed voter provisions” on the ballot, in official voter guides, or on advertising. These additional inducements are discussed below. Many jurisdictions include a mix of these or other incentives, including public subsidies.

A. Contribution “Cap Gaps”

Some states have implemented a statutory scheme that allows candidates who agree to spending limits to accept larger contributions than those who reject such limits. Limits in such a scheme are sometimes known as “variable contribution limits,” and the scheme is sometimes known as a “cap gap” because it creates a gap between the caps on contributions permitted to participating and nonparticipating candidates. Rhode Island,

¹ *Buckley*, 424 U.S. at 57 n.65 (“Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.”).

² *Id.* at 54-58 (invalidating mandatory candidate spending limit). See Section II below for further discussion of efforts to implement mandatory campaign spending caps.

for instance, has a 2-1 cap-gap: candidates who agree to limit spending are permitted to accept contributions twice the size of those that nonparticipating candidates may accept. See *Vote Choice v. DiStefano*, 4 F.3d 26, 37-40 (1st Cir. 1993).³

Tips

Tip: *If cap gaps are used to encourage participation, contribution limits for nonparticipating candidates must be high enough to permit those candidates to raise sufficient funds for effective advocacy.* See Chapter Three, section I(A), for a discussion of basic limits on contributions to candidates.

Tip: *The government may not impose a system that asymmetrically increases the contribution limits of one candidate after a privately financed rival candidate's spending exceeds a given amount.*

Legal Analysis

Under current law, the mere existence of a cap gap does not present a constitutional problem. Variable contribution limits raise serious First Amendment concerns only if the base limit is so low that candidates operating under that limit will be unable to raise adequate funds for effective advocacy and thus are coerced into accepting a spending limit. Compare *Vote Choice*, 4 F.3d at 38 (describing the \$1,000 base limit as constitutional), with *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) (describing \$100, \$250, and \$500 base limits as unconstitutionally low), and *Wilkinson v. Jones*, 876 F. Supp. 916, 929 (W.D. Ky. 1995) (holding that \$100 base limit was too low).⁴ If the base contribution cap is not unconstitutionally low, the additional amount that candidates who accept spending limits are allowed to raise will generally be permitted as a regulatory incentive to accept those limits. See *Kennedy v. Gardner*, No. CV 98-608-M, 1999 WL 814273, *5-*6 (D.N.H. Sept. 30, 1999) (unpublished opinion) (upholding New Hampshire's five-to-one cap gap, with a basic limit of \$1,000). “[A] statutory framework which merely presents candidates with a voluntary alternative to an otherwise applicable, assuredly constitutional, financing option imposes [no] burden on first amendment rights.” *Vote Choice*, 4 F.3d at 39.

The additional amount that participating candidates may accept could be constitutionally questionable, however, if the gap is too large. The *Wilkinson* court invalidated Kentucky's variable contribution limits in part because, combined with the state's two-to-one matching program, the five-to-one cap gap created a disparity of fifteen-to-one in favor of those who accepted the spending limits. See 876 F. Supp. at 929 (“In reality, a privately-financed candidate may receive his contributions at most \$100 at a time, while a publicly-funded candidate may receive as much as \$1,500 per contribution.”). This sharp disparity unconstitutionally

³ See also R.I. Gen. Laws § 17-25-30(c) (West 2010).

⁴ Although the reasoning of *Cal. ProLife Council PAC* and *Wilkinson* is flawed, and it was expressly rejected in *Colorado Right to Life Comm., Inc. v. Buckley*, No. 96-S-2844, slip op. at 13 (D. Colo. Apr. 17, 1998), vacated as moot sub nom. *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), reformers should be aware that some courts may regard the existence of the higher limit as evidence that the lower limit is not necessary to deter real or apparent corruption.

transformed the “carrot” that is offered to publicly financed candidates into a “stick” used upon privately-financed candidates.” *Id.* at 930.

The Supreme Court recently struck down a cap gap that was not conditioned on accepting public financing. In *Davis v. FEC*, 128 S. Ct. 2759 (2008), the Court considered the “Millionaires’ Amendment” of the federal Bipartisan Campaign Reform Act. Under that provision, when a candidate’s personal expenditures exceeded \$350,000, the limit on individual contributions to rival candidates would triple. Unlike the voluntary spending limit in *Buckley*, the system at issue in *Davis* triggered strict scrutiny because it did “not provide any way in which a candidate c[ould] exercise th[e] right [to make unlimited personal expenditures] without abridgment.” *Id.* at 2772. In the absence of a compelling state interest to justify this involuntary cap gap, the Court held that it unconstitutionally burdened the “unfettered right to make unlimited personal expenditures.” *Id.* at 2772. The Court stressed that the “asymmetrical” effect on candidates motivated its conclusion. *Id.* at 2772 n.7. While legislation “rais[ing] the contribution limits for all candidates” would be permissible, this provision forced a candidate to choose between a limit on personal expenditures or the “activation of a scheme of discriminatory contribution limits.” *Id.* at 2770-72. It should be noted, however, that the Millionaires’ Amendment applied to congressional races where both candidates’ campaigns were *privately* financed.

B. Informed Voter Provisions

One of the incentives that have been explored as means to encourage voluntary acceptance of spending limits is publicity concerning the candidate’s participation. Information may be provided in the form of a ballot notation, a statement in an official voter guide, or a disclosure requirement for candidate advertising. Sometimes disparaged as “scarlet letters,” informed voter provisions have met with considerable skepticism in the courts.

1. Ballot Notations

Ballot notations are just what they sound like: information appearing on the face of the ballot that a voter uses when voting in an election. The political party with which a candidate is affiliated is a common type of ballot notation. A ballot notation informing voters whether a candidate was participating in a voluntary spending limit scheme might read along the lines of: “Accepted voluntary spending limits” or “Declined voluntary spending limits.”

Tips

Tip: *Ballot notation requirements have never survived constitutional scrutiny.*

Legal Analysis

There have been no published opinions ruling directly on the constitutionality of ballot notations indicating whether a candidate has chosen to accept a voluntary spending limit. The Maine district court in *Daggett v.*

Webster suggested, however, that *any* official labeling would be “most troubling,” 74 F. Supp. 2d 53, 57 (D. Me. 1999), and the First Circuit rejected objections to the Maine Clean Election Act’s certification requirement on representations that the state did not intend to classify candidates as “clean.” See *Daggett v. Committee. on Government Ethics & Election Practices*, 205 F.3d 445, 470 (1st Cir. 2000). In addition, there is one unpublished decision specifically invalidating requirements that the primary and general election ballots clearly indicate which candidates have and have not accepted Colorado’s voluntary spending limits.⁵ See *Colorado Right to Life Committee v. Buckley*, No. 96-S-2844, slip op. at 10, 15-23 (D. Colo. Apr. 17, 1998), vacated as moot sub nom. *Citizens for Responsible Government State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).⁶

These rulings are consistent with case law involving other ballot notations. The Supreme Court struck down a ballot notation indicating whether candidates had taken certain actions with respect to term limits. See *Cook v. Gralike*, 531 U.S. 510, 525 (2001) (invalidating ballot notations stating: “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” or “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS” as improper regulation of congressional elections under the Elections Clause); accord *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1096 (D.S.D. 1998) (finding it “hard to imagine a more chilling impact on political speech” than such notation).⁷ *Daggett* and *Colorado Right to Life* suggest that courts may well regard ballot notations indicating a candidate’s acceptance or rejection of spending limits in the same way.

2. *Statements in Official Voter Pamphlets*

Some jurisdictions publish guides to inform voters about candidates who will be on the ballot. In some cases, candidates may draft their own statements and pay the costs of publication. Offering candidates who accept spending limits the opportunity to publish such statements for no cost is a form of public subsidy that is unlikely to raise any constitutional questions. Requiring that the voter guide indicate whether or not a candidate has accepted a spending limit raises different concerns, as do limits on what candidates can say in their statements.

Tips

Tip: *Any statement that the government places in a voter pamphlet must be scrupulously factual and neutral.* If the statement is slanted in favor of participating candidates, courts may find that candidates have no real choice but to accept the limits. Even using the term “clean” is very risky.

⁵ California’s ballot notation provision was preliminarily enjoined without discussion, along with the rest of Proposition 208, a comprehensive campaign finance initiative. See *Cal. Prolife Council PAC*, 164 F.3d at 1190.

⁶ A copy of the unpublished opinion is on file at the Brennan Center.

⁷ Scholarly literature is also critical of ballot notations. See Bruce E. Cain, *Garrett’s Temptation*, 85 Va. L. Rev. 1589, 1589 (1999) (noting that the labels may “allow a majority to characterize a minority’s voting position without any guarantee that it will do so fairly”).

Legal Analysis

VanNatta v. Keisling considered a challenge under the Oregon Constitution to a requirement that statements be placed in voter pamphlets identifying whether candidates had agreed to accept voluntary spending limits. 931 P.2d 770, 787-88 (Or. 1997). The Oregon Supreme Court rejected the claim that such a provision unlawfully coerced candidates into accepting the limits, noting that the publication requirement did not by its terms inflict a punishment and stating:

[W]e have difficulty accepting the proposition, in the context of political campaigns, that the neutral reporting of this kind of objective truth . . . somehow *impermissibly* burdens expression.

Admittedly, a candidate's knowledge that his or her refusal to agree to expenditure limitations will be brought to the attention of the voters might persuade some candidates to agree to expenditure limits when, in the absence of that voter notification, they would not have agreed. Indeed, we assume that such a result was the precise purpose behind [the provision]. But encouraging such an outcome does not amount to impermissible coercion.

*Id.*⁸ Such a provision has yet to be reviewed in any other court.

There are only three cases considering whether a state may place limits on what candidates may say in statements submitted for official voter pamphlets. In *Clark v. Burleigh*, 841 P.2d 975 (Cal. 1992), the California Supreme Court rejected First Amendment and equal protection challenges to restrictions that confined judicial candidates to discussions of their own background and qualifications. Such a ruling is not entirely surprising, given the special concerns arising from the election of judges. But courts have since ruled that even non-judicial candidates may be barred from attacking opponents in the statements. See *Hammond v. Agran*, 90 Cal. Rptr. 2d 876, 879 (Cal. Ct. App. 1999); *Dean v. Superior Court*, 73 Cal. Rptr. 2d 70, 72-73 (Cal. Ct. App. 1998).

3. Advertising Disclosure Requirements

Another type of informed voter requirement imposes on the candidates themselves the obligation to disclose, in any print or electronic advertising, whether they have accepted voluntary spending limits.

Tips

Tip: No court has upheld a requirement that a candidate's advertising disclose whether the candidate has agreed to limit spending.

⁸ The *VanNatta* court also upheld a requirement that the voter pamphlet disclose when a candidate who agreed to limit spending in a prior election actually failed to abide by the limit, noting a special exception under Oregon's Constitution for laws targeted at fraud. See 931 P.2d at 788.

Legal Analysis

There have been no published opinions ruling directly on the constitutionality of a requirement that advertising disclose whether or not a candidate has agreed to limit spending. But in an unpublished opinion, the *Colorado Right to Life* court invalidated such a rule. The challenged provision required that candidates who refused spending limits include in all messages they produced a prominent statement that: “(Candidate’s name) HAS NOT AGREED TO THE CAMPAIGN SPENDING LIMITS ADOPTED BY THE VOTERS IN THE FAIR CAMPAIGN PRACTICES ACT.” The court distinguished *VanNatta*, noting that the advertising disclosure provision did not merely impose a requirement on the state but compelled candidates to convey a specific political message. *Colorado Right to Life*, No. 96-S-2844, slip op. at 17. Although the district court’s ruling was vacated as moot after Colorado repealed the law and is not technically binding precedent, the court’s reasoning is consistent with decisions that have invalidated other advertising disclosure provisions that require more than identification of the sponsor. See Chapter Eight, section II (discussing cases).

II. Mandatory Spending Limits

Many reformers are concerned about the skyrocketing cost of political campaigns. As costs escalate each year, candidates scramble to raise greater and greater sums of money. Candidates become locked in a spiraling fundraising “arms race” that neither side will unilaterally abandon for fear of electoral defeat. The best solution, many reformers believe, is a mandatory limit on the amount of money each candidate in a race may spend. Such limits would free candidates from chasing every possible contribution and make them more likely to decline funds from donors seeking special favors. In addition, candidates could spend less time fundraising and more time campaigning (or governing if they are already officeholders).

However, the Supreme Court has all but ruled out mandatory spending limits as a means of accomplishing these goals. *Buckley* struck down such ceilings in federal law, and in *Randall v. Sorrell*, 548 U.S. 230 (2006), the Supreme Court reaffirmed that holding in striking down Vermont’s campaign expenditure limits.⁹ In a plurality decision, the *Randall* Court expressly rejected the argument that expenditure limits were necessary to reduce the amount of time candidates spent raising money, citing *Buckley*. *Id.* at 240-241. More recently, in *Davis v. FEC*, the Supreme Court invalidated a provision because it indirectly burdened the “unfettered right to make unlimited personal expenditures.” 128 S. Ct. 2759, 2772 (2008).

⁹ *Buckley* used strong language in striking down the federal expenditure ceilings, whether they applied to independent expenditures, see 424 U.S. at 48-49 (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”); the expenditure of the candidate’s personal funds, see *id.* at 54 (“[T]he First Amendment simply cannot tolerate [FECA’s] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy”); or spending by a candidate’s campaign committee, see *id.* at 57-58 (“The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.”).

Tips

Tip: The Supreme Court has very recently struck down mandatory limits on how much money candidates and their campaigns can spend in an election. It is unlikely that a new test case will be viable for some time.

Tip: A jurisdiction interested in defending the constitutionality of mandatory spending limits must build a factual record even stronger than that developed in *Randall*.¹⁰

Tip: Mandatory spending limits may stand a better chance of surviving constitutional scrutiny if a jurisdiction can demonstrate that other types of campaign finance regulation already in place — such as contribution limits and incentives for voluntary spending limits — are insufficient to address the asserted governmental interests.

Legal Analysis

Buckley involved a challenge to mandatory limits on both the amount of money that federal campaigns could spend in an election and on the amount of personal wealth that candidates could spend to advance their own candidacies.¹¹ The Supreme Court invalidated both sorts of limits under the First Amendment, *Buckley*, 424 U.S. at 39-59, and has never questioned that holding.¹² *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 610 (1996) (plurality opinion) (noting *Buckley*'s invalidation of limits on candidates' spending of their own money and on campaign expenditures).

In *Buckley* the Supreme Court began its constitutional analysis of FECA's mandatory spending limits by examining the burden they imposed on the First Amendment rights of candidates and their supporters. The Court rejected the argument that in enacting spending limits Congress was regulating conduct (the spending of money) rather than speech. *Buckley*, 424 U.S. at 15-17. Newspaper comments, the Court reasoned, are considered a "pure form of expression" involving "free speech alone" even though it requires money to publish and disseminate the comments. *Id.* at 17 (quoting *Cox v. Louisiana*, 379 U.S. 559, 563-64 (1965)). *Buckley* explained that the Supreme Court had "never suggested that the dependence of a communication on

¹⁰ See *Randall*, 548 U.S. at 239-240 (noting Vermont had "not shown, for example, any dramatic increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem.").

¹¹ *Buckley* also involved a challenge to a \$1,000 annual ceiling on expenditures made independently by an individual or an organization "relative to a clearly identified candidate." 424 U.S. at 39-51. The Court found that neither the governmental interests in preventing the reality and appearance of corruption nor the interest in equalizing the relative ability of individuals and groups to influence the outcome of elections was sufficient to justify the limit. See *id.* at 46-49. For further discussion of the constitutional issues raised with respect to independent expenditures, see section I(B)(3)(b) of this chapter (addressing the treatment of independent expenditures in the context of voluntary spending limit schemes), Chapter Four, section II (addressing limits on contributions to independent expenditure committees), and Chapter Six (addressing monetary limits on independent expenditures).

¹² The mandatory spending limits considered in *Buckley* were lower than the costs of many federal campaigns at the time. For example, at least 25% of all major-party senatorial candidates in the two political cycles prior to the enactment of the ceilings had spent more than the prescribed spending limits. 424 U.S. at 20 n.21. The Court noted that the percentage of candidates who exceeded the limits in those years was probably even higher, since that figure reflected the aggregate limits allowed for the primary and general elections and the combined amounts spent by candidates in both elections, whereas the provisions at issue in *Buckley* imposed separate caps for each election and did not allow the amounts to be aggregated. *Id.* at 20 n.21. The Court thus concluded that the limits "would have required restrictions in the scope of a number of past . . . campaigns." *Id.* at 20, see *id.* at 55 n.62. More generous limits might not have faced the same problem.

the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment.” 424 U.S. at 16. Instead, the Court insisted:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19. The Court concluded that FECA's expenditure limits represented “substantial . . . restraints on the quantity and diversity of political speech.” *Id.*; see also *id.* at 39 (“[FECA's] expenditure ceilings impose direct and substantial restraints on the quantity of political speech.”).

The Court also held that the campaign spending limits burdened the associational rights of a candidate's supporters. First Amendment protection of the freedom of association includes the right of individuals “to pool their resources in furtherance of common political goals.” *Id.* at 22. Accordingly, limits “on the ability of . . . candidate campaign organizations to expend resources on political expression ‘is simultaneously an interference with the freedom of [their] adherents.’” *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion) (alteration in original)).

In sum, the Court held that, although contribution limits and spending limits both implicate First Amendment rights, “expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.” *Buckley*, 424 U.S. at 23. The Court therefore applied strict scrutiny to the mandatory expenditure ceilings. As is explained below, neither the limit on candidate self-financing nor the limit on campaign committee expenditures survived the exacting review.

A. Candidate Self-Financing

The *Buckley* Court swiftly rejected FECA's limits on expenditures by candidates from their personal funds.¹³ The Court began by stressing the importance of allowing candidates “the unfettered opportunity to make their views known.” *Id.* at 52-53. It then rejected the two proffered governmental interests—the prevention of

¹³ Some Justices have suggested that limits on self-financing should not be regarded as expenditure limits. *Buckley*, 424 U.S. at 287 (“[FECA] imposes no overall limit on the amount a candidate can spend; it simply limits the ‘contribution’ a candidate may make to his own campaign.”) (Marshall, J., concurring in part and dissenting in part). In *Nixon v. Shrink Missouri Government PAC*, Justice Breyer suggested that “it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience stressed by Justice Kennedy . . . , making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns.” 528 U.S. 377, 405 (2000) (Breyer, J., joined by Ginsburg, J., concurring). The recent decision in *Randall* suggests that such an approach will not be considered favorably by the current Supreme Court.

corruption and the equalizing of candidates' financial resources. The interest in combating corruption, the Court explained, is advanced by *allowing* candidates to spend freely from their own resources, thereby reducing their dependence on outside contributions. *Id.* at 53. The Court then held that the interest in equalizing the relative financial resources of candidates is not a legitimate basis for burdening candidates' speech rights. It explained: "[T]he First Amendment simply cannot tolerate . . . restriction[s] upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

Since *Buckley*, no court has upheld constraints on the self-financing of campaigns.¹⁴ In *Gable v. Patton*, the Sixth Circuit struck down a ban on candidates' contributions to their own campaigns within the last 28 days of an election. 142 F.3d 940, 951-53 (6th Cir. 1998) (holding that the ban—unlike a ban on contributions from others during the same 28-day period—could not be justified as a means of effectuating trigger provisions in Kentucky's public financing system). Recently, in *Anderson v. Spear*, another panel of the same circuit invalidated additional provisions of Kentucky's campaign finance law on the grounds that they functioned to limit candidate self-financing. 356 F.3d 651, 666-67, 672-73 (6th Cir. 2004) (invalidating the definition of "contribution" and a \$50,000 limit on loans).¹⁵

Dann v. Blackwell involved a provision requiring candidates contributing more than \$25,000 to their own campaigns to file a notice with County Board of Elections, upon penalty of forfeiture of the candidates' nomination or election. Opposing candidates then had the option of lifting limits on contributions to their campaigns. 83 F. Supp. 2d 906 (S.D. Ohio 2000). The *Dann* court held that the legislature could not lengthen the notice period, if the timing of the legislative amendment would effectively prevent a candidate from financing his own campaign. *Id.* at 912-13 & n.10 (declining to decide the constitutionality of the scheme as a whole).

B. Spending by Campaign Committees

Without much difficulty, the Court in *Buckley* also invalidated FECA's limits on spending by a candidate's campaign committee. First, the Court held that the interest in combating corruption was not implicated by the spending limits, because "[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations and disclosure provisions." *Buckley*, 424 U.S. at 55. Second, the Court rejected the equality rationale. The Court explained that, under a system of contribution limits, the amount of money a candidate raises "will normally vary with the size and intensity of the candidate's support."¹⁶ *Id.* at 56. Accordingly, the Court found nothing "invidious, improper, or unhealthy" in permitting candidates to

¹⁴ In 2008, the Supreme Court emphasized *Buckley*'s continuing vitality in this regard. *See Davis*, 128 S. Ct. at 2772 (invalidating provision that indirectly burdened "unfettered right to make unlimited personal expenditures").

¹⁵ The Sixth Circuit also invalidated Kentucky's definition of "contribution" on the grounds that it applied to a self-financed candidate's spending, even though the Kentucky law expressly exempted candidate contributions to their own campaigns from otherwise applicable contribution limits. *See Anderson*, 356 F.3d at 667 ("*Buckley* drew a line in the sand, and prohibited the government from restricting a candidate's ability to make expenditures on his own behalf.").

¹⁶ The Court did not consider that the financial means of a candidate's supporters also affects how much money a candidate can raise.

spend whatever they are able to raise.¹⁷ *Id.* Finally, the Court dismissed as anathema to the First Amendment the notion that the skyrocketing costs of political campaigns could justify limiting campaign spending. Such a justification, according to the Court, was at base paternalistic: “The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.” *Id.* at 57.

Before *Randall*, lower courts consistently struck down mandatory campaign spending limits, although some questioned whether *Buckley* represented a *per se* ban on mandatory spending limits. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *reversed sub nom Randall v. Sorrell*, 548 U.S. 230 (2006); *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 543 U.S. 1002 (2004); *Kruse v. Cincinnati*, 142 F.3d 907 (6th Cir. 1998); *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998). But *Randall* reaffirmed the conclusion of *Buckley* that that campaign expenditure limitations unacceptably burden the First Amendment, because they “necessarily ‘reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.’” 548 U.S. at 242 (quoting *Buckley*, 424 U.S. at 19). The *Randall* plurality also reaffirmed *Buckley*’s holding that corruption and the appearance thereof are adequately addressed through contribution limits and disclosure requirements, holding that Vermont had not demonstrated any interests requiring a different result, such as a dramatic increase in corruption or evidence that expenditure limits were “the only way to attack that problem.” *Id.* at 239. Finally, *Randall* held that *Buckley* had also considered and rejected the burdens of candidate fundraising as a justification for campaign expenditure limits. *Id.* at 240-241. After *Randall*, it will be extremely difficult to enact mandatory campaign expenditure limits that will survive constitutional scrutiny.¹⁸

¹⁷ The *Buckley* Court also pointed out that equalizing campaign resources may hurt candidates without name recognition. 424 U.S. at 56-57.

¹⁸ The case law since *Randall* has been similarly unpromising. In *Davis v. FEC*, the Supreme Court approved *Buckley*’s holding that limits on “overall campaign expenditures [are] unconstitutional.” *See* 128 S. Ct. at 2772.

CHAPTER SIX

LIMITS ON INDEPENDENT EXPENDITURES

There are two conceptual components of “independent expenditures.” “Expenditures” constitute the first element. Prior to the Supreme Court’s decision in *McConnell v. FEC*, 540 U.S. 93 (2003), “expenditures” were understood to refer to disbursements made for “express advocacy” – communications advocating in express terms the election or defeat of a clearly identified candidate. The Bipartisan Campaign Reform Act of 2002 (“BCRA,” also known as the McCain-Feingold Bill) preserved that conception of “expenditures” and introduced a new term, “electioneering communications,” which also could be financed independently in an effort to influence federal elections. “Electioneering communications” were defined as targeted broadcast advertisements referring to a federal candidate and run in the period immediately before an election. Because the same constitutional rules apply to expenditures and electioneering communications that are the functional equivalent of express advocacy, *see FEC v. Wisconsin Right to Life*, 551 U.S. 449, 465 (2007), this chapter uses the term “expenditures” broadly to include disbursements for either express advocacy or its functional equivalent.¹

The second concept embedded in the term “independent expenditure” is that of “independence.” An expenditure is “independent” only if it is not in any way “coordinated” with a candidate, candidate committee, or political party (or an agent of the candidate or party). Coordinated expenditures are typically treated as contributions to the candidate or party, and they are subject to contribution limits.

I. The General Rule: No Monetary Limits on Independent Expenditures

Tips

Tip: *The Supreme Court has struck down monetary limits on independent expenditures by individuals, corporation, unions and other organizations, and political parties. There is little prospect that the Supreme Court will reconsider these rulings in the foreseeable future.*

Tip: *If you want to test the limits of the constitutional precedents, be sure to develop a strong factual record demonstrating the real or perceived corrupting influence of the expenditures on candidates and elected officials, the likelihood that the limits will help to alleviate those harms, and the generosity of the monetary ceiling. The evidence you present will have to demonstrate that the ceilings afford ample opportunity for political expression. You will also have to overcome a strong presumption that independent expenditures, unlike contributions to candidates, do not carry a substantial risk of actual or perceived corruption.*

¹ For further discussion of express advocacy and electioneering communications, *see* Chapter Seven (“Campaign Ads and Issue Advocacy”).

Tip: Reporting and disclaimer requirements may be imposed on entities making independent expenditures. See Chapter Eight for a discussion of these requirements.

Tip: A cap on contributions made to groups that make both contributions to candidates or parties and independent expenditures is permissible as a means of preventing the evasion of individual contribution limits. The Supreme Court has not yet decided whether it is constitutional to impose limits on contributions to groups that make only independent expenditures.² See Chapter Four, section II, for further discussion of these issues.

Legal Analysis

Placing monetary limits on independent expenditures—campaign spending that is not coordinated with a candidate or political party—is not a promising regulatory strategy, however desirable it may seem in principle. The Supreme Court has repeatedly invalidated Federal Election Campaign Act (“FECA”) provisions imposing monetary limits on independent expenditures. *Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010) (striking down FECA’s rules on independent expenditures by corporations, noting “chilling effect” of “[l]imits on independent expenditures”); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (“*Colorado Republican I*”) (plurality opinion) (striking down FECA’s limits on independent expenditures by political parties); *FEC v. Nat’l Conservative Political Action Committee*, 470 U.S. 480, 501 (1985) (“*NCPAC*”) (striking down limits on independent expenditures related to candidates who had accepted spending limits); *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (*per curiam*) (striking down FECA’s limits on independent expenditures by individuals and groups). All other courts, state and federal, are bound by these precedents and therefore are likely to strike down any monetary limits on independent expenditures by individuals, political action committees (“PACs”), corporations, unions and other organizations, and political parties in support of or opposition to state or local candidate.

In *Buckley*, the Court invalidated a \$1,000 limit on independent expenditures by individuals, associations, and PACs. 424 U.S. at 39-51. After narrowly construing “independent expenditures” to mean independently conducted “express advocacy,” the Court determined that none of the proffered state interests was sufficient to satisfy “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”³ *Id.* at 44-45. The expenditure limit could not be justified as a means of maximizing the effectiveness of the contribution limits, because anyone wishing to buy influence with a candidate could still sponsor advertising that did not expressly advocate the election or defeat of a candidate but clearly benefited the candidate’s campaign. *Id.* at 45. Moreover, the Court reasoned, independent expenditures present a “substantially diminished potential for abuse,” because the very fact that they are not coordinated in any way with candidates means that such expenditures “may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Id.* at 47.

² But see, e.g., *SpeechNow.org v. Federal Election Com’n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (“[T]he government has no anti-corruption interest in limiting contributions to an independent expenditure group”), *cert. denied*, *Keating v. FEC*, No. 10-145, 2010 WL 4272775 (U.S. Nov. 1, 2010); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008) (invalidating \$4,000 contribution limit for independent expenditure political committees because not “closely drawn” to preventing corruption).

³ For further discussion of the burden that expenditure limits place on rights of free speech and association, see Chapter Five, section II.

Buckley also rejected the government’s asserted “interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Id.* at 48. In a rousing defense of the rights of the rich, the Court stated:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment The First Amendment’s protection against governmental abridgement of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.

Id. at 48-49. The Court explicitly distinguished prior voting rights and ballot access cases that sought to eliminate economic barriers to participation in the electoral process. The principles that permitted the Court to invalidate restrictions on the franchise did not, so *Buckley* said, permit the Court to uphold restrictions on political expression. *Id.* at 49 n.55.

It is difficult to say whether the Court would have so vehemently opposed limits on independent expenditures if the limit imposed under FECA had been more generous. After all, as *Buckley* noted, \$1,000 would not buy even a quarter-page ad in a major newspaper. *Id.* at 40. Under those circumstances, it was not unreasonable for the Court to conclude that the ceiling heavily burdened core First Amendment rights. *Id.* at 47-48. But the Court voiced its strong opposition to that limit in terms that reach much farther than the particular ceiling at issue in *Buckley*. The Court reaffirmed its antipathy to limits on independent expenditures in *NCPAC*. In that case, the Court struck down a separate \$1,000 limit on independent expenditures by PACs seeking to further the election of presidential candidates who accepted public funding and voluntary spending limits. 470 U.S. 480. On the record of that case, the Court determined that the risk of corruption by such expenditures was “a hypothetical possibility and nothing more,” *id.* at 498, and thus could not justify a “wholesale restriction of clearly protected conduct,” *id.* at 501. ⁴ Under *NCPAC*, as under *Buckley*, there is a “fundamental constitutional difference between money spent to advertise one’s views independently of the candidate’s campaign and money contributed to the candidate to be spent on his campaign.” 470 U.S. at 497.

The Supreme Court later invalidated limits on certain independent expenditures by political parties in *Colorado Republican I*. In that case the plurality invoked the constitutional distinction between contributions and independent expenditures and discounted the risk of corruption from the latter. 518 U.S. at 615-16. *Nixon v. Shrink Missouri Government PAC* also expressly reaffirmed that distinction. 528 U.S. 377, 386-87 (2000). The Court thus gives no sign of backing down from the analysis of independent expenditures it gave in *Buckley*. ⁵

In reliance on *Buckley*, the Nebraska Supreme Court invalidated a provision requiring groups intending to spend more than \$2,000 on independent expenditures to provide notice at least 45 days before the election of how much they intended to spend, and then to spend no more than 120% and no less than 80% of the announced amount.

⁴ The Court explained, “[T]hat candidates and elected officials may alter . . . their . . . positions . . . in response to political messages paid for by the PACs can hardly be called corruption.” *NCPAC*, 470 U.S. at 498.

⁵ Citing *Colorado Republican I*, two courts in New York – one federal, one state – struck down a state law forbidding political parties from spending money in aid of a party candidate in a primary election. *Kermani v. N.Y. State Bd. of Elections*, 487 F. Supp. 2d 101 (N.D.N.Y. 2006); *Avella v. Batt*, 820 N.Y.S.2d 332 (N.Y. App. Div. 2006).

State ex rel. Stenberg v. Moore, 605 N.W.2d 440, 449 (Neb. 2000). The court found that the provision was not narrowly tailored to advance either of the state’s interests in preventing corruption or encouraging participation in its public financing system.

II. Independent Expenditures by Corporations and Unions

In *Citizens United*, the Supreme Court struck down an outright ban on independent expenditures funded by the general treasuries of corporations, even though the law provided an alternative mechanism for corporate political activity through separate segregated funds. The Court opined that corporate independent expenditures and the resultant “appearance of influence [over political candidates] . . . will not cause the electorate to lose faith in our democracy.” 130 S. Ct. 876, 910 (2010). The decision in *Wisconsin Right to Life* recognized an as-applied exception to BCRA’s ban for electioneering communications that did not qualify as the functional equivalent of express advocacy. See Chapter Seven.

Tips

Tip: *Corporations and unions may not be banned from making independent expenditures.* The Supreme Court has held that such a ban unconstitutionally burdens the freedom of expression of associated individuals speaking through their expenditures in the corporate form, and has rejected various rationales for applying differential expenditure limits to corporations.

Tip: *Restrictions that apply to corporations do not necessarily have to be applied to unions.* The Supreme Court has not expressly overruled case law that permits differential treatment of corporations and unions under state law.

Legal Analysis

In the recent *Citizens United* decision, the Supreme Court struck down FECA’s age-old restrictions on independent expenditures by corporations. 130 S. Ct. at 897. The Court held that corporate “independent expenditures . . . do not give rise to corruption or the appearance of corruption” and are protected as “political speech.” *Id.* at 909-10. Because independent expenditures do not entail any risk of “*quid pro quo* corruption,” the Court explained, a ban on corporate independent expenditures could not withstand “rigorous First Amendment scrutiny.” *Id.* The Court rejected the government’s proffered interest in preventing the “distortion” of the electoral process through the expenditure of “immense aggregations of wealth” by corporations solely interested in maximizing their profits. *Id.* at 904-05. In response to arguments that corporations could already make expenditures through political action committees (“PACs”), the Court emphasized that PACs were excessively “burdensome alternatives.” *Id.* at 897. PACs were “separate associations” and both “expensive to administer and subject to extensive regulations” requiring recordkeeping and reporting. *Id.* Importantly, the federal scheme required corporations to register PACs *before* they made independent expenditures, *id.* at 898, and the Court castigated the result that corporations must get “prior permission to speak.” *Id.* at 895.

To fill this sudden gap in campaign finance regulations, states have swiftly passed less intrusive disclosure requirements.⁶ These laws aim to deter corruption as effectively as possible while complying with the *Citizens*

⁶ See, e.g., Minn. Stat. §§ 10A.12(1)-(1a), 211B.15(3) (2010); Iowa Stat. Ann. §§ 68A.102(18), .402(9), .402B(3), .404(3)-(4)

United framework. One such disclosure requirement in Minnesota is currently under challenge. The relevant provisions require that corporations form registered and periodically reporting political funds after making independent expenditures beyond \$100. Minn. Stat. § 10A.12(1)-(1a). The federal District Court of Minnesota upheld these provisions, distinguishing them from the more intrusive regime in *Citizens United*. Under the Minnesota system, corporations maintain control over the political funds they create, which may be merely corporate accounts for the purpose of independent expenditures. *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, No. 0:10-cv-02938-DWF-JSM, at 18 (D. Minn. filed Sept. 29, 2010) (on file at Brennan Center). Corporations in Minnesota may also solicit contributions to political funds from anyone, and even contribute unlimited amounts to these funds themselves. *Id.* Critically, corporations are free to begin making independent expenditures *before* the registration of their political funds, so long as they register within fourteen days of their first donation. *Id.*⁷ For all these reasons, the Court ruled, the Minnesota provisions amount merely to disclosure requirements, rather than a ban on speech, and thus warrant a lesser degree of scrutiny. *Id.* at 22. The Court upheld Minnesota’s disclosure requirements because they have a “substantial relation” to “sufficiently important” government interests, including the public’s interest in “knowing who is speaking about a candidate shortly before an election.” *Id.* at 23 (quoting *Citizens United*, 130 S. Ct. at 915).

In addition to the old restrictions on corporate expenditures, *Citizens United* also abolished the historical distinction between media and non-media corporations for purposes of expenditure limits. Previously, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court had sustained a “media exception” to Michigan’s ban on corporate independent expenditures, due to “the unique role that the press plays in ‘informing and educating the public, offering criticism, and providing a forum for discussion and debate.’” *Id.* at 667. Nevertheless, the *Citizens United* Court summarily rejected the reasoning of *Austin*, and held that “differential treatment [for media corporations] cannot be squared with the First Amendment.” 130 S. Ct. at 905-06. The Court reasoned that many media corporations have “immense aggregations of wealth,” and that “the views expressed by media corporations often ‘have little or no correlation to the public’s support.’” *Id.* at 905.⁸

According to case law that has not been expressly overruled, state law does not have to treat corporations and unincorporated unions the same. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the

Supreme Court rejected a claim that Michigan’s differential treatment of unincorporated labor unions and corporations was unconstitutional under the Equal Protection clause. The Court reasoned:

Whereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure The

(2010) (imposing disclosure requirements for independent expenditures above \$750, as well as registration and ongoing reporting requirements for organizations that raise over \$1,000).

⁷ See also Minn. Stat. § 10A.14(1).

⁸ The Court’s reasoning that the views of media corporations are often out of line with those of the public borrows from the government’s proffered anti-distortion rationale for the ban on corporate expenditures—a rationale that, peculiarly enough, the

desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case; thus, excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth does not undermine its justification for regulating corporations.

Id. at 665 (internal quotations and citations omitted). Moreover, workers had the right to benefit from collective bargaining by a union without contributing to the union's political activity, so "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." *Id.* at 666.

Notably, the *Citizens United* Court rejected *Austin*'s reasoning that the "corrosive and distorting effects of immense aggregations of [corporate] wealth" justified a ban on corporate independent expenditures. *Citizens United*, 130 S. Ct. at 903. The *Austin* Court had upheld the differential treatment of corporations and unions based partly on this same, later-rejected rationale. Nevertheless, *Citizens United* did not explicitly overrule *Austin*'s distinction between corporations and unions for Equal Protection purposes, and the Supreme Court has not yet revisited that portion of *Austin*. According to at least one federal court, *Austin*'s holding that corporations and unions are not similarly situated for Equal Protection purposes remains good law. *Minnesota Citizens Concerned for Life*, No. 0:10-cv-02938-DWF-JSM, at 32-33 ("[T]he Supreme Court in *Citizens United* did not address, and therefore did not overrule, the portion of the *Austin* decision that addressed the equal protection clause").

III. "Independent" vs. "Coordinated" Expenditures

Court had already rejected. *See* 130 S. Ct. at 904-05.

When an expenditure is coordinated with a candidate or party, it is usually treated as a contribution to the candidate or party. Under federal law, coordinated expenditures are thus subject to the amount and source limitations applicable to contributions. For example, an individual may not spend more than \$2,400 per election in coordination with a federal candidate.⁹ But if an expenditure is truly independent, that same individual may spend an unlimited amount to support the candidate. Whether an expenditure is genuinely independent is therefore a matter of considerable importance.

Tips

Tip: *When defining “independent” expenditures, include clearly defined objective examples of activity that will defeat any claim of true independence.* For example, spending should not be considered independent if it is for communications directed at the voting public, and the person making the expenditure:

- retains a consultant who is also providing campaign-related services to the candidate whom the person is seeking to help by making the expenditure;
- simply replicates a candidate’s own campaign materials;
- uses information provided by candidate, campaign workers, or consultants with an understanding that the person is considering making the expenditure;
- notifies the campaign about the advertising in advance; or
- is actually working for the campaign at a high level.

These types of coordination would have to be defined more clearly in actual legislation. But the basic point is that it is easier to characterize expenditures that are obviously not independent than it is to provide a comprehensive definition of coordinated expenditures.

Tip: *Merely obtaining information from a campaign that is otherwise publicly available or lobbying an elected official on a policy issue should not defeat the independence of a subsequent expenditure.*

Tip: *Any advertising coordinated with a candidate, even if not for narrowly defined “express advocacy” or its functional equivalent should be treated as a contribution to the candidate.*

Legal Analysis

In 2001, the Supreme Court for the first time considered the constitutionality of limits on coordinated expenditures. *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (“*Colorado*

⁹ The federal contribution limits are now indexed for inflation, thus they rise over time. Check with the Federal Election Commission for the present contribution limits.

Republican II") held that coordinated expenditures were the functional equivalent of contributions and that limits on them were a constitutionally permissible means of preventing evasion of individual contribution limits.¹⁰ Because independent expenditures cannot be limited, see section I *supra*, it is crucially important to know whether an expenditure is properly categorized as independent.

In 2010, the Fifth Circuit reaffirmed the *Colorado Republican II* approach to party coordination limits. *Cao v. FEC*, 619 F.3d 410, 422 (5th Cir. 2010) ("the Supreme Court's analysis fully supports the Government's differential treatment of political parties-because of what *Colorado II* recognized as a political party's unique susceptibility to corruption."). The *Cao* court noted, "[t]he Court in *Colorado [Republican] II* expressly recognized that Congress has the power to regulate coordinated expenditures in order to combat circumvention of the contribution limits and political corruption." *Id.* at 428. The court then rejected the plaintiff's arguments noting that to rule in the plaintiffs favor would be in contradiction to the holdings in *Colorado Republican II*:

The argument raised by the Plaintiffs in this case rests ... on the same general principles rejected by the Court in *Colorado [Republican] II*, namely the broad position that coordinated expenditures may not be regulated. Finding for the Plaintiffs would require us to hold that Congress cannot limit a party's expenditures on a campaign ad, the content of which the party adopts, regardless of the degree of coordination with the candidate. Because such a conclusion would effectually overrule all restrictions on coordinated expenditures, the RNC's argument must fail in light of *Colorado II*.

Id. at 430.

The most influential case attempting to distinguish between "independent" and "coordinated" expenditures is *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). Because the Christian Coalition is a corporation, it is not permitted to make contributions to federal candidates. 2 U.S.C. § 441b(a). Because coordinated expenditures are treated as contributions under federal law, any coordination of Coalition spending with its favored candidates would violate the law.

The *Christian Coalition* case is important for two reasons. First, the court recognized that election-related spending coordinated by candidates and supporters counts as a contribution, even if the funds are not spent on "express advocacy." "The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." 52 F. Supp. 2d at 92. This holding is very important, because a ruling to the contrary would allow those seeking to influence elections to coordinate unlimited amounts of spending as long as they craftily avoided certain kinds of advertising and thus open a huge new loophole in federal campaign finance law.

The second point of significance made in *Christian Coalition* was its adoption of an exceedingly narrow definition of what would count as "coordination," opening the door unnecessarily to unregulated collusion between

¹⁰ See *Cao v. FEC*, 619 F.3d 410 (5th Cir. 2010) (upholding the federal party coordination limits), *cert. petition filed*, No. 10-776 (Dec. 8, 2010).

candidates and big spenders. The court recognized that spending requested or suggested by a candidate counted as coordination, but determined that:

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes “coordinated;” where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication’s: (1) contents; (2) timing; (3) location, mode or intended audience (*e.g.*, choice between newspaper or radio advertisement); or (4) “volume” (*e.g.*, number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

Id. According to the court, this standard limits regulation to cases where the candidate shows enough interest in the expenditure to show that it is perceived as valuable for the campaign. *See id.*

This standard, if adopted more widely, would open a new loophole in the law. Although the control, discussions, or negotiations described above should certainly be *sufficient* to show coordination, they should not be *necessary*. This definition would not rule out highly beneficial exchanges of important information between spenders and key insiders in a campaign, as long as the contact did not reach the level of a “partnership.” True independence should mean more than *Christian Coalition* suggests.

To date, no other court has expressly adopted this definition.¹¹ Unfortunately, the FEC declined to appeal the *Christian Coalition* decision and adopted regulations, based largely on the decision, which allowed a new range of coordinated activity to pass as independent. BCRA rejected those regulations and directed the FEC to adopt a more rigorous definition of coordination. In *McConnell*, the plaintiffs challenging the BCRA argued that the statutory requirement was unconstitutional because it specified that the regulations “shall not require agreement or formal collaboration to establish coordination.” *McConnell*, 540 U.S. at 219 (quoting BCRA § 214(c)). The Supreme Court rejected that argument, holding that an agreement is not necessary for expenditures to be coordinated. *Id.* at 221. But the Court deferred an as-applied analysis of the new regulations for a future case, *id.* at 223, thus providing little concrete guidance on what rules defining coordination are constitutional.

McConnell struck down a provision of BCRA that would have required political parties to choose between making independent expenditures and benefiting from a higher limit on coordinated expenditures. 540 U.S. at 213-19. The Court invalidated the provision on the ground that it could not serve a “meaningful governmental interest” because it limited only express advocacy. *Id.* at 702-03. The Court also rejected the defense that the choice simply offered parties a benefit, by allowing them to choose whether to retain the ability to make independent expenditures or to make larger coordinated expenditures than would be permitted for other political committees.

¹¹ One state court commented favorably upon the *Christian Coalition* discussion of coordination, when deciding that Wisconsin could pursue an enforcement action against a group alleged to have coordinated spending with a candidate for Supreme Court Justice. *Wis. Coalition for Voter Participation v. State Elections Bd.*, 605 N.W.2d 654, 686 n.10 (Wis. Ct. App. 1999). Another state court referred repeatedly to *Christian Coalition* while determining whether certain organized distributions of campaign literature were coordinated. *Rutt v. Poudre Educ. Ass’n*, 151 P.3d 585, 589-91 (Colo. Ct. App. 2006) (holding that distributions were coordinated). The state supreme court reversed this decision on other grounds, however, and expressly declined to define coordinated expenditures. *Colorado Educ. Ass’n v. Rutt*, 184 P.3d 65, 82 (Colo. 2008).

The Court concluded that this defense could not prevail because BCRA required all party committees to make the same choice, in effect allowing the first party committee in a given race to either make an independent expenditure or a coordinated expenditure to bind all other party committees. *Id.* at 703. It is impossible to judge from the Court’s opinion whether it would uphold a similar provision that was more carefully tailored either to cover a broader category of expenditures or to allow each party committee to make an independent choice.

Since the enactment of BCRA, its congressional sponsors have twice successfully challenged FEC regulations defining “coordinated communications.” *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (invalidating coordination content and coordination conduct regulations regarding campaign vendors and former employees,¹² 11 C.F.R. § 109.21(c)-(d), and related definitions of “voter registration activity” and “get-out-the-vote activity,” *id.* § 100.24(a)(2)-(3)); *Shays v. FEC*, 414 F.3d 76, 97-102 (D.C. Cir. 2005).

The FEC recently promulgated a third set of regulations defining coordinated communications. Effective December 1, 2010, coordinated communications additionally include any statement that is both coordinated¹³ and the “functional equivalent of express advocacy.” 11 C.F.R. § 109.21(c)(5). In other words, a communication that is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate” now triggers FEC regulations. *Id.* This provision appears to serve as a catch-all for equivalents of express advocacy that escape the more specific prohibitions of section 109.21(c)(1)-(4). It remains to be seen, however, whether this definition of “coordinated communications” will fare better in court.¹⁴

The meaning of “independent expenditures” has been litigated in only a few other cases. Before being reversed by the state supreme court, one state appellate court held that “coordination does not require a formal collaboration between the parties, or express approval of the [union’s] activities by the [candidate’s] campaign. [It] simply requires the parties ‘to harmonize in a common action or effort’ and to ‘work together harmoniously.’” *Rutt v. Poudre Education Association*, 151 P.3d 585, 591 (Colo. Ct. App. 2006). Applying that reasoning, the court found coordination between two unions and a candidate’s campaign when (1) the unions received “thousands of . . . flyers and numerous yard signs” from the campaign; (2) the candidate appeared at an event organized by the unions and thanked volunteers; (3) the executive director of one of the unions conversed several times with the candidate’s campaign manager. *Id.* Though “[n]one of these activities, standing alone, may have been sufficient to constitute coordination,” the court wrote, “viewed together, these activities constitute coordinated action by the various entities.” *Id.* On appeal, the state supreme court reversed the appellate decision on unrelated grounds, and expressly declined to define “coordinated expenditures.” *Colorado Educ. Ass’n v. Rutt*, 184 P.3d 65, 82 (Colo. 2008).

In *FEC v. Public Citizen*, the court properly concluded that obtaining publicly available information from a campaign was not alone sufficient for coordination. 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999), *rev’d on other*

¹² The Court upheld the “firewall safe harbor” provisions of the conduct regulations, which aimed at “protect[ing] vendors and organizations in which some employees are working on a candidate’s campaign and others—separated by a firewall—are working for outside groups making independent expenditures.” *Shays*, 528 F.3d at 929.

¹³ The definition of coordination itself remains unchanged. *See* 11 C.F.R. § 109.21(d).

¹⁴ At the time this edition went to press, the new regulations had not been challenged.

grounds, 268 F.3d 1283 (11th Cir. 2001) (“Coordination . . . implies ‘some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.’”) (quoting *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997)). Thus, campaign finance regulations may not bar such inquiries or insist that they be made in writing. *Clifton*, 114 F.3d at 1314, 1317.

The Kentucky Supreme Court narrowed its statute defining independent expenditures by construing the phrase “consultation involving a . . . candidate, slate of candidates . . . or agent” to have the same meaning as “consultation with a . . . candidate, slate of candidates . . . or agent regarding the content, timing, place, nature or volume of the communication for which the expenditure is made.” *Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003) (internal quotations omitted), *cert. denied*, 539 U.S. 928 (2003). The Kentucky Supreme Court upheld the statute as narrowed, rejecting arguments based on *Christian Coalition* that would have opened up enormous coordination loopholes.

Finally, a number of courts have found that the government may not *presume*, without actual evidence, that expenditures claimed to be independent are actually coordinated. In *Colorado Republican I*, the Supreme Court found no evidence of actual coordination between the state Republican Party and its not-yet-endorsed nominee and therefore refused to presume that coordination had occurred. 518 U.S. at 613-14, 619. *Republican Party of Minnesota v. Pauly* invalidated a presumption of coordination even after the party endorsed its candidate. 63 F. Supp. 2d 1008, 1019 (D. Minn. 1999).¹⁵ And the Eighth Circuit invalidated a presumption that an independent expenditure on behalf of a candidate was actually coordinated if the candidate failed to file a “statement of disavowal” and “take corrective action” within 72 hours of receiving a required report of the expenditure. *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999). Some of the facts that ought to be considered evidence of coordination are set forth in the *TIPS* above.

¹⁵ It is not clear, however, that *Pauly* is consistent with the Supreme Court’s ruling in *Shrink Missouri* on the government’s evidentiary burden.

CHAPTER SEVEN

CAMPAIGN ADVERTISING AND ISSUE ADVOCACY

For decades, advertising sponsored by individuals or groups other than candidates, political parties, or political action committees (“PACs”) has been a powerful force in candidate campaigns, especially in federal elections. Over that period, the constitutional constraints on the regulation of such advertising have changed dramatically—and they are still in flux. This chapter provides an overview of that shifting legal landscape, including discussions of three critical Supreme Court cases: *McConnell v. FEC*,¹ which opened the door to more meaningful regulation; *FEC v. Wisconsin Right to Life, Inc.* (“*WRTL II*”),² decided just four years later, which recognized an exception to *McConnell*’s holding; and *Citizens United v. FEC*,³ which eliminated longstanding bans on corporate and union political advertising.

Before the decision in *McConnell*, many lower courts had ruled that regulation of advertising was constitutionally permissible only with respect to ads that expressly advocated the election or defeat of a clearly identified candidate. Moreover, most of those courts concluded that such “express advocacy” required the use of “magic words”—terms such as “vote for” or “vote against” or their synonyms. Ads without magic words were treated as “issue advocacy” (advocacy of a position on an issue of public policy) exempt from regulation, regardless of their intent or effect. After *Citizens United*, the government is prohibited from limiting independent expenditures by corporations or unions, which includes any express advocacy containing the above listed magic words. However, *Citizens United* also made clear that “magic words” were not required to trigger disclosure and disclaimer requirements.

Even before *Citizens United* removed the source restrictions, it was child’s play to create campaign ads without magic words in order to avoid regulation. Earlier rulings had opened a giant “sham issue ad” loophole in federal campaign finance law. Although FECA prohibited corporations and unions from spending treasury funds on federal elections, millions of dollars of corporate and union funds poured through the loophole into sham issue ads supporting or opposing presidential and congressional candidates. The loophole allowed the ad sponsors to escape federal reporting requirements, leaving the public in the dark about the financing of the ads. *McConnell* closed the sham issue ad loophole by making it clear “that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled.”⁴

The *McConnell* case involved challenges to provisions of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) that regulated “electioneering communications”—broadcast advertisements that referred clearly to federal candidate, targeted his or her constituents, and ran 30 days before a primary or 60 days before a general election. BCRA included a source ban (corporations and unions were barred from spending general treasury funds on such ads) and disclosure requirements that informed the public who actually was paying for

¹ 540 U.S. 93 (2003).

² 551 U.S. 449 (2007).

³ 130 S. Ct. 876 (2010).

⁴ *Id.* at 205.

the ads. *McConnell* upheld the source restriction and reporting requirements for electioneering communications, while preserving federal regulation of express advocacy.

These provisions of BCRA were challenged again in *Citizens United*, which overturned *McConnell* in part as well as struck down the source restrictions for independent expenditures in *Austin*. The Court in *Citizens United* held that corporations and unions could not be restricted from spending general treasury funds on either express advocacy or electioneering communications. The majority in *Citizens United* emphasized that it is speech, not the speaker, that is protected by the First Amendment and rejected prior case law that had subjected corporations and unions to tighter regulations than other groups.

Prior to *Citizens United*, the Supreme Court had already begun backing away from the expansive language of *McConnell* and tightened the constitutional constraints on the regulation of political advertisements. *WRTL II* found that the ban on using corporate treasury funds for “electioneering communications” was unconstitutional as applied to the plaintiff, a corporation, because the plaintiff’s ads were not express advocacy or its “functional equivalent.” Although the holding technically applied only to the particular ads reviewed in *WRTL II*, the ruling had a broader impact. The Federal Election Commission (“FEC”) approved a rule carving out an exemption to BCRA’s restriction on corporate electioneering communications and setting out indicia of the “functional equivalent” of express advocacy.

Citizens United transformed the *WRTL II* and the FEC exemption to the corporate electioneering communications restrictions into the rule and completely eliminated the source restrictions on the use of corporate treasury funds on independent expenditures, including electioneering communications. *Citizens United* struck down § 203 of BCRA, meaning that corporations and unions are authorized to engage in unlimited independent expenditures, even in reference to clearly identified candidates in the periods directly before a primary or general election. Because corporations are now permitted to engage in direct advocacy of a candidate through independent expenditures, the functional equivalence test put forward in *WRTL II* is also overruled by *Citizens United* for disclaimer and disclosure requirements.

This chapter discusses the remaining regulations on electioneering communications and campaign advertising in light of *Citizens United*. Chapter Six addresses limits on corporate and union campaign-related contributions and expenditures, generally, and Chapter Eight discusses the reporting and disclaimer requirements applicable to campaign ads in more detail.

I. “Electioneering Communications” Under BCRA

BCRA coined a new term—“electioneering communications”—for a category of campaign advertising that would be subject to regulation. Following *Citizens United*, the statutory definition of electioneering communications remains unchanged. But because BCRA § 203 which was codified as 2 U.S.C. § 441b is no longer in effect, the source restrictions on electioneering communications are no longer in effect. The definition still has consequences for purposes of disclaimer and disclosure requirements, which were upheld in *Citizens United*.

As defined in BCRA, an “electioneering communication” is any “broadcast, cable, or satellite communication” that

- I. refers to a clearly identified candidate for Federal office;
- II. is made within:
 - aa. 60 days before a general, special, or runoff election for the office sought by the candidate; or
 - bb. 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
- III. in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.⁵

A communication is “targeted to the relevant electorate” if it “can be received by 50,000 or more persons . . . in the district or State the candidate seeks to represent.”⁶

In other words, there are four key elements of BCRA’s definition:

- the *media* that are regulated (broadcast, cable, and satellite communications);⁷
- the *reference to a clearly identified candidate*;
- the *time period* during which ads are regulated; and
- *targeting* to the jurisdiction of intended representation.

The Supreme Court upheld this definition against claims that it was vague, noting that its components “are both easily understood and objectively determinable.” *McConnell*, 540 U.S. at 103. State or local laws modeled on BCRA also should be drafted to ensure that they are not vague, although meeting this constitutional test does not require that those laws use exactly the same terms as BCRA does. Laws that include easily understood and objectively determinable variations of these four components should have no trouble surviving a *vagueness* challenge.

BCRA contained two sets of provisions pertaining to electioneering communications, only one of which is still in effect. First, it prohibited corporations and unions from using general treasury funds to pay for communications that qualified as electioneering communications. This prohibition was invalidated in *Citizens*

⁵ 2 U.S.C.A. § 434(f)(3)(A)(i) (Supp. 2003).

⁶ *Id.* § 434(f)(3)(C).

⁷ In *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), the D.C. Circuit invalidated an FEC regulation defining “electioneering communications” to include only communications that had been disseminated through these media for a fee. The court held that this limitation was contrary to the text of BCRA.

United.⁸ Second, expenditures on electioneering communications of at least \$10,000 in a calendar year would trigger a range of important reporting and disclaimer requirements. These disclosure requirements are still in place.

Citizens United ended BCRA's political advertisement funding restrictions for corporations and unions. In *Citizens United*, the Supreme Court overturned BCRA's ban on spending union or corporate treasury funds on electioneering communications, as well as FECA's ban on making independent expenditures with such funds. 130 S. Ct. at 897, 904. The decision did not invalidate the statutory definition of an "electioneering communication." However, corporations and unions are now permitted to use general treasury funds to make independent expenditures, including both electioneering communications and express advocacy. *Citizens United* also clarified that disclosure requirements for such communications remain constitutional, whatever their source.

At the time of this writing, the FEC has yet to promulgate post-*Citizens United* rules. The FEC issued rule 11 C.F.R. § 114.15(c) following *WRTL II* to address how it would evaluate the functional equivalent of express advocacy, but *Citizens United* has largely rendered this rule dead-letter. The *Citizens United* Court found that the *Hillary* film at issue qualified as the functional equivalent of express advocacy but nonetheless could not be subjected to § 441b's source restrictions without chilling speech in violation of the First Amendment. 130 S. Ct. at 890, 894, but could be subject BCRA's disclaimer and disclosure requirements.

Tips

Tip: *Be sure that each component of an "electioneering communication" definition is easily understood and objectively determinable.* It should be clear whether or not any particular ad is governed by the definition. It may be necessary to provide subsidiary definitions for some of the terms used in the basic definition, as BCRA does for the phrase "targeted to the relevant electorate."

Tip: *The facts about campaign advertising in a state or locality should support the need for regulation.* In *McConnell*, there was an extensive factual record as well as expert testimony to show that the vast majority of broadcast, cable, and satellite ads referring to a candidate, and targeted at the relevant electorate within the statutory time period, were aired for an electioneering purpose.

Tip: *Tailor regulation to the advertising media actually used for the races covered, but take care not to over-regulate.* In many state races, broadcast ads play a minor role compared with leaflets, mailers, and voter guides. If these less expensive means of campaigning are regulated, there should be a reasonable cost threshold that triggers regulation, so as not unduly to burden individuals or groups who only casually communicate about an election. People should be able to mobilize their friends without fear that they may be violating the law.

Tip: *Disclosure requirements modeled on BCRA still may be required for all electioneering communications.* The Supreme Court is currently very hostile to campaign finance regulation, but both *McConnell* and *Citizens United* upheld BCRA's disclosure requirements by a vote of eight to one. Moreover, the Court has upheld

⁸ See *Citizens United*, 130 S. Ct. at 917 (2010).

disclosure requirements pertaining to the financing of ballot measures, which need not involve “magic words” express advocacy.⁹

Tip: BCRA contains some exceptions from its definition of an “electioneering communication,” which also should be included in state and local versions. Specifically, BCRA exempts most news stories, commentary, and editorials; communications that are already regulated as expenditures or independent expenditures; certain candidate debates; and most other communications for which the FEC creates an exception.¹⁰

Legal Analysis

Regulation of independent campaign advertising began in 1947, with the adoption of Taft-Hartley which restricted expenditures by unions and corporations in federal elections. Taft-Hartley’s ban was recodified into FECA, but was not challenged in *Buckley*. In addition, one section of FECA imposed a \$1,000 limit on expenditures by individuals “relative to a clearly identified candidate.” 18 U.S.C. § 608(e)(1) (quoted in *Buckley v. Valeo*, 424 U.S. 1, 193 (1976)). Another section of FECA imposed reporting requirements for persons who made independent expenditures of more than \$100 “for the purpose of . . . influencing” a federal election. 2 U.S.C. §§ 431(e), 434(e) (quoted in *Buckley*, 424 U.S. at 145, 160). The Court in *Buckley* concluded that these regulations presented potential problems of both vagueness and overbreadth.

Under First Amendment “vagueness” jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague campaign finance provision might “chill” some political speakers who have no electioneering purpose but are afraid that the provision nevertheless governs their speech. The *Buckley* Court found that the provisions of FECA that applied to expenditures “relative to a clearly identified candidate” and “for the purpose of . . . influencing” an election were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech. *See* 424 U.S. at 40-44, 78-80.

The overbreadth doctrine in First Amendment jurisprudence is concerned with regulation that may be precise but covers a substantial amount of constitutionally protected speech. In *Buckley*, the Court worried that a regulation governing any expenditure made “for the purpose of influencing” a federal election or that is “relative to a clearly identified candidate” could have substantial application to protected speech. *See id.*

In order to avoid these vagueness and overbreadth problems, the *Buckley* Court held that the government’s regulatory power under FECA would be construed to reach only funds used for communications that “include explicit words of advocacy of the election or defeat” of a clearly identified candidate. *Id.* at 43. In a footnote, the Court explained that its construction of FECA would limit the reach of the statute “to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’

⁹ *See Doe v. Reed*, 130 S. Ct. 2819-20 (upholding disclosure requirements for the financing of ballot measures to “preserv[e] the integrity of the electoral process” and to “provid[e] information to the electorate”).

¹⁰ The FEC has ruled that Citizens United is a press entity, and as a member of the media is exempt from disclosure requirements. *See* Op. Fed. Elec. Comm. 2010-08, 6-8, 11 (2010), available at <http://www.scotusblog.com/wp-content/uploads/2010/06/FEC-draft-opinions-CU-6-10-10.pdf>.

‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ or ‘reject.’” *Id.* at 44 n.52. Those examples eventually gave rise to the “magic words” test for advertising that could constitutionally be subject to campaign finance restrictions.¹¹

The Supreme Court made clear in *McConnell* that *Buckley*’s narrow construction of FECA “was the product of statutory interpretation rather than a constitutional command.” 540 U.S. at 192. Although FECA was constitutionally infirm, Congress could cure that infirmity with a new law that was neither vague nor overbroad, even if the new law did not “toe the same express advocacy line” as that defined in *Buckley*. *Id.* Congress cured FECA’s vagueness problem by setting forth a new four-part “bright-line” test for electioneering communications in BCRA, which the Court upheld in *McConnell*. Moreover, the *McConnell* Court rejected the idea “that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.” *Id.* at 193. The constitutional objections that led the *Buckley* Court to limit FECA’s reach to express advocacy were “simply inapposite” in the case of BCRA. *Id.* at 194.

Citizens United, however, overturned the portion of *McConnell* that upheld BCRA § 203’s extension of § 441b’s restrictions on corporate independent expenditures. In other words, because the *Citizens United* Court held that the Government may not limit independent expenditures that are funded by corporate or union treasury funds, the distinction between express advocacy and so-called issue advocacy is no longer constitutionally significant from the point of view of the funding sources of the ads. It does still have significance from the point of view of disclosure. A pure issue ad may not be subject to disclosure while independent expenditures and electioneering communications are.

Before *McConnell* and *Citizens United*, several courts considered—and invalidated—state laws or regulations using BCRA’s approach to campaign advertising. *See, e.g., Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000) (striking down a provision requiring reporting of expenditures of \$500 or more for “mass media activities” that include the name or likeness of a candidate and occur within 30 days of an election); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998) (enjoining a regulation that barred corporations and unions from using general treasury funds to pay for communications containing the name or likeness of a candidate within 45 days of an election); *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766, 771 (W.D. Mich. 1998) (same); *West Virginians for Life v. Smith*, 960 F. Supp. 1036, 1039-41 (S.D. W. Va. 1996) (invalidating a law that presumed an electioneering purpose when a voter guide, scorecard, or other written analysis of a candidate’s position was disseminated within 60 days of an election).

Four years after *McConnell*, in *WRTL II*, the Supreme Court considered an overbreadth challenge to BCRA’s corporate funding ban, as applied to a series of television ads in Wisconsin. By a vote of 5-to-4, a divided Supreme Court held that BCRA could not be applied to the ads at issue even though they met all four components of the electioneering communications definition. Three Justices argued that *McConnell* should be overturned, that BCRA’s corporate ban on electioneering communication was unconstitutional, and that the

¹¹ Expenditures that include “magic words” and are made by entities other than candidates are generally regulated as “independent expenditures.” The magic words test is discussed more fully below in Section II, and independent expenditures are discussed in Chapter 6.

other long-time bans on corporate campaign spending were unconstitutional. *See* 551 U.S. at 482-504. (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in judgment). In an opinion written by Chief Justice Roberts and joined only by Justice Alito,¹² a plurality of the Court held that BCRA's ban on corporate funding of electioneering communications could not be applied to Wisconsin Right to Life's ads because they were not express advocacy or its "functional equivalent." The Court explained that the ads lacked any of the "indicia of express advocacy," which include (1) "mention[ing] an election, candidacy, political party, or challenger," and (2) "tak[ing] a position on a candidate's character, qualifications, or fitness for office." *Id.* at 470.

The *WRTL II* Court refused to broaden its test for express advocacy beyond these clearly defined indicia, and reacted skeptically to claims that "anyone who heard [WRTL's] ads would know that WRTL's message was to vote against" a particular candidate. *Id.* at 470 n.6.¹³ Specifically, the majority declined to consider contextual evidence that WRTL had actively opposed the candidate in question during the same election cycle, despite its potential bearing on WRTL's subjective intent in running the advertisement. *Id.* at 472.¹⁴ The Court also dismissed expert testimony that advertisements which avoided "magic words" like "elect" and "defeat," in favor of more subtly advocacy, were most effective. *Id.* at 471. According to the majority, this "heads I win, tails you lose approach" would let Congress regulate the least express advocacy just as much as the most express advocacy, and transform every "genuine issue ad" prior to an election to a "very effective electioneering ad." *Id.* at 471-72.

WRTL II limited BCRA's funding restrictions to ads that were express advocacy or "the functional equivalent" of express advocacy. After *Citizens United*, both express advocacy and its functional equivalent are protected areas of speech no longer subject to source restrictions. Furthermore, *Citizens United* rejected the *WRTL II* functional equivalence test for disclosure laws, thus rendering *WRTL II* largely a dead letter.¹⁵

II. Magic Words

It is important to understand what role magic words now play in campaign finance law. *McConnell* held that, with a sufficiently precise definition of the advertising subject to regulation, it is permissible to regulate

¹² Because there was no majority opinion, and Chief Justice Roberts' opinion provides the narrowest rationale for the outcome, it functions as the opinion of the Court. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977).

¹³ The Court cited a study finding that 85 percent of voters could not name any candidates for the House of Representative from their own districts. *WRTL II*, 551 U.S. at 470 n.6.

¹⁴ The Court declared that an organization's subjective intent in running an advertisement is entirely "irrelevant" to whether the advertisement constitutes express advocacy. *WRTL II*, 551 U.S. at 472.

¹⁵ One place where *WRTL II*'s approach lives on is in the FEC's rulemakings. In 2010, the FEC adopted a new federal coordination rule which specifically covers communications which are either express advocacy, electioneering communications or the functional equivalent of express advocacy. According to this new rule, "[t]he new content standard applies to any public communication that is the 'functional equivalent of express advocacy.'" New 11 CFR 109.21(c)(5) specifies that a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. The new content standard applies without regard to the timing of the communication or the targeted audience." FEC, "Coordinated Communications Final Rule," Notice 2010-17 (Sept. 15, 2010) (effective Dec. 1, 2010).

campaign ads that do not use magic words. *Citizens United* affirmed this holding as applied to disclosure and disclaimer regulations. However, the government is prohibited from limiting independent expenditures just because of the identity of the speaker, including any express advocacy containing magic words.

Tips

Tip: *Be very careful when using FECA's original provisions as models for new laws.* *Buckley* found that language in FECA pertaining to independent expenditures was vague and overbroad. The Court sought to cure these problems by creating the now-discredited “magic words” test. Some state laws that contained language modeled on FECA also were struck down.¹⁶ Reformers should learn from Congress’s mistake in FECA, not repeat it.

Legal Analysis

Before the Supreme Court decided *McConnell*, most courts treated challenges to campaign finance restrictions on advertising as disputes about how to differentiate between “issue advocacy” and “express advocacy.” Although the federal courts of appeals disagreed about the meaning of “express advocacy,” the vast majority refused to go beyond the “magic words” approach. Several circuits explicitly adopted the magic words test,¹⁷ while others invalidated state laws seeking to regulate speech other than express advocacy, but without ruling that express advocacy requires magic words.¹⁸ Only the Ninth Circuit explicitly rejected the magic words test for express advocacy.¹⁹

Justice Thomas only slightly overstated the impact of *McConnell* when he wrote: “The Court, . . . by concluding that the ‘express advocacy’ limitation derived by *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question (except, perhaps, one).” 540 U.S. at 278 n.11 (Thomas, J., dissenting). *Citizens United*, by eliminating the prohibition on the use of corporate or union general treasury funds in campaign advertising, permits even corporate and union express advocacy.

¹⁶ See, e.g., *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 663-66 (5th Cir. 2006), cert. denied 127 S. Ct. 938 (2007) (holding that the Louisiana Campaign Finance Disclosure Act definition of “independent expenditure,” which closely tracked the FECA definition, was constitutional only when limited as in *Buckley* to communications that expressly advocate the election or defeat of a clearly identified candidate).

¹⁷ See *Virginia Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (invalidating federal regulation defining express advocacy to include more than magic words); *Chamber of Commerce v. Moore*, 288 F.3d 187, 194-95 (5th Cir. 2000) (finding magic word requirement in attempt to regulate judicial electioneering ads under Mississippi law); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999) (granting preliminary injunction against definition of “express advocacy” in state law that went beyond magic words); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (per curiam) (invalidating federal regulation).

¹⁸ See *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1193-95 (10th Cir. 2000); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000).

¹⁹ See *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

Tips

Tip: Consider using a reasonable person definition only as a supplement to the BCRA model and the magic words test, and be sure to include a clause allowing the severability of any clause found unconstitutional. *WRTL II* seems to provide a constitutional imprimatur for a reasonable person test that is drawn narrowly. However, it does so within the confines of BCRA’s electioneering communications provision, which significantly narrows the group of communications subject to the test. Standing alone, reasonable person tests may be vulnerable to vagueness challenges.

Tip: If you seek to employ a reasonable person test, generally, consider adopting a dollar threshold for activities that will be covered by your regulation. A dollar threshold is useful for ensuring that the law does not inhibit *de minimis* electoral communications or small and unsophisticated groups that do not engage in significant amounts of electioneering.

Tip: Provide guidance as to the extent to which the factual context may be considered when implementing a “reasonable person” test. *McConnell* upheld regulation of “electioneering communications,” the definition of which incorporates two contextual elements: timing and audience. Similarly, *Furgatch* held that proximity to the election and the advertisement’s audience could be considered in determining whether an ad could be regulated. Basic background information of the sort necessary to implement the FEC rule should present no problem. But *WRTL II* suggests that any contextual analysis that requires discovery may be constitutionally at risk.

Tip: Provide guidance as to what factors courts consider when evaluating advertisements under a “reasonable person” standard. Although “magic words” like “vote for” and “defeat” are still constitutionally sufficient to trigger disclaimer and disclosure regulations, courts have recently been willing to scrutinize the content of advertisements more deeply. *Citizens United* relied on a variety of factors within an advertisement to hold that it was an electioneering communication, including its critical commentary about the candidate’s character and fitness for office, its selectively chosen historical footage, and its repeated references to future policies and to the political office in question.

Tip: A reasonable person approach may stand a better chance of surviving a constitutional challenge if there are no criminal penalties for violating regulations that apply to express advocacy. Courts may relax their scrutiny to some extent if a statute imposes only civil penalties.

Legal Analysis

The FEC’s new definition of “express advocacy” and the Supreme Court’s approval of a “reasonable person” test for the “functional equivalent of express advocacy” in *WRTL II* set up an alternative framework for regulating campaign advertising. Noting that a “magic words” definition of “express advocacy” could be easily evaded, the *WRTL II* Court adopted a test under which an advertisement does not qualify as express advocacy “unless [the] ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 474 n.7.

Following an influential opinion in the Ninth Circuit,²⁰ the FEC promulgated a new definition of “express advocacy” under FECA. See 11 CFR § 100.22. Under the regulation, “express advocacy” is defined to include not only those communications that contain “magic words,” but also communications that “[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s).” *Id.* Despite its narrow reach, this regulation was immediately challenged as an unconstitutional encroachment on free speech, and it was invalidated by both the First and Fourth Circuits, primarily on the ground that it was unconstitutionally vague.²¹

The test for the functional equivalent of express advocacy in *WRTL II* is virtually indistinguishable from the test for express advocacy articulated in the FEC rule. The *WRTL II* plurality described its test as being “objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.” 551 U.S. at 469. Defending the test against Justice Scalia’s attack on its vagueness, the plurality argued that the “no reasonable interpretation” standard satisfies the “imperative for clarity in this area.” *Id.* at 474 n.7. It also emphasized that the “magic words” test from *Buckley* was not “the constitutional standard for clarity . . . in the abstract, divorced from specific statutory language.” *Id.* The magic words standard is merely the product of statutory construction and “does not dictate a constitutional test.” *Id.*

The *Citizens United* decision shed light on what factors support a finding of express advocacy. Under consideration was the polemical film *Hillary*, or as the Court described, an “extended criticism of Senator Clinton’s character and her fitness for the office of the Presidency.” 130 S. Ct. at 890.²² The Court rejected claims that *Hillary* was just a “documentary film that examines certain historical events,” and held that *Hillary* was the “functional equivalent of express advocacy” as defined in *McConnell* and *WRTL II*. *Id.* Because *Hillary* was the functional equivalent of express advocacy, the Court concluded, it triggered both the now-invalidated ban on corporate independent expenditures and BCRA’s still-effective disclaimer and disclosure provisions. The Court cited specific factors present in the film to support its finding of express advocacy: (1) “critical” interviews and voiceover; (2) the particular selection of “historical footage”; (3) a focus on past “alleged wrongdoing” and predicted future “policies”; (4) references to the political office in question, to past holders of that office, and to the vote; and (5) suggestions that much is “at stake,” even without explicit reference to a particular vote. *Id.* Based on these factors, the Court concluded that there was “no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton,” thus employing the standard of *WRTL II* to find that *Hillary* was the functional equivalent of express advocacy. *Id.* The willingness of the Court to look for express advocacy not only beyond phrases like “vote for” and “defeat,” but even in the selection of what was indisputably “historical footage,” represents a remarkable broadening of the narrow “magic words” standard announced in *Buckley* and long embraced by circuit courts.²³

²⁰ See *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

²¹ See *Virginia Soc’y for Human Life*, 263 F.3d at 392; *Maine Right to Life Comm.*, 98 F.3d at 1-2.

²² See also *WRTL II*, 551 U.S. at 470 (the “indicia of express advocacy” include “tak[ing] a position on a candidate’s *character* . . . or *fitness for office*”) (emphasis added).

²³ One lingering and potentially important question is whether two communications, neither of which is express advocacy on its own, may be treated as single piece of express advocacy together. For example, if one mailing urges recipients to vote for

Because *Citizens United* is less than a year old presently, few courts have had a chance to apply its new standards. Applying the new *Citizens United* standard, a district court upheld Maine's disclaimer and disclosure requirements. The Maine District Court explained that, "*Citizens United* rejected the idea that 'disclosure requirements must be limited to speech that is the functional equivalent of express advocacy' [and] that even if ads 'only pertain to a commercial transaction' and do not engage directly in political speech, government can require disclosure of 'who is speaking about a candidate.'" *National Organization for Marriage v. McKee*, --- F. Supp. 2d ---, 2010 WL 3270092, *9 (D. Me. Aug. 19, 2010).

III. The Future of the "Issue Advocacy" Loophole

The distinction between "issue advocacy" and "express advocacy" arose in the context of constitutional challenges to regulations of independent expenditures. Prior to the decision in *McConnell*, the distinction had also begun to infect decisions on an array of other regulatory measures. For example, one group engaged in so-called issue advocacy under the magic words test successfully challenged the applicability to them of North Carolina's definition of "political committee," thereby escaping compliance with all campaign finance provisions governing such committees—including administrative, organizational, and reporting requirements. See *Community Alliance for a Responsible Environment v. Leake*, No. 5:00-CV-554-BO(3), slip op. at 8, 12-17 (E.D.N.C. Feb. 22, 2001) (unpublished opinion on file with the Brennan Center). A similar challenge to Florida's definition of "political committee" resulted in a narrowing construction, limiting the term's reach to groups whose major purpose was to engage in express advocacy. See *Florida Right to Life, Inc. v. Mortham*, 1998 WL 1735137, *2-*4 (M.D. Fla. Sept. 30, 1998) (unpublished opinion), *aff'd sub nom. Florida Right to Life, Inc. v. Lamar*, 238 F.3d 1288, 1289 (11th Cir. 2001); see also *Colorado Right to Life Comm. v. Davidson*, 395 F. Supp. 2d 1001, 1019-21 (D. Colo. 2005), *aff'd by* 91 F.3d 1137 (10th Cir. 2007) (same); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999) (narrowing definition of "political action committee" to reach only organizations that make contributions or expenditures for express advocacy).

Some recent decisions have continued to narrow state definitions of "political committee" to accord with a more rigid reading of *Buckley*. In *North Carolina Right to Life, Inc. v. Leake* ("NCRTL III"), the Fourth Circuit struck down a provision that included as a political committee any organization that has "a major purpose" to support a particular candidate. 525 F.3d 274, 286 (4th Cir. 2008) (emphasis added). The Court held that, under *Buckley*, to regulate an organization as a political committee, "the major purpose" of the organization must be "supporting or opposing a candidate." *Id.* at 288. To include every organization with "a major purpose" of influencing elections would be both unconstitutionally overbroad, because it would sweep in too much constitutionally protected political speech, and unconstitutionally vague, because the statute provided "absolutely no direction" as to what constituted "a major purpose." *Id.* at 289. The Court suggested as a constitutionally sound alternative that the state may pass new disclosure requirements "based on the communication, not the organization," which would "only impos[e] regulatory burdens on communications that [we]re unambiguously campaign related." *Id.* at 290 (punctuation removed). The Court opined that

whomever takes the proper positions on certain issues, and another mailing lists which candidates "rate best" on the same issues, may these be treated as a single piece of express advocacy? The D.C. District Court recently expressed skepticism about integrating two documents as one piece of advocacy, but declined to decide the issue. *Akins v. FEC*, No. 92-1864, 2010 WL 3563109, *10 (D.D.C. Sept. 10, 2010).

these communication-based disclosure requirements may produce the “same benefits of transparency and accountability” as did organization-based regulations. *Id.*²⁴

The Ninth Circuit, in contrast, has explicitly rejected this narrow construction of “political committee” from *NCRTL III. Human Life of Washington Inc. v. Brumsickle*, No. 09-35128, 2010 WL 3987316, at *15-16 (9th Cir. Oct. 12, 2010). While groups with “the major purpose of political advocacy” are obviously “sufficient” to qualify as political committees, the Court explained, this does not mean an “entity must have that major purpose to be deemed constitutionally a political committee.” *Id.* at *16. The operative part of the major purpose test is “the word ‘major,’ not the article before it.” *Id.* at *17 (quoting *NCRTL III*, 525 F.3d at 328 (Michael, J., dissenting)). Any group with “a major purpose” of political advocacy that is not “engaged purely in issue discussion” may be regulated as a political committee, but only if the “burdens imposed by the disclosure requirements are substantially related to the government’s important informational interest.” *Id.* at *16.

The *Human Life* decision runs directly contrary to *NCRTL III*’s holding that *the* major purpose of a political committee must be to influence elections. The Ninth Circuit declared that the result of *NCRTL III* was unreasonable, based on the “fundamental organizational reality that most organizations do not have just one major purpose.” *Id.* at *16-*17 (quoting *NCRTL III*, 525 F.3d at 330 (Michael, J., dissenting)) (punctuation removed). An organization could easily circumvent regulation as a political committee, under the Fourth Circuit’s definition, by “merging with [an] affiliated organization, and thus diluting the newly created organization’s relative share of advocacy activity.” *Id.* at *18. For these reasons, the Court upheld a broadly worded state law requiring disclosure from any organization “one of [whose] primary purposes [is] to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions.” *Id.* at *3, *28.

²⁴ The Tenth Circuit has followed the same approach. See *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (“Regulation as a political committee is only proper if an organization primarily engages in election-related speech because an alternate rule would threaten the regulation of too much ordinary political speech to be constitutional”) (quoting *NCRTL III*, 525 F.3d at 286) (punctuation removed).

CHAPTER EIGHT

REPORTING AND DISCLAIMER RULES

The federal government, almost every state, and many localities have laws imposing disclosure requirements on campaign advertising. These disclosure requirements stand on firm constitutional ground after the Supreme Court upheld disclosure in both *Citizens United* and *Doe v. Reed* in 2010.¹ *Citizens United*, 130 S. Ct. at 915-917 (upholding disclaimer and disclosure requirements for independent expenditures and electioneering communications); *Doe v. Reed*, 561 U.S. ____, slip op. at 10 (2010) (upholding disclosure of referendum petitions). The disclosures required include one or both of the following:

- filing of campaign finance reports with an administrative agency, which makes the information available to the public (“reporting requirements”); and
- disclosure of information about the sponsorship of campaign advertising, *on* or *in* the advertising, whether printed or spoken (“disclaimer requirements”).²

These requirements serve three important purposes: (1) educating voters about who supports the candidates and thus helping voters to make informed choices about the candidates; (2) deterring actual and apparent corruption by bringing sunlight to large campaign contributions and expenditures, including independent expenditures; and (3) promoting compliance by candidates and political groups with other campaign finance laws.³

¹ *Citizens United* went on to avoid federal disclosure requirements by claiming that it is a press entity. In an advisory opinion, the FEC agreed thereby granting *Citizens United* a media exemption from disclosure. *See* Op. Fed. Elect. Comm., 2010-08 (Jun. 11, 2010).

² Courts have used conflicting terminologies to refer to disclosure requirements. While “disclosure” is frequently used as a general term, some courts contrast “reporting requirements” with “disclosure requirements.” Others speak in terms of “disclosure requirements” as opposed to “disclaimer requirements.” Sometimes “disclosure” refers only to disclosures on the face of an advertisement, while other writers limit it to disclosures to administrative agencies. To minimize any confusion, we use “reporting requirements” and “disclaimer requirements,” because each of those terms is well-understood, and we use “disclosure requirements” to cover both. Readers should consider this definitional disagreement when reading other materials that refer to disclosure requirements.

³ Disclosure requirements are often considered the bedrock of campaign finance reform. The first such laws were enacted in several states in the 1890s. *See* Elizabeth Hedlund & Lisa Rosenberg, *Plugging in the Public: Introduction and Overview* (1996), *available at* http://web.archive.org/web/20041204232920/www.opensecrets.org/pubs/law_plug/pluginindex.html. Congress passed the Publicity Act of 1910, the first federal law to require public disclosure of financial spending by political parties. This law required political committees to disclose the names of all contributors of \$100 or more and to identify recipients of expenditures of \$10 or more. In 1911, the Act was revised to include conventions and primary campaigns. Act of June 25, 1910, c. 392, 36 Stat. 822; *see also* *Buckley v. Valeo*, 424 U.S. 1, 61 (1976) (per curiam).

I. Reporting Requirements

Campaign finance reporting laws usually require that the reporting entity: (1) keep certain records of campaign finance contributions and expenditures and (2) report certain recorded information to an agency responsible for collecting the data and making it available for public inspection.⁴ That agency is usually also responsible for analyzing the data and monitoring compliance with, and enforcing, the requirements.

Tips

Tip: *A law imposing reporting requirements should specify clearly:*

- *who is required to report;*
- *what information must be reported;*
- *when reports must be filed;*
- *where the reports must be filed;*
- *the method of filing;*
- *terms for public access to the reported information; and*
- *rights and obligations of the agency responsible for collecting reports.*

More specific *TIPS* with respect to each of these elements are provided below.

Who is required to report.

Tip: *Entities required to report could include political action committees (“PACs”), political party committees, corporations, labor unions, and candidates (or their committees) who make contributions or expenditures, and anyone who makes independent expenditures or electioneering communications.*⁵

Tip: *Consider adopting separate reporting requirements for lobbyists.* Increasingly, states have begun to require direct reporting from lobbyists.⁶ Although candidates may be required to report these contributions, separate reporting from lobbyists is a good enforcement tool and organizes the information for easier public access.

⁴ The Council on Government Ethics Laws has developed a model law on campaign finance reporting, which is available online. See Elizabeth Hedlund & Lisa Rosenberg, Plugging in the Public Appendix 1: COGEL Model Law on Campaign Finance Reporting (1996), available at http://web.archive.org/web/20041204232920/www.opensecrets.org/pubs/law_plug/pluginindex.html. The Campaign Disclosure Project also has a model disclosure law. See Molly Milligan, Loopholes, Tricks and End Runs: Evasions of Campaign Finance Laws, and a Model Law to Block Them (Center for Governmental Studies 2009), available at <http://www.policyarchive.org/handle/10207/bitstreams/21930.pdf>.

⁵ The difference between election-related independent expenditures and electioneering communications, which may be subject to reporting requirements, and “issue advocacy,” which is protected from such requirements, is discussed in Chapter Seven.

⁶ Concern over the influence of lobbyists has also prompted legislation banning contributions from lobbyists during the legislative session. The bans are addressed more fully in Chapter Three, section II(C) (“Contributions from Lobbyists, Contractors and Regulated Industries”) and section III(A) (“Legislative Session Bans”).

Tip: Consider adopting separate reporting requirements for bundlers.⁷ If the bundlers are not required to file separately, it may be useful to require reporting of each donor’s occupation and employer and the employer of the donor’s spouse. That information will assist watchdogs, journalists, and the public to follow patterns of contributing and to determine whether corporations or other businesses are “bundling” employee donations.

Tip: Consider requiring separate reporting requirements for government contractors.⁸ **TIP:** Include reporting exemptions for contributors to minor party candidates who make a showing that publicized support of their party can lead to discrimination or harassment.

Tip: Consider adopting reasonable monetary limits below which reporting is not required. Below a certain point, the burdens on the reporting party and administrative agency may outweigh the benefits of reporting.⁹

What information must be reported.

Tip: Most reporting laws require disclosure of a contributor’s name, address, and the size of the donation, and many reporting laws require the disclosure of the occupation and employer of contributors who give more than a threshold amount.¹⁰ As noted above, reporting of a spouse’s employer may help to identify corporate bundlers.

Tip: Consider requiring contributors to provide reasonable estimates of the value of non-monetary contributions. This requirement could apply to contributions of equipment, services, office space, and other things of value, and prevents the public from having to guess at the true value of an in-kind campaign contribution.¹¹

Tip: The nature of the information to be reported may vary with the nature of the party responsible for filing reports. Information required from individuals may differ from information required from PACs.

⁷ Reporting requirements for bundlers are discussed in Chapter Three, section II(F) (“Bundling”).

⁸ See, e.g., *Secs. Indus. & Fin. Mkts. Ass’n v. Garfield*, No. 3:06cv2005, 2007 WL 28435, (D. Conn. Jan. 3, 2007). In *Garfield*, a federal district court issued a preliminary injunction enjoining the enforcement of a state law that required the “collection, disclosure and publication on the Internet of the identities of spouses and dependent children of certain directors, officers and employees of state contractors and prospective state contractors.” *Id.* at *1. However, the court expressly permitted narrower reporting requirements, including the public disclosure of (1) “the names of principal executives of state contractors, prospective state contractors, and their spouses” and (2) “the names of dependent children who actually make contributions in violation of [the campaign finance law].” *Id.*

⁹ See *Canyon Ferry Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009) (“the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.”).

¹⁰ See, e.g., Fla. Stat. Ann. § 106.07(4)(a)(1) (West 2010); Ky. Rev. Stat. Ann. § 121.160(2)(b) (West 2010).

¹¹ In *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138 (D.D.C. 2005), a PAC donated a mailing list to a candidate and reported the fact of the donation but not the monetary value thereof to the FEC. The court held that federal election law did not require the PAC to state the value of the list, and that the FEC could provide enough information on its web site so that viewers could estimate the value of the list on their own. See also *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 339-40 (D.C. Cir. 2007) (determining the precise value of a list of activists given to a campaign “would add only a trifle to the store of information about the transaction already publicly available,” including a copy of the list on the FEC’s website).

Tip: For reporting of expenditures, consider requiring use of a list of expenditure category codes, supplemented with a description section in which filers are required to provide detail. Most jurisdictions require itemized reporting of payments from campaign coffers. These reports should include the date and amount of the expenditure, the name and address of the person or entity to which the payment was made, and the purpose of the expenditure. The use of expenditure category codes provides consistency for the agency and aids in the organizing and searching of information in electronic databases.

Tip: Consider requiring the reporting of independent expenditures and electioneering communications, including information indicating whether an expenditure is in support of or opposition to a candidate, along with the candidate's name and the office sought. Some jurisdictions require detailed reporting of independent expenditures, including the occupation and employer of those making the independent expenditure. Although independent expenditures are, by definition, not coordinated with the candidate, the identity and association of those spending money in favor of or in opposition to a candidate may reveal important information about the candidate's constituency.¹² Similar reasoning applies to electioneering communications.

When reports must be filed.

Tip: Almost all jurisdictions require some reporting prior to primary and general elections, but the frequency of reporting required varies considerably. A few states require reports on a monthly basis.¹³ Others require less frequent reports.¹⁴ Many states do not require any disclosure until the few weeks before the election.

Tip: The frequency of reporting may vary with proximity to an election. For example, reports could be submitted semi-annually during an off-year, quarterly during an election year, monthly during the quarter preceding the election, once 10 days before the election, and within 24 hours of receiving large contributions in the days very close to the election. Many large contributions are made in the last days right before an election. The law should be drafted in a way to ensure that they are disclosed before the election is over.¹⁵

¹² For a more detailed explanation of what expenditures should be reported, see the discussion of "independent expenditures" in Chapter Six and the discussion of "electioneering communications" in Chapter Seven. *See also, e.g., Harwood v. Senate Majority Fund*, 141 P.3d 962 (Colo. App. 2006) (holding that under state constitution and statute requiring reporting of express advocacy expenditures, PAC need not report expenditure amount for opinion poll meant to inform its own political strategy).

¹³ *See, e.g.,* Ark. Code. Ann. § 7-6-207(a) (West 2010) (requiring monthly reports during election year and quarterly reports at other times); Wash. Rev. Code § 42.17.080(2) (West 2010) (effective until Jan. 1, 2012) (requiring monthly reports and additional reports around the time of the election).

¹⁴ *See, e.g.,* Iowa Code Ann. § 68A.402(2) (West 2010) (requiring filings by May 19, July 19, October 19, and January 19 during election years).

¹⁵ *See, e.g.,* Va. Code Ann. § 24.2-947.6 (West 2010) (requiring reports to be filed with increasing frequency as election date approaches). In the few weeks preceding any election, federal law requires candidates to disclose contributions of at least \$1,000 within 48 hours of receiving them. *See* 2 U.S.C. § 434(a)(6)(A). Several states also require last-minute disclosure. Alaska, for instance, requires reporting within 24 hours from candidates who receive contributions of more than \$250 in the last nine days of the campaign. *See* Alaska Stat. § 15.13.110(b) (West 2010).

Tip: Consider a 24-hour reporting requirement for independent expenditures and electioneering communications made in the final days of an election. During the last few weeks before an election, federal law requires reporting within 24 hours of making an independent expenditure aggregating more than \$1,000.¹⁶ Federal law includes a 24-hour reporting requirement for anyone who spends more than \$10,000 on electioneering communications, which by definition are made near an election.¹⁷

Tip: Consider requiring reporting when a campaign commits to spending funds, as opposed to when funds are actually spent. Requiring reporting only when certain amounts of money are spent allows campaigns to defer reporting by entering into binding agreements to pay prior to the election that do not require actual expenditures of funds until after the election. Federal law closes this loophole by treating contracts to disburse funds as disbursements for purposes of some reporting requirements.¹⁸ Such provisions provide more timely information to voters and were upheld in *McConnell*.

Where reports must be filed.

Tip: Consider requiring candidates to file both locally and with the state agency. The dual filing allows interested individuals, researchers, and reporters to monitor elections more easily and is unlikely to prove unduly burdensome to candidates. A county resident interested in the race for state representative is unlikely to travel to the capital to view disclosure reports. Similarly, a statehouse reporter trying to track a pattern of spending should not be required to go from county to county to dig up contribution information.

Tip: If dual filing is deemed infeasible, consider requiring agencies to transmit copies of reports to other repositories.

Tip: The need for dual filing can be avoided if electronic filing is required.

Tip: Direct reporting to affected candidates, as well as to the administrative agency, may be required for last-minute independent expenditures.

¹⁶ See 2 U.S.C. § 434(g)(1).

¹⁷ 2 U.S.C. § 434(f).

¹⁸ See, e.g., 2 U.S.C. § 434(f)(5).

Method of reporting.

Tip: *Electronic filing should be implemented if possible.*¹⁹ Where electronic filing is not feasible for all entities required to report, consider more limited requirements, such as:

- requiring only candidates for certain statewide offices (or, in large municipalities, for jurisdiction-wide offices) to file electronically;
- requiring candidates, PACs, and political party committees that raise or spend more than a specified amount to file reports electronically; or
- providing incentives for voluntary electronic filing by entities not required to file electronically.

Tip: *Filing should be in a standardized form developed by the responsible campaign finance agency.*

Terms for public access.

Tip: *Easy access to reported information is essential to an effective system of disclosure.* Jurisdictions vary widely with respect to requirements for public access to disclosed information. As the Sunlight Foundation has articulated in its Principles for Transparency in Government, “Whatever information the government has or commits to making public, the standard for ‘public’ should include ‘freely accessible online.’”²⁰

Tip: *Campaign finance data should be stored electronically in a database that can be easily searched by members of the public.* Given the internet technology that is available today, the public should not be forced to comb through thousands of pages of reports to compile and analyze campaign finance data. An early investment in, and use of, such technology will facilitate the filing and analysis of, and access to, reportable information. If reports are not electronically filed, the administrative agency should be required to enter the reported information into an electronic database. Information should then be posted on a web site and made available at a public computer terminal at the agency office and other locations around the state. Approximately 30 states and several large cities had comprehensive electronic reporting systems (including both filing and public access to data) as of 2000; by 2003, at least 46 jurisdictions in the United States and Canada had some form of electronic filing.²¹

¹⁹ The Campaign Disclosure Project, a collaboration of the UCLA School of Law, the Center for Governmental Studies, and the California Voter Foundation, evaluates state electronic filing programs, see *Grading State Disclosure* at <http://campaigndisclosure.org/gradingstate/> (last visited Nov. 16, 2010).

²⁰ Sunlight Foundation, *Sunlight Agenda 2010* (2010).

²¹ See Craig B. Holman & Robert M. Stern, Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Activity (2000), available at <http://www.cgs.org/images/publications/AccessDelayedisAccessDenied.pdf>; Center for Governmental Studies, Electronic Filing and Disclosure Survey: 2003 Update, available at http://www.cgs.org/images/publications/2003_survey_results.pdf.

Agency rights and obligations.

Tip: The agency charged with administering reporting requirements should: (1) prescribe the form of, receive, organize, file, maintain, and otherwise process the reports, (2) review and analyze the reports, (3) get the information in the reports out to the public, and (4) monitor and enforce the submission of reports.²²

Tip: Reporting requirements can be effective only if the agency administering the system is adequately staffed and funded. Funding and staff should be substantial enough to permit the agency to perform all of the duties described above.

Legal Analysis

A. Reporting of Contributions and Candidates' Expenditures

In *Buckley v. Valeo*, the Supreme Court upheld the broad reporting requirements of the Federal Election Campaign Act ("FECA") against claims that the laws infringed on First Amendment associational and free speech rights. *See* 424 U.S. 1, 60-74 (1976) (per curiam). The Court found that three compelling governmental interests justified reporting requirements: (1) enhancing voters' knowledge about a candidate's possible allegiances and interests; (2) deterring actual and apparent corruption; and (3) enforcing contribution limits.²³ *See id.* at 66-68.

Buckley's approach to reporting requirements is notable for its deference to legislative judgments. The plaintiffs had challenged FECA's requirements that political committees maintain records with the name and address of those who make contributions in excess of \$10 and report the name, address, occupation, and employer of those who contribute, in the aggregate, more than \$100. The Court agreed that these thresholds were "indeed low," but concluded that "we cannot require Congress to establish that it has chosen the highest reasonable threshold." *Id.* at 83.²⁴ To the contrary, the Court held that drawing that line was "best left in the context of this complex legislation to congressional discretion." *Id.*²⁵

²² *See* Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 37-39 (1998) (discussing various practical aspects of effective disclosure).

²³ In *Agua Caliente Band of Cabuilla Indians v. Superior Court of Sacramento County*, 148 P.3d 1126 (Cal. 2006), the California Supreme Court held that under the federal Constitution's Guarantee Clause (U.S. Const. art. IV, § 4) and the Tenth Amendment, Native American tribes may be sued for violations of California's contribution reporting requirements, despite Native American tribes' traditional sovereign immunity. *Id.* at 1140.

²⁴ Additionally, the Court recognized that the record-keeping requirement for the \$10 contributors assisted in the enforcement of the disclosure provision for \$100 contributions. *Buckley*, 424 U.S. at 84.

²⁵ Federal tax law requires some additional disclosures beyond those required by FECA. Organizations that declare themselves to be "political organizations" in order to receive tax-exempt status must disclose the name, address, and occupation of each contributor who gives at least \$200 and the name and address of recipients of at least \$500 in expenditures. 26 U.S.C. § 527(j). The Eleventh Circuit dismissed a challenge to the constitutionality of this statute on procedural grounds, vacating a district court ruling that § 527's requirements violated the First Amendment. *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1363 (11th Cir. 2003), *vacating Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300 (S.D. Ala. 2002).

The U.S. Court of Appeals for the First Circuit struck down a Rhode Island law that required PACs to disclose the identity of every contributor, even when the contribution was as small as \$1, a practice known as “first dollar disclosure.” *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 29 (1st Cir. 1993). What troubled the *Vote Choice* court was not the first dollar disclosure requirement, however, but the fact that Rhode Island applied it only to contributions received by PACs, while the reporting threshold for contributions to political parties and candidates was \$100. *See id.* at 33-34 (“[J]udicial deference to legislative line-drawing diminishes when the lines are disconnected, crooked, or uneven.”). Indeed, the court held that “first dollar disclosure is not, in all cases, constitutionally proscribed,” *id.* at 33, because “signals are transmitted about a candidate’s positions and concerns not only by a contribution’s size but also by the contributor’s identity,” *id.* at 32. *See Or. Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1260 (D. Or. 1977) (three-judge court) (upholding first dollar record-keeping and partial public disclosure).

A Colorado state court upheld the application of reporting requirements to a candidate’s personal expenditures, which it ruled could be treated as contributions to the candidate’s campaign committee. *Hlavac v. Davidson*, 64 P.3d 881 (Colo. App. 2002). The court recognized that the law could not restrict the amount of expenditures from personal assets that a candidate can make, but could require the candidate to report those expenditures as campaign contributions. *But see Anderson v. Spear*, 356 F.3d 651, 666-67 (6th Cir. 2004) (holding that a state could not define expenditures by a candidate as contributions to his or her campaign for purposes of triggering matching funds for publicly funded opponents). While *Anderson’s* flawed analysis is primarily focused on a matching fund program, it could be interpreted to cast doubt on requirements that candidates disclose their own expenditures.²⁶ Most courts, however, would probably uphold requirements like the Colorado reporting scheme.

In upholding FECA’s reporting requirements, *Buckley* also rejected an overbreadth challenge based on the applicability of the requirements to minor as well as major parties. The plaintiffs claimed both that the First Amendment rights of minor parties were seriously burdened by the requirement that they disclose contributors, because their supporters were more susceptible to harassment, and that the government had little real interest in information from parties with little chance of winning elections. *See* 424 U.S. at 68-74. The Court refused to carve out a blanket exemption for minor parties, citing insufficient evidence of potential harassment in the factual record of that case. *Buckley* recognized, however, that a specific minor party might in the future demonstrate a “reasonable probability” that compelled reporting would subject the party’s contributors to “threats, harassment, or reprisals.” *Id.* at 74. A party that could make that showing would be entitled to an exception from the reporting requirements.²⁷

²⁶ While *Anderson* will remain binding precedent within the Sixth Circuit, unless the Supreme Court overturns its conclusions, other courts will consider only the persuasiveness of its reasoning. As a result, courts outside the Sixth Circuit should not treat *Anderson* as worthy of much respect.

²⁷ The *Buckley* Court established a “flexible” standard for establishing the right to an exemption, indicating that proof could include:

specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

Id.

Minor parties occasionally succeed in demonstrating a right to protection from disclosure requirements. In *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 88 (1982), the Socialist Workers Party satisfied the standard articulated in *Buckley* and obtained an exemption from Ohio's reporting requirements.²⁸ *Brown* made clear that the First Amendment protected from disclosure the identities of not only the Socialist Worker Party contributors but also the recipients of campaign funds from the party. The recipients of those disbursements would be "as vulnerable to threats, harassment, and reprisals as are contributors" and therefore were entitled to protection of their associational rights. *Id.* at 97. In *Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1178 (W.D. Wash. 2004), the court allowed a minor party to avoid identifying its contributors by showing evidence of threats, harassment, and reprisals against other minor parties with similar political beliefs.²⁹

After *McConnell*, states that did not previously do so may begin to require reporting of all contributions to political parties. In *Libertarian Party of Alaska, Inc. v. State*, 101 P.3d 616 (Alaska 2004), the Alaska Supreme Court held that although the Alaska Campaign Disclosure Act expressly regulates only hard money contributions, defined as contributions made for the purpose of influencing the nomination or election of a candidate,³⁰ regulations under the Act³¹ could require political parties to disclose soft money contributions (all other contributions) as well. *Id.*, 101 P.3d at 623-27. The court held that because political parties and candidates are often so closely connected, all of the functions served by reporting of hard money contributions as described in *Buckley*—informing the public where political money comes from, deterring corruption by publicizing large contributions, and aiding enforcement of the campaign finance laws—applied equally well to soft-money contributions to political parties. *Id.* at 623-27.

B. Reporting of Independent Expenditures

When a group or individual engages in election-related spending that is not coordinated with a candidate, states may require reporting of these independent expenditures – along with information about the financial sponsors of the expenditures. See *Buckley*, 424 U.S. at 80-81; *Voters Educ. Comm. v. Wash. State Public Disclosure Comm'n*, 166 P.3d 1174, 1186-87 (Wash. 2007) (holding that disclosure requirements are not a prior restraint), *cert denied*, 553 U.S. 1079 (2008). Even associations that are not PACs may be required to file reports of such spending. See

²⁸ The Socialist Workers Party did not fare as well in Oregon. See *Or. Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1259 (D. Or. 1977) (finding "no 'reasonable probability' that disclosure of the names of contributors to the SWP will result in official or unofficial harassment of these contributors"). A more recent case rejected a candidate's claim that compliance with New York City's reporting requirements would subject Orthodox Jews to harassment. See *Herschaft v. N.Y.C. Campaign Fin. Bd.*, 139 F. Supp. 2d 282 (E.D.N.Y.), *aff'd*, 10 Fed. App'x 21 (2d Cir. 2001) (unpublished table decision); see also *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1219-20 (E.D. Cal. 2009) (rejecting a pro-marriage group's claim that compliance with California's reporting requirements would subject their group to harassment).

²⁹ The *Averill* court also held that portions of the Seattle municipal code requiring such groups to demonstrate that they had been subject to interference with advocacy and that the exercise of their First Amendment rights had been chilled—in addition to showing a reasonable probability of future threats, as required under *Buckley*—were unconstitutional as applied to the plaintiffs, but declined to strike the statute as unconstitutional on its face *Averill*, 325 F. Supp. 2d at 1179.

³⁰ Alaska Stat. § 15.13.070(b)(1)-(2).

³¹ Alaska Admin. Code tit. 2, § 50.327.

Colo. Right To Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1144 (10th Cir. 2007) (upholding against a facial challenge a requirement that nonprofit organizations disclose disbursements for electioneering communications over a \$1,000 threshold); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 791 (9th Cir. 2006) (upholding as constitutional Alaska’s registration and financial reporting requirements for all non-PAC groups, even if they are small nonprofit political organizations of the type contemplated in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)), *cert. denied*, 549 U.S. 886 (2006); *Nat’l Org. for Marriage v. Roberts*, --- F. Supp. 2d ---, 2010 WL 4678610, at *5 (N.D. Fla. Nov. 8, 2010) (“the trigger point for disclosure [for electioneering communications] is speech that is an “appeal to vote” under the *WRTL*, and thus unambiguously campaign related. Requiring disclosure for such speech satisfies the exacting scrutiny test. The government has a sufficiently important interest to increase the fund of information concerning those who support [a] candidate ... [and] shed the light of publicity on spending.”) (internal quotations omitted); *Nat’l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 212-13 (D. Me. 2009) (upholding reporting requirements for ballot questions affecting nonprofit corporations that are not PACs)³²; *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000) (holding that groups whose major purpose is not electioneering may nevertheless be required to disclose “express advocacy”); *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000) (holding that a married couple need not file as a political committee but must comply with reporting requirements).

The Supreme Court unambiguously established in *McConnell v. FEC* that reporting requirements may be applied to electioneering communications as well as to independent expenditures that constitute express advocacy. *McConnell v. FEC*, 540 U.S. 93, 194-98 (2003).³³ The Supreme Court later upheld the same reporting requirements in *Citizens United v. FEC*. 130 S. Ct. 876, 916 (2010) in an as-applied challenge. In addition to expanding the category of advertisements to which reporting requirements may be applied, the Court’s opinion in *McConnell* is also notable for the broad language extolling the virtues of reporting, providing additional emphasis to the already broad statements in *Buckley*. *McConnell* overturned several lower court decisions that had struck down reporting requirements that applied to advertisements that did not expressly advocate the election or defeat of a specific candidate. Regulation of pure “issue advocacy” that cannot be categorized as electioneering is, however, likely to raise constitutional questions, even if the regulation is limited to reporting requirements.³⁴ PACs, in contrast, may be required to report “substantially all” of their contributions and expenditures, even if some of their funds are directed at pure issue advocacy. *See Richey*, 120 F. Supp. 2d at 1311. Although no court has directly considered the issue, the same analysis should apply to political parties, which are a type of PAC under federal law. Political parties are in fact required to report all federal contributions and expenditures, irrespective of whether they are used for express advocacy.

³² In 2010, the same judge ruling on candidate-related spending struck parts of Maine’s PAC definition as being unconstitutionally vague. *Nat’l Org. for Marriage v. McKee*, --- F.Supp.2d ----, 2010 WL 3270092, at *13 (D. Me. 2010) (“Maine’s use of the ‘influence’ and ‘influence in any way’ standards in its election laws is unconstitutionally vague...”).

³³ The as-applied challenge to BCRA’s ban on corporate funding of electioneering communications, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), did not raise a claim with respect to BCRA’s reporting requirements, and the Court did not reach that issue. The court clarified that *WRTL II* does not apply to disclosure in *Citizens United*.

³⁴ *See* Chapter Seven for a discussion of independent expenditures, electioneering communications, the “functional equivalent” of express advocacy, and issue advocacy.

Although, as a general matter, reporting requirements for independent expenditures are constitutionally secure, some timing requirements may invite challenge. *McConnell* upheld, without discussion, 24-hour reporting requirements for electioneering communications, which by definition are made near in time to an election.

The *McConnell* Court also upheld a provision that went even further, requiring disclosure when a contract for electioneering communications or independent expenditures is formed, even if the ads have not yet been disseminated. *McConnell*, 540 U.S. at 199-200. The Court stated that “[g]iven the relatively short time frames in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant.” *Id.* at 200. The Court did note that the disclosures “would not have to reveal the specific content of the advertisements,” raising the possibility that a reporting requirement that required disclosure of the contents of ads before the ads were released might not pass muster. The *McConnell* decision overturned a lower court opinion that had invalidated similar requirements. *See Fla. Right to Life, Inc. v. Mortham*, No. 98770CIVORL19A, 1998 WL 1735137, at *8-9 (M.D. Fla. Sept. 30, 1998) (striking down reporting requirement that applied within 24 hours of obligating funds), *aff’d on other grounds sub nom. Fla. Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001). *Mortham* should no longer be considered good law.³⁵

One case prior to *McConnell* suggests that applying 24-hour requirements far from elections may be unconstitutional. In *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), the Tenth Circuit saw “no constitutional problems” with mandatory reporting of the amount and use of an expenditure, as well as the name of the candidate supported or opposed. *Id.* at 1197. But the court ended up invalidating the entire reporting requirement because of a provision mandating separate notice to the candidates in an affected race and a “patently unreasonable” 24-hour deadline for all reports. *Id.* Lower courts have not yet had call to consider similar requirements since *McConnell* was decided. *But see, W. Tradition P’ship v. City of Longmont*, No. 09-CF-02303-WDM-MTW, 2009 WL 3418220, at *7 (D. Colo. Oct. 21, 2009) (preliminarily enjoining a municipal electioneering communications law such that only express advocacy could be regulated). *Citizens United* indicates that *Longmont* is wrongly decided as the Supreme Court upheld disclosure as applied to the functioning equivalent of express advocacy, not just “magic words” express advocacy.

Requiring disclosure of the content of an ad prior to its distribution risks invalidation. The Ninth Circuit struck down an Arizona statute that required sponsors of independent ads to provide 24-hour notice of intent to run an ad, with a copy of the ad, to any candidate mentioned in it. *Ariz. Right to Life Comm. v. Bayless*, 320 F.3d 1002, 1004 (9th Cir. 2003). Reporting requirements should be designed to provide the public information about who is spending how much on political advertising. Discouraging negative ads by allowing candidates an improved opportunity to respond is not likely to be found a constitutionally sufficient justification for reporting requirements.

³⁵ However, a district court in 2010 did strike a 24 hour reporting requirement for independent expenditures in Maine. *Nat’l Org. for Marriage v. McKee*, --- F. Supp. 2d ---, 2010 WL 3270092, at *13 (D. Me. Aug. 19, 2010) (“[Maine’s] regulation requiring twenty-four-hour disclosure of any independent expenditure over \$250 at any time is unconstitutionally burdensome.”).

II. Disclaimer Requirements

Most states require that advertisements for candidate elections contain disclaimers disclosing the ads' financial sponsors.³⁶ Some jurisdictions also require disclosure of whether the ad is authorized by any candidate. Consequently, the public is used to seeing or hearing brief disclaimers at the bottom of television advertisements or at the end of radio spots, such as: "I'm John Doe and I approve this message" or "Nonprofit Organization is responsible for the content of this advertising." Such information helps the public evaluate the advertisement. After all, an ad soliciting votes for Candidate Doe on the grounds that "Doe has the best environmental record in the legislature" may mean something very different coming from the Sierra Club than it does coming from the American Chemistry Council.

Tips

Tip: *Preventing the reality and appearance of corruption and avoiding evasion of contribution limits and reporting requirements should be identified as the purposes of the disclaimer requirements.*

Tip: *Draft disclaimer requirements so that they apply exclusively to electioneering communications and expenditures that expressly advocate the election or defeat of a clearly identified candidate. See Chapter Seven for discussions of "electioneering communications" and "express advocacy."*

Tip: *Consider adding the requirement to name the top five donors in the disclaimer.*³⁷

³⁶ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting) (commenting that, as of 1995, every state except California had disclosure statutes of this sort). *McIntyre* involved leafleting for a tax referendum, rather than advertising for candidate elections. Readers should note that this handbook focuses exclusively on *candidate* campaigns and that campaigns on *ballot issues* are sometimes subject to a different constitutional analysis. For example, the Tenth Circuit held Colorado's disclosure law unconstitutional as applied to a group of six neighbors who raised less than \$1,000 in a ballot measure fight. *Sampson v. Buescher*, No. 08-1389 (10th Cir. Nov. 9, 2010); see also *Canyon Ferry Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (holding disclosure statute unconstitutional as applied to a one-time in-kind de minimis expenditure in a ballot measure context).

³⁷ See Conn. Public Act No. 10-187, "An Act Concerning Independent Expenditures" (2010) (requiring the top five contributors to be listed on independent expenditures).

Legal Analysis

The plaintiffs in *Buckley* did not challenge FECA's disclaimer requirements for advertising that expressly advocated the election or defeat of a clearly identified candidate.³⁸ Since that time, the Supreme Court issued opinions in two cases involving advertising in connection with ballot issues. The plaintiffs in *McConnell* sought to challenge BCRA's expanded disclaimer requirements for candidate elections, but the Supreme Court refused to reach the issue for technical reasons. In *Citizens United*, the Court revisited the expanded requirements and approved of them, saying:

The disclaimers required by § 311 provide the electorate with information . . . and insure that the voters are fully informed about the person or group who is speaking. . . . At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

130 S. Ct. at 915-16 (internal citations, quotation marks, & brackets omitted). As a result, the disclaimer requirements remain in force. The language suggests that the Court is very receptive to upholding disclaimer requirements.

The first Supreme Court case with potential bearing on disclaimer requirements was *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *Bellotti* involved a Massachusetts criminal statute that prohibited banking and business corporations from making contributions or expenditures to influence the vote on ballot initiatives, unless the initiative materially affected corporate assets, property, or business. Although the Supreme Court invalidated the statute on First Amendment grounds, the Court recognized that “[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.” *Id.* at 792 n.32 (citing *Buckley*, 424 U.S. at 66-67). The citation to *Buckley* suggests, however, that *Bellotti* may have been reaffirming the constitutionality of reporting requirements, rather than disclaimer requirements.

The Supreme Court explicitly addressed disclaimer requirements in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).³⁹ Margaret McIntyre had been fined for violating an Ohio statute that required disclosure, on the face of the campaign material, of the name and address of any person issuing the literature. The state

³⁸ The disclaimer requirement is set forth at 2 U.S.C. § 441d. At the time of *Buckley*, the requirement applied only to expenditures to finance express advocacy. Under BCRA, certain other categories of campaign advertising are covered as well.

³⁹ In one largely overlooked case predating *McIntyre*, the Supreme Court affirmed a Fifth Circuit decision upholding a sponsor identification requirement insofar as it governed state candidates and state issues. See *Texas v. KVUE-TV, Inc.*, 465 U.S. 1092 (1984), *aff'g mem.* 709 F.2d 922 (5th Cir. 1983) (upholding a requirement that all “political advertising” state the name and address of the sponsor). *McIntyre* thus appears to have overruled *KVUE* as it applies to ballot measures, at least with respect to advertising by individuals.

complained that her home-made and hand-distributed leaflets on a proposed school tax levy failed to include that information. After an impassioned discussion of the importance of anonymous leafleting in the history of this country, the Supreme Court struck down the challenged statute. In doing so, however, *McIntyre* expressly distinguished the overbroad disclaimer requirements in the Ohio law from the provisions of FECA upheld in *Buckley*, stating:

Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests. The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures; and we construed "independent expenditures" to mean only those expenditures that "expressly advocate the election or defeat of a clearly identified candidate." . . . Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office. . . . Moreover, the federal Act contains numerous legitimate disclosure requirements for campaign organizations; the similar requirements for independent expenditures serve to ensure that a campaign organization will not seek to evade disclosure by routing its expenditures through individual supporters. . . . In short, although *Buckley* may permit a more narrowly drawn statute, it surely is not authority for upholding Ohio's open-ended provision.

Id. at 356 (footnotes & citations omitted). *McIntyre* thus appears to preclude disclaimer requirements only as they apply to ballot measures, and possibly only by private individuals.⁴⁰

Most recently, *McConnell* has suggested that *McIntyre* applies only to genuine issue advocacy, such as advertisements attempting to influence ballot measures. The only place where any of the majority opinions in *McConnell* addresses *McIntyre* is in a cryptic footnote responding to some dissenting arguments about whether electioneering communications could be treated the same as express advocacy. The footnote reads:

As Justice Kennedy emphasizes in dissent, we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads. The premise that apparently underlies Justice Kennedy's principal submission is a conclusion that the two categories of speech are nevertheless entitled to the same constitutional protection. If that is correct, Justice Kennedy must take issue with the basic holding in *Buckley* and, indeed, with our recognition in [*Bellotti*] that unusually important interests underlie the regulation of corporations' campaign related speech. In *Bellotti* we cited *Buckley*, among other cases, for the

⁴⁰ In view of the Court's prior decision in *Bellotti*, the *McIntyre* Court suggested that disclosure requirements might be appropriate for corporations, even though they were unconstitutional as applied "to independent communications by an individual like Mrs. McIntyre." 514 U.S. at 354; *see also id.* at 358 (Ginsburg, J., concurring) ("The Court's decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity."); Malcolm A. Heinicke, Note, *A Political Reformer's Guide to McIntyre and Source Disclosure Laws for Political Advertising*, 8 Stan. L. & Pol'y Rev. 133 (1997) (arguing that *McIntyre* does not invalidate source disclosure rules applied to groups putting forth large-scale, organized political ads for ballot initiatives and candidate elections).

proposition that “preserving the integrity of the electoral process, preventing corruption, and ‘sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government’ are interests of the highest importance.” “Preservation of the individual citizen’s confidence in government,” we added, “is equally important.” BCRA’s fidelity to these imperatives sets it apart from the statute in *Bellotti* – and, for that matter, from the Ohio statute banning the distribution of anonymous campaign literature, struck down in [*McIntyre*].

McConnell, 540 U.S. at 206, n.88 (internal citations omitted). While the footnote is hardly a model of clarity, it seems to be drawing a distinction between BCRA’s disclosure requirements, which apply only to candidate-election-related speech, and the disclaimer requirement in *McIntyre*, which applied to the purely issue-oriented speech about ballot measures. That analysis suggests that *McIntyre* does not govern disclaimer requirements that apply only in candidate elections. *Citizens United* clarified that disclaimers are constitutional as applied to candidate elections, however, the case was silent about *McIntyre*’s protection of certain anonymous speech about ballot measures.

One final disclaimer provision of BCRA – the so-called “stand-by-your-ad” provision – remains in effect after *McConnell*, because the Court did not address its constitutionality. Under 2 U.S.C. § 441d(d), radio and television express advocacy, electioneering communications, and advertisements paid for by political committees must include a statement by their sponsors taking responsibility for the ads. In the case of ads paid for by a campaign committee, that statement must be made by the candidate and must state that the candidate has approved the communication.

Three recorded decisions have addressed the constitutionality of disclaimer requirements since *McConnell* was decided. The Seventh Circuit upheld the constitutionality of an Indiana statute that required disclaimers on political advertising that “expressly advocat[es] the election or defeat of a clearly identified candidate.” *Majors v. Abell*, 361 F.3d 349, 350 (7th Cir. 2004) (quoting Ind. Code § 3-9-3-2.5(b)(1)). The Seventh Circuit did not discuss the distinction between disclaimer requirements and reporting requirements at length, *see id.* at 354-55, but concluded that *McConnell* had established the constitutionality of reporting requirements, at least when an exception is provided for individuals distributing small amounts of political materials. *Id.* at 355.⁴¹ The Ninth Circuit struck down a disclaimer requirement that applied to “any material or information relating to an election, candidate or any question on a ballot.” *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004) (quoting Nev. Rev. Stat. 294A.320 (repealed 2007)). The Ninth Circuit noted that some disclaimer requirements could be constitutional but concluded that Nevada’s law was not narrowly tailored because it included all speech about an election and applied to ballot measures as well as candidate elections. The court also

⁴¹ The most notable thing about the *Majors* opinion is how different it is from a prior opinion issued by the same panel before *McConnell* was decided. In the earlier opinion, the same judge wrote skeptically about the distinction between candidate elections and ballot measure campaigns. *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003). While the panel did not conclude definitively that the Indiana statute was unconstitutional, it strongly implied that it would strike the statute if it had to reach the issue, before certifying a question about the scope of the law to the Indiana Supreme Court. *Id.* The dramatic shift in attitude of the Seventh Circuit may reflect a more general trend: while *McConnell* did not unambiguously uphold disclaimer requirements or clearly draw a distinction between candidate elections and ballot measures, its language and approach will nonetheless convince some courts to uphold disclaimer provisions in candidate elections that they might have struck down before *McConnell*.

held that a safe harbor that the statute created for individuals distributing information independently of any organization or business was insufficient to distinguish Nevada's statute from the law at issue in *McIntyre*. Finally, as mentioned above, the *Citizens United* Court upheld disclaimer requirements as fully constitutional. See 130 S. Ct. 913-16.

In the time between *McIntyre* and *McConnell*, a clear majority of courts upheld state-law sponsor identification requirements for advertisements expressly advocating the election or defeat of a clearly identified candidate. See *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997) (upholding Kentucky's "Sponsor Identification" law, which required identification of the party who "paid for" the advertisement); see also *Gable v. Patton*, 142 F.3d 940, 945 (6th Cir. 1998) (reaffirming the constitutionality of Kentucky's "Sponsor Identification" requirement); *Griset v. Fair Political Practices Comm'n*, 23 P.3d 43 (Cal. 2001) (reversing on technical grounds a decision invalidating sponsor identification requirement for mass mailings in support of or opposition to a candidate); *Seymour v. Elections Enforcement Comm'n*, 762 A.2d 880 (Conn. 2000) (distinguishing *McIntyre* to uphold "paid for" requirement on ads by or coordinated with candidates); cf. *Ark. Right to Life State Political Action Comm. v. Butler*, 983 F. Supp. 1209, 1226-30 (W.D. Ark. 1997) (denying plaintiffs' motion for summary judgment on the unconstitutionality of disclaimer requirements for independent expenditures for candidate elections), *aff'd on other grounds*, 146 F.3d 558 (8th Cir. 1998). In addition, two federal appellate courts have upheld the constitutionality of the federal disclaimer requirements, which govern both advertisements and solicitations for contributions, as defined under federal law. See *FEC v. Public Citizen*, 268 F.3d 1283 (11th Cir. 2001); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 293-98 (2d Cir. 1995). These courts have acknowledged that the challenged disclaimer statutes serve the state interests approved in *Buckley* and its progeny: combating the reality and appearance of corruption and preventing evasion of contribution limits and state reporting requirements.

However, a significant minority of courts have struck down disclaimer statutes. See *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1200 (10th Cir. 2000) (invalidating a disclaimer requirement for independent expenditures in excess of \$1,000 that called for "the full name of the person [making an independent expenditure], the name of the registered agent, the amount of the expenditure, and the specific statement that the advertisement or material is not authorized by any candidate"); *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 291 F. Supp. 2d 1052, 1067-69 (D. Minn. 2003) (striking disclaimer requirement that applied to "any . . . material tending to influence voting . . . except for news items or editorial comments by the news media" on the grounds that the definition was unconstitutionally vague and that the exception granted to individuals who independently distribute small amounts of campaign materials was insufficient to satisfy *McIntyre*), *rev'd on other grounds*, 427 F.3d 1106 (8th Cir. 2005); *Doe v. Mortham*, 708 So. 2d 929, 934-35 (Fla. 1998) (striking requirement that advertisement state name and address of sponsor, while upholding requirement that ad state "Paid political advertisement"); *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. Ct. App. 2006) (striking down an amended version of the law at issue in *Kelley*, *supra*); *Doe v. State*, 112 S.W.3d 532 (Tex. Crim. App. 2003) (striking down requirement of disclaimer of full name and address of sponsor of political advertising). Note that in most of these cases, the invalidated law required more information than the disclaimers that have been upheld.

McConnell held that disclaimer requirements face no higher burden when applied to electioneering communications than to express advocacy. 540 U.S. at 231. Requirements that govern pure issue advocacy as well as express advocacy and electioneering communications are, however, likely to continue to fare poorly in courts. (See Chapter Seven for a complete discussion of these issues.) Prior to *McConnell*, courts that considered disclaimer requirements applicable to speech besides express advocacy generally invalidated the requirements. The Second Circuit invalidated disclosure requirements that applied to any “political advertisement” that “expressly or implicitly advocate[d] the success or defeat of a candidate” and thus extended to “advocacy with respect to public issues.” *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000); see also *Stewart v. Taylor*, 953 F. Supp. 1047, 1055-56 (S.D. Ind. 1997) (invalidating a sponsor identification requirement applicable to both express and issue advocacy). While *McConnell* overruled these cases to the extent that they would invalidate disclaimer requirements applied to electioneering communications, they continue to constrain pure issue advocacy. Again, however, the Court was more sympathetic to disclosure and disclaimers in *Citizens United*, saying “we reject [the] contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.” 130 S. Ct. at 915. *Citizens United*’s approach has been embraced by lower courts. *Yamada v. Kuramoto*, 2010 WL 4603936, at *20 (D. Haw. Oct. 7, 2010) (holding “the disclaimer provision for an electioneering-communication advertisement all withstand constitutional challenge. These Hawaii provisions promote disclosure—a value endorsed, embraced and extended in *Citizens United*.”); *Center for Individual Freedom v. Madigan*, --- F. Supp. 2d ---, 2010 WL 3404973, at *4 (N.D. Ill. Aug. 26, 2010) (“Recently, in *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent.”).

Courts have split on the constitutionality of requirements calling for disclosure of whether an independently financed political advertisement was authorized by a candidate. Compare *FEC v. Public Citizen*, 268 F.3d 1283, 1291 (11th Cir. 2001) (upholding the federal requirement), and *Guetzloe v. Fla. Elections Comm’n*, 927 So.2d 942, 945 (Fla. App. 2006) (upholding a Florida requirement that independent speakers provide broadcasters with written statement that no candidate approved the advertisement), with *Ark. Right to Life State Political Action Comm. v. Butler*, 29 F. Supp. 2d 540, 550 (W.D. Ark. 1998) (holding that Arkansas had not come forward with any “demonstrable evidence” that independent expenditures caused genuine problems and finding that the “disassociation message” was not narrowly tailored to serve the state’s interest in informing the public of the sources of support for or opposition to a candidate), and *Shrink Mo. Gov’t PAC v. Maupin*, 892 F. Supp. 1246, 1254-56 (E.D. Mo. 1995) (overturning a Missouri requirement that advertisements commenting on candidates carry a notice that the candidate ostensibly benefiting from the advertisements had approved and authorized them), *aff’d*, 71 F.3d 1422 (8th Cir. 1995). The Missouri law was designed to reduce negative advertisements by requiring candidates to approve advertisements designed to work in their interest. The court did not recognize the implicit interests in promoting civility or improving the quality of campaigns as sufficiently compelling to justify the infringement on First Amendment rights.⁴² See *Maupin*, 892 F. Supp. at 1255. Other disclosure requirements have met with similar resistance. *N.C. Right to Life, Inc. v. Leake* preliminarily enjoined a requirement that advertisements disclose on their face the sponsor’s position for or against the identified candidate. See 108 F. Supp. 2d 498, 511-13 (E.D.N.C. 2000).

⁴² The requirement effectively eliminated the possibility of making truly independent expenditures and thus imposed a major burden on speech.

CHAPTER NINE

PUBLIC FINANCING OF CANDIDATES' CAMPAIGNS

Public funding is an important part of the state and local campaign finance landscape. At this time, 23 states have some form of public financing, including 17 states that provide grants or matching funds for candidates with at least seven that authorize funding for political party organizations.¹ Sixteen localities also have full or partial public funding programs for candidates.²

This Chapter discusses some of the more common mechanisms for subsidizing *candidates'* campaigns—lump-sum grants, matching funds, refunds and tax incentives for contributors, and free or reduced-fee television or radio time—all of which may be adopted with or without voluntary spending limits.³ Most of the discussion concerns the basic components of full and partial public funding systems, including eligibility criteria, allocation of public funds, spending limits, reporting requirements, and administration of the program.⁴

To function properly, a public funding program should be part of a more comprehensive campaign finance system, which governs all candidates, including those who choose to decline public funds. The elements of those systems are discussed in detail in Chapters Three through Eight. Recently, pay-to-play provisions (*see* Chapter Three) adopted in conjunction with public funding laws have drawn constitutional attacks.

Tip: *Include a severability clause in any law establishing public funding.* Many public funding systems have been challenged by opponents of campaign finance regulation, sometimes repeatedly over many years. A severability clause states that if a court finds any provision of a law unconstitutional or otherwise invalid, the invalidity will not affect other provisions, which can continue in effect.

I. Full and Partial Public Funding: “Clean Money” and Matching Systems

There are two principal types of public financing systems that operate by providing funds directly to candidates. One model is often known as a “Clean Money” or full public funding system. Under that system,

¹ Jessica Levinson, *State Public Financing Charts 2009*, Center for Governmental Studies (2009), *available at* http://www.cgs.org/images/publications/cgs_state_pfc_050409.pdf. The regulatory scheme generally is lightest in states that provide financing solely for political party organizations, where funding appears to be aimed at encouraging additional party involvement in the political system. *See* Michael Malbin & Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 52-53 (1998). In contrast, 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.*

² Jessica Levinson, *Local Public Financing Charts 2009*, Center for Governmental Studies (2009), *available at* http://www.cgs.org/images/publications/cgs_local_pfc_050409.pdf.

³ For a review of some of the common forms of public financing, see S. Levin, *Keeping It Clean: Public Financing in American Elections*, Center for Governmental Studies (2006), *available at* http://www.cgs.org/images/publications/Keeping_It_Clean.pdf; Elizabeth Daniel, *Subsidizing Political Campaigns: The Varieties & Values of Public Financing*, Brennan Center (2000), *available at* http://brennan.3cdn.net/2f2a961589ad86b21f_7um6iic72.pdf.

⁴ For an array of resources on full public funding systems, visit Public Campaign’s website at <http://library.publiccampaign.org>.

candidates raise a threshold number of small donations and then receive a lump sum sufficient to run a typical campaign. Once the grant is supplied, candidates may not raise or spend private funds. Most states that have adopted statewide public funding in recent years, including Arizona, Connecticut, Maine, New Mexico, and North Carolina, have implemented this system.

The second model is a partial public funding system in which candidates raise qualifying contributions at the beginning and then receive a grant covering only a portion of campaign expenses or have small amounts of contributions matched with public funds throughout the campaign. The match may be small or generous; New York City provides a six-to-one match for up to \$175 of each individual's contribution (capped at a higher amount). The presidential public financing system offers matching funds for the primaries and a lump-sum grant for the general election.

A third approach is a hybrid model. The Fair Elections Now Act or "Fair Elections" (H.R. 6116 in the 111th Congress) utilized this model. The bill provides both grants for publicly financed Congressional candidates as well as small dollar donor match throughout the election cycle. "Fair Elections" does not require participating candidates to abide by an expenditure cap, but does require them to gather all of their donations from small donors.

Tips

Tip: For tips pertaining to full public funding programs, we highly recommend the excellent policy guide written by Janice Thompson, *Clean Money Comparisons: Summaries of Full Public Financing Programs, Public Campaign*, (2006), available at <http://library.publiccampaign.org/sites/default/files/Clean%20Money%20Comparisons.pdf>. Much of the guidance provided in Ms. Thompson's publication also applies to matching systems.

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, political action committees ("PACs"), or independent expenditures. If financing of parties and PACs also is limited, the law should be crafted so as not unduly to undermine the work they do to register and mobilize voters. Consider an exemption from the definition of "contribution" for certain kinds of grassroots activity.

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

Tip: A matching system encourages the involvement of small donors throughout the campaign, but it requires that more candidate time be spent on fundraising than a full public funding system.

Tip: A generous matching program can help open the political process to candidates who lack wealthy supporters without creating unintended incentives for increased independent expenditures. Studies show that groups

sometimes shift funds that otherwise would be contributed to candidates into independent expenditures, when candidates may not accept contributions. This dynamic sometimes develops in matching systems as well once donors make the maximum permitted contributions to candidates.

A. Eligibility Criteria

Drafters of either form of public financing legislation must establish criteria for determining which candidates qualify for public funds. Generous 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 candidates. On the other hand, if the threshold is too high, the requirements for qualification will weed out serious candidates who do not have the extensively organized support that major-party incumbents tend to have, such as challengers, new candidates, or independent or third-party candidates.

Tips

Tip: Structure the system to require a showing of some public support before candidates qualify for public funds. There are three principal mechanisms for identifying candidates entitled to funding:

- *Collection of signatures on a petition.* Some people want candidates to be able to demonstrate support without raising any money at all. Others believe that people will sign anything if it costs them nothing, so signature gathering does not serve as a meaningful way to identify serious candidates.
- *Collection of a specified number and dollar amount of “qualifying contributions.”* This system generally includes a limit on the amount of each contribution counted toward qualification (e.g., \$200 or less) and often restricts the source of contributions to individuals. Limiting the size of qualifying contributions allows candidates without access to wealthy donors to participate on the same terms as those with such access and ensures a showing of broad support.
- *Votes in a prior election.* This method is often used to distinguish among major party candidates and those who are independents or members of minor parties. In the federal system, for instance, non-major 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.⁵ Candidates of new parties do not receive any money before the election, but they may receive funds afterward if they win a threshold number of votes.⁶

Tip: Where contributions must be collected to establish eligibility, require candidates to provide identifying information from contributors, including their names, addresses, employers, occupations, and signatures. Such

⁵ See 26 U.S.C. § 9003(c).

⁶ *Id.* § 9004(a)(3).

information will help to inform the public about the nature and extent of the candidate's support and guard against fraud.

Tip: Consider whether to permit non-residents, residents, or only registered voters in the jurisdiction to provide qualifying signatures or contributions. Most systems require that qualifying signatures or contributions come from a candidate's potential constituents. Limiting signatures or contributions to registered voters simplifies the verification process, when seeking to confirm residency. The restriction bars participation, however, by members of the community who cannot vote but want to support a candidate who will represent their interests. The restriction thus may cut off important sources of support for minority candidates seeking to represent communities with substantial numbers of non-citizens.⁷

Tip: If elections are partisan, take care in establishing qualification requirements for third parties. Consider whether third parties should need the same number of qualifying contributions as major parties and whether they should receive the same amount of public funding. This issue is discussed in more detail in Section I(B) (Allocation of Public Funds).

Tip: Make sure that there is a logical link between the time allowed for collecting qualifying signatures or contributions, the number of signatures or contributions required, and the major events of the election cycle. For instance, consider whether the jurisdiction has early or late primary elections.

Tip: Candidates must be able to collect private funds to cover the expenses of setting up a campaign and gathering petition signatures or qualifying contributions. Such funds are often known as "seed money." A full public financing law should specify limits on the amount of each seed money donation (usually \$100 or less), an aggregate limit on the amount of seed money that can be collected, the amount of personal funds the candidate may contribute toward that limit, and restrictions on the use of seed money, *i.e.* whether it may be used solely to gather qualifying contributions or signatures or also may be used for other campaign expenses.

Tip: Consider prohibiting or limiting seed money donations from the candidates' personal funds. Such provisions further the purposes of public financing by limiting the significance of personal wealth and prior fundraising ability.

Tip: Participating candidates should be required to declare their intent to participate in the funding program. The declaration must make clear that the candidate will abide by all the rules of the program or lose public funds. Such a declaration may be made before or after fulfilling the requirements for qualification as a participating candidate.

Tip: Provide for the possibility that a candidate may withdraw from participation in the funding program or from the race itself. If you decide to allow withdrawal from the funding program after a declaration of intent to

⁷ Under federal law, legal permanent residents (or "green card holders") are permitted to contribute to federal candidates. See 11 C.F.R. § 110.20(a)(3)(ii) (defining "foreign national" to exclude permanent residents).

participate, consider requiring candidates to continue to abide by spending limits in the campaign, to return unused public funds, and to pay interest on returned public funds.

Legal Analysis

Two legal claims have been raised in challenges of eligibility criteria. The first challenges the time limits for raising qualifying contributions. Courts have established that states and localities may impose reasonable time limits in which candidates must qualify for public funds. *See Piccolo v. N.Y. City Campaign Finance Bd.*, No. 05-CV-7040, 2007 WL 2844939, at *3, *11 (S.D.N.Y. Sept. 28, 2007) (upholding a June 1 deadline for a November election); *Ostrom v. O'Hare*, 160 F. Supp. 2d 486, 495 (E.D.N.Y. 2001) (same); *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).

The second claim challenges both eligibility criteria and provisions allocating public funds, when a law provides different qualification requirements and funding levels for major parties and minor parties or independent candidates. An analysis of this case law is provided in the next section.

B. Allocation of Public Funds

The public purse is not bottomless. For a public financing program to work, the number of elections and offices covered must reflect the amount of funding available. If funds are spread too thinly among too many elections and offices, the scheme may not afford candidates sufficient funds to get out their message and thus may not attract meaningful participation. Factors to consider when deciding coverage include:

- *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 campaigning occurs in the primaries, and there rarely is competition in the general election, the funding system may be structured so that candidates 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. You also may want to structure the program so that candidates in uncontested races do not qualify for the full grant otherwise provided.

A public funding scheme must give serious third-party and independent candidates a reasonable chance to participate.⁸

⁸ *See Green Party of Conn. v. Garfield*, 616 F.3d 213, 236 (2d Cir. 2010) (finding a “performance-based” system that provided full public funding only to parties that garnered at least 20% of the previous vote, with two-thirds funding for parties with 15% and one-third funding for parties with 10%, fell just within the “outer edge of the constitutionally permissible range”). In this case, the Second Circuit rejected claims that Connecticut’s performance-based system unconstitutionally burdened the First Amendment rights of minor parties, noting that minor parties were “arguably stronger” and “certainly not weaker” due to the system. *Id.* The district court in *Garfield* suggested that a party-neutral system, such as that in Maine and Arizona, offered a

Tips

Tip: Public funds should be available only for qualified campaign expenditures and payment of legitimate campaign debts, not for personal use.

Tip: In full public funding systems, grants calculated district-by-district are more difficult to administer but better take into consideration geographic variation in the costs of campaigns.

Tip: In matching systems, the lower the matched amount of each contribution (e.g., up to \$100 or \$200) and the more generous the match-ratio, 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: 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.⁹ If there are at least two candidates participating in the funding program who are vying for the same office, they should be required to take part in a public debate hosted by a neutral entity.

Legal Analysis

The Federal Election Campaign Act (“FECA”) includes a matching funds program for candidates who run in primary elections and a lump-sum grant for general election candidates. *Buckley v. Valeo* upheld the program against claims that it discriminated against candidates who qualified for the ballot by means other than party primaries. 424 U.S. 1, 105-06 (1976) (per curiam). 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. *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.

Public funding statutes also may be subject to equal protection challenges to their method of allocating 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*

less restrictive alternative to the Connecticut system. *See Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298, 359 (D. Conn. 2009), *rev’d*, 616 F.3d 213. At the time this publication was written in 2010, the *Garfield* case was still on-going.

⁹ 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.

Court applied a rational basis test to uphold FECA's allocation method, 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." *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 rational basis for its allocation plan, it need not treat non-major parties identically to major parties. See *Anderson v. Spear*, 356 F.3d, 651, 676 (6th Cir. 2004) (holding Kentucky's interest in "maintaining and managing scarce resources" justified its refusal to offer public funds to write-in candidates). On the other hand, the Second Circuit warned that Connecticut's differential provisions for minor party candidates only fell just within the "outer edge of the constitutionally permissible range." See *Green Party of Conn.*, 616 at 236 (upholding public financing system despite reservations because it left minor parties "arguably stronger" and "certainly not weaker"). The system that was challenged in *Garfield* based the public funding available to non-major parties, in part, on the party's percentage of the vote in the last election. *Id.* at 234. In upholding Connecticut's provisions, the Second Circuit relied heavily on evidence that more than one-third of non-major party candidates qualified for funding, and one-eighth qualified for full funding. Connecticut's requirements for funding were therefore "high," but not "so high as to shut-out minor-party candidates who enjoy public support." *Id.* On that basis, the Court held that Connecticut's public financing system was "narrowly drawn" to support the Government's "sufficiently important interest" in eliminating the improper influence of large private contributions. *Id.* at 230, 236. A system that "operated to reduce the strength of minor-party candidates," in contrast, would likely not survive the Court's exacting scrutiny. See *id.* at 239.

C. Voluntary Spending Limits

Currently, all public funding systems—federal, state, and local—condition the receipt of public funds on the acceptance of a spending limit. 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 to cover the rest. For example, the federal "Fair Elections" bill limits contribution amounts and matching grants, but has no overall expenditure ceiling for participating candidates.¹⁰ We know of no jurisdiction that has implemented such a proposal, but some civil libertarians continue to advocate this "floors without ceilings" approach.¹¹

States have selected a variety of public funding schemes to induce candidates to agree to spending limits. The cash forms include the full or partial public funding systems described above as well as refunds or tax

¹⁰ The Fair Elections Now Act, ("Fair Elections"), H.R. 6116 (111th Cong.), which would provide public financing for congressional elections does not have expenditure limits. This bill has not become law yet.

¹¹ Mark Schmitt, "Mismatching Funds How Small-donor Democracy Can Save Campaign Finance Reform," *Democracy Journal* (Spring 2007) (discussing what the "American Civil Liberties Union used to call 'floors without ceilings': public funding that was not tied to limits on spending and that did not attempt to shut down all sources of outside money.").

incentives for donors, and some systems involve a mix of these. Minnesota provides a tax credit for contributions to participating candidates and a direct subsidy. Rhode Island provides free television time on public and community access stations to candidates who agree to public funding. Other states have included, usually (but not always) along with another form of funding, a free statement in the official voters' guide.

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 be set off by nonparticipating candidate spending, independent spending, or both. Full public funding systems typically match opposition expenditures dollar-for-dollar, up to a new limit (usually 2-3 times the original base amount); matching systems may increase the rate of the ongoing match.

Triggers are designed to ensure that all viable candidates can compete in a world where mandatory spending limits are unconstitutional. *See generally* Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems That Include “Triggers” Are Constitutional*, 24 J. Legis. 223 (1998). Triggers prevent the unilateral disarmament that would result if one candidate were bound by a low expenditure limit, while the opposition's spending went unchecked, so they are often regarded as useful incentives for acceptance of the limit. Recent case law, however, has thrown into doubt the constitutionality of trigger fund provisions that directly subsidize participating candidates. *E.g.*, *McComish v. Bennett*, 605 F.3d 720 (9th Cir. 2010), *stay granted*, 130 S. Ct. 3408 (Jun. 8, 2010), *cert. granted*, 10-239 (Nov. 29, 2010).¹² It would be wise to accompany any trigger fund provisions with a severability clause, to ensure that the rest of the public financing system survives any hostile court ruling.

Tips

Tip: *As a practical (rather than constitutional) matter, voluntary spending limits must be high enough to permit effective advocacy.* If limits are too low, candidates will not accept them.¹³ Before setting limits, talk to elected

¹² *See also* *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30, 2010) (enjoining trigger fund provisions); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (same). *Cf. Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008) (invalidating provisions that increased private contribution limits following high personal expenditures of the self-financed opponent).

¹³ Jurisdictions that have placed spending limits well below typical spending levels have not been successful in securing candidate participation, while well-funded programs have been more successful. Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 62 (1998).

officials, unsuccessful challengers, political consultants, and others who may provide guidance about the costs of campaigning for various different offices. Limits may be reduced in uncontested elections.

Tip: *Inducements to accept spending limits must be generous enough to encourage candidate participation without being so enticing as to become irresistible.* Examples of incentives include: grants, matching funds, increased contribution limits (“cap gaps”), free statements in voter guides, and free television time.¹⁴ But if, for example, a large cap gap is paired with a generous matching program, their combined effect could produce a package of inducements that is so benefit-laden that candidates will have no choice but to accept the spending limit—rendering the laws unconstitutional.

Tip: *Inducements should be focused on benefiting participants, not punishing nonparticipants.* Subsidies to participating candidates, for instance, enhance the speech of participants without burdening the ability of nonparticipating candidates to raise money for their campaigns. By contrast, a program that attempted to limit the sources of contributions available to nonparticipating candidates could be found to be an unconstitutional burden on speech, especially if the Supreme Court extends the rationale of *Davis* to apply to public financing cases. In *Davis*, the Supreme Court struck down provisions that increased contribution limits for privately funded candidates after self-funded opponents spent more than a threshold amount, out of concern that the “asymmetrical” benefits for one candidates might deter personal expenditures from his or her opponent. *Davis*, 128 S. Ct. at 2772.

Tip: *It is a good idea to index the limits for inflation.* Automatic increases provide some assurance that the limits will keep pace with rising costs and avoid the need for constant legislative tinkering with the law.

Tip: *Consider a variety of factors when introducing trigger provisions for independent expenditures.* Relevant factors include:

- whether the public financing program already provides a dollar-for-dollar match for all expenditures that nonparticipating candidates make over the participants’ spending limits;
- whether any matching funds should be set off by independent expenditures made in support of a participating candidate, in opposition to a nonparticipating candidate, or some combination of the two, taking races with more than two parties into account; and
- whether there should be maximum distribution amounts that cannot be exceeded regardless of the extent of independent expenditures.

Tip: *If a trigger is used to encourage acceptance of a spending limit in a full public financing system, structure the system to minimize the risk that nonparticipating candidates or their supporters will undermine the trigger with last-minute expenditures.* For example, you may want to require expenditure reports within 24 hours in the last week or two of the campaign.

¹⁴ States may provide free television time only if they operate or control a television station.

Legal Analysis

Because public funding programs typically include an agreement by participating candidates to abide by a spending limit and to decline (or limit) private contributions, such programs might theoretically be subject to attack on the ground that they violate the First Amendment rights of contributors as well as candidates. *Buckley* recognized, however, that public funding offered in exchange for a candidate's agreement to abide by spending limits is consistent with constitutional principles.¹⁵ See 424 U.S. at 92-93; see also *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 286 (S.D.N.Y. 1980) (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 stated, 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.

Since *Buckley*, courts generally have approved public subsidies offered in exchange for an agreement to accept spending limits.¹⁶ See *Daggett v. Comm'n on Gov'tal Ethics & Elections*, 205 F.3d 445, 472 (1st Cir. 2000) (upholding full public funding system); *Gable v. Patton*, 142 F.3d 940, 948-49 (6th Cir. 1998) (upholding matching fund system); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996) (upholding subsidy plan); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. at 285-86 (reviewing and upholding the federal system). The one exception to date is the Kentucky scheme, which paired a two-to-one matching grant with a five-to-one cap gap. *Wilkinson v. Jones*, 876 F. Supp. 916, 929 (W.D. Ky 1995) (invalidating an effective fifteen-to-one disparity between candidates accepting spending limits and those who declined them).

1. The Legal Standard, Generally

The first question courts will ask when public funding schemes with voluntary spending limits are challenged is whether the limits are truly voluntary. If the spending limit is genuinely voluntary, it does not burden First Amendment rights and is therefore constitutional. If the limit is voluntary in name only, and candidates are effectively coerced to accept it, the state will have to prove that the scheme satisfies strict scrutiny.

a. The Coercion Analysis

In *Buckley*, the Supreme Court indicated that a system of spending limits, accepted voluntarily in exchange

¹⁵ For a discussion of legal issues involved in the use of inducements to accept voluntary spending limits, other than public funding, see Chapter Five, Section I.

¹⁶ To date, lawsuits attempting to compel implementation of public funding systems have been dismissed by the courts without consideration of the merits. *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).

for some form of public funding, is constitutional.⁶ 424 U.S. at 57 n.65. The Court has never addressed what parameters courts should consider in determining whether a specific program is voluntary or coercive. Lower federal courts agree, however, that providing incentives to induce acceptance of expenditure limits is lawful even if the inducements create some pressure for participation. *Gable*, 142 F.3d at 948; *Rosenstiel*, 101 F.3d at 1550-51; *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980). The compelling state interests that justify spending limits allow states to tilt the scales in favor of participation. *Vote Choice*, 4 F.3d at 39 (noting that the “state need not be completely neutral”); *Wilkinson*, 876 F. Supp. at 928 (“Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations . . .”).

On the other hand, courts will examine spending limit schemes closely to determine whether they are truly voluntary or in fact coercive. In addressing this question, courts usually adopt one or more of three approaches. First, some courts have held that the system is not coercive if there is “rough proportionality” between the benefits given participating candidates and the restrictions they accept. *Vote Choice*, 4 F.3d at 39 (noting that the scheme need not achieve “perfect equipoise”); see *Daggett v. Commission on Gov’tal Ethics & Election Practices*, 205 F.3d 445, 467 (1st Cir. 2000) (quoting *Vote Choice*). Courts have not offered particularly clear explanations of how to balance those benefits and burdens.

Second, courts may ask whether the package of inducements provided to encourage candidates to accept spending limits is so “benefit-laden as to create such a large disparity between benefits [to participants] and restrictions [on nonparticipants] that candidates are coerced” to participate in the scheme. *Rosenstiel*, 101 F.3d at 1550. Courts have noted that “there is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.” *Vote Choice*, 4 F.3d at 38; see *Gable*, 142 F.3d at 948 (noting that offering benefits to participating candidates does not “per se result in an unconstitutional burden, [but] such benefits could conceivably snowball into a coercive measure upon a nonparticipating candidate”) (internal quotation omitted); *Wilkinson*, 876 F. Supp. at 929 (five-to-one disparity in contribution levels, combined with two-to-one matching fund subsidy, pushed Kentucky scheme “beyond the pale”).

Under this analysis, courts must decide when financing regimes reach the “point” where they become coercive. Under the Kentucky system considered in *Gable*, participating candidates receive a \$2 subsidy for every \$1 raised, and these matching grants continue even if the nonparticipating candidate’s spending triggers the removal of the spending limits—making the subsidy virtually unlimited. Nevertheless, the *Gable* court concluded that this generous benefit, specifically including the trigger, was not so great that it reached the point of coercion. 142 F.3d at 947-49 (noting, however, the lower court’s view that a four-to-one matching scheme would be coercive, because once the trigger lifted the ceiling, a nonparticipating candidate could not keep up in the fundraising race).

⁶ *Buckley* upheld a system of public subsidies offered in exchange for spending limits in the presidential primary and general elections. 424 U.S. at 97-108. The challenge in *Buckley* was grounded not on the coerciveness of the system, however, but on its alleged discrimination against non-major political parties.

Finally, courts may ask whether the scheme is based essentially on rewarding candidates who accept spending limits or on punishing candidates who reject such limits. *See Daggett*, 205 F.3d at 470 (“The question before us is whether the ‘tilt’ rises to the level of a coercive penalty.”). Inducements, even generous ones, are rarely found to render the state’s scheme coercive, while plans that appear to be based on penalizing those who do not agree to limits are likely to be found coercive. For example, a plan that allows participating candidates to raise private funds at twice the limit applicable to nonparticipating candidates is likely to be upheld as long as the basic contribution limit permits nonparticipating candidates to raise sufficient funds for effective advocacy. *See Vote Choice*, 4 F.3d at 38 (finding “nothing inherently penal” in Rhode Island’s two-to-one cap gap). But if the basic limit is too low, the cap gap may be seen as punitive in effect. *See Cal. Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) (preliminarily enjoining two-to-one cap gap because nonparticipant’s limit was so low that it “preclude[d] an opportunity to conduct a meaningful campaign”), *aff’d on other grounds*, 164 F.3d 1189 (9th Cir. 1999); *Wilkinson*, 876 F. Supp. at 929 (striking Kentucky’s five-to-one cap gap because the \$100 nonparticipants’ limit was “palpably penal”). Similarly, one court found a statute that limited nonparticipating candidates to contributions from individuals to be coercive, suggesting that the restriction was inherently unconstitutional. *Shrink Mo. Gov’t Political Action Comm. v. Maupin*, 71 F.3d 1422, 1425 (8th Cir. 1995) (reviewing a statute that also imposed special reporting requirements on nonparticipating candidates who exceeded the voluntary spending limit).

b. Application of Strict Scrutiny

A spending limit scheme that is found to be “coercive,” and thus to burden First Amendment rights, may still be constitutionally permissible. The scheme could be upheld if the state shows that the expenditure limits are narrowly tailored to further compelling government interests. *See Rosenstiel*, 101 F.3d at 1553 (finding that limits were not coercive but commenting that, even if they were, they would survive strict scrutiny); *Vote Choice*, 4 F.3d at 39-40 (same). To date, however, spending limit schemes that have been found coercive have ultimately been found unconstitutional. *See Maupin*, 71 F.3d at 1426 (holding that state “failed to meet its burden” under strict scrutiny); *Wilkinson*, 876 F. Supp. at 929 (holding that \$100/\$500 cap gap was not narrowly tailored to thwart corruption).

Courts have recognized two principal interests that are sufficiently compelling to justify spending limit schemes: (1) reducing the actual or apparent corrupting influence of campaign contributions by reducing the demand for private money, and (2) limiting the time that candidates spend fundraising and thus increasing the time available for a discussion of issues. *See Rosenstiel*, 101 F.3d at 1553 (“It is well settled that these governmental interests are compelling.”); *Republican Nat’l Comm. v. FEC*, 487 F. Supp. at 285 (finding that the statutory scheme, including expenditure limits, was supported by compelling state interests in “reduc[ing] the deleterious influence of large contributions on our political process’ . . . and . . . ‘free[ing] candidates from the rigors of fundraising” (quoting *Buckley*, 424 U.S. at 91)); *McComish v. Bennett*, 611 F.3d 510, 523-24 (9th Cir. 2010) (finding that the statutory scheme, including expenditure limits, was supported by Arizona’s compelling interest in preventing corruption and the appearance of corruption). One court has also acknowledged a state interest in promoting political dialogue among the candidates. *See Wilkinson*, 876 F. Supp. at 928. The Ninth Circuit recently held that a State has a compelling interest in providing matching

funds in order to encourage participation in its public funding scheme, but the Supreme Court stayed enforcement of the relevant provisions pending a *certiorari* decision. *McComish*, 611 F.3d at 523-24, *stay granted*, 130 S. Ct. at 3408.¹⁷ The Eighth Circuit rejected asserted interests in (1) maintaining the individual citizen’s participation in and responsibility for the conduct of government and (2) discouraging the race toward hugely expensive campaigns, especially at the local level.⁸ *Maupin*, 71 F.3d at 1426 (internal quotation marks omitted).

Whether specific provisions will survive scrutiny therefore depends upon whether they are found to be narrowly tailored to serve the recognized interests. Courts upholding spending limits have found that each element of the particular scheme under review was narrowly tailored to further the asserted interests. *See, e.g., Rosenstiel*, 101 F.3d at 1553 (describing narrow tailoring of trigger and subsidy); *Vote Choice*, 4 F.3d at 39-40 (describing narrow tailoring of cap gap). Provisions of spending limit schemes that have failed constitutional scrutiny have been found inadequately tailored to deter corruption. *See Maupin*, 71 F.3d at 1426 (“While the state’s interest in reducing corruption and its related concerns constitute a compelling state interest, the state has failed to explain how the campaign spending limits here in question are narrowly tailored to serve this interest or address these concerns.”); *Wilkinson*, 876 F. Supp. at 930 (“We have been shown no case in which a disparity of greater than two-to-one was found to be narrowly tailored.”).

2. *Application of the Legal Standard to Trigger Provisions*

Campaign finance systems that include voluntary spending limits usually also provide a mechanism that gives participating candidates additional money (or the opportunity to raise additional money) in the event that their nonparticipating opponents—or persons supporting their opponents—spend more than a certain amount. These mechanisms, known as “triggers,” are designed in several different ways and are generally reviewed like the other inducements for participation—that is, courts ask whether the triggers are structured so that they coerce candidates to accept the spending limits. In at least four cases, however, triggers were challenged as direct violations of the First Amendment, without raising a coercion claim. *McComish*, 611 F.3d at 523-24 (upholding triggers in Arizona’s public financing system), *cert. granted*, 10-239 (Nov. 29, 2010); *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30, 2010) (enjoining Florida’s trigger fund provisions after *Davis*); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (striking Connecticut’s trigger fund provisions after *Davis*); *Jackson v. Leake*, 476 F. Supp. 2d 515 (E.D.N.C. 2006), *aff’d*, *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008) (upholding triggers in judicial public financing system), *cert. denied by Duke v. Leake*, 129 S. Ct. 490 (Nov. 3,

¹⁷ At the time this publication went to press in late 2010, the Supreme Court had just granted certiorari in *McComish* and the outcome of the case was not yet known.

⁸ The Eighth Circuit regarded the first proffered interest as an impermissible effort to “level the playing field.” *Maupin*, 71 F.3d at 1426 (internal quotation omitted). But the Supreme Court’s decision in *McConnell v. FEC* suggests that courts should begin to look more favorably on the interest in democratic participation. 540 U.S. 93, 136-37 (2003) (“[M]easures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate.”), *partially rev’d on other grounds*, *Citizens United v. FEC*, 130 S.Ct. 876 (2010). Considering the second proffered interest, the *Maupin* court noted that *Buckley* had directly rejected the growing cost of campaigns as a reason in itself for restricting expenditures. 71 F.3d at 1426 (citing 424 U.S. at 57).

2008). The ultimate resolution of the constitutionality of trigger provisions in public financing systems awaits the Supreme Court's ruling in the *McComish* case. As discussed below, triggers based on the independent spending of parties other than the candidate raise distinct constitutional issues.

a. Spending by Nonparticipating Candidates

In the context of public funding systems, courts have generally upheld triggers that release participating candidates from spending limits when nonparticipating candidates spend over a specified amount, explaining that this is necessary to “assuage the wholly legitimate fears of participating slates that they will be vastly outspent due to their agreement to accept spending limits.” *Gable*, 142 F.3d at 947 (internal quotation marks omitted); see *Daggett*, 205 F.3d at 469 (quoting *Rosenstiel*, 101 F.3d at 1551); *Wilkinson*, 876 F. Supp. at 927-28. Recent cases, however, have called into question what types of benefits spending by nonparticipating candidates may constitutionally trigger for participating candidates. The Supreme Court has ruled that raising contribution limits only for non-self-funded candidates would impermissibly burden the right of self-funded candidates to make unlimited personal expenditures. *Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008). The circuits have split on whether the government may match spending by nonparticipating candidates beyond a threshold amount with equal public funding to participating candidates.¹⁸

These triggers take a variety of forms—generally based on the other inducements offered to candidates to accept spending limits. Under the Minnesota statute considered in *Rosenstiel*, for instance, the participating candidate is released from the spending limit if a nonparticipating candidate “receives contributions or makes expenditures equaling 20 percent of the applicable limit prior to 10 days before the primary election, and contributions or expenditures equaling 50 percent of the applicable limit thereafter.” *Rosenstiel*, 101 F.3d at 1547; Minn. Stat. Ann. § 10A.25(10)(a)(1)-(2) (1998)). The participating candidate is then permitted to raise private funds without limit; regardless of how much he raises, he is allowed to keep the public subsidy of up to 50 percent of the spending limit. See *Rosenstiel*, 101 F.3d at 1547-48 (describing scheme).¹¹

Under the Kentucky scheme considered in *Gable*, the spending limit is lifted when the nonparticipating candidate spends any amount over the spending limit. The participating candidate can then raise money over the limit and continue to receive a two-for-one match. See *Gable*, 142 F.3d at 949 (describing advantage of trigger provision). The triggering provisions in Minnesota and Kentucky were attacked as unconstitutionally

¹⁸ See *McComish v. Bennett*, 605 F.3d 720 (9th Cir. 2010) (sustaining trigger fund provisions after *Davis*), stay granted, 130 S. Ct. 3408 (Jun. 8, 2010), petition for cert. filed, 79 U.S.L.W. 3109 (Aug. 17, 2010), cert. granted, 10-239 (Nov. 29, 2010); *North Carolina Right to Life v. Leake* (“*NCRTL*”), 524 F.3d 427, 437 (4th Cir. 2008) (sustaining trigger fund provisions before *Davis*), cert. denied by *Duke v. Leake*, 129 S. Ct. 490 (Nov. 3, 2008); *Daggett v. Comm’n on Gov’tal Ethics and Elec. Practices*, 205 F.3d 445, 463-65 (1st Cir. 2000) (same). But see also *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30, 2010) (enjoining trigger fund provisions after *Davis*); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (same).

¹¹ The triggering provision considered, and upheld, by the district court in *Rosenstiel* lifted the spending limit when an opposing candidate opted out of the spending limit plan. See *Rosenstiel*, 101 F.3d at 1547. The Minnesota legislature amended the statute while the case was pending before the Court of Appeals.

coercive on the ground that the trigger, in effect, removed any burden on the candidates who accept a spending limit. The *Rosenstiel* and *Gable* courts rejected this argument on the merits.

The *Rosenstiel* court found that the trigger in Minnesota balanced the benefits and restrictions of the spending limit. “The expenditure limitation waiver . . . is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit.” 101 F.3d at 1551. By averting this disincentive through a trigger that funds additional speech, “the State’s scheme promotes, rather than detracts from, cherished First Amendment values.” *Id.* at 1552.

The *Gable* court went so far as to recognize that “[b]ecause of the trigger, a nonparticipating candidate derives no relative advantage” from the spending limit, while the two-for-one matching grant given to participating candidates assesses “a substantial cost for nonparticipation.” 142 F.3d at 948. According to the court, “there is only a narrow set of circumstances under which a candidate could make a financially rational decision not to participate.” *Id.* Relying on the analysis in *Rosenstiel*, the *Gable* court nevertheless held that this kind of financial pressure is not sufficient coercion to render the scheme unconstitutional. *See id.* at 949 (“Absent a clearer form of coercion, we decline to find that the incentives inherent in the Trigger provision are different in kind from clearly constitutional incentives.”).

Only one federal appeals court has invalidated a trigger that released publicly funded candidates from their voluntary spending limits after nonparticipating candidates spent more than a specified amount. In *Anderson v. Spear*, the Sixth Circuit invalidated the very same provision upheld in *Gable* but only as applied to self-financing candidates. 356 F.3d 651 (2004). The opinion effectively privileges candidates who are wealthy enough to bankroll their own campaigns over candidates whose campaigns are privately financed by a large base of supporters.

Other types of triggered benefits, besides the mere release from spending limits, have been deemed more constitutionally problematic. The Court in *Davis* expressed concern that the “asymmetrical” benefits in the privately funded context would unconstitutionally discourage wealthy candidates from enjoying their “unfettered right to make unlimited personal expenditures.” *Davis*, 128 S. Ct. at 2772.

Before the Supreme Court announced its holding in *Davis*, the First and Fourth Circuits had sustained trigger fund provisions in North Carolina and Maine that matched privately financed candidate expenditures beyond a threshold amount with public funds for participating candidates. *North Carolina Right to Life v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S. Ct. 490 (Nov. 3, 2008); *Daggett v. Comm’n on Gov’tal Ethics and Elec. Practices*, 205 F.3d 445, 463-65 (1st Cir. 2000). Following *Davis*, however, the Second and Eleventh Circuits invalidated similar trigger fund provisions in Connecticut and Florida, citing *Davis*’s prohibition against burdening the right to unlimited personal expenditures. *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30, 2010) (enjoining trigger fund provisions in Florida); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (invalidating trigger fund provisions in Connecticut).

The Ninth Circuit recently upheld the trigger fund provisions of Arizona’s Clean Elections Act, only to have the Supreme Court stay enforcement of the provisions pending a decision on *certiorari*. *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010).¹⁹ Under Arizona’s trigger fund system, any candidate who voluntarily accepted a spending limit received a lump-sum initial grant. *Id.* at 516. If any privately financed opponent plus third party spenders together spent more than the amount of the initial grant in opposing the publicly financed candidate, this triggered an injection of public funds to the candidate so as to match what the opponent had spent. *Id.* In total, the publicly financed candidate may receive trigger funds equal to no more than twice the initial grant. *Id.* at 517.

The Ninth Circuit distinguished Arizona’s system from that in *Davis*, noting that *Davis*’s trigger was activated solely by the personal expenditures of candidates, while Arizona’s trigger amount included *third-party* expenditures that benefited or opposed candidates. *Id.* at 522. Thus, Arizona’s trigger fund did not aim specifically to “disadvantage the rich,” as did the unconstitutional *Davis* trigger, but sought merely to benefit publicly funded candidates who faced high expenditures from *any* source. *Id.* The Ninth Circuit rejected the arguments of privately financed candidates that Arizona’s trigger fund provisions may have a chilling effect on speech in the form of expenditures, because the privately funded plaintiffs failed to offer “any specific instances” that they were “actually chilled . . . from accepting campaign contributions or making expenditures.” *Id.* at 524. It remains to be seen whether the Supreme Court will also demand specific examples of a chilling effect, or instead reach a decision based on the theoretical chill that the plaintiff candidates have alleged.

b. Independent Expenditures by Third Parties

Some jurisdictions have enacted trigger provisions that lift a participating candidate’s spending limit (and in some cases provide additional funds) when third parties make independent expenditures in opposition to the participating candidate or in support of an opponent. The most recent appellate case ruling on the constitutionality of such a trigger upheld it under a First Amendment challenge, but the Supreme Court issued a stay on those provisions pending a *certiorari* decision. See *McComish*, 611 F.3d at 510; see also *Daggett*, 205 F.3d at 463-65 (upholding the matching funds trigger in Maine’s Clean Election Act).

¹⁹ Certiorari was granted in *McComish* by the Supreme Court on November 29, 2010.

In the earlier *Daggett* decision, which was decided eight years before *Davis*, the First Circuit noted that the complaint about Maine’s trigger “boil[ed] down to a claim of a First Amendment right to outraise and outspend an opponent.” *Id.* at 464. In rejecting that claim, the Court stated:

Appellants misconstrue the meaning of the First Amendment’s protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources. The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures.

Id. (internal quotations and citations omitted); see *AAPS v. Brewer*, 363 F. Supp. 2d 1197, 1201 (D. Ariz. 2005) (quoting *Daggett* favorably); *Jackson v. Leake*, No. 5:06-CV-324-BR (E.D.N.C. Mar. 30, 2007) (dismissing complaint for reasons stated in 476 F. Supp. 2d 515 (E.D.N.C. 2006) (denying preliminary injunction)), *aff’d*, *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008). This reasoning echoed a similar analysis in the court below. Speaking of the trigger’s opponents, that court reasoned:

Their view of free speech is that there is no point in speaking if your opponent gets to be heard as well. The question is not whose message is more persuasive, but whose message will be heard. The general premise of the First Amendment as interpreted by the Supreme Court, on the other hand, is that it preserves and fosters a marketplace of ideas. . . . In that view of the world, more speech is better. If a privately funded candidate puts out his/her candidacy and ideas to the public, the public can only gain when the opposing candidate speaks in return. This “marketplace of ideas” metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.

Daggett v. Webster, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (citation omitted), *aff’d*, 205 F.3d 445.

In upholding Maine’s trigger, the First Circuit had explicitly rejected the reasoning of the Eighth Circuit in *Day v. Holahan*, 34 F.3d 1356, 1362 (8th Cir. 1994). The Minnesota statute at issue in *Day* lifted the voluntary spending limit of a participating candidate “by the sum of independent expenditures made in opposition to [such] candidate plus independent expenditures made on behalf of the candidate’s major political party opponents” and granted the candidate public funds equal to one-half the independent expenditure. *Id.* at 1359. The Eighth Circuit “equate[d] responsive speech with an impairment to the initial speaker,” *Daggett*, 205 F.3d at 465, and, because Minnesota already had nearly 100% participation in its voluntary spending limit scheme, ruled that the state could not justify the impairment by asserting a

compelling interest in encouraging participation. *See Day*, 34 F.3d at 1362.²⁰ A federal district judge in Maine ruled in 2010 that *Daggett* is still controlling precedent, at least in the First Circuit.²¹

As discussed above, the Ninth Circuit upheld Arizona’s public financing system in *McComish* largely because it included third-party expenditures toward the trigger activation amount, rather than merely personal expenditures as in *Davis*. 611 F.3d at 522. While the *Davis* system aimed to “disadvantage the rich” by specifically discouraging personal expenditures, in Arizona, the maximum possible amount of matching funds may be triggered entirely by third-party expenditures—even if a wealthy, privately financed candidate declines to spend any money at all. *See id.* Therefore, under Arizona’s system, the privately funded candidate has significantly less incentive to avoid personal expenditures. *See id.* The Supreme Court will soon decide whether Arizona’s efforts to distinguish its public financing system from that in *Davis* have succeeded. *See id.*

3. *Multiple Match for Small Donors*

As an alternative to trigger fund schemes, New York City has devised what is known as a multiple match system.²² The multiple match system not only ensures that publicly financed candidates have adequate resources to mount a resistance against privately wealthy candidates, but also encourages robust participation by low to middle-income contributors. Under the New York City multiple match system, the city government will match the first \$175 of any contribution to a candidate six times. *See* N.Y. City Code §§ 3-703.2(a), 3-705.2(a). For example, if a contributor gives \$150, the city government will supplement that with \$900, for a total of \$1,050. This encourages a candidate to seek contributions from many different sources, including individuals of limited financial means, because a few small contributions end up counting more than a single, somewhat larger contribution. For example, although a single contribution of \$1,500 seems greater at first blush than five contributions of \$150, the \$1,500 contribution ends up counting for only \$2,550, while the five \$150 contributions effectively provide a New York City candidate with \$5,250. As an additional benefit, the multiple match system inspires low to middle-income residents to participate in politics despite their more limited resources, because even a small expenditure will end up providing a hefty boost to the publicly funded candidate.

²⁰ The Supreme Court, however, recently revitalized *Day* by citing it for the proposition that a law increasing a candidate’s expenditure limits based on independent expenditures against her burdened the speech of those making the independent expenditures. *Davis*, 128 S. Ct. at 2772 (citing *Day*, 34 F.3d at 1359-60).

²¹ *Cushing v. McKee*, No. 1:10-cv-330-GZS, slip op. at 12, 15 (D. Me Sept. 15, 2010) (Order denying temporary restraining order of Maine’s triggers) (“Here, the Court is not writing on a clean slate. All of the same arguments currently raised by Plaintiffs in their Verified Complaint were raised, and ultimately rejected, in *Daggett*...” and concluding, “[t]he Court is not convinced that *Davis* and/or *Citizens United* cast *Daggett* into disrepute or otherwise reflect an overruling of *Daggett*), *denial of TRO aff’d sub nom., Respect Maine PAC v. McKee*, No. 10-2119 (1st Cir. Oct. 5, 2010), *aff’d*, No. 10A362 (Oct. 22, 2010).

²² New York City also has trigger fund provisions to increase the maximum amount of matching funds a candidate may receive in the event of high spending by a privately funded opponent, but these provisions are conceptually distinct from the multiple match system itself. *See* N.Y. City Code § 3705.7.

D. Reporting Requirements

Reporting requirements are an essential component of any campaign finance system, and they are discussed in detail in Chapter Eight. Public funding programs that provide cash subsidies to candidates require additional reporting requirements. Full public funding systems require prompt reporting by nonparticipating candidates and independent spenders, so that the agency administering the system can establish when matching funds are triggered. Partial public funding systems require reporting both by participating candidates who are seeking matching funds and by nonparticipating candidates and independent spenders, if the system includes triggers.

Tips

All of the *TIPS* applicable to reporting requirements in general, *see* Chapter Eight, also apply to reporting requirements that are specific to public funding programs.

Legal Analysis

As is noted in Chapter Eight, reasonable reporting requirements have been upheld by court after court. Public funding opponents therefore tend to argue that the reporting requirements specific to the program are unduly burdensome. In most cases, they argue that the burden is so great that they are forced into the public funding system with its spending limit. To date, no court has accepted this argument. *See Daggett*, 205 F.3d at 465-66; *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008) (upholding the dismissal of a complaint for reasons stated in 476 F. Supp. 2d 515 (E.D.N.C. 2006) (denying preliminary injunction)).

E. Administration and Enforcement

Every public funding system requires an agency to administer the program and enforce its rules. Fair and efficient administration of the system is crucial to its success, as is impartial and vigorous enforcement. Among the agency's responsibilities are

- making rules and develop forms for qualifying, participation, fund distribution, and reporting;
- distributing public funds;
- auditing compliance with campaign finance rules;
- giving notice and a hearing to alleged violators; and
- imposing civil fines to deter violations.

The agency will need sufficient resources to carry out these duties. In addition, when a new public funding program is introduced, the agency must be given adequate time to staff up and to develop the requisite procedures and forms.

Tip: *If a new administrative agency is created, structure it to maximize the likelihood that it will operate in a nonpartisan fashion.* There should be an odd number of agency members to ensure that the agency is not hamstrung by tie votes.

Tip: *Public funding laws must set reasonable deadlines for distribution of public funds.* In matching systems, speedy distribution of funds is necessary to encourage candidate participation. In full public funding systems, participants should receive the entire amount permissible quickly after they qualify for funding.

Tip: *The program should include funding for education about the mechanics of the program.* Education of the general public will encourage taxpayers to use the check box system. Candidates and campaign treasurers should also be trained as to how to participate.

Tip: *Statutes that do not include criminal penalties may be subject to a lower First Amendment standard of review.* Stiffer civil penalties such as treble damages can be used in place of criminal penalties to ensure adherence to public financing laws.

Legal Analysis

The only challenge to the administration of an agency of which we are aware related to the method of its selection. In *Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 712-13 (Ariz. 2000), the Arizona Supreme Court invalidated the statutory mechanism for appointment of the Citizens Clean Elections Commission. The law allowed judges to participate in the selection of executive agency members, and the court found that the appointment mechanism violated the separation of powers. The selection provision was severed from rest of the Act, leaving the public funding system intact.

We have not reviewed and therefore are not familiar with any challenges to the specific penalties imposed for violations of campaign finance rules. But there are nevertheless reasons why reformers may wish to restrain their punitive instincts and confine penalties for such violations to civil fines or injunctive relief. When criminal penalties are available, courts may look more closely at constitutionally challenged provisions than they do when violation of the provisions results only in a civil sanction. In *Buckley*, for example, the Supreme Court emphasized that the criminal penalties that FECA provided as punishment for violators required it to adopt an extremely restrictive reading of the disclosure requirements of the Act. 424 U.S. at 76-77.²³ When violation of a statute only leads to civil penalties, however, one court held that the difference in sanctions “affects the extent to which a narrowing construction of the [state’s] law is necessary.” *Crumpton v. Keisling*, 982 P.2d 3, 10 (Or. App. 1999). When a statute affecting speech “does not have criminal consequences, the

²³ Criminal sanctions were also discussed critically in *Citizens United*—a case about privately funded elections. See *Citizens United*, 130 S. Ct. at 889 (“In addition to the costs and burdens of litigation, this [] would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions. The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”).

constitutional requirements appear to be significantly less.” *Id.*; cf. *CSC v. Letter Carriers*, 413 U.S. 548 (1973) (finding that restrictions of political activity were sufficiently precise to overcome vagueness challenge, where the only sanctions for violation were suspension or removal from office). Since the Oregon disclosure law provided only for civil penalties, the *Crompton* court held that the definition of “in support of or in opposition to” could be interpreted more broadly than in *Buckley* without running afoul of the First Amendment.

F. Sources of Public Funding

Different public financing programs draw their funds from different sources. For an excellent review of a wide variety of funding options, see *Public Financing of Elections: Where To Get the Money*, Center for Governmental Studies (2003), available at http://www.cgs.org/images/publications/Where_to_get_the_money.pdf. Care must be taken not to generate revenues by taxing speech or other constitutionally protected activities.

Tips

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.²⁴ A handful of states rely on an income tax add-on in which participating taxpayers agree to increase their tax liability by a small amount. Neither check-off nor add-on programs are consistently effective at producing sufficient funds.

Tip: *Civil fines generated from violations of the state’s campaign finance laws can also be used to fund a public financing program.* As a policy matter, we do not recommend surcharges on criminal fines, as they tend to be regressive in effect.

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. Lobbying fees may be used to cover the costs of administering systems regulating lobbying.

Legal Analysis

Aspects of the funding mechanisms for the Arizona and Vermont programs have been challenged. The Arizona law originally provided for funding from an income tax check-off, direct donations to the state

²⁴ The Maine program is funded primarily by a \$2 million appropriation from the state general fund and a \$3 income tax check-off. See 21-A Me. Rev. Stat. Ann. § 1124(2) (West 2004).

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*, *May v. Brewer*, 528 U.S. 923 (2003); 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).

II. Refunds and Tax Incentives for Small Contributions

Some programs help finance electoral campaigns by offering individuals monetary incentives to make contributions to candidates or political organizations (including PACs and political parties). 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. The incentive may take the form of a rebate, a tax deduction, a tax credit, or a rebate of the amount of the contribution up to a specified limit. Since tax incentives and rebates are available on an equal basis to those supporting third-party and independent candidates, contributors decide which candidates are "serious," not the statutory funding scheme.

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 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 fundraising 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.

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 limits. 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 Court of Appeals 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.

III. Free or Reduced-Rate TV and Radio Air Time

Free broadcast or cable services can help candidates without easy access to big money, by making available an otherwise costly campaign resource, thereby reducing the amount candidates must raise to be competitive. Vouchers can be provided to candidates for free air time on public television and radio stations and local access or government cable stations. Where the air-time is not needed, the voucher could be transferred to the candidate's political party in exchange for other assistance.

Tip: Some commercial stations have been persuaded to provide free air-time as a voluntary public service.

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: 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, or as an alternative, to providing air-time to candidates for advertising, 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. Rhode Island 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.

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 it was 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 argued that Rhode Island's program created 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* appears 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 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.²⁵

²⁵ *See, e.g.*, Ariz. Rev. Stat. § 16-956; Ky. Rev. Stat. § 121A.100 (Baldwin 2004); N.J. Stat. Ann. §§ 19:44A-45 to 47 (West 2004); Austin Tex., Code at §2-9-65; Los Angeles Mun. Code § 49.7.19C (2001); New York City, N.Y., Admin. Code §3-709.5; San Francisco, Cal., Campaign and Governmental Conduct Code § 1.146(a) (2005).

EPILOGUE: A NOTE ON LOCAL LEGISLATION

This handbook has focused on state campaign finance reform, but the recommendations and constitutional analysis apply equally to local reform efforts. Such efforts raise two additional concerns, however, which we address briefly below: (1) state limits on local governance, and (2) supposed counterexamples to the legal analysis we have provided in Part Two.

Home Rule. Unlike states, municipalities are not sovereigns in their own right. Localities are chartered entities limited to the powers that the state confers upon them. The state constitutional or statutory right of localities to exercise control over matters of local concern—such as the financing of local campaigns—is known as “home rule.” Some states give broad authority for home rule; others retain tighter or complete state control.¹ The scope of home rule may be discerned from the state constitution, state statutes, and judicial decisions interpreting those laws.²

Local activists thus should not automatically assume that their municipality has the power to enact the campaign finance provisions of its choice. Reformers wishing to draft laws relating to the financing of elections in any jurisdiction smaller than the state—including counties, cities, towns, and villages—should first confirm that such an enterprise is authorized. State law may preclude political subdivisions from adopting laws pertaining to elections or require consultation with the state. State law also will govern the procedures that may be used to adopt and amend local laws, including campaign finance measures. If the state has its own campaign finance legislation, that law may limit the scope of local reform.

This handbook cannot provide a 50-state analysis of home rule law. Our concern here is rather to alert activists to not only the federal but also the state legal constraints on local campaign finance reform. If a locality is severely constrained by miserly home rule provisions, its only options may be legislative action at the state level or a state constitutional amendment.

Unchallenged Laws. Where local reform is possible, activists often ask the Brennan Center for assistance in assessing the constitutionality of proposed amendments to their campaign finance laws. When we flag provisions presenting potential legal problems, unhappy reformers sometimes hold up identical provisions from other jurisdictions and ask how those laws can exist if our analysis is right. The answer to that question lies in the important distinction between laws that are likely to survive, if challenged, and laws that survive because no one has sued yet.

¹ See generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 10-11 (1990) (describing two models of home rule).

² See, e.g., N.Y. Const. art. IX, § 2 (McKinney 2002) (including home rule powers of local governments); N.Y. Mun. Home Rule L. § 10 (McKinney 2005) (describing general powers of local governments to adopt and amend local laws).

There are many local laws now on the books and in force that do not comply with the “*Tips*” or “*Legal Analysis*” presented in this handbook. For example, many jurisdictions have successfully implemented time limits on fundraising. Those provisions have never been challenged (or at least never litigated to a final decision) in court. Unless and until they are, they will remain the law in their jurisdictions.

The survival of numerous local laws, despite their obvious constitutional weaknesses, in part reflects economic and political choices of campaign finance reform opponents. Litigation is resource-intensive, and even the well-financed and organized opposition must choose its battles. Because state laws generally affect larger jurisdictions and offices carrying greater power than local laws do, state laws are more likely to be challenged in court. Reformers may also find it easier to build broad-based coalitions in support of municipal reform and thus ward off challenge by local special interests.

Reformers nevertheless run a risk if they use constitutionally vulnerable laws as models for new legislation. The new reforms may slip under the radar screen of the opposition, but if the legislation *is* challenged, the locality may be unable to defend it under current constitutional precedents. In addition, risk-averse lawyers for the municipality are likely to resist such reforms and thus make the reforms more difficult to enact via legislation rather than initiative.

Ultimately, of course, proponents of reform must decide what risks they are willing to take. To make that decision wisely, however, reformers first must understand fully what those risks are. We hope that this handbook will be helpful in enhancing that understanding, even to activists who choose to go for broke.

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APPENDIX B: LAY PERSON'S GUIDE TO FEDERAL CIRCUITS

In the body of this manual, we often cite Court of Appeals decisions from the 13 federal judicial circuits covering the 50 states, the District of Columbia, and United States territories. Each decision is binding precedent only for district courts that are located within the appellate court's circuit, although courts may choose to follow the reasoning of a court in a different circuit. The following table is designed to help lay persons determine which Court of Appeals decisions govern the law of campaign finance in their states.

CIRCUIT	COMPOSITION
District of Columbia	District of Columbia
First	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
Second	Connecticut, New York, Vermont
Third	Delaware, New Jersey, Pennsylvania, Virgin Islands
Fourth	Maryland, North Carolina, South Carolina, Virginia, West Virginia
Fifth	District of the Canal Zone, Louisiana, Mississippi, Texas
Sixth	Kentucky, Michigan, Ohio, Tennessee
Seventh	Illinois, Indiana, Wisconsin
Eighth	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
Ninth	Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii
Tenth	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming
Eleventh	Alabama, Florida, Georgia
Federal	All federal judicial circuits

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David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994)

Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 342 (2009)

Janice Thompson, *Clean Money Comparisons: Summaries of Full Public Financing Programs*, Public Campaign (2006)

Ciara Torres-Spelliscy, Kahlil Williams & Thomas Stratmann, *Electoral Competition and Low Contribution Limits* (Brennan Center 2009)

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 (1996)

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APPENDIX D

NATIONAL ORGANIZATIONS OFFERING RESOURCES FOR CAMPAIGN FINANCE REFORMERS

Americans for Campaign Reform

John D. Rauh, President
5 Bicentennial Square
Concord, NH 03301
phone: 603-227-0626
fax: 603-227-0625
email: info@just6dollars.org
www.just6dollars.org

Americans for Campaign Reform is a non-partisan grassroots campaign to restore public accountability and increase participation in American politics through public financing of federal elections.

American University School of Communication

Prof. Wendell Cochran
4400 Massachusetts Avenue NW
Washington, DC 20016-8017
phone: 202-885-2075
fax: 202-885-2019
e-mail: cochran@american.edu
www1.soc.american.edu/campfin/index.cfm

The *American University School of Communication* has a campaign finance project with its own web site, normally housed at the top URL but temporarily at the lower one.

Brennan Center for Justice at NYU School of Law

Monica Youn, Senior Counsel, Democracy Program
161 Avenue of the Americas, 12th Floor
New York, NY 10013
phone: 646-292-8342
fax: 212-995-4550
e-mail: brennan.center@nyu.edu
www.brennancenter.org

The Democracy Program of the *Brennan Center for Justice* supports campaign finance reform through scholarship, public education, and legal action, including litigation and legislative counseling at the federal, state, and local levels. The Brennan Center has served as litigation counsel for proponents of reform in cases throughout the country and encourages reformers to call for legal advice throughout the legislative drafting process.

Brookings Institution

Thomas E. Mann, Senior Fellow
1775 Massachusetts Avenue NW
Washington, DC 20036
phone: 202-797-6000
fax: 202-797-6004
e-mail: gscomments@brookings.edu
www.brookings.edu

The *Brookings Institution* maintains a web page specifically addressed to campaign finance issues (<http://www.brookings.edu/topics/campaign-finance.aspx>).

Campaign Finance Information Center

C/O Investigative Reporters and Editors
138 Neff Annex
Missouri School of Journalism
Columbia, MO 65211
phone: 573-882-2042
fax: 573-882-5431
e-mail: cfic-comments@ire.org
www.campaignfinance.org

The *Campaign Finance Information Center* is a division of the Investigative Reporters and Editors and the National Institute for Computer-Assisted Reporting. The Center provides story ideas, networking information, and databases for journalists reporting on campaign finance. It also publishes *Tracker*, a quarterly online newsletter on campaign finance.

Campaign Finance Institute

Michael J. Malbin, Executive Director
1667 K Street, NW Suite 650
Washington, D.C. 20006
phone: 202-969-8890
fax: 202-969-5612
e-mail: info@CFInst.org
cfinst.org

The *Campaign Finance Institute* brings together activists and academics from different political backgrounds to work towards campaign finance reform that enjoys broad popular support. Not committing themselves to one singular principle or reform method, the founders of the Campaign Finance Institute seek to promote agreement on campaign finance issues through sound political science research.

Campaign Legal Center

Trevor Potter, President and General Counsel
215 E Street, NE
Washington, DC 20002
phone: 202-736-2200
fax: 202-736-2222
email: info@campaignlegalcenter.org
www.campaignlegalcenter.org

The Campaign Legal Center is a non-profit organization created to act as the “people’s voice” in administrative hearings and proceedings on campaign finance and media laws.

Center for Governmental Studies

Robert M. Stern, President
10951 West Pico Blvd., Suite 120
Los Angeles, CA 90064
phone: 310-470-6590
fax: 310-475-3752
e-mail: center@cgs.org
www.cgs.org

The *Center for Governmental Studies* is a non-partisan think tank in the areas of campaign finance, electoral, and government reform and a leader in the use of technology for those reforms. CGS supplies state and local governments and public interest organizations with model laws, case studies, databases, and other campaign finance information.

Center for Public Integrity

Bill Buzenberg, Executive Director
910 17th Street NW, 7th Floor
Washington, DC 20006
phone: 202-466-1300
e-mail: contact@publicintegrity.org
www.publicintegrity.org

The *Center for Public Integrity* is a watchdog organization that has published a variety of studies related to campaign finance reform and the influence of money on politics.

Center for Responsive Politics

Sheila Krumholz, Executive Director
1101 14th Street NW, Suite 1030
Washington, DC 20005
phone: 202-857-0044
fax: 202-857-7809
e-mail: info@crp.org
www.crp.org and www.opensecrets.org

The *Center for Responsive Politics* (“CRP”) is a non-partisan research organization that specializes in the role that money plays in congressional elections and action. CRP develops complete campaign finance profiles of every congressional race. In addition, CRP maintains an impressive variety of campaign finance databases and has issued landmark publications in the field.

Common Cause

Bob Edgar, President
1133 19th Street, NW
9th Floor
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e-mail: poadmin@commoncause.org
www.commoncause.org

Common Cause is a nonpartisan citizens’ lobbying organization promoting open, honest, and accountable government in part through campaign finance reform. Its web site includes a number of campaign finance studies and an interactive database tracking the campaign finance activities of every member of Congress. State chapters of Common Cause have also been active in drafting campaign finance legislation.

Council of State Governments

Dan Sprague, Executive Director
2760 Research Park Drive
P.O. Box 11910
Lexington, KY 40578-1910
phone: 859-244-8000
fax: 859-244-8001
e-mail: info@csg.org
www.csg.org

The *Council of State Governments* serves state governments with a network for identifying and sharing ideas. Its publication *The Book of the States* offers a comprehensive description of election and campaign finance laws in each state.

Council on Governmental Ethics Laws

P.O. Box 81237
Athens, GA 30608
phone: 706-548-7758
fax: 706-548-7079
e-mail: director@cogel.org
www.cogel.org

The *Council on Governmental Ethics Laws* seeks to provide members with avenues for the exchange and dissemination of up-to-date information in the areas of ethics, elections, campaign finance, lobbying, and freedom of information. It has developed a model campaign finance reporting and disclosure bill.

Democracy 21

Fred Wertheimer, President and CEO
2000 Massachusetts Avenue, NW
Washington, DC 20036
phone: 202-335-9600
fax: 202-355-9606
e-mail: info@democracy21.org
www.democracy21.org

Democracy 21 is working actively for campaign finance reform on the federal level.

Democracy Matters

Joan Mandle, Executive Director
P.O. Box 157
Hamilton, NY 13346
phone: 315-824-4306
fax: 315-824-4306
e-mail: joanm@democracymatters.org
www.democracymatters.org

Democracy Matters seeks to reduce voter apathy as well as the role of private money in elections by educating and organizing students on college campuses around the country.

Environmental Working Group

Ken Cook, President
1436 U St. N.W., Suite 100
Washington, DC 20009
phone: 202-667-6982
fax: 202-232-2592
e-mail: info@ewg.org
www.ewg.org

The *Environmental Working Group* (“EWG”) provides information and technical assistance to public interest organizations and citizens campaigning to protect the environment. EWG helps environmental groups understand how to use campaign finance data and educate the public about campaign finance reform. The EWG web site includes a number of reports on “Money and Environmental Politics,” linking campaign contributions to federal environmental policy.

Federal Election Commission

Matthew S. Petersen, Chairman
999 E Street NW
Washington, DC 20463
phone: 800-424-9530; in DC: 202-694-1100
fax: 202-219-8504 (Information Division)
www.fec.gov

The *Federal Election Commission* is the governmental agency administering the federal campaign finance law. Its web site provides access to disclosure reports filed by candidates, parties, and PACs in all federal elections. The site also provides information about current campaign finance laws.

FECInfo

Tony Raymond, Co-founder
1255 22nd Street N.W
Washington, DC 20037
phone: 202-419-8500
fax: 202-237-2815
e-mail: traymond@trkcinc.com
www.politicalmoneyline.com

FECInfo provides Federal Election Commission data in a format said to be more user-friendly than that used by the FEC. It is a free service made available by TRKC Inc. and Tony Raymond.

League of Women Voters of the United States

Lloyd Leonard, Senior Director of Advocacy and Lobbying
1730 M Street NW, Suite 1000
Washington, D.C. 20036
phone: 202-429-1965
fax: 202-429-0854
e-mail: lwv@lwv.org
www.lwv.org

The *League of Women Voters* has long supported campaign finance reform, including comprehensive reforms such as public financing and voluntary spending limits. Many of the League's chapters are active on the issue on the state and local levels. The League's web site offers information about campaign finance issues, strategies for reform, and more. The web sites of state and local chapters are also available as links on the national web site.

National Civic League

Gloria Rubio-Cortes, President
1889 York Street
Denver, CO 80206
phone: 303-571-4343
fax: 303-571-4404
e-mail: ncl@ncl.org
www.ncl.org

The *National Civic League* ("NCL") seeks to transform democratic institutions by helping local reform groups learn from each other. NCL has established a New Politics Program, which has published a study of local campaign finance reforms.

National Conference of State Legislatures

William T. Pound, Executive Director
7700 East First Place
Denver, CO 80230
phone: 303-364-7700
fax: 303-364-7800
www.ncsl.org

The *National Conference of State Legislatures* publishes information on its web site regarding state legislation related to campaign finance, lobbying, and ethics.

National Institute on Money in State Politics

Edwin Bender, Executive Director
833 N. Last Chance Gulch, 2nd Floor
Helena, MT 59601
phone: 406-449-2480
fax: 406-457-2091
www.followthemoney.org

The *National Institute on Money in State Politics* tracks campaign finance data and developments at the state level. Its web site offers a database containing information on state laws, ballot measures, and contributions to candidates, including state supreme court candidates.

National Voting Rights Institute

Stuart Comstock-Gay, Executive Director
27 School Street, Suite 500
Boston, MA 02108
phone: 617-624-3900
fax: 617-624-3911
e-mail: nvri@nvri.org
www.nvri.org

The *National Voting Rights Institute* is dedicated to challenging the current system of financing elections through litigation and public education. The Institute seeks to redefine the issue of private money in public elections as the newest voting rights barrier and to emphasize the constitutional rights of all citizens, regardless of economic status, to participate in the electoral process on an equal and meaningful basis.

Project Vote Smart

Richard Kimball, President
1 Common Ground
Philipsburg, MT 59858
phone: 406-859-8683, 888-VOTE-SMART
fax: 406-859-8681
e-mail: comments@vote-smart.org
www.vote-smart.org

Project Vote Smart has compiled information on more than 12,000 candidates and elected officials, including detailed breakdowns of campaign finance contributions. Project Vote Smart also provides educational materials on campaign financing to clarify regulations and procedures. If you are unable to find information you need on the Project's web site, you may call the Voter's Research Hotline: 1-888-868-3762.

Public Campaign

Jeannette Galanis, National Field Director
1133 19th Street NW, Suite 900
Washington, DC 20036
phone: 202-293-0222
fax: 202-640-5601
e-mail: info@publiccampaign.org
www.publiccampaign.org

Public Campaign advocates “Clean Money Campaign Reform,” which includes full public financing of candidate campaigns. Campaign finance laws based on Public Campaign’s model went into effect in 2000 in Maine and Vermont. The web site contains an extensive collection of links to other organizations engaged in the campaign finance debate.

Public Citizen

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215 Pennsylvania Avenue SE
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phone: 202-546-4996
fax: 202-547-7392
email: congress@citizen.org
www.citizen.org

Public Citizen has long been committed to bringing about meaningful campaign finance reform. Information about federal campaign finance reform can be found at a web page dedicated to the subject: www.citizen.org/congress/campaign/index.cfm.

Reform Institute, Inc.

Cecilia Martinez, Executive Director
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Alexandria, VA 22314
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email: cmartinez@reforminstitute.org
www.reforminstitute.org

The Reform Institute is a not-for-profit 501(c)(3) educational organization representing a thoughtful, moderate voice for reform in the campaign finance and election administration debates.

USAction

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www.usaction.org

USAction coordinates state and national issue work by state-based citizen organizations, many of which are leaders in developing campaign finance reform work in their states.

U.S. Public Interest Research Group

Gary Kalman, Federal Legislative Office Director
218 D Street SE
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www.uspirg.org

The *U.S. Public Interest Research Group* (“U.S. PIRG”) works through state affiliates to promote \$100 contribution limits and out-of-district contribution limits. U.S. PIRG also advocates challenges to *Buckley v. Valeo* and a constitutional amendment to permit low contribution limits and mandatory spending limits.