

Writing REFORM

A Guide to Drafting State &
Local Campaign Finance Laws

2004 Revised Edition

Deborah Goldberg, Editor

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

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About the Editor

Deborah Goldberg is the Director of the Democracy Program at the Brennan Center. She oversees all of the Program's scholarship, public education, and litigation. Campaign finance cases that she has litigated across the country include *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (upholding low contribution limits against First Amendment challenge), in which she served as lead counsel for the intervenor. Ms. Goldberg graduated from Harvard Law School (1986), clerked for then-Judge Stephen G. Breyer of the U.S. Court of Appeals for the First Circuit and for Judge Constance Baker Motley of the U.S. District Court for the Southern District of New York, and then entered private practice. Before law school, she obtained a doctorate in philosophy from Johns Hopkins University (1980) and taught ethics and political philosophy for three years at Columbia University.

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C Deborah Goldberg, Editor

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FOREWORD

Purpose. The Brennan Center for Justice at New York University School of Law has designed this manual for those 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 should certainly 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 should also 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 and books, and a list of organizations that offer resources to campaign finance reformers.

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 page of the text in the lower, right-hand corner. 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. 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: 212-998-6730 or via e-mail: brennan.center@nyu.edu.

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. 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. 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. But 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 and 2003, there were major Supreme Court decisions with important implications for the interpretation of *Buckley*. The first is *Nixon v. Shrink Missouri Government PAC* and the second is *McConnell v. FEC*. Because it is impossible to understand campaign finance law without also understanding these more recent cases, this chapter summarizes their analysis and holdings as well, with particular attention to their implications for *Buckley*.

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.

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 does 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. 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 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.”¹ *Id.* at 19.

By contrast, the *Buckley* Court regarded a contribution largely as a “symbolic expression of support” for a candidate,² *id.* at 21, which is not transformed into political debate until it is spent by the recipient to convey views to the voters.³ *Id.* Because the contributor’s right to discuss candidates and issues remains otherwise 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,”

¹This point is sometimes (inaccurately) encapsulated in the phrase: “Money is speech.”

²The 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. *Id.*

³Communication 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).

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, on the other hand, 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.

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 nevertheless 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.

The government proffered three interests in support of the contribution limits:

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

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. *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.

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 “invarious and invidious discrimination” against these classes of candidates. *Id.* at 32-34.

2. Other Contribution Limitations

Buckley upheld three additional limitations on contributions:

- C a \$5,000 limitation on contributions to candidates by certain PACs, *id.* at 35;⁴
- C limitations on volunteers’ incidental expenses, *id.* at 36-37; and
- C a \$25,000 limit on total contributions to all candidates, during any calendar year, *id.* at 38.

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.

⁴The 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.

C. Expenditure Limitations

After upholding FECA's caps on contributions, the Court turned its attention to a series of monetary limits on expenditures. 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 exacting scrutiny.

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. 18 U.S.C. § 608(e)(1). 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). The distinction between “express advocacy” and “issue advocacy” originates here.⁵ 424 U.S. at 44.

⁵ See later in this chapter and Chapter Seven for further discussions of this distinction and

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:

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

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.”⁶ *Id.* at 45.

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.

its implications for efforts to regulation campaign advertising.

⁶The 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).

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. 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. The Court also determined that the interest in equalizing candidates’ resources was insufficient to override the candidate’s interest in free speech. Moreover, the Court 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.” *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.⁷ Opponents challenged the

⁷The minimum amounts triggering the reporting requirement are now \$250 and \$200 per

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.” *Buckley*, 424 U.S. at 64. *Buckley* acknowledged, however, three categories of governmental interests that were “sufficiently important to outweigh the possibility of infringement”:

- C providing 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;
- C 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
- C providing the essential means of gathering the data necessary to detect violations of contribution limits.

Id. at 66.

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.” *Id.* at 68. *Buckley* acknowledged, however, that if a group could show a reasonable probability that 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. *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

year, for independent expenditures and contributions, respectively. 2 U.S.C. § 434(c).

advocated the election or defeat of candidates. 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.

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) one dollar of their taxes for presidential campaigns. 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.

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. But 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-fund 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 limits." *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 94-95 & 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 96-98, 101. 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.

***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. Because 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. In so doing, the Court also clarified several aspects of *Buckley* that had caused confusion and controversy in recent years, including:

- C the standard of review — contribution limits are governed by a different, and less strict, standard of review than expenditure limits;
- C 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;
- C 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";
- C 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;

C the significance of inflation since *Buckley* — none; neither \$1,000 nor any other amount is a constitutional minimum below which legislatures cannot regulate.

Most importantly, *Shrink Missouri* articulated a new standard for the “outer limits of contribution regulation.” 528 U.S. 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 upheld in all but the most extraordinary of circumstances. In more than four years since the decision in *Shrink Missouri*, no individual contribution limit has been held unconstitutional.

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 attack on campaign finance regulation.)

For the first time in so many words, Justice Stevens stated: “Money is property; it is not speech.” *Id.* at 910 (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.”). He 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 911 (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.*, 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.*

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 914 (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. Notably, he left open the possibility that expenditures as well as contributions could be limited constitutionally (although he expressed considerable skepticism on that score).

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. The full significance of *Shrink Missouri* will emerge only gradually, however, as the opinion is interpreted in new campaign finance cases. The periodic updates of this handbook should help to alert you to key developments and new trends.

GIANT LOOPHOLES SUCCESSFULLY CLOSED: *MCCONNELL V. FEC*

In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"), 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 11 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, 124 S. Ct. 619 (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. The Court’s deference to the political judgments of Congress provides strong support for campaign finance laws at the state and local level that are designed to address problems similar to those addressed in BCRA.

The first two sections of this overview of *McConnell* focuses on the Court’s decisions upholding the loophole-closing provisions. At the end, is a schematic summary with bullets 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. 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 Committees before BCRA. Now, as *McConnell* explains, BCRA "takes national parties out of the soft-money business."

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;
- 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.

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
- like national committees, state and local committees cannot solicit soft-money contributions to 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.

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. 124 S. Ct. at 649. The Court also summarized evidence, including 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.* Applying the reduced standard of review reaffirmed in *Shrink Missouri, id.* at 655-59, 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.

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.* The Court made it clear that Congress was entitled to consider historical evidence and the context in which a particular practice takes place in deciding how to limit campaign fundraising. *Id.* at 666. 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 667.

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” was supposed to take positions

on issues. But 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.

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;
- 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.

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 30 days of a primary election or 60 days of a general election and that can be received by at least 50,000 people in the candidate's constituency. 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." Thus, a television commercial saying "The President is wonderful" or "The President is horrible" would be an electioneering communication if broadcast in October 2004.

"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." *Id.* at 689. The Court explained that the distinction was purely the product of statutory construction and not a constitutional requirement. *Id.* at 688. Because the electioneering communications provisions were neither vague nor overbroad, they were fully compliant with First Amendment requirements.

The Court upheld the following restrictions, among others:

- corporate and union money cannot be used for electioneering communications; and
- individuals, PACs, and other associations must disclose the source of funding for electioneering communications.

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.

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. 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.⁸ With regard to BCRA's coordination provisions, the Supreme Court:

- 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 Federal Election Commission redraft its regulations and held that the specific regulations that the FEC has adopted in response were not yet reviewable.

B. Miscellaneous

With regard to other provisions, the Supreme Court:

- Upheld a requirement that the sponsor of an election-related ad (whether or not broadcast) identify itself in the ad.
- Allowed the "Millionaire Provisions" to stand (held not yet reviewable).

⁸ After BCRA was upheld, the FEC again promulgated inadequate coordination regulations. Those rules and others inconsistent with the purpose of the statute were invalidated in *Shays v. FEC*, 2004 WL 2097498 (D.D.C. Sept. 18, 2004).

- 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.

CHAPTER TWO

DRAFTING LAWS TO SURVIVE CHALLENGE

In today's political climate, virtually any new state campaign finance law (and even some old ones) will be challenged in court. Some reformers may welcome 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 can also increase reformers' chances of success — whatever their goals. Careful drafting will enhance any law's chances 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 (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. 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 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.

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

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

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.

²See *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); *California 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.”), *aff’d on other grounds*, 164 F.3d 1189 (9th Cir. 1999). *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), *aff’d on other grounds sub nom. Daggett v. Commission on Gov’tal Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000).

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 two decades (as Part Two of this handbook shows). 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. To promote survival of bills or initiatives, drafters who use that phrase should make clear that they are “leveling up” by providing public funding, not “leveling down” by limiting spending. 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.

³See *California ProLife Council PAC*, 989 F. Supp. at 1294.

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.

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. 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.

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 quotations omitted).

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 cut 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 civil enforcement, more punitive measures can be considered later.

Although reformers outraged by the undue influence of money on 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

⁵*FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 254-55 (1986) ("Detailed record-keeping 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.").

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 benefit of the doubt to opponents of reform.⁶ A punitive approach can therefore be self-defeating.

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 regulations 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:

- C off-year fundraising bans;
- C mandatory limits on spending by candidates or their campaigns; and
- C monetary limits on independent expenditures.

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. 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.

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.”).

On the other hand, some jurisdictions may want to push the envelope of reform. In our first edition, we identified a contribution limit of less than \$1,000 as a “red flag” provision. Until the decision in *Nixon v. Shrink Missouri Gov’t 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 have been reinstated and other courts have upheld contribution limits of less than \$300 for legislative candidates in several states. Low contribution limits might not have come off our “red flag” list if states had not been willing to risk having such limits overturned.

Disclosure statutes that were not limited to “express advocacy” were red flags until recently. With the decision in *McConnell*, it is now clear that states can regulate campaign advertising in the pre-election period, even if the ads do not use “magic words.” In this case, 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 has yet to take such a case, but such efforts are still new and few. As the record in favor of such limits grows, the tide may turn on that front as well.

VII. Severability Clauses

A severability clause will express the drafters’ intent to preserve parts of a campaign finance law that are found 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.

CHAPTER THREE

THE FINANCING OF CANDIDATES' CAMPAIGNS

I. Financial Limits on Contributions

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

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

¹For example, the Federal Election Campaign Act provides a multi-page definition, explaining exactly what the term does and does not include. Under the federal statute, the term “contribution” includes:

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

2 U.S.C. § 431(8)(A). For an explanation of what does *not* count as a “contribution” under federal law, see *id.* § 431(8)(B). Michigan’s definition has received repeated attention in court. See *Dep’t of State Compliance & Rules Div. v. Mich. Educ. Ass’n-NEA*, 650 N.W.2d 120 (Mich. Ct. App. 2002) (holding that including “forbearance” in definition of contribution did not make definition unconstitutionally vague); *Mich. Educ. Ass’n v. Secretary of State*, 616 N.W.2d 234, 240 (Mich. Ct. App. 2000) (relying on the intent to influence an election in holding that money given to finance a recount qualified as a contribution under Michigan law). Kentucky’s definition of “contribution” was recently struck down in a poorly reasoned opinion holding that the definition impermissibly applied to the spending of self-financed candidates. *Anderson v. Spear*, 356 F.3d 651, 667 (6th Cir. 2004), *petition for cert. filed sub nom Stumbo v. Anderson*, No. 04-103 (U.S. July 24, 2004).

A. Individuals

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

TIPS

TIP: Before accepting the legitimacy of individual contribution limits, courts may require some evidence of corruption or the appearance of corruption in your state. The Supreme Court, in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), made it clear that state legislatures could rely for this purpose, at least in part and perhaps entirely, on the evidence and findings accepted in *Buckley*. In addition, the *Shrink Missouri* Court determined that the following types of evidence collectively sufficed to establish a governmental interest in combating perceived corruption:

- C 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;
- C newspaper articles and opinion pieces about the influence of money on politics;
- C judicial opinions from prior cases citing evidence of corruption related to campaign contributions; and
- C 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:

- C opinion polls about public attitudes toward money and politics;
- C direct mail or other advertising produced in support of candidates, which suggests that their opponents are improperly influenced by contributors;
- C invitations to fundraisers promising special access to public officials for major donors;
- C 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.*;

- C official documents from enforcement actions related to campaign contributions or other illegal payments to candidates or elected officials; or
- C statements from both current and former politicians and contributors who can comment on the influence of money on the legislature and who are willing to testify in court.

TIP: Do not starve the system. Candidates do need some money to run campaigns. If contribution limits are so low that candidates cannot amass the resources needed for effective advocacy, the limits will be struck down.

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

- C how much was given to candidates in recent pre-reform elections in amounts over the limits you propose;
- C how many contributions under the proposed limits would be required to replicate the amounts raised without the limits;
- C what fundraising techniques have been used in your jurisdiction and what additional techniques exist;
- C how much pre-reform competitive campaigns have been costing, for both incumbents and challengers;
- C how pre-reform campaigns have been run in your jurisdiction and what techniques are available to keep costs down;
- C examples of innovative candidates who were able to run effective campaigns for less money than their opponents;
- C studies or testimony showing that purchasing significant television time is not the key to an "effective" campaign;
- C technological advances that may reduce campaign costs;

- C whether contribution limits in other jurisdictions or at other times in your jurisdiction have had a severely detrimental effect on the amounts candidates can raise.

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

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

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

TIP: Consider introducing public funding to make up for private money you take out of the system. By doing so, you may temper claims that you are starving the system. See section V of this chapter for a discussion of public funding.

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

TIP: Consider adopting a mechanism to allow for acquisition of seed money. For example, higher contribution limits could be permitted for 20% of voluntary spending limits during the early part of a campaign.

TIP: Limits that apply per election, rather than per year or per cycle, have better prospects of survival. Limits that apply per year are more likely to precipitate claims of discrimination against

challengers, because incumbents are usually the only candidates who engage in substantial off-year fundraising. Limits that apply per election cycle may also give an advantage to incumbents, who are less likely to face challengers in a primary.

LEGAL ANALYSIS

In *Buckley v. Valeo*, the Supreme Court upheld a limit on contributions from individuals of \$1,000 per candidate per election.² 424 U.S. 1, 23-35 (1976). With minor exceptions, the ceiling applied whether the contribution was given directly to the candidate or a committee authorized by the candidate to accept contributions in support of his or her campaign or through an intermediary to either of those recipients in funds earmarked for the campaign. *Id.* at 23-24 & n.24. The Court held that the \$1,000 limit did not unjustifiably burden First Amendment freedoms, was not unconstitutionally overbroad, and did not unlawfully discriminate against challengers or minor-party candidates.

1. First Amendment

Before focusing on the specific contribution limits challenged in *Buckley*, the Court sought to determine the extent of the burden that limits generally would impose on contributors' First

²Self-financing candidates might be regarded as making contributions to their own campaign committees. *See Shrink Missouri*, 529 U.S. at 405 (Breyer, J., joined by Ginsburg, J., concurring); *Buckley*, 424 U.S. at 287 (Marshall, J., concurring in part and dissenting in part); *see also Buckley*, 519 F.2d 821, 854 (D.C. Cir. 1975), *rev'd*, 424 U.S. 1 (1976). But the Supreme Court in *Buckley* viewed self-financing strictly as an issue of *expenditures* for one's own campaign and struck down FECA's limit on such speech. *See* 424 U.S. at 51-54. Since then, lower courts have uniformly interpreted *Buckley* to preclude any limit on self-financing. Without any limit on self-financing, wealthy candidates have an enormous advantage over candidates who must rely on outside sources of funds to finance their campaigns, and there is now no lawful way wholly to eliminate that advantage. The advantage can be reduced by encouraging wealthy candidates to accept voluntary spending limits and by providing public financing to qualifying competing candidates. *See* section V of this chapter for further discussion of public financing and Chapter Five, section II(A), for further discussion of candidate self-financing. Congress attempted to address the advantage of self-funding candidates, with the so-called "millionaire's amendment" to the McCain-Feingold bill. The provision raises contribution limits for candidates facing high spending opponents.

Amendment freedoms and thus to determine the applicable standard of review. The Court concluded that “a limitation upon the amount that any one person or group may contribute to a candidate . . . entails only a marginal restriction upon the contributor’s ability to engage in free communication.” *Id.* at 20-21. According to the Court, a contribution served only as a “symbolic expression of support,” which did not change materially with the size of the contribution. *Id.* at 21. Because the contributor’s right to discuss candidates and issues remained otherwise unimpaired, the contribution limit “involve[d] little direct restraint on his political communication.” *Id.*

Buckley also determined that contribution limits would not have a dramatic effect on the recipients’ speech rights. On the record in that case, only 5.1% of money raised by candidates in 1974 was contributed in amounts greater than \$1,000. *Id.* at 21 n.3. Under those circumstances, the *Buckley* Court inferred:

The overall effect of the Act’s contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

Id. at 21-22. Because FECA’s contribution limits would not “prevent[] candidates and political committees from amassing the resources necessary for effective advocacy,” the Court determined that the limits would not have a severe impact on political dialogue. *Id.* at 21.

In *Shrink Missouri*, the Court reaffirmed *Buckley*’s assessment of the First Amendment impact of contribution limits. 528 U.S. at 387 (“We thus said, in effect, that limiting contributions left communication significantly unimpaired.”). The Court also found that, notwithstanding the effects of inflation over nearly a quarter of century, a limit of approximately \$1,000 would not prevent Missouri statewide candidates from amassing the resources needed for effective advocacy.

See id. at 395-96. The Court reached this conclusion even though more than 25% of the pre-reform funds raised by candidates for one statewide office were collected in amounts over the Missouri limit, *see* Brief of Senator Mitch McConnell, *et al.*, *Amici Curiae* in Support of Respondents, 1999 WL 367218, *28, *Shrink Missouri*, 528 U.S. 377, and even though total expenditures in the 1998 (post-reform) statewide primary elections actually dropped by approximately 89%, *see* 528 U.S. at 426 n.10 (Thomas, J., joined by Scalia, J., dissenting).

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

Over time, the *Buckley* Court’s articulation of the standard of review for First Amendment challenges to contribution limits generated considerable confusion and controversy. Until the Court decided *Shrink Missouri*, opponents of campaign finance reform had been arguing that such limits should be subject to the most strict scrutiny. But in *Shrink Missouri*, the Court expressly confirmed

that contributions limits require a less compelling justification than restrictions on expenditures. *See* 528 U.S. at 387.

Having recognized that contribution limits implicate First Amendment rights to some extent, *Buckley* continued its analysis with a review of the three governmental interests proffered in support of the \$1,000 cap: (1) preventing the reality and appearance of corruption; (2) equalizing “the relative ability of all citizens to affect the outcome of elections;” and (3) putting a brake on the skyrocketing costs of campaigns. 424 U.S. at 25-26. The Court determined without hesitation that the first interest sufficed as a constitutional justification for the contribution ceiling and that it thus did not need to decide whether the other two interests were adequate rationales for that restriction.³ As a consequence, “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”⁴ *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (“*NCPAC*”).

³Although 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.

⁴But several Justices have indicated a willingness to consider alternative rationales for campaign finance regulation. *See Shrink Missouri*, 528 U.S. at 401 (Breyer, J., joined by Ginsburg, J., concurring) (focusing on the values of fairness and democracy); *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 649 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) (arguing that campaign finance regulations tend to protect “equal access to the political arena”). The joint opinion authored by Justices Stevens and O’Connor in *McConnell v. FEC*, favorably cites Justice Breyer’s concurrence in *Shrink Missouri* in noting that “measures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate.” 124 S. Ct. 619, 656 (2003). For a discussion of the relationship between corruption and inequality, see David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994).

The Supreme Court's campaign finance cases have offered no consistent definition of "corruption" or the "appearance of corruption."⁵ Under *Buckley*, actual exchanges of money for political favors are clearly within the purview of "corruption." See 424 U.S. at 26-27 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."); see also *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) ("*Colo. Republican I*") (recognizing "the Government's interest in preventing exchanges of large financial contributions for political favors"). But the *Shrink Missouri* Court explained clearly that the concern about corruption is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." 528 U.S. at 389; cf. *NCPAC*, 470 U.S. at 497 ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.").⁶ It is clear after *Shrink Missouri* that contribution limits may be used to "address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery." 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28); *FEC v. Colo. Republican Fed. Campaign Comm.* 533 U.S. 431, 441 (2001) ("*Colo. Republican II*") (acknowledging that corruption

⁵See 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).

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

extends beyond explicit cash-for-votes agreements to “undue influence on an officeholder’s judgment”).

McConnell confirms that “corruption” means more than outright trades of votes for money. 124 S. Ct. at 660 (favorably citing *Shrink Missouri* and *Colorado Republican II*). Finding that the *McConnell* plaintiffs “conceive[d] of corruption too narrowly,” the Court commented: “Many of the ‘deeply disturbing examples’ of corruption cited by this Court in *Buckley* to justify FECA’s contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials.” 124 S. Ct. at 664 (citations omitted). The *McConnell* Court chided Justice Kennedy for a “crabbed view of corruption, and particularly of the appearance of corruption, [that] ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.” 124 S. Ct. at 665.

According to the Court:

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

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

Buckley equated the “appearance of corruption” with the appearance of “improper influence” or “impropriety” and the “potential for corruption.” 424 U.S. at 27, 28, 30. *Buckley* was quite clear that avoiding that appearance is “critical,” *id.* at 27 (quotation and citation omitted), even if the appearance is grounded not in evidence of actual corruption, but only in “the opportunity for abuse

inherent in the process of raising large monetary contributions,” *id.* at 30. The state may legitimately address the demoralizing effect of both the real and the “*imagined* coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.” *Id.* at 25 (emphasis added).

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

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

528 U.S. at 390 (internal citations omitted). In *McConnell*, the Court specifically held that the sale of access to office-holders gives rise to the appearance of corruption. 124 S. Ct. at 666 (“Implicit (and, as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence.”).

Proving a state interest in preventing real or perceived corruption is considerably easier after *Shrink Missouri*. 528 U.S. at 391 (“The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”). The idea that combating corruption justifies limits on large contributions is “neither novel nor implausible.” *McConnell*, 124 S. Ct. at 661. The Supreme Court has made it clear that states may rely on the evidence in *Buckley* to justify the adoption of state campaign finance laws. *See Shrink Missouri*, 528 U.S. at 391. Whether or not states may rely exclusively on that

evidence is not clear from the opinion, however, so wise reformers will collect additional evidence before enacting (or reducing) contribution limits.

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

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

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

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

Buckley separately discussed two overbreadth claims raised against the contribution limit, rather than treating them as part of the tailoring analysis. The Court recognized that “most large contributors do not seek improper influence over a candidate’s position or an officeholder’s action,” but held that “the truth of that proposition . . . does not undercut the validity of the \$1,000

contribution limitation.” *Id.* at 29-30. The Court simply deferred to Congress’s determination that the limit was necessary to safeguard against the appearance of impropriety.

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

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

Id. at 30 (quotation and citation omitted).

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

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

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

Before the decision in *Shrink Missouri*, many lower courts invalidated limits on individual contributions to candidates that were lower than \$1,000 per election.⁷ Since none of those courts

⁷See *Shrink Mo. Gov’t PAC v. Adams*, 161 F.3d 519, 523 (8th Cir. 1998) (invalidating Missouri’s \$275, \$525, and \$1,075 limits on contributions to state legislative and statewide

understood just how rigorous the test for an unconstitutionally low contribution limit really was, and certainly none of them applied the specific test articulated by the Supreme Court in *Shrink Missouri*, the authority of those cases is questionable at best. Since the decision in *Shrink Missouri*, no court has invalidated any individual contribution limit.⁸ See *Landell v. Sorrell*, 382 F.3d 91, 137-39 (2d Cir. 2004) (upholding Vermont's limits of \$200, \$300, and \$400 per two-year election cycle for candidates for state House, Senate, and statewide office); *Mont. Right to Life Ass'n, et al. v. Eddleman*, 343 F.3d 1085, 1092-96 (9th Cir. 2003) (upholding Montana's \$100, \$200, and \$400 limits on contributions to legislative candidates, statewide candidates other than governor and lieutenant governor, and candidates jointly filed for the offices of governor and lieutenant governor); *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002) (upholding Akron's \$100 limits on contributions to ward council members and \$300 limits on contributions to at-large members or Mayor); *Daggett v. Comm'n on Gov'tal Ethics & Election Practices*, 205 F.3d 445, 461-62 (1st Cir. 2000) (upholding Maine's \$250 limit on contributions to legislative candidates); *Shrink Mo. Gov't*

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

⁸In November 2000, California voters approved a ballot measure with contributions limits higher than those preliminarily enjoined in *California ProLife Council PAC*, 989 F. Supp. 1282.

PAC v. Adams, 204 F.3d 838, 840 (8th Cir. 2000) (upholding Missouri’s \$275, \$525, and \$1,075 limits on contributions to House, Senate, and statewide candidates); *Florida Right to Life, Inc. v. Mortham*, 2000 WL 33733256, *4-*6 (M.D. Fla. Mar. 20, 2000) (upholding Florida’s \$500 limit “even though candidates in Florida are raising fewer funds than they are capable of raising and fewer funds than were actually raised under previous limits”). Limits at even lower levels may now be constitutional, and many of the caps that were struck down before *Shrink Missouri* was decided would almost certainly survive now.

Both the Supreme Court opinion in *Shrink Missouri* and the subsequent lower court decisions upholding contribution limits provide some guidance as to how the new standard should be interpreted. The Supreme Court upheld Missouri’s limits even though the number of contested statewide primaries and the fundraising for all statewide primaries declined by approximately 90% in the first post-reform election cycle. *See Shrink Missouri*, 528 U.S. at 426 n.10 (Thomas, J., joined by Scalia, J., dissenting); *cf. Mortham*, 2000 WL 33733256, *4 (noting the nearly 20% decline in average amount raised in successful statewide cabinet campaigns and the more than 40% decline in average funds raised per voter). Even a very substantial reduction in the number of candidates running or the amount of funds raised is therefore plainly insufficient to defeat contribution limits, provided that the candidates who do run raise funds adequate for effective advocacy (and there is no evidence of systematic discrimination against any category of candidates). *See Shrink Missouri*, 528 U.S. at 396 (finding plausible the conclusion that “candidates . . . are still able to amass impressive campaign war chests”) (citation omitted). Moreover, when there are “instances where innovative candidates were able to run very ‘effective’ campaigns for less money than their opponents,” or evidence that expensive media is not cost effective, courts should be able to conclude that contribution limits will not lead to a system of suppressed political advocacy. *Mortham*, 2000 WL

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

Shrink Missouri had the benefit of post-reform data, as did the *Mortham* and *Eddleman* courts. When little or no such data are available, however, baleful predictions about the effects of contribution limits should be received with pointed skepticism. *See Daggett*, 205 F.3d at 460 (noting that “‘worst-case’ scenario statistics, which consider the historical funding pattern and discount any contribution made over the limit,” overpredict the loss of contributions). “It is the statistics distilled from experience” — such as cross-jurisdictional studies or studies of campaign finance systems over time — “that, far more than worst-case scenarios, should inform decisions as to proper contribution limits.” *Id.* at 462.

2. Equal Protection

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

In *Buckley*, the Court treated the discrimination claim with respect to major-party challengers separately from the claim of minor-party candidates. In the case of major-party challengers, the Court recognized that the contribution limits might have an adverse effect in some cases, where the

amounts that would have been raised over the limits would be important to the challenger's potential for success, but concluded that "the record provide[d] no basis for predicting that such adventitious factors will invariably and invidiously benefit incumbents as a class."⁹ 424 U.S. at 33; see *California ProLife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1291 (E.D. Cal. 1998) ("The commanded hesitancy, and the absence of evidence of the invidious discrimination that *Buckley* also demands, defeats plaintiffs' claim of discriminatory impact."), *aff'd*, 164 F.3d 1189 (9th Cir. 1999); *Driver v. Distefano*, 914 F. Supp. 797, 803 (D.R.I. 1996) ("[T]here is no evidence that the 'calendar year calculation' . . . is responsible for incumbents receiving more from individual donors than challengers receive.").

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

Where a record of class-wide discrimination *can* be established, equal protection claims may succeed. In *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312 (9th Cir. 1992) ("*SEIU*"), for example, plaintiffs alleged that contribution limits calculated on a fiscal year basis discriminated against challengers. Because the record showed that incumbents were essentially the only candidates to raise money in the off year, the Ninth Circuit found that measuring contribution limitations on a fiscal year basis invariably and invidiously

⁹The record evidence showed major-party challengers were generally well known in their community, that they were often incumbents in other offices, and that they were capable of raising large sums for campaigning. *See Buckley*, 424 U.S. at 32 & nn.34-36. The record also established that incumbents raised twice as much money as challengers in sums over the limits, so that FECA might actually have the "practical effect of benefitting challengers as a class." *Id.* at 32 & n.37.

discriminated against challengers as a class. *See id.* at 1316-18, 1321; *see also Shrink Missouri*, 528 U.S. at 404 (Breyer, J., joined by Ginsburg, J., concurring) (calling for scrutiny of contribution limits at levels that “insulate[] legislators from effective electoral challenge”).

B. PACs

Jurisdictions that impose monetary limits on contributions from individuals often impose such limits on contributions from PACs as well. The amount of the limit may or may not be the same as that imposed on individual contributions. Under federal law, for example, small PACs (common “political committees”) are subject to the contribution limits applicable to individuals, whereas PACs that have numerous financial supporters and give to multiple candidates (“multicandidate political committees”) are permitted to make larger contributions. Campaign finance legislation should carefully define the PACs that are governed by its provisions.¹⁰

TIPS

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

TIP: Consider structuring limits on PAC contributions to enhance the voices of small donors.

You may want to allow PACs that receive small amounts of money from numerous donors to make larger contributions than a single individual.

LEGAL ANALYSIS

¹⁰Being a PAC need not be a stated purpose of a non-profit corporation, as set forth in its articles of incorporation, for the organization to qualify as a political committee. *See League of Women Voters v. Davidson*, 23 P.3d 1266, 1275 (Colo. App. 2001).

Buckley upheld a \$5,000 per election limit on contributions to candidates from “multicandidate political committees.” *See* 424 U.S. at 35-36 (sustaining 2 U.S.C. § 441a(a)(2)(A)). The *Buckley* plaintiffs had challenged the provision as discriminatory against *ad hoc* associations or small PACs, as opposed to established interest groups, because FECA defined a “multicandidate political committee” as a group that had been registered as such with the FEC for at least six months, received contributions from more than 50 persons, and (except for state political parties) contributed to at least five candidates for federal office. *See* 2 U.S.C. § 441a(a)(4). The Court brushed aside the claim, holding that the provision enhanced opportunities for group participation in the political process, rather than impairing freedom of association, and at the same time prevented circumvention of the limits on individual contributions by ensuring that individuals would not just call themselves committees. *See Buckley*, 424 U.S. at 35; *see also Daggett*, 205 F.3d at 462 (“[L]imitations on contributions from groups are a necessary adjunct if limits on individual contributions are to be effective.”); *see also Landell*, 382 F.3d at 139-42 (upholding PAC limits identical to Vermont’s individual limits); *Alaska Civil Liberties Union*, 978 P.2d at 625 (upholding Alaska’s \$1,000 annual limit on PAC contributions to all candidates as not different in kind from *Buckley*’s \$5,000 PAC limit); *Florida Police Benevolent Ass’n—Political Action Comm. v. Florida Elections Comm’n*, 430 So. 2d 483, 485 (Fla. Dist. Ct. App. 1983) (recognizing anti-evasion interest and interest in “preserving the integrity of the electoral process by encouraging the active, alert responsibility of individual citizens” in upholding \$1,000 limit on contributions by PACs). The only lower courts to have struck down limits on contributions from PACs are those that also invalidated limits on individual contributions under the pre-*Shrink Missouri* standard.¹¹ The limit upheld in *Shrink Missouri* applied to both individuals and PACs.

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

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

Unfortunately, the only appellate court to decide a challenge to a small donor PAC provision was the Eighth Circuit. That court has never upheld a contribution limit unless the Supreme Court has given it no choice. In *Russell*, the Eighth Circuit applied strict scrutiny to Arkansas’ small donor PAC rule and struck it down on First Amendment grounds. The court refused even to consider the state interest in promoting citizen participation and determined that the higher limit on contributions to candidates was not narrowly tailored to prevent the reality or appearance of corruption. *See Russell*, 146 F.3d at 572. Under *Shrink Missouri*, the Eighth Circuit plainly applied the wrong standard of review, and *Russell*’s reasoning is directly at odds with the Supreme Court’s decision in

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

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

C. Political Parties

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

TIPS

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

LEGAL ANALYSIS

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

¹²The district court in *Russell* upheld the small donor PACs, recognizing that “restricting small donor PACs to receiving no more than \$25 in annual contributions from only individuals greatly diminishes the potential for actual or perceived corruption that can accompany contributions from approved [large donor] PACs.” 978 F. Supp. 1221, 1227 (E.D. Ark. 1997). The trial court also noted that, the provisions applicable to the two kinds of PACs reflected “the judgment of the voters that these . . . PACs have ‘differing structures and purposes,’ and that different forms of regulation are permitted.” *Id.* (citing *California Medical Ass’n v. FEC*, 453 U.S. 182, 201 (1981)).

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

In June 2001, the U.S. Supreme Court confirmed its support for the anti-evasion rationale in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado Republican I*"), which upheld the federal limits on coordinated expenditures. The Court stated in no uncertain terms that "all Members of the Court agree that circumvention is a valid theory of corruption." *Id.* at 456. The Court reasoned that, without the limit, wealthy donors would have an added incentive to evade existing contribution limits by channeling funds through the political parties. The Court noted that the "tally" system — whereby candidates get credit for funds they raise for the party, which in turn supports the candidates' campaigns — was already "a sign that contribution limits are being diluted and could be diluted further if the floodgates were open." *Id.* at 459 n.22.

Colorado Republican II reaffirms earlier Supreme Court decisions upholding restrictions designed to prevent circumvention of other provisions of an integrated campaign finance scheme. *See, e.g., Austin*, 494 U.S. at 664 (upholding a ban on independent expenditures directly from corporate treasuries, where corporations could otherwise "circumvent the Act's restriction [on corporate contributions] by funneling money" through each other's treasuries); *California Medical Ass'n*, 453 U.S. at 197-99 (recognizing that Congress limited contributions to PACs "in part to prevent circumvention of the . . . limitations on contributions [to candidates]" and that "this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*"); *Buckley*, 424 U.S. at 38. Lower courts

have also recognized the anti-evasion rationale in a variety of contexts. *See Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 649 (6th Cir. 1997) (acknowledging a “legislative determination that aggregate limitations are necessary to prevent manipulation of permanent committees in order to evade the Act’s \$1,000 limitation on direct contributions to any one political candidate”); *Vote Choice v. DiStefano*, 4 F.3d 26, 35 (1st Cir. 1993) (recognizing “the state’s interest in enforcing its contribution limits”); *SEIU*, 955 F.2d at 1322 (noting that a transfer ban can serve the state’s interest in preventing circumvention of contribution limits only if the underlying limits are valid).

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

Some states have also limited the amounts that parties can give to candidates, and such caps have been upheld as a means of preventing evasion of individual contribution limits. *See Missouri Republican Party v. Lamb*, 270 F.3d 567, 570 (8th Cir. 2001) (“[I]t is not necessary for the state to show that circumvention is actually occurring in Missouri, for the factual record developed in *Colorado [Republican] II* suffices to justify Missouri’s conclusion that means other than its earmarking provision are necessary to prevent circumvention.”), *cert. denied sub nom. Missouri Republican Party v. Connor*, 122 S. Ct. 2329 (2002); *Citizens for Responsible Government State PAC*, 60 F. Supp. 2d at 1095, *vacated as moot sub nom. Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Missouri Libertarian Party v.*

Conger, 88 S.W.3d 446, 447-48 (Mo. 2002) (*per curiam*) (upholding Missouri’s limits under the state Constitution); *Alaska Civil Liberties Union*, 978 P.2d at 625-26. With respect to the numerical limit placed on contributions by political parties, the standard articulated in *Nixon* applies. See *Lamb*, 270 F.3d at 571 (citing the *Nixon* standard in upholding Missouri’s limits on political party contributions, even “though they are much lower than those upheld in *Colorado IP*”).

D. Loans

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

TIPS

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

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

LEGAL ANALYSIS

For more than 20 years, FECA has treated loans as contributions from both the lender and any guarantor. See 2 U.S.C. § 431(8)(A) (defining a “contribution” to include a “subscription, loan, advance, or deposit of money”); *id.* § 431(8)(B)(vii)(I) (defining a bank loan as “a loan by each endorser or guarantor”); see also *FEC v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1114-16 (9th Cir. 1988) (treating post-election guarantee of personal loan to candidate as a campaign contribution). Opponents of campaign finance reform have evidently recognized that the Supreme

Court's analysis of contribution limits in general applies equally to loans, loan guarantees, and extensions of credit, and they have not specifically challenged FECA as to those provisions.

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

The Sixth Circuit recently invalidated Kentucky's \$50,000 limits on loans by a candidate to his or her own campaign. *Anderson v. Spear*, 356 F.3d 651, 672-73 (6th Cir. 2004), *petition for cert. filed sub nom. Stumbo v. Anderson*, No. 04-103 (U.S. July 24, 2004). The court concluded that such “loans are candidate expenditures, unless and until they are repaid. . . . [A]nd limitations on campaign expenditures are prohibited by *Buckley*.” *Id.* According to the Sixth Circuit, the vulnerability of the candidate to pressure by interested post-election contributors is mitigated by Kentucky's contribution limits. *Id.* at 673. The court also found “not reasonable” any perception that the money would “line the pockets” of the candidate, even though the contributions would

ultimately go to the candidate as an individual. *Id.* The State is seeking Supreme Court review of this decision.

II. Source Limits on Contributions

Source limits are restrictions on *who* may give to candidates, as distinguished from caps on the *amount* that may be contributed by any one donor. The permissible kinds of donors vary from jurisdiction to jurisdiction. Limits have been placed on contributions to candidates from individuals, PACs, political parties, corporations, unions, and various other types of donors.¹³ The rationales for different source limitations vary depending upon the different characteristics of the contributors in question.

TIPS

TIP: The only source limit on contributions to candidates explicitly upheld by the Supreme Court is a ban on contributions directly from the general treasuries of corporations. A ban on contributions from the treasuries of banks and labor unions would very likely be sustained as well. Under federal law, however, those entities may make contributions from separate segregated funds, which pool money from individuals with certain close connections to the organization.

TIP: Consider carefully the cumulative impact of source limits and any other restrictions that may make it more difficult for candidates to raise sufficient funds for effective advocacy.

¹³Some jurisdictions define a class of “persons” whose contributions are similarly limited. For example, FECA provides:

The term “person” includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

2 U.S.C. § 431(11). Campaign finance legislation should clearly define each category of contributors subject to regulation.

Buckley did not consider the cumulative impact of the various contribution limits challenged in that case. Once the individual contribution limits were sustained, the others were upheld as reasonable means of preventing evasion of the basic limits. But hostile courts may use the alleged cumulative impact of various limits as an excuse to invalidate campaign finance reform.

LEGAL ANALYSIS

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

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

A. Geographic Limits on Contributions

Geographic limits restrict the amount of money a candidate may raise from particular geographic areas, usually those outside the candidate’s district or state. Proponents of such restrictions ordinarily see them as a way to make office holders “more attuned to district interests” and thus to “enhance[] the perceived legitimacy of the political system.” Bruce E. Cain, *Moralism*

and Realism in Campaign Finance Reform, 1995 U. Chi. Legal F. 111, 133 (noting that “there is no reason to think that disallowing out-of-district contributions is a sensible reform for every democracy”). Courts have split on the constitutionality of geographic limits on contributions.

TIPS

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

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

LEGAL ANALYSIS

To date, three courts have decided constitutional challenges to bans on out-of-district contributions.¹⁴ In *VanNatta v. Keisling*, the Ninth Circuit Court of Appeals applied less than strict

¹⁴In *Whitmore v. FEC*, 68 F.3d 1212, 1216 (9th Cir. 1996), the Ninth Circuit suggested that out-of-district limits might be unconstitutional but did not reach the question.

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

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

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

Most recently, Vermont's statute limiting out-of-state contributions to 25% of a candidate's funds failed constitutional scrutiny for reasons similar to those articulated in *VanNatta*. The Vermont district court was not persuaded that the problem with out-of-state contributions was a matter of their source, rather than the size of the contributions. Moreover, the court recognized that "many people outside of Vermont have legitimate stakes in Vermont politics, and therefore have a right to participate in Vermont elections" and ruled that they must have some access to the political process there. *Landell*, 382 F.3d at 147-49.

B. Corporations and Unions

The federal government bans corporations and unions from making contributions in connection with elections or political party processes for selecting candidates.¹⁵ See 2 U.S.C. § 441b¹⁶. Many states have similar provisions. The purpose of such bans is to keep the large sums of money amassed with the regulatory assistance of the government from distorting the political process.

TIPS

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

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

¹⁵Regulations 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).

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

LEGAL ANALYSIS

Since 1907, corporations have been prohibited from making contributions to candidates for federal office. That ban, as subsequently broadened, is now codified in FECA. *See* 2 U.S.C. § 441b(a) (banning contributions and expenditures by corporations, banks, and labor unions). A challenge on the federal ban on corporate contributions to candidates did not reach the Supreme Court until recently, when it was upheld in *FEC V. Beaumont*, 123 S. Ct. 2200 (2003) (upholding the ban even as applied to nonprofit corporations). *See also Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) (upholding the federal ban on corporate contributions). The federal ban on union contributions, enacted in 1947, has never been challenged directly, but *Beaumont* and *Mariani* would likely be extended to cover that restriction as well.

Even before *Beaumont*, the Supreme Court recognized that states have a compelling interest in seeing that the “substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization . . . not be converted into political ‘war chests’ which could be used to incur political debts from legislators.” *FEC v. National Right to Work Comm.*, 459 U.S. 197, 207 (1982) (“*NRWC*”). Similar rhetoric appeared in the Court’s decision in *United States v. UAW*, 352 U.S. 567 (1957), a case filed shortly after Congress also banned labor union contributions and expenditures.¹⁷ *See id.* at 585 (describing the government’s effort “to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital”). The Supreme Court has also acknowledged the need “to protect the individuals who have paid money into a corporation or union for purposes other than the support of

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

candidates from having that money used to support political candidates to whom they may be opposed.”¹⁸ *NRWC*, 459 U.S. at 208.

Although federal law bans direct corporate and union contributions, FECA allows corporations and unions to establish “separate segregated funds,” which may solicit and collect money from specified corporate- or union-affiliated individuals and make contributions to candidates, much as PACs do. *See* 2 U.S.C. § 441b(b)(4). Availability of the funds preserves the individuals’ right to associate with each other in supporting political candidates. At the same time, “[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors’ support” for the views advanced with their money. *Austin*, 494 U.S. at 660.

The Court has recognized the First Amendment rights not only of individuals contributing to separate segregated funds but also of corporations and unions as separate entities. *See Austin*, 494 U.S. at 657 (“The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (noting that the value of speech entitled to First Amendment protection “does not depend upon the identity of its source, whether corporation, association, union, or individual”). Indeed, the Court has recognized that even requiring political activity to be conducted through such funds burdens corporate and union freedom of expression. *See Austin*, 494 U.S. at 657; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) (“*MCFL*”) (plurality opinion). The *Austin* Court nevertheless found a ban on corporate independent expenditures narrowly tailored to serve the

¹⁸Unionized workers receive separate protection under Supreme Court decisions that allow employees who do not want to support the union’s political activities to demand a refund of the portion of any mandatory union fee that is used for such purposes. *See Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

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

Without the option of separate segregated funds, however, a ban becomes more constitutionally questionable. For Justice Brennan, for example, the availability of a separate segregated fund was clearly essential to the constitutionality of Michigan's ban on independent expenditures by corporations. *See Austin*, 494 U.S. at 669 n.1 (Brennan, J., concurring) (distinguishing the mandatory use of separate funds from the complete foreclosure of any opportunity for political speech). In an unpublished decision, a federal district court invalidated a New Hampshire ban that did not allow for separate segregated funds. *See Kennedy v. Gardner*, 1999 WL 814273, *2-*4 (D.N.H. Sept. 30, 1999).

Under federal law, non-profit corporations are generally treated like for-profit corporations in terms of campaign finance regulations. For example, the corporation at issue in *NRWC* was a non-profit, single issue, ideological corporation; yet the Court held it bound by the usual rules for the financing of separate segregated funds. *See* 459 U.S. at 208. The Court has, however, carved out a narrow exception for *expenditures* by certain non-profit organizations that do not accept contributions from business corporations. *Compare MCFL*, 479 U.S. at 263-64 (defining the exception), *with Austin*, 494 U.S. at 662-65 (applying ban on corporate expenditures to non-profit corporation that accepted for-profit corporate contributions).

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

Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 646 (6th Cir. 1997) (“[A] distinction between nonprofit and for-profit corporations simply does not apply to regulation of direct corporate contributions.”). Following *Beaumont*, portions of the decisions in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (invalidating North Carolina’s ban on corporate contributions and expenditures, because the ban applied equally to for-profit and nonprofit corporations), are no longer good law.

C. Lobbyists and Regulated Industries

Another common source limit is a ban on contributions from lobbyists to candidates. Contributions made by lobbyists, who meet directly with public officials about legislation or administrative action affecting the lobbyists’ clients at the same time they are delivering checks to the candidates, raise at least the appearance of corruption. For similar reasons, some states have attempted to limit or ban contributions from particular industries, especially regulated industries or government contractors. Such restrictions are sometimes known as “pay-to-play” regulations, because they seek to prevent deals whereby contributors “pay” officials for the opportunity to “play” with the government or in a government-regulated arena.

TIPS

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

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

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

LEGAL ANALYSIS

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

Two cases out of California have resolved challenges to outright bans on lobbyists' contributions. The law at issue in the first case, *Fair Political Practices Comm'n v. Superior Ct. of Los Angeles County*, banned all contributions from all lobbyists. The California Supreme Court recognized that the state did have a compelling interest in “rid[ding] the political system of both apparent and actual corruption and improper influence” but struck down the statute as overbroad. 25 Cal. 3d 33, 45 (1979) (“While either apparent or actual corruption might warrant some restriction of lobbyist associational freedom, it does not warrant total prohibition of all contributions by all lobbyists to all candidates.”).²⁰ The Court was concerned that the statute banned contributions even

¹⁹For example, Massachusetts limits lobbyists to a \$200 individual contribution to candidates, as opposed to \$500 for non-lobbyists. *See* Mass. Gen. Laws Ann. ch. 55, § 7A (West 2002).

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

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

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

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

completely, but only while the legislature is in session. *See, e.g.*, Conn. Gen. Stat. § 9-333l(e) (2002). To that extent, the bans are really time limits on contributions and not restrictions on lobbyists *per se*. *See Kimbell v. Hooper*, 665 A.2d 44, 51 (Vt. 1995) (treating session ban on lobbyists' contributions as time limit); *see also* section III(A) ("Legislative Session Bans") below.

Barker v. Wisconsin Ethics Bd., 841 F. Supp. 255 (W.D. Wis. 1993), invalidated a ban on lobbyists volunteering for campaigns, finding that the ban impermissibly abridged the lobbyists' associational rights. *See id.* at 260. Contributions by lobbyists were not at issue; indeed, the statute that outlawed volunteering left lobbyists free to give financial contributions to campaigns. *See id.* at 257.

A similar interest has been held to justify bans on political contributions from groups that contract with or are regulated by particular agencies or officers of the government. *See, e.g., Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making campaign contributions to politicians who award government underwriting contracts); *Casino Ass'n of Louisiana v. State*, 820 So. 2d 494 (La. 2002), *cert. denied*, 529 U.S. 1109 (2003) (upholding ban on contributions from riverboat and land-based casinos); *Gwinn v. State Ethics Comm'n*, 426 S.E.2d 890 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance); *Soto v. State*, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976) (upholding ban on contributions from members of liquor industry). But courts have not spoken consistently on this type of regulation. Compare *Penn v. Foster*, 751 So. 2d 823 (La. 1999) (*per curiam*) (invalidating ban on contributions from members of the gambling industry), *cert. denied sub nom. Louisiana v. Penn*, 529 U.S. 1109 (2000), with *Lee v. Commonwealth*, 565 S.W.2d 634 (Ky. Ct. App. 1978) (invalidating ban on property owner contributions to candidates for property tax assessor, based on state Constitution). The regulations are more likely to be invalidated if courts perceive that a jurisdiction is attempting to keep a particular industry from expressing its viewpoint in the political process, *see Penn*, 751 So. 2d at 834 (Calogero, C.J., concurring), rather than addressing a documented history of corruption, *see id.* at 848-50 (Knoll, J., dissenting); *see also Blount*, 61 F.3d at 945; *Soto*, 565 A.2d at 1096-97.

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

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

D. Government Employees

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

Legal Analysis

The Supreme Court has repeatedly upheld restrictions on the participation of governmental employees in political campaigns, *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act prohibition against federal employees taking an active part in political management or in political campaigns), including through making contributions to other government employees who may be candidates for office, *Ex parte Curtis*, 106 U.S. 371 (1882).

Most recently, the Eighth Circuit reaffirmed that a city could ban contributions to candidates for mayor or city council from certain city employees. *Int'l Ass'n of Firefighters v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *see also Reeder v. Kansas City Bd. of Police Comm'ners*, 733 F.2d 543 (8th Cir. 1984) (upholding ban on contributions by officers or employees of the Police Department).

E. Inter-Candidate Transfers

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

TIPS

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

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

LEGAL ANALYSIS

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

SEIU also recognized the possibility that inter-candidate transfers would be used by legislative leaders, or those wanting to become leaders, to secure the loyalty of recipients. *See* 747 F. Supp at 591 (“The evidence before the court has demonstrated that contributing to other candidates is a recognized means of seeking and maintaining leadership positions in California's legislative bodies.”). On appeal, the Ninth Circuit assumed for the purposes of the case that “preventing corruption or the appearance of corruption by political power brokers” is an important state interest, but the court rejected the transfer ban as overbroad. 955 F.2d at 1323 (internal quotations omitted). Reasoning that “[t]he potential for corruption stems not from campaign contributions per se but from large campaign contributions,” the court invalidated the ban. *Id.*

F. Bundling

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

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

Bundlers, such as EMILY's List (an organization that collects contributions for pro-choice Democratic women candidates for governor and Congress), have been very successful in encouraging individuals who otherwise might not make contributions to pool resources in support of candidates of their choice. Consequently, restrictions on bundling have implications for individual rights of speech and association. See Frank J. Sorauf, *Politics, Experience and the First Amendment: The Case of American Campaign Finance*, 94 Colum. L. Rev. 1348, 1364 (1994) ("At the very least, such [bans] cut[] very close to the rights of association and political activity of many Americans."). This concern counsels that reformers move cautiously in this area. Further, there are as yet no cases dealing with bundling, so we cannot be certain how courts will treat the practice.

TIPS

TIP: Consider instituting reporting requirements on bundling, in lieu of banning the practice altogether. Information that might be required includes the identity of the bundler; for what political or other interests they solicit; a list of the names, addresses, occupation, employer, and spouse's employer of all individual contributors; and the total amount the bundler collects for each candidate. This approach allows individuals to continue to use bundlers to convey political contributions, while disclosing to the public the interests to which the candidate might be indebted.

LEGAL ANALYSIS

Reformers who seek to justify regulations on bundling by appeal to the interest in preventing bundlers from using large collections of funds to wield undue influence on candidates tend to regard bundling as an attempt to evade the spirit, if not the letter, of individual contribution limits. Although the anti-corruption rationale is firmly established, the anti-evasion rationale has so far been

recognized only where actual evasion is a possibility. *See California Medical Ass’n*, 453 U.S. at 197-99 (plurality opinion) (upholding limits on donations to PACs as a means to avoid circumvention of individual limits on contributions to candidates); *Buckley* 424 U.S. at 27 (accepting the anti-evasion rationale in upholding \$25,000 aggregate annual limit on individual contributions). Reformers who seek to restrict bundling thus seek an extension of the anti-evasion rationale, when valid individual contribution limits are in place. *See* Fred Wertheimer & Susan W. Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1155 (1994) (“In order for contribution limits to work, it is essential to enact effective anti-bundling provisions.”).

Another oft-repeated complaint about bundling is that it is a hidden practice. Without any regulation of bundling, a chief executive from a corporation can deliver a hundred checks from his employees and their spouses, in amounts just below the reportable limit, and no-one — not the regulatory agency, not the press, not the voters — will be able to tell that these seemingly individual contributions are, in effect, one giant contribution from the corporation. *See* Geoffrey M. Wardle, Note, *Political Contributions and Conduits After Charles Keating and EMILY’s List: An Incremental Approach to Reforming Federal Campaign Finance*, 46 Case W. Res. L. Rev. 531, 557-58 (1996) (“Bundling undermines the legitimacy of elections by enabling political committees and wealthy or well-connected individuals to exercise significant influence over elections without any notice of such influence to the electorate.”).²¹ The only party certain to appreciate the connection is

²¹The FEC currently has reporting requirements that call for “conduits or intermediaries” to report to the candidate and the FEC all contributions over \$200 by name, occupation, and employer. 11 C.F.R. § 110.6(c)(1)(iv)(A) (2002). A recipient has to list intermediaries who have handed over one or more contributions that exceed \$200 in a calendar year and must include the total amount received from such intermediaries. *See id.* § 110.6(c)(2)(i). Bundlers can get around current reporting requirements by soliciting contributions of only \$199, which still must be reported, *see id.* § 100.6(c)(1)(iv)(A), but without identifying the contributors’ occupation or employer, which often

the recipient, because the bundler delivers the collected checks in such a way as to make the corporation's involvement exceedingly clear. One could argue that the state has a compelling interest in exposing this practice, because non-public contributions are more likely to inspire preferential treatment than contributions subject to public scrutiny.

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

Reporting requirements for bundlers may well be a solution. Reasonable reporting requirements for contributions to candidates are constitutional. *See Buckley*, 424 U.S. 64-68; *see also* Chapter Eight, section I ("Reporting Requirements"). Information that could be required includes the identity of the bundler; what business, political, or other interests they work on behalf of; a list of the names, addresses, occupation, employer, and spouse's employer of all individual contributors; and the total amount the bundler delivers to each candidate. This approach would expose corporate bundlers, who often ask employees to make contributions in their spouse's name, so that the contribution does not appear to be coming from a source connected to corporation. *See* Ky. Rev. Stat. Ann. § 121.180(3)(a)(2) (Baldwin 2000) (requiring that all candidates for state-wide office list contributors' names, employers, and spouse's employers for contributions over \$100); *cf.* Citizen's Research Foundation, *New Realities, New Thinking: Report of the Task Force on Campaign Finance Reform 23* (1997) (suggesting reporting requirements, including identification of the political interest the bundler seeks to advance). The relationship between bundlers and

provide crucial links to the bundler. Further, even the \$200 reporting requirements are rarely followed. *See* Wardle, *supra*, at 561 n.189 (citing newspaper sources.)

candidates could then be closely monitored, and if specific instances of corruption were noted, reformers could use this as evidence to institute stronger reforms.

Another way to tailor bundling restrictions is to ban only bundling from entities that also employ registered lobbyists. *See* H.R. 3, 103d Cong. § 401 (1993). The theory here is that bundlers who have a legislative or executive agenda for which they will be lobbying present a greater appearance of corruption than those who are not engaged in lobbying, because only those who lobby will be asking for specific action from legislators or executive officials in exchange for the bundling.

This approach has been criticized, perhaps rightly, for making an artificial distinction between bundlers. After all, whether they lobby or not, bundlers can be said to wield a certain influence as a result of the large sums of money they deliver to officeholders. *See* Wardle, *supra*, at 566-67 (arguing that even bundlers without express lobbying arms exert legislative influence on lawmakers, because the lawmakers know that the bundlers raised campaign contributions and know of the bundlers' publicly announced agenda).

G. Aggregate Limits on PACs or Special Interest Sources

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

TIPS

TIP: Compile evidence that money from PACs buys access to legislators and that legislators are influenced by such PAC money. Evidence showing that PACs, or the organizations that sponsor PACs, are likely to have a related lobbying entity might go to this point. Evidence of candidates receiving money from PACs, and then helping a PAC position, by voting or by tactical maneuvering within committees, would also be helpful. The idea is to boost one of the arguments made in support

of aggregate PAC limits — that there is something inherently corrupting about candidates receiving a large proportion of their campaign funds from PACs with a legislative or executive agenda.

LEGAL ANALYSIS

Four cases have addressed aggregate PAC limits. See *Montana Right to Life v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003); *Citizens for Responsible Government*, 60 F. Supp. 2d at 1090-92; *Kentucky Right to Life*, 108 F.3d 637; *Gard v. Wisconsin State Election Bd.*, 456 N.W.2d 809 (Wis. 1990). *Gard* contains the most extensive discussion of those limits and provides a useful review of potential state interests.

Gard recognized the anti-evasion rationale for aggregate PAC limits, finding them necessary to prevent a PAC that has reached its contribution limit from spawning new PACs and giving *ad infinitum*. See 456 N.W.2d at 820-24, 826; see also *Citizens for Responsible Government*, 60 F. Supp. 2d at 1090. But *Gard* took its concern with circumvention of PAC limits one step farther — upholding an overall 65% limit on all political committee contributions to candidates, *including political party contributions*. Without such an overall limit, according to the court, PACs would send their money to state party committees, who would then pass it on to the candidates in unlimited amounts.²² See 456 N.W.2d at 824-26.

The Wisconsin Supreme Court also stated that: “The aggregate limit encourages candidates to seek a broad base of support by allowing many people to make smaller contributions. Encouraging smaller contributions from a greater number of contributors is a legitimate legislative goal.” *Id.* at 825. *Buckley* indirectly supported this goal in acknowledging that \$1,000 individual

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

contribution limits force candidates to raise smaller amounts of money from greater numbers of contributors. *See* 424 U.S. at 21-22.

The *Gard* court accepted the overarching premise that collecting a large percentage of campaign funds from special interest groups, such as PACs, in itself raises the appearance of corruption. *See* 456 N.W.2d at 823; *see also Kentucky Right to Life*, 108 F.3d at 650 (“Furthermore [the statute] attempts to eliminate perceived corruption in the political process by limiting the total amount of funds gubernatorial candidates may accept from groups with vested interests.”). The Wisconsin Supreme Court was willing to accept as evidence of apparent corruption the simple fact that candidates in Wisconsin were getting larger and larger percentages of their contributions from PACs. *See Gard*, 456 N.W.2d at 822. The *Gard* court also accepted as evidence the legislative rationale for the limit, which was based on policy recommendations of a committee commissioned by the Wisconsin legislature to recommend changes in the law. *See id.* at 813-16.

Reformers may also wish to collect evidence of the undue influence of PAC contributions. The *Eddleman* court found “damning evidence” in a “letter from a state senator urging legislators to vote for a bill in order to keep insurance industry PAC money in the Republican camp.” 343 F.3d at 1096-97; *see also id.* at 1097 (citing testimony that “PACs funnel money into state legislative campaigns only when their interests are at stake in order to ‘get results’”). Statistical evidence that PAC money affects candidates’ voting has not been readily available, but there is evidence of PAC influence on tactical maneuvering within committees. *See* Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* 163-70 (1992) (noting that, when controlling for factors such as party affiliation, constituent interests, and ideology, there is little support for notion that PAC contributions influence the roll-call votes of legislators;²³ but acknowledging that PAC influence is

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

strongest in narrow, less visible issues and can be seen to a certain extent in legislative maneuvering²⁴). Of course, legislators' testimony about the deleterious effect of special interest money on legislative decision making, if available, would be helpful.

Gard dismissed the two major arguments made against implementation of aggregate limits: that they are covert spending limits,²⁵ and that they burden the associational rights of PACs or political party committees who wish to give to candidates *after* the candidate has reached the aggregate limit for such limits. Aggregate political committee limits do not impermissibly cap spending, *Gard* held, because a candidate is free to spend unlimited amounts from individual contributions. *See* 456 N.W. 2d at 819. Further, the associational rights of late-giving PACs are not impinged because a candidate can always return some money to other political committees in order to receive a new donation. In essence, the choice is being given to the candidate whether he wishes to associate with a PAC.²⁶ *See id.* at 825; *see also Eddleman*, 343 F.3d at 1098 (“What matters is that so long as a candidate wants a PAC involved in funding his campaign, Montana’s law does not infringe on the PAC’s associational freedoms.”). In any event, the court held, PACs and parties

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

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

²⁵The 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.

²⁶In upholding FECA’s public financing scheme, the Supreme Court has implicitly acknowledged that contributors have no right to give money to a candidate who chooses not to accept the contribution.

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

III. Time Limits on Fundraising

Time limits on fundraising generally take one of two forms: (1) bans on fundraising while the legislature is in session (“session bans”) or (2) bans on soliciting or accepting contributions during delimited periods, usually immediately after or more than a year before elections (“post-election” or “off-year fundraising bans”).²⁷ The judicial reception to such limits has been mixed.

A. Legislative Session Bans

A “legislative session ban” prohibits fundraising by candidates while the relevant legislature (Congress, state assembly, city council) is in session. Existing state session bans govern either legislators alone or both legislators and state-wide officials.²⁸ Sometimes the ban applies only to contributions from lobbyists. Reformers usually propose these bans for two reasons: first, to combat the appearance of corruption raised when legislators accept money from contributors *at the*

²⁷In addition, Kentucky has imposed a 28-day ban on gubernatorial fundraising immediately before primary or general elections as a means of effectuating Kentucky’s trigger provisions. In *Gable v. Patton*, 142 F.3d 940, 949-51 (6th Cir. 1998), the Sixth Circuit upheld the time limit and compared its effect to that of caps on contributions:

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

Id. at 951. In *Anderson v. Spear*, the 6th Circuit struck down the 28-day window as applied to write-in candidates. 356 F.3d at 675.

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

same time that they are considering the contributors' legislative agenda, and second, to free legislators from the rigors of fundraising during the time that they are supposed to be concentrating on legislating.

TIPS

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

TIP: A session ban applicable only to officeholders may have a better chance of survival.

Some courts have struck down session bans that apply to challengers, because contributions given to persons who are not in office may not carry the same appearance of corruption as those given to sitting legislators. Further, there is no "time-saving" interest where challengers who are not holding office are concerned, because they have no official duties from which to be distracted by the demands of fundraising.

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

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

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

- C correlations between contributions during the legislative session and action on legislation affecting the contributors;

- C a poll disclosing public perceptions of fundraising by office holders during the legislative session; and
- C testimony from legislators about the amount of time they spend fundraising during the session.

LEGAL ANALYSIS

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

Assuming conservatively that strict scrutiny will ordinarily be applied to session bans, states defending such bans will have to demonstrate a “compelling” interest in implementing the

restriction. The first interest that reformers typically advance is the one specifically sanctioned by *Buckley*: reduction of corruption or the appearance of corruption. Session bans advance this interest, because the temporal proximity between a contribution and a legislator's acting on the contributor's legislative agenda gives rise to a heightened perception of corruption. Courts that have considered session bans have recognized the legitimacy of this concern. *See Bartlett*, 168 F.3d at 715-16; *Arkansas Right to Life*, 983 F. Supp. at 1234; *Emison*, 951 F. Supp. at 722-23; *Maupin II*, 922 F. Supp. at 1420; *Dodd*, 561 So. 2d at 267 (“We commend the legislature for making an effort to eliminate the problems or perceived problems associated with campaign contributions solicited or accepted by incumbents during a session.”).

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

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

Reformers may therefore advance the time-saving interest as a supplement to (but not substitute for) the traditional corruption-prevention rationales.²⁹

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

Courts are split on the question whether session bans may be extended to challengers as well as incumbents. Some courts have reasoned that banning contributions to challengers does not address the heightened appearance of corruption caused by contributions to incumbents, because a challenger has no power to advance the contributor's agenda when the contribution is made. *See Emison*, 951 F. Supp. at 723; *Maupin II*, 922 F. Supp. at 1422 ("What possible corrupting influence or arrangement can be prevented by prohibiting campaign contributions to persons with no power to interfere with the integrity of the legislative process?"). But, as the Fourth Circuit has recognized, "sticks can work as well as carrots, and the threat of contributing to a legislator's challenger can supply as powerful an incentive as contributing to that legislator himself." *Bartlett*, 168 F.3d at 716;

²⁹The Eighth Circuit has acknowledged the time-saving interest in upholding a state law providing for public financing of elections, but has not addressed the rationale in the context of session limits. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) ("[T]he State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and for campaigning. It is well settled that [this] government interest [is] compelling."). There is academic support for the time-saving justification as well. *See* Vincent Blasi, *Spending Limits and the Squandering of Candidates' Time*, 6 J. L. & Pol'y 123 (1997); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).

see also Winborne v. Easley, 523 S.E.2d 149, 154 (N.C. App. 1999). As for the time-saving rationale, candidates who do not hold office do not have any governmental work from which to be diverted. It is the incumbents' work to govern. It is the challengers' job to mount campaigns against incumbents.

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

Session bans that apply only to incumbents present different issues. On the one hand, they may have a better chance of being upheld in court. *See Emison*, 951 F. Supp. at 723 (enjoining a session ban's application to challengers and declining to rule on its application to incumbents, because there were no incumbents challenging the ban).³⁰ On the other hand, as *Bartlett* noted, “if

³⁰The court in *Arkansas Right to Life* initially denied the plaintiffs' motion for summary judgment with respect to session limits applying only to incumbents. *See* 983 F. Supp. at 1234. But upon later renewal of the motion, the court determined that the session ban was nevertheless insufficiently tailored to prevent corruption because “it [did] not take into account the fact that corruption can occur any time, and that only large contributions pose a threat of corruption.” 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998).

challengers and incumbents were required to play by different sets of campaign finance rules, few reforms would be likely to win legislative enactment.” 168 F.3d at 717.

To be found narrowly tailored, session bans must also leave enough time for legislators to raise the money necessary for effective advocacy and for contributors to associate financially with candidates. *See id.* at 714-18 (upholding a North Carolina ban, where the legislature was in session for one or two months during election years and for longer periods during off-years);³¹ *Arkansas Right to Life State Political Action Comm. v. Butler*, 29 F. Supp. 2d 540, 551-553 (W.D. Ark. 1998) (invalidating ban on fundraising during any legislative session as well as 30 days before and after regular sessions); *Maupin II*, 922 F. Supp. at 1419 (invalidating a session ban that lasted 4½ months, because cutting off funds for ⅓ of an election year prevented candidates from amassing the resources necessary for effective advocacy); *Alaska Civil Liberties Union*, 978 P.2d at 630-31 (invalidating a ban that allowed fundraising only two months before the primary and two and a half months before the general election); *Dodd*, 561 So. 2d at 264 (invalidating a session ban that applied to both regular and special sessions, which may be called at any time, because it imposed a “potentially . . . limitless” period of time during which money could not be raised). There is no bright-line test for determining which bans are too long or too indefinite, but long breaks between legislative sessions, or substantial reprieves from the ban prior to elections, may help to defuse concern about candidates’ ability to raise enough money to get their message across.

Whether a session ban will prevent candidates from raising necessary funds will also depend in no small part on what monetary contribution limits govern the jurisdiction. Courts may be better disposed to session bans if no contribution limits exist, or if the limits are relatively high, because

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

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

Finally, in considering whether a session ban is narrowly tailored, courts may question the assumption that all contributions to incumbents during the legislative session carry the same potential for corruption. To address that concern, reformers may wish to focus their session bans only on contributions by lobbyists, or entities that employ lobbyists, because those contributors are advocating their agenda directly to office holders.³² Knowing that “[e]lected officials must ration their time among those who seek access to them and they commonly consider campaign contributions when deciding how to ration their time,” *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992), courts may concede that contributions from lobbyists during the legislative session buy — or at least appear to buy — disproportionate access and undue influence. *See Bartlett*, 168 F.3d at 716; *Kimbell*, 665 A.2d at 51 (upholding a ban on lobbyist contributions to sitting legislators while the legislature is in session).

B. Post-Election and Off-Year Fundraising Bans

Post-election and off-year fundraising bans are not nearly as common as session bans, perhaps because they raise difficult questions about exactly when campaigns begin or ought to begin.³³ How long before an election a campaign “naturally” begins depends upon the office sought, the strength of the incumbent, and the amount of money needed to run in that jurisdiction, among

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

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

other things. Reformers cannot limit the length of campaigns if the restriction affords candidates insufficient time for essential fundraising.

TIPS

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

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

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

LEGAL ANALYSIS

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

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

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

As with session bans, the asserted interests better support off-year fundraising restrictions on incumbents than on challengers. But challengers generally do not declare their candidacies far in advance of an election and thus tend to begin fundraising relatively late. As a result, off-year fundraising bans generally have a greater impact on incumbents than challengers, reducing rather than exacerbating the inherent advantages of incumbency.³⁴ Whether this general rule will apply in the case of any particular off-year fundraising limit must be determined through empirical research in the affected jurisdiction.

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

IV. Spend-Down Provisions

Reformers sometimes seek to promote more competitive elections by requiring elected officials to divest themselves of unspent campaign funds shortly after winning an election. The

³⁴Because most off-year fundraising is conducted by incumbents, reformers may be tempted to introduce off-year fundraising bans as a means of "leveling the playing field" between incumbents and challengers. But efforts to equalize candidate resources, by cutting off funds to better financed candidates, are suspect under *Buckley*. On the other hand, in jurisdictions where incumbents substantially out-raise challengers during off years, the different fundraising patterns can serve to defeat an equal protection claim that the off-year fundraising ban discriminates against challengers.

requirement is intended to discourage incumbents from amassing campaign war chests with which they can scare off challengers long before the next election. The provision is sometimes known as a “spend-down” provision, because candidates will generally choose to spend the funds in the last days of a campaign, rather than returning or relinquishing them after the election. The measure may also be known as a “turn over” or “carry forward” provision.

TIPS

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

LEGAL ANALYSIS

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

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

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

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

Most recently, the Sixth Circuit invalidated a spend-down provision that required candidates to turn over unspent funds to the state. *Anderson v. Spear*, 356 F.3d at 667-70. The right of the state to demand return of unspent public funds was not challenged. *Id.* at 668. But as applied to private funds, the provision was found to be a *per se* taking for public use without compensation, in violation of the Fifth Amendment. *Id.* at 669-70.

V. Public Financing

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

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

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

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

A. Full Public Funding

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

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

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

³⁸Annotated model legislation for “Clean Money/Clean Elections Reform” is available on Public Campaign’s website (<http://www.publiccampaign.org/publications/2001modelbill.htm>).

³⁹See *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).

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

TIPS

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

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

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

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

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

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

TIP: The source of public funds may affect the amount of funding available for distribution.

Most states pay for their programs through an income tax check-off provision under which taxpayers do not increase their tax liability.⁴² A handful of states rely on an income tax add-on in which

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

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

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

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

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

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

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

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

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

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

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

- C *Collection of signatures on a petition.*
- C *Collection of a specified dollar amount of qualifying contributions.* This system generally includes a limit on the amount of each contribution that can count toward qualification (e.g., \$200 or less) and often restricts the source of contributions to individuals.⁴⁴ Limiting the size of qualifying contributions allows candidates without access to wealthy donors to raise the qualifying amount and ensures a showing of broad support.
- C *Votes in a prior election.* Care must be taken in a vote-based system not to snare non-major party candidates in a Catch-22, where they need public funding to reach potential voters but are unable to qualify for public funding until they have won substantial votes in an election. In the federal system, for instance, minor party presidential candidates receive a reduced grant based on the percentage of the vote received in the previous election. They are, however, permitted to raise private money up to the spending limit placed on major party candidates who accept full public funding.⁴⁵ Candidates of new parties do not receive any money before the election.

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

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

⁴⁵See 26 U.S.C. § 9003(c).

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

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

LEGAL ANALYSIS

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

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

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

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

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

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

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

B. Partial Grants and Matching Funds

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

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

TIPS

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

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

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

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

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

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

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

LEGAL ANALYSIS

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

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

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

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

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

TIPS

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

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

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

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

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

TIP: Incentive schemes that encourage small-donor 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.

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

LEGAL ANALYSIS

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

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

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

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

TIPS

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

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

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

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

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

LEGAL ANALYSIS

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

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

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

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

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

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

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

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

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 may also 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. For example, an organization

¹All 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. That view was repudiated by *McConnell v. FEC*, 124 S. Ct. 619 (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). It is not yet clear whether

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.²

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. 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) (plurality opinion); *id.* at 203-04 (Blackmun, J., concurring in part and concurring in the judgment).⁴ The

post-*McConnell* courts will similarly limit the definition of “political committee” to entities engaged in conduct that may itself be regulated, such as electioneering communications.

² A Washington Court of Appeals found that dues collected by unions do not count as contributions if collected from members that are unaware 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 labor union not a political committee subject to disclosure laws because its membership dues did not constitute contributions).

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].” *Landell v. Sorrell*, 118 F. Supp. 2d 459, 488 (D. Vt. 2000) (quoting *Buckley*, 424 U.S. at 38, in upholding Vermont’s \$2,000 limit on contributions to PACs), *aff’d*, 382 F.3d 91 (2d Cir. 2004); *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*, 2000 WL 33733256, *6 (M.D. Fla. Mar. 20, 2000) (“[T]his Court’s determination that Florida’s limit on contributions to candidates is permissible also resolves Plaintiffs’ challenge to Florida’s [\$500] limit on contributions to political committees.”); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 625 (Alaska 1999) (upholding a \$500 limit).

If PAC contribution limits are justified only as 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. The Eighth Circuit, at least, has voiced skepticism about the possibility that contributions to PACs, by themselves,

³For 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 (1976) (per curiam) (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

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.

contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate”).

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

II. Independent Expenditure Committees

A distinction is sometimes made 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 part).

TIPS

TIP: Because PACs that contribute to candidates have a constitutional right to make independent expenditures as well, there is no reason for campaign finance laws to create separate entities called “independent expenditure committees.” Indeed, we recommend *against* creating a separate regulatory category for independent expenditure committees, because doing so may raise constitutional issues regarding contributions to such committees that would otherwise not arise.⁵

LEGAL ANALYSIS

When a committee is entitled to make both contributions and independent expenditures, a cap on contributions to the committee can 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

⁵As is explained below, some courts have concluded that committees making only independent expenditures are exempt from contribution limits applicable to PACs, but there is no

where a single entity registers as both a PAC and an independent expenditure committee), *aff'd*, 146 F.3d 558 (8th Cir. 1998); *Mott v. FEC*, 494 F. Supp. 131, 137 (D.D.C. 1980) (upholding federal limits on contributions to committees that may make both contributions and independent expenditures, citing the anti-evasion rationale).⁶

Courts have split on whether the government can limit contributions to committees that are entitled to make contributions to candidates (or coordinated expenditures) but as a matter of practice fund only independent expenditures. Since *Buckley* prohibits the government from limiting the amount that an individual can spend directly on independent expenditures, it can be argued that the anti-circumvention rationale simply does not apply to individual's contributions to committees that in turn make only independent expenditures.⁷ 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). At least two courts, citing Justice Blackmun, have struck down limits on contributions to independent expenditure committees, though the Supreme Court recently

reason for campaign finance reformers to create special exceptions for any committee that is legally *entitled* to make contributions as well as independent expenditures.

⁶In *Fla. Right to Life, Inc. v. Mortham*, the court declined to consider a challenge to a \$1,000 limit on contributions given for the purpose of making independent expenditures, because the plaintiff was already subject to a \$500 limit on contributions to PACs. 2000 WL 33733256, at *6 (M.D. Fla. Mar. 20, 2000) (unpublished decision).

⁷The anti-circumvention rationale would, however, support a ban on corporate or union contributions to committees that make independent expenditures that corporations and unions are barred from making directly, such as BCRA-style "electioneering communications." See Chapter 6 for a discussion of bans on corporate and union independent expenditures.

vacated the judgment in one case and ordered the lower court to reconsider in light of *McConnell. N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418, 433-34 (4th Cir. 2003), *vacated and remanded*, 124 S. Ct. 2065 (2004); *San Franciscans for Sensible Gov't v. Renne*, No. C 99-02456 CW, slip op. (N.D. Cal. Sept. 8, 1999), *aff'd*, No. 99-16995, slip op. (9th Cir. Oct. 20, 1999).

Another court, however, has upheld limits on contributions to groups that make only independent expenditures. *Fla. Right to Life, Inc. v. Mortham*, 1998 WL 1735137, *5-*6 (M.D. Fla. Sept. 30, 1998) (accepting anti-circumvention rationale and finding that \$1,000 limit did not restrict the committee's ability to engage in independent expenditures) (unpublished decision). Also, in a discussion it later retracted in an amended opinion, a Ninth Circuit panel expressed skepticism about the immunity of candidates to the influence of wealthy independent spenders. *Lincoln Club of Orange County v. City of Irvine, Cal.*, 274 F.3d 1262, 1268-69 (9th Cir. 2001), *superseded and amended by* 292 F.3d 934 (9th Cir. 2002). In its original opinion upholding limits on independent expenditures by PACs, the court reasoned that even under strict scrutiny, the limits were justified by the concern for improper influence, the appearance of or actual evasion of limits on contributions to candidates, and the potential for *quid pro quo* corruption. *Id.* The panel noted the likelihood that candidates would know the identity of their contributors, and the resulting potential for evasion of limits, and actual or perceived corruption. *Id.* On petition for rehearing, the panel issued an amended opinion that retracted its findings on constitutionality, and remanded the case to the lower court to apply strict scrutiny.⁸

⁸The *Lincoln Club* panel ruled that because the ordinance affected expenditures and not merely contributions, the district court erred in using a lesser level of scrutiny. 292 F.3d at 938. The Ninth Circuit found that the ordinance burdened speech by barring expenditures unless the

Reformers in the states should be aware that the regulation of independent expenditure committees is a very hot topic at the federal level. After a highly publicized and contentious process, the FEC declined in May 2004 to adopt new rules governing independent expenditure committees whose “major purpose” is to influence federal elections. The most controversial among the defeated proposals would have subjected such committees to the same regulations as PACs, including the \$5,000 contribution limit. As noted above, there is a serious question under current constitutional jurisprudence whether the government can restrict contributions to committees that do not contribute to candidates. Various reformers have announced plans to pursue litigation in an attempt to force the FEC to adopt regulations in this area, and the *Leake* case will also reach this issue on remand to the Fourth Circuit, so there may soon be important new precedents regarding independent expenditure committees.

III. Political Parties

As a recent Supreme Court decision 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 recent passage of the Bipartisan Campaign Reform Act (“BCRA,” formerly 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

plaintiff would dramatically alter its organizational structure, in which case its associational interests would be heavily burdened. *Id.* at 938-39.

engaged in federal election activities, and the Supreme Court has upheld the new approach. 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, more 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 v. FEC*, 124 S. Ct. 619 (2003), 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 a 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. Before

BCRA, donors avoided federal contribution limits by giving to state and local party committees, who then used the money (in coordination with the national party) to support federal candidates.

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:

- C how much money political parties have raised in the past;
- C what percentage of funds raised in previous years would be affected by the new limits;
- C what methods political parties have used to raise money in the past;
- C what additional fundraising methods are available;
- C the percentage of registered voters who contribute to the parties and the average amounts of their contributions;
- C income and wealth of registered voters in the jurisdiction; and
- C 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 Three, section V, for 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 can 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. 124 S. Ct. 619. After *McConnell*, states can presumably limit all contributions to state and local party committees, just as the federal government can limit all contributions to national committees.

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 could also transfer soft money to state and local parties, which had even looser restrictions on using it for mixed-purpose activities. Soft money could also 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 generally McConnell*, 124 S. Ct. at 648-50, 652-54.

Congress responded by “tak[ing] national parties out of the soft-money business.” *Id.* at 654. The core of BCRA’s soft-money provisions is the new 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 cannot give any money to national party committees for any purpose, individuals cannot give more than \$25,000 to a national party committee for any purpose, and PACs cannot give more than \$15,000 to a national party committee for any purpose.⁹ Other provisions of BCRA are aimed at preventing circumvention of the soft-money ban; for example, federal elected officials cannot 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. This is the regime *McConnell* upheld.

⁹Even 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 \$5,000 limit on individual contributions and ban on corporate soft-money contributions on reasoning similar to *McConnell*’s, but striking down limit of \$5,000 on value of professional services individual professionals could donate); *Landell*, 382 F.3d at 140-41; (\$2,000 limit on contributions to parties appropriate to prevent corruption and evasion of individual contribution limits); *Alaska Civil Liberties Union*, 978 P.2d at 625 (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.

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*, 124 S. Ct. at 658. This 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 655-59; *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*, 124 S. Ct. at 650, 661. 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 662. 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 661-62.

But even when soft-money contributions are *not* directed for the direct benefit of 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 federal candidates and officeholders in exchange for large soft-money donations.” *Id.* at 664. 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). 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 667-68.

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 668-69, 682-83. 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 must 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 683.

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

- All contributions to parties can be regulated and limited;
- Corporations and unions can be prohibited from giving any money to parties (stated another way, corporations and unions can 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 can 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. 124 S. Ct. at 652, 663, 666.

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 661-62; *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].”). 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.*, 124 S. Ct. at 649 n.13.

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. The Court of Appeals in *Landell* upheld a Vermont statute treating all national, regional, state, county, and town committees of one party as a single entity for purposes of contribution limits. 382 F.3d at 143-44 (noting District Court’s comment that federal law also treats state, county, and town committees as a unit for some purposes).

Finally, in setting contribution limits for parties, advocates must not reduce contributions below a level at which the parties can function effectively. In upholding contribution limits, courts have applied the *Shrink Mo.* test: limits cannot be “so radical in effect as to render political association ineffective, drive the sound of [a political party’s] voice below the level of notice, and render contributions pointless.” *Id.* at 485 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397 (2000)). *Landell* upheld a \$2,000 limit after considering evidence of how the parties’ fundraising and spending had changed after the limit was imposed, 382 F.3d at 140-41,

while *Jacobus* upheld a \$5,000 limit on the simple grounds that *Buckley* had permitted a \$5,000 limit on contributions to PACs, 338 F.3d at 1117.

IV. A Note on Candidate Contributions to Non-Political 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 the candidate contributions. In *Fla. Right to Life, Inc. v. Lamar*, the Eleventh Circuit Court of Appeals found the ban unconstitutional. 273 F.3d 1318, 1325-29 (11th Cir. 2001). What is important to note is that the 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 non-political organizations for the purpose of securing electoral support. *Id.* at 1326 n.10. *McConnell* upheld BCRA's limitations on the amounts federal candidates and office holders can solicit on behalf of charitable organizations. 124 S. Ct. at 682-83.

CHAPTER FIVE

LIMITS ON CANDIDATE SPENDING

I. Voluntary Spending Limits

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 mechanisms that encourage candidates to accept voluntary spending limits as a way of limiting the influence of big money on campaigns, preserving office holders' time for legislative duties (instead of fundraising), encouraging candidates to run for office, and increasing political dialogue.

Most jurisdictions adopting voluntary spending limits have used some form of public subsidy as an inducement for candidates to accept spending limits. Others have enacted variable contribution limits — or “cap gaps” — under which candidates who agree to the spending limit are allowed to accept larger private contributions. Some jurisdictions have sought to publicize whether a candidate has accepted spending limits, through “informed voter provisions” on the ballot, in official voter guides, or on advertising. Many jurisdictions include a mix of these or other incentives.

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.

A key component of most voluntary spending limit programs is the “trigger” — a mechanism that gives candidates who have agreed to spending limits additional money (or the opportunity to raise additional money) if their non-participating opponent spends or receives money over a certain “triggering” amount or the opponents’ supporters independently spend over a certain amount. These triggers prevent a kind of unilateral disarmament that would result if one candidate were bound by the agreed limit while the opposition's spending went unchecked.

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.³ Before setting limits, talk to elected officials, unsuccessful challengers, political consultants, and others who may provide guidance about the costs of campaigning for various different offices.

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: Inducements should be focused on benefiting participants, not punishing non-participants. Subsidies to participating candidates, for instance, enhance the speech of participants without burdening the ability of non-participating candidates to raise money for their campaigns. By contrast, a program that attempted to limit the sources of contributions available to non-participating candidates was found to be an unconstitutional burden on speech.

TIP: Inducements to accept spending limits must be generous enough to encourage candidate participation without being so enticing as to become irresistible. Examples of

³Jurisdictions 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).

incentives include: subsidies, matching grants, increased contribution limits, free statements in voter guides, and free television time.⁴ 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 participate.⁵

TIP: If cap gaps are used to encourage participation, contribution limits for non-participating 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: If a trigger is used to encourage participation, structure the system to minimize the risk that non-participating 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.

LEGAL ANALYSIS

A. The Legal Standard

The first question courts will ask when spending limits are challenged is whether the limits are truly voluntary. If the spending limit scheme is genuinely voluntary, it does not burden First Amendment rights and is therefore constitutional. If the scheme is voluntary in name only, but coercive in actual effect, the state will have to prove that the scheme satisfies strict scrutiny.

⁴States can provide free television time only if they operate or control a television station.

⁵For an explanation of cap gaps and other specific inducement mechanisms, see Section I(B) of this chapter.

1. The Coercion Analysis

In *Buckley*, the Supreme Court held that a system of spending limits, accepted voluntarily in exchange 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 v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550-51 (8th Cir. 1996); *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*, 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 v. Jones*, 876 F. Supp. 916, 928 (W.D. Ky. 1995) (“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*,

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.

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 non-participants] 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 non-participating candidate”) (internal quotation omitted); *Wilkinson*, 876 F. Supp. at 929 (5-1 disparity in contribution levels, combined with 2-1 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 non-participating 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 4-1 matching scheme would be coercive, because once the trigger lifted the ceiling, a non-participating candidate could not keep up in the fundraising race).

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 non-participating candidates is likely to be upheld as long as the basic contribution limit permits non-participating candidates to raise sufficient funds for effective advocacy. *See Vote Choice*, 4 F.3d at 38 (finding “nothing inherently penal” in Rhode Island’s 2-1 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 2-1 cap gap because non-participant’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 5-1 cap gap because the \$100 non-participants’ limit was “palpably penal”).⁷ Similarly, one court found a statute that limited non-participating 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 non-participating candidates who exceeded the voluntary spending limit).

⁷The law at issue in *Scully* was superseded by a later ballot initiative with higher contribution limits, but absent the new initiative, the ruling that the basic limit was too low would not have survived the Supreme Court’s decision in *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000).

2. 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)). One court has also acknowledged a state interest in promoting political dialogue among the candidates. *See Wilkinson*, 876 F. Supp. at 928. The Eighth Circuit has 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 2 to 1 was found to be narrowly tailored.”).

B. Specific Inducements to Accept Limits

States have used a variety of systems to encourage candidates to accept spending limits. Most schemes include several mechanisms, such as variable contribution limits (cap gaps), public funds, triggers that lift the spending limit when the opposition spends over a certain

⁸The court 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 recent decision in *McConnell v. FEC* suggests that courts should begin to look more favorably on the interest in democratic participation. 124 S. Ct. 619, 656 (2003) (“[M]easures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate.”). 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).

amount, or “informed voter provisions,” notifying the public which candidates have accepted the limits.

1. 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 do not participate. 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 participating and non-participating candidates. Rhode Island, 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 non-participating candidates may accept. *See Vote Choice*, 4 F.3d at 37-40.

The mere existence of a cap gap should not present a constitutional problem.⁹ Variable contribution limits will raise a serious First Amendment concern, however, if the base limit is so low that non-participating candidates are hamstrung in their attempts to raise funds and thus coerced into participating. *Compare Vote Choice*, 4 F.3d at 38 (describing the \$1,000 limit for non-participating candidates as constitutional), *with Cal. ProLife Council PAC*, 989 F. Supp. at 1299 (describing \$100, \$250, and \$500 limits for non-participating candidates as unconstitutionally low), *and Wilkinson*, 876 F. Supp. at 929 (holding that \$100 limit for non-participating candidates is too low). (Both *Cal. ProLife Council PAC* and *Wilkinson* were decided before the Supreme Court held in 2000 that states could impose contribution limits lower

⁹*But see Cal. ProLife Council PAC*, 989 F. Supp. at 1296 (finding evidence in a cap gap that the basic contribution limit was not narrowly tailored to prevent corruption); *Wilkinson*, 876 F. Supp. at 930 (same). Although the reasoning of these courts 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.

than those in the federal law. It is not clear that those cases remain good law.) If the limit placed on non-participating candidates is not unconstitutionally low, the additional amount that participating candidates are allowed to raise will generally be regarded as an acceptable regulatory incentive to accept spending 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 5-1 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 if the gap is too large. The *Wilkinson* court invalidated Kentucky's variable contribution limits in part because, combined with the state's 2-1 matching program, the 5-1 cap gap created a disparity of 15-1 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 transformed the "carrot" that is offered to publicly financed candidates into a "'stick' used upon privately-financed candidates." *Id.* at 930.

2. Public Funding

States have selected a variety of public funding schemes to induce candidates to agree to spending limits. The cash forms of public funding range from direct subsidies to matching funds to tax credits, and some systems involve a mix of these. *See Rosenstiel*, 101 F.3d at 1546 (involving tax credit for contributions to participating candidates and a direct subsidy). Other states, Rhode Island in particular, provide free television time on public and community access

stations to candidates who agree to public funding. *See Vote Choice*, 4 F.3d at 40-41. Still others have included, usually (but not always) along with another form of funding, a free statement in the official voters' guide or a statement on the ballot that the candidate has complied with the spending limit provisions.¹⁰

Since *Buckley* upheld the federal presidential campaign finance system, 424 U.S. at 57 n.65, courts have generally approved public subsidies offered in exchange for an agreement to accept spending limits. *See Gable*, 142 F.3d at 948-49 (upholding matching fund system); *Rosenstiel*, 101 F.3d at 1550 (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*, 876 F. Supp. at 929.

3. 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 non-participating 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. As discussed below, triggers based on the independent spending of parties other than the candidate raise distinct constitutional issues.

¹⁰For a more extensive discussion of public financing options see Chapter Three, Section V, and Elizabeth Daniel, *Subsidizing Political Campaigns: The Varieties & Values of Public Financing* (Brennan Center 2000), which may be downloaded from the Center's web site: www.brennancenter.org.

a. Spending by Non-Participating Candidates

Triggers are mechanisms aimed at ensuring that all viable candidates can compete in a world where mandatory spending limits are considered unconstitutional. *See generally* Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems That Include “Triggers” Are Constitutional*, 24 J. Legis. 223 (1998). Courts have generally upheld triggers that provide financial benefits to participating candidates when candidates who opt out spend over a specified amount, describing them as 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); *Rosenstiel*, 101 F.3d at 1554; *Wilkinson*, 876 F. Supp. at 927-28.

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 non-participating 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

¹¹The 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.

Under the Kentucky scheme considered in *Gable*, the spending limit is lifted when the non-participating 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).

In Arizona, the spending limit is lifted when a non-participating candidate exceeds the spending limit. The participating candidate then receives public funds to match the non-participant's spending, up to three times the initial spending limit. Ariz. Rev. Stat. § 16-952(A)-(B) (1998).

The triggering provisions in Arizona, Minnesota, and Kentucky were attacked as unconstitutionally 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. And a trial court recently denied a preliminary injunction motion aiming to halt Arizona's trigger. *Ass'n of American Physicians & Surgeons v. Brewer*, No. CIV 04-0200-PX-EHC, slip op. at 10 (D. Ariz. July 8, 2004) ("AAPS").¹⁰

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.

¹⁰ A copy of the unpublished opinion is on file at the Brennan Center.

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 non-participation.” 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 activated by the spending of a non-participating candidate. 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 (6th Cir. 2004), *petition for cert. filed sub nom Stumbo v. Anderson*, No. 04-103 (U.S. July 24, 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. The Commonwealth of Kentucky has asked the Supreme Court to review the decision.

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. *See Daggett*, 205 F.3d at 463-65 (upholding the matching funds trigger in Maine’s Clean Election Act).

The *Daggett* court 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*, No. CIV 04-0200-PX-EHC, slip op. at 9 (quoting *Daggett* favorably). 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 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. *Daggett* also recognized that the vitality of *Day* may be open to question in light of the more recent Eighth Circuit decision in *Rosenstiel* (upholding a trigger for candidate expenditures). *See Daggett*, 205 F.3d at 464 n.25.

4. Informed Voter Provisions

One of the incentives that have been explored as a means to encourage voluntary acceptance of a spending limit 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.

a. 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* suggested, however, that *any* official labeling would be “most troubling,” 74 F. Supp. 2d at 57, 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* 205 F.3d at 470. 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.¹² *See Colo. Right to Life Comm., Inc. 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 Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).¹³

These rulings are consistent with case law involving other ballot notations. The Supreme Court has recently 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

¹²California’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.

¹³A copy of the unpublished opinion is on file at the Brennan Center.

speech”).¹⁴ *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.

b. 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.

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

¹⁴Scholarly literature is also critical of ballot notations. See Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 Va. L. Rev. 1533, 1566-81 (1999) (arguing that such provisions create too much power for interest groups and may contribute to voter confusion and alienation); see also 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”).

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. (footnote omitted).¹⁵ 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 candidate 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 Ct.*, 73 Cal. Rptr. 2d 70, 72-73 (Cal. Ct. App. 1998).

¹⁵The *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.

c. 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.

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).

The imposition of mandatory spending caps is still vulnerable to constitutional challenge. *Buckley* struck down such ceilings in federal law, and there is no lower court precedent upholding mandatory limits in the states. In August 2004, the Second Circuit ruled that *Buckley* does not represent a per se ban on mandatory spending limits, and that Vermont had demonstrated compelling state interests in imposing its limits, but the panel sent the case back to the District Court to determine whether the limits were narrowly tailored to serve those interests. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004). As of this writing, the Supreme Court is being asked to review a Tenth Circuit decision, *Homans v. Albuquerque*, 366 F.3d 900 (10th Cir.), *petition for cert. filed* No. 05-___ (U.S. Sept. 22, 2004), striking down Albuquerque’s spending limits. If the Supreme Court takes the case, it will likely rule – reaffirming the decision in *Buckley* or overruling it – by the summer of 2005. If the Supreme Court declines to hear the Albuquerque case, the Vermont case will ultimately go back up on appeal, and if the spending

limits are upheld, the Supreme Court will likely revisit *Buckley* and its analysis of mandatory expenditure limits at that time.¹⁶

TIPS

TIP: The Supreme Court has struck down mandatory limits on how much money candidates and their campaigns can spend in an election. Enact mandatory spending limits only if you are prepared to litigate a test case.

TIP: A jurisdiction interested in defending the constitutionality of mandatory spending limits must build a record in its support that differs significantly from the one considered in Buckley.¹⁷ Reformers should attempt to establish facts that undermine Buckley’s analysis of expenditure limits as a means of combating real and apparent corruption and that establish state interests not considered in Buckley that support enactment of the limits.

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

¹⁶*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.”). Recent cases have suggested that some Justices are prepared to reconsider this aspect of *Buckley*, but they are still a minority on the Court.

¹⁷*See e.g., 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, 1288 (1994) (identifying facts suggesting that *Buckley*’s conclusion about spending limits “should not be considered settled law”). Proponents of the Vermont mandatory limits appear to have persuaded two appellate judges that the facts in *Landell* were materially different from those in *Buckley*. *See Landell*, 382 F.3d 91 (discussed in Section B below).

already in place — such as contribution limits and incentives for voluntary spending limits — are insufficient to address the asserted governmental interests.

*TIP: Mandatory spending limits may be more likely to survive constitutional challenge if they take into account actual spending patterns and campaign costs.*¹⁸

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.¹⁹ 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.²⁰ *Colo. Republican Fed. Campaign Comm. v. FEC* (“*Colo. Republican I*”), 518

¹⁸*Id.* at 41 (finding limits that approximate actual spending patterns to be narrowly tailored).

¹⁹*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).

²⁰The 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 face the same problem.

U.S. 604, 610 (1996) (plurality opinion) (noting *Buckley*'s invalidation of limits on candidates' spending of their own money and on campaign expenditures).²¹

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 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.

²¹Four Justices on the current Court have indicated a willingness to reconsider the constitutionality of spending limits, at least in some circumstances. *Shrink Mo.*, 528 U.S. at 404-05 (Breyer, J., joined by Ginsburg, concurring); *id.* at 405-10 (Kennedy, J., dissenting); *Colo. Republican I*, 518 U.S. at 648-50 (Stevens, J., joined by Ginsburg, J., dissenting). Two members of the *Buckley* Court would have upheld them at that time. 424 U.S. at 262-66 (White, J., concurring in part and dissenting in part); *id.* at 286-90 (Marshall, J., concurring in part and dissenting in part).

Id. at 19. The Court concluded that FECA’s expenditure limits represented “substantial . . . restraints on the quantity and diversity of political speech.” *Id.* at 19, *see 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.²² The Court began by stressing the importance of allowing candidates “the

²²Some 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 *Shrink Missouri*, 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

unfettered opportunity to make their views known.” *Id.* at 52-53. It then rejected the two proffered governmental interests — the prevention of 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. In *Gable*, 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 at 951-53 (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 at 666-67, 672-73 (invalidating the definition of “contribution” and a \$50,000 limit on loans).²³

expenditures might be considered contributions to their own campaigns.” 528 U.S. at 405 (Breyer, J., joined by Ginsburg, J., concurring).

²³The 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.”).

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 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."²⁴ *Id.* at 56. Accordingly, the Court found nothing "invidious, improper, or unhealthy" in permitting candidates to spend whatever they are able to raise.²⁵ *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

²⁴The Court did not consider that the financial means of a candidate's supporters also affects how much money a candidate can raise.

²⁵The *Buckley* Court also pointed out that equalizing campaign resources may hurt candidates without name recognition. 424 U.S. at 56-57.

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.

In 1998, the Sixth Circuit decided two cases involving challenges to mandatory campaign spending limits. In *Suster v. Marshall*, the court upheld a preliminary injunction against the enforcement of such limits in judicial elections. 149 F.3d 523 (6th Cir. 1998). In *Kruse v. Cincinnati*, the court struck down limits enacted by the City of Cincinnati for members of the City Council. 142 F.3d 907 (6th Cir. 1998). In both cases, the Sixth Circuit reiterated *Buckley*’s analysis and found no interest compelling enough to justify the limits. *Suster*, 149 F.3d at 532-33; *Kruse*, 142 F.3d at 915-18. The Supreme Court declined to review either decision.

Most recently *Homans v. Albuquerque*, 366 F.3d 900 (10th Cir. 2004), *petition for cert. filed* No. 05-____ (U.S. Sept. 22, 2004), struck down Albuquerque’s mandatory spending limits, which had been in place since 1974 notwithstanding the Supreme Court’s decision in *Buckley*. In a 2-1 opinion, the majority rejected rationales other than combatting corruption that had been proffered by the State in defense of the limits – including preservation of officeholder time and promoting electoral competition – as “fundamentally at odds with *Buckley* and its progeny.” *Id.* at 914. In the same breath, the Court agreed that *Buckley* did not impose a *per se* ban on mandatory spending limits, *id.* at 915, but nevertheless expressed “doubt that any evidence would sustain such limitations under *Buckley*,” *id.* at 917. According to the Court, a public funding system is the answer to the concern about officeholder time that Albuquerque attempted to address with mandatory limits. *Id.* at 919 (“A public funding scheme would presumably take fund-raising pressure off of elected officials and also allow challengers to forego the rigors of purely private fund-raising.”). The Court also concluded that electoral competition could be promoted with less restrictive means than spending caps. *Id.* at 920. The dissenting judge

recognized the legitimacy of the alternative rationales proffered by the State but concluded that the evidence was inadequate to establish that the limits furthered either officeholder time-saving or electoral competition. *Id.* at 913. A petition for Supreme Court review of this case was filed on September 22, 2004.

The Second Circuit had been keeping court-watchers guessing for years in a case challenging mandatory spending limits applicable in Vermont’s statewide campaigns. In August 2002, the Court upheld the limits in a 2-1 decision. *Landell v. Vt. Pub. Research Group*, Nos. 00-9159(L), 00-9180(CON), 00-9231(XAP), 00-9239(XAP), 00-9240(XAP), slip op. at 65. But less than two months later, after receiving a petition for rehearing, the Court withdrew its decision. *Landell*, 2002 WL 31268493, at *1. The Court waited for more than three years from the time that the appeal was argued to reissue its decision, which it finally did on August 18, 2004. *Landell*, 382 F.3d 91.

In that decision, the Court ruled – again in a 2-1 decision – that *Buckley* did not represent a *per se* ban on mandatory spending limits. *Id.* at 107. Based on extensive evidence in the record, the majority recognized two state interests that, taken together, are sufficiently compelling to justify such limits: the familiar interest in deterring corruption and the appearance of corruption and the interest in permitting candidates and officeholders to spend less time fundraising and more time interacting with voters and performing duties. *Id.* at 115-25.¹¹ But the Court remanded the case to the trial court for consideration whether the mandatory limits were narrowly tailored to serve those interests. The plaintiffs filed a petition for rehearing *en banc* on September 22, 2004.

¹¹ The Court declined to consider whether other interests, such as “encouraging electoral competition and protecting the ability of non-wealthy Vermonters to run for state office” were also sufficiently compelling. 382 F.3d at 125.

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*, 124 S. Ct. 619 (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.¹ Because the constitutional rules governing expenditures and electioneering communications are identical, this chapter uses the term “expenditures” broadly to include both express advocacy and electioneering communications.

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.

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

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, groups (other than corporations or unions), and political parties. Do not impose such limits unless you want to test the limits of Supreme Court precedent.

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.

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 decided whether it is constitutional to impose limits on contributions to groups that make only independent expenditures. 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. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (“*Colo. Republican I*”) (plurality opinion) (striking down FECA’s limits on independent expenditures by political parties); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (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 are therefore likely to strike down any monetary limits on independent expenditures by individuals, political action committees (“PACs”) and other unincorporated associations, and political parties in support of or opposition to state or local candidates.

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.”² *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 benefitted 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

²For further discussion of the burden that expenditure limits place on rights of free speech and association, see Chapter Five, section II.

means that such expenditures “may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Id.* at 47.

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*, 470 U.S. 480. 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. 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 501.³ 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 *Colo. Republican I*. 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 Mo. Gov’t 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*.

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. *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. The Lone Exception: Corporations and Unions

The Supreme Court has upheld an outright ban on independent expenditures funded by the general treasuries of corporations, where the law provided an alternative mechanism for corporate political activity. In *McConnell*, the Court upheld a ban on corporate and union electioneering

³The Court explained “that 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.

communications, under circumstances where the covered organizations could conduct political activity through separate segregated funds established for that purpose.

TIPS

TIP: Where bans on independent expenditures by corporations or unions have been upheld, the affected entities have had the right to set up separate segregated funds, analogous to PACs, as an alternative mechanism for financing independent political expression, such as electioneering ads.

TIP: One category of non-profit corporation must be exempt from bans on corporate independent expenditures. Non-profits that were formed for ideological (not business) purposes, have no shareholders or other persons affiliated with the organization who have a claim on its earnings or assets, and were not established by a corporation or union and have a policy against accepting contributions from such entities are permitted to make expenditures directly from their treasuries.

TIP: Restrictions that apply to corporations do not necessarily have to be applied to unions. The Supreme Court upheld a Michigan ban on independent expenditures that applied only to corporations.

TIP: Include an exemption from the ban for media corporations. The Supreme Court has upheld such an exception, and the media will certainly challenge any law that does not exempt the press from a ban on corporate independent expenditures.

LEGAL ANALYSIS

FECA contains a ban on independent expenditures financed by general treasury funds of banks, corporations, and labor unions, *see* 2 U.S.C. § 441b, which has escaped the Supreme Court's general hostility to limits on independent expenditures. In addition, the Supreme Court has explicitly upheld a state ban on independent expenditures made directly from corporate treasuries.

Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990). But both the federal and state laws at issue offered an alternative outlet for independent political expression by the affected entities, allowing them to set up separate segregated funds analogous to PACs. The funds, which must be financed by individuals with certain close connections to the business or union, allow those individuals to exercise their associational rights. At the same time, “[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors’ support for the corporation’s political views.” *Id.* at 660.

The *Austin* decision, upholding Michigan’s ban on corporate independent expenditures, is noteworthy in two principal respects. First, *Austin* identifies a new form of corruption that states may have an interest in preventing: “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” *Id.* Second, based on this conception of the state’s interest, the Court rejected a challenge to Michigan’s failure to treat unincorporated labor unions the same as corporations. 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 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.

The Court also rejected two equal protection claims. First, *Austin* permitted Michigan to distinguish in general between corporations and unincorporated associations with the ability to

amass large treasuries. *Id.* (holding that the focus on corporations was precisely tailored to eliminate from the political process “the corrosive effect of political ‘war chests’ amassed with the aid of the legal advantages given to corporations”). Second, the Court sustained a “media exception” because of “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.

The Supreme Court reiterated *Austin*’s holding in *McConnell*. In addition to settling any doubt about whether the current Supreme Court continues to support *Austin*, the *McConnell* Court stated in sweeping terms that “Congress’ power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law.” 124 S. Ct. at 694. The *McConnell* Court emphasized that corporations have the option to set up segregated funds that would not be subject to the prohibition on independent expenditures. *Id.* at 695. Although *McConnell* eliminated any doubt about whether bans on independent expenditures could be applied to unions, *Austin*’s conclusion that a state may choose to restrict only corporate expenditures remains good law.

Notwithstanding *Austin*, certain ideological non-profit corporations are entitled to an exemption from bans on direct corporate independent expenditures. *FEC v. Mass. Citizens for Life, Inc.* (“*MCFL*”), 479 U.S. 238, 258-59 (1986); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999) (invalidating ban on corporate expenditures because: “Like the federal election law in *MCFL*, North Carolina’s law makes no exception for nonprofits that present a minimal risk of distorting the political process.”). The small non-profit in *MCFL* complained that FECA’s administrative requirements were so burdensome as to chill its First Amendment rights. In accepting that claim, the *MCFL* Court listed three attributes of the corporation that were “essential” to the

exemption: (1) the group “was formed for the express purpose of promoting political ideas, and cannot engage in business activities;” (2) it had “no shareholders or other persons affiliated [such as union members giving dues] so as to have a claim on its assets or earnings;” and (3) it “was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.” 479 U.S. at 264. The corporate funds of such groups are thought to be a direct expression of the strength of their political ideas as opposed to their power in the economic market. The Court noted: “It may be that the class of organizations affected by our holding today will be small.” *Id.*

Courts have split on how literally to interpret the three *MCFL* criteria with respect to whether a non-profit may accept any money from for-profit corporations, but the trend in the lower federal courts appears to be toward permitting a minor amount of corporate funding. *Compare Faucher v. FEC*, 743 F. Supp. 64, 69 (D. Me. 1990) (holding that exempt corporations must have a policy of accepting no corporate contributions), *aff’d*, 928 F.2d 468 (1st Cir. 1991), *and FEC v. NRA Political Victory Fund*, 778 F. Supp. 62, 64 (D.D.C. 1991) (same), *rev’d on other grounds*, 6 F.3d 821 (D.C. Cir. 1993), *with FEC v. Nat’l Rifle Ass’n*, 254 F.3d 173, 192 (D.C. Cir. 2001) (focusing on whether an absolute amount of corporate funds received annually turned a non-profit into a potential conduit for corporate contributions); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292-93 (2d Cir. 1995) (permitting non-profits whose corporate receipts are not “significant” to make independent expenditures directly from corporate treasuries); *Day v. Holahan*, 34 F.3d 1356, 1363-64 (8th Cir. 1994) (same); *and Beaumont v. FEC*, 278 F.3d 261 (4th Cir. 2002) (finding North Carolina’s ban on corporate contributions and independent expenditures unconstitutional as applied to a non-profit deriving a small percentage of its revenues from for-profit corporate contributions), *rev’d on other grounds sub nom. FEC v. Beaumont*, 123 S. Ct. 2200 (2003) (recognizing corrupting potential of

MCFL-type corporations and finding ban on direct contributions constitutional as applied to non-profit advocacy corporation).

The cases precluding non-profit corporations that receive corporate or union funds or conduct business activity from benefiting from the *MCFL* exemption are truer to the language of *MCFL*. A strict interpretation of *MCFL* also avoids the difficult question of how much income or business-related activity is “significant” and thus provides a clear rule for non-profits. The Supreme Court has implied in several recent cases that the strict interpretation is correct, but has not yet directly addressed the issue.⁴ See *McConnell*, 124 S. Ct. at 699 (noting that *MCFL* is limited to a “carefully defined category of entities”); *Beaumont*, 123 S. Ct. at 2204 (describing a policy against accepting any corporate or union contributions as “essential to [the *MCFL*] holding”); *Austin*, 494 U.S. at 662 (rejecting application of *MCFL* to the Chamber of Commerce and recounting the “crucial” *MCFL* features).

III. “Independent” vs. “Coordinated” Expenditures

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 — an individual may not spend more than \$2,000 per election in coordination with a federal candidate, for example. 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

⁴The question whether N.C. Right to Life was entitled to accept corporate funds was not presented

considered independent if it is for communications directed at the voting public, and the person making the expenditure:

- C retains a consultant who is also providing campaign-related services to the candidate whom the person is seeking to help by making the expenditure;
- C simply replicates a candidate's own campaign materials;
- C uses information provided by candidate, campaign workers, or consultants with an understanding that the person is considering making the expenditure;
- C notifies the campaign about the advertising in advance; or
- C 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 what *are* 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 "electioneering communications" 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. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colo. Republican I*") held that coordinated expenditures were the functional equivalent of

to the Supreme Court in *Beaumont*, and the Court declined to reach the issue.

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

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 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.⁵ 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. But the regulations that the FEC drafted in response to BCRA continue to treat a wide range of coordinated activity as independent. As a result, BCRA's congressional sponsors have brought a lawsuit challenging those new regulations in an effort to get new regulations that adequately cover coordination. That lawsuit is still pending.

⁵One 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).

The plaintiffs in *McConnell* argued that Congress’s decision to require new regulations was unconstitutional because it specified that the regulations could not “require agreement or formal collaboration to establish coordination.” 124 S. Ct. at 704 (quoting BCRA). The Supreme Court rejected that argument, holding that an agreement is not necessary for expenditures to be coordinated. *Id.* at 705. But the Court deferred a full analysis of the new regulations for a future case, thus providing little concrete guidance on what rules defining coordination are constitutional.

The meaning of “independent expenditures” has been litigated in only a few other cases. In *FEC v. Public Citizen, Inc.*, 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 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.

Recently, 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*, 123 S. Ct. 2586 (mem.) (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 *Colo. 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. More recently, *Republican Party of Minn. v. Pauly* invalidated a presumption of coordination even after the party endorsed its candidate. 63 F. Supp. 2d 1008, 1019 (D. Minn. 1999).⁶ 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. *Ia. Right to Life Comm., Inc. 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.

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. 124 S. Ct. at 700-04. 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. 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.

⁶It is not clear, however, that *Pauly* is consistent with the Supreme Court’s ruling in *Shrink Mo.* on the government’s evidentiary burden.

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.

CHAPTER SEVEN

CAMPAIGN ADVERTISING AND ISSUE ADVOCACY

The Supreme Court's decision in *McConnell v. FEC* swept away constraints that many lower courts had wrongly imposed on the regulation of campaign advertising.¹ Prior to *McConnell*, courts interpreting *Buckley* held that such regulation was constitutionally permissible only with respect to ads that expressly advocated the election or defeat of a clearly identified candidate. Most courts further concluded that, under *Buckley*, such "express advocacy" required the use of so-called "magic words" – terms such as "vote for" or "vote against" or their synonyms. Ads without magic words were treated as "issue advocacy" exempt from regulation, regardless of their intent or effect. Because it was child's play to create campaign ads without magic words, the misinterpretation of *Buckley* opened a giant "issue advocacy" loophole in federal campaign finance law. *McConnell* closed that loophole by making it clear "that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled."²

McConnell thus opens the door to more meaningful regulation of campaign advertising. The decision specifically upheld the definition of a newly coined term, an "electioneering communication," which identifies a type of advertising that may be regulated under the Bipartisan Campaign Reform Act of 2002 ("BCRA"). In addition, it is still possible to regulate ads that do contain magic words. And in some jurisdictions, a contextual definition of ads that may be regulated, or a "reasonable person" standard for such ads, may also be enforceable.

¹124 S. Ct. 619, 686-706 (2003).

²*Id.* at 695.

All three tests for the regulation of campaign advertising – BCRA’s definition, the “magic words” test, and the “reasonable person” or contextual test – are discussed in this Chapter. Chapter Eight discusses reporting and disclosure requirements applicable to campaign ads, including “electioneering communications” as defined in BCRA. Limits on corporate and union independent expenditures, including on electioneering communications, are addressed in Chapter Six.

I. “Electioneering Communications” Under BCRA: The Time-Frame Test

BCRA coined a new term – “electioneering communications” – for a category of campaign advertising that would be subject to regulation. As defined in BCRA, an “electioneering communication” is any “broadcast, cable, or satellite communication” that

- (1) refers to a clearly identified candidate for Federal office;
- (2) is made within–
 - (aa) 60 days before a general, special, or runoff elections 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
- (3) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.³

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.”⁴

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

1. the *media* that are regulated (broadcast, cable, and satellite communications);
2. the *reference to a clearly identified candidate*;

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

⁴*Id.* § 434(f)(3)(C).

3. the *time period* during which ads are regulated;
4. *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.”⁵ *McConnell*, 124 S. Ct. at 689. State or local laws modeled on BCRA will also have to be drafted to ensure that they are not vague. Meeting this constitutional test does not require that the state or local law 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.

TIPS

TIP: Be sure that each component of an “electioneering communications” 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. State or local laws modeled on BCRA should be supported by evidence that advertising in the state or locality in question is similar in relevant respects to that in federal campaigns, and departures from the terms of BCRA – in the media or time period covered, for instance – should also have evidentiary support.

⁵The Court addressed overbreadth claims against BCRA in the context of challenges to bans on corporate and union expenditures on electioneering communications, which are discussed in Chapter Six.

TIP: BCRA contains some exceptions from its definition of an “electioneering communication,” which should also 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.

TIP: Cautious drafters of state or local campaign finance laws modeled on BCRA may want to exempt from their definition of electioneering communications additional categories of ads that do not appear to constitute electioneering. For example, an ad that does nothing more than support or criticize a pending bill known by its sponsors’ names – e.g., the McCain-Feingold bill – might be excluded from the definition of “electioneering communications” even if the sponsors happen to be running for office and the ad is run in their districts during the short period before an election. An exemption of this sort should be considered only if there is evidence of substantial numbers of such ads in the jurisdiction.

TIP: There may be other clear tests for ads with an electioneering purpose. Advertisers will look for ways to circumvent BCRA and any new laws that follow its model, just as they circumvented the magic words test. Watch the electioneering ads for candidates in your jurisdiction. If the vast majority of those ads share a characteristic other than the four used in BCRA’s definition of electioneering communications, that characteristic may be an element of another appropriate test.

LEGAL ANALYSIS

FECA attempted to regulate political expenditures by private parties. One section of FECA imposed a \$1,000 limit on expenditures “relative to a clearly identified candidate.” 18 U.S.C. § 608(e)(1) (quoted in *Buckley*, 424 U.S. at 193). Another section of FECA imposed reporting requirements for persons who make independent expenditures of over \$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, 159). The Court in *Buckley* concluded that these regulations presented potential problems of both vagueness and overbreadth.

Under First Amendment “void for 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 Court in *Buckley* 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,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’

‘vote against,’ ‘defeat,’ ‘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.

What the Supreme Court made clear in *McConnell* is that the narrowing construction of FECA “was the product of statutory interpretation rather than a constitutional command.” 124 S. Ct. at 688. 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.* That is precisely what Congress did with BCRA.

Congress cured FECA’s vagueness problem by setting forth a new “bright-line” test for electioneering communications in BCRA. The four components of that test raised none of the concerns that drove the Court to create the express advocacy standard for FECA. 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 688-89. The constitutional objections that led the *Buckley* Court to limit FECA’s reach to express advocacy was “simply inapposite” in the case of BCRA. *Id.* at 689.

Before *McConnell*, five courts considered — and invalidated — state laws or regulations using BCRA’s approach to campaign advertising.⁶ In *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000), the Second Circuit struck 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. The court noted that the provision would, for example, impermissibly regulate an advertisement about a bill that was known by the name of a sponsor who happened to be running for reelection. *Id.* The court in *West Virginians for Life v.*

⁶Connecticut’s campaign finance law has defined “expenditure” with a time-frame test since 1999, C.G.S.A. § 9-333c(a)(2), and the provision has never been challenged.

Smith, 960 F. Supp. 1036, 1039-41 (S.D. W. Va. 1996), invalidated a law presuming 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. In addition, two district courts in Michigan have enjoined 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. See *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998); *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766, 771 (W.D. Mich. 1998). *McConnell* establishes that these cases contain flawed First Amendment analyses.

Only one decision anticipated the reasoning in *McConnell*: *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002). Wisconsin law provided that a communication "that is made during the period beginning on the 60th day preceding a[n] . . . election and ending on the date of that election and that includes a reference to . . . a clearly identified candidate" was one made for a "political purpose." The *Ponto* court rejected a vagueness challenge to this definition, noting that "the state legislature's approach appears to draw a line even brighter than the one established in *Buckley*." *Id.* at 1086. The court held that an overbreadth challenge required examination of a factual record, stating:

Without considering any evidence of the state's experience in conducting elections and the character of ads featuring candidates in the 60 days before an election, I cannot conclude as a matter of law that the state's regulatory scheme would reach a substantial number of communications so attenuated from elections as to render all regulation constitutionally impermissible.

Id. at 1088. The court therefore refused to hold the definition unconstitutional. Unfortunately, the court did find another provision of the same statute unconstitutional, and a *non-severability* clause included in the statute brought down the law in its entirety.

II. Magic Words

It is important to understand what role magic words now play in campaign finance law. *McConnell* says that, with an appropriate alternative definition of the advertising subject to regulation, it is permissible to regulate campaign ads that do not use magic words. But it is also still permissible to regulate ads that *do* use magic words. The magic words test can supplement a test modeled on BCRA (or a contextual definition, discussed in section III below).

TIPS

TIP: Define advertising subject to regulation to include BOTH electioneering communications modeled on BCRA's definition AND ads using magic words. As in BCRA, these complementary tests for regulated advertising can be introduced in separate definitions of "independent expenditures" and "electioneering communications." By including both tests, a state or locality can regulate ads with magic words year-round, while capturing ads without magic words in the more limited periods before elections.

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. BCRA solves the problem that FECA originally created. Some state laws that contained language modeled on FECA were also struck down. 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 a 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. The First, Fourth, Fifth, and Eighth Circuits explicitly adopted the magic words test, *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, 193 (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), while the Second and Tenth Circuits invalidated state laws seeking to regulate speech other than express advocacy, but without ruling that express advocacy requires magic words, *see Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1193-94 (10th Cir. 2000); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000). Only the Ninth Circuit expressly rejected the magic words test for express advocacy. *See FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

In sum, 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).” 124 S. Ct. at 737 n.11 (Thomas, J. dissenting). States throughout the country are now free to regulate campaign advertising that does not contain magic words, as long as the test used to identify which ads fall within the scope of state campaign finance provisions is neither vague nor overbroad.⁷

⁷The importance of avoiding vagueness and overbreadth, especially in jurisdictions hostile to campaign finance law, cannot be overstated. Only five weeks after the decision in *McConnell*, the Sixth Circuit revived the magic words test and applied it to a ban on electioneering within 500 feet

III. The “Reasonable Person” Test and Other Contextual Approaches

The “reasonable person” approach was first suggested by the Ninth Circuit in *Furgatch*, 807 F.2d 857, as an alternative to the magic words test for express advocacy. That case involved a newspaper advertisement criticizing the Carter presidential re-election campaign for allegedly using underhanded tactics, stating: “It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON’T LET HIM DO IT.” *Id.* at 858. Noting that a “magic words” definition of “express advocacy” could be easily evaded, the court adopted a contextual test under which a message is deemed to be express advocacy “when read as a whole, and with limited reference to external events, [it could] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” *Id.* at 864. *Furgatch* identified three components of its test:

First, even if it is not presented in the clearest, most explicit language, speech is “express” for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed “advocacy” if it presents a clear plea for action, and thus speech that is merely informative is not covered by [FECA]. Finally, it must be clear what action is advocated. Speech cannot be “express advocacy” . . . when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. Thus, just as context plays a role in areas of law such as “subversive speech, ‘fighting words,’ libel, and speech in the workplace and in public fora,” so would context be considered when considering whether speech expressly advocates the election or defeat of a candidate. *Id.* at 863.

The Ninth Circuit held that the anti-Carter advertisement was express advocacy.

of a polling place. *Anderson v. Spear*, 356 F.3d 651, 665 (6th Cir. 2004) (justifying a limiting construction on the grounds that “Kentucky’s statute is vague and because the State has failed to provide any evidentiary support for regulating both express and issue advocacy”).

It is important to remember that even the *Furgatch* Court assumed that only express advocacy could be regulated by campaign finance laws. The Ninth Circuit simply concluded that express advocacy was possible without using magic words. After *McConnell*, it is clear that campaign advertising can be regulated even if it contains no express advocacy – as long as the test for regulated advertising is neither vague nor overbroad.

TIPS

TIP: Consider using a reasonable person or contextual definition only as a supplement to the BCRA model and magic words test, and be sure to include a clause allowing the severability of any clause found unconstitutional. Reasonable person tests remain highly vulnerable to vagueness challenges.

TIP: Draft a rule implementing a “reasonable person” approach in as narrow a manner as possible. There is a significant difference between: (1) regulating an advertisement that a reasonable person could interpret as containing an electioneering message, and (2) regulating an advertisement that no reasonable person could take as containing anything other than an electioneering message. The first approach sweeps in all ads that could arguably be electioneering, while the latter approach sweeps in only those ads that are indisputably electioneering. Limiting the regulatory reach of the statute with the second approach will make constitutional challenges more difficult.

TIP: Consider limiting your regulation to advertisements that appear in certain specified media, such as broadcast television or radio. Obviously you do not want to enact a statute that, on its face, regulates a letter (“any communication”) that a person may write to his mother, urging her to vote against the incumbent. You should determine the particular abuses that are prevalent in your

locality and tailor your legislation accordingly. If the abuses occur mainly in television and radio ads, then you may not be concerned about, for example, billboard or newspaper advertising.

TIP: 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: A reasonable person or contextual 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

Following the decision in *Furgatch*, the FEC codified the Ninth Circuit's approach in a definition of "express advocacy" under FECA. *See* 11 CFR § 100.22.⁸ Under the regulation,

⁸11 CFR § 100.22 states:

Expressly advocating means any communication that -- (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!" or

(b) When 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) because --

“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 candidates(s).” *Id.* The regulation further states that, under its approach, the electoral portion of the communication must be “unmistakable, unambiguous, and suggestive of only one meaning.” *Id.*

The FEC’s regulatory definition of “express advocacy” incorporates a “reasonable person” standard that applies in only a very narrow set of circumstances. If “magic words” are not used, the advertisement is “express advocacy” only if the electioneering purpose of the advertisement is unmistakable, unambiguous, and so clear that reasonable minds simply could not differ as to its meaning. Thus, the regulation attempts to bring within the regulatory sphere some of the most egregious instances of electioneering that occur without the use of “magic words.” Despite its narrow reach, this regulation was immediately challenged as an unconstitutional encroachment on free speech, and it was found unconstitutional by both the First and Fourth Circuits.⁹ *See Virginia Soc’y for Human Life*, 263 F.3d at 392; *Maine Right to Life Comm.*, 98 F.3d at 1-2. Under *McConnell*, these cases are no longer good law.

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

⁹The Eighth Circuit also rejected Iowa’s reasonable person approach to express advocacy in favor of the formalistic magic words test. *See Iowa Right to Life*, 187 F.3d at 969-70 (preliminarily enjoining reasonable person test employed in Iowa reporting requirements). But this case is no longer good law after *McConnell*.

One other federal court recognized that *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), supported a “more context-sensitive approach to ‘express advocacy.’” *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 61 (D.D.C. 1999). After considering the competing concerns militating in favor of the magic words test and the FEC regulation, the court proposed the following standards:

First, the communication must in effect contain an explicit directive. . . . That effect is determined first and foremost by the words used. . . . For a communication to contain, in effect, an explicit directive it must use an active verb (or its functional equivalent, *e.g.*, “Smith for Congress,” or, perhaps, an unequivocal symbol).

Second, that verb or its immediate equivalent — considered in the context of the entire communication, including its temporal proximity to the election — must unmistakably exhort the reader/viewer/listener to take electoral action to support the election or defeat of a clearly identified candidate. . . . [E]xpress advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.

Finally, application of the “express advocacy” standard is . . . a pure question of law. . . . [A] communication can be held to contain express advocacy only if no reasonable person could understand the speech in question — and in particular the verbs in question — [except] to, in effect, contain an explicit directive to take electoral action in support of the election or defeat of a clearly identified candidate.

Id. at 61-62. The court recognized that this standard was still “susceptible of circumvention by all manner of linguistic artifice,” *id.* at 65, but it nevertheless constitutes an improvement over the magic words test.

Several state courts have looked favorably upon the approach first developed in *Furgatch*. Four of them are in the Ninth Circuit: Oregon, Washington, Arizona, and California. The Oregon Court of Appeals used *Furgatch* as the basis of a contextual definition of “expenditures” subject to Oregon’s reporting requirements, while avoiding the “reasonable person” standard. *See State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10-11 (Or. App. 1999), *review denied*, 994 P.2d 132 (Ore. 2000). Under the *Crumpton* test, reporting is required for expenditures:

if the expenditure is for a publication that is in support of or opposition to a candidate under the following criteria: (1) the message, in its context, clearly and unambiguously urges the election or defeat of one or more identifiable candidates for a covered office; (2) the message, as a whole, seeks action rather than simply giving information; and (3) it is clear what action the message advocates.

Id. at 11. The *Crumpton* court explained that it could adopt an approach that was “somewhat less restrictive” than the *Furgatch* test because the Oregon statute (unlike federal law) did not impose criminal penalties for violation of reporting requirements. *Id.* at 10-11 (adopting the emphasis on context found in *Furgatch* but excluding reference to the “reasonable person”).

Courts in the other three Ninth Circuit states agreed that express advocacy of an election outcome did not require magic words – as long as an ad unambiguously urged an electoral outcome – but rejected the appeal to contextual factors external to the language of the advertisement. In *Washington State Republican Party v. Washington State Public Disclosure Comm’n*, 4 P.3d 808, 821, 823-24 (Wash. 2000), the second of two advertisements under consideration began with strong criticism of gubernatorial candidate Gary Locke and concluded: “And now he wants to be our governor? Gary Locke: another extreme liberal we can’t afford.” Although the ad avoided use of “magic words,” the Washington Supreme Court unhesitatingly described it as express advocacy, explaining:

With this language the second advertisement is susceptible to no other reasonable interpretation than as an exhortation to vote for or against a candidate. . . . This language in the second ad is unmistakable and unambiguous in its meaning, and presents a clear plea for the listener to take action to defeat candidate Gary Locke. . . . Reasonable minds could not differ as to whether the second ad calls for a vote against Locke.

Id. at 823-24.

The Arizona Supreme Court adopted the same approach, rejecting the magic words test in strong terms: “[S]uch a narrow construction of the statute leave room for great mischief. Application of the statute could be avoided simply by steering clear of the litany of forbidden words,

albeit that the message and purpose of the communication may be unequivocal.” *Kromko v. City of Tucson*, 47 P.3d 1137, 1140 (Ariz. 2002) (discussing the test in the context of advertising about ballot propositions). But the Court rejected the legitimacy of appealing to “factors surrounding the communication . . . independent of the communication itself.” *Id.* at 1141.

In California, two state appellate courts split on the constitutionality of the *Furgatch* approach. One court accepted the approach adopted in Washington, recognizing that express advocacy may be based on communications that “taken as a whole unambiguously urged” a favorable or negative vote. *Schroeder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 339 (Cal. Ct. App. 2002) (considering ads in the context of a ballot measure campaign). Another court held that the First Amendment required the magic words test. *Governor Gray Davis Comm. v. Am. Taxpayers Alliance*, 125 Cal. Rptr. 2d 534, 551 (Cal. Ct. App. 2002). *McConnell* makes it clear that *Schroeder* had the better reasoning.

The Wisconsin Supreme Court also observed that *Furgatch* provided “an attractive alternative” to the magic words approach and left open the question whether context could be considered in deciding whether a communication was express advocacy. *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 733 (Wis. 1999). Wisconsin later opted for a BCRA-type approach, which was brought down by a non-severability clause, when another provision in the statute was found unconstitutional. *See supra* Section II.

The key to a sustainable *Furgatch*-type approach to the regulation of electioneering ads is a standard that is clear and unambiguous. BCRA introduced a version of the “reasonable person” standard as a fallback definition of an “electioneering communication” to be employed if the principal definition were invalidated. Because the Supreme Court upheld the principal definition, it did not reach the constitutional challenges to the backup definition, which limited an “electioneering

communication” to “ any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which is suggestive of no plausible meaning other than as an exhortation to vote for or against a specific candidate.” But the three-judge District Court that decided *McConnell* in May 2003 did consider a First Amendment challenge to the backup definition. One judge upheld the backup definition; another found the entire definition unconstitutionally vague; and the third found vagueness only in the final clause (which narrowed the definition to any communication “suggestive of no plausible meaning other than as an exhortation to vote for or against a specific candidate”). The conflict among the judges and between this decision and the five state court decisions means that the jury is still out as to whether new state and local laws using some version of a reasonable person test for advertising subject to regulation will survive vagueness challenges.

IV. 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, two groups 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 North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003), *vacated*, 124 S. Ct. 2065 (2004); *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 under the magic words test. 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 *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999) (narrowing construing definition of "political action committee" to reach only organizations that make contributions or expenditures for express advocacy). These decisions are now open to question; the Supreme Court vacated the *Leake* decision and remanded it to the Fourth Circuit for further consideration in the light of *McConnell*.

Some states have already responded to the *McConnell* decision with BCRA-type bills or administrative rules designed to compel additional disclosure of election-period advertising in some or all state campaigns. Since the decision, such measures have been introduced in Florida, Michigan, Mississippi, Ohio, Washington, and Wisconsin; only Florida's has passed as of this writing. This option is open in all states.

Even before the decision, Arizona, Connecticut, Hawaii, and Illinois enacted BCRA-type provisions, which have not been challenged in court. In 2002, Colorado passed a BCRA-type measure via initiative. That law is now being challenged. *Colo. Right to Life Comm. v. Davidson*, Civ. No. 03-WM-1454 (PAC) (D. Colo. filed July 31, 2003). Motions that will decide the case are pending before the Court.

CHAPTER EIGHT

REPORTING AND DISCLAIMER RULES

The federal government, almost every state, and many localities have laws imposing disclosure requirements on campaign advertising.¹ The disclosures required include one or both of the following:

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

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.²

¹Courts 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.

²Disclosure requirements are often considered the bedrock of campaign finance reform. The first such laws were enacted in several states in the 1890s. *See* Center for Responsive Politics, *Plugging in the Public: Introduction and Overview*, (visited Apr. 18, 2002) (http://www.opensecrets.org/pubs/law_plug/plug00.html). Federal reporting requirements were first enacted in 1910. *See 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.³ 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:

- C *who is required to report;*
- C *what information must be reported;*
- C *when reports must be filed;*
- C *where the reports must be filed;*
- C *the method of filing;*
- C *terms for public access to the reported information; and*
- C *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

³The Council on Government Ethics Laws has developed a model law on campaign finance reporting, which is available on the Center for Responsive Politics’ web site. See Center for Responsive Politics, *Plugging in the Public Appendix 1: COGEL Model Law on Campaign Finance Reporting* (visited June 21, 2004) (http://www.opensecrets.org/pubs/law_plug/plug05.html).

*make contributions or expenditures, and anyone who makes independent expenditures or electioneering communications.*⁴

TIP: Consider adopting separate reporting requirements for lobbyists. Increasingly, states have begun to require direct reporting from lobbyists.⁵ 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.

*TIP: Consider adopting separate reporting requirements for bundlers.*⁶ 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.*⁷

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.

⁴The 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.

⁵Concern 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) ("Lobbyists") and section III(A) ("Legislative Session Bans").

⁶Reporting requirements for bundlers are discussed in Chapter Three, section II(E) ("Bundling").

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.⁸ As noted above, reporting of a spouse's employer may help to identify corporate bundlers.

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.

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 whom 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

⁷See, e.g., Haw. Rev. Stat. § 11-205.5 (2003).

⁸See, e.g., Fla. Stat. Ann. § 106.07(4)(a)(1) (West Supp. 2004); Ky. Rev. Stat. Ann. § 121.160(2)(b) (Baldwin Supp. 2001). Under federal election law, the occupation and employer of all contributors who give more than \$200 total must be reported. See 2 U.S.C. § 434(b)(3) (2004).

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. 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.⁹ Others require less frequent reports.¹⁰ 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 closing days of the election. Many large contributions are made in the last days of an election. The law should be drafted in a way to assure that they are disclosed before the election is over.¹¹

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 of

⁹*See, e.g., Ark. Code. Ann. § 7-6-207(a) (West Supp. 2001) (requiring monthly reports during election year and quarterly reports at other times); Wash. Rev. Code § 42.17.080(2) (Supp. 2004) (requiring monthly reports and additional reports around the time of the election).*

¹⁰*See, e.g., Iowa Code Ann. § 68A.402(2) (West 2004) (requiring filings by May 19, July 19, October 19, and January 19 during election years).*

¹¹*See, e.g., Va. Code Ann. § 24.2-916 (Michie 2000) (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) (Lexis 2004).*

an election, federal law requires reporting within 24 hours of making an independent expenditure.¹² 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.¹³

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.¹⁴ Such provisions provide more timely information to voters.

Where reports must be filed.

IP: 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 capitol 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.

¹²See 2 U.S.C. § 434(g)(1).

¹³2 U.S.C. § 434(f).

¹⁴See, e.g., 2 U.S.C. § 434(f)(5).

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

Method of Reporting.

TIP: Electronic filing should be implemented if possible.¹⁵ Where electronic filing is not feasible for all entities required to report, consider more limited requirements, such as:

- C requiring only candidates for certain statewide offices (or, in large municipalities, for jurisdiction-wide office) to file electronically;
- C requiring candidates, PACs, and political party committees that raise or spend more than a specified amount to file reports electronically; or
- C 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. For instance, at least one state has onerous identification requirements for individuals seeking to review disclosure reports, requiring such persons to complete a form in triplicate with their name, address, occupation, and the reason for viewing the report.¹⁶

¹⁵The Center for Governmental Studies published a comprehensive study of electronic filing: Craig B. Holman & Robert Stern, *Campaign Money on the Superhighway: Electronic Filing and Disclosure of Campaign Finance Reports* (2000). The Center for Responsive Politics provides information about electronic filing, including proposed language for reporting laws, on its web site. See Center for Responsive Politics, *Plugging in the Public 3. Electronic Filing of Campaign Finance Disclosure Reports* (visited Apr. 14, 2004) (http://www.opensecrets.org/pubs/law_plug/plug03.html).

¹⁶See Center for Responsive Politics, *Plugging in the Public 1. Model Campaign Finance Disclosure Law* (visited June 20, 2004) (http://www.opensecrets.org/pubs/law_plug/plug01.html).

TIP: Campaign finance data should be stored electronically in a database that can be easily searched by members of the public. Given the computer, CD-ROM, and 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.¹⁷

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.*¹⁸

¹⁷See Craig B. Holman & Robert M. Stern, "Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Activity," *Public Integrity* 11 (Winter 2001), republished at http://www.brennancenter.org/programs/downloads/electronic_reporting2000.pdf; Center for Governmental Studies, *Electronic Filing and Disclosure Survey: 2003 Update* (visited June 20, 2004) (http://www.cgs.org/publications/docs/2003_survey_results.pdf.)

¹⁸See 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).

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. *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 83.¹⁹ To the contrary, the Court held that drawing that line was "best left in the context of this complex legislation to congressional discretion." *Id.*²⁰

¹⁹Additionally, 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.

²⁰Federal 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

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 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 Oregon 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), *petition for cert. filed sub nom. Stumbo v. Anderson*,

and the name and address of recipients of at least \$500 in expenditures. 26 U.S.C. § 527. 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 (11th Cir. 2003), *vacating Nat’l Fed. of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300 (S.D. Ala. 2002).

No. 04-103 (U.S. July 24, 2004). 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.²¹ 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.²²

²¹*Anderson* struck down numerous provisions of Kentucky election law in a remarkably poorly-reasoned opinion. While it 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.

²²The *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.

In *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982), the Socialist Workers Party satisfied the standard articulated in *Buckley* and obtained an exemption from Ohio's reporting requirements.²³ *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.

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. Even associations that are not PACs may be required to file reports of such spending. *See 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).

Id.

²³The Socialist Workers Party did not fare as well in Oregon. *See Oregon Socialist Workers 1974 Campaign Comm.*, 432 F. Supp. at 1259 (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. New York City Campaign Finance Board*, 139 F. Supp. 2d 282 (E.D.N.Y.), *aff'd mem.*, 2001 WL 533590 (2d Cir. 2001) (unpublished table decision).

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*, 124 S. Ct. 619, 690-92 (2003). In addition to expanding the category of advertisements to which reporting requirements may be applied, the Court's opinion 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.²⁴ PACs, in contrast, may be required to disclose "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.

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

²⁴See Chapter Seven for a discussion of independent expenditures, electioneering communications, and issue advocacy.

the ads have not yet been disseminated. *McConnell*, 124 S. Ct. at 692-93. 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 693. 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 Florida Right to Life, Inc. v. Mortham*, 1998 WL 1735137, *8-*9 (M.D. Fla. Sept. 30, 1998) (striking down reporting requirement that applied within 24 hours of obligating funds). *Mortham* should no longer be considered good law.

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.

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. *Arizona Right to Life Comm. v. Bayless*, 320 F.3d 1002 (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.

II. Disclaimer Requirements

Most states require that advertisements for candidate elections contain disclaimers disclosing the ads' financial sponsors.²⁵ 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: "Paid for by Clinton/Gore '96" or "Paid for by the AFL-CIO." Such information helps the public evaluate the advertisement. After all, an ad soliciting votes for Candidate Smith on the grounds that "Smith has the best environmental record in the legislature" may mean something very different coming from the Sierra Club than it does coming from the Chemical Manufacturers' Association.

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."

LEGAL ANALYSIS

²⁵See *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.

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.²⁶ 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, but the Supreme Court refused to reach the issue for technical reasons. As a result, the disclaimer requirements remain in force, but no binding precedent establishes that they are constitutional. Additional litigation should be expected.

The first Supreme Court case with potential bearing on disclaimer requirements was *First Nat'l 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 Comm'n*, 514 U.S. 334 (1995).²⁷ Margaret McIntyre had been fined for violating an Ohio

²⁶The 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.

²⁷In one largely overlooked case pre-dating *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, Inc.*, 465 U.S. 1092 (1984), *aff'g mem.* 709 F.2d

statute that required disclosure, on the face of the campaign material, of the name and address of any person issuing the literature. The state 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 and citations omitted). *McIntyre* thus appears to preclude disclaimer requirements only as they apply to ballot measures, and possibly only by private individuals.²⁸

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.

²⁸In 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

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 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, 124 S. Ct. at 696, 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. It’s difficult to be positive, however, because the Supreme Court did not fully determine the constitutionality of BCRA’s disclaimer provisions. The Court upheld the expansion of FECA’s

groups putting forth large-scale, organized political ads for ballot initiatives and candidate elections).

disclaimer provisions to cover electioneering communications, but only based on the assumption that FECA's disclaimer provisions were themselves constitutional. *Id.* at 710.

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. This requirement that the disclaimer be made in the candidate's own voice may provoke additional litigation.

Only two 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). 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 355.²⁹ The Ninth

²⁹The 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

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*, 2004 U.S. App. LEXIS 16209 (9th Cir. August 6, 2004) (quoting Nev. Rev. Stat. 294A.320).

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 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*.

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 *Kentucky 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. *Arkansas 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

convince some courts to uphold disclaimer provisions in candidate elections that they might have struck down before *McConnell*.

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 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); *Citizens for Responsible Gov't State Political Action Comm.*, 236 F.3d 1174 (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”); *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”); *Minnesota 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*). 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. *McConnell*, 124 S. Ct. at 710. 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.” *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2nd 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.

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 at 1291 (upholding the federal requirement), *with Arkansas Right to Life*, 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 Missouri Gov’t PAC v. Maupin*, 892 F. Supp. 1246, 1254-56 (E.D. Mo.) (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.³⁰ *See* 892 F. Supp. at 1255. Other disclosure requirements have met with similar resistance. *North Carolina 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).

³⁰The requirement effectively eliminated the possibility of making truly independent expenditures and thus imposed a major burden on speech.

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 will also govern the procedures that may be used to adopt and amend local laws, including

¹See 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).

²See, e.g., N.Y. Const. art. IX, § 2 (McKinney 1998) (including home rule powers of local governments); N.Y. Mun. Home Rule L. § 10 (McKinney 1997) (describing general powers of local governments to adopt and amend local laws).

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 has yet sued.

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, and at least one city (Albuquerque, NM) has had mandatory spending limits in effect for years.³ 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-

³See National Civic League, *Local Campaign Finance Reform 73-75* (1998) (table showing jurisdictions that have adopted a range of campaign finance laws).

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 must first 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.

APPENDIX A

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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 financing in their states.

<i>Circuit</i>	<i>Composition</i>
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

APPENDIX C

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Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. Chi. Legal F. 111

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Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 Am. J. Pol. Sci. 1 (1989)

Richard Hall & Frank Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797 (Sept. 1990)

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Jonathan S. Krasno & Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center 2000)

Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* (Brookings Institution 1998)

Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 *Cath. L. Rev.* 107, 127 (1999)

Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* 37-46 (1995).

Frank Sorauf, *Politics, Experience and the First Amendment: The Case of American Campaign Finance*, 94 *Colum. L. Rev.* 1348 (1994)

Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* 163-70 (1992)

David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 *Colum. L. Rev.* 1369 (1994)

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Elizabeth Daniel, *Subsidizing Political Campaigns: The Varieties & Values of Public Financing* (Brennan Center 2000)

Glenn Moramarco, *Regulating Electioneering: Distinguishing Between “Express Advocacy” and “Issue Advocacy”* (Brennan Center 1998)

Burt Neuborne, *The Values of Campaign Finance Reform* (Brennan Center 1996)

Burt Neuborne, *A Survey of the Efforts to Reform the Campaign Finance System* (Brennan Center 1996)

Burt Neuborne, *Campaign Reform and the Constitution: A Critical Look at Buckley v. Valeo* (Brennan Center 1998)

E. Joshua Rosenkranz, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* (20th Century Fund 1998)

APPENDIX D

NATIONAL ORGANIZATIONS OFFERING RESOURCES FOR CAMPAIGN FINANCE REFORMERS

Association of Community Organizations for Reform Now (ACORN)

Steve Kest, Executive Director

88 3rd Avenue

Brooklyn, NY 11217

phone: 1-877-55ACORN

fax: 718-246-7939

e-mail: natexdirect@acorn.org

Zach Pollett, Political Director

2101 South Main Street

Little Rock, AR 72206

phone: 501-376-7151

fax: 501-376-3952

e-mail: poldirect@acorn.org

www.acorn.org

ACORN is a grassroots organization of community groups that are made up of low and moderate income families. *ACORN* has experience organizing for campaign finance reform and has participated as a party in reform litigation.

Alliance for Better Campaigns

Meredith McGehee, Executive Director

1900 M Street, N.W., Suite 200

Washington, DC 20036

phone: 1-888-6FREETV or 202-659-1300

fax: 202-659-1743

e-mail: alliance@bettercampaigns.org

www.bettercampaigns.org

The *Alliance for Better Campaigns* seeks to improve elections by promoting high standards for candidate accountability, media coverage, and citizen engagement. The Alliance has been actively promoting free broadcast time for candidates.

Americans for Campaign Reform

John D. Rauh, President
PO Box 2124
New Castle, NH 03854
phone: 603-430-4974
fax: 603-430-4973
email: jrauh@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
cf.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

Deborah Goldberg, Director, Democracy Program
161 Avenue of the Americas, 12th Floor
New York, NY 10013
phone: 212-998-6730
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: gscomment@brook.edu
www.brook.edu

The *Brookings Institution* maintains a web page specifically addressed to campaign finance reform (www.brook.edu/gs/cf/cf_hp.htm) and distributes a variety of publications on the issue.

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
1990 M Street NW Suite 380
Washington, D.C. 20036
phone: 202-969-8890
fax: 202-969-5612
e-mail: info@CFInst.org
<http://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
1640 Rhode Island Avenue
Suite 650
Washington, DC 20036
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. The Center administers the National Resource Center on State and Local Campaign Finance Reform, (www.cgs.org/projects/discriptions.htm), which supplies state and local governments and public interest organizations with model laws, case studies, databases, and other campaign finance information.

Center for Public Integrity

Charles Lewis, Executive Director
910 17th Street NW, 7th Floor
Washington, DC 20006
phone: 202-466-1300
fax: 202-466-1101
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

Larry Noble, 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.

Committee for the Study of the American Electorate

Curtis Gans, Director
601 Pennsylvania Ave, NW, South Building
Suite 900
Washington, DC 20004
phone: 202-546-3221
fax: 202-546-3574
www.gspm.org/csae/

The *Committee for the Study of the American Electorate* (“CSAE”) is a research institution with a primary focus on citizen engagement in politics. CSAE provides information on campaign advertising and campaign finance among other issues.

Common Cause

Chellie Pingree, President
1250 Connecticut Ave., NW #600
Washington, DC 20036
phone: 202-833-1200
fax: 202-659-3716
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

Tony Kramer, Executive Director
P.O. Box 417
Locust Grove, VA 22508
phone: 540- 972-3662
fax: 540-972-3693
e-mail: cogeldirector@aol.com
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
1825 I Street NW, Suite 400
Washington, DC 20006
phone: 202-429-2008
fax: 202-293-9574
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
2600 Johnny Cake Hill Road
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
1718 Connecticut Ave NW, Suite 600
Washington, DC 20009
phone: 202-667-6982
fax: 202-232-2592
e-mail: info@ewg.org
www.ewg.org/dirtymoney

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.

Fannie Lou Hamer Project
Carrie Bolton, Acting Director
PO Box 117
Kalamazoo, MI 49004
phone: 888-287-3547
fax: 888-285-3548
e-mail: amadoll2@flhp.org
www.flhp.org

The *Fannie Lou Hamer Project* is a part of a national grassroots movement that connects the history of earlier voting and civil rights struggles to the ongoing struggle for campaign finance reform. The Project serves as a vehicle for traditional civil rights organizations and communities of color to engage in campaign finance reform.

Federal Election Commission
Bradley A. Smith, 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

P.O. Box 42040

Washington, DC 20015

phone: 202-628-0618

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, 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

Chris Gates, President

1445 Market Street, Suite 300

Denver, CO 80202-1717

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

Jennie Drage Bowser, Policy Associate
7700 East First Place
Denver, CO 80230
phone: 303-364-7700
fax: 303-364-7800
e-mail: jennie.drage@ncsl.org
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

Samantha Sanchez, Co-Director
833 North Main, 2nd Floor
Helena, MT 59601
phone: 406-449-2480
fax: 406-443-4216
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

Deb Ross, National Field Director
1320 19th Street NW, Suite M-1
Washington, DC 20036
phone: 202-293-0222
fax: 202-293-0202
e-mail: dross@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

Frank Clemente (Congress Watch Contact)
215 Pennsylvania Avenue SE
Washington, DC 20003
phone: 202-546-4996
fax: 202-547-7392
e-mail: fclemente@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
211 N. Union St., #250
Alexandria, VA 22314
phone: 703-535-6897
fax: 703-801-8596
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

William McNary, President
1341 G St. NW, 10th Floor
Washington, DC 20005
phone: 202-624-1730
fax: 202-737-9197
e-mail: usaction@usaction.org
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

Adam Lioz, Democracy Advocate

218 D Street SE

Washington, DC 20003

phone: 202-546-9707

fax: 202-546-2461

e-mail: uspirg@pirg.org

<http://pirg.org/democracy/>

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.