Catholic University Law Review

Volume 49
Issue 1 *Fall 1999*

Article 5

1999

All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars

James Bopp Jr.

ARTICLES

ALL CONTRIBUTION LIMITS ARE NOT CREATED EQUAL: NEW HOPE IN THE POLITICAL SPEECH WARS

James Bopp, Jr.[*]

It is an unfortunate reality in today's election law world that those with a passion to participate fully in the "uninhibited, robust and wide-open"[1] marketplace of political speech often must have the fortitude to pass first through the federal courthouse to vindicate their constitutional rights to do so. Since the early 1970s, an increasingly complicated web of federal and state statutes, administrative regulations, and agency advisory opinions have converted "the freedom of speech"[2] guarantee by the Bill of Rights into a trap for the unwary by making potential criminals out of those who pursue once innocent endeavors like paying for an ad in the local newspaper,[3] or on the local radio,[4] or television station.[5]

To justify this proliferation of government regulation of pure political speech and association, the campaign finance "reformers" decry the influence of "Special Interests" backed by "Big Money" without any apparent embarrassment that the "reform" crowd is an especially vocal

---

* James Bopp, Jr., B.A., Indiana University, 1970; J.D., University of Florida, 1973; Attorney, Bopp, Coleson & Bostrom, Terre Haute, Indiana; Of Counsel, Webster, Chamberlain & Bean, Washington, D.C.; General Counsel, James Madison Center for Free Speech; Chairman, Election Law Subcommittee, Free Speech and Election Law Practice Group of the Federalist Society.

The author wishes to express his appreciation to attorney James R. Mason, III, Bopp, Coleson & Bostrom for research and writing assistance.

1. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open").

2. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

3. *See* Federal Election Comm'n v. Furgatch, 807 F.2d 857, 865 (9th Cir. 1987).

4. *See* Kansans for Life, Inc. v. Gaede, 38 F. Supp. 2d 928, 938 (1999) (plaintiffs represented by author).

5. *See* Federal Election Comm'n v. Christian Action Network, 894 F. Supp. 946, 952 n.6, 953 (W.D. Va. 1995), *aff'd mem.*, 92 F.3d 1178 (4th Cir. 1996).

coalition of special interests backed by big money.[6] Leaving aside discussion of the reformers' motivations, the result of many so-called "reform" efforts is to limit the amount of money that individuals and organizations may donate to others to pay for the publication or broadcasting of political speech. The Supreme Court has upheld limits on the size of individual and political committee contributions to a candidate's campaign war chest to prevent the evil of *quid pro quo* corruption of a candidate created by *large* contributions.[7] As more states pass ever-lower limits on contributions to candidates, court battles rage over how low a limit can be before it is unconstitutionally too low.[8]

Not all political contributions, even large ones, however, necessarily implicate the governmental interest in preventing corruption of a candidate. Nevertheless, the federal government and many states limit the size of those political contributions, apparently based on the mistaken belief that contributions are less deserving of constitutional protection than are expenditures.[9]

This Article will discuss two relatively new battlegrounds in the speech wars where federal and state limits on contributions are ripe for a court to strike the limits down, regardless of size. First, a compelling govern-

---

6. For example, billionaire Jerome Kohlberg is the principal donor for The Campaign for America Project, a self-styled "reform" organization. The Project spent over $300,000 in 1998 on advertisements promoting campaign finance reform and over $466,000 on advertisements attempting to defeat now-Senator Jim Bunning in the Kentucky federal senatorial election because Bunning did not agree with its position. The Project did much of this spending after extensive consultations with other "reform" groups, including Common Cause, League of Women Voters, Public Citizen, PIRG, and Public Campaign. *See* Affidavit of Douglas Berman, President of Campaign for America, March 25, 1999, in support of Plaintiff's Motion for Summary Judgment, Republican Nat'l Comm. v. Federal Election Comm'n, C.A. No. 98-CV-1207 (WBB) (D.D.C. 1998). Additionally, Public Campaign accepted $1 million from former Democratic Rep. Cecil Heftel and $3 million from the Open Society Institute, whose founder, billionaire George Soros made his fortune speculating in the post-communist European currency markets. Public Citizen refuses to disclose the source of its money. *See* Chuck Raasch, *Do Public Interest Groups that Push Campaign Finance Reform Really Represent Citizens?*, GANNET NEWS SERVICE, June 13, 1997.

7. *See* Buckley v. Valeo, 424 U.S. 1, 29 (1976) (per curiam).

8. This Article will not address the problem of limits on contributions to candidates that are unconstitutionally too low. For a thorough discussion of that issue, see generally James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235 (1998-99) and D. Bruce La Pierre, *Raising a New First Amendment Hurdle for Campaign Finance "Reform,"* 76 WASH. U. L.Q. 217 (1998).

9. There is a split in the circuits over whether contribution limits are to be evaluated under "strict" scrutiny, *see* Russell v. Burris, 146 F.3d 563, 568 (8th Cir. 1998); Kruse v. City of Cincinnati, 142 F.3d 907, 911-12 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 511 (1998), or "rigorous" scrutiny, *see* Vannatta v. Keisling, 151 F.3d 1215, 1220 (9th Cir. 1998) (Brunetti, J., concurring in part and dissenting in part).

mental interest does not justify federal and state limits on individual contributions to political committees organized for the sole purpose of making independent expenditures. Second, federal and state limits on individual contributions to political parties designated to be spent on the party's own speech, whether independently or in coordination with a candidate, are unconstitutional because political parties do not corrupt their own candidates. For this same reason, limits on intra-party transfers cannot be justified. This Article will also discuss an emerging trend in courts holding that governments may not ban direct monetary contributions to candidates made by certain not-for-profit ideological corporations.

Contribution limits are not created equal. If not justified by the compelling governmental interest in preventing *quid pro quo* corruption, contribution limits must fail. By reorganizing their handling of contributions and by mounting preenforcement challenges to unjustified contribution limits, organizations and political parties can position themselves so that they and their individual contributors may be free to participate in the political process to a greater degree than federal and many state laws permit today. That is, that organizations and political parties may be able to participate to the full extent guaranteed by the First Amendment.

This Article proceeds from the premise that the First Amendment is not a loophole[10] employed by the unscrupulous to evade the legitimate ends of a paternalistic state.[11] Rather, the First Amendment is the supreme election law of the land, and stands as the preeminent safeguard of our republican democracy. Furthermore, the First Amendment is the reef on which overreaching government regulations of speech run aground and eventually founder, to the benefit of a liberty-loving people. Thankfully, in the last decade, courts have struck down dozens of recently enacted government restrictions of political speech as violating the First Amendment.[12] For those who still believe that "We the people" are

---

10. *See* James Bopp, Jr. & Richard E. Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. WEST L.A. L. REV. 1 (1997).

11. *See* Wanda Franz & James Bopp, Jr., *The Nine Myths of Campaign Finance Reform*, 10:1 STAN. L. & POL'Y REV. 63, 64 (1998).

12. The author has been privileged to represent numerous plaintiffs in their successful efforts to vindicate their constitutional right to free speech in the election context. *See* Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999); North Carolina Right To Life, Inc. v. Bartlett, 168 F.3d 705, 718 (4th Cir. 1999); California Prolife Council Political Action Comm. v. Scully, 164 F.3d 1189, 1191 (9th Cir. 1999); Clifton v. Federal Election Comm'n, 114 F.3d 1309, 1317 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1036 (1998) (mem.); Minnesota Concerned Citizens for Life v. Federal Election Comm'n, 113 F.3d

sovereign and that "the freedom of speech" stands as a bulwark against government tyranny, be of good cheer. The more the "reformers" tighten their grip, the more political speech slips through their fingers!

I. BACKGROUND

In the field of First Amendment election law, all roads eventually lead to the Supreme Court's landmark opinion, *Buckley v. Valeo*,[13] where the Court addressed several aspects of Congress' comprehensive, post-Watergate regulation of campaign finances, the Federal Election Campaign Act (FECA).[14] Out of *Buckley* emerged the critical constitutional distinctions between a candidate spending money on her own speech (expenditures), which government could not constitutionally limit,[15] and money given by individuals to a candidate (contributions), which could be subject to some limits to prevent *quid pro quo* corruption.[16]

Buckley also made important distinctions about money spent by a non-candidate on speech that expressly advocates the election or defeat of a candidate. It is beyond Congress' power to limit the amount of money spent by an individual independently from the candidate (independent expenditure). When the individual, however, coordinates the content, timing, and distribution of the express advocacy speech with the candidate (coordinated expenditure), the money spent by the individual may be treated like a direct monetary contribution to the candidate and limited accordingly.[17] The *Buckley* opinion did not address the FECA's limitations on contributions to political action committees (PACs), or its limitations on individual contributions to political parties or from parties to candidates in the form of coordinated expenditures. But it established the analytical framework for judging whether those limits are constitutional.

II. INDEPENDENT EXPENDITURE PACS

Many states and the federal government impose limits on the amount

---

129, 133 (8th Cir. 1997); New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 19-20 (1st Cir. 1996); Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir. 1994); Faucher v. Federal Election Comm'n, 928 F.2d 468, 472 (1st Cir. 1991); Maine Right to Life Comm. v. Federal Election Comm'n, 914 F. Supp. 8, 13 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997) (mem.).

13. 424 U.S. 1 (1976) (per curiam).

14. *See* 2 U.S.C. §§ 431-434 (1994 & Supp. III 1998).

15. *See Buckley*, 424 U.S. at 19-21.

16. *See id.* at 25-27.

17. *See id.* at 46 & n.53.

of money an individual may contribute to a PAC.[18] Definitions of what it takes to be considered a PAC vary widely in the specifics, but they tend to share the same general features. The FECA's definition is representative: "The term 'political committee' means . . . any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year . . . ."[19] A political committee is nothing more than an association of persons who pool their resources and spend them to advance their commonly held political beliefs through the electoral process. Generally, political committees use their money either to make direct monetary contributions to candidates—who then use the money as they see fit, or to pay for

18. *See* 2 U.S.C. § 441a(a)(1)(C) (1994); ALASKA STAT. § 15.13.070 (Michie 1998) (imposing a limit of $500 per year); ARIZ. REV. STAT. ANN. § 16-905(E) (West Supp. 1998) (limiting aggregate contribution to $2820 per annum); ARK. CODE ANN. § 7-6-203(b) (Michie 1993) (limiting aggregate contribution to $1000 per election); CONN. GEN. STAT. ANN. § 9-333m(d) (West Supp. 1999) (restricting aggregate contributions to $15,000 per election); D.C. CODE ANN § 1-1441.1(d)(1) (1999) (imposing $5000 limit per election); FLA. STAT. ANN. § 106.08(1)(a) (West Supp. 1999) (restricting contributions to $500 per election); HAW. REV. STAT. ANN. § 11-204(b) (Michie 1998) (limiting contributions to $1000 per election); KY. REV. STAT. ANN. § 121.150(10) (Michie Supp. 1998) (imposing a $1500 per year restriction); LA. REV. STAT. ANN. § 1505.2(K)(1) (West Supp. 1999) (restricting contributions to $100,000 per every four year election cycle); MD. CODE ANN., ELEC. § 26-9(d)(1) (1997) (restricting contributions to $4000 per four year election cycle); MASS. GEN. LAWS ANN. ch. 55, § 7A(a)(1) (West Supp. 1999) (restricting contributions to $500 per year); N.H. REV. STAT. ANN. § 664:4(V)(1) (1996) (restricting contributions to $5000 or $1000 if candidate does not abide by voluntary spending limits); N.Y. ELEC. LAW § 14-114(8) (McKinney 1998) (limiting aggregate contributions to $150,000 per year); N.C. GEN. STAT. § 163-278.13(a) (1995) (imposing a $4000 contribution limit per election); OHIO REV. CODE ANN. § 3517.10.2(B)(1)(g) (Anderson 1998) (restricting contributions to $5000 per year); OKLA. STAT. ANN. tit. 21, § 187.1(A)(1) (West Supp. 1999) (restricting contributions to $5000 per person or family per year); R.I. GEN. LAWS § 17-25-10.1(a)(1) (1996) (limiting contributions to $1000 per year); S.C. CODE ANN. §§ 8-13-1314(A)(1)(a), 8-13-1322(A) (Law. Co-op. Supp. 1998) (restricting contributions to $3500 per year); VT. STAT. ANN. tit. 17, § 2805(a) (Supp. 1998) (restricting contributions to $2000 per year per two year election cycle); W. VA. CODE § 3-8-12(f) (1999) (limiting contributions to $1000 per election); WIS. STAT. ANN. § 11.26(4) (West Supp. 1998) (limiting aggregate contributions to $10,000 per year); WYO. STAT. ANN. § 22-25-102(c) (Michie 1999) (imposing a $25,000 contribution restriction per election cycle).

19. 2 U.S.C. § 431(4)(A) (1994). The State of Vermont's definition is typical of state PAC definitions and is similar in character to the FECA's: "'Political committee' . . . means any formal or informal committee of two or more individuals, not including a political party, which receives contributions or makes expenditures of more than $500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates . . . ." VT. STAT. ANN. tit. 17, § 2801(4). For purposes of the First Amendment, a permissible definition of "political committee" is further limited to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79, *quoted in* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 252 n.6 (1986).

the political committee's own speech. The FECA limits the amount an individual may contribute to a federal PAC to $5000 per calendar year.[20]

The FECA definition of political committee, like most state statutes, imposes limits on contributions to PACs without recognizing a distinction between a PAC that makes contributions and one that makes only independent expenditures. One, however, cannot use government labels to justify restrictions on political speech or association.[21] Thus, although a particular statutory scheme does not specifically provide for the organization of independent expenditure PACs (IE-PACs), the government cannot prevent individuals from associating for that purpose, or from exercising their First Amendment freedoms to the constitutional limit.

A. Contribution Limits and the Supreme Court

The Supreme Court has generally upheld the *concept* of contribution limits, but it has uniformly struck down all attempts by Congress and the Federal Election Commission (FEC) to impose limits on independent expenditures.[22] Even though the First Amendment protects contributions as association and speech, courts have upheld contribution limits when the particular limits were narrowly tailored to address a compelling governmental interest.[23] The Supreme Court's rationale for the distinction between contributions and independent expenditures has been that a large monetary contribution to a candidate presents the risk of *quid pro quo* corruption or its appearance, while independent expenditures do not. In the words of the *Buckley* Court:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.[24]

The Supreme Court's requirement that contribution limits must be

---

20. *See* 2 U.S.C. § 441a(a)(1)(C) (1994).

21. *See* Colorado Republican Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 621-22 (1996) (Breyer, J., plurality opinion) ("An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one.").

22. Most recently, the Supreme Court ruled that even political parties could make unlimited independent expenditures. *See Colorado Republican*, 58 U.S. at 613-15.

23. *See Buckley*, 424 U.S. at 14-15.

24. *Id.* at 47.

aimed at the prevention of *quid pro quo* corruption of a candidate, when considered in conjunction with its well-established precedent that unlimited independent expenditures do not present that risk, logically requires the conclusion that imposing limits on the ability of individuals to pool their money for the sole purpose of making independent expenditures by giving money to an "Independent Expenditure PAC," would not be justified by the compelling governmental interest of preventing *quid pro quo* corruption of a candidate.

Consider the following: the government has no compelling interest in preventing Smith from spending more than $5000 to advocate the election of a candidate. It also has no compelling interest in preventing Jones from doing likewise. Additionally, if Smith and Jones were to associate by pooling their resources, the government would also have no compelling interest in limiting the Smith-Jones IE-PAC's independent expenditures.[25] How, then, can the government justify limiting Smith and Jones to contributing only $5000 apiece to the Smith-Jones IE-PAC[26] when neither their individual spending nor their combined spending implicate a compelling governmental interest?

Although no case has ever directly addressed the issue,[27] in *California Medical Ass'n v. Federal Election Commission*, the Supreme Court strongly supported the above analysis.[28] That case involved an FEC enforcement action against California Medical Association for accepting contributions to its own PAC in excess of the $5000 contribution limit.[29] In a plurality opinion written by Justice Marshall, four members of the

25. *See* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 501 (1985).

26. The FECA does not make a statutory distinction between "contribution PACs" and "IE-PACs." The Court's reasoning suggests a distinction between what government regulation the First Amendment permits and what it does not. The FEC, however, has recognized the implications of *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981), and attempted to foreclose the formation of IE-PACs by administrative regulation. "[T]he limitation on contributions of this paragraph also applies to contributions made to political committees making independent expenditures . . . ." 11 C.F.R. 110.1(d)(2) (1999).

27. On September 9, 1999, the District Court for the Northern District of California preliminarily enjoined enforcement of a contribution limit as applied to an IE-PAC. *See* San Franciscans For Sensible Gov't. v. Renne, No. C 99-02456 CW (N.D. Cal. Sept. 8, 1999) (Order Granting Plaintiffs' Motion for a Preliminary Injunction). The Ninth Circuit stayed the injunction pending appeal, *see Campaign Cash Restricted in S.F.*, S.F. CHRON., Oct. 6, 1999, but lifted the stay on October 21, 1999, *see* San Franciscans for Sensible Government v. Renne, No. 99-16995 (9th Cir. Oct. 20, 1999) (on file with the *Catholic University Law Review*).

28. 453 U.S. at 197-98.

29. *See id.* at 186.

Court voted to uphold the individual $5000 limit to multicandidate PACs, in part, because multicandidate PACs by definition make direct monetary contributions to five or more federal candidates.[30] Although some of the reasoning in the plurality opinion is problematic,[31] the plurality specifically left open the question of the constitutionality of the $5000 contribution limit as applied to IE-PACs.[32]

More importantly, Justice Blackmun's concurring opinion makes it clear that his deciding vote depended on limiting the holding in the case to multicandidate PACs, which make contributions to candidates, and would not reach IE-PACs, which, as he explained, could not make contributions to candidates. Without Justice Blackmun's concurrence in the judgment, the $5000 contribution limit to multicandidate PACs would not have been upheld. Accordingly, in a future case, Justice Blackmun's forceful reasoning in defense of the constitutional right of individuals to make unlimited contributions to IE-PACs (and the right of IE-PACs to accept them) would be afforded great weight.

Justice Blackmun's discussion begins with a correct understanding of the underlying rationale for the Court's distinction between contributions and independent expenditures first expressed in *Buckley*:

> *Buckley* states that "contribution and expenditure limitations both implicate fundamental First Amendment interests," and that "governmental 'action which may have the effect of curtailing freedom to associate is subject to the closest scrutiny.'" Thus, contribution limitations can be upheld only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[33]

With the above understanding in mind, Justice Blackmun concluded that the contribution limits to multicandidate PACs passed the test "as a means of preventing evasion of the limitations on *contributions to a candidate* or his authorized campaign committee upheld in *Buckley*."[34]

Turning to the question of IE-PACs, Justice Blackmun continued:

> I stress, however, that . . . a *different result would follow* if § 441a(a)(1)(C) were applied to contributions to a *political*

30. *See id.* at 196, 201. Multicandidate PAC is defined in 2 U.S.C. § 441a(a)(4) (1994).

31. *See California Medical*, 453 U.S. at 196-97 (discussing in dicta the FEC's "speech by proxy" argument).

32. *See id.* at 197 n.17.

33. *Id.* at 202 (Blackmun, J., concurring) (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)) (citation omitted).

34. *Id.* at 203 (emphasis added).

> *committee established for the purpose of making independent expenditures*, rather than contributions to candidates . . . . The Court repeatedly has recognized that effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. By pooling their resources, adherents of an association amplify their own voices; the association is but the medium through which its individual members seek to make more effective the expression of their own views. Accordingly, I believe that contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing actual or potential corruption, and if the limitation is no broader than necessary to achieve that interest.[35]

In *Federal Election Commission v. National Conservative Political Action Committee*,[36] the Supreme Court reaffirmed that limits on independent expenditures by political committees were unconstitutional, and recognized unequivocally that *California Medical* applied only to multicandidate PACs:

> The FEC urges that these contributions do not constitute individual speech, but merely "speech by proxy," . . . . The plurality emphasized in that case, however, that nothing in the statutory provision in question "limits the amount [an unincorporated association] . . . may independently expend in order to advocate political views," *but only the amount it may contribute to a multicandidate political committee.*[37]

B. Challenging PAC Contribution Limits as Applied to IE-PACs

The FECA's definition of political committee (and most state statutory definitions) does not recognize a separate category for IE-PACs. An IE-PAC can accept unlimited contributions from individuals and make unlimited independent expenditures to expressly advocate the election or defeat of federal candidates, including candidates for President. Additionally, the courts have never decided the constitutionality of FECA's PAC contribution limits as applied to IE-PACs. If an organization were to find it useful to establish an IE-PAC, it would be necessary to sue the FEC in a preenforcement challenge against § 441a(a)(1)(C) of the FECA as applied to IE-PACs, and against the FEC regulation that implements

35. *Id.* (internal citations and quotations omitted) (emphasis added).

36. 470 U.S. 480 (1985).

37. *Id.* at 494-95 (citing *California Medical*, 453 U.S. at 196 (Marshall, J.) (plurality opinion)) (emphasis added).

the statute.[38]

Recent cases in the Eighth Circuit suggest that such a challenge would be successful. In *Day v. Holahan*,[39] the court struck down a state's contribution limit to PACs, including those that make contributions, stating that "the concern of a political *quid pro quo* for large contributions, which becomes a possibility when the contribution is to an individual candidate is not present when the contribution is given to a political committee or fund that by itself does not have legislative power."[40]

The Eighth Circuit reiterated its belief that contributions to political committees do not present a risk of corruption of a candidate in *Russell v. Burris*,[41] where the court again struck down a state's contribution limit to PACs, reasoning that "[t]here is also less of a danger of *quid pro quo* corruption, such as the sort that one might presume from large contributions given directly to candidates, when a contribution is given to a PAC that does not itself wield legislative power."[42] The Eighth Circuit cases have evaluated PAC contribution limits strictly in terms of the governmental interest of preventing *quid pro quo* corruption of a candidate. These cases do not advert to, much less follow, the prophylactic rationale of the plurality opinion in *California Medical* that limits to PACs are necessary to prevent corruption of candidates.

The salutary result of a successful challenge to PAC contribution limits by an IE-PAC would be to increase the liberty of individuals to associate to amplify their voices by producing more and better political speech. That, in turn, would provide voters with more information about candidates from sources other than the candidate's campaign and the news

38. *See* 11 C.F.R. § 110.1(d)(2) (1999) ("The limitation on contributions of this paragraph also applies to contributions made to political committees making independent expenditures . . . ."). Additionally, an individual donor plaintiff would also need to challenge the $25,000 aggregate maximum contribution limit in § 441a(a)(3). While it is true that *Buckley* upheld the $25,000 limit, the Court was not presented with an as-applied challenge by an IE-PAC. Further, § 110.1(h)(2) would prohibit an individual from contributing to an IE-PAC "with the knowledge that a substantial portion will be . . . expended on behalf of" a federal candidate to whom the individual also made a contribution. 11 C.F.R. § 110.1(h)(2) (1999). The FEC has interpreted this provision in an advisory opinion to be an outright ban on contributing to a "single candidate committee that makes independent expenditures on behalf of the candidate" if the contributor has already made a $1000 contribution to the candidate. Limitations on Contributions to Unauthorized Comm., 17,016 Fed. Election Camp. Fin. Guide (CCH) ¶ 6914 (Jan. 26, 1989) (Answer to Charles H. Breecher, Del. Volunteers for Reagan). Accordingly, the individual plaintiff would need to challenge this regulation as well.

39. 34 F.3d 1356 (8th Cir. 1994).

40. *Id.* at 1365 (citation omitted).

41. 146 F.3d 563 (8th Cir. 1998).

42. *Id.* at 571.

media. This result, while antithetical to the goals behind many efforts at so-called "reform," is the constitutional norm:

> The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.[43]

III. CHALLENGING INDIVIDUAL CONTRIBUTION LIMITS TO POLITICAL PARTIES

Political parties could also benefit by creating an internal independent expenditure account, which, analytically at least, ought to be allowed to receive unlimited contributions from individuals for the same reasons that an IE-PAC would be able to receive such contributions. Political parties, however, are not just "super-PACS," suggesting that the First Amendment analysis regarding the relationship between individual contributors, a political party, and a party's candidates requires a more nuanced approach. The developing case law indicates that a party's expenditure for its own speech may not be limited constitutionally whether it is done independently or in coordination with the candidate because parties are not a source of candidate corruption. The only adequate justification for government limits on funding political speech is preventing corruption.[44] This, in turn, implies that individual contributions to a political party, which the party would use to pay for the party's own speech (whether independent or coordinated), likewise may not be limited constitutionally.

A. Political Parties are Unique Institutions and Ought to be Encouraged

Haley Barbour, the former Chairman of the Republican National Committee, defined a political party as "an association of like-minded people who debate issues, who attempt to influence government policy, and who work together to elect like-minded people to local, State, and Federal office."[45] Mr. Barbour's definition succinctly raises the constitu-

---

43. Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 498 (1985).

44. *See id.* at 496-97 ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

45. *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Comm. on House Oversight*, 104th Cong. 10-11 (1995) [hereinafter *Campaign Finance Reform Hearing*] (statement of Haley S. Barbour, former chairman, Re-

tionally protected First Amendment activities in which political parties engage. First, political parties have a legitimate role in debating issues, promoting ideas, and in formulating public policy. Second, parties are primarily an association of people; they are not simply repositories for campaign contributions, or super-PAC's. Third, national parties have significant local and state components; they are national, not federal, committees. National parties exist for the purpose of electing federal and state candidates and for effecting federal and state public policy.

Although there are varying opinions about the role of money in campaigns, there is almost universal agreement that political parties ought to be strengthened rather than weakened. For example, A. James Reichley, Visiting Senior Fellow of the Graduate Public Policy Program at Georgetown University, testified before the House Oversight Committee on the Role of Political Parties that "there is a broad consensus within the profession [of political scientists] on the desirability of strengthening parties, that parties have been weakened in the overall system."[46] Parties ought to be strengthened because they "promote agreement between different interests and groups," promote discussion of major issues, and educate the electorate.[47] They also "foster effective government" across all divisions of the American system by "providing responsibility and accountability."[48] Additionally, they "promote participation," and perhaps, most relevant, *parties "promote clean politics."*[49]

Contrary to the widely-held belief regarding the desirability of strengthening parties, many efforts at reform, including the FECA, have had the opposite effect. As Congressman William Thomas, Chairman of the House Committee on Oversight has explained:

> [P]olitical parties are unique institutions. Unfortunately, I don't believe there was adequate knowledge in the 1970s about the role of the political parties in not only recruiting candidates but getting them elected and then programming public policy and the issues, or the education that the parties do. Perhaps, the limits that were placed on the ability of political parties to get funds I think significantly hampered parties in a negative way and relatively enhanced the special interests. Now, while people are looking at ways to change the system, I think perhaps

---

publican National Committee).

46. *Id.* at 66 (statement of A. James Reichley, visiting Senior Fellow of the Graduate Public Policy Program, Georgetown University).

47. *Id.* at 42 (statement of Gerald M. Pomper, Professor of Political Science, Eagleton Institute of Politics, Rutgers University).

48. *Id.* at 42-43.

49. *Id.* at 43 (emphasis added).

> unleashing political parties or freeing them from the current legislation would go a long way toward solving our problems.[50]

Nevertheless, the trend in recently adopted state legislation[51] and proposed federal legislation[52] is to continue to restrict further the legitimate role of political parties by imposing new limits on political party funding. As the legislative noose tightens, the Supreme Court has begun to impose judicial limits on government's ability to restrict political party speech through restrictions on party funding.

B. Colorado Republicans Federal Campaign Committee v. Federal Election Commission

In what has the potential to be one of the most staggering examples of unintended consequences for the "reformers," the FEC commenced an enforcement action against the Colorado Republican Party for exceeding the FECA's limits on party expenditures[53] when it paid for certain political advertisements before the 1986 federal election.[54] In Round I, seven justices of the Supreme Court agreed that the FECA's party expenditure limits could not be applied constitutionally to party independent expenditures: "We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."[55]

The Court specifically left open, however, the question of whether the FECA's limitations on party expenditures is constitutional as applied to party express advocacy expenditures coordinated with the candidate.[56] In other contexts, the Court has treated coordinated expenditures as candidate contributions. But, as applied to political parties, the Court ex-

---

50. *Id.* at 27-28 (statement of Congressman William Thomas, Chairman, House Committee on Oversight).

51. For example, Vermont recently enacted a $2000 contribution limit to the state political party, which includes transfers from the national party committee. *See* VT. STAT. ANN. tit. 17, § 2805(a) (Supp. 1998).

52. *See* Bipartisan Campaign Finance Reform Act of 1999, H.R. 417, 106th Cong. § 101 (1999); BiPartisan Campaign Reform Act of 1999, S. 26, 106th Cong. § 101 (1999). "A national committee of a political party . . . shall not solicit, receive, or direct to another person a contribution, donation, or transfer of funds, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirement of this Act." H.R. 417, 106th Cong. § 101 (1999).

53. *See* 2 U.S.C. § 441a(d)(3) (1994).

54. *See* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n., 518 U.S. 604, 608 (1996).

55. *Id.* at 618.

56. *See id.* at 622, 625-26.

pressed skepticism about whether Congress enacted the provision for a valid governmental purpose: "[T]his Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful . . . spending."[57]

Four concurring Justices would have reached the question of the facial constitutionality of the party spending limits. Those Justices would have held that limits on the amount of money that a political party may spend on both independent and coordinated express advocacy communications are unconstitutional under the First Amendment. As Justice Kennedy said in his concurrence, which the Chief Justice and Justice Scalia joined:

> The problem is not just the absence of a basis in our First Amendment cases for treating the party's spending as contributions. The greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do. It is fanciful to suppose that limiting party spending of the type at issue here does not in any way infringe the contributor's freedom to discuss candidates and issues, since it would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consultation." The party's speech, legitimate in its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the [expenditure] restrictions imposed here.[58]

As Justice Thomas pointed out in his concurring opinion, in which the Chief Justice and Justice Scalia joined:

> The structure of political parties is such that the theoretical danger of those groups actually engaging in *quid pro quos* with candidates is significantly less than the threat of individuals or other groups doing so. American political parties, generally speaking, have numerous members with a wide variety of interests, features necessary for success in majoritarian elections. Consequently, the influence of any one person or the importance of any single issue within a political party is significantly

57. *Id.* at 618.

58. *Id.* at 630 (Kennedy, J., concurring in the judgment and dissenting in part) (internal quotations & citations omitted).

diffused.[59]

On remand, the district court agreed with the concurring justices and held that the FEC had failed to meet its burden of proving that limits on party *coordinated* expenditures are justified by a compelling governmental interest.[60] The district court rejected all of the FEC's proffered justifications as either illogical, in view of the unique role that parties play in the political process, or as unsupported by the evidence.[61] The FEC has appealed from that decision, setting the stage for Round II of the *Colorado Republican* case—the Supreme Court possibly striking down limits on coordinated party expenditures.

If that is the outcome of Round II, it would seriously call into question the justification for limiting the amount an individual could contribute to a political party. As the courts continue to grapple with restrictions on political parties, the emerging picture is not of an institution that is inherently corrupting of candidates. Rather, courts appear to view political parties as healthy, moderating influences on the electoral process.[62]

No one has challenged the FECA's $20,000 individual contribution limit to political parties.[63] If a party's unlimited spending to produce speech in coordination with a candidate does not raise, however, the specter of *quid pro quo* corruption of the candidate, then it logically follows that an individual's contribution to the party would not be a source of *quid pro quo* corruption either. As one prominent proponent of campaign finance reform has conceded: "For political parties, there seems little alternative to simply legitimizing what has already happened de facto: the abolition of all limits . . . . [S]uch an outcome is not to be lamented. Political parties *deserve* more fundraising freedom, which would

---

59. *Id.* at 646-647 (Thomas, J., concurring in the judgment and dissenting in part) (citations omitted).

60. *See* Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 41 F. Supp. 2d 1197, 1213 (D. Colo. 1999).

61. *See id.* at 1209-13. It is beyond the scope of this Article to refute the watered-down definitions of "corruption" used by enforcers and reformers alike to justify unconstitutional regulations of political speech. This Article adheres to the Supreme Court's definition of corruption of a candidate: "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." Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 497 (1985).

62. *See* Missouri Republican Party v. Lamb, 31 F. Supp. 2d 1161, 1162, 1164 (E.D. Mo. 1999) (enjoining preliminary enforcement of $10,750, $5250 and $2750 state limits on political party contributions to candidates). The court enjoined the state limits on the ground that the party would likely succeed on merits of its claim that the statute violated its First Amendment rights, the party faced the threat of irreparable harm if injunction was denied, and issuing the injunction was in the public interest. *See id.* at 1163-64.

63. *See* 2 U.S.C. § 441a(1)(B) (1994).

give these critical institutions a more substantial role in elections."[64]

C. Challenging State Law Restrictions on Transfers from National Party Committees to State Party Committees

As previously discussed, national parties have considerable constitutionally protected interests to participate in state and local elections. The FECA does not restrict the amount of money that may be transferred between national and state party committees.[65] There appears to be, however, a disturbing trend in state law, toward restricting intra-party transfers. For example, in 1998, Vermont went from no restrictions to a $2000 per two-year cycle limit and, in 1999, Connecticut completely banned the transfer of non-federal funds to state parties.[66] Several other states also limit intra-party transfers.[67] If the trend continues unchallenged, national party committees will increasingly find themselves on the sidelines in state elections, and state parties will be deprived of a significant source of funding. It is doubtful that restricting contributions from a national party committee to a state party committee can be justified because that limit is one step farther removed from a compelling government interest. That is, if the national party committee does not present the risk of corrupting federal candidates, how can it corrupt state candidates by transferring money to the state party committee, which likewise is inherently noncorrupting of state candidates? State law restrictions on intra-party transfers ought to be challenged because they are not justified by the prevention of *quid pro quo* corruption and therefore may not be limited, consistent with the First Amendment.

---

64. LARRY J. SABATO AND GLENN R. SIMPSON, DIRTY LITTLE SECRETS 334 (1996) (referring specifically to "soft" money contributions).

65. *See* 2 U.S.C. § 441a(a)(4) (1994).

66. *See* CONN. GEN. STAT. ANN. § 9-333s(b) (West Supp. 1999); VT. STAT. ANN. tit. 17, § 2805(a) (Supp. 1998). Furthermore, to the extent that state law intra-party contribution limits would impinge on the ability of the state parties to produce issue advocacy communications, they would be unconstitutional no matter what the original source of the money.

67. *See* D.C. CODE ANN. § 1-1441.1 (d)(1) (1999) (restricting contributions to $5000 per election); HAW. REV. STAT. ANN. § 11-204(c) (1998) (imposing a $50,000 restriction); KAN. STAT. ANN. § 25-4153(d) (1993) (restricting contributions to $25,000 per year); MD. CODE ANN., ELEC. § 26-9(e)(2) (1997) (restricting contributions to $6000 per four year election cycle); MASS. GEN. LAWS ANN. ch. 55, § 6 (West Supp. 1999) (imposing a $5000 contribution limit per year); N.J. STAT. ANN. § 19:44A-11.4(a)(2) (West 1999) (restricting contributions to $50,000 per year); R.I. GEN. LAWS § 17-25-10.1 (1996) (limiting contributions to $25,000); S.C. CODE ANN. § 8-13-1314(A)(1)(a) (Law. Co-op. Supp. 1998) (restricting contributions to $3500 per year); WASH. REV. CODE ANN. § 42.17.640(6) (West Supp. 1999) (limiting contributions to $2500); W. VA. CODE § 3-8-12(f) (1999) (restricting contributions to $1000 per election).

IV. CHALLENGING THE BAN ON CONTRIBUTIONS FROM CORPORATIONS AS APPLIED TO IDEOLOGICAL CORPORATIONS

Another contribution limit that is not created equal is the ban on political contributions by corporations imposed by the federal[68] and many state governments.[69] In this regard, it is probably more accurate to say that not all *corporations* are created equal, because, according to an emerging trend in the lower courts, a ban on corporate contributions may not be applied constitutionally to certain ideological corporations, depending on the corporation's characteristics.

In *Federal Election Commission v. Massachusetts Citizens for Life*[70] *(MCFL)*, the FEC commenced an enforcement action against MCFL, a nonprofit, nonstock, corporation, alleging that the money spent by MCFL to produce a newsletter was a banned corporate expenditure under the FECA[71] because the newsletter expressly advocated the election of federal candidates. Even though the Supreme Court agreed with the FEC that the communication was express advocacy, and therefore, a banned "expenditure" by a corporation, it ruled that the FECA provision banning corporations from making "expenditure[s] 'in connection with' any federal election"[72] could not constitutionally be applied to a not-for-profit "ideological" corporation.

The Court noted that regulation of corporate political spending had been generally upheld

> to restrict the influence of political war chests funneled through the corporate form; to eliminate the effect of aggregated wealth on federal elections; to curb the political influence of those who exercise control over large aggregations of capital; and to regulate the substantial aggregations of wealth amassed by the spe-

---

68. *See* 2 U.S.C. § 441b(a) (1994).

69. *See* ALASKA STAT. § 15.13.074(f) (Michie 1998); ARIZ. REV. STAT ANN. § 16-919(A) (West 1996); CONN. GEN. STAT. ANN. § 9-333o(a) (West 1999); IOWA CODE ANN. § 56.15(1) (West Supp. 1999); KY. REV. STAT. ANN. §§ 121.025, 121.035 (Michie 1993); MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1991); MICH. COMP. LAWS ANN. § 169.254 (West Supp. 1999); MINN. STAT. ANN. § 211B.15 (West Supp. 1999); MONT. CODE ANN. § 13-35-227 (1999); N.H. REV. STAT. ANN. § 664:4(I) (1996); N.C. GEN. STAT. § 163-278.15 (1995); N.D. CENT. CODE § 16.1-08.1-03.3 (1997); OHIO REV. CODE ANN. § 3599.03 (Anderson 1996); OKLA. STAT. ANN. tit. 74, § 4219 (West 1995); PA. STAT. ANN. tit. 25, § 3253 (West 1994); R.I. GEN. LAWS § 17-25-10.1(h); S.D. CODIFIED LAWS § 12-25-2 (Michie 1995); TENN. CODE ANN. § 2-19-132(a) (1994); TEX. ELEC. CODE ANN. §§ 253.094, 253.104 (West 1999); W. VA. CODE § 3-8-8(a); WIS. STAT. ANN. § 11.38(1)(a)(1) (West 1996); WYO. STAT. ANN. § 22-25-102(a) (Michie 1999).

70. 479 U.S. 238 (1986).

71. *See id.* at 241.

72. *Id.*

cial advantages which go with the corporate form.[73]

The Court reasoned, however, that "[r]egulation of corporate political activity thus has reflected concern not about the use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes."[74]

In evaluating the not-for-profit ideological corporation in light of the above considerations, the Court concluded that MCFL did not engage in business activities, had no shareholders, and was not established or funded by a business corporation or labor union.[75] Further, the Court held that the FECA's ban on independent expenditures from MCFL's corporate treasury "infringe[d] protected speech without a compelling justification for such infringement."[76]

In *North Carolina Right to Life, Inc. v. Bartlett*,[77] the Fourth Circuit Court of Appeals applied the *MCFL* rationale and concluded that a state corporate ban on direct monetary *contributions* to a candidate could not be applied to an ideological corporation. Additionally, the Alaska Supreme Court ruled that Alaska's recently enacted ban on corporate contributions could not be applied constitutionally to *MCFL*-type ideological corporations.[78] The Court in *MCFL* dealt with only independent expenditures in the context of the FECA. The First Amendment rationale relied on by the courts discussed above, however, would invalidate the federal ban on corporate contributions as applied to ideological corporations because it is not justified by the risk of *quid pro quo* corruption either.

---

73. *Id.* at 257 (citations and internal quotations omitted).

74. *Id.* at 259.

75. *See id.* at 264.

76. *Id.* at 263. Significantly, three courts of appeals have held that *MCFL* did not create a rigid, three-part test for determining whether § 441b may constitutionally be applied to an ideological corporation. Rather, the characteristics of *MCFL* are illustrative of considerations to be made in determining whether the ideological corporation represents a threat of corrupting the political process because of wealth unrelated to its advocacy of political ideas. *See* North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 714 (4th Cir. 1999) (striking down a state statutory exemption for *MCFL*-type corporations as too narrow); Day v. Holahan, 34 F.3d 1356, 1363-65 (8th Cir. 1994) (same); Survival Educ. Fund v. Federal Election Comm'n, 65 F.3d 285, 292-93 (2d Cir. 1995) (granting *MCFL*-type corporation summary judgment in FEC enforcement civil suit even though the non-profit corporation accepted some contributions from business corporations). Furthermore, the Eighth Circuit struck down as facially unconstitutional a FEC regulation, 11 C.F.R. § 114.10, which essentially codified the precise features of *MCFL*. *See* Minnesota Concerned Citizens for Life v. Federal Election Comm'n, 113 F.3d 129, 132-33 (8th Cir. 1997).

77. 168 F.3d 705 (4th Cir. 1999).

78. *See* Alaska v. Alaska Civil Liberties Union, 978 P.2d 597, 611-13 (Alaska 1999).

Although this logical extension of *MCFL* to include direct monetary contributions does not have the far-reaching significance presented by the possibility of unlimited constitutionally protected individual contributions to IE-PACs or to political party committees, it does allow those ideological corporations greater flexibility in directly participating in the electoral process. Qualifying ideological corporations would need to be mindful of the tax consequences of direct electoral intervention. Additionally, if a qualifying ideological corporation's independent expenditures and contributions were to become the corporation's major purpose, it would be required to comply with the additional organizational, reporting, and disclosure requirements required of a political committee under federal and many state laws.[79] Navigating these additional risks is a small trade-off for even a modest increase in First Amendment liberty. As the late Supreme Court Justice William Brennan eloquently summarized in *MCFL*:

> Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech is the matrix, the indispensable condition, of nearly every other form of freedom. Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction.[80]

V. CONCLUSION

This Article has discussed typical limits on political contributions that are not justified by a compelling governmental interest. For this reason, limits on individual contributions to independent expenditure PACs and political parties are ripe for preenforcement challenges. Likewise, recently enacted state limits on intra-party transfers will not withstand judicial scrutiny. Finally, the federal and state bans on the use of general treasury funds for direct monetary contributions to candidates may not be applied constitutionally to a qualified not-for-profit ideological corporation. When faced with these unconstitutional limits on political speech, individuals and organizations can rely on the First Amendment to avoid becoming contribution limits casualties in the political speech wars.

79. *See Massachusetts Citizens for Life*, 479 U.S. at 262.

80. *Id.* at 264-65 (quotations and citations omitted).