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CONSTITUTIONAL LIMITS ON CAMPAIGN CONTRIBUTION LIMITS

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There is a hue and cry amongst pols and populists that too much money is spent on political campaigns. The overabundance of cash, they say, is responsible for negative advertising, the numbing of positive campaigning, and voter disinterest on election day. Whether motivated by altruism or political advantage, reformers want contribution limits lowered to reduce the overall amount of money spent on campaigns. Only one thing stands in the way: the First Amendment. Because the act of making a campaign contribution is protected by the First Amendment rights of free speech and free political association, contributions cannot constitutionally be limited for just any reason. Only one reason has been held sufficiently compelling to justify contribution limits: preventing *quid pro quo* corruption and the appearance of corruption that may be spawned by large individual cash contributions. Upon this principle, the Supreme Court, in the landmark case of *Buckley v. Valeo*,¹ upheld the \$1,000 per election limit on contributions from individuals to federal candidates that was contained in the largely experimental Federal Election Campaign Act of 1971.² In the Fall of 1999, in its first candidate

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¹ 424 U.S. 1 (1976) (per curiam).

² 2 U.S.C. § 441a(a)(1)(A).

contribution limit case since *Buckley*, the Supreme Court will hear arguments in *Shrink Missouri Government PAC v. Adams (Shrink PAC)*.³

In *Shrink PAC*, the Eighth Circuit Court of Appeals reviewed Missouri limits of \$1,075 for state-wide candidates and ruled that the limits were too low to pass constitutional muster. Prior to *Shrink PAC*, no contribution limit over *Buckley's* benchmark \$1,000 had been struck down as too low.⁴ Conversely, beginning with the leading assault in *Day v. Hayes*,⁵ no contribution limit under \$1,000 has been upheld.⁶ Of the justices who considered *Buckley*, only Chief Justice Rhenquist remains on the Court, and political players from all sides are now watching the Court with keen interest.

In the years since *Buckley*, courts have struggled to fill in the jurisprudential interstices of that opinion and have wrestled with the effects

³ 161 F.3d 519 (8th Cir. 1998), *cert. granted sub nom.*, *Nixon v. Shrink Mo. Gov't PAC*, 119 S. Ct. 901 (1999).

⁴ See *Mintz v. Barthelemy*, 722 F. Supp. 273 (E.D. La. 1989), *aff'd*, 891 F.2d 520 (5th Cir. 1989) (\$5,000 limit for mayoral races upheld); *Mott v. FEC*, 494 F. Supp. 131 (D.D.C. 1980) (\$5,000 limit upheld); *Gard v. Wisconsin State Election Bd.*, 456 N.W.2d 809 (Wis. 1990), *cert. denied*, 498 U.S. 982 (1990) (\$11,000 aggregate PAC contribution limit upheld); *In re Vandelinde*, 366 S.E.2d 631 (W. Va. 1988) (\$1,000 limit upheld); *Florida Police Benevolent Ass'n v. Florida Election Comm'n*, 430 So.2d 483 (Fla. Dist. Ct. App. 1983) (\$1,000 limit upheld). See also, *Driver v. DiStefano*, 914 F. Supp. 797 (D.R.I. 1996) (\$1,000 per calendar year limit upheld); *Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 162 (1997) (approving in dicta newly raised \$1,000 per election limit). Cf. *California Med. Ass'n v. FEC*, 453 U.S. 182, 101 S. Ct. 2712 (1981) (\$5,000 limit on contributions to PACs upheld).

⁵ 863 F. Supp. 940 (D. Minn. 1994), *aff'd in part, rev'd in part*, *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (striking down \$100 limit on contributions to PACs). The author was counsel for the Minnesota Citizens Concerned for Life plaintiffs in the district court and the court of appeals in this case.

⁶ See *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995) (striking down limits of \$300 and \$100); *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999) (striking down graduated limits of \$500, \$250, and \$100); *Russell v. Burris*, 978 F. Supp. 1211 (E.D. Ark. 1998), *aff'd in part, rev'd in part*, 146 F.3d 563 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 510 (1998) (striking down \$300 and \$100 limits to candidates and \$200 limits on contributions to PACs); *Arkansas Right to Life v. Butler*, 983 F. Supp. 1209 (W.D. Ark. 1997), *aff'd*, 146 F.3d 558 (8th Cir. 1998) (striking down \$300 limits for candidates); *National Black Police Ass'n v. District of Columbia Bd. of Elections and Ethics*, 924 F. Supp. 270 (D.D.C. 1996), *vacated as moot due to rise in limit*, 108 F.3d 346 (D.C. Cir. 1997) (striking down \$100 and \$50 limits later statutorily raised to \$2,000, \$1,500, \$1,000, etc.); *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (striking down \$100 limit as "palpably penal"); *Shrink Missouri Gov't PAC v. Maupin*, 892 F. Supp. 1246 (E.D. Mo. 1995), *aff'd*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) (striking down limit on candidate's contributions to own campaign and mandatory spend-down provisions); *Vannatta v. Keisling*, 931 P.2d 770 (Or. 1997) (striking down \$100 limits). See also *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 721 F. Supp. 1172 (E.D. Cal. 1991), *aff'd*, 955 F.2d 1312 (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992) (striking down \$1,000 per fiscal year limit as discriminatory against challengers).

of changing campaign conditions. From these decisions, certain constitutional principles may be culled. Some may be amplified and others diminished when *Shrink PAC* is ultimately decided, but the principles and propositions that follow will continue to guide public participation in 21st century political campaigns.

I. THE FIRST AMENDMENT PROTECTS POLITICAL CONTRIBUTIONS AND EXPENDITURES

In *Buckley v. Valeo*, the Supreme Court held that the Constitution protects both political contributions and political expenditures. "The First Amendment affords the broadest protection to such political expression in order 'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"⁷ Reiterating the position it had set forth in *Monitor Patriot Co. v. Roy*,⁸ the Court stated, "it can hardly be doubted that [this right] has its fullest and most urgent application precisely to the conduct of campaigns for political office."⁹ The Court held that limits on political contributions and expenditures profoundly impact First Amendment rights, because

[c]ontribution and expenditure limitations operate in the area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.¹⁰

In *Buckley*, the Supreme Court held that the government may limit political contributions to candidates to prevent *quid pro quo* corruption, or its appearance, that may arise when persons or groups give large amounts of money to candidates. The Court, however, also held that the government may not limit political expenditures by candidates;¹¹ because political expenditures are not given to candidates, they do not implicate the state's interest in preventing corruption.¹²

A. Contribution Limits Infringe the Free Speech and Associational Rights of Contributors

Contribution limits adversely affect our system of representative government by restricting the resources available for political dialogue.

⁷ 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

⁸ 401 U.S. 265 (1971).

⁹ *Id.* at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

¹⁰ *Id.* at 14.

¹¹ *Id.* at 51 (independent expenditures), 54 (personal expenditures) and 58 (total expenditures).

¹² *Buckley*, 424 U.S. at 46-48 (independent expenditures), 53 (personal expenditures) and 55-57 (total expenditure).

A restriction on the amount of money a person or group can spend on political communications 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.¹³

An individual's freedom to speak about issues and candidates is significantly affected by the freedom to contribute money. Therefore, contribution limits must be considered in light of the First Amendment right to free speech.

More importantly, however, contribution limits threaten the First Amendment right to free association. "The First Amendment," of course, "protects political association as well as political expression,"¹⁴ because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."¹⁵ Contribution limits restrict not only the ability to speak about political beliefs, but also the ability to "associate with others for the common advancement of political beliefs and ideas"¹⁶

Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. . . . [C]ontribution ceilings thus limit one important means of association with a candidate or committee [even though] they leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates.¹⁷

As the Supreme Court has stated, "[T]he primary First Amendment problem raised by . . . contribution limitations is their restriction of one aspect of the contributor's freedom of political association."¹⁸

Contribution limits may permissibly infringe the First Amendment rights of contributors only if they advance the government's interest in preventing *quid pro quo* corruption, or its reasonable appearance, which occurs when a large, individual contribution is given to a candidate. But in advancing this interest, government cannot set the limits so low that, instead of just preventing a few large contributions, they prevent many smaller contributions that pose no threat of corrupting public servants.

¹³ *Id.* at 19.

¹⁴ *Id.* at 15.

¹⁵ *Id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973)).

¹⁶ *Id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973)).

¹⁷ *Id.* at 22.

¹⁸ *Buckley*, 424 U.S. at 24.

B. Contribution Limits Affect the Right of Political Candidates to Engage In Political Speech

Contribution limits must also not be so low that they prevent a candidate from raising the funds needed to get his message out to the voters. This second test is implied in *Buckley*. "Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."¹⁹

Although not articulated by the Court, contribution limits that prevent candidates from communicating their message are unconstitutional because they are *de facto* expenditure limits. Non-voluntary expenditure limits are *per se* unconstitutional.²⁰ The government may not dictate how much speech is "enough." Rather, it is up to candidates, political parties, and individuals who wish to engage in speech to determine how much political speech is needed.

The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.²¹

Campaign finance "reformers" proceed from the opposite premise. They believe there is too much political spending (there is too much speech), and government must limit this spending (reduce this speech) to an "appropriate" amount. Under their view, the government is to define the amount that is "appropriate." This premise—one that is obnoxious to the First Amendment—undergirds efforts to limit candidate spending through contribution limits.

C. Contribution Limits Must Pass Two Separate Tests

Contribution limits impinge upon the First Amendment rights of both contributors and candidates. These limits prevent contributors from speaking effectively in the political process,²² and from associating with the candidates of their choice. They may also interfere with candidates' abilities to amass the financial resources necessary to express them-

¹⁹ *Id.* at 21-22.

²⁰ *Id.* at 51-59.

²¹ *Id.* at 57.

²² *Buckley*, 424 U.S. at 14-15.

selves.²³ Therefore, for contribution limits to pass constitutional muster, they must satisfy two separate tests—one which considers the First Amendment rights of contributors and the other which considers the First Amendment rights of candidates.

II. APPLYING STRICT SCRUTINY FROM THE CONTRIBUTOR'S PERSPECTIVE

Labeling the scrutiny to be applied to contribution limits is still an open exercise, due primarily to the Supreme Court's inconsistent use of key language. In *Buckley*, the Court did say that a contribution limit "entails only a marginal restriction" involving "little direct restraint," and that expenditure limits impose "significantly more severe restrictions" than do limits on contributions.²⁴ At the same time, the Court wrote that restrictions on associational activity are "subject to the closest scrutiny,"²⁵ and described its review of the FECA limits as "rigorous."²⁶ In later election process cases, the Court has employed a sliding scale approach where direct restrictions on core constitutional rights are strictly scrutinized while lesser restrictions on non-First Amendment rights are given more deference. In *Russell v. Burris*, the Eight Circuit explained that for contribution limit cases, strict scrutiny is still appropriate.

In *Colorado Republican Fed. Campaign Committee v. Federal Election Commission*, a case involving the application of federal campaign expenditure limits, three justices resorted to what [one] calls a weighing test, rather than strict scrutiny, to decide the case. These justices described their approach as consistent with cases in which the Court "essentially weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." This adjudicatory approach appears to us to be a restatement or reformulation, not a modification, of the Court's familiar strict scrutiny analysis.²⁷

Contribution limits are subject to strict scrutiny because they infringe upon contributors' First Amendment rights to political speech²⁸ and association.²⁹ When the Supreme Court determined in *Buckley* that

²³ *Id.* at 21-22.

²⁴ *Id.* at 20-23.

²⁵ *Id.* at 25.

²⁶ *Id.* at 29.

²⁷ *Russell v. Burris*, 146 F.3d 563, 567-68 (quoting *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (opinion of Breyer, J.) (internal citations omitted)).

²⁸ *Buckley*, 424 U.S. at 14-15.

²⁹ *Id.* at 24.

contribution limits are subject to closest scrutiny, it analyzed both the speech and association aspects of contributions.³⁰ As to the speech component, the Court stated that “a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.”³¹ The Court determined, however, that “the primary First Amendment problem raised by . . . contribution limitations is their restriction of one aspect of the contributor’s freedom of political association.”³² Because of “the fundamental nature of the right to associate,”³³ the *Buckley* Court concluded that strict scrutiny should be applied when evaluating contribution limits, teaching that government “action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”³⁴ Because contribution limits directly infringe First Amendment rights of political association, the Court applied strict scrutiny in evaluating them.³⁵ In the only other contribution case since *Buckley*, the Supreme Court again applied strict scrutiny,³⁶ and the Eighth and Sixth Circuits have both followed suit.³⁷

³⁰ In this regard, *Buckley* noted that its “decisions involving associational freedoms establish that the right of association is a ‘basic constitutional freedom,’ *Kusper v. Pontikes*, 414 U.S. at 57, that is ‘closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.’” *Buckley*, 424 U.S. at 25 (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (parallel citations omitted)).

³¹ *Buckley*, 424 U.S. at 20-21 (emphasis added).

³² *Id.* at 24 (emphasis added).

³³ *Id.*

³⁴ *Id.* at 25 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958)).

³⁵ The direct infringement on contributors’ First Amendment rights of political association distinguishes the associational burden from the arguably indirect burden on speech rights. See *Buckley*, 424 U.S. at 20-21. In short, while contribution limits may involve “speech by proxy,” see *California Med. Ass’n v. FEC*, 453 U.S. 182, 196 (1981) (Marshall, J., plurality) (discussing limits on contributions to political committees), there is no “association by proxy.” *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 639 (1996) (opinion of Thomas, J., concurring in the judgment and dissenting in part) (citing *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985) (“The ‘speech by proxy’ label is, however, an ineffective tool for distinguishing contributions from expenditures,” for “we have recently recognized that where ‘proxy’ speech is endorsed by those who give, that speech is a fully protected exercise of the donors’ associational rights.”)).

³⁶ *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

³⁷ The Ninth Circuit, however, has held that strict scrutiny does not apply where evaluating contribution limits. *Service Employees Int’l Union v. Fair Political Practices Comm’n*, 955 F.2d 1312, 1321 n.13 (9th Cir. 1992), cert. denied, 505 U.S. 1230 (1992) (citing *Buckley*, 424 U.S. at 20-21, 23) (“[C]ontribution limits are subject to a lower level of scrutiny than expenditure limits.”). Instead, a lesser form of heightened scrutiny applies. *Service Employees*, 955 F.2d at 1322 (“[T]he test is still a rigorous one.”). The Ninth Circuit has recently reiterated that it will apply “rigorous scrutiny,” not strict scrutiny, in analyzing contribution limits. *Vannatta v. Keisling*, 151 F.3d 1215, 1220-1221 (9th Cir. 1998), cert. denied, 19 S. Ct. 870 (1999). But see *FEC v. Colorado Republican Fed. Campaign Comm.*,

In *Citizens Against Rent Control v. City of Berkeley*,³⁸ the Court addressed the constitutionality of an ordinance banning contributions above \$250 to committees that were formed to support or oppose ballot measures. The Court held that the ban infringed the right of association, and the individual and collective rights of expression.³⁹ Rather than simply defer to the city, the Court “subject[ed] [the ordinance] to *exacting* judicial scrutiny” because contributions to committees are “beyond question a very significant form of political expression.”⁴⁰ Not only did the Court not apply a test other than strict scrutiny, but it twice stated that when First Amendment rights are impacted, regardless of degree, strict scrutiny is *always* required.

The appellees concede that the challenged ordinance has an impact on First Amendment rights; the parties disagree only as to the extent of the impact. Long ago this Court admonished with respect to the First Amendment: “The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.” This was but another way of saying that regulation of First Amendment rights is *always subject to exacting judicial review*.⁴¹

The Court acknowledged “the importance of freedom of association,”⁴² and reiterated its determination in *Buckley* that “[t]he First Amendment protects political association as well as political expression.”⁴³ It noted that making a “contribution” (albeit in that case, to a referenda committee) “is beyond question a very significant form of political expression”⁴⁴ and political association.⁴⁵ The Court then stated a second time that when a statute infringes First Amendment rights, strict scrutiny is always required: “[a]s we have noted, regulation of First Amendment rights is always subject to exacting judicial review.”⁴⁶ The Court ultimately concluded that the contribution limit at issue did not satisfy strict scrutiny.⁴⁷

__ F.Supp.2d. __, 1999 WL 86840 at 20 (D. Colo. Feb 18, 1999) (court equated coordinated expenditures with campaign contributions and applied strict scrutiny despite FEC arguments for an intermediate standard of scrutiny).

³⁸ 454 U.S. 290 (1981).

³⁹ *Id.* at 300.

⁴⁰ *Id.* at 298 (emphasis added).

⁴¹ *Id.* at 294 (quoting *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (emphasis added)).

⁴² *Id.* at 295.

⁴³ *Berkeley*, 454 U.S. at 299.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 298.

⁴⁷ *Id.* at 300.

Strict scrutiny is the proper standard of review for analyzing contribution limits because contribution limits restrict freedom of association⁴⁸ and thereby “operate in an area of the most fundamental First Amendment activities.”⁴⁹ The Supreme Court has repeatedly stated, as in *Berkeley*, that when core First Amendment rights are involved, such as political association, strict scrutiny always applies.⁵⁰ If contribution limits “operate in an area of the most fundamental First Amendment activities,”⁵¹ and restricting contributions is the restriction of “a basic constitutional freedom,”⁵² to wit, the freedom of association, then strict scrutiny must apply. To hold otherwise is to say that strict scrutiny applies to analyzing the infringement of certain “fundamental First Amendment activities” and certain “basic constitutional freedoms,” but not to others.

The Sixth and Eighth Circuits have applied strict when they have analyzed contribution limits. In *Carver v. Nixon*,⁵³ the Eighth Circuit held that it must “apply strict scrutiny” in evaluating Missouri’s contribution limits. Although the Eighth Circuit recognized that individual justices of the Supreme Court, in dicta, have differed over the level of

⁴⁸ *Buckley*, 424 U.S. at 13.

⁴⁹ *Id.* at 24-25. Focusing on either the freedom of expression or the freedom of association implicated by contribution limits may not be helpful. As the Court in *Berkeley* explained, [a] limit on contributions . . . need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend.” *Id.* at 300.

⁵⁰ In *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir. 1998), the Eighth Circuit noted that in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997), the Supreme Court held that a sliding scale of scrutiny applied to evaluating infringements on associational rights. *Timmons*, however, and the cases upon which it relied, e.g., *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992), involved the mechanics of the electoral process, such as laws prohibiting candidates from appearing on the ballot as a candidate of more than one political party, so-called antifusion laws (*Timmons*), or laws prohibiting write-in voting (*Burdick*); neither *Timmons* nor any of its supporting authorities involved the regulation of campaign finances. *Timmons*’s sliding scale scrutiny is thus confined to the “electoral mechanics” context. *Accord Vannatta v. Keisling*, 151 F.3d at 1221 (“The Supreme Court has not applied this test to campaign contribution restrictions, which more directly infringe on speech rights and which are not necessarily an integral aspect of a state’s management of election.”). But even if *Timmons* established a new methodology for reviewing campaign finance laws, its higher standard of review would apply to analyzing contribution limits, for *Buckley* itself noted that such restrictions directly prohibit fundamental speech and association rights. *Cf. Buckley*, 424 U.S. at 18 (“The critical difference between this case and those time, place, and manner cases is that the present Act’s contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties”); see also *Russell*, 146 F.3d at 568 (“We believe . . . that restrictions on individual contributions to candidates and on candidates amassing sufficient resources to run for office are more severe than the restrictions at issue in *Timmons*. Where the regulations impose severe burdens on First Amendment rights, as here, *Timmons* reiterates the Court’s position that strict scrutiny applies.”).

⁵¹ *Buckley*, 424 U.S. at 14.

⁵² *Id.* at 25.

⁵³ 72 F.3d 633, 638 (8th Cir. 1995) (internal citations omitted).

scrutiny applicable to contribution limits, it also observed that, in *Buckley*, the Court had articulated and applied strict scrutiny in analyzing the FECA's contribution limits.⁵⁴

Since *Buckley*, members of the Court, in dicta, have indicated that contribution limits should receive a lower level of scrutiny. In contrast, other members of the Court strongly disagree, arguing that nothing less than strict scrutiny should apply to contribution limits. The Court has not ruled that anything other than strict scrutiny applies in cases involving contribution limits. When the Court in *Buckley* analyzed the contribution limits, it articulated and applied a strict scrutiny standard of review. Therefore, like other courts since the *Buckley* decision, we must apply the "rigorous" standard of review articulated in *Buckley*.⁵⁵

The Sixth Circuit appears to have recently echoed this observation. In *Kruse v. City of Cincinnati*,⁵⁶ the Sixth Circuit quoted *Buckley* for the proposition that "[t]he Act's contribution and expenditure limitations operate in an area of the most Fundamental First Amendment activities."⁵⁷ *Kruse* observed that *Buckley* had applied strict scrutiny in analyzing the FECA's contribution limits, and had upheld them only because they were narrowly tailored to advance the compelling interest in preventing corruption. *Kruse* noted that *Buckley* similarly had applied strict scrutiny in analyzing the FECA's expenditures limits and had struck them down because they did not further the state's compelling interest.

The *Buckley* court drew a general distinction between limitations on campaign contributions, which are constitutionally justified by the compelling state interest of preventing corruption and the appearance of corruption in the electoral process, and limitations on independent campaign expenditures, which are unconstitutional because they cannot be similarly justified.⁵⁸

Both *Kruse*⁵⁹ and, more recently, *Suster v. Marshall*,⁶⁰ though they dealt with restrictions on expenditures limits, indicate that strict scrutiny ap-

⁵⁴ *Carver*, 72 F.3d at 637 (quoting *Buckley*, 424 U.S. at 25) ("In view of the fundamental nature of the right to associate, governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.") (emphasis added). See also *Buckley*, 424 U.S. at 25-29.

⁵⁵ *Id.* (internal citations omitted). Accord *Russell v. Burris*, 146 F.3d 563, 567-68 (8th Cir. 1998), cert. denied, 119 S. Ct. 510 (1998) (applying strict scrutiny in analyzing limits on contributions to candidates, expressly rejecting lower standard of review); *Shrink Mo. Gov't Political Action Comm. v. Adams*, 161 F.3d 519, 521 (8th Cir. 1998), cert. granted sub nom., *Nixon v. Shrink Mo. Gov't PAC*, 119 S. Ct. 901 (1999).

⁵⁶ 142 F.3d 907 (6th Cir. 1998), cert. denied, 119 S. Ct. 511 (1998).

⁵⁷ *Id.* at 912 (citing *Buckley*, 424 U.S. at 14).

⁵⁸ *Id.* at 911-912 (citing *Fed. Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491 (1985)) (emphasis added).

⁵⁹ 142 F.3d at 912-13.

plies when analyzing any restrictions on political spending, not only when analyzing contribution limits.

The Ninth Circuit has taken a different approach, and has held that contribution limits are subject to “rigorous” scrutiny, a standard somewhere between strict scrutiny and intermediate scrutiny. In *Vannatta v. Keisling*, the court explained that, “while contribution limitations are reviewed under a ‘rigorous’ level of scrutiny, they are not reviewed under strict scrutiny.”⁶¹ The court stated that “[r]estrictions on contributions are upheld when the ‘state demonstrates a sufficiently important interest and employs means closely drawn to avoid the unnecessary abridgement of associational freedoms.’ While the test is less stringent than strict scrutiny, ‘the test is still a rigorous one.’”⁶² Whatever subtle difference there may be between “strict” and “rigorous” scrutiny, under either test the government must demonstrate that the harm it seeks to prevent by its restrictions on contributions is real—not simply conjectural.⁶³

A. *The State’s Burden*

To ensure that government does not suppress First Amendment rights except where there is the utmost need for doing so, the Supreme Court requires government to prove the existence of the “evil” it fears, the source from which it emanates, and that the means it has chosen are needed to eliminate it. Once a plaintiff has shown that his First Amendment rights have been impinged upon by a government regulation, the burden completely shifts to the government to prove that the regulation is justified. Under a strict scrutiny standard, the regulation is presumptively unconstitutional and will pass muster only if the government proves that (a) a compelling state interest exists for suppressing the protected speech; and (b) the method employed is narrowly tailored to advance the proven interest. “*We again remind the State that it has the burden of showing that any limits it places on campaign contributions are narrowly tailored to serve the State’s compelling interest in addressing proven ‘real or perceived undue influence or corruption at-*

⁶⁰ 149 F.2d 523 (6th Cir. 1998), *cert denied*, 119 S.Ct. 890 (1999).

⁶¹ *Vannatta v. Keisling*, 151 F.3d 1215, 1220 (9th Cir. 1998)(Brunetti, J., concurring in part and dissenting in part).

⁶² *Id.* (quoting *Service Employees Int’l Union v. Fair Political Practices Comm’n*, 955 F.2d 1312, 1322 (quoting *Buckley v. Valeo*, 424 U.S. at 25)). *See also* *Harwin v. Goleta Water Dist.*, 953 F.2d 488, 491 & n.6 (9th Cir. 1991) (“[U]nder either strict scrutiny or the ‘rigorous’ standard of *Buckley*, the Water District must show that a substantial governmental interest is served by the discrimination [among campaign contributors].”).

⁶³ *Harwin*, 953 F.2d at 491 & n.6.

tributable to large political contributions.”⁶⁴ If the government does not carry its burden, the regulation, initially presumed unconstitutional, must be held unconstitutional.

The courts sometimes miss this shift in burden. To illustrate, in *Arkansas Right to Life State PAC*, the plaintiffs moved for summary judgment on a state provision that banned all contributions during sessions of the General Assembly. Initially, the court incorrectly held that it was the plaintiffs’ burden to demonstrate that the state did not have a compelling interest for banning contributions.⁶⁵ One year later, the court granted the plaintiffs’ renewed motion for summary judgment, this time correctly allocating the burdens. The court wrote,

In our first opinion, we held that it was the *plaintiffs’* burden, as the moving party, to demonstrate to the court that no genuine issues of material fact exist as to whether the state has a compelling interest . . . however, we [now] believe it is the *defendants* that have the burden of proving that there was a compelling state interest and that the statute involved is narrowly tailored to serve that interest.⁶⁶

Courts sometimes overlook the shift of burden because they are more familiar with according a presumption of constitutionality to legislative enactments passed with procedural regularity. That was the case in a recent decision by a federal district court in Colorado.⁶⁷ There, the court missed the burden shift and mistakenly applied the more familiar standard. The court began its review with “the venerable presumption that the acts of a state legislature are constitutional.”⁶⁸ As a result, it mistakenly concluded that “[p]laintiffs, as the parties attacking the constitutionality of Amendment 15, must show beyond a reasonable doubt that it is unconstitutional.”⁶⁹

The district court overlooked the fact that special treatment is accorded First Amendment rights. As the Tenth Circuit has stated, “Where . . . a law infringes on the exercise of First Amendment rights, *its propo-*

⁶⁴ *Shrink PAC*, 161 F.3d at 523 (quoting *Russell*, 146 F.3d at 568) (emphasis added).

⁶⁵ *Arkansas Right to Life State PAC v. Butler*, 983 F. Supp. 1209, 1234 (W.D. Ark. 1997), *affirmed*, 146 F.3d 558 (8th Cir. 1998) (interlocutory appeal) (“[I]t is the plaintiffs’ burden, as the moving party, to demonstrate to the court that no genuine issues of material fact exist as to whether the state has a compelling interest.”). The author was counsel for plaintiffs in this case in both the district court and the court of appeals.

⁶⁶ *Arkansas Right to Life State PAC v. Butler*, 29 F. Supp. 2d 540, 551 (W.D. Ark. 1998) (emphasis added).

⁶⁷ *Colorado Right to Life Comm. v. Buckley*, slip op., Case No. 96-S-2844 (D. Colo. Apr. 17, 1998) (order on partial summary judgment). The author was counsel for lead plaintiffs in this case.

⁶⁸ *Id.* at 9.

⁶⁹ *Id.*

ment bears the burden of establishing its constitutionality.”⁷⁰ The Eighth Circuit further explained that “although a duly enacted statute normally carries with it a presumption of constitutionality, when a regulation allegedly infringes on the exercise of First Amendment rights, the statute’s proponent bears the burden of establishing the statute’s constitutionality.”⁷¹

There is, or ought to be, a heavy presumption of constitutional invalidity when a statute impinges on constitutionally anchored rights, and courts have so held.⁷² Once a plaintiff comes forward with proof of injury to his First amendment rights, the burden must shift to the government to justify the injuring statute. Governments should have to carry this burden because, if they do not, constitutional rights will be relegated to a disfavored status and legislation that injures First Amendment rights will be unduly exalted as presumptively legitimate.

A government entity that seeks to carry its burden and justify an infringement of First Amendment rights on the basis of a compelling state interest must meet certain criteria. The government may not go after a group based upon an unsubstantiated fear that the exercise of First Amendment rights will cause (or is) an evil. “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.”⁷³

While this requirement holds true for the most seemingly reasonable restrictions that impact First Amendment rights, it is heightened when a statute *expressly regulates* expressive activity. “As Justice Bran-

⁷⁰ *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987) (emphasis added).

⁷¹ *Association of Community Orgs. for Reform Now v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983) (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). See also *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 146 (“It is a well-established rule that where legislation restricts speech, even commercial speech, the party seeking to uphold the restriction carries the burden of justifying it.”); *Pursley v. City of Fayetteville, Arkansas*, 820 F.2d 951, 956 & n.7 (8th Cir. 1987).

⁷² *E.g. Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1222 (7th Cir. 1984) (“[T]here is a ‘heavy presumption’ against the constitutional validity of a statute which infringes upon First Amendment guarantees.”) (citations omitted), *affirmed*, 469 U.S. 1200 (1985). See also *Information Providers’ Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 869 (9th Cir. 1991) (“Although a reviewing court should not ignore Congress’ conclusion about an issue of constitutional law, it is the ultimate responsibility of the courts to decide. . . . This is particularly true where the legislature has concluded that its product does not violate the first amendment. ‘Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.’”) (citations omitted).

⁷³ *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (concurring opinion)).

dies reminded us, a reasonable burden on expression requires a justification far stronger than mere speculation about serious harms."⁷⁴ But a statute that "singles out expressive activity for special regulation heightens the Government's burden of justification."⁷⁵ In such cases, the state bears a heavy burden of *proving* that a serious harm exists:

[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, *it must do more than simply 'posit the existence of the disease sought to be cured'. . . . It must demonstrate that the harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.*⁷⁶

In *Turner Broadcasting System*, the Court found that the government did not meet its burden of actually demonstrating that regulating the exercise of First Amendment rights was needed to remedy a specific harm.⁷⁷ Even though the government could point to legislative findings and an administrative study indicating that the regulation was necessary,⁷⁸ the Court nevertheless found that it had failed to meet its burden. The government had failed to prove that the regulation was needed to remedy a *specific* harm.⁷⁹

Contribution limits infringe upon First Amendment rights to engage in political speech and association. The government is thus required to demonstrate, not simply speculate, that there is a problem with actual or apparent *quid pro quo* corruption *in the jurisdiction* for which the *particular contribution limits* are needed. The government must demonstrate that the regulation of campaign contributions is necessary to remedy a *specific* harm.

Because the Supreme Court, in *Buckley*, accepted the Federal Election Campaign Act's \$1,000 individual contribution limit without requiring proof of specific harm, it can be argued that *Buckley* does not re-

⁷⁴ 513 U.S. at 475.

⁷⁵ *Id.*

⁷⁶ *Id.* (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664-66 (1994) (quoting *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)) (emphasis added)).

⁷⁷ *Turner*, 512 U.S. at 664-66.

⁷⁸ *Id.* at 665 ("[I]n defending the factual necessity [of the regulation,] the Government relies in principal part on Congress' legislative finding . . .") and at 666 ("As support for [the regulation,] the Government relies upon a 1988 FCC study . . .").

⁷⁹ *Id.* at 667 ("Without a more substantial elaboration . . . of predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence . . . we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions . . ."). *Accord* *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 618 (1996) ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures.").

quire a demanding review of the government's evidence offered to prove the need for limits. If true, this would suggest that government does not always shoulder the heavy burden of proving instances of actual *quid pro quo* corruption prior to enacting restrictions. Indeed, *Buckley's* statement that "[i]t is unnecessary to look beyond the Act's primary purpose . . . in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation"⁸⁰ has been employed to suggest a lower evidentiary burden.

This argument is simultaneously both wrong and right. As to the need to prevent actual corruption, the Court did look for, and found, evidence of actual *quid pro quo* corruption. The Court stated that "the deeply disturbing examples [of the pernicious practice of giving large contributions to secure a political *quid pro quo* from current or potential officeholders] surfacing after the 1972 election demonstrate that the problem is not an illusory one."⁸¹ These "deeply disturbing examples"⁸² had been noted by the Court of Appeals.⁸³ Dairymen had pledged, and then laundered, \$2,000,000 in contributions in exchange for the President's decision to overrule the Secretary of Agriculture and increase dairy price supports.⁸⁴ Six ambassadorial candidates had donated a combined \$3,000,000 for ambassadorial appointments⁸⁵ and one ambassador had contributed \$100,000 in a trade for an even more prestigious post.⁸⁶ Thus, prior to the contribution limits addressed by *Buckley*, there existed a system allowing unlimited contributions and proof of huge contributions given to secure political *quid pro quos*.

At first blush, *Buckley* also appears to have lowered the quantum of proof necessary to justify contribution limits where the appearance of *quid pro quo* corruption is concerned. The Court seemed simply to defer to the legislative judgment of Congress. "Congress was surely entitled to conclude . . . that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption *inherent in a system permitting unlimited financial contributions*."⁸⁷ The key to the Court's apparent deference to Congress is, however, that an appearance of corruption is "inherent in a system permitting unlimited financial con-

⁸⁰ *Buckley*, 424 U.S. at 26.

⁸¹ *Id.* at 27 & n.28.

⁸² *Id.* at 27.

⁸³ *Id.* at 27 n.28 ("The Court of Appeals' opinion in this case discussed a number of the abuses uncovered after the 1972 elections.")

⁸⁴ *Buckley v. Valeo*, 519 F.2d 821, 840 n.36 (D.C. Cir. 1975).

⁸⁵ *Id.* at 840 n.38.

⁸⁶ *Id.*

⁸⁷ *Buckley*, 424 U.S. at 28.

tributions.”⁸⁸ The Federal Election Campaign Act’s \$1,000 individual contribution limit was enacted in a context of previously unlimited federal campaign contributions. With the federal government and two-thirds of the states now employing campaign contribution limits, jurisdictions that still allow unlimited contributions are increasingly rare. More commonplace is the scenario where contribution limits already in place are being lowered further. Where existing contribution limits are being lowered, any level of scrutiny demands proof beyond a speculative legislative judgment that the prior limits were ineffective. Evidence of specific harm is required. In *Carver v. Nixon*, the Eighth Circuit stated that “[t]he question is not simply that of some [contribution] limits or none at all, but rather [of the new lower limits] compared to those [already enacted].”⁸⁹

Putting the government to its proof in Arkansas, where contribution ceilings were already in place and then lowered, the Eighth Circuit refused to defer to any “legislative judgment” about the need for lower limits to prevent the appearance of corruption. On the contrary, the court described the necessary inquiry,

We begin with the observation that no defendant provided any credible evidence to the trial court of actual undue influence or corruption stemming from large contributions. We are left, then, to determine whether the defendants proved that a reasonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.⁹⁰

Had there been no limits already in place, the Eighth Circuit might have followed *Buckley’s* lead and simply accepted, without evidentiary support, the justification that an appearance of corruption is inherent in a system of unlimited campaign contributions. In those jurisdictions where limits already exist, however, evidentiary proof of both actual and apparent corruption must be in the record in order to satisfy the government’s burden of justifying its restrictions on First Amendment speech and association.⁹¹

Also implicit in the inquiry is an equally important aspect of the government’s burden of proof. The *Russell* court inquired “whether the defendants proved that *a reasonable person could perceive*, on the *basis of the evidence* presented at trial, that such contributions make for undue influence or spawn corruption.”⁹² Thus, a public “perception” of cor-

⁸⁸ *Id.*

⁸⁹ 72 F.2d 633, 642 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

⁹⁰ *Russell v. Burris*, 146 F.3d 563, 569 (8th Cir. 1998).

⁹¹ *Cf. Carver v. Nixon*, 72 F.2d at 643 (“The record is barren of any evidence of a harm or disease that needed to be addressed between the limits of [the prior law] and those enacted in Proposition A.”).

⁹² *Russell*, 146 F.3d at 569 (emphasis added).

ruption must be predicated upon something more substantive than popular musings and pedestrian fears. It must be "objectively reasonable."⁹³ Put another way, the Eighth Circuit implicitly held that an irrational public perception of corruption is too light a matter upon which to stifle contributors' and candidates' First Amendment rights.⁹⁴ While public perception based upon actual events could be sufficient (if reasonable), public perception that is without basis, or based upon events in some distant setting, is nothing more than the irrational type of public view for which men once feared witches and burnt women.⁹⁵ Consequently, when contribution limits already exist and lower limits are imposed, the government must come forward with evidence of: (1) a real problem of actual *quid pro quo* corruption that was not adequately addressed by the prior contribution limits; or (2) an objectively reasonable public appearance of *quid pro quo* corruption that is both: (a) based upon facts; and (b) perceived through the eyes of a reasonable person. Since neither condition was true in Arkansas, the Eighth Circuit had no trouble striking down the reduced contribution limits.⁹⁶

To sum up, a contribution limit may be perfectly reasonable if *quid pro quo* corruption actually exists. On the other hand, a contribution limit may be highly capricious if such corruption does not exist.

In addition to proving that contribution limits are necessary to prevent corruption, or its appearance, the government must also prove that regulations of campaign contributions do not infringe upon substantially

⁹³ *Id.* ("Even assuming . . . [it] was correct that there was a public perception of corruption, we must determine whether that public perception was reasonable, and whether the perception derived from the magnitude of contributions. . . We believe that the defendants did not prove that the perception of corruption . . . was *objectively reasonable*." (emphasis added)).

⁹⁴ *Id.* ("The defendants provided no evidence at trial, for instance, that Mr. Dietz changed his position on the tobacco bill due to an intervening contribution.") *Cf.* *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 499 (1985) ("In the District Court, the FEC attempted to show actual corruption or the appearance of corruption by offering evidence of high-level appointments in the Reagan administration . . . and newspaper articles and polls purportedly showing a public perception of corruption. . . . A tendency to demonstrate distrust of PACs is not sufficient . . . 'the evidence supporting an adjudicative finding of corruption or its appearance is evanescent.'").

⁹⁵ *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) ("As Justice Brandeis reminded us, a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms. 'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.'" *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927))).

⁹⁶ *Russell*, 146 F.3d 563.

more political speech and association than is necessary.⁹⁷ In the parlance of the First Amendment, the government must introduce evidence that the regulations are carefully drawn or narrowly tailored.

This requirement has been recognized by several lower federal courts. In *Carver*,⁹⁸ for instance, the Eighth Circuit reviewed the constitutionality of a Missouri referendum that provided for staggered contribution limits based upon population (\$100, \$250, and \$300). It held that Missouri "ha[d] failed to carry its burden of demonstrating that [its contribution limits] will [prevent *quid pro quo* corruption] in a direct and material way or is closely drawn to avoid unnecessary abridgement of associational freedoms."⁹⁹ It acknowledged that Missouri had produced some evidence of a general need for contribution limits. The state, however, had not produced any evidence that *its* contribution limits were closely drawn. The limits, designed to prevent a few large contributions that might corrupt political candidates, unduly prevented smaller contributions that carried no corrupting influence.¹⁰⁰

⁹⁷ While *Turner* involved "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994), the Supreme Court still required the government to *prove* that the regulations survived this level of scrutiny. *Id.* at 664-65 (emphasis added) (internal citation omitted) ("Thus, in applying *O'Brien* scrutiny we must ask *first* whether the Government has adequately *shown* that the economic health of local broadcasting is in jeopardy and in need of the protections afforded by *must-carry*. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'). Because contribution limits infringe upon core First Amendment rights of political speech and association, rigorous, rather than intermediate, scrutiny is involved. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). The evidentiary requirements articulated in *Turner*, thus apply with even more vigor.

⁹⁸ *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

⁹⁹ *Id.* at 644 (emphasis added) (internal citation omitted).

¹⁰⁰ See *id.* at 638-42.

The [district] court relied on the fact that twenty-seven states and the federal government have imposed contribution limits, and that an overwhelming seventy-four percent of Missouri voters 'determined that contribution limits are necessary to combat corruption and the appearance thereof.' . . . These findings may address the desirability of campaign contribution limits [in general], but they do not focus on whether the Proposition A limits are narrowly tailored to address the reality or appearance of corruption associated with large contributions [in Missouri].

Id. at 642 (internal citation omitted).

The State presented testimony at trial about a \$420,000 contribution from a Morgan Stanley political action committee to various races in north Missouri, and about the 'Keating Five' scandal. None of these examples prove that the Proposition A limits are narrowly tailored. A \$420,000 contribution is a far cry from the limits in Proposition A, and the other examples involve individual conduct leading to criminal prosecution. We

The State produced no evidence as to why the Proposition A limits of \$100, \$200, and \$300 were selected. Further, the State presented no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions. The record is barren of any evidence of harm or disease that needed to be addressed between the limits of Senate Bill 650 and those enacted in Proposition A.¹⁰¹

Because Missouri “made no showing as to why” it needed so severely to “restrict the First Amendment rights of so many contributors in order to prevent corruption or the appearance of corruption associated with large campaign contributions,” the Court held “that [its] limits unconstitutionally burden . . . rights of association and expression.”¹⁰²

B. The State’s Interest

1. *Quid Pro Quo* Corruption or Its Appearance

As the Court made clear in *Federal Election Commission v. National Conservative Political Action Committee*, the “hallmark of corruption” is a “financial *quid pro quo*: dollars for political favors.”¹⁰³ This interest, however, is narrowly construed to encompass only acts by a politician that are contrary to his obligations of office or which give the objective, reasonable appearance of corruption.¹⁰⁴

(a) Quid Pro Quo Corruption

The Supreme Court has defined “[c]orruption [as] a subversion of the political process [where] [e]lected 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.”¹⁰⁵ Simply “influencing” candidates to act in response to a contribution, including a large contribution, does not constitute corruption. Corruption is “influencing

cannot conclude that the limits in Proposition A are in any way narrowly tailored or carefully drawn to remedy such situations.

Id. (internal citations omitted).

¹⁰¹ *Carver*, 72 F.3d at 643 (internal citation omitted).

¹⁰² *Id.* at 644.

¹⁰³ *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

¹⁰⁴ *Id.* at 497 (emphasis added).

¹⁰⁵ *Id.*

them to act contrary to their obligations of office.”¹⁰⁶ Corruption is “unduly” or “improperly” influencing candidates.¹⁰⁷

Corruption is not defined as a contributor having a financial interest in legislation before a contributee. A *quid pro quo* is necessary. The Ninth Circuit explained the distinction this way:

[I]t is not the existence of a financial interest that defines corruption, but rather the existence of ‘a political *quid pro quo* from current and potential officeholders.’ In other words, it is the *connection* between a contribution and a political favor that makes a contribution corrupt, not the nature of the political favor.¹⁰⁸

The distinction may not be simple, but it is critically important. Recognizing the importance of the distinction, the Supreme Court went to some length to make it clear in the Hobbes Act case of *McCormick v. United States*.¹⁰⁹ In *McCormick*, the Court reversed the criminal conviction of a state legislator who had extorted \$900 in campaign contributions and then introduced legislation in which his contributors had an interest. The Court observed,

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. . . . to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns

¹⁰⁶ *Id.*

¹⁰⁷ *Berkeley*, 454 U.S. at 296-97 (emphasis added) (“The exception [to the rule that limits on political activity are contrary to the First Amendment] relates to the perception of *undue* influence of large contributors to a candidate.”). See also *Buckley*, 424 U.S. at 29 (“Appellants’ first overbreadth challenge to the contribution ceilings rests on the proposition that most large contributors do not seek improper influence over a candidate’s position or an officeholder’s action.”); *id.* at 30 (“A second, related overbreadth claim is that the \$1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder.”).

¹⁰⁸ *Harwin v. Goleta Water District*, 953 F.2d 488, 491 n.5 (9th Cir. 1991) (emphasis added). In *Harwin*, the court struck down a provision that acted as a contribution limit only for those contributors who had a water permit application pending before the candidate/Water District board member.

¹⁰⁹ 500 U.S. 257 (1991).

are financed by private contributions or expenditures, as they have been from the beginning of the Nation.¹¹⁰

Instead of focusing on a simple correlation between a given contribution and a candidate acting favorably on legislation that would benefit a contributor “shortly before or after campaign contributions are solicited and received from those beneficiaries,” the Court requires an “explicit promise or undertaking.”¹¹¹ The “forbidden zone of conduct” is properly understood in terms of the presence or absence of a *quid pro quo*:

A moment’s reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.¹¹²

The correlation in time between a campaign contribution and political action on the part of a government official is not sufficient to constitute “corruption” unless there is also an “explicit promise or undertaking.”¹¹³ Without the explicit promise to act, the correlation is “well within the law” and will exist as long as campaigns are privately financed. Put simply, there must be more than correlation because there will always be correlation. For corruption there must be causation.

Furthermore, for corruption to exist, there must be something more than a contributor gaining *access*, or *unequal access*, to a candidate (though many campaign reformers and the FEC argue that such access is sufficient to constitute corruption). The weakness of the access argument was recently made clear by a federal district court in Colorado. In *FEC v. Colorado Republican Campaign Committee*,¹¹⁴ the court wrote, “[t]he FEC’s attempt to broaden the definition of corruption to include *mere access* is unsupported by precedent.”¹¹⁵ The court continued,

Buckley . . . recognized that money, in many cases, may grant access to a candidate. It did not, however, conclude that such access is akin to corruption or the appearance of corruption.

¹¹⁰ *Id.* at 272.

¹¹¹ *Id.* at 273.

¹¹² *Id.* (quoting *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982) The Court thus disagreed with the lower court and held a *quid pro quo* must be present to turn a campaign contribution into a illegal act. “We thus disagree with the court of Appeals’ holding in this case that a *quid pro quo* is not necessary for conviction under the Hobbes Act when an official receives a campaign contribution.” *Id.* at 274.

¹¹³ *Id.* at 273.

¹¹⁴ ___ F.Supp.2d ___, 1999 WL 86840, Case No. 89-N-1159 (D. Colo. Feb. 18, 1999)(after remand from the Supreme Court).

¹¹⁵ *Id.* at *12 (emphasis added).

The FEC seeks to broaden the definition of corruption to the point that it intersects with the very framework of representative government. Corruption cannot be defined so broadly.¹¹⁶

Buckley's discussion of the state interests supporting reporting requirements shows that the Supreme Court does not consider candidate access as necessarily constituting "improper" or "undue" influence.¹¹⁷ In discussing the state's interest in helping voters determine who is funding a candidate, the Court stated that "the sources of a candidate's financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."¹¹⁸ Thus, candidates who are responsive to their contributing constituents are not necessarily "acting contrary to their obligations of office."¹¹⁹

The Supreme Court also indicated what it meant by corruption and, more specifically, *improperly* influencing officials, in discussing the state interests that support reporting requirements.

[D]isclosure requirements *deter actual corruption and avoid the appearance of corruption* by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for *improper purposes* either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect *any post-election special favors that may be given in return*. . . . [F]ull disclosure tends to prevent the corrupt use of money to affect elections.¹²⁰

The *Buckley* Court did not equate "corruption" and "improper purposes" with simply influencing officials with contributions. The Court was instead referring to the giving of "special favors . . . in return" for contributions. As the Eighth Circuit stated in *Russell*, it would be both silly and dangerous to presume "special favors" from the fact that a candidate's vote pleases his contributors.

If it were reasonable to presume corruption from the fact that a public official voted in a way that pleased his contributors, legislators could constitutionally ban all contributions except those from the public official's opponents, a patent absurdity. That would spell the end to the political right, protected by the First Amendment, to support a candidate of one's choice.¹²¹

¹¹⁶ *Id.*

¹¹⁷ *Colorado Republican Fed. Campaign Comm.*, 1999 WL 86840 at *11.

¹¹⁸ *Buckley*, 424 U.S. at 66-67 (emphasis added) (internal citation omitted).

¹¹⁹ *National Conservative Political Action Comm.*, 470 U.S. at 497.

¹²⁰ *Buckley*, 424 U.S. at 67 (emphasis added) (internal citations and quotations omitted). The third interest supporting reporting requirements, not relevant to determining what *Buckley* meant by "corruption," is that they serve "an essential means of gathering the data necessary to detect violations of . . . contribution limits . . ." *Id.* at 67-68.

¹²¹ *Russell*, 146 F.3d at 569.

Thus, corruption does not exist merely when contributions influence officials; officials who are influenced by contributions are not *ipso facto*, “acting contrary to the obligations of office” or engaging in *quid pro quo* corruption. Corruption exists only if a public official is *unduly* or *improperly* influenced. A public official has been *unduly* or *improperly* influenced when he grants “special favors” in return for a contribution.¹²²

(b) *The Appearance Of Corruption*

When government seeks to limit contributions to avoid the appearance of corruption, the *appearance* of corruption must be objectively reasonable:

Whatever else is true, the appearance of corruption must be more than illusory or conjectural; instead “there must be real substance to the fear of corruption; mere suspicion, that is, ‘a tendency to demonstrate distrust . . . is not sufficient,’ no matter how widely the suspicion is shared.”¹²³

A perception of corruption is “objectively reasonable” if it is based upon *evidence* of corruption.¹²⁴ Evidence that an official receives contributions from interests he usually supports, and then votes in accord with those interests, is not sufficient to establish the appearance of corruption. The Eighth’s Circuit’s decision in *Russell v. Burris* illustrates this point.

In *Russell*, the state had attempted to “demonstrate specific instances in which large contributions had given rise to the appearance of undue influence or corruption.”¹²⁵ “Much of this proof focused on the introduction in the Arkansas legislature of a bill that would have prohib-

¹²² This distinction was dispositive in the recent Supreme Court case of *United States v. Sun-Diamond Growers of Ca.*, No. 98-131, 1999 WL 241704 (1999). There, the Court discussed 18 U.S.C. § 201(c)(1)(A), the “illegal gratuity statute,” and determined that the statute only prohibits gifts that are given to public officials with the intent to influence them to do a specific act. It does not, the Court held, apply to gifts given merely by reason of the donee’s office. For example a gift given to “build a reservoir of good will” that might ultimately affect one of a multitude of unspecified acts, is neither a bribe, which requires a *quid pro quo*, nor an illegal gratuity, which must be tied to a specific act. While campaign contributions were not at issue in the case, the specter of influence undue occasioned by a gift is similar to the range of concerns posed by a campaign donation.

¹²³ *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998), *aff’d*, 164 F.3d 1189 (9th Cir. 1999) (quoting *Service Employees Int’l Union v. Fair Political Practices Comm’n*, 721 F. Supp. 1172, 1179 (E.D. Cal. 1989) (quoting *National Conservative Political Action Comm.*, 470 U.S. at 499)). See also *Russell v. Burris*, 146 F.3d at 569 (“[W]e must determine whether that public perception of corruption was reasonable.”). The author was counsel for the lead plaintiffs in *California ProLife Council PAC v. Scully* in both the district court and the court of appeals.

¹²⁴ *Russell v. Burris*, 146 F.3d at 569.

¹²⁵ *Id.* at 569-70.

ited local governments from regulating tobacco.”¹²⁶ The Eighth Circuit noted that even though the bill’s sponsor received substantial contributions from tobacco interests, and even though another legislator testified that the public uniformly perceived corruption “associated with the bill’s having been introduced and supported by legislators who had received contributions from tobacco interests,” this was insufficient to demonstrate an *objectively reasonable* appearance of corruption.¹²⁷

We believe . . . that the defendants did not prove that the perception of corruption to which Mr. Thomas alluded was objectively reasonable. A newspaper article admitted into evidence quoted [the bill’s sponsor] as saying that he supported [the bill] because he believed [in it]. That [the sponsor] received political contributions from those whose interests he tended to support hardly indicates, on its own, any corruption.¹²⁸

Moreover, like evidence of actual corruption, *relevant* evidence of perceived corruption, is that which is based upon *large individual contributions*.¹²⁹

We begin with the observation that no defendant provided any *credible evidence* to the trial court of *actual* undue influence or corruption stemming from *large* contributions. We are left, then, to determine whether the defendants proved that a reasonable person could perceive, on the basis of the *evidence* presented at trial, that *such contributions* make for undue influence or spawn corruption.¹³⁰

An allegation of the appearance of corruption must be based upon the magnitude of contributions,¹³¹ and the magnitude must be large.¹³² Otherwise, corruption cannot be established within the meaning of *Buckley*.¹³³

In *Russell*, the Eighth Circuit distinguished the state’s allegations of apparent corruption from similar allegations in *Buckley* and determined that the small contributions at issue in Arkansas could not create an objectively reasonable appearance of corruption.

¹²⁶ *Id.*

¹²⁷ *Id.* at 569.

¹²⁸ *Id.* at 569-70 (“The evidence . . . shows that the ‘real estate interests’ contributed to candidates who supported initiatives with which the contributors agreed—that is, the ‘real estate interests appear to have chosen well which candidate to support.’” (emphasis added)).

¹²⁹ *See Vannatta*, 151 F.3d at 1221 (noting that corruption is based upon size of contributions, not their source).

¹³⁰ *Russell*, 146 F.3d at 569 (emphasis added).

¹³¹ *See Id.* (“[W]e must determine . . . whether that perception of corruption derived from the magnitude of the contributions.”).

¹³² *See Id.*

¹³³ *See, e.g., Buckley*, 424 U.S. at 26 (state interest is in “limiting actuality and appearance of corruption from *large individual contributions*.”) (emphasis added).

The defendants' objections to [the sponsor's] activities are also, we believe, essentially unrelated to the size of the individual contributions he received. The defendants did not provide evidence, such as that produced by the government in *Buckley*, of multimillion-dollar contributions to [the bill's sponsor]. Indeed, our review of the evidence presented to the trial court indicates that [he] reported no individual contributions larger than \$1,000 from any source, tobacco-related or otherwise. We believe that \$1,000 is simply not a large enough sum of money to yield, of its own accord and without further evidence, a reasonable perception of undue influence or corruption.¹³⁴

The Court concluded that "supporting tobacco legislation, accepting contributions from those appearing before or having interests before one's legislative committee, accepting contributions from supporters outside one's district, or the like,"¹³⁵ do not lead to an objectively reasonable appearance of corruption.¹³⁶

Trying to prevent an appearance of corruption that has no basis in fact is an impossible task.¹³⁷ There is "no way to challenge the 'appearance of corruption'—others' subjective perception that corruption does exist—other than to make the case that their perceptions are wrong."¹³⁸ In essence, the appearance of corruption justification approves restricting First Amendment rights of contributors to any degree "necessary" to alleviate the appearance problem. Since, however, the appearance may be based upon unrelated events, or irrational fears, there may be no con-

¹³⁴ *Russell*, 146 F.3d at 569.

¹³⁵ *Id.* at 571.

¹³⁶ *Id.* See also *Vannatta*, 151 F.3d at 1221 (could not prohibit out-of-district contributions; analysis is based upon size of contribution, not its source).

¹³⁷ See Bradley A. Smith, FAULTY ASSUMPTIONS AND UNDEMOCRATIC CONSEQUENCES OF CAMPAIGN FINANCE REFORM, 105 *Yale L.J.* 1049, 1067 n.113 (1996).

¹³⁸ *Id.*

"[T]he appearance of corruption" rationale is both unnecessary and dangerous. If the campaign finance system leads to actual corruption, then that *may* be a constitutionally sufficient justification for the state to infringe on free speech rights, in which case the "appearance of corruption" basis is superfluous. If the campaign system does not lead to actual corruption, then it seems very dangerous to suggest that the mistaken view of some could justify restricting the First Amendment liberties of others. For example, if complete campaign finance reform were insufficient to change the public's erroneous view, would the state be justified . . . in censoring political reporting that wrongly focuses excess attention on money and thus itself creates the "appearance of corruption"? The justification of such restrictions by a belief known to be erroneous is a sharp departure from traditional First amendment doctrine. . . . Allowing the "appearance of corruption" to justify government intrusion on First Amendment liberties essentially allows the majority to justify the suppression of minority rights through its own propaganda.

Id. (internal citations omitted).

tribution limit that is low enough to dispel apparent corruption. Indeed, even a zero limit may not suffice. Polls commonly show a public perception that large corporate contributions in a given state are corrupting candidates, when, in fact, corporate contributions in that state have already been completely prohibited. When this is the case, the appearance of corruption standard can become a loose cannon lit by a tyrannous majority and turned toward contributors. More insidiously, public perceptions may be manipulated by incumbent legislators who seek to impede the fundraising efforts of their opponents by enacting low (or complete) contribution limits.

In any event, proving or disproving at trial whether an appearance of corruption exists where there is no evidence of actual corruption is something of a fool's errand. The usual trial technique is to look to the anecdotal testimony of public officials, media pieces or polling statistics. But, none of these sources is very satisfactory. Public officials may base their testimony on the handful of complaints they have handled personally, as opposed to the quiet majority of citizens. Media pieces and newspaper articles naturally tend toward the sensational because such stories are more interesting or newsworthy. Few newspaper headlines are published along the lines of "Voters Perceive Candidates Are Acting Properly." Often, news of corruption occurring in distant jurisdictions leads local voters to believe that similar corruption must be occurring at home.¹³⁹

Polls are likewise unsatisfactory. While polling may reveal the public opinion or perception, polls do not reveal whether the perception is informed or imagined, reasoned or irrational. Thus, limiting the First Amendment contribution rights of some based upon a public perception of corruption is reminiscent of forcing World War II Japanese Americans into internment camps based upon a public perception that all people of Asian descent are spies. It is wholly unsatisfactory, if not truly worrisome, to eviscerate the First Amendment upon "evidence" as evanescent as unfounded public perceptions.

¹³⁹ *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 499 (1985) (newspaper articles and polling evidence insufficient). *See also* *Democratic Party of the U.S. v. National Conservative Political Action Comm.*, 578 F. Supp. 797, 833-840 (E.D. Pa. 1984)(opinion below); *California ProLife Council PAC v. Scully*, 989 F. Supp. at 1298 ("The facts pertinent to each jurisdiction . . . undermines the value of crude comparisons . . . every jurisdiction is *sui generis*, and thus every campaign contribution limitation must be judged on its own circumstances.").

2. The State's Narrow Interest in Large, Individual Contributions

The state interest at issue here is *not* in "limiting contributions," "preventing corruption," or even "limiting the corruption that may exist from contributions."¹⁴⁰ Rather, it is in preventing the corruption, or its appearance, that may result from *large individual* contributions to candidates.¹⁴¹ In *Carver*, the Eighth Circuit noted that *Buckley* "reiterated this interest at least seven times."¹⁴² The Eighth Circuit also acknowledged that the Supreme Court had restated this point when it scrutinized the contribution limits in *Berkeley*.¹⁴³ In *Berkeley*, the Supreme Court observed that "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of *large* contributors to a candidate"¹⁴⁴

Because the gravamen of the potential corruption problem is large individual contributions, as opposed to small or medium contributions, regulatory schemes that shut off all contributions can never be narrowly tailored. These campaign restrictions usually come in the form of a context-sensitive prohibition or a temporal ban. One example of the former is inter-candidate transfer bans. Where a strong party candidate may be

¹⁴⁰ See *Carver*, 72 F.3d at 639 ("The district court held that 'under *Buckley*, Missouri clearly has a compelling state interest in limiting campaign contributions.' *Carver*, 882 F. Supp. at 904. This does not square with the interest of limiting 'large campaign contributions' as defined in *Buckley*. The district court's decision substantially broadens the compelling interest identified in *Buckley*. The district court erred as a matter of law in extending *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions. . . . The State, however, fails to refine this general interest [in preventing a quid pro quo between a candidate and a contributor] consistent with the compelling interest defined by the Court in *Buckley* as limiting the reality or perception of undue influence and corruption from *large* contributions.").

¹⁴¹ See, e.g., *Buckley*, 424 U.S. at 25-27 (emphasis added) ("According to the parties and *amici*, the primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of *large financial contributions* on candidates' positions and on their actions if elected. . . . It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from *large individual financial contributions*—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation. . . . To the extent that *large contributions* are given to secure a political *quid pro quo* from current and potential officeholders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of *large individual financial contributions*.").

¹⁴² *Carver*, 72 F.3d at 638 (citing *Buckley*, 424 U.S. at 25-29). See also *Buckley*, 424 U.S. at 45-46, 55, 67.

¹⁴³ *Carver*, 72 F.3d at 638-39.

¹⁴⁴ 454 U.S. at 296-97 (emphasis in original).

running against weak opposition, the candidate may be able to amass more campaign funds than is needed to win re-election and then transfer some of his campaign funds to other candidates in his party. After California voters passed Proposition 73 to ban such inter-candidate transfers, it was challenged and struck down by the Ninth Circuit in *Service Employees International Union v. Fair Political Practices Commission*.¹⁴⁵ Proponents of the initiative argued that the inter-candidate transfer ban was justified by the state's interest in "preventing corruption or the appearance of corruption by 'political power brokers.'"¹⁴⁶ The Ninth Circuit focused instead on the ban's failure to distinguish between large and small contributions in the form of candidate transfers. Determining that the ban was not closely drawn, the Ninth Circuit explained, "[t]he potential for corruption stems not from campaign contributions per se but from large campaign contributions. The inter-candidate transfer ban prohibits small contributions from one candidate to another as well as large contributions."¹⁴⁷ Had the transfer ban applied only to large contributions (however defined), it presumably would have passed constitutional muster.

A recent Oregon initiative provides another example of a context-sensitive complete prohibition on contributions that could not withstand even the Ninth Circuit's lesser "rigorous" scrutiny.¹⁴⁸ Measure 6 established a prohibition on contributions from individuals who resided outside a candidate's voting district. The measure made no distinction between large and small out-of-district contributions but prohibited both. When the government was put to its proof, it was clear the measure was not closely drawn.¹⁴⁹ The Ninth Circuit explained the problem: "Measure 6 bans all out-of-district donations, *regardless of size* or any other factor that would tend to indicate corruption."¹⁵⁰ The Court continued, "Appellants are unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*."¹⁵¹ The contribution ban "was not closely drawn"¹⁵² and the total prohibition was declared unconstitutional.¹⁵³

¹⁴⁵ 955 F.2d 1312 (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992).

¹⁴⁶ *Id.* at 1323 (citation omitted).

¹⁴⁷ *Id.* The *Service Employees* court also invalidated an intra-candidate transfer ban because it operated as an unconstitutional expenditure limit due to the fact that it limited the purposes for which money raised by a candidate could be spent. The ban thus failed strict scrutiny. *Id.* at 1322.

¹⁴⁸ See *supra* note 37 and accompanying text.

¹⁴⁹ See *Vannatta v. Keisling*, 151 F.3d 1215, 1221 (9th Cir. 1998), *cert denied*, 119 S. Ct. 870 (1999).

¹⁵⁰ *Id.* (Brunetti, J., writing for a unanimous panel in part and dissenting in part) (emphasis added).

¹⁵¹ *Id.*

Another type of constitutionally suspect, undifferentiated, context-sensitive ban is an aggregate limit on PAC contributions. The State of Kentucky has such a ban on PAC contributions to candidates for governor.¹⁵⁴ There, once a gubernatorial candidate accepts \$150,000 from PACs, he may not accept one dollar more.¹⁵⁵ Montana voters, by initiative, enacted a much more restrictive limit of the same genre.¹⁵⁶ Affecting only state legislators, the Montana limit for 1998 places an aggregate limit of \$1,950 in allowable contributions from all PACs for senate candidates and an aggregate limit of \$1,150 for house of representative candidates.¹⁵⁷ The effect, once the limit is reached, is to foreclose any late-contributing PACs from making even a small non-corrupting contribution.¹⁵⁸ For these PACs, there is a total ban on both the right to speak and the right to associate with a candidate through a donation.

An aggregate PAC contribution limit/ban, at first blush, appears to address corruption by limiting the overall amount of contributions a candidate may receive from an industry or interest group. Such a provi-

¹⁵² *Id.* The Ninth Circuit had earlier rejected an invitation to ban all out-of-state (versus out-of-district) contributions to federal candidates, regardless of size, calling the argument in favor of doing so "frivolous." *Whitmore v. FEC*, 68 F.3d 1212, 1216 (9th Cir. 1995).

¹⁵³ *Vannatta*, 151 F.3d at 1221. A second initiative, Measure 9, was passed in Oregon at the same time which lowered contribution limits to state candidates to a mere \$100. The \$100 contribution limit was struck down by the Oregon Supreme Court in *Vannatta v. Keisling*, 931 P.2d 770 (Or. 1997).

¹⁵⁴ See KY. REV. STAT. ANN. § 121A.030(4). The statute places a limit on aggregate PAC contributions calculated as 25% of the overall aggregate limit a candidate may accept. Since a gubernatorial candidate may accept no more than \$600,000 in contributions from all sources, the aggregate PAC limit is \$150,000.

¹⁵⁵ Surprisingly, the Sixth Circuit upheld the Kentucky limit in *Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 162 (1997). It was significant, and perhaps paramount, that the court treated the potential injury as simply hypothetical and therefore any burden on First Amendment rights as "nearly imperceptible." The court opined that 150 different PACs would be allowed to contribute up to their own \$1,000 limit to a candidate for governor. Any restriction on speech would only be felt by the 151st PAC that wished to contribute. The court called that an "unlikely scenario" and cited the lower court observation that there was no record indication that the provision had limited PAC contributions in the past "or is likely to do so in the future." *Id.* at n.27. Consequently, the court did not deal with the difficult constitutional questions had there been a 151st or 152nd PAC that was foreclosed from associating or contributing even a symbolic amount to a candidate. The author was counsel for plaintiff in *Kentucky Right to Life*.

¹⁵⁶ See MONT CODE ANN. § 13-27-218.

¹⁵⁷ *Id.* The limits when enacted in 1983 were \$1,000 and \$600, respectively, but are adjusted upward for inflation annually.

¹⁵⁸ Unlike the situation in Kentucky, the aggregate PAC limit impacts late-contributing PACs and totally forecloses contributions and is a real scenario affecting several candidates in Montana. The provision is currently being challenged in U.S. District Court in *Montana Right to Life Ass'n. v. Eddleman*, 999 F. Supp 1380 (D. Mont. 1998). The author is counsel for plaintiffs in *Montana Right to Life Ass'n.*

sion, however, fails to make the important distinction between large individual contributions (which might corrupt) and an aggregated large dollar amount of smaller single contributions (which do not spawn corruption).

*Russell v. Burris*¹⁵⁹ illustrates this important difference. In Arkansas, the government defended its new contribution limit by presenting evidence of a Poultry Federation fundraising event where a legislator received an aggregate contribution of \$22,000 from various PACs, lobbyists, and corporations.¹⁶⁰ No single source donated over \$1,000.¹⁶¹ In its decision, the *Russell* court stated that "\$1,000 is simply not a large enough sum of money to yield, of its own accord and without further evidence, a reasonable perception of undue influence or corruption."¹⁶² The court further observed that the legislator who received the aggregate contribution had not changed his political behavior after receiving the donations, he had not attempted to conceal the contributions or their sources, and he had not voted in any particular fashion after receipt of the contributions.¹⁶³ Consequently, the court found that the appearance of corruption implied by the fact that all the contributions came from the same industry, was "not related to the size of the contributions made . . . and thus [did] not satisfy the compelling state interest."¹⁶⁴

Aggregate PAC limits/bans are flawed because they are aimed at the constitutionally prohibited goal of reducing overall campaign spending, instead of addressing *quid pro quo* corruption from large individual gifts. When many small contributions come from different groups with a similar interest, government cannot take these contributions and simply aggregate them to prove the existence of a large, potentially corrupting contribution.

An additional defect in aggregate PAC limits/bans is that they operate irrespective of the potential (or lack of potential) for corruption that might flow from one additional contribution. This is the issue the Sixth Circuit never addressed in *Kentucky Right to Life*.¹⁶⁵ Because the court found it unlikely that any PAC would be cut off from donating, it did not come to terms with a statute that would prevent a small, noncorrupting contribution from one additional group.

Even if, contrary to *Russell*, it were appropriate to consider the unifying interests of manifold individual PAC contributors, aggregate PAC

¹⁵⁹ 146 F.3d 563.

¹⁶⁰ See *Russell v. Burris*, 146 F.3d 563, 570 (8th Cir 1998).

¹⁶¹ See *Id.* (\$1,000 was the limit at the time.)

¹⁶² *Id.* at 569.

¹⁶³ See *Id.*

¹⁶⁴ *Id.* at 570 (emphasis added).

¹⁶⁵ See *supra* note 157 and accompanying text.

limits/bans also operate irrespective of the alignment of interests of either the contributing PACs or the shut-out PACs. To illustrate, suppose ten pro-gambling PACs contributed their maximum \$200 contribution to a Montana candidate for senate. The aggregate PAC limit of \$1,950 would operate to prohibit any further PAC contributions (as well as \$50 of the last contribution) to the candidate. If there was another pro-gambling PAC who wished to contribute, but could not, the result might be applauded by anti-gambling groups. But the aggregate PAC limit would also outlaw a contribution from a pro-family PAC, an anti-gambling PAC or even an environmental PAC. If a single monied person could create ten PACs and donate early in a campaign, he could individually "capture" the candidate's loyalty, and force every other group to sit out a particular race and watch mute from the sidelines. In that scenario, an aggregate PAC limit perversely enhances the potential for actual corruption and increases the appearance of corruption.

Temporal bans also restrict both large and small contributions and are therefore constitutionally suspect. A "temporal ban" is a prohibition on all contributions for a certain period of time. Arkansas had a complete ban that prohibited members of its General Assembly from accepting a contribution in any amount 30 days before, during, and 30 days after any regular session of the General Assembly and during extended and special sessions.¹⁶⁶ Holding that the provision was not narrowly tailored, a federal court recently declared the provision unconstitutional because, inter alia, "it [did] not take into account the fact that . . . only large contributions pose a threat of corruption."¹⁶⁷ In so doing, it followed courts that have struck down temporal bans in Missouri,¹⁶⁸ Kentucky,¹⁶⁹ Tennessee,¹⁷⁰ Florida,¹⁷¹ and Massachusetts.¹⁷²

¹⁶⁶ See ARK. CODE ANN. § 7-6-203(g)(1) and (2) (Supp. 1997) (the ban applied only to officeholders, not their challengers).

¹⁶⁷ *Arkansas Right to Life State PAC v. Butler*, 29 F.Supp.2d 540, 553 (W.D. Ark. 1998). The court also noted that the temporal ban did not take into account the fact "that corruption can occur any time." The court also pointed out that the ban affected "office holders that do not have legislative power" because it included the Commissioner of Lands, the Attorney General, the Auditor of the State, the Treasurer of the State, the Secretary of the State, the Lieutenant Governor and the Governor. *Id.* at 552.

A far more insidious danger that the court did not address was caused by the statute's non-application to challengers. As a result, were a special session to be called in the period just prior to an election, incumbents would be prohibited from raising money while their challengers could continue fundraising unabated during the arguably most productive fundraising season and during the time period when campaigning ordinarily reaches its highest intensity. One can imagine a state governor contriving to call a special session just prior to a general election in order to hobble the campaign efforts of a legislature controlled by members of his opposite party.

¹⁶⁸ See *Shrink Missouri Gov't PAC v. Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996). There an opposite problem was present. The statute prohibited all candidates from raising

money during the legislative session, thus restricting the fundraising of challengers who had no ability to vote on legislation.

¹⁶⁹ See *Gable v. Patton*, 142 F.3d 940, 951-53 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1112 (1999). In *Gable*, the Sixth Circuit struck down a provision that prevented a traditionally funded gubernatorial candidate from contributing to his own campaign in the final 28 days preceding an election. The court reasoned that it infringed the candidate's unrestricted right to spend money on his own campaign to distribute his message. At the same time, however, the Sixth Circuit upheld a provision prohibiting all other contributions during the final 28 days of an election because it felt such a restriction was crucial to the state's proper administration of a public campaign funding scheme, which it justified as the state's effort in preventing corruption. *Gable* rationalized the 28 day ban by acknowledging that the temporal ban "makes no distinction based on contribution size."

The effect of the 28-Day Window with respect to external contributions is 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 950-51.

¹⁷⁰ See *Emison v. Catalano*, 951 F. Supp. 714 (E.D. Tenn. 1996) (striking down ban on contributions to both incumbent and non-incumbent candidates during the legislative session).

¹⁷¹ See *Zeller v. Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995) (striking down prohibition on all contributions to judicial candidates up to one year prior to an election); *State v. Dodd*, 561 So.2d 263 (Fla. 1990) (striking down ban on all contributions during sessions of the legislature). More recently, a federal district court enjoined a Florida statute that prohibited all contributions during the five days preceding an election. See *Florida Right to Life v. Mortham*, slip op., Case No. 98-770-Civ-Orl-19A (M.D. Fla. Sept 30, 1998).

¹⁷² See Opinion of the Justices to the House of Representatives, 637 N.E.2d 213 (Mass. 1994) (opining that an aggregate limit on contributions during non-election years would be unconstitutional). *But see* *North Carolina Right to Life v. Bartlett*, 3 F. Supp.2d 675 (E.D.N.C. 1998), *affirmed in part and reversed in part*, ___ F.3d ___, 1999 WL 74739 (4th Cir. Feb. 17, 1999). In this recent decision, properly understood as employing a "prohibited source" analysis, the Fourth Circuit reversed a district court order striking down a temporal ban on contributions from lobbyists during the legislative session. See *North Carolina Right to Life v. Bartlett*, 3 F. Supp.2d 675 (E.D.N.C. 1998). Dismissing the argument that a temporal ban affects not only large contributions but also small ones, the court waxed about the narrowness of such view. "Corruption, either petty or massive, is a compelling state interest." *North Carolina Right to Life*, 1999 WL 74739 at *10. But the court missed the point. The distinction *Buckley* was making by emphasizing the potential for corruption from large contributions is that candidates simply are not tempted to trade their votes for small contributions. Thus, small contributions never pose a potential for corruption. The Fourth Circuit's underlying concern is, instead, that lobbyists are in a unique position to be talking about legislation while also making a contribution shortly before or after the legislator actually votes. The court wrote, "lobbyists are paid to effectuate particular outcomes. The pressure on them to perform mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange 'dollars for political favors' can be powerful." *Id.* at *17. The court noted that the statute prohibited only lobbyists and the PACs that employ them, *i.e.* particular sources. The author was counsel for plaintiff in both the district court and the court of appeals.

3. Narrowly Tailored Contribution Limits

As previously discussed, the state interest supporting restricting contributions is in preventing *quid pro quo* corruption that may result from large, individual contributions to candidates.¹⁷³ If the contributions that are limited are not *large*, then the government is infringing upon substantially more political speech and association than is necessary to prevent *quid pro quo* corruption. Thus, if people believe that officials are giving a *quid pro quo* in exchange for a \$10,000 contribution, a carefully drawn contribution limit is one that is close to \$10,000. In contrast, for this scenario, a contribution limit of \$100, \$250, \$500, or \$1000 would not be carefully drawn.

This issue is important because the Supreme Court has instructed that “[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.”¹⁷⁴ The Court went on to explain, “[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind.”¹⁷⁵ It follows that once the government has shouldered its burden of proving a compelling state interest in preventing a proven problem with *quid pro quo* corruption or its objectively reasonable appearance, the question becomes how best to evaluate or scrutinize the chosen dollar limit. Several diagnostic approaches have been employed.

(a) Absolute Comparison

The most obvious approach is absolute comparison, without adjusting for inflation. This approach was taken in *Day v. Hayes*,¹⁷⁶ the first case to strike down a contribution limit as so low as to be “different in kind” from *Buckley*’s limit. There, the court directly contrasted a \$100 contribution limit to the \$1,000 limit upheld in *Buckley*. Absolute comparison was also used in *Russell*, where the court considered a \$200 limit on contributions to PACs in light of the federal \$5,000 limit for PAC contributions upheld by the Supreme Court in *California Medical Associa-*

¹⁷³ See *Buckley*, 424 U.S. at 26 (“[Limiting] actuality and appearance of corruption from large individual contributions.”). See also *Vannatta*, 151 F.3d at 1221 (“[C]orruption stems from large campaign donations, not small ones.”).

¹⁷⁴ *Id.* at 30 (citation omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Day v. Hayes*, 863 F. Supp. 940, 952 (D. Minn. 1994), *aff’d in part, rev’d in part*, *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). The author was counsel for the Minnesota Citizens Concerned for Life plaintiffs in the district court and the court of appeals in this case.

tion v. Federal Election Commission.¹⁷⁷ In *Russell*, the court observed that a \$200 limit was less than 5 percent of the federal \$5,000 limit, and based upon this and other comparisons struck it down.¹⁷⁸ As the Eighth Circuit recently remarked, “the Court in *Buckley* did not declare that limits of less than \$1,000 on contributions are unconstitutional per se, but we also recognize that the \$1,000 figure provides us with something of a benchmark.”¹⁷⁹

(b) *Relative Comparison*

More common than absolute comparisons are comparisons between *Buckley*'s \$1,000 limit and current limits using inflation-adjusted dollars. Again, the case of *Day v. Hayes*¹⁸⁰ is in the vanguard of cases employing this approach. Setting a trend now widely followed, the court took notice that the \$100 allowed under a Minnesota limit was the equivalent of “\$40.60 at the time of *Buckley*,” and thus, in real terms it translated into 4% or 1/25 of the amount permitted by *Buckley*.¹⁸¹ In the recent decision in *Shrink PAC*, the court put it simply, “[a]fter inflation, [Missouri's] limits of \$1,075, \$525, and \$275 cannot compare with the \$1,000 limit approved in *Buckley* twenty-two years ago.”¹⁸² In *Shrink PAC*, the court noted the fact that \$1,075 in 1976 dollars is the equivalent of just \$378 in purchasing power today.¹⁸³

Six months prior to the *Shrink PAC* decision, the Eighth Circuit pointed out in *Russell v. Burris* that *Buckley*'s \$1,000 would be worth approximately \$2,500 in 1998 dollars after adjusting for inflation.¹⁸⁴ In view of the effects of inflation, the *Russell* court determined that Arkansas' limits of \$300 and \$100 were only twelve percent and four percent, respectively, of *Buckley*'s \$1,000 limit when inflation is considered. Looking at inflation from a different angle, *Russell* also compared similar dollar limits that were imposed on an election cycle basis (as opposed

¹⁷⁷ 453 U.S. 182, 195-99 (1981) (plurality opinion).

¹⁷⁸ *Russell v. Burris*, 146 F.3d at 571.

¹⁷⁹ *Shrink PAC*, 161 F.2d at 523.

¹⁸⁰ 863 F. Supp. 940 (D. Minn. 1994).

¹⁸¹ *Id.* at 953.

¹⁸² *Shrink PAC*, 161 F.3d at 522-23.

¹⁸³ *Id.* at 523 n.4.

¹⁸⁴ See *Russell*, 146 F.3d at 570. See also Findings of Fact, *California ProLife Council Council PAC*, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66, *41 (E.D. Cal. Jan. 6, 1998) (According to Finding of Fact No. 130, “The value of \$1,000, as described in *Buckley v. Valeo* in 1976, taking into account the rate of inflation in the consumer price index, is worth today approximately \$300, or less if the rate of inflation of campaign media costs is considered. Conversely, it would take approximately \$3,000 in 1997 dollars, or more if the rate of inflation of campaign media costs is considered, to equal the value of \$1,000 in 1976.”).

to a per election basis) and astutely observed that the \$300 and \$100 limits were the equivalent of only six percent and two percent of *Buckley's* \$1,000 limit. The Eighth Circuit described these inflation-adjusted limits as "dramatically lower than, and different in kind from, the limits approved in *Buckley*," and declared them unconstitutionally low.¹⁸⁵

Other courts have similarly considered the effect of two decades of inflation on *Buckley's* \$1,000 benchmark. For example, a federal court in California struck down variable contribution limits of \$500, \$250, and \$100 after finding that the California limits, depreciated to their deflation-adjusted 1976 values, were much lower than the limits *Buckley* upheld. In 1976, 1998's \$500 would have been worth only \$167; \$250 would have been worth only \$83; and the 1998 \$100 limit was the equivalent of a \$33 limit in 1976.¹⁸⁶ In its holding, the court implied that the *Buckley* Court most assuredly would not have upheld a \$167, \$83, or \$33 contribution limit.

The process of adjusting *Buckley's* benchmark limit of \$1,000 to account for the eroding effects of 20 years of inflation is not without criticism. One criticism is that *Buckley* remains a precedent to which the Court "has never added the 'inflation proviso.'"¹⁸⁷ Another criticism is that the \$1,000 limit upheld by *Buckley*, if adjusted for inflation, would itself now be unconstitutional. This argument, of course, simply begs the question, i.e., "would the Court, if given the opportunity today, strike down as too restrictive a \$1,000 contribution limit on giving to federal candidates?" Given the many changes in the Court's makeup since *Buckley*, no one is sure what that answer would be. A third criticism is based upon a visceral discomfort with tying First Amendment rights to the effects of inflation over time. It has been said that "[w]hatever may be the pernicious effects of inflation, I am certain that the First Amendment's dictates do not depend upon the Consumer Price Index."¹⁸⁸ The rejoinder, however, is that the exercise of First Amendment political speech is intimately tied to the economic costs of communicating that speech. Analogizing dollars to gallons of gasoline, the Supreme Court explained,

¹⁸⁵ *Russell v. Burris*, 146 F.3d at 571; see also *Days v. Hayes*, 863 F. Supp. at 953; *Day v. Holahan*, 34 F.3d at 1366.

¹⁸⁶ See *California ProLife Council PAC v. Scully*, 989 F. Supp 1282 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999); Findings of Fact, *California ProLife Council Council PAC*, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66, *42-43 (E.D. Cal. Jan. 6, 1998) (Findings of Facts Nos. 132, 133, and 134.).

¹⁸⁷ *Shrink PAC*, 161 F.3d at 525 (Gibson, J., dissenting).

¹⁸⁸ *Id.*

[B]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.¹⁸⁹

Thus, because the ability to disseminate one's speech is a function of the economic costs of disseminating speech, a current measure of that cost, such as the Consumer Price Index, is always relevant in determining whether political expression is able to flourish.

Finally, inflation-adjusted comparisons to Buckley's benchmark have been questioned on the belief that the Consumer Price Index does not provide an accurate measure of the costs of political communications. Those who favor lower contribution limits point to emerging technologies that permit inexpensive communications such as World Wide Web home pages for candidates, broadcast e-mailing via the Internet, and broadcast faxing, and argue that campaigning has become less expensive over time.¹⁹⁰ These advances, they say, mitigate or eliminate inflation's erosive effect on the true value of contributions. Advocates of higher limits, on the other hand, contend that the rising costs of traditional avenues of political communication (television, radio, and newspaper advertising, and the U.S. mail) have all outpaced the general Consumer Price Index. Additionally, they maintain that, while advances in communication technologies hold promise for reducing the cost of delivering a candidate's message, that day has not yet come. Some voters will not visit a candidate's web page on their own initiative, and just as it takes time and money to assemble an effective mailing list, it also will take time and money to assemble fax and e-mail lists.

(c) *Before-and-After Comparison*

Another common technique for determining whether a particular contribution limit is narrowly tailored to prevent only those "large" contributions that carry with them the potential to corrupt is to engage in a hypothetical before-and-after study of contribution patterns. This approach is implied by the *Buckley* decision comments found in notes 23 and 27. The Supreme Court took comfort in the fact that only 5.1 percent of the money raised by congressional candidates in 1974 came from donations over the new \$1,000 limit. In other words, the Court projected that 94.9 percent of all contributions would be permissible even under

¹⁸⁹ *Buckley*, 424 U.S. at 19 n.18. It is also of interest to note that Congress *did* include an annual inflation adjuster for the expenditure limits found in §608 and that the adjustment was to be based upon changes in the Consumer Price Index. *Id.* at 55. The candidate expenditure limits ultimately were struck down because of their restrictions on First Amendment political speech for a variety of other reasons.

¹⁹⁰ *E.g.*, *Shrink PAC*, 161 F.3d at 525 n.5 (Gibson, J., dissenting).

the new limit.¹⁹¹ While 5.1 percent is not a magic point, it is another benchmark for gauging how narrowly tailored a new contribution limit might have to be to proscribe constitutionally only those contributions which are "large."

The before-and-after calculation measures the amount of speech contributors impacted by a new limit. The blueprint for this type of analysis was first presented in *Day v. Hayes*¹⁹² and built upon in *National Black Police Ass'n v. District of Columbia Board of Elections and Ethics*.¹⁹³ In *Day*, a federal court reviewed a \$100 limit on contributions to PACs. It found that, in the prior election cycle, between one fourth and one third of the total contributions to the plaintiff PAC came in amounts disallowed by the new limit.¹⁹⁴

In *National Black Police Ass'n*, a federal district court reviewed the presumed effects of a newly imposed \$100 contribution limit to candidates. To determine the effect of the new, lower limit, the court looked at contribution patterns from the previous 1990 election. The change was fairly dramatic. For example, focusing on the seven mayoral candidates, the court noted that the percentage of prior contributions now over the limit was much greater than *Buckley's* 5.1%. For the seven candidates, the percentage of previous contributions that would be cut off by the new \$100 limit were, respectively 54%, 47%, 44%, 41%, 35%, 28%, and 17%.¹⁹⁵

Another example of dramatic change in contribution patterns is found in the case of *Carver v. Nixon*.¹⁹⁶ In *Carver*, the court looked at past contribution patterns in its analysis of \$300, \$200, and \$100 limits for statewide candidates, state senate candidates, and state house candidates, respectively. It found that 27.5% of contributors to the previous statewide State Auditor's race gave contributions greater than the new \$300 limit.¹⁹⁷ In the previous state senate races, 23.7% gave in amounts above the new \$200 limit, and, in the previous state house races, 35.6% contributed an amount greater than the new \$100 limit.¹⁹⁸ The court determined that the effect of the new limits was significant and asked why

¹⁹¹ *Buckley*, 424 U.S. at 21 n.23 ("Statistical findings . . . reveal that approximately 5.1% of the \$73, 483,613 raised by the 1,161 candidates for Congress in 1974 was obtained in amounts in excess of \$1,000.")

¹⁹² 863 F. Supp. 940, 953 (finding that in the prior election cycle between one-fourth and one-third of the total contributions to Minnesota Citizens Concerned for Life Candidate State PAC came in amounts disallowed by the new limit).

¹⁹³ 924 F. Supp. 270 (D.C.D.C. 1996), *vacated as moot on other grounds*, 108 F.3d 346 (D.C. Cir. 1997).

¹⁹⁴ 863 F. Supp. at 953.

¹⁹⁵ *Id.* at 275-76 & nn.3-11.

¹⁹⁶ 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

¹⁹⁷ *Id.* at 643.

¹⁹⁸ *Id.* at 643-44.

it was necessary to "restrict the First Amendment rights of so many contributors."¹⁹⁹

A third example comes from the recent decision in *California Pro-Life Council PAC v. Scully*.²⁰⁰ There, the court measured the percentage of contributions to legislative candidates that would have been disallowed, or lost, had the \$250 or \$500 limit been in place during a prior election. At the \$500 limit, between 52% and 67% of donations to incumbents would have been disallowed, while between 69% and 81% of donations to challengers would have been prohibited.²⁰¹ This type of before-and-after analysis allows a court to gain a sense of the true number of individuals actually being chilled as a result of a newly lowered contribution limit. The number of innocent contributors implicates the narrow tailoring inquiry when a court applies strict scrutiny.

Although such statistics reveal how many contributors are hurt by contribution limits, they tell little about the effect of such limits on candidates. Calculating the percentage of contributions cut off does not measure the impact on the candidate in terms of the amount of campaign dollars lost. From the candidate's perspective, it may be more important to examine the total dollar amount of contributions that would be over the limit and thus prohibited in future elections.

In *National Black Police Ass'n*, the court did have such data for eight City Council candidates.²⁰² Two examples show that the percentage of contributions affected by the limits may be more or less than the percentage of actual campaign receipts lost under new limits. One candidate for City Council received a total of 360 contributions; 303 (or 84%) were in amounts over the new limit. These 303 contributions accounted for 65% of the overall fundraising receipts.²⁰³ In another case, 721 individuals made contributions amounting to \$128,536. Of those, only 231 contributions (or 32%) were over the new limit. Significantly, however, the 32% of contributions over the limit accounted for \$82,104 (or 64%) of the total fundraising receipts for the candidate's campaign.²⁰⁴ In the second case, a significantly smaller percentage of contributions would have been affected by the new limit. Ultimately, however, the second candidate

¹⁹⁹ *Id.* at 644.

²⁰⁰ 989 F. Supp. 1282 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999).

²⁰¹ Findings of Fact, *California ProLife Council Council PAC*, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66 (E.D. Cal. Jan. 6, 1998) (In Finding of Fact No. 279, the court noted that, in open seat races during the same election period, the \$500 limit would have had the effect of shutting out between 69% and 83% of contributions to Assembly candidates, and between 34% and 40% of contributions to Senate candidates. *Id.* at *75-*76.).

²⁰² *See* *National Black Police Ass'n v. District of Columbia Bd. Of Elections and Ethics*, 924 F. Supp. 270, 276 (D.C.D.C. 1996).

²⁰³ *See Id.* (figures are for candidate Frank Smith).

²⁰⁴ *See Id.* & nn.14-16 (figures are for candidate Linda Cropp).

would lose the same percentage of total fundraising receipts as the first candidate.

From the candidate's perspective, it is also valuable to consider the timing of large campaign contributions. It is a fact of political life that to be competitive, challengers need a few large contributions very early in their campaigns ("seed money") to establish a viable candidacy.²⁰⁵ Conversely, candidates sometimes need large contributions at the very end of a campaign to respond to unexpected events such as large independent expenditures or a barrage of negative publicity that demands a candidate's response.²⁰⁶ Low contribution limits stymie a candidate's ability to acquire seed money early or respond to independent expenditures made late in the campaign.

Although *Buckley* addressed the need for seed money, it left for future decisions the impact of contribution limits on acquiring seed money.²⁰⁷ The Court observed,

Although appellants claim that the \$1,000 ceiling governing contributions to candidates will prevent the acquisition of seed money necessary to launch campaigns, *the absence of experience under the Act prevents us from evaluating this assertion*. As appellees note, it is difficult to assess the effect of the contribution ceiling on the acquisition of seed money since candidates have not previously had to make a concerted effort to raise start-up funds in small amounts.²⁰⁸

The *Buckley* Court assumed that contributions lost as a result of the \$1,000 limit could simply be replaced through "efforts to raise additional contributions" from more people giving amounts within the limit.²⁰⁹ While this might be true where only 5.1% of contributors are cut off (as in *Buckley*), defenders of low limits advance this argument regardless of

²⁰⁵ See *Buckley*, 424 U.S. at 242 n.5 (Burger, C.J., concurring and dissenting) ("[S]eed money' can be essential, and the inability to obtain it may effectively end some candidacies before they begin.").

²⁰⁶ During the March-April 1998 trial of *Colorado Right to Life v. Buckley*, Case No. 96-S-2844 (U.S. Dist. Ct. D. Colo) (taken under advisement) (challenge to \$500 and \$250 contribution limits), Oregon House candidate Bill Moshofsky testified that although he had the ability to raise much larger sums than he actually did under Oregon's newly lowered \$100 limits (as demonstrated in his campaigns prior to Oregon's lowered contribution limits) he was unable to respond to large independent expenditure mail campaigns directed against him made in the few weeks remaining before the election. He testified that because the independent expenditures came at the "last minute," he had already spent most of his campaign budget and simply did not have the time to raise the necessary contributions to respond effectively. Put another way, low contribution limits prevented candidate Moshofsky from being able to communicate his message to the voters. Oregon's limits were later struck down as unconstitutionally low in *Vannatta v. Keisling*, 931 P.2d 770 (Or. 1997).

²⁰⁷ *Buckley* never addressed the quandary faced by a candidate who is overwhelmed late in a campaign by negative independent expenditures.

²⁰⁸ *Buckley*, 424 U.S. at 35 n.40 (emphasis added).

²⁰⁹ *Id.* at 26 n.27.

the amount of contributions lost.²¹⁰ They ignore the burden placed on candidates, who lose precious time needed to communicate their message because they are forced to undertake constant fundraising efforts.²¹¹ At some point, it belies sensibility to insist that this burden does not have a deleterious effect on political dialogue.²¹²

(d) *Percentage of Disallowed Contributions*

Recently, a new approach has been tried for determining which contribution limits pose a difference in degree and which pose a difference in kind. According to this approach, the court would look at new contribution limits as a fraction of prior campaign expenditures and compare them to the same fractional result of *Buckley*. If the fractional result of a

²¹⁰ *California ProLife Council PAC*, 989 F. Supp. at 1298 (“[D]efendants’ contention [is] that there is nothing sacrosanct about the historic methods of campaigning and that all Proposition 208 does is require alteration in the method of campaigning . . .”).

²¹¹ *Id.* (“[G]iven that the limits will require the candidate to spend yet more time raising money since it must be raised from a greater number of donors, it is doubtful that there is anything the candidate could do to alter campaigns in meaningful ways.”); *Buckley*, 424 U.S. at 244 n.9 (Burger, C.J., concurring and dissenting) (“Candidates who must raise large initial contributions in order to appeal for more funds to a broader audience will be handicapped. It is not enough to say that the contribution ceilings ‘merely . . . require candidates . . . to raise funds from a greater number of persons,’ where the limitations will effectively prevent candidates without substantial personal resources from doing just that.”).

²¹² See Findings of Fact, *California ProLife Council PAC*, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66, *39-40 (E.D. Cal. Jan. 6, 1998) In Finding of Fact No. 126, the court stated,

Within the California context, the contribution limits in Proposition 208 produce the following results: (i) They will significantly reduce the candidate’s ability to campaign personally through means such as attendance at public forums, house meetings, public debates, and the like, *due to the increased time that will need to be spent fundraising*; (ii) They will significantly reduce the candidate’s ability to engage in political speech—in some instances below the level of perception—due to the decrease in funds candidates will be able to raise under the contribution limits; (iii) Financial supporters of a candidate will reduce contributions to the candidate and increase or initiate independent expenditures.

(emphasis added). The court noted in Finding of Fact No. 269 that “[t]he effect of the \$100, \$250, and \$500 contribution limits to candidates in Proposition 208 is, *inter alia*, to require more time and effort to be expended on fundraising for candidates and their campaign committees.” *Id.* at *73. According to Finding of Fact No. 271, “Raising contributions in small increments puts pressure on candidates to spend more time meeting potential donors and others who have networks of donors whom they can solicit.” *Id.* at *73-74. Finding of Fact No. 272 stated, “The need to raise funds in small increments also puts pressure on candidates to spend more time on the telephone seeking contributions.” *Id.* at *74. And, in Finding of Fact No. 273 the court stated that “[i]n general, time a candidate spends raising money is time that he or she would otherwise spend meeting voters, communicating their message or learning about the voting district or the state.” *Id.*

new limit is significantly different from the fractional result derived from *Buckley*, then the new limit would be regarded as different "in kind." When *Buckley* approved the \$1,000 limit for federal candidates in 1976, the average overall expenditure on a federal House race was \$74,000. Since the \$1,000 limit was a per election limit, a contributor could donate \$1,000 for the primary and another \$1,000 for the general election, or \$2,000 per campaign. Dividing \$2,000 by \$74,000 shows that the contribution limit limited one person to contributing 1/37th of the overall expenditures of the average House candidate in 1976.²¹³

With that comparison in view, the court in *California ProLife Council PAC v. Scully* found that a \$250 per election limit on contributions to California Assembly candidates constituted only 1/727th of the average total expenditures for an Assembly candidate based upon California elections from 1984-1994.²¹⁴ Other evidence showed that for California State Senate campaigns, the \$250 per election limit amounted to merely 1/1143rd of the average total campaign expenditure.²¹⁵ The court found that "the [\$250 per election limit] of Proposition 208 [was] from 20 to 30 times as restrictive as those [\$1,000 per election limit] in *Buckley*."²¹⁶ Based on this and other factors, the Court ultimately struck Proposition 208's limits because they prevented candidates from communicating their messages.

The implication here is that *Buckley* approved a limit where, on average, an entire campaign could be financed by as few as 37 contributors, notwithstanding the potential for a candidate to fall beholden to his or her 37 main contributors. If the Court was willing to risk candidates being "bought" by 37 contributors as a tolerable tradeoff for protecting contributors' rights to associate with candidates, then there can be no

²¹³ *Id.* at *76-77 (Finding of Fact No. 280).

²¹⁴ *Id.*

²¹⁵ Plaintiff's Exhibit No. 37, *California ProLife Council PAC*, 989 F. Supp. 1282 (E.D. Cal. 1998) (No. Civ. S-96-1965).

²¹⁶ Findings of Fact, *California ProLife Council PAC*, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66 (E.D. Cal. Jan. 6, 1998) (Finding of Fact No. 280). The relevance of this type of analysis is bolstered by Chief Justice Burger's observation in note six of his concurring and dissenting opinion in *Buckley*. There Burger criticizes the undifferentiated sweep of the \$1,000 limit, suggesting that the potential for corrupting a candidate recipient with a \$1,000 gift will vary enormously from place to place because the amounts spent by candidates in different locations vary enormously. First he implied that the cost of running a campaign in New York or California will vary greatly from the cost of running a campaign in Alaska or Wyoming. Then he noted the expenditure disparities evident from the 1974 elections, with seven Senatorial candidates spending more than \$1,000,000 while many House candidates spent less than \$25,000. Burger wrote, "the gift's potential for corruptly influencing the recipient will vary enormously from place to place." *Buckley*, 424 U.S. at 244 n.6.

justification for diminishing the risk by spreading it out to 727 or 1,143 contributors by imposing much smaller limits.

4. Variable Contribution Limits

“Variable limits” refer to regulatory schemes which impose a set limit for all candidates, but permit a higher contribution limit for candidates who agree to modify their campaign behavior in some specified way. For example, a state might impose an across-the-board contribution limit of \$500, but double that limit for a candidate who agrees to limit his campaign spending to a predetermined amount. Thus, the limit may increase to reward statutorily encouraged behavior of individual candidates. This was the case in California under Proposition 208.

Variable limits can also be found in legislation that encourages the formation of particular types of political action committees. In Arkansas, “Initiated Act I” set an across-the-board limit on contributions that political action committees could give to candidates (\$300 limit for state-wide candidates; \$100 limit for other candidates).²¹⁷ The Act, however, permitted one type of PAC (a “small donor” PAC) to contribute \$2,500 to a candidate. Thus, the scheme encouraged the creation of PACs that amassed funds in increments of \$25 or less.²¹⁸

Both types of variable limits may actually tend to increase, not decrease, *quid pro quo* corruption. Variable limits that are contingent upon voluntary expenditure ceilings tend to make certain contributions more significant to a candidate because he or she need no longer raise an unlimited amount of campaign funds, only funds to reach the ceiling. This type of variable limit allows one person to make a large contribution at the precise time when the overall campaign budget has shrunk. Thus, a favor-carrying contributor will be in a position to exercise a disproportionately large influence over a candidate’s ability to amass needed campaign money, and as a result, over the candidate.

The variable limits for small-donor PACs also tend to increase, rather than decrease, corruption. Defenders of variable limits for small-donor PACs claim the variation is acceptable because small-donor PACs receive their money in non-corrupting small increments. Consequently, the argument goes, no one contributor would be likely to control a PAC.²¹⁹ The Eighth Circuit in *Russell* exposed the weakness of that argument by pointing out that it “ignore[s] the possibility that the small-donor PAC itself will seek to control a given candidate.”²²⁰

²¹⁷ See ARK. CODE ANN. §§ 7-6-203(d) and 7-6-201(12).

²¹⁸ *Id.*

²¹⁹ *Russell v. Burris*, 146 F.3d 563, 572 (8th Cir 1998).

²²⁰ *Id.*

Russell concluded that if any amount is potentially corrupting, it is the higher \$2,500 amount, which is two and-a-half times greater than the amounts permitted to be given by all other contributors. Holding that the variable limits were not narrowly tailored, the court explained,

A \$2,500 contribution would be even more likely to exacerbate this difficulty than the \$1,000 contribution limit applicable to most other contributors. Indeed, if any contribution is likely to give rise to a reasonable perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-one-half times the amount that most others are allowed to contribute.²²¹

As noted earlier, the state interest that justifies restricting contributions is preventing *quid pro quo* corruption that may occur when *large*, individual contributions are given to candidates. Regulatory schemes that allow a candidate to receive larger contributions if they abide by expenditure limits do not advance the government's interest in limiting the *size* of contributions. The Supreme Court noted in *Buckley* that the FECA's expenditure limits would not advance *any* of the government's interests, including, most importantly, its interest in preventing *quid pro quo* corruption from large contributions.²²²

No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings.²²³

Because the FECA's expenditure limits did not serve to prevent *quid pro quo* corruption, the Court declared them unconstitutional.²²⁴

Furthermore, variable contribution limits are not closely drawn.²²⁵ A statute is closely drawn when the means chosen do not "burden substantially more speech than is necessary to further the government's le-

²²¹ *Id.* at 572. The court compared the \$2,500 small-donor PAC limit to a \$1,000 limit, rather than Act I's \$300 and \$100 limits because the court had already determined that the lower limits were unconstitutional and thus Arkansas state law would revert to the pre-Act I \$1,000 limits. Had it not already declared the lower limits unlawful, the small-donor PAC limit would have been between eight and 25 times greater than the limits applicable to all other donors. *See id.*

²²² *See Buckley*, 424 U.S. at 55-58.

²²³ *Id.* at 55. The Court then rejected the remaining interests the state advanced. *See Id.* at 55-58. The Court rejected limits on independent expenditures, *see id.* at 45-48, and personal/family candidate expenditures on the same grounds, *see id.* at 53-54: they would not advance the government's interest in preventing *quid pro quo* corruption from large contributions to candidates. *See id.* at 55-58.

²²⁴ *Id.*

²²⁵ *California ProLife Council PAC*, 989 F. Supp. at 1296.

gitimate interests."²²⁶ In the case of variable limits, the government has essentially admitted that lower limits are lower than what is needed to prohibit *quid pro quo* corruption because greater contributions are allowed.²²⁷ Implicit in these variable limits is a state finding that a contribution made at the higher limit does not present a risk of actual or apparent corruption.

When the *California ProLife Council PAC* court reviewed Proposition 208, it summed up the problem with variable limits by stating,

Whatever else may be true of Proposition 208's variable limits scheme, it seems relatively clear that the electorate has manifested its judgment that the higher limitations are not unacceptably corrupting. . . .

It follows that the lower limits are not closely drawn to achieve the only governmental purposes sufficient to justify regulation.²²⁸

Then, to make the point absolutely clear, the court wrote,

Put another way, the adoption of the variable limits reflects a conclusion on the part of the voters that the \$200 limit suffices to address the issue of corruption even if it is not the lowest amount which would

²²⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

²²⁷ *California ProLife Council PAC*, 989 F. Supp. at 1296.

²²⁸ *Id.* In the much different context of public campaign funding, the First Circuit approved Rhode Island's differential contribution limits of \$1,000/\$2,000 in *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). Calling the scheme a "cap gap" the First Circuit explained that there is a constitutional difference between a penalty imposed and a premium earned, the former failing constitutional muster and the latter passing. It then characterized the lower \$1,000 contribution cap as not "inherently" penal and the higher \$2,000 cap as a legitimate premium earned for truly voluntary public financing scheme. *Id.* at 38. The court concluded "the gap appears to reflect a carefully calibrated legislative choice anent the differential risk of *quid pro quo* corruption in the two instances. In the state's view, the many eligibility requirements for public financing make it less likely that a given contribution will tend to corrupt a candidate." *Id.*

There are, however, two competing arguments over the tendency to corrupt with variable limits, as *Vote Choice* recognized in footnotes 15 and 16. The one which ultimately held sway was that since the public funding provisos included an overall limit on permissible fundraising, any single contributor would become "less important" because the contributor could ultimately "be 'replaced' at no marginal cost." *Id.* at 40 n.15. This would be true where the campaign would seem likely to reach its overall fundraising limit which in turn would mean that a given large contributor "occupying a contribution slot" could easily be replaced with another. "With this distinction in the importance of individual contributors comes a corresponding diminution in the risk of corruption and therefore, a diminished justification for stringent contribution limits." *Id.* The rejoinder argument was recorded by the court as well:

A state legislature could certainly conclude that a \$2,000 contributor to a campaign complying with the spending limits actually holds a greater sway with the candidate than does a \$1,000 contributor to an unlimited campaign because the former contribution represents, in most cases, a greater percentage of the candidate's kitty than does the latter.

Id. at 40 n.16. Deferring to the state legislature, the First Circuit explained that it need not "choose sides, at this level of particularity, in the flux and reflux of policy considerations." *Id.*

do so. That conclusion requires a finding that the lower limit is not closely drawn.²²⁹

Because variable limits on campaign contributions do not advance the state's interest in preventing corruption or its appearance, they are unconstitutional.

III. APPLYING STRICT SCRUTINY FROM THE CANDIDATE'S PERSPECTIVE

Obviously, contribution limits do not injure only political contributors. They also threaten the constitutional rights of political candidates.²³⁰ Just as contributors have a constitutional right to engage in political speech and to associate with any given candidate, political candidates also enjoy a First Amendment right to associate with a contributor, to receive a contributor's speech, and to engage in political speech of his own.²³¹ Although contribution limits do not directly prohibit a candidate's speech, at some point these limits can be so low that they actually impinge upon a candidate's speech "[b]ecause campaign contributions translate into a candidate's speech."²³² This occurs when the impediment to amassing contributions prevents the candidate from raising the funds necessary to disseminate his speech. This was perhaps the primary basis upon which the *Shrink PAC* court recently struck down limits above \$1,000. *Shrink PAC* held, "[i]n today's dollars, the [\$1,075, \$525, and \$275] limits appear likely to 'have a severe impact on political dialogue' by preventing many candidates for public office 'from amassing the resources necessary for effective advocacy.'"²³³

In *Buckley*, the Supreme Court held that campaign expenditures are unconstitutional because they impinge upon a candidate's ability to speak.²³⁴ When contribution limits operate as *de facto* candidate expen-

²²⁹ *California ProLife Council PAC*, 989 F. Supp. at 1296.

²³⁰ "The Act's constraints on the ability of . . . candidate campaign organizations to expend resources on political expression 'is simultaneously an interference with the freedom of their adherents.'" *Buckley*, 424 U.S. at 22 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1976) (plurality opinion)).

²³¹ See generally *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 756 (1976) (freedom of speech protects "the communication, to its source and to its recipients both"). From this First Amendment concept derives the concomitant principle that candidates have a reciprocal First Amendment right to receive speech in the form of contributions from those who wish to speak through their donations. At the same time, the right of political association, which the Supreme Court has said protects the right to contribute to candidates, also protects the reciprocal right of a candidate to associate with his or her contributors.

²³² *California ProLife Council PAC*, 989 F. Supp. at 1296.

²³³ 161 F.3d at 523 (quoting *Buckley v. Valeo*, 424 U.S. at 21).

²³⁴ "The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech." *Buckley*, 424 U.S. at 39. "[M]ore fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

diture limits, they become *per se* unconstitutional. At the time of *Buckley*, the Supreme Court did not have sufficient experience with contribution limits to fully consider the constitutional ramifications of their effect on candidates. But the Court explicitly cautioned,

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.²³⁵

The most recent case to extensively explore this area is *California ProLife Council PAC v. Scully*. There, the court noted that “in *Buckley*’s record [t]here is no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.”²³⁶ The court determined that “[t]his contrasts with the instant record where the court has concluded that the contribution limits will prevent the marshaling of assets sufficient to conduct a meaningful campaign.”²³⁷

In *California ProLife Council PAC*, the court found a myriad of ways in which the low contribution limits would hamstring candidates. The court observed that campaigns cost more in California than elsewhere, and found that direct mail, radio, and television advertising are a necessary part of campaigning in large districts. The court also noted that, when raising funds in small increments, a candidate must change the way he communicates with potential voters. “Time a candidate spends raising money is time that he or she would otherwise spend meeting voters, communicating their [*sic*] message.”²³⁸ The more time a candidate must spend reaching out to additional contributors, the less time he has to get his message out to voters. The same holds true for campaign volunteers. Time campaign volunteers spend making fundraising calls, is “time that they would otherwise spend walking door to door or organizing coffee klatches to communicate the candidate’s position and background to voters.”²³⁹

Low contribution limits then create several hurdles that obstruct the free speech of political candidates. First, the time a candidate spends finding additional donors is time lost for actually meeting and talking with voters. Second, time that a candidate’s volunteers spend fundraising is time that will not be spent distributing his message. Third, if a

²³⁵ *Buckley*, 424 U.S. at 21.

²³⁶ *California ProLife Council PAC*, 989 F. Supp. at 1298 (quoting *Buckley*, 424 U.S. at 21) (alteration in original).

²³⁷ *Id.*

²³⁸ Findings of Fact, *California ProLife Council PAC*, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66, *74 (E.D. Cal. Jan. 6, 1998) (Finding of Fact No. 273).

²³⁹ *Id.* at *74 (Finding No. 274).

candidate is ultimately not able to raise sufficient funds due to these limits, the candidate's message suffers, either in the form of less discussion and name recognition or in the form of diminished initial coverage and less overall repetition.

Candidates face yet another challenge, heretofore unrecognized in the caselaw. Regulatory schemes that handcuff a contributor's ability to give a candidate financial assistance eventually channel the unspent money into the only uncapped outlet for contributors' speech: *independent expenditures*. These increased independent expenditures negatively affect political candidates because they elevate the "noise" level of campaign rhetoric through which a candidate must deliver his own speech. Low contribution limits "divert campaign contributions from the candidate to independent expenditures, thus providing a source of campaign rhetoric which may drown out or at least dilute the candidate's own message."²⁴⁰ As a result, a low contribution limit not only makes it more difficult for a candidate to raise his own funds, it also raises the threshold of "noise" over which the candidate's speech must rise to be heard.

IV. LIMITS ON CONTRIBUTIONS TO PACS AND INDEPENDENT EXPENDITURE COMMITTEES

Limits on contributions to political action committees and independent expenditure committees do not advance the state's interest in preventing corruption or at least do not advance it in a carefully tailored way. Limits on contributions to political associations do not further the state's interest in preventing corruption or its appearance because political associations do not exercise legislative power. Regardless of the size of a given contribution made to a political action committee, the committee, in turn, is still limited in what it can give to any particular candidate. In striking down a \$200 limit to political action committees, one court recently acknowledged, "There is . . . less of a danger of *quid pro quo* corruption, such as the sort 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."²⁴¹ A federal district court in Minnesota struck down a \$100 limit on contributions to PACs because it was not narrowly tailored.²⁴² There, the court pointed out that "[a] \$100 limit on contributions regulates too broadly by limiting the rights of association of relatively small contributors along with those of large contributors . . . [and thus] is not narrowly drawn."²⁴³

²⁴⁰ *California ProLife Council PAC*, 989 F. Supp. at 1297 n.37.

²⁴¹ *Russell v. Burris*, 146 F.3d 563, 571 (8th Cir 1998); cf. *Day v. Holahan*, 34 F.3d at 1365.

²⁴² See *Day v. Hayes*, 863 F. Supp. at 953.

²⁴³ *Id.*

Limits on contributions to independent expenditure committees also do not further the state's interest in preventing corruption or its appearance. Independent expenditure committees, because of the definition of an "independent expenditure," can never give contributions to candidates. Nor can such committees coordinate their expenditures with a candidate. It follows then, that there is little danger that a candidate will trade his vote in an exchange for independent expenditure activity that may or may not assist the candidate. As the Supreme Court observed in *Buckley*,

[S]uch independent expenditures [unlike contributions] 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 . . . 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.²⁴⁴

A \$500 limit on contributions to independent expenditure committees was recently struck down in *Arkansas Right to Life PAC v. Butler*.²⁴⁵ There, the court stated, "We are hard pressed to find any such 'demonstrable' evidence in the record before us that large contributions to independent expenditure committees has attributed to actual or perceived corruption in Arkansas' political process."²⁴⁶ This result was predicted by Justice Blackmun in his concurring opinion in *California Medical Ass'n v. Federal Election Commission*. In *California Medical Ass'n*, the Supreme Court upheld a \$5,000 limit on contributions to a political action committee that was designed to prevent an individual from channeling funds through a multicandidate PAC to avoid the \$1,000 limit on direct contributions.²⁴⁷ Justice Blackmun explained that he would probably not have upheld such a limit on independent expenditure committees:

I stress, however, that this analysis suggests that a different result would follow if [the contribution limit] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates. By definition, a multicandidate political committee . . . makes contributions to five or more candidates for federal office. Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat.²⁴⁸

²⁴⁴ *Buckley*, 424 U.S. at 47.

²⁴⁵ See *Arkansas Right to Life PAC v. Butler*, 29 F. Supp. 2d 540 (W.D. Ark. 1998).

²⁴⁶ *Id.* at 546.

²⁴⁷ *California Med. Ass'n v. FEC*, 453 U.S. 182, 198 (1981).

²⁴⁸ *Id.* at 203 (Blackmun, J., concurring) (emphasis added).

Because statutory limits upon contributions to committees that engage solely in making independent expenditures do not further the state's interest in preventing corruption or the appearance of corruption, they can never be constitutionally justified. Indeed, the Supreme Court in *National Conservative Political Action Committee* at least tacitly recognized the constitutional problem with such a prohibition:

The plurality [in *California Medical Ass'n*] emphasized in that case, however, that nothing in the statutory provision in question "limits the amount an unincorporated association or any of its members may independently expend in order to advocate political views," i.e., by themselves or through an independent expenditure committee *but only the amount* it may contribute to a multicandidate [PAC].²⁴⁹

V. UNDULY LOW CONTRIBUTION LIMITS

When contribution limits are so low that they increase rather than decrease corruption, they obviously do not further the state's interest in preventing corruption or its appearance. Such limits are obviously different "in kind" from those approved by the Supreme Court in *Buckley* and are unconstitutional. Similarly, when contribution limits are so onerous that they prevent candidates from raising the money needed to get their message out to voters, such limits can never qualify as a narrowly drawn method of achieving the state's compelling interest. In either case, such unduly low contribution limits should be struck down as *per se* unconstitutional.

A. Contribution Limits that Increase Corruption

If the only constitutional justification for limiting one's First Amendment right to financially support a favorite candidate is the prevention of corruption or its appearance, then it follows, *a fortiori*, that contribution limits which actually increase corruption are *per se* unconstitutional. Unduly low limits do, in fact, lead to the unintended consequence of promoting corruption in the form of contribution laundering. Some of the reasons for this phenomenon are obvious while others are less so.

In *California ProLife Council PAC*, the defenders of Proposition 208's low state-wide limits pointed to San Diego as a poster child for effective \$250 limits. For many years, San Diego has limited city council candidates from accepting more than \$250 from any one person. In a fairly dramatic turn at trial, however, evidence was introduced that since the imposition of \$250 limits, there had been a marked increase in

²⁴⁹ *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 494-95 (1985) (quoting *California Med. Ass'n*, 453 U.S. at 195) (emphasis added).

contribution laundering.²⁵⁰ The problem of contribution laundering was clearly exemplified by one scenario evidenced at trial. While raising funds for his campaign, one candidate telephoned a real estate developer and requested a large contribution. The developer, after deciding to make the large contribution, learned that he was limited to contributing \$250. He turned to his company's employees and the employees of a law firm he employed for advice. Various employees made individual \$250 contributions to the candidate. They were later reimbursed by the developer, who was eventually caught and charged with making illegal contributions.

An investigator for the Fair Political Practices Commission (the state campaign watchdog agency) explained that contribution laundering was fairly easy to spot because of the large numbers of identical contributions with a common connection (i.e., same employer or same address) in favor of a common candidate over a narrow period of time. The investigator further testified that incidents of contribution laundering were far more common in California cities that, like San Diego, had enacted low contribution limits than in California cities without such limits.²⁵¹ Anecdotal evidence likewise suggests that contribution laundering on the federal level has increased steadily as inflation continuously eats away at the value of a \$1,000 contribution and reduces its size in real dollars.

This effect is predictable and understandable. "It is naive to think that when the government is heavily involved in virtually every aspect of economic life in the country . . . people affected by government actions will accept whatever comes without some kind of counterstrategy."²⁵² In other words, as the level of government benefits increases, competition for government transfers of wealth will naturally tend to increase campaign expenditures. In ever larger numbers and in ever greater amounts, voters will want to contribute to the candidates that promise to

²⁵⁰ The term "contribution laundering" refers to the situation where a person has an intense desire to contribute a large amount of money to a favorite candidate, but is prevented from doing so directly by a low contribution limit. Then, to effect the large contribution, the person asks numerous other persons to contribute the allowable maximum amount, reimbursing the others for the contributions made in their own names. Thus, the large illegal contribution is "laundered" through a network of smaller "legal" contributions funded from the same source.

²⁵¹ In its Findings of Fact, Finding No. 117, the court found, "Under the \$250 contribution limits in San Diego, the new forms of fundraising that have emerged are . . . illegal money laundering." Findings of Fact, *California ProLife Council PAC*, S-96-1965, 1998 U.S. Dist. LEXIS 66, *37. In Finding No. 118, the Court found that "[t]he experience of the FPPC has been that jurisdictions with contribution limits experience an increase in illegal money laundering." *Id.* at *37-38.

²⁵² Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049, 1077 (1996).

secure the greatest payoff of government benefits. If those who seek government benefits are foreclosed from legitimate avenues of rent-seeking, their campaign contributions are more likely to come in less desirable forms.²⁵³

When the incentive for donating to candidates who control the large stream of government payments (whether in the form of contracts or regulatory benefits) is great, and the benefits of putting or keeping in office those politicians who value similar ideals are substantial, restricting contributions is like squeezing a balloon. Squeezing out legitimate forms of participation is bound to lead to covert participation. "There is always the possibility that limiting private contributions will simply increase the value of a more corrupting alternative: outright bribery."²⁵⁴

The overarching problem with contribution laundering stems from the fact that the final vote tallied at the end of election day is definitive. Once won, an office remains the victor's, regardless of irregularities in contributors' conduct. Elections are rarely unwound. Even more rarely are officeholders forced to re-run for their seats because they received illegal campaign contributions. In the truest sense, winning is everything. Thus, a contributor may be willing to engage in contribution laundering to ensure his favorite candidate succeeds because: (a) he may never be found out; (b) even if he is found out, the penalties are likely to be monetary and thus the "risk" is worth the "reward"; and most important (c) his candidate will remain in office. Thus, the winner-take-all context in which low contribution limits operate tends to increase the likelihood of illegal contribution laundering.

²⁵³ John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures are Increasing: The Government is Getting Bigger*, (Nov. 1996) (unpublished working paper on file with the *Regent University Law Review*) ("The public policy debate presumes that all the supposed evils of campaign finance would be simply solved by putting limits on donations or on the total amount that candidates can spend. Yet, as with other types of controls, one risks merely changing the form of payments rather than really restricting the level of payments.")

The trial court in *California ProLife Council PAC*, 989 F. Supp. at 1292 n.22, recognized professor Lott's free market economy analogy for an unregulated system of campaign contributions.

²⁵⁴ Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049, 1077 (1996). Smith goes on to note that others have argued that the cost of illegal bribery is so high that most influence seekers and peddlers will not attempt it, yet he remonstrates "influence seekers denied a lawful means to press their case will be more prone to consider unlawful means, and there will always be takers at the right price." *Id.* at 1077 n.170. Certainly, the cost of contribution laundering for the contributor wanting to influence outcomes is smaller than illegal bribery and involves less risk for the candidate than participating in bribery. As a result, contribution laundering is more likely to take place, if one assumes the contributor desires to reduce his overall risk.

Where it can be proved, as it was for San Diego, that low contribution limits have actually increased the occurrences of corruption, such limits should be held *per se* unconstitutional. Preventing corruption, or its appearance, is the only state interest recognized by the courts for limiting the First Amendment rights of contributors. Therefore, if contribution limits cause an increase in corruption, the state interest in preventing corruption no longer supports their existence. If limits do not prevent corruption, then they have no *raison d'être*.

B. Contribution Limits that Prevent Candidates from Communicating Their Messages

Wholly apart from the question of whether a contribution limit is so low as to be different in kind from the \$1,000 limit acknowledged in *Buckley*, is the question of whether the limit prevents a candidate from communicating his campaign message. This is an independent test of constitutionality. In other words, to pass constitutional muster, a donation limit must be both similar in kind to *Buckley's* \$1,000 limit and high enough to permit candidates to raise sufficient funds. Failure under either test dooms a contribution limit.

This second test is necessary because a system that fosters non-corrupt campaign financing must not, through impediments to fund-raising, leave the electorate uninformed about the positions of candidates, the merits of their platforms, or the very identity of the candidates who are running. As the Supreme Court stated in *Buckley*, "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."²⁵⁵ If it were otherwise, elections would devolve into uncounseled and undifferentiated incumbent reelections or reactionary challenger victories. The heart of our representative democracy would be severely threatened.

C. Contribution Limits Are Always Unconstitutional

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,²⁵⁶ Justice Thomas observed that the existence of a few individuals might corrupt political candidates through large contributions does not warrant preventing many more individuals from mak-

²⁵⁵ *Buckley*, 424 U.S. at 52-53.

²⁵⁶ 518 U.S. 604 (1996) (Thomas J., concurring in the judgment and dissenting in part).

ing contributions that do not corrupt.²⁵⁷ He also stated that simply because bribery laws may not eliminate all instances of corruption does not mean that contribution limits are narrowly tailored. Similarly, the fact that other means of expression remain open does not prove that a contribution limit is narrowly tailored.²⁵⁸ Under Justice Thomas' approach, contribution limits are *per se* unconstitutional.

VI. THE FECA'S CONTRIBUTION LIMITS

Various contribution limit provisions contained in the FECA are now ripe for challenge. Among them are: (a) the \$1,000 limit on individual contributions to candidates; (b) the limits on contributions to political action committees; (c) the limits on contributions to independent expenditure committees, and (d) the limits on contributions to political parties.

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

The \$1,000 individual contribution limit is found in §441a(a)(1) of the FECA.²⁵⁹ This limit suffers from the same maladies that plague low state contribution limits. The ravages of inflation over the two and one-half decades since the passage of the FECA have severely diminished the political message-buying power of a \$1,000 contribution. And, like its state counterparts, as inflation eats away at its value, the \$1,000 limit is pressuring contributors to find other ways of contributing. There has been an explosion in independent expenditures and an increase in contribution laundering (or "conduit contributions," as they are sometimes labeled). These increases have left the electorate with less information about campaign participants and has led to alliances between a candidate and his contributors. The *Shrink PAC* case presently pending before the Supreme Court will give the Court its first opportunity since *Buckley* to address the frailties of the twenty-five year old FECA limit.²⁶⁰

²⁵⁷ See *id.* at 642 (quoting Brief of Appellants in *Buckley v. Valeo*).

²⁵⁸ See *id.* at 643-44.

²⁵⁹ "No person shall make contributions—(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$1,000." 2 U.S.C. § 441a(a)(1) (1998). The limit applies to each election, that is, \$1,000 for a primary election and \$1,000 for the general election. See 2 U.S.C. § 441a(a)(6) (1998).

²⁶⁰ *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999). The *Shrink PAC* decision is the first case since *Buckley* was decided to strike down a contribution limit as different in kind from *Buckley's* benchmark \$1,000 limit.

B. The \$5,000 Limit on Contributions to PACs

The second contribution limit provision that appears vulnerable to challenge is §441a(a)(1)(C), which established the aggregate calendar year limit of \$5,000 to a non-candidate political committee. This section is problematic for three reasons. First is the questionable rationale supporting limits on contributions to committees, which do not have any official political favors with which to repay a large contributor.²⁶¹ A political committee is simply a term of art employed to describe “mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to amplify the voice of their adherents.”²⁶² Limiting contributions to these groups impinges upon First Amendment rights of speech and association.²⁶³ In order to justify this burden, the limit must be narrowly drawn to achieve the government’s goal of preventing corruption or its reasonable appearance.²⁶⁴ “Corruption,” as defined by the Supreme Court, is a *quid pro quo* exchange between a contributor and a candidate in order to secure a vote or political favor contrary to the candidate’s obligations of office.²⁶⁵ Yet, there can be no specter of corruption between a contributor and a political committee, since the recipient committee can promise no favors of office or legislative votes to the contributor.

In *Day v. Holahan*, the Eighth Circuit struck down a limit on contributions to political committees.²⁶⁶ Among the court’s stated reasons for its holding was its recognition that there is no danger of *quid pro quo* corruption between a contributor and a PAC. The court stated 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.”²⁶⁷ That observation was also made in the recent case of *Russell v. Burris*. There, the court struck down a \$200 limit on contributions to PACs stating, “There is also

²⁶¹ Cf. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263 (1986) (suggesting that “[v]oluntary political associations do not . . . present the specter of corruption.”).

²⁶² *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) (quoting *Buckley v. Valeo*, 424 U.S. at 22) (brackets in original).

²⁶³ See *California Med. Ass’n v. FEC*, 453 U.S. 182, 202-04 (1981) (Blackmun, J. concurring).

²⁶⁴ *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”).

²⁶⁵ See *Id.* at 497; *McCormick v. United States*, 500 U.S. 257, 271-75 (1991).

²⁶⁶ 34 F.3d 1356, 1366 (8th Cir. 1994).

²⁶⁷ *Id.* (citation omitted).

less of a danger of quid pro quo corruption, such as the sort 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.”²⁶⁸

Although the decision in *California Medical Ass’n*²⁶⁹ supported a limit on donations to PACs, the reasoning presented in support of that limit is flawed. The splintered Court in *California Medical Ass’n* upheld the limit not because of its own merit, but as a prophylactic measure to prevent individuals from evading their own \$25,000 aggregate limit on contributions to candidates.²⁷⁰ The Court wrote, “individuals could evade the \$25,000 limit on aggregate annual contributions to candidates if they were allowed to give unlimited sums to multi-candidate political committees, since such committees are not limited in the aggregate amount they may contribute in any one year.”²⁷¹ The reasoning misses the point. No matter how well funded a PAC is, the PAC itself is still limited in the amount it may give to any particular candidate. While a PAC with a wealthy benefactor may be able to contribute its limit of \$5,000 to many candidates, the limit still prevents the PAC (or the individual channeling his contribution through a PAC) from making a “large” donation that could possibly corrupt any particular candidate.²⁷²

The limit on contributions to noncandidate political committees is also vulnerable to the pigeon hole argument. According to this argument, limits on money given to PACs should be relegated solely to those contexts where a few large contributions historically have funded a PAC. In other words, one could argue that *California Medical Ass’n* should be limited to situations where a PAC’s contributions come in the form of a few large donations rather than many small ones. The Supreme Court, itself, seemed to adopt this line of reasoning in *National Conservative Political Action Committee* where it pointed out “[u]nlike *California Medical Assn.*, the present cases involve . . . contributions [which] are predominantly small and thus do not raise the same concerns as the sizable contributions in *California Medical Assn.*”²⁷³ The Court seemingly

²⁶⁸ 146 F.3d 563, 571 (1998).

²⁶⁹ 453 U.S. 182 (1981) (plurality opinion).

²⁷⁰ See *id.* at 198-99.

²⁷¹ *Id.*

²⁷² The *California Medical Ass’n* plurality decision was also flawed because it dismissed arguments that other bribery and disclosure provisions would constitute more narrowly tailored restrictions. It reasoned that contributions to PACs were simply not entitled to heightened scrutiny. Whether less restrictive means might exist was irrelevant. *Id.*

²⁷³ *FEC v. National Conservative Political Action Comm.*, 470 U.S. at 495. It also bears pointing out that of the original nine justices on the Court at the time of *California Medical Ass’n*, only Chief Justice Rehnquist (who dissented) and Justice Stevens (who joined Part III) sit on the Court today.

presumed that, where the contributions to a PAC are smaller and manifold, there is no danger that contributions are being channeled to evade individual limits. Thus, limits on money given to PACs should only apply where a PAC historically has received small numbers of large contributions.

The last problematic aspect of FECA's \$5,000 limit on contributions to PACs was addressed in *Buckley* but not in *California Medical Ass'n*. *California Medical Ass'n* never dealt with the constricting effect of a limit on a PAC's ability to raise necessary financial support to get its own message out. The logic here is parallel to the analysis of contribution limits from the candidate's perspective. As *Buckley* cautioned,

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and *political committees* from amassing the resources necessary for effective advocacy.²⁷⁴

Although, at the time of *Buckley*, "[t]here [was] no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and *political associations*,"²⁷⁵ twenty years later, contribution limits are having an adverse effect. Acknowledging this adverse effect, *Day v. Holahan* struck down a \$100 limit,²⁷⁶ and *Russell v. Burris* struck down a \$200 limit,²⁷⁷ on donations to PACs.

C. The \$5,000 Undifferentiated Limit on Contributions to Independent Expenditure Committees

"Political associations allow citizens to pool their resources and make their advocacy more effective, and such efforts are fully protected by the First Amendment. If an individual is limited in the amount of resources he can contribute to the pool, he is most certainly limited in his ability to associate for purposes of effective advocacy."²⁷⁸ The \$5,000 calendar year limit on contributions to political committees, contained in §441a of the FECA applies, by its plain terms, to all political committees.²⁷⁹ It does not differentiate between committees formed to contribute

²⁷⁴ *Buckley*, 424 U.S. at 21 (emphasis added).

²⁷⁵ *Id.* (emphasis added).

²⁷⁶ 34 F.3d at 1365-66.

²⁷⁷ 146 F.3d at 571 ("The limit is simply too low to allow for appropriately robust participation in protected political speech and association . . .").

²⁷⁸ *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 637 (1996) (Thomas, J., concurring in judgment and dissenting in part) (citing *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981)).

²⁷⁹ 2 U.S.C. § 441(a).

to candidates (which might be susceptible to the corrupting influence of a large contribution), and committees that are formed for, and make only, independent expenditures²⁸⁰ (which pose no danger of *quid pro quo* corruption). This overbreadth calls for a narrowing construction to exempt independent expenditure committees from the \$5,000 limit. Without a narrowing construction that exempts these committees, the FECA's provision may face the same fate as the \$500 limit in Arkansas, which was recently struck down by a federal court because it unconstitutionally burdened political speech.²⁸¹

In *Federal Election Commission v. National Conservative Political Action Committee*, the Supreme Court reaffirmed *Buckley* by holding that any limits on independent expenditures by political committees are unconstitutional.²⁸² In *Buckley*, the Court had explained,

Unlike contributions, such *independent expenditures* may well provide little assistance to the candidate's campaign and indeed may prove to be 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.²⁸³

Although the FECA does not *directly* limit these constitutionally-protected independent expenditures, it does *indirectly* limit them by limiting the dollar amount that a person may donate to a committee formed to make independent expenditures. In the area of free speech, the government may not indirectly deny speech that it may not directly prohibit.²⁸⁴ It follows that since government may not put limits on a PAC's independent expenditures, neither may government put limits on contributions given for the purpose of making those independent expenditures.

²⁸⁰ FECA defines an "independent expenditure" as: an expenditure "which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431 (17).

²⁸¹ See *Arkansas Right to Life State PAC v. Butler*, 29 F. Supp. 2d 540, 544-47 (W.D. Ark. 1998). A similar limit is currently enjoined along with the several other contribution limit provisions in California's Proposition 208 as a result of a constitutional challenge there. See *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998). Likewise, a \$1,000 limit on contributions to committees is currently the subject of a First Amendment challenge in federal court in Florida. See *Florida Right to Life v. Mortham*, Case No. 98-770-Civ-Orl-19A (M.D. Fla. Sept. 30, 1998).

²⁸² *FEC v. National Conservative Political Action Comm.* 470 U.S. 480 (1985); See also *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 19 (1st Cir. 1996) ("The First Amendment does not tolerate such drastic limitations on protected political advocacy.")

²⁸³ *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (emphasis added).

²⁸⁴ See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Those who favor contribution limits for independent expenditure committees might look to the *California Medical Ass'n* opinion and argue that limits on contributions to political committees do not affect real speech but only affect "speech by proxy."²⁸⁵ This "speech by proxy" argument is not, however, likely to succeed. When the Federal Election Commission presented it in *National Conservative Political Action Committee*, the Supreme Court rejected it, explaining,

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.*²⁸⁶

In addition, the *California Medical Ass'n* opinion only addressed limits on contributions to political committees that give dollars directly to candidates. It did not determine whether it would be constitutional to apply these limits to contributions given to political committees that exist only to make protected independent expenditures. In his concurring opinion in *California Medical Ass'n*, Justice Blackmun indicated the probable answer to this question.²⁸⁷ Justice Blackmun explained that, while limiting contributions to a traditional PAC is permissible, there is no reason to limit donations to an independent expenditure committee because, as *Buckley* intimated, there is no threat of actual or perceived corruption from donations to such a committee.

I conclude that contributions to multicandidate political committees may be limited to \$5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate

*I stress however, that this analysis suggests that a different result would follow if [the contribution limit] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates. . . . Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat.*²⁸⁸

²⁸⁵ See *California Med. Ass'n*, 453 U.S. at 196.

²⁸⁶ *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) (emphasis added) (brackets in original) (citation omitted).

²⁸⁷ Justice Blackmun's concurring opinion constituted the necessary fifth vote for upholding the \$5,000 limit on contributions to multicandidate PACs. Thus, his comments are significant.

²⁸⁸ *California Med. Ass'n*, 453 U.S. at 203. (Blackmun, J., concurring in plurality) (emphasis added).

In other words, there is no compelling government interest supporting any limits on donations to independent expenditure committees because there is no threat of corruption from such donations.²⁸⁹ By confusing the Supreme Court's concern for multicandidate PACs with the First Amendment protection to be accorded independent expenditure committees, the contrary argument misses the mark.

Some have argued that if there is no limit on contributions to independent expenditure committees, the \$1,000 limit on contributions to candidates will easily be circumvented and the state's attempt to prevent corruption, or its appearance, will be thwarted. In reality, however, contributors are not likely to try to circumvent candidate contribution limits by giving to an independent expenditure committee because the expenditures made by the committee may or may not actually assist the candidate.²⁹⁰ A more narrowly tailored, and more appropriate, mechanism to prevent circumvention would be to raise individual limits to \$5,000.

D. Limits on Contributions to Political Parties

A \$20,000 annual aggregate limit on contributions to national political parties was included as part of the reticulated set of campaign financing provisions in the FECA.²⁹¹ This was not the issue before the

²⁸⁹ Even when considering donations to a PAC which *does* give directly to candidates (such as the *California Med. Ass'n* PAC), the Eighth Circuit has found a lessened danger of corruption. "There 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." *Russell v. Burris*, 146 F.3d 563, 571 (8th Cir. 1998). How much less the danger from giving to a PAC that, by definition, does not even communicate or coordinate with candidates—as is the case with an independent expenditure committee.

²⁹⁰ Three illustrations may be helpful to appreciate why an independent expenditure might actually hurt, rather than help, a favored candidate. One can easily imagine a pro-life candidate in a district where the majority of voters are pro-choice, but oblivious to the candidate's pro-life leanings. In that circumstance, an independent expenditure committee advertisement praising the candidate for his pro-life stance might actually damage the candidate's election chances. Perhaps more common is the "attack ad" or negative advertisement made by an independent expenditure committee which has the unintended effect of generating sympathy for the candidate attacked and casting a "mudslinger" label on the candidate intended to be supported. The third illustration is one where the independent expenditure advertisement is simply incorrect in setting forth the positions of the favored candidate. The candidate is actually harmed because of the effort that she must make to correct the misinformation broadcast by means of the independent expenditure.

That is why the Court in *Buckley v. Valeo* remarked that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove to be counterproductive." *Buckley*, 424 U.S. at 47.

²⁹¹ 2 U.S.C. § 441a(a)(1)(B) provides: "No person shall make contributions—(B) to the political committees established and maintained by a national political party . . . in any calendar year which, in the aggregate, exceed \$20,000." *Id.*

Court in *Colorado Republican Federal Campaign Committee v. FEC*,²⁹² but three concurring justices directly addressed it and viewed it as unsupported.²⁹³ Justice Thomas wrote, "As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force."²⁹⁴ To say that a party could "corrupt" its candidate by contributing money to a candidate's campaign distorts the meaning of "corruption" as used by the Court.²⁹⁵ Because of the unique structure and purposes of political parties, "the theoretical danger of those groups actually engaging in *quid pro quos* with candidates is significantly less than the threat of individuals or groups doing so."²⁹⁶ On remand from the Supreme Court, the Federal Election Commission's argument that parties may exert corrupt influence over candidates was again rejected.²⁹⁷ The district court understood that

[t]he FEC's facts do suggest that the parties and their committees are involved with the candidates and their policy positions. That, however, is the nature of the party-candidate relationship. . . . Given the purpose of political parties in our electoral system, a political party's decision to support a candidate who adheres to his parties' belief is not corruption. Conversely, a party's refusal to provide a candidate with electoral funds because the candidate's views are at odds with party positions is not an attempt to exert improper influence. . . . A party that refuses to fund a candidate who engages in what the party deems as undesirable campaign tactics is not reflecting corruption or the appearance of corruption."²⁹⁸

If a candidate changes his position on an issue because of pressure from his political party, this does not constitute corruption. Rather, it is an example of a candidate responding to the wishes of a broad cross-section of constituents as reflected by the party.²⁹⁹ Indeed, some would suggest

²⁹² 518 U.S. 604 (1996).

²⁹³ See *id.* at 644-48 (Thomas, J., concurring in judgment, joined by Rehnquist, C.J., and Scalia, J.).

²⁹⁴ *Id.* at 646.

²⁹⁵ See *id.* ("What could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes.")

²⁹⁶ *Id.*

²⁹⁷ *FEC v. Colorado Republican Fed. Campaign Comm.*, 1999 WL 86840, at *15 (D. Colo. Feb. 18, 1999) (mem.).

²⁹⁸ See *id.* at *12-13; see also *Missouri Republican Party v. Lamb*, 31 F. Supp. 2d 1161, 1164 (E.D. Mo. 1999) ("[T]he Court has some doubt whether the anti-corruption rationale used to justify limits on contributions by individuals is of equivalent relevance in the context of political party contributions.")

²⁹⁹ One former chairman described the Republican Party as a wide-spread national grass-roots association:

The Republican Party, by its organization, is a grass-roots, bottom up organization. It is not organized from the top down. It is a Federation of State

that one solution for reversing the decline of campaigns in general is to strengthen the national political parties by allowing unlimited contributions³⁰⁰ because parties “promote agreement between different interests and groups. They promote discussion of major issues and educate the electorate. They promote effective government across all divisions of the American system. They provide responsibility and accountability. They promote participation, and perhaps, most relevant, *they promote clean politics.*”³⁰¹ Donald L. Fowler, former National Chairman of the Democratic Party has also 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 . . . 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 unleashing political parties or freeing them from the current legislation would go a long way toward solving our problems.³⁰²

Since the \$20,000 limit does not serve the congressional purpose of preventing *quid pro quo* corruption, there is no constitutional basis for its restriction, and elimination of the restriction may well serve to strengthen parties in their ability to police their own candidates.

VII. CONCLUSION

Contribution limits exact a toll on what would otherwise be unlimited First Amendment speech and association of contributors and the candidates and political associations to which they contribute. While limits that prevent corruption may be constitutional, government use of the “anti-corruption rationale” as a mantra is inadequate to support contribution limits. There must be a more searching investigation to discern whether particular contribution limits are unnecessarily trenching on First Amendment rights. While it is not a court's prerogative to carve up

parties. . . . The Republican National Committee represents millions of Republican voters . . . who come together to choose the leadership of our parties. Haley Barbour, Testimony, *Campaign Finance Reform Legislation: The Role of Political Parties: Hearings Before the House Oversight Comm.*, 104th Cong. 11 (1995).

³⁰⁰ See LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS* 334 (1996) (“For political parties, there seems little alternative to simply legitimize 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 give these critical institutions a more substantial role in elections.”).

³⁰¹ Gerald M. Pomper, Professor of Political Science, Engleton Institute of Politics, Rutgers University, Testimony, *Campaign Finance Reform Legislation: The Role of Political Parties: Hearings Before the House Oversight Comm.*, 104th Cong. 42 (1995) (emphasis added).

³⁰² *Id.* 104th Cong. 22.

limits with a scalpel, neither should it thoughtlessly defer to government restrictions.

Courts must put the government to its proof to show that a corruption problem really exists. They should reject contribution limits that strangle and drown whole schools of dolphins in an attempt to catch the specter of a shark. If a corruption problem is proved, the court should then determine whether government has cast too wide a net.³⁰³ Although the Supreme Court has approved limits that catch the dangerous influence buyer, limits that ensnare large numbers of harmless individuals and political committees who are simply exercising their right to support candidates of their choice will not withstand constitutional scrutiny.

³⁰³ See *Vote Choice v. DiStefano*, 4 F.3d 26, 34 (1st Cir. 1993) ("While legislative judgments must be given a wide berth, judicial deference should never be confused with outright capitulation. Federal courts would abdicate their constitutional responsibility if they were to rubber-stamp whatever constructs a state legislative body might propose.").