From *Buckley* to *Citizens United*

A Campaign Finance Primer

By Matthew G. Davis

FAST FACTS

From *Buckley* through *Citizens United*, campaign finance laws are in tension with constitutionally protected rights.

The primary areas of campaign finance litigation involve expenditures and contributions.

Compliance with campaign finance reporting also demands the practitioner's attention.

Preventing quid pro quo corruption or its appearance in elections—and by extension public policy—has been historically and in contemporary law the expressed interest behind government restrictions on constitutionally protected activity related to political campaigns. Governments have sought, through various statutory schemes and administrative rules, to achieve that interest by, among other things, imposing restrictions on speech and association. Those restrictions, while related to election law, are the most substantive components of campaign finance law.

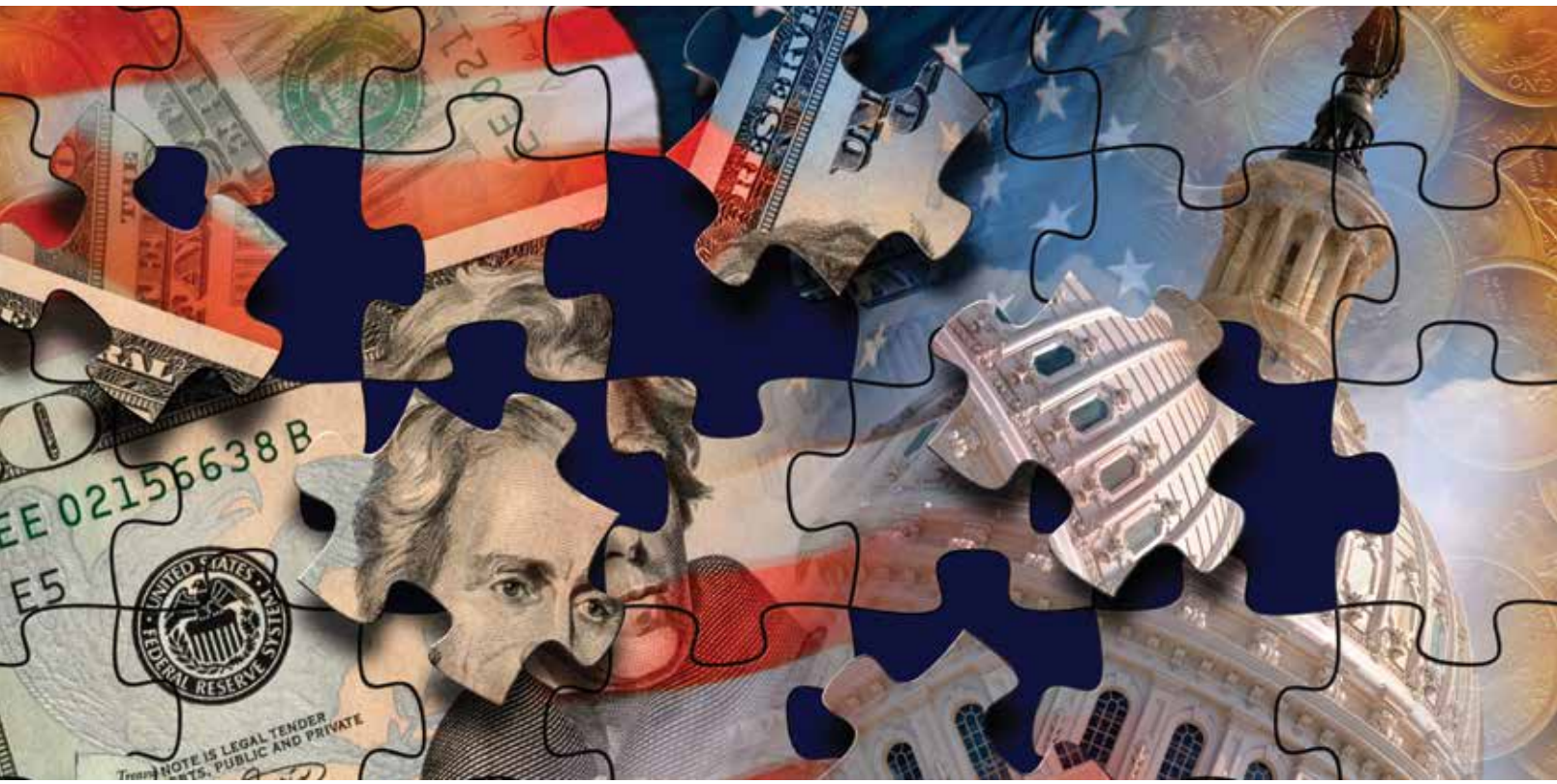
The Federal Election Campaign Act

The defining authority of modern campaign finance law with respect to government restrictions on speech and association came with the United States Supreme Court's decision in *Buckley v Valeo*.[1] In examining the constitutionality of the Federal Election Campaign Act,[2] the *Buckley* Court cleaved the First Amendment protection for speech from the First Amendment protection for association, making them unequal in terms of what restrictions government may impose.

Splitting the two rights into different tracks in the context of political campaigns has caused confusion among nonpractitioners and average citizens alike. In political campaigns, "expenditures" are an expression of political speech, and that right is protected under *Buckley* such that any restriction must meet strict scrutiny to survive a challenge. That is, the restriction must be narrowly tailored to meet a compelling governmental interest. A restriction is narrowly tailored if it is the least restrictive means used to meet the interest.

By contrast, "contributions" in political campaigns are a manifestation of the right of association. That right, the *Buckley* Court determined, may be legally curtailed if the restriction is substantially related to an important governmental interest, i.e., the restriction meets intermediate scrutiny. The *Buckley* Court reached its conclusion, separating the two while also reiterating the need for strong protection against government infringement on constitutionally protected rights, explaining that "[t]he constitutional right of association…stemmed from the Court's recognition that '(e)ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'"[3] Nevertheless, the Court concluded that government could impose greater limits on association than it does on speech because of a difference in the degree of the *quantity* of speech afforded by expenditures, on one hand, and contributions on the other, determining that:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.[4]



In contrast to speech, the Court determined that a contribution serves as a general expression of support for the candidate, but that the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution…."[5] In other words, those making political contributions convey their message of support irrespective of the amount of the contribution. Based on this logic, the Court concluded that:

> [a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.[6]

How closely to either intermediate or strict scrutiny courts have hewed varies, even within jurisdictions. Moreover, while both tests place the burden on government to demonstrate that a challenged restriction is constitutional, courts have been far more reluctant—notwithstanding the different levels of scrutiny—to deem a restriction illicit if it were imposed on contributions compared to expenditures.

From the viewpoint that desires government control of political activity, this arrangement makes sense: contributions naturally precede expenditures in the alimentary canal of a political campaign—one cannot spend what one does not have.

Adding another piece to the puzzle is the very real possibility that a government agency charged with enforcing a campaign finance law may determine—using a post-hoc analysis—that an expenditure changed into a contribution at the point at which the expenditure met certain prescriptions. The election law practitioner must be ever conscious of the possibility of such a determination because, under *Buckley*, government restrictions on expenditures (speech) are far less constitutionally viable than government restrictions on contributions (association) and, therefore, expose the client to possible criminal penalties for engaging in what appeared to be speech.

Thus, should a government agency determine that an apparently independent expenditure meets the prescription to become a contribution, e.g., the expenditure was coordinated with a campaign, then contribution limits may be unwittingly exceeded—and a violation prosecuted. That is why *Buckley*'s unique slicing and dicing of the First Amendment's protections for speech and association have posed a barrier to those who would loosen or eliminate contribution limits, and why election lawyers counsel their clients to be wary about how closely a client's proposed expenditure cross-pollinates with a political campaign—in fact or appearance.

Various campaign finance laws allow for a determination of whether an expenditure would become a contribution before the expenditure is made; however, the Court in *Citizens United v Federal Election Commission*[7] raised the specter that such pre-expenditure determinations are a form of prior restraint, explaining:

> The regulatory scheme at issue may not be a prior restraint in the strict sense. However, given its complexity and the deference courts show to administrative determinations, a speaker wishing to avoid criminal liability threats and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. The restrictions thus function as

> the equivalent of a prior restraint, giving the FEC power analogous to the type of government practices that the First Amendment was drawn to prohibit.[8]

Thus, despite the existence of a statutory scheme that allows a would-be speaker to have his or her proposed speech pre-approved by government with the intention of averting a post-hoc determination that such speech morphed into a contribution and violated contribution limits, laws designed to do so have the effect of chilling speech by making at least some expenditures subject to contribution limits. The speaker may be counseled to seek a pre-speech (pre-expenditure) determination—and government approval of such speech—or speak and take his or her chances that government will not later determine such speech was a contribution and violated contribution limits.

Pre-approval of some types of speech is arguably within the contours of current law. As an example, Michigan has long *required* that a recall proponent have his or her recall petition language pre-approved for clarity. Petition circulation is a form of political speech that deserves the "zenith" of the First Amendment's protections.[9]

Even after navigating the question of expenditures and contributions and the statutes and rules that apply to either, there are arguments to be made about the effectiveness the restrictions have in achieving the expressed interest. In addition to calling into question the entire campaign finance scheme allowing for pre-approval of expenditures, the Court in *Citizens United* appeared also to question the assumption that one's access to lawmakers rose to the level of even the appearance of quid pro quo corruption, explaining:

> When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption….The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt….[10]

The primary issue in *Citizens United* was whether a federal ban on corporate and union independent expenditures—made for the purpose of advocating for or against a candidate—was constitutional. The independent expenditure ban had been upheld by *McConnell v Federal Election Commission*[11] on the basis of *Austin v Michigan Chamber of Commerce*.[12] In striking down the ban, the Court tacked the country's campaign finance laws, with respect to expenditures, toward requiring more proof from government that a given restriction on expenditures achieves the expressed interest.[13]

The Michigan Campaign Finance Act

The same constitutional questions raised in cases from *Buckley* to *Citizens United* also make appearances in litigation involving the Michigan Campaign Finance Act.[14] The speech protections of the First Amendment to the U.S. Constitution are coterminous with those protections recognized by the Michigan Constitution.[15] As such, the same tensions arise between that fundamental right and the state government's attempts to impose restrictions on it.

Michigan differs sharply with federal law, though, with respect to whether political speech in the form of an expenditure can morph into a contribution and thus subject a would-be speaker to contribution limits. Specifically, Michigan applies an "express advocacy" standard to speech such that the words spoken must expressly advocate—using language such as *support, oppose, vote for, vote against*—if the communication were to fall within the statute's ambit. The express advocacy standard comes from *Buckley*, which left to the Federal Election Commission the determination of whether a communication was, in effect, a contribution only if the communication contained the "magic words" of express advocacy.

Thus, *Buckley*, besides cleaving speech rights from association rights, also delineated between express advocacy and what has since been called "issue advocacy," the latter of which might mention a candidate and his or her voting record but does not ask for the listener's support or opposition.

In *McConnell*, the first case from the United States Supreme Court to determine the constitutionality of the Bipartisan Campaign Finance Reform Act of 2002, the Court explained the creation of a bright-line test with "the use or omission of 'magic words' such as 'Elect John Smith' or 'Vote Against Jane Doe' separating 'express advocacy' from 'issue advocacy.'"[16] The *McConnell* Court said of such a distinction, while "neat in theory, the two categories of advertisements proved functionally identical in important respects."[17] In upholding the constitutionality of the Bipartisan Campaign Finance Reform Act on a facial challenge,

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McConnell created a new "functional equivalency" test. Under this test, the Court stated:

> [A] court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.[18]

In *Citizens*, the Court stated that the test is an objective one. The effect of employing the test subjects otherwise valid issue advocacy communications in federal campaigns to the scrutiny of the Federal Election Commission and, ultimately, a court. The functional equivalency test, therefore, imposes additional speech restrictions because the speaker will have to guess what words will meet the prescription for a given limit.

By comparison, Michigan's adherence to the express advocacy test allows speakers who want to raise issues during political campaigns to use issue advocacy without being subjected to such restrictions. In an April 20, 2004, interpretive statement issued to the Michigan Chamber of Commerce, the Michigan Department of State, which is the agency charged with administering the Michigan Campaign Finance Act, stated in part:

> *McConnell* unambiguously requires the express advocacy test for any statutory definition of expenditure that employs vague, broad language. The vagueness and over-breadth discussed in *Buckley* and clarified in *McConnell* still lurk in the MCFA's definitions of contribution and expenditure. For that reason, we are compelled to apply the express advocacy test to all communications.[19]

In essence, Michigan's use of the express advocacy standard has not changed since *Buckley*, and the department has taken the position that it cannot unilaterally change the standard from express advocacy to functional equivalence without legislative approval.

Besides the vagueness and over-breadth problems within the Michigan Campaign Finance Act, many other constitutional infirmities may exist. In *Citizens United*, the Court stated: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[20] Yet the act is full of criminal penalties, including fines and jail time, if someone engages in political speech that is later determined to have violated some limitation in the act. The process by which the department must investigate allegations of any violation also gives pause to the practitioner.

Given the jigsaw-puzzle nature of campaign finance law, the multiple government agencies involved in terms of regulations, and the stakes in play, it is probably fitting to end this article with some wisdom from our Republic's highest court. In *Citizens United*, the Court stated:

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application."…The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.[21] ■

Note: Since this article was written, Michigan Secretary of State Ruth Johnson proposed a rule change regarding the express advocacy and functional equivalency standards for political speech. The legislature passed a bill, SB 661, that codifies use of the express advocacy standard.

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ENDNOTES

1. *Buckley v Valeo*, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976).
2. 2 USC 431 *et seq.*
3. *Buckley*, 424 US at 15.
4. *Id.* at 19.
5. *Id.* at 21.
6. *Id.*
7. *Citizens United v Fed Elections Comm*, 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010).
8. *Id.* at 335.
9. See *Meyer v Grant*, 486 US 414, 425; 108 S Ct 1886; 100 L Ed 2d 425 (1988); *Bogaert v Land*, 572 F Supp 2d 883 (WD Mich, 2008).
10. *Citizens United*, 558 US at 359.
11. *McConnell v FEC*, 540 US 93; 124 S Ct 619; 157 L Ed 2d 491 (2003).
12. *Austin v Mich Chamber of Commerce*, 494 US 652; 110 S Ct 1391; 108 L Ed 2d 652 (1990).
13. In striking down the ban, the Court overruled *Austin*.
14. MCL 169.201 *et seq.*
15. *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003).
16. *McConnell*, 540 US at 126 (internal citations omitted).
17. *Id.*
18. *FEC v Wis Right to Life*, 551 US 449, 469–470; 127 S Ct 2652; 168 L Ed 2d 329 (2007).
19. Letter from Brian DeBano, chief of staff, Michigan Department of State, to Robert LaBrant, Michigan Chamber of Commerce (April 20, 2004), available at <http://www.michigan.gov/documents/2004_126239_7.pdf> (accessed December 8, 2013).
20. *Citizens United*, 558 US at 349.
21. *Id.* at 324.