BAW; *last updated 4/26/18*

Overview of Campaign Finance Law

A. Introduction

"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." Buckley v. Valeo, 424 U.S. 1, 14 (1976). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates." Id. (other citations omitted).

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." Id. at 14-15.

"A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces 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." Id. at 19.

In campaigns, people make *independent expenditures*, which is political speech protected by the First Amendment, and *contributions*, which are protected by the First Amendment's freedom of association. The courts treat limits on independent expenditures and contributions differently. The U.S. S. Ct. has struck down laws that limit independent expenditures, whereas it has upheld certain limits on contributions, due to the differences in these First Amendment protections.

B. Independent Expenditures = Speech

I. ***Standard of Review:*** **Strict scrutiny.**

a. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.'" Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (other citations omitted).

b. "Unlike contributions . . . the absence of pre-arrangement 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." Buckley at 47.

c. Government must prove restriction furthers a *compelling interest* and is *narrowly tailored* to achieve the interest. Citizens United at 898.

II. ***Corporations.*** Federal law used to prohibit corporations and labor unions from making *either* independent expenditures or contributions without first establishing a separate segregated fund (SSF), which is a PAC.

a. In a pre-cursor to Citizens United, the U.S. S. Ct. struck down the requirement that issue advocacy nonprofits form a SSF PAC in order to engage in independent expenditures. FEC v. MCFL, 479 U.S. 238 (1986). The SSF PAC avenue "is more burdensome" than unfettered speech. Id. at 255.

b. Later, in Citizens United, 130 S. Ct. 876 (2010), the Ct. held that "PACs are burdensome alternatives," and the fact that any corporation must create SSF PACs in order to make independent expenditures creates a prior restraint on corporate speech. Id. at 897-898.

   i. "[P]olitical speech does not lose its First Amendment protection 'simply because its source is a corporation.' . . . Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.'" Citizens United at 900 (other citations omitted).

c. In the D.C. Dist. Ct. case SpeechNow.org v. FEC, 599 F.3d 686 (2010), the Ct. stated that "[i]n light of the [Citizen United] Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption," and that therefore, it must conclude that "government has no anti-corruption interest" in limiting contributions to independent expenditure-only PACs. Id. at 432-433. *So began the creation of Super PACs.*

III. ***Independent expenditure-only PACs, a.k.a. Super PAC; definition.*** A PAC "that conducts its activities entirely independent of candidates; does not give contributions to candidates, political committees, or political parties; does not make related expenditures; and is not closely related to a political party or to a political committee that makes contributions to candidates or makes related expenditures." 17 V.S.A. § 2901(10).

C. Contributions = Association

IV. *Standard of Review:* Closest scrutiny.

a. "By contrast with a limitation upon [independent] expenditures for political express, 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." It is a "symbolic act" that "does not in any way infringe the contributor's freedom to discuss candidates and issues." Buckley at 20-21.

b. A significant interference may be sustained if State demonstrates *sufficiently important interest* with a means *closely drawn* to avoid unnecessary abridgement of freedom. Buckley at 25.

c. *Preventing corruption or its appearance* is a sufficiently important government interest. Buckley at 26.

d. A contribution limit is closely drawn if it does not undermine to a material degree political discussion. Buckley at 29.

   i. A contribution limit is unconstitutional if it prohibits candidates and PACs from amassing resources necessary for effective advocacy. Randall v. Sorrell, 548 U.S. 230, 247-48 (2006).

   ii. Re: contributors, a court will look at the infringement on the person's symbolic support, balanced by the 1st Am rights not impacted, such as the freedom to discuss candidates and issues. Buckley at 21; Randall at 246-47.

   iii. Randall at 253-262, re: why 1997 VT CF law was not closely drawn:

      1. Restricted $ available for *challengers* to run effective campaigns;
      2. *Political parties* subject to same contribution limits as other contributors, threatening harm to the right to associate;
      3. Did not exempt expenses of *volunteers*;
      4. Not adjusted for *inflation*; and
      5. Record did not provide *special justification* for these ultra-low limits.

V. *Contribution bans.*

a. SCOV has upheld a contribution ban. *See* Kimbell v. Hooper, 164 Vt. 80, 91 (1995): 2 V.S.A. § 266(a)(3)'s ban on lobbyist contributions to legislators during session is a timing measure, and the law does not ban contributions to parties. The "limited prohibition focuses on a narrow period during which legislators could be, or could appear to be, pressured,

coerced, or tempted into voting on the basis of cash contributions rather than the public weal."

b. *See also*:

i. Sole source contractor contribution prohibition, 17 V.S.A. § 2950;

ii. Superior Court judge prohibition on contributing to a political party, 4 V.S.A. § 605; and

iii. Contracted investment services firm prohibition on contributing to State Treasurer, 32 V.S.A. § 109.

VI. *Contribution limits.*

a. *See* Vermont's limits in 17 V.S.A. § 2941.

i. Adjusted for inflation via 17 V.S.A. § 2943 and § 2905.

ii. Current limits can be found on pg. 5 of the Sec. of State's Guide to Vermont's Campaign Finance Law.

b. *See also* other states' limits as provided by NCSL.

VII. *Corporations; ability to regulate contributions.*

a. FEC v. Beaumont, 539 U.S. 146 (2003) upheld the federal law requirement that issue advocacy nonprofits form an SSF PAC in order to make a contribution. The Ct. stated in part that:

i. Corporations enjoy the benefits of state laws, "such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," Id. at 154, which "present the potential for distorting the political process," Id. at 158;

ii. That congressional judgment in the area of corporate contributions "warrants considerable deference" and "reflects a permissible assessment of the dangers posed by [corporations] to the electoral process," Id. at 156-157 (other citations omitted); and

iii. That there is still a hard line between speech and association, the latter of which may be limited, Id. at 161-162.

b. The post-Citizens United Second Circuit case Ognibene v. Parkes, 671 F.3d 174 (2011) discussed that Beaumont is still good law in its application to contributions, and reiterated that Citizens United only applies to corporate independent expenditures. Id. at 182-184.

c. *See also* CT's prohibition on business entities establishing more than one PAC. Ct. Gen. Stat. § 9-613(a).

VIII. ***Corporations; federal law; separate segregated funds.*** Under federal law, corporations and labor unions are prohibited from making contributions in federal elections. 52 U.S.C. § 30118(a).

a. However, a corporation or labor union may establish a separate segregated fund "to be utilized for political purposes." 52 U.S.C. § 30118(b)(2)(C).

b. A corporation or labor union is limited to soliciting funds for its separate segregated funds from individuals associated with the corporation or labor union (specified ex.: stockholders, members, and their families, and other specified individuals). 52 U.S.C. § 30118(b)(4).

c. A separate segregated fund is a PAC. 52 U.S.C. § 30101(4)(B).

d. The name of a separate segregated fund "shall include the name of its connected organization." 52 U.S.C. § 30102(e)(5).

IX. ***Out-of-State contributors.*** The Second Circuit in Landell v. Sorrell, 382 F.3d 91, 146-147 (2006) held unconstitutional VT's former 17 V.S.A. § 2805(c), which prohibited candidates, PACs, and parties from accepting more than 25% of total contributions from non-VT residents, PACs, or parties, and the parties did not challenge that holding on appeal in Randall v. Sorrell, 548 U.S. 230, 239 (2006).

"We can find no sufficiently important governmental interest to support the provision of Act 64 that limits out-of-state contributions to 25 percent of all candidate contributions . . . [this] out-of-state contribution limit isolates one group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed by others (Vermont residents) . . . the government does not have a permissible interest in disproportionately curtailing the voice of some, while giving others free rein, because it questions the value of what they have to say." Landell at 146-147.

X. ***Related expenditures.*** A related expenditure — which is an expenditure intended to promote the election of a specific candidate or group of candidates or the defeat of an opposing candidate or group of candidates that is intentionally facilitated by, solicited by, or approved by a candidate or a candidate's committee — is a **contribution** to the candidate on whose behalf it was made. 17 V.S.A. § 2944.

a. *See also* the Sec. of State's rule on related expenditures in Appendix A (pg. 18) of the Sec. of State's Guide to Vermont's Campaign Finance Law.

D. Influencing an Election

XI. ***Uses.*** "Influencing an election" is a term used in the definitions of "contribution," "expenditure," and "political committee" in 17 V.S.A. § 2103.

XII. ***SCOV interpretation***. Influencing an election "means encouraging a vote for or against a candidate or a vote "yes" or "no" on a public question." State v. Green Mountain Future, 194 Vt. 625, 648 (2013).

XIII. ***SCOV application***. "[W]e conclude that the 'magic words' [meaning, "vote for" or "vote against"] need not be required in a communication in order to uphold a registration, disclosure or identification requirement of the type contained in the [campaign finance law]." Green Mountain Future at 634.

a. "[T]he objective observer should look to multiple factors: for example, the timing of the advertisement, the images used in the advertisement, the tone of the advertisement, the audience to which the advertisement is targeted, and the prominence of the issue(s) discussed in the advertisement in the campaign." Id. at 648.

E. Disclosure

XIV. ***Standard of Review:*** **Exacting scrutiny.** Requires a *substantial relation* between the disclosure and a *sufficiently important* government interest. Citizens United at 914.

a. Substantial gov't interest is providing the electorate with info re: sources of election-related spending. Id. at 367.

XV. ***Vermont disclosures:***

a. Reported information, 17 V.S.A. § 2963.

b. State, legislative, and county candidates; PAC; and party reporting dates, 17 V.S.A. § 2964.

   i. Additional reports for State and legislative candidates, 17 V.S.A. § 2967.

c. Local candidate reporting dates, 17 V.S.A. § 2968.

d. Public question reporting dates, 17 V.S.A. § 2970.

e. Mass media reports, 17 V.S.A. § 2971.

f. Identification in electioneering communications, 17 V.S.A. § 2972.

   i. Specific ID requirements for radio, TV, or Internet communications, 17 V.S.A. § 2973.

F. Public questions

XVI. ***Contribution limits prohibited.*** Citizens Against Rent Control v. City of Berkeley, CA, 454 U.S. 290 (1981) held that there cannot be limits on contributions to PACs that advocate for public questions because public questions lack the potential for *quid pro quo* or its appearance between contributors and candidates.

a. *See* 17 V.S.A. § 2942, which exempts these types of PACs from Vermont's contribution limits.

G. Foreign Nationals

XVII. ***Contributions and independent expenditures prohibited.*** Prohibited from directly or indirectly making a contribution or independent expenditure in connection with a federal, **State,** or **local** election. 52 U.S.C. § 30121; 11 C.F.R. 110.20.