REGULATING POLITICAL CONTRIBUTIONS BY STATE CONTRACTORS: THE FIRST AMENDMENT AND STATE PAY-TO-PLAY LEGISLATION

Melanie D. Reed†

† Visiting Assistant Professor of Law, Texas Tech University School of Law. J.D., J. Reuben Clark Law School, Brigham Young University, 2003; B.A., Brigham Young University, 1997. The author wishes to thank Robert K. Kelner, Covington & Burling LLP; Darrin Hurwitz, Human Rights Council; and Michael Paulhus, King & Spaulding, LLP for valuable insights and feedback. As well, the author wishes to thank Kelly Meilstrup for editorial assistance. The views expressed are the author's.

I. INTRODUCTION

In 2004, Governor Jim Rowland of Connecticut resigned in the midst of scandal.[1] He was accused of accepting lavish gifts and political contributions from state government contractors in exchange for awarding government contracts.[2] In response to this scandal, Connecticut passed one of the most comprehensive state ethics reform bills in recent years.[3] Among other things, the new law flatly prohibits a wide range of individuals associated with state contractors from making political contributions to a wide range of state candidates.[4]

Connecticut's law is just one recent example of legislation aimed at eliminating so-called "pay-to-play" between state contractors and state political candidates. Several states have

1. *See, e.g.*, *The Week*, NATIONAL REVIEW, July 12, 2004 "After a prolonged corruption scandal, Connecticut governor John Rowland resigned rather than face certain impeachment by the legislature . . . ."); Fred Bayles, *Scandal-plagued Conn. governor to resign*, USA TODAY, June 22, 2004, at 3A; Amy Fagan, *Governor resigns; Ethics Scandal Ousts Rowland of Connecticut*, WASH. TIMES, June 22, 2004, at A01; *Connecticut Gov. Rowland Resigns; John G. Rowland Leaving Office Amid Gift-Taking Scandal*, CBS NEWS.COM, June 21, 2004, http://www.cbsnews.com/stories/2004/07/01/politics/main627067.html. Rowland later pleaded guilty and was sentenced to a prison term for taking bribes. *See, e.g.*, Matt Apuzzo, *Ex-Connecticut Governor Gets 1 Year in Prison for Corruption*, WASH. POST, Mar. 19, 2005, at A03; Matt Apuzzo & John Christoffersen, *Former Gov. Rowland Gets a Year in Prison for Graft*, USA TODAY.COM, Mar. 18, 2005, http://www.usatoday.com/news/nation/2005-03-18-rowland_x.htm.

2. *See generally* sources cited *supra* note 1.

3. *See* An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices, 2005 Conn. Acts P.A. 05-5 (Spec. Sess.) (codified at CONN. GEN. STAT. §§ 9-601 to 9-674 (Supp. 2007)), *available at* http://www.cga.ct.gov/2005/ACT/PA/2005PA-00005-R00SB-02103SS3-PA.htm.

4. *See* CONN. GEN. STAT. § 9-612(g)(1)(F) (Supp. 2007).

enacted such laws. This article begins by providing a high-level overview of the types of laws state legislatures have passed, focusing on six states with generally applicable pay-to-play laws: Connecticut, Kentucky, New Jersey, Ohio, South Carolina, and West Virginia.[5]

The article then discusses the First Amendment issues raised by these state laws. Although the right to make political contributions is not entitled to the same high-level scrutiny as other First Amendment rights, limits on contributions nevertheless must be "closely drawn" to a "sufficiently important state interest."[6] The Supreme Court has held that combating corruption, including quid pro quos, is a sufficient state interest.[7] Nonetheless, some of the pay-to-play laws in force do not appear to be closely drawn to this interest. Therefore, they impair the rights of those who seek to participate in the political process through political contributions.

This article analyzes the laws of the six states surveyed and asserts that the laws of Connecticut and New Jersey may be unconstitutionally overbroad. They prohibit contributions from individuals only marginally related to state contracts to recipients who may not be in a position to act on the award of a state contract.[8] This article concludes that states passing pay-to-play laws should tailor the reach of such laws to focus on those contributors and recipients closely related to state contracts. States also can build additional safeguards into pay-to-play legislation by requiring

5. This article does not discuss pay-to-play laws in many states that are focused on a particular industry. *See, e.g.*, ALA. CODE §§ 10-2A-70.1, –70.2 (LexisNexis 1999) (regulating contributions from public utilities regulated by the Public Services Commission); CAL. BUS. & PROF. CODE §§ 19981–82 (Supp. 2007) (regulating contributions to the Gambling Control Commission); DEL. CODE ANN. tit. 18, § 2304(6) (1999) (regulating contributions from insurance companies to the Insurance Commissioner); FLA. STAT. § 106.082 (2002) (regulating contributions from vendors who do business with the Commissioner of Agriculture); LA. REV. STAT. ANN. § 18:1505.2(L) (Supp. 2007) (regulating contributions from persons associated with the gaming industry); MO. REV. STAT. § 409.107 (2001) (regulating contributions from an entity serving as financial underwriter, financial advisor, or investment advisor for a State Highway and Transportation Commission bond); N.H. REV. STAT. ANN. § 402:43 (2005) (regulating contributions from insurance companies); N.M. STAT. § 10-11-130.1(B) (2003) (regulating contributions from contractors with the Public Employees Retirement Board).

6. Randall v. Sorrell, 126 S. Ct. 2479, 2491 (2006) (plurality op.) (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

7. *See Buckley*, 424 U.S. at 25–27 (1976). S*ee also infra* Part IV.A.

8. *See* CONN. GEN. STAT. § 9-612(g) (Supp. 2007); N.J. STAT. ANN. §§ 19:44A-20.15, –20.16 (Supp. 2007).

open and competitive bidding of state contracts or by prohibiting earmarked contributions.

II. PAY-TO-PLAY LEGISLATION IN GENERAL

The aim of state pay-to-play legislation is to eliminate political quid pro quos; i.e., state contractors giving political contributions to state candidates in exchange for favorable treatment in awarding state contracts.[9] The states surveyed vary in how broadly they define "state contractor" (i.e., the contributor) and "state candidate" (i.e., the recipient). States also take different approaches in determining the types of contracts that would make a state contractor subject to the law. This section discusses the contributors, recipients, and contracts targeted by the laws of Connecticut, Kentucky, New Jersey, Ohio, South Carolina, and West Virginia.

A. Contributors Targeted

State laws that apply to the narrowest category of contributors subject only the state contractor itself to pay-to-play laws and do not apply to natural persons (unless, of course, the state contractor is a natural person). The laws of South Carolina and West Virginia are two examples. For instance, South Carolina's pay-to-play law extends to a "person who has been awarded a contract with the State, a county, a municipality, or a political subdivision thereof."[10] This law appears, at least facially, to apply only to the actual entity entering into the state contract. Thus, unless the state contractor

9. For instance, the New Jersey state legislature explained that it was prohibiting the award of government contracts to business entities that contribute to political candidates because of a "compelling interest" in "protecting the integrity of government contractual decisions and of improving the public's confidence in government." N.J. STAT. ANN. § 19:44A-20.13 (Supp. 2007). It explained:

> There exists the perception that campaign contributions are often made to a State or county political party committee by an individual or business seeking favor with State elected officials, with the understanding that the money given to such a committee will be transmitted to other committees in other parts of the State, or is otherwise intended to circumvent legal restrictions on the making of political contributions or gifts directly to elected State officials, thus again making elected State officials beholden to those contributors . . . .

Id.

10. S.C. CODE ANN. § 8-13-1342 (Supp. 2006).

happens to be a sole proprietorship, individual political contributions would not be involved.[11]

Most pay-to-play legislation, however, also encompasses contributions from other individuals closely associated with a state contractor. For example, Connecticut's law completely bans certain political contributions from "principals" of state contractors and prospective state contractors.[12] The principals of a business entity include the following groups: (1) members of the board of directors;[13] (2) owners of five percent or more of the business;[14] (3) the president, treasurer, and executive vice president (or other chief executive officer);[15] (4) employees who have "managerial or discretionary responsibilities with respect to a state contract;"[16] (5) spouses and dependent children over eighteen-years old of any of the above;[17] and (6) political committees (including political action committees, or "PACs") "established or controlled" by any of the other or by the state contractor itself.[18] The business entity itself is flatly barred from making a political contribution.[19]

In New Jersey, a business entity that contracts with the state may not make any reportable political contributions during the

11. West Virginia's law facially extends only to the "person" who actually enters into a contract with the state. *See* W. VA. CODE § 3-8-12(d) (2006) (providing that "no person entering into any contract with the State" may make certain political contributions).

12. *See* CONN. GEN. STAT. § 9-612(g)(2)(A)–(B) (Supp. 2007). Although Connecticut's law applies equally to state contractors and prospective state contractors, this article generally refers only to state contractors. The term "state contractor" can include any "person, business entity or nonprofit organization that enters into a state contract." *Id.* at subdiv. (g)(1)(D). "Business entity" is defined in the statute to include, among other things,

> [s]tock corporations, banks, insurance companies, business associations, bankers associations, insurance associations, trade or professional associations which receive funds from membership dues and other sources, partnerships, joint ventures, private foundations . . . ; trusts or estates; [certain other] corporations . . . ; cooperatives, and any other association, organization or entity which is engaged in the operation of a business or profit-making activity.

Id. § 9-601(8).

13. *Id.* § 9-612(g)(1)(F).

14. *Id.*

15. *Id.*

16. The statute explains that "managerial or discretionary responsibilities" means that the person has "substantive responsibilities with respect to the negotiation of the state contract." *Id.* at subdiv. (g)(1)(H).

17. *Id.* at subdiv. (g)(1)(F).

18. *Id.*

19. *See id.* § 9-613.

term of the contract.[20] "Business entity" is defined in the statute to include not only to the state contractor itself, but also (1) any principal who owns or controls more than ten percent of the profits, assets, or stock of the company; (2) any indirect or direct subsidiary of the company; (3) any PAC directly or indirectly controlled by any of the above; and (4) if the state contractor is a natural person, the individual's cohabitating spouse or child.[21] A similar ban applies to a business entity that contracts with a county or municipal government.[22]

Ohio's law is less burdensome than Connecticut's or New Jersey's, although it still applies to a large group of contributors. It does not flatly prohibit political contributions from state contractors.[23] Instead it imposes aggregate limits on the political

20. *See* N.J. STAT. ANN. §§ 19:44A-20.15, –20.16 (Supp. 2007) (defining "contribution" to include only reportable contributions). A contribution is reportable if it is more than $300. *See id.* § 19:44A-8(d). "[A]ny natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited partnership, business trust, association or any other legal commercial entity organized under the laws of this State or of any other state or foreign jurisdiction" is considered a "business entity." *Id.* § 19:44A-20.17. S*ee also id.* § 19:44A-20.7 (same definition applied to county and municipal contracts). A business entity that seeks to obtain a state contract is also subject to certification and reporting requirements. *See id.* § 19:44A-20.8 (requiring state legislative agencies, counties, and municipalities to obtain written certification from a business entity that it has not made a prohibited contract prior to the award of the contract and requiring the business entity to report any improper contribution it makes during the duration of the contract); § 19:44A-20.18 (requiring the state to require a report of a business entity's political contributions for the previous four years prior to the award of a state contract); § 19:44A-20.19 (requiring the state to obtain a written certification from a business entity that it has not made a prohibited contribution prior to the award of a contract and requiring the business entity to report any improper contribution it makes during the duration of the contract); § 19:44A-20.26(a) (requiring a state, county, or municipality to obtain a list of political contributions made during the preceding twelve-month period within ten days of entering into certain state contracts). Every contract and bid application must contain a provision indicating that compliance with the pay-to-play law is a material term. *See id.* § 19:44A-20.24.

21. *See id.* § 19:44A-20.17.

22. *See id.* § 19:44A-20.4 (regarding county contracts); § 19:44A-20.5 (regarding municipal contracts). The only difference is that the provisions regarding county and municipal government specifically exempt contracts entered into through a "fair and open process." *Id.* S*ee also id.* § 19:44A-20.6 (providing for application to an entity having an interest in the business entity and the spouse or child of the business entity, when the entity is a natural person); § 19:44A-20.7 (defining "business entity," "interest," and "fair and open process").

23. *See* OHIO REV. CODE ANN. § 3517.13(I)(3) (Supp. 2007) (regarding unincorporated state contractors); § 3517.13(J)(3) (regarding incorporated state contractors).

contributions of certain individuals associated with state contractors.[24] For incorporated state contractors, the contribution limits apply to owners of more than twenty percent of the corporation, as well as their spouses and children between ages seven and seventeen.[25] Such persons may not make political contributions totaling more than $1000 from the date of the contract through one year following the conclusion of the contract.[26] In addition, these owners, spouses, and children, along with any political action committee ("PAC") affiliated with the state contractor, are subject to a *combined* aggregate limit of $2000 during this time period.[27]

Kentucky's law is the most lenient of those surveyed. It subjects state contractors, and those associated with state contractors, to the *same* contribution limits as other individuals and entities.[28] But if a state contractor, or a person who has a substantial interest in a state contractor, contributes more to a candidate for governor or lieutenant governor than is allowed by law, the state contractor may not enter into a contract during the term of office following the campaign, unless the contract has been obtained through competitive bidding.[29] A natural person has a "substantial interest" in a state contractor if the person, together with his or her immediate family members, owns or controls ten percent or more of the state contractor.[30]

24. Any state contractor must certify in the contract that it and the individuals associated with it are in compliance with the political contribution limits. *See id.* § 3517.13(I)(3) (regarding unincorporated state contractors); § 3517.13(J)(3) (regarding incorporated state contractors).

25. *See id.* § 3517.13(J)(2)(a). The law only takes into account owners for the entire period of the contract. *Id.*

26. *Id.*

27. *See id.* § 3517.13(J)(2)(b). For unincorporated state contractors, the $1,000 individual limit applies to an individual, partner or owner, shareholder (of an association), an executor of an estate, or a trustee, as well as to spouses and children between ages seven and seventeen-years old. *See id.* § 3517.13(I)(2)(a). The $2,000 combined aggregate limit also encompasses an affiliated PAC. *See id.* § 3517.13(I)(2)(b).

28. *See* KY. REV. STAT. ANN. § 121.056(2) (Supp. 2007) (citing contribution limits in section 121.150).

29. *See id.* § 121.056(2).

30. *See id.* at subdiv. (2)(a).

B. Recipients Targeted

1. State Officials

States with pay-to-play laws that apply to the narrowest class of recipients prohibit contributions only to the public official actually in a position to determine the award of the state contract. South Carolina's narrowly tailored pay-to-play law, for instance, prohibits a person who has been awarded a state contract from contributing to the public official who "was in a position to act on the contract's award."[31] Similarly, Ohio's law addresses only contributions "to the holder of the public office having ultimate responsibility for the award of the contract or to the public officer's campaign committee."[32] Kentucky's law addresses only contributions to candidates for governor and lieutenant governor.[33]

West Virginia's law affects the broadest range of candidates. That state's law restricts state contractors from making any political contribution to *any* candidate for public office or, in fact, "to any person for political purposes or use."[34]

Other state pay-to-play provisions fall somewhere in the middle of these two extremes. New Jersey bases its restrictions on whether the contract is with a municipal, county, or state government. Municipal contractors may not contribute to municipal elected officials or municipal political parties.[35] County contractors may not contribute to county elected officials or county political

31. S.C. CODE ANN. § 8-13-1342 (Supp. 2006). The provision also prohibits a state contractor from investing "in a financial venture in which [the] public official has an interest." *Id.* S*ee also* KY. REV. STAT. ANN. § 121.056(2) (Supp. 2007) (applying only to contributions to candidates for governor and lieutenant governor).

32. OHIO REV. CODE ANN. § 3517.13(I)(1) (Supp. 2007); § 3517.13(J)(1) (Supp. 2007).

33. KY. REV. STAT. ANN. § 121.056 (Supp. 2007).

34. *See* W. VA. CODE § 3-8-12(d) (2006) (prohibiting a state contractor from making "any contribution to any political party, committee or candidate for public office or to any person for political purposes or use."). Note, however, that West Virginia's restrictions on contributors covered are not so broad. Facially, West Virginia's law appears to only prohibit contributions from the state contractor itself. *Cf. id.* § 3-8-8(b) (allowing a corporation to communicate with its stockholders and executive on any subject—including, presumably to encourage individual political contributions—and to administer a separate segregated fund that can contribute to candidates); § 3-8-12(d) (specifically exempting activities that are permissible under § 3-8-8 from the pay-to-play provision).

35. *See* N.J. STAT. ANN. § 19:44A-20.5 (Supp. 2007).

parties.[36] State contractors may not contribute to gubernatorial candidates.[37]

Connecticut bases its restrictions on the branch of government involved in the contract.[38] If the contract involves the executive branch, the law prohibits the state contractor from making political contributions to the governor, lieutenant governor, attorney general, state comptroller, secretary of state, or state treasurer (or to any of their committees).[39] On the other hand, if the contract involved involves the state legislature, the law prohibits the state contractor from making political contributions to candidates for state senator or state representative (or either of their committees).[40] One exception applies to certain prospective state contractors; if a prospective state contractor holds a valid prequalification certificate issued by the Commissioner of Administrative Services, it may not contribute to either executive or legislative candidates or committees.[41]

2. Political Parties

Three states surveyed target so-called "back door" contributions by barring political contributions from state contractors (and associated individuals) to political party committees, as well as to individual candidates. For instance, individuals subject to West Virginia's pay-to-play law are prohibited from making any political contribution to a political party located in the state.[42] New Jersey's and Connecticut's laws contain similar bans.[43] The pay-to-play laws of Kentucky, Ohio, and South Carolina do not limit contributions to political parties.

36. *See id.* § 19:44A-20.4.

37. *See id.* § 19:44A-20.15.

38. Connecticut's pay-to-play statute does not facially apply to contracts with local governmental units; it defines "state contract" to include agreements and contracts "with the state or any state agency or any quasi-public agency." CONN. GEN. STAT. § 9-612(g)(1)(C) (Supp. 2007).

39. *Id.* § 9-612(g)(2)(A).

40. *See id.* at subdiv. (g)(2)(B). Principals of state contractors and prospective state contractors may still establish exploratory or candidate committees for their own campaigns. *Id.* at subdiv. (g)(4).

41. *Id.* at subdivs. (g)(2)(A)–(B).

42. *See* W. VA. CODE § 3-8-12(d) (2006) (prohibiting a person entering into a state contract from making any direct or indirect contribution to any political party).

43. *See* CONN. GEN. STAT. § 9-612(g)(2)(A)–(B) (prohibiting contributions from a state contractor to a party committee, regardless of whether the contract

C. *Types of Contracts Targeted*

1. *Competitive versus Non-competitive Bidding*

Three of the states' pay-to-play laws—those of Kentucky, New Jersey, and South Carolina—provide an exception (at least in part) for state contractors involved in contracts not awarded through an open, competitive bidding process.[44] For example, the part of New Jersey's law dealing with county and municipal contracts exempts those awarded pursuant to a "fair and open process."[45] "Fair and open process" is defined to mean that the contract is publicly advertised, proposals are publicly solicited, the contract is awarded under publicly available criteria, and the contract is publicly announced when awarded.[46] Despite these requirements for county and municipal contracts, however, the provisions of New Jersey law regarding state contracts apply regardless of whether the contract is awarded pursuant to a "fair and open process."[47]

2. *Monetary Thresholds*

Three states—Connecticut, New Jersey, and Ohio—regulate contributions only when an entity's state contracts reach certain monetary thresholds. Connecticut's law applies only to relationships resulting from a single state contract with a value of $50,000 or more or a series of contracts with a value of $100,000 or

involves the executive or legislative branches of government); N.J. STAT. ANN. § 19:44A-20.4 (Supp. 2007) (prohibiting contributions from a county contractor to a county committee of a political party "if a member of that political party is serving in an elective public office of that county when the contract is awarded"); § 19:44A-20.5 (prohibiting contributions from a municipal contractor to a municipal committee of a political party "if a member of that political party is serving in an elective public office of that municipality when the contract is awarded"); § 19:44A-20.15 (prohibiting contributions from a state contractor to "any State or county political party committee prior to the completion of the contract or agreement.").

44. *See, e.g.*, KY. REV. STAT. ANN. § 121.056(2) (LexisNexis 2004 & Supp. 2007); S.C. CODE ANN. § 8-13-1342 (Supp. 2007).

45. *See* N.J. STAT. ANN. § 19:44A-20.4 (Supp. 2007) (regarding contracts with county governments and municipal governments).

46. *Id.* § 19:44A-20.7.

47. *See id.* § 19:44A-20.14 (discussing contracts with state governments, but not including any language limiting the provision's application to contracts not awarded pursuant to a "fair and open process"). S*ee also* OHIO REV. CODE ANN. § 3517.13 (I)–(J) (Supp. 2007) (not containing any language limiting application to competitively bid contracts).

more in a fiscal year.[48] New Jersey's provisions generally apply only to contracts above $17,500.[49] Ohio's provisions apply to contracts valued at more than $500.[50]

III. FIRST AMENDMENT PROTECTION FOR POLITICAL CONTRIBUTIONS

The Supreme Court has recently confirmed, in a plurality opinion, that limits on the rights of individuals to make political contributions "'implicate fundamental First Amendment interests,' namely, the freedoms of 'political expression' and 'political association.'"[51] By making a political contribution, an individual is able to "express[] . . . support" for a candidate and the candidate's views, as well as to "affiliate . . . with a candidate."[52]

Because contribution limits "involve[] little direct restraint" on communication, the Supreme Court has subjected contribution limits to a lower standard of scrutiny than expenditure limits, which are thought to directly affect an individual's ability to engage in communication.[53] Nonetheless, contribution limits are still subject to some intermediate level of "exacting scrutiny."[54] In *Randall v. Sorrell*, the Supreme Court's most recent case dealing with

48. *See* CONN. GEN. STAT. § 9-612(g)(1)(C)–(D) (Supp. 2007) (defining "state contractor" and "prospective state contractor" to apply to such relationships). The state contract must involve (1) the rendition of personal services; (2) the furnishing of material, supplies, or equipment; (3) the construction, alteration, or repair of any public building or public work; (4) the acquisition, sale, or lease of any land or building; (5) a licensing agreement; or (6) a grant, loan, or loan guarantee. *Id.* at subdiv. (g)(1)(C).

49. *See* N.J. STAT. ANN. § 19:44A-20.4 (Supp. 2007) (dealing with contracts with county governments); § 19:44A-20.5 (dealing with contracts with municipal governments); § 19:44A-20.14 (dealing with contracts with the state government).

50. *See* OHIO REV. CODE ANN. § 3517.13(I)–(J) (Supp. 2007).

51. Randall v. Sorrell, 126 S. Ct. 2479, 2491 (2006) (plurality opinion) (quoting Buckley v. Valeo, 424 U.S. 1, 23 (1976)).

52. *Buckley*, 424 U.S. at 21, 22.

53. *Id.* at 21. The *Buckley* Court explained, "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* The Court explained that the size of an individual's contribution did little more than "provide[] a very rough index of the intensity of the contributor's support for the candidate." *Id.* Nonetheless, the individual could still freely "discuss candidates and issues." *Id.* S*ee also* Colo. Republican Fed. Campaign Comm'n v. FEC, 518 U.S. 604, 610 (1996) ("The provisions that the Court found constitutional [in prior campaign finance cases] mostly imposed *contribution* limits."); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259–60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").

54. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000).

contribution limits, the Court invalidated a Vermont statute that imposed what it viewed as overly restrictive contribution limits.[55] Justice Breyer, joined in his plurality opinion by Chief Justice Roberts and Justice Alito, explained that "[contribution] limits might *sometimes* work more harm to protected First Amendment interests than their anticorruption objectives could justify."[56] Therefore, contribution limits were subject to "some lower bound."[57] Otherwise, "the constitutional risks to the democratic electoral process become too great."[58] Justice Breyer did not identify any specific level at which contribution limits could be too low, but he found that Vermont's contribution limits contained "danger signs" because the limits were "sufficiently low as to generate suspicion that they [were] not closely drawn."[59]

After pointing out that Vermont's contribution limits were the lowest in the nation and well below limits previously upheld by the Court, Justice Breyer noted five specific problems with the low limits. First, the statute's limits were likely to "significantly restrict the amount of funding available for challengers," particularly in hotly contested races.[60] Second, the low limits also applied to political parties, which would have made it difficult for political parties to engage in coordinated activities and "threaten[ed] harm to . . . the right to associate in a political party."[61] Third, the low limits applied to expenses incurred by political volunteers, which would impede the ability of individuals to associate with political campaigns.[62] Fourth, the low limits were not adjusted for

55. *Randall*, 126 S. Ct. at 2500. Under the Vermont law, Act 64, each individual, political committee, or political party was limited to contributing a total of $200 to $400 to each candidate for each two-year general election cycle. *Id.* at 2486. These limits were not indexed for inflation. *Id.*

56. *Id.* at 2491–92 (citing *Nixon*, 528 U.S. at 395–97; *Buckley*, 424 U.S. at 21).

57. *Id.* at 2492.

58. *Id.*

59. *Id.* at 2492–93.

60. *Id.* at 2494–95.

61. *Id.* at 2496; *see also* Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997); Colo. Republican Fed. Campaign Comm'n. v. FEC, 518 U.S. 604, 616 (1996); Norman v. Reed, 502 U.S. 279, 288 (1992); *cf.* Buckley v. Valeo, 424 U.S. 1, 20–22 (1976) (explaining that contribution limits are "only a marginal restriction" on First Amendment rights, since a contributor can still associate in other ways).

62. *Randall*, 126 S. Ct. at 2498. Act 64 excluded volunteer activities from its definition of "contribution." *Id.* (citing VT. STAT. ANN. tit. 17, § 2801(2) (2002)). However, Act 64 did not exclude expenses incurred while performing those volunteer activities. *See id.*

inflation.[63] Finally, Vermont had failed to put forth any "special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described."[64] Accordingly, Justice Breyer concluded that the statute's contribution limits were not "narrowly tailored."[65] Justice Thomas, joined by Justice Scalia, concurred in the holding on the grounds that contribution limits are subject to strict scrutiny and Vermont's limits did not pass this test.[66] Justice Kennedy concurred and agreed with the "exacting scrutiny" employed by the plurality.[67]

After *Randall*, it appears that six justices—a majority of the current Court—would apply some heightened level of review to contribution limits.[68] At a minimum, contribution limits must be justified by some "sufficiently important interest" and "closely drawn" to match that interest.[69]

IV. APPLICATION OF FIRST AMENDMENT PRINCIPLES TO STATE PAY-TO-PLAY LEGISLATION

Under the principles cited above, state legislation limiting political contributions can only survive constitutional review if it is closely tailored to a substantial state interest.[70] State pay-to-play legislation is aimed at what is almost certainly an adequate state interest in preventing corruption.[71] But some state legislation may not be closely tailored to this interest.

63. *Id.* at 2499.
64. *Id.*
65. *Id.*
66. *See id.* at 2502 (Thomas, J., concurring).
67. *See id.* at 2501 (Kennedy, J., concurring).
68. *See* Rachel Gage, Note, Randall v. Sorrell*: Campaign Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST AMEND. L. REV. 341, 359–68 (2007) (discussing the attitudes of each of the justices towards a heightened level of review for political contributions).
69. *Randall*, 126 S. Ct. at 2491; *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000) ("[U]nder *Buckley*'s standard of scrutiny, a contribution limit involving 'significant interference' with associational rights could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine tuned.'").
70. *See Randall*, 126 S. Ct. at 2491.
71. *See id.*

A. Preventing Corruption and Quid Pro Quos is Clearly a Substantial State Interest

The Supreme Court has made clear that state governments have an interest in preventing potential state contractors from buying access to the market by making political contributions to those who are in a position to decide who will receive a state contract.[72] "[T]he prevention of corruption and the appearance of corruption" is a "constitutionally sufficient justification" for imposing contribution limits.[73] This corruption interest includes an interest in preventing actual or perceived quid pro quos.[74]

Additionally, quid pro quo arrangements are not the only opportunities for "improper influence" of the election process.[75] Improper influence can also result from "the broader threat from politicians too compliant with the wishes of large contributors."[76]

72. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2672 (2007) ("This Court has long recognized 'the governmental interest in preventing corruption and the appearance of corruption' in election campaigns.") (quoting Buckley v. Valeo, 424 U.S. 1, 45 (1976)); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–497 (1985) [hereinafter NCPAC] ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978) ("The importance of the governmental interest in preventing [corruption] has never been doubted."). Nonetheless, the Supreme Court's holdings in this regard are certainly open to criticism. *See, e.g.*, Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption & Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004) (arguing that "trends in public perception of corruption may have little to do with the campaign finance system"); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 63 (1997) (arguing that reformers have "overstated the governmental interest in the anticorruption rationale" and "anything beyond disclosure" cannot be narrowly tailored to this interest).

73. *Buckley*, 424 U.S. at 25, 26.

74. *NCPAC*, 470 U.S. at 497 ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."); *Buckley*, 424 U.S. at 26–27 ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."); *see also* Blount v. SEC, 61 F.3d 938, 943 (D.C. Cir. 1995) ("In every case where a *quid* in the electoral process is being exchanged for a *quo* in a particular market where the government deals, the corruption in the market is simply the flipside of the electoral corruption.").

75. *Nixon*, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28).

76. *Id.*; *see also NCPAC*, 470 U.S. at 497 ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.").

Thus, a legislative body may "constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery."[77] In particular, a "perception of corruption [is] 'inherent in a regime of large individual financial contributions' to candidates for public office" and is "a source of concern 'almost equal' to quid pro quo improbity."[78]

Connecticut's law, for example, is clearly intended to address the above state interests. A federal district court assessing the law (but not on constitutional grounds) explained:

> The statute seeks to restore public confidence in the integrity of state government and to eliminate corruption and undue influence flowing from campaign contributions given or solicited by certain special interests. The law also seeks to eliminate the appearance of corruption flowing from such contributions and to promote transparency in campaign financing and state contracting.[79]

Nonetheless, the fact that state pay-to-play laws may be intended to combat legitimate state interests does not mean that the means used to achieve these legitimate ends are appropriate.

B. Some State Pay-to-Play Laws May Not be Closely Tailored

The real issue with state pay-to-play legislation is whether such legislation is closely tailored to a state's interest in preventing state contractors from using political contributions to "buy" state contracts. The pay-to-play laws of the six states surveyed in this article generally fall into four categories: (1) laws that do not actually restrict political contributions, (2) laws that restrict contributions only from the state contractor itself to the public official in a position to award the contract, (3) laws that restrict

77. *Nixon*, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28); *see also* United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961) ("Democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.").

78. *Nixon*, 528 U.S. at 390 (quoting *Buckley*, 424 U.S. at 27); *see also* McConnell v. FEC, 540 U.S. 93, 153 (2003) ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.").

79. Sec. Indus. & Fin. Mkts. Ass'n v. Garfield, 469 F. Supp. 2d 25, 38 (D. Conn. 2007).

contributions from a broad class of contributors, but only to the public official in a position to award the contract, (4) laws that restrict contributions only from the state contractor itself, but to a broad class of state officials or to political parties, and (5) laws that restrict contributions from a broad class of contributors to a broad class of state officials or to political parties. While state laws in categories (1) through (4) would most likely pass constitutional scrutiny, state laws in category (5) seem unconstitutionally overbroad.

1. A Law that Does Not Actually Restrict Political Contributions

Kentucky's law applies to a broad class of contributors and recipients. But this law is different from the other laws surveyed because the law does nothing to limit an individual's ability to make political contributions equal to those made by other individuals not associated with a state contractor. Rather, it merely imposes an additional penalty on state contractors when they (or their owners and immediate family members) make contributions exceeding the general limits: such state contractors may not obtain any state contract that has not been competitively bid.[80] Thus, Kentucky's law is not imposing any additional restrictions on the ability of individuals to participate in the political process by making political contributions. This law appears constitutional.

2. Laws Restricting Contributions Only From the State Contractor Itself to the Public Official in a Position to Award the Contract

State law limiting contributions from an entity that hopes to contract with the state to the public official in a position to award a contract seems to be closely tailored, since it directly targets quid pro quos between the contributor and the recipient. South Carolina's law is an example, as it prohibits contributions only from the state contractor itself to the public official "in a position to act on the contract's award."[81] On its face, this law only affects political contributions from one person (the state contractor itself) to another (the public official acting on the contract's award). In

80. *See* KY. REV. STAT. ANN. § 121.056(2) (LexisNexis 2004 & Supp. 2007).

81. S.C. CODE ANN. § 8-13-1342 (Supp. 2006). The provision also prohibits a state contractor from investing "in a financial venture in which [the] public official has an interest." *Id.* S*ee also* KY. REV. STAT. ANN. § 121.056(2) (LexisNexis 2004 & Supp. 2007) (applying only to contributions to candidates for governor and lieutenant governor).

fact, the only situation in which the law would affect an individual's political contributions would be in the event that the state contractor was a sole proprietorship.[82] "[A] showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional."[83] Thus, South Carolina's law probably could pass constitutional scrutiny because it is closely tailored to the perceived problem South Carolina is seeking to avoid.

3. Laws Restricting Contributions From a Broad Class of Contributors, but Only to the Public Official in a Position to Award the Contract

Ohio's law also applies to a broad group of potential contributors; however, it is limited in its application to recipients. For instance, for an incorporated state contractor, the act applies to contributions by any 20% owner, as well as that owner's spouse, and any child between seven and seventeen years of age.[84] But the only contributions barred are those to "the holder of the public office having ultimate responsibility for the award of that contract."[85] Furthermore, the context of the statute suggests that only one public official would ever have "ultimate responsibility" for the award of any particular state contract.[86] Thus, the restriction on any individual's general ability to make political contributions seems slight; in most cases, an individual would be prohibited from making a political contribution to only one state official.[87] This law also seems to be closely tailored.[88]

82. *Cf.* Blount v. SEC, 61 F.3d 938, 947 (D.C. Cir. 1995) (determining that MSRB Rule G-37, regulating pay-to-play in the municipal securities business, is constitutional because it "constrains relations only between the two potential parties to a quid pro quo: the underwriters and their municipal finance employees on the one hand, and officials who might influence the award of negotiated municipal bond underwriting contracts on the other.").

83. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 396 (2000).

84. OHIO REV. CODE ANN. § 3517.13(J)(2)(a) (Supp. 2007).

85. *Id.*

86. For instance, the statute provides that when the "public officer who is responsible for the award of a contract is appointed by the governor . . . the office of the governor is considered to have ultimate responsibility for the award of the contract." § 3517.13(K)(1). S*ee also* § 3517.13(K)(2) (regarding appointees by the elected chief executive officer of a municipal corporation).

87. The prohibition could extend further if a particular state contractor entered into multiple contracts involving different public officials. But in most instances, a state contractor with multiple contracts likely would be involved in repeated contracts with the same agency.

4. Laws Restricting Contributions Only From the State Contractor Itself, but to a Broad Class of State Officials or to Political Parties

In terms of contributors and recipients affected, West Virginia has taken an approach almost directly opposite to Ohio. West Virginia's restriction facially applies to only one contributor: the state contractor itself.[89] But the law bans contributions from the state contractor to *any* political party, committee, or candidate.

Federal campaign finance law uses an approach similar to West Virginia's; a U.S. government contractor is flatly banned from making any direct or indirect political contributions.[90] But, a U.S. government contractor may still establish a PAC and employees of the contractor may make individual political contributions, so long as they are not indirect contributions from the contractor itself.[91]

West Virginia's law, like the federal law, appears to be narrowly tailored. The state law only restricts contributions from the state contractor itself.[92] Therefore, unless the state contractor is a natural person, the law does not prohibit political contributions from individuals. At the same time, the law applies to both indirect and direct contributions from the state contractor.[93] Thus, the law addresses the problem of a state contractor using its employees as a "pass-through" for the contractor's political contributions, while allowing employees of a state contractor to freely make political contributions that have not been directed by their employer.

88. The D.C. Circuit has deemed an analogous rule—Rule G-37 of the Municipal Securities Rulemaking Board—to be constitutional. *See* Blount v. SEC, 61 F.3d 938, 938 (D.C. Cir. 1995). Rule G-37 prohibits municipal securities brokers and dealers, associated professionals, and PACs controlled by municipal securities brokers, dealers, and professionals, from contributing to the political campaigns of "an official of the issuer who can, directly or indirectly, influence the awarding of municipal securities business." Self Regulatory Organizations, Exchange Act Release No. 33,868, 56 SEC Docket 1045 (Apr. 7, 1994). "Municipal securities business" includes only business that is not competitively bid. *Id.*

89. W. VA. CODE § 3-8-12(d) (2006).

90. 2 U.S.C. § 441c(a)(1) (2000) (prohibiting any person who enters into a contract with the United States from directly or indirectly making "any contribution of money or other things of value" or promising "expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use . . . .").

91. *See id.* at subdiv. (b) (allowing government contractors to establish separate segregated funds, but prohibiting "indirect" contributions from government contractors).

92. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 396 (2000).

93. W. VA. CODE § 3-8-12(d) (2006).

5. Laws Restricting Contributions From a Broad Class of Contributors to a Broad Class of State Officials or to Political Parties

In each of the examples above, the state has enacted a law that affects contributions by state contractors, but has limited the application of the law either: (a) to those contributors who are most likely to make contributions in order to influence the award of a contract, (b) to those recipients who are most likely to be influenced by contributors to award a contract, or (c) to both groups. New Jersey's and Connecticut's laws have a much broader application.

a. Connecticut

Connecticut's law is broader than New Jersey's law. Connecticut's pay-to-play statute limits contributions not only from the employee who would actually administer a state contract, but from many other individuals who either have leadership responsibility or ownership interest in the business entity seeking to contract with the state.[94] However, the law does not stop there. It also applies to the spouse or dependent child (over eighteen-years old) of any of these individuals.[95]

Connecticut's law prohibits *all* these individuals from making a wide range of political contributions. If the contract involves the executive branch, these individuals are prohibited from contributing to any state-wide officer, as well as to any state political party.[96] In addition, once an unacceptable political contribution has occurred, the state agency involved in the contract may void an existing contract and is prohibited from awarding any additional contract.[97]

Imagine the following scenario: ABC Corp. seeks to contract with the Connecticut Department of the Treasury. *X* is a member

94. *See* CONN. GEN. STAT. § 9-612(g)(1)(F) (Supp. 2007) (including an individual who is a member of the board of directors, an individual who is employed by a state contractor or senior vice president, an individual who is a chief executive officer, and an individual who has managerial or discretionary responsibilities with respect to a state contract).

95. *Id.*

96. *See id.* at subdiv. (g)(2)(A) (prohibiting contributions to the governor, lieutenant governor, attorney general, state comptroller, secretary of state, or state treasurer).

97. *Id.* at subdiv. (g)(2)(C).

of ABC Corp.'s board of directors. *X*'s spouse, *Y*, contributes to the candidate for state attorney general, not because *Y* has any intention of influencing the award of the state contract (*Y* may not even be aware that contract negotiations are occurring), but because *Y* supports the attorney general candidate's views on drug control, consumer protection, or any number of issues entirely unrelated to the state contract. Under Connecticut's law, *Y* could unilaterally affect ABC Corp.'s ability to obtain a state contract.

Connecticut's law does contain an exception for "mitigating circumstances."[98] But it is unclear whether and how this exception would apply to this scenario, and it seems likely that in these circumstances the Department of the Treasury would simply choose another contractor if faced with a choice between ABC Corp. and another prospective state contractor with a clean bill of health. Connecticut's law also contains a clause allowing for the return of an improper contribution within thirty days.[99] But within thirty days a contract might already be awarded. More importantly, requiring *Y* to obtain a refund still affects *Y*'s ability to participate in the political process by contributing to *Y*'s candidate of choice.

The prohibition on contributions to political parties exacerbates this problem. By completely barring all political contributions from certain individuals associated with state contractors to political parties, Connecticut's law hampers the ability of these individuals to associate with political parties.[100] Furthermore, the limitation is overbroad because these individuals, many of which may have no close connection to a state contract, could contribute to political parties for a variety of reasons other than as part of an effort to secure a state contract.[101]

98. *See id.*

99. *Id.*

100. Randall v. Sorrell, 126 S. Ct 2479, 2496 (2006) (discussing the "important political right" of being able to "associate in a political party . . ."); *see also* Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."); Norman v. Reed, 502 U.S. 279, 288 (1992) ("[T]his Court has recognized the constitutional right of citizens to create and develop new political parties.").

101. In a suit filed against the director of the Connecticut State Elections Enforcement Commission, the plaintiffs argued that Connecticut failed to show any connection between contributions by those the new law considers to be "principals" of state contractors and the award of state contracts. *See* Plaintiffs'

Certainly some individuals might contribute to a political party in response to a request by a particular official who is in a position to award a state contract, or might earmark contributions to a party for a particular state candidate in an effort to get around rules forbidding direct contributions to candidates. But these problems can be solved in other ways. For example, Connecticut could ban "indirect" contributions by state contractors to certain state officials, as West Virginia has done.[102] Connecticut could also prohibit earmarked contributions or contributions made at the request of another.

Furthermore, Connecticut's law does not merely limit political contributions by the individuals affected; it outright bans *all* political contributions from these individuals to the relevant branch of government or to political parties.[103] A federal district court has recently described the application of the law to spouses and children "as a prophylactic measure to prevent state contractors from circumventing the statute by using their immediate family as a conduit."[104] Nonetheless, there is a significant difference between limiting contributions from individuals associated with state contractors and prohibiting *any* contributions from these same individuals.[105] Barring a minimal

Mem. of Law in Supp. of Mot. for Summ. J., at 68–71, Green Party of Conn. v. Garfield, No. 3:06-cv-1030 (D. Conn. July 13, 2007).

102. *See* W. VA. CODE § 3-8-12(d) (2006). *See also* 2 U.S.C. § 441c (prohibiting direct and indirect contributions from federal government contractors).

103. *See* CONN. GEN. STAT. § 9-612(g)(2) (Supp. 2007).

104. Sec. Indus. & Fin. Mkts Ass'n v. Garfield, 469 F. Supp. 2d 25, 38–39 (D. Conn. 2007) (discussing Kaplan v. Bd. of Educ., 759 F.2d 256, 261 (2d Cir. 1985)). *See also* Blount v. SEC, 61 F.3d 938, 945 (D.C. Cir. 1995) (in relation to pay-to-play in the municipal securities field, explaining that "actors in this field are presumably shrewd enough to structure their relations rather indirectly . . ."). The court in *Garfield* was dealing with the issue of whether to grant a preliminary injunction to the plaintiffs to prevent enforcement of a provision of the state's pay-to-play law requiring Internet disclosure of minor children of principals of state contractors. *See Garfield*, 469 F. Supp. 2d at 28. The court granted the preliminary injunction on the basis that the state had not sufficiently tailored the disclosure requirement to its interest in restoring public confidence in the integrity of state government. *See id.* at 38–41. The state legislature subsequently amended the bill to only prohibit contributions by and require disclosure of dependent children over eighteen years of age. *See* Conn. Gen. Assembly, Public Act No. 07-1, 2007 Ct. ALS 1 (Jan. Sess. 2007).

105. *Cf.* NCPAC, 470 U.S. 480, 498 (1985) (explaining that even if "the large pooling of financial resources by [the two PACs discussed in the opinion] and FCM did pose a potential for corruption or the appearance of corruption," Congress's legislative "response to that evil" was "fatally overbroad" because it applied equally to "multimillion dollar war chests" and "informal discussion

contribution from the spouse of an individual only tangentially involved with procuring a state contract hardly seems justified, even from an anti-corruption standpoint.[106]

Finally, the law applies to all state contractors involved in contracts above a threshold amount.[107] It is not limited in application—as are other states' laws—to those contracts most likely to be awarded through shrewd and surreptitious processes, such as those that only regulate state contractors involved in non-competitively bid contracts.[108] Accordingly, Connecticut's pay-to-play law does not appear to be closely tailored to the state interest of avoiding corruption in government.[109]

groups that solicit neighborhood contributions"). Similarly, even if pay-to-play poses a true threat to public confidence in government, Connecticut's law attempts to combat that threat by banning many absolutely harmless political contributions.

106. *Cf.* Randall v. Sorrell, 126 S. Ct. 2479, 2499 (2006) (discussing Vermont's lack of justification for imposing restrictive contribution limits).

107. *See* CONN. GEN. STAT. §§ 9-612(g)(1)(C), (g)(2) (Supp. 2007).

108. *Cf.* MSRB Rule G-37, Exchange Act Release No. 34-33868, 56 SEC Docket 1045 (Apr. 7, 1994) (regarding pay-to-play in the municipal securities business and exempting, for the most part, contracts obtained through competitive bidding from the definition of "municipal securities business").

109. In fact, a similar argument has already been raised. The ACLU filed a lawsuit in 2006, asserting that the law's

> absolute ban on political contributions and solicitation of contributions by "communicator lobbyists" (and by their families), and by the officers, directors and some employees of state contractors and prospective state contractors (and by their families) violate[d] those individuals' freedoms of speech and association, protected by the First and Fourteenth Amendments, by directly curtailing their ability to engage in political speech and participate in the political process.

Plaintiffs' Compl. ¶ 5, Green Party of Conn. v. Garfield, No. 3:06-cv-1030 (D. Conn. July 6, 2006) (citing CONN. GEN. STAT. §§ 9-333*l*(h)–(i), -333n(g)–(j) (codified as amended CONN. GEN. STAT. §§ 9-610(h)–(i), 9-612(g)–(j) (Supp. 2007))). The lawsuit also alleges constitutional infirmities in the state's new public financing program, which was enacted into law as part of the same legislation. *See id.* ¶¶ 1–4. *But see* Casino Ass'n of La. v. State *ex rel.* Foster, 820 So. 2d 494, 502–04 (La. 2002) (rejecting arguments that a state law prohibiting any political contributions from any officer, director, trustee, partner, senior management level employee, or key employee in the casino industry, or the spouse of any of the foregoing was unconstitutionally broad); Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61, 66–67 (Ill. 1976) (rejecting arguments that a state law prohibiting any political contributions from any officer, associate, agent, representative, or employee of a liquor licensee was unconstitutionally broad).

b. New Jersey

New Jersey's law is not nearly as broad as Connecticut's law, but it suffers from some of the same infirmities. In most cases, the law applies to a broad group of contributors and recipients. The law bans reportable contributions not only from the state contractor and its owners, but also from spouses and children living with any individual state contractor or owner.[110]

The provisions of New Jersey's law that apply to municipal and county contractors ban contributions to *any* elected municipal or county official.[111] The provisions that apply to state contractors limit only reportable contributions to gubernatorial candidates.[112] But regardless of the division of state or local government involved in the contract, reportable contributions to political parties at that level of government are completely barred.[113]

One redeeming quality to New Jersey's law is that it only prohibits "reportable" contributions. Contributions of up to $300 are not reportable under state law.[114] Therefore, those subject to the law still have some ability to participate in the political process by making political contributions. Nonetheless, one can still argue that imposing a $300 contribution limit on individuals not closely connected to a state contract unnecessarily infringes on the ability of individuals to make political contributions, particularly when those limits apply to contributions to political parties as well as to candidates.[115]

New Jersey's general campaign finance law provides that a corporation is prohibited from making contributions indirectly through its officers or employees by providing them with any type of reimbursement or remuneration for the purpose of making contributions.[116] New Jersey could use a similar approach in its pay-

110. *See* N.J. STAT. ANN. §§ 19:44A-20.4, -20.5, -20.7, -20.17 (Supp. 2007).

111. *See id.* §§ 19:44A-20.4, -20.5.

112. *See id.* § 19:44A-20.15.

113. *See id.* §§ 19:44A-20.4, -20.5, -20.15. State contractors and their principals also are barred from contributing to county political parties. *See id.* § 19:44A-20.15.

114. *See id.* § 19:44A-8(d).

115. Generally individuals would be subject to much higher contribution limits: $2600 per candidate per election, $25,000 per state political party per year, $37,000 per county political party per year, and $7200 per municipal political party per year. *See* N.J. Election Law Enforcement Comm'n, *Contribution Limits Chart: Entities Receiving Contributions* (2007), *available at* http://www.elec.state.nj.us/ForCandidates/elec_limits.html.

116. N.J. STAT. ANN. § 19:44A-20.1 (Supp. 2007).

to-play law to eliminate indirect political contributions by people unconnected with state contracts, while still allowing individuals not closely connected to state contracts to make political contributions.

V. CONCLUSION

Certainly, "[political] [m]oney, like water, will seek its own level. The price of apparent containment may be uncontrolled flood damage elsewhere."[117] Understandably, states passing broad pay-to-play legislation, such as Connecticut and New Jersey, have chosen to dam as many avenues for political money as possible. These states likely enacted such broad bans on political contributions in hopes that they could keep state contractors from accomplishing indirectly what they could not do directly.

Nonetheless, to the extent such state laws eliminate the ability of individuals not associated with the state contracting process to make any political contributions—and particularly to the extent these laws bar individuals from contributing to political parties—such pay-to-play laws seem unconstitutionally overbroad. In the competitive state contracting market, states certainly have a legitimate interest in preventing the exchange of political contributions for political favors, as well as increasing public confidence in government. But when creating legislation aimed at this purpose, states should consider whether they could accomplish this purpose through means less onerous than virtually eliminating contribution opportunities by individuals not closely tied to state contracts. They should look past the contributor's identity to determine whether a state contractor is really using its employees, owners, or other persons as pass-throughs for contributions to state officials. They should also look past the identity of the recipient to determine whether the contribution has actually been earmarked for someone else.

117. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999).