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Campaign Finance and *Randall v. Sorrell*: How Much is Too Much and Who Decides? The Court's Splintering Devotion to Its Own Problematic Framework

Natalie Rainforth

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Campaign Finance and *Randall v. Sorrell*: How Much is Too Much and Who Decides? The Court's Splintering Devotion to Its Own Problematic Framework

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I. INTRODUCTION

Amidst fears that a candidate for public office could be bought for the price of an average-quality digital television, Vermont's legislature enacted Act 64.¹ However, the price tag was set below an acceptable retail value. In fact, the Act anticipated that candidates would sell for record-low, red-tag amounts.² The Supreme Court rejected the State's contention that higher campaign contribution levels would result in an electoral clearance sale, and reasserted that campaign finance limitations have a constitutional "lower bound."³ In doing so, it declined to answer the calls of critics—from inside the judiciary and out—to refashion the structure of its campaign finance jurisprudence.⁴

Largely adhered to for more than thirty years, the framework established in *Buckley v. Valeo*⁵ has been treated by some as "superprecedent"—and by others as flawed.⁶ A direct and deliberate provocation to the latter, Act 64

1. Vermont's Public Act No. 64, codified at VT. STAT. ANN. tit. 17, § 2801-2883 (2002) ("Act 64" or "the Act"), took effect immediately following the 1998 elections. *Randall v. Sorrell*, 126 S. Ct. 2479, 2486 (2006) (plurality opinion). On a broad level, Act 64 imposed two stringent limitations on campaign money. *Id.* at 2485. First, among other expenditure restrictions, candidates for public office could exhaust only specified, maximum amounts during any "two-year general election cycle." *See id.* at 2486 (holding the Act's staggered expenditure limits violative of the First Amendment by adhering to thirty years of cases doing the same). Second, individuals were permitted to contribute only set, minimal amounts to political parties and campaigns for state office. *See id.* (holding the Act's contribution limits unconstitutional by judicially determining how much is too much to give candidates before a bona fide risk of corruption arises). Act 64 subjected individuals, political committees, and political parties to identical contribution limits, and did not index any of these provisions for inflation. *Id.*; *see also* Landell v. Sorrell, 118 F. Supp. 2d 459, 464-73 (D. Vt. 2000); *see generally* Bryan R. Whittaker, Note, *A Legislative Strategy Conditioned on Corruption: Regulating Campaign Financing after McConnell v. FEC*, 79 IND. L.J. 1063 (2004) (discussing in detail the risk of corruption and its repeated assertion as a governmental interest in campaign finance cases). *But cf.* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 425 (2000) (Thomas, J., dissenting) (stating that he "cannot fathom how a \$251 contribution could pose a substantial risk of 'secur[ing] a political *quid pro quo*'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 26 (1976)) (alteration in original)).

2. *See, e.g.*, VT. STAT. ANN. tit. 17, § 2805(a)-(b) (1997) (limiting contributions to candidates for Vermont office in a two-year election cycle to \$200 for state representative, to \$300 for state senator, and to \$400 for governor and other key statewide positions).

3. *See Randall*, 126 S. Ct. at 2492 (plurality opinion) (finding Act 64's contribution limits unconstitutionally low and asserting that "limits that are too low can [] harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability"). The Court prefaced this assertion with the acknowledgment that Vermont's "legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 137 (2003)). However, as this Note will address, the Court fails to articulate any sort of a precise mathematical formula for determining how low is too low. On the other hand, Justice Breyer provides lower courts with a well-delineated, five-factor approach, which may or may not prove useful for guidance-thirsty judges. *See id.* at 2495-99.

4. *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311 (1998) (arguing the inadequacies of campaign finance restrictions and proposing some alternatives).

5. 424 U.S. 1 (1976) (per curiam).

6. A case eligible for "superprecedent" status generally has, for a protracted period of time,

was enacted in 1997 by proponents who embraced the unavoidable attack brought by politicians, and the inevitable return of campaign finance reform to the Nation's highest court.⁷ But a plurality of justices declined to take the bait.⁸ Rather, *Buckley* provided the central basis upon which the Court found the Act's contribution and expenditure limitations unconstitutional.⁹

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble"¹⁰ Campaign finance cases, both before and after *Randall*, contemplate a balance between First Amendment protections and the need to thwart the corruption that potentially follows large sums of money.¹¹ Indeed, the rights of free speech and political expression are inextricably intertwined in the electoral setting.¹²

averted potential legal disputes and persuaded out-of-court settlement. See Allison R. Hayward, *The Per Curiam Opinion of Steel: Buckley v. Valeo as Superprecedent? Clues from Wisconsin and Vermont*, 2006 CATO SUP. CT. REV. 195, 202-03 (arguing that *Buckley* is not a good case for superprecedent status because it has not prevented legal disputes or encouraged the early resolution thereof). Given *Buckley*'s thirty-year survival record, it seems that many Justices of the Court believe it is worthy of the label. See *Randall*, 126 S. Ct. at 2488-90 (plurality opinion) (recognizing that "[o]ver the last [thirty] years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley*'s constraints," that "*Buckley* has promoted considerable reliance," and that "[o]verruling *Buckley* now would dramatically undermine this reliance on our settled precedent"). However, Hayward believes that allowing *Buckley* to be unassailable is a mistake of constitutional magnitude, as it has "[n]either . . . prevented legal disputes from arising nor encouraged them to be settled without litigation." Hayward, *supra*, at 202. She criticizes the long-standing reliance placed on the decision's use of dual levels of scrutiny. *Id.* at 209.

7. See Memorandum from Deborah L. Markowitz, Vt. Sec'y of State, to Senate Gov't Operations/House Local Gov't Comms. (Jan. 9, 2001) (asserting that some of Act 64's provisions were enacted with the "express legislative goal of giving the Supreme Court an opportunity to re-evaluate its decision in *Buckley v. Valeo*"), available at <http://vermont-elections.org/elections1/2001GAMemoCF.html>.

8. See *Randall*, 126 S. Ct. at 2489-91 (plurality opinion); see also 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:14.60 (2006) ("*Randall v. Sorrell* plainly indicates growing unrest on the Supreme Court with *Buckley*, but no clear five-Justice majority ready to overturn it.").

9. See *Randall*, 126 S. Ct. at 2487-88, 2490-92 (plurality opinion).

10. U.S. CONST. amend. I.

11. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 23-25, 55 (1976) (per curiam); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 193-94 (1981) (plurality opinion) (no violation of the First Amendment); *FEC v. Nat'l Conservative Political Action Comm. (NPAC)*, 470 U.S. 480, 493 (1985) (violation of First Amendment); *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 251 (1986) (violation of First Amendment as applied to non-profit organization); *Randall*, 126 S. Ct. at 2491 (plurality opinion) (two-fold violation of First Amendment); *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 649-52 (9th Cir. 2007) (violation of First Amendment in context of signature-gathering phase of recall election).

12. During oral arguments in *Randall v. Sorrell* on February 28, 2006, Justice Scalia opined: "[Y]ou're not talking about money here. You're talking about speech. So long as all that money is going to campaigning, you're talking about speech. And when you say you don't need any more

At the same time however, a constitutional democracy cannot long absorb the effects of political scandals and the expense of the campaigns that initiate them, and the result is that the Supreme Court has essentially bifurcated its approach to campaign contributions and campaign expenditures.¹³ It articulates—or, arguably, *fails* to articulate—dual standards.¹⁴ Then in its application of these standards, the Court—largely unqualified to assert how much money is enough to run an effective campaign (and how much is too much)—engages in a numbers game somewhat resembling casino roulette.¹⁵

The judicially-crafted dichotomy imposed upon political money seems, at first glance, relatively straightforward: campaign contributions are properly the subject of governmental supervision while campaign spending is not.¹⁶ However, the scheme diverges here, and the branches are subject to differing constitutional standards.¹⁷ In *Buckley* and in later cases, the Court lays down an exacting standard, obscurely communicated but strongly

speech than this, that's a very odd thing for . . . a United States government to say." Transcript of Oral Argument at 50, *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (No. 04-1528), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1528.pdf. The Justice further observed that when the government "will tell you how much campaigning is enough," "[t]hat's extraordinary." *Id.* at 52; cf. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part) ("Proceeding from the maxim that 'money talks,' the Court finds that the expenditure limitations will seriously curtail political expression by candidates and interfere substantially with their chances for election.").

13. See generally *Buckley*, 424 U.S. 1 (distinguishing between expenditure and contribution limitations and applying different standards of scrutiny to each).

14. See *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 283, 283 (2006) [hereinafter *Supreme Court 2005*] (indicating that the reaction to *Buckley* was "almost universally negative"). *Buckley* is certainly the largest factor contributing to today's general confusion about the appropriate framework to be applied to campaign finance legislation. *Id.* *Randall* brings additional uncertainty to this already misguided jurisprudence—or, in the very least, it does nothing to clarify the situation. See *Randall*, 126 S. Ct. 2485-500 (plurality opinion). It essentially affirmed *Buckley*, and endorsed the general acceptance of contribution limitations and the prohibition of expenditure regulations. See *id.*

15. As will be discussed later, the plurality seems to arbitrarily distinguish *Nixon v. Shrink Missouri Government PAC*, which upheld the limit of \$1,075 on contributions to candidates for state auditor, from the \$200 per election per candidate limit in *Randall*. See *Randall*, 126 S. Ct. at 2494 (plurality opinion); see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). Justice Breyer recognizes that Vermont's population is much smaller than Missouri's, and thus Act 64's amount per constituent is actually *more*; he then hastily asserts that "this does not necessarily mean that Vermont's limits are less objectionable than the limit upheld in *Shrink*." *Randall*, 126 S. Ct. at 2494 (plurality opinion). At the same time however, this does not mean that Act 64's limits are any *more* objectionable. Secondly, this is a feeble attempt to provide concrete guidance to inferior courts. See *id.* at 2503 (Thomas, J., concurring only in the judgment) (criticizing the plurality's use of *Shrink Missouri* as a factor in its analysis of Act 64's contribution limitations). Indeed, this is a ripe setting for the inconsistency that inevitably ensues when lower court judges are forced to take a gamble.

16. *Buckley*, 424 U.S. at 23; see also *Supreme Court 2005*, *supra* note 14, at 283.

17. See *McConnell v. FEC*, 540 U.S. 93, 134 (2003) (recognizing that restrictions on campaign expenditures are generally subject to closer scrutiny than restrictions on contributions); see also *Buckley*, 424 U.S. at 19 (drawing a line between contribution and expenditure limits, and treating the former as direct restraints on speech subject to some higher level of scrutiny).

reminiscent of strict scrutiny, to be applied to expenditure limitations.¹⁸ Alternatively, restraints on monetary contributions face a “less rigorous standard,” one which requires only that the limits are “closely drawn to match a sufficiently important [governmental] interest.”¹⁹ It is in this context that the risk of corruption and other justifications tip the balance in favor of permissible regulation.²⁰

To appreciate the basis of the above distinction, one must perform a modest amount of mental gymnastics. Essentially, restrictions on campaign expenditures unduly limit First Amendment free speech interests because they directly and necessarily reduce the amount of political communication accessible to candidates and groups.²¹ Because the dissemination of political

18. See *Buckley*, 424 U.S. at 44-45 (“[T]he constitutionality of [FECA’s expenditure limits] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”). Cf. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 252 (1986) (indicating only that independent expenditures are at the core of our First Amendment interests and thus must be justified by a “compelling state interest”); *McConnell*, 540 U.S. at 134 (stating that “[i]n *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions”); *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (reconciling the two degrees of scrutiny by stating that their operation “turns on the nature of the activity regulated”; also suggesting that the “compelling interest test” applies to a limitation on corporate expenditures); *Beaumont*, 539 U.S. at 164 (Thomas, J., dissenting) (“I continue to believe that campaign finance laws are subject to strict scrutiny.”); *Randall*, 126 S. Ct. at 2488-89 (plurality opinion) (heavily relying on *Buckley*, but otherwise entirely failing to articulate a standard of review for expenditure regulations).

19. *McConnell*, 540 U.S. at 137, 231 (stating that “[t]he less rigorous standard of review we have applied to contribution limits (*Buckley*’s ‘closely drawn’ scrutiny) shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise”); see also *Buckley*, 424 U.S. at 25 (upholding contribution limitations under the lesser standard which requires a state to demonstrate a “sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms”); *Randall*, 126 S. Ct. at 2492 (plurality opinion) (reasserting the “closely drawn” standard of *Buckley* but focusing on “whether Act 64’s contribution limits prevent candidates from ‘amassing the resources necessary for effective [campaign] advocacy’” (alteration in original)); *Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007) (applying “*Buckley*’s reduced scrutiny” to limits on contributions to ballot measure campaigns and holding that they were not “‘closely drawn’ to match a ‘sufficiently important government interest’”).

20. See *Buckley*, 424 U.S. at 25-27 (declining to reach ancillary justifications because that Act’s primary justification of preventing corruption and the perception thereof was sufficient to satisfy the reduced scrutiny required).

21. *Id.* at 19. Spending restrictions necessarily “reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” *Id.* Justice Stevens, however, disagrees. See *Randall*, 126 S. Ct. at 2508-09 (Stevens, J., dissenting). He asserts in his *Randall* dissent that a candidate does not need money to speak, and that a candidate on a budget is not limited in his capacity to deliver speeches and conduct interviews. *Id.* at 2508. However, Justice Stevens, with his willingness to uphold expenditure limitations, overlooks the fact that without substantial media coverage, the public might not know when or where to receive the message of a candidate. Indeed, even the frugal candidate who delivers a

views is directly correlated to the amount of media purchased,²² expenditure limitations “impose significantly more severe restrictions on protected freedoms of political expression and association”²³ By contrast, contribution limitations bear only a tangential relationship to these First Amendment concerns because the contributor’s donation provides him a “symbolic” expression of his values.²⁴ In conjunction with his ability to freely discuss issues of the American political landscape, the (reasonable) regulation of his contributions is sufficiently justified as an anti-corruption device.²⁵

In *Randall v. Sorrell*,²⁶ the Court validates the aforementioned principles and further fuels the debate on its campaign finance jurisprudence.²⁷ While campaign reform is a highly contentious issue in both Congress and the state legislatures, the big debate may actually be situated in the judiciary.²⁸ And

speech in a public park may not have anyone to speak to without first absorbing the cost of advertising his event. An incumbent can more readily acquire news coverage, so the Justice’s assertion that “seasoned campaigners” have endorsed expenditure limitations reduces the credibility of his argument. *Id.* at 2509.

22. In addition to the free media exposure given incumbents, Senator Mitch McConnell attributes the difficulty of disseminating political views to the dispersion of eligible voters, to the expense of televised advertising, and to the splintering of the television market caused by increasing channel availability. *See Campaign Contribution Limits: Hearing Before the S. Comm. on Rules & Admin.*, 106th Cong. 2 (1999) (statement of Sen. Mitch McConnell, Chairman, S. Comm. on Rules & Admin), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:55770.pdf.

23. *Buckley*, 424 U.S. at 23.

24. *Id.* at 21. This is a pivotal point in campaign finance law, on which the distinction between contributions and expenditures in campaign finance jurisprudence hinges. *See id.* The underlying premise is that while expenditure limits impose “direct and substantial restraints on the quantity of political speech,” *id.* at 39, contribution restrictions “entail[] only a marginal restriction upon the contributor’s ability to engage in free communication.” *Id.* at 20. The Court in *Buckley* averred that large contributions serve the same purpose—to the contributor, that is—as small contributions: “a general expression of support.” *Id.* at 21. Under this model, an increase in the size of a contribution is but a demonstration of the “intensity of the contributor’s support for the candidate.” *Id.* (emphasis added). Therefore, a cap on the amount an individual can spend is little more than an indirect check on the contributor’s freedom to communicate. *Id.* This argument is weak, however, because by asserting that contributions only curb the speech of the would-be recipient, and not the contributor himself, the Court ignores the right of an individual to pay another to speak for him. *See id.*

25. *See id.* at 25; *see also* *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 388-90 (2000); *McConnell v. FEC*, 540 U.S. 93, 136 (2003). In *Buckley*, two additional governmental interests were offered to support FECA’s contribution limits: (1) the creation of equal political access for all citizens, and (2) the deceleration of the rising costs of campaigns, which would in turn offer political opportunities to less wealthy individuals. *Buckley*, 424 U.S. at 25-26. However, the Court found it unnecessary to evaluate these reasons because the stated anti-corruption objective was sufficient to uphold the limits. *Id.* at 26.

26. 126 S. Ct. 2479 (2006).

27. *See id.* at 2490 (plurality opinion) (disappointing critics by “declin[ing] . . . to reconsider *Buckley*” in light of its rank as well-established precedent); *see also* *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 631 (1996) (Thomas, J., dissenting) (arguing that, contrary to *Buckley*, strict scrutiny should be the test for both campaign expenditure limitations and contributions).

28. Several Justices have criticized the Court’s application of less rigorous scrutiny to

the big question in the big debate: Is the *Buckley* framework truly a superior solution and, as such, deserving of the faithful application of *stare decisis*, or is the outcome of *Randall* merely indicative of the Court's division, and consequential paralysis?²⁹ There are merits to both conclusions and each will be discussed in turn.

This Note will accordingly explore the *Randall* decision and the reasoning that substantiates its final disposition. Part II presents some historical insight through an evaluation of relevant precedent and other issues peripheral to campaign finance.³⁰ In Part III, campaign finance reform and the history of laws specific to Vermont are discussed.³¹ Part IV supplies the facts significant in *Randall*,³² and Part V provides a comprehensive analysis of the Court's plurality, concurring, and dissenting opinions.³³ Part VI offers a glimpse of the legal and societal implications of *Randall*, touching the current state of the law.³⁴ Finally, concluding remarks can be found in Part VII.³⁵

II. CAMPAIGN FINANCE LAW: HISTORICAL BACKGROUND

A. Pre-Buckley v. Valeo

Attempts to regulate campaign finance date back to the mid-nineteenth century.³⁶ The first steps toward legislation can be imputed to the post-Civil War industrial expansion and the amassing of wealth by a small, affluent

contribution limits. See, e.g., *Shrink Mo.*, 528 U.S. at 405-10 (Kennedy, J., dissenting); *id.* at 410-20 (Thomas, J., dissenting); *Colorado I*, 518 U.S. at 635-44 (Thomas, J., dissenting); *Randall*, 126 S. Ct. at 2501-06 (Thomas, J., concurring only in the judgment). In fact, Justices Stevens, Scalia, and Thomas all unambiguously called for *Buckley* to be overturned, with other Justices leaning in that direction. See *Randall*, 126 S. Ct. at 2506-07 (Thomas, J., concurring only in the judgment and Scalia, J., joining); *id.* at 2506-11 (Stevens, J., dissenting).

29. The Court is deeply divided, six ways in fact, on the issue of campaign finance regulation. See *Supreme Court 2005*, *supra* note 14, at 287. There was hope that the recent change in Court membership would create a different result. *Id.* Instead however, the Court retained its traditional individual rights approach, which focuses on "whether and to what extent . . . [a] regulation comports with the First Amendment." Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1706 (1999).

30. See *infra* notes 36-119 and accompanying text.

31. See *infra* notes 120-34 and accompanying text.

32. See *infra* notes 135-66 and accompanying text.

33. See *infra* notes 167-258 and accompanying text.

34. See *infra* notes 259-73 and accompanying text.

35. See *infra* notes 274-75 and accompanying text.

36. See *United States v. Int'l Union United Auto., Aircraft, & Agric. Implement Workers (UAW-CIO)*, 352 U.S. 567, 570 (1957) [hereinafter *Automobile Workers*].

sector of the population.³⁷ This acute concentration of capital led to concerns that the elite could pervade American politics using money and power.³⁸ Congress enacted several pieces of legislation between the years 1867 and 1947, but early efforts at campaign finance reform were often anemic in one way or another and efforts to enforce them crumbled.³⁹

In 1972, Congress passed comprehensive legislation in the form of the Federal Election Campaign Act (“FECA”).⁴⁰ Original FECA provisions consolidated earlier reforms and included mandatory disclosures of political donations exceeding \$100, and of candidate and political committee expenditures greater than \$1,000 per year.⁴¹ The Act embraced previous laws against the use of corporate and union general treasury funds for political purposes, but specifically approved the formation and

37. *Id.*

38. The first campaign finance legislation, passed by Congress in 1867, was the Naval Appropriations Bill (“NAB”), which prohibited government employees from soliciting contributions from naval yard workers. See Hoover Institution, Important Dates: Federal Campaign Finance Legislation, <http://www.campaignfinancesite.org/history/financing1.html> (last visited June 20, 2007). In 1883, the Civil Service Reform Act extended the NAB to all federal civil service workers, eliminating the requirement that these employees make campaign contributions. *Id.* Several futile disclosure laws followed, and American lawyer and statesman Elihu Root called for more effective legislation, stating that: “The idea is to prevent . . . the great aggregations of wealth from using their corporate funds, directly or indirectly, [to elect legislators willing to] vote for their protection and the advancement of their interests as against those of the public.” *Automobile Workers*, 352 U.S. at 571 (quoting E. ROOT, ADDRESSES ON GOVERNMENT & CITIZENSHIP 143 (R. Bacon & J. Scott eds. 1916)). Indeed, such legislation would “strike[] at a constantly growing evil”—namely, corruption. *Id.* President Theodore Roosevelt, in a 1905 address to Congress, spurred the widely-held, contemptuous view of “‘big money’ campaign contributions” by recommending that: “All contributions by corporations to any political committee or for any political purpose . . . be forbidden by law.” *Id.* at 572. Congress answered in 1907 with the Tillman Act, which prohibited direct contributions to federal candidates by corporations and nationally-chartered interstate banks. See Wayne Batchis, *Reconciling Campaign Finance Reform with the First Amendment: Looking Both Inside and Outside America’s Borders*, 25 QUINNIPIAC L. REV. 27, 33 (2006). Congress amended it to include public disclosure and expenditure requirements. *Id.* The first contribution limits were established by the Federal Corrupt Practices Act of 1910 (“FCPA”), which was revised in 1925 to extend the proscription of contributions to include “anything of value” and to introduce criminal penalties for corporate contribution. *McConnell v. FEC*, 540 U.S. 93, 116 (2003) (citing *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209 (1982)). One U.S. Senator described “‘one of the great political evils of all time’” as “‘the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions.’” *Automobile Workers*, 352 U.S. at 576; see also *Burroughs v. United States*, 290 U.S. 534 (1934) (upholding the FCPA). The end of World War II brought another change in the political climate: the influence of unions. See *McConnell*, 540 U.S. at 116-17. Congress reacted by limiting union contributions in the Hatch Act circa 1940, and eventually, through the Smith-Connally Act, which prohibited labor unions’ financial support of federal candidates altogether. *Id.* Restrictions were extended further still by the Taft-Hartley Act in 1947, which brought all union election-related expenditures within its prohibitions. *Id.* at 117.

39. See generally Batchis, *supra* note 38, at 33-35 (detailing campaign finance history and observing that the creation of the first political action committee in 1947 “allow[ed] systematic circumvention of laws designed to prevent ‘the pernicious influence of large campaign contributions.’” (quoting *McConnell*, 540 U.S. at 117)).

40. Pub. L. No. 92-225, 86 Stat. 3 (1972); see also *McConnell*, 540 U.S. at 117.

41. *McConnell*, 540 U.S. at 117-18; see also Whittaker, *supra* note 1, at 1068-69.

administration of separate segregated funds to be used for such purposes.⁴² However, dissatisfaction with FECA's results—further augmented by the Watergate scandal⁴³—facilitated amendments to the Act in 1974.⁴⁴ The new laws included rigorous contribution and spending limits applicable to both campaigns and committees, public financing for presidential general election campaigns, and provisions directing the formation of the Federal Election Commission, an independent regulatory agency that would enforce campaign finance directives.⁴⁵ The amendments attempted to “close[] the loophole” that had fostered circumvention of the contribution limits imposed on political committees.⁴⁶ Further still, limitations on individual contributions to any single candidate were capped at \$1,000 per election, in addition to an overall annual limitation of \$25,000.⁴⁷ These amendments became the subject of a landmark Supreme Court case, *Buckley v. Valeo*.⁴⁸ As the seminal campaign-finance case, *Buckley* merits a careful study before moving on.

B. Congress Asks and the Court Answers: *Buckley v. Valeo*

In *Buckley*, the court of appeals had upheld the 1974 FECA's contribution and expenditure provisions on the basis that they should be examined as “regulations of conduct rather than speech.”⁴⁹ The Supreme

42. *McConnell*, 540 U.S. at 118. As a general matter, corporations may not make direct or indirect contributions out of their general treasury funds. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). However, they can use treasury funds for some other activities, including ballot measures and issue campaigns. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793-95 (1978).

43. See *Watergate.info*, *Watergate: The Scandal That Brought Down Richard Nixon*, <http://watergate.info/> (last visited June 22, 2007) (“Watergate ushered in changes in campaign finance reform and a more aggressive attitude by the media.”); see also John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609 (2000) (discussing Watergate and the corruption involved).

44. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (amending the FECA of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)).

45. See *id.*; see also *McConnell*, 540 U.S. at 118-19.

46. *McConnell*, 540 U.S. at 118. Candidates could establish an unlimited number of PACs, thereby circumventing the limits placed on PAC contributions to the candidate. *Id.*

47. *Buckley v. Valeo*, 424 U.S. 1, 12-13 (1976). Under FECA, a contribution is broadly defined as “any gift, subscription, loan, advance, or deposit of money or anything of value made . . . for the purpose of influencing any election for Federal office.” 2 U.S.C.A. § 431(8)(A)(i) (1970); *Buckley*, 424 U.S. at 12-13. Individuals were also limited from spending \$1,000 per year “relative to a clearly identified candidate.” 2 U.S.C.A. § 608(e) (1970); *Buckley*, 424 U.S. at 1.

48. See generally *Buckley*, 424 U.S. 1.

49. *McConnell*, 540 U.S. at 120 (citing *Buckley v. Valeo*, 519 F.2d 821, 840-41 (D.C. Cir. 1975) (en banc) (*per curiam*) (relying on *United States v. O'Brien*, 391 U.S. 367 (1968), in upholding the constitutional validity of FECA's contribution and expenditure limits)). *But see Buckley*, 424 U.S. at

Court, however, determined that the Act's limitations were "direct restraints on [content-based] speech," and therefore had to be reconciled with the First Amendment.⁵⁰ Under a modified standard of scrutiny, the Court found the Government's justifications for its constitutional transgressions sufficient to uphold FECA's contribution limits only.⁵¹ Use of this lower standard to evaluate contribution provisions was defended on the grounds that such

16 ("We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restriction on conduct upheld in *O'Brien* Some forms of communication made possible by the giving and spending of money involve speech alone [T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.").

50. *McCConnell*, 540 U.S. at 120 (citing *Buckley*, 424 U.S. at 20-21). While it is axiomatic that Congress has the constitutional power to regulate the time, place, and manner of elections, when restrictions are content-based they are given greater protection and must be evaluated under strict scrutiny. See U.S. CONST. art. I, § 4; see also John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1120 (stating that "[i]f the law is content-based, then the Court proceeds to apply strict scrutiny, and usually finds the law unconstitutional"). However, the Court in *Buckley* did not explicitly address whether the restrictions were content-based or viewpoint neutral, stating simply that "[a]lthough the Act does not focus on the ideas expressed by persons or groups subject to its regulations," "the governmental interests advanced in support of the Act involve 'suppressing communication.'" *Buckley*, 424 U.S. at 17, 39 ("The restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'"). For other discussions about content-based restrictions on speech in the area of campaign finance, see *Landell v. Sorrell*, 382 F.3d 91, 110 (2d Cir. 2004) ("As a regulation of the amount that a candidate can spend on speech made 'for the purpose of influencing an election,' Vermont's expenditure limits are a content-based restriction on speech 'Content-based regulations are presumptively invalid'[,] . . . [t]o uphold a content-based restriction on speech, the government must prove the existence of a compelling state interest to support the restriction, and that the restriction is narrowly tailored to advance that interest." (citations omitted)). Other courts often fail to directly discuss the distinction, but implicitly meet this prerequisite by observing that expenditure regulations are not subject to the lower standard of scrutiny applied to time, place, and manner restrictions. See, e.g., *Buckley*, 424 U.S. at 18 ("Nor can the Act's contribution and expenditure limits be sustained, as some of the parties suggest, by reference to the constitutional principles reflected in such decisions as *Cox v. Louisiana* . . . ; *Adderly v. Florida*; and *Kovacs v. Cooper*. Those cases stand for the proposition that the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication."). But see *Randall v. Sorrell*, 126 S. Ct. 2479, 2508 (2006) (Stevens, J., dissenting) (stating that Act 64's "limits on expenditures are far more akin to time, place, and manner restrictions than to restrictions on the content of speech" and "[l]ike Justice White, I would uphold them 'so long as the purposes they serve are legitimate and sufficiently substantial'" (quoting *Buckley*, 424 U.S. at 264 (White, J., concurring and dissenting) (failing to discuss the distinction between content-based and content-neutral restrictions))); *FEC v. Beaumont*, 539 U.S. 146 (2003) (same).

51. *Buckley*, 424 U.S. at 25-26. Recognizing that the rights of political association and participation are not absolute, the Court reasoned that even a considerable infringement on these protected rights "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* at 25. The Court then declined to reach peripheral justifications, and found that the objective of preventing corruption was a "weighty interest," "sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling." *Id.* at 26-29.

restrictions have only a marginal impact on the capacity of political players to engage in the type of free speech associated with public elections.⁵²

Conversely, the unforgiving First Amendment restrictions imposed by most of the expenditure limitations compelled the Court to invalidate these infringing provisions.⁵³ Under the more rigid form of scrutiny commonly applied to equal protection claims, the Court held that the Government's interests in the prevention of corruption and equalizing speech⁵⁴ were not sufficient "to justify the restriction on the *quantity* of political expression" of a particular candidate.⁵⁵ Because "virtually every means of communicating

52. *Id.* at 20-21. The Court adds:

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. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.

Id. at 21. However, this distinction has been criticized because "it completely misses the point of why people make contributions and independent expenditures." Daniel R. Ortiz, *Election Law as its Own Field of Study*, 32 LOY. L.A. L. REV. 1217, 1223 (1999). Indeed, people contribute to campaigns to help their chosen candidate prevail in an election so that, as elected legislators, they can make favorable changes in the law. *Id.* By this logic, the infringement on the First Amendment rights of campaign contributors goes farther than the first-degree limits on their direct and coordinated contributions. *But see Buckley*, 424 U.S. at 21 (arguing that contribution limits are indirect restraints on speech and, as such, are different in kind).

53. *See Buckley*, 424 U.S. at 44 (applying what was labeled as "exacting scrutiny" to expenditure limits). FECA defines expenditures as: "[A] purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of influencing" any election for "Federal office." *Id.* at 147. The *Buckley* Court later narrowly construed the term "expenditure" to cover only communications that "advocate the election or defeat of a clearly identified candidate for federal office," and do so using express terms such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 43-44 & n.52.

54. *See id.* at 48-49 (recognizing that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). *Id.* The Government had argued in *Buckley* that FECA's stringent expenditure limits could be justified on the basis that individuals and groups would have a more equalized ability to influence elections and issues. *Id.* at 48. However, the Court rejected this argument as contrary to the purpose of the First Amendment. *Id.* at 49; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964) (recognizing the aim of the First Amendment is "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (quoting *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S. 476, 484 (1957))).

55. *Buckley*, 424 U.S. at 55 (emphasis added). In addition to its approval of limits on individual contributions, the Court also upheld disclosure requirements and public financing provisions. *See Buckley*, 424 U.S. at 60-87. However, the Court struck down several expenditure provisions that too far eroded First Amendment liberties. *See id.* at 39-59. Specifically, these included limits on candidate expenditures, on contributions by candidates and their families to their own campaigns, and on expenditures disbursed independently and not coordinated with candidates or their respective committees. *See id.*

ideas in today's mass society requires the expenditure of money," core First Amendment rights were implicated and heightened scrutiny was necessary.⁵⁶ On balance, the risk of corruption presented by an individual donor is quite low.⁵⁷

Importantly, a review of the Court's decisional record reveals that *Buckley* has governed its analysis in every major apposite case since 1976.⁵⁸ In *Randall*, the Court evinced a willingness to further solidify *Buckley*'s position as the cornerstone of campaign finance jurisprudence.⁵⁹ Thus, *Buckley* will frequently be revisited in Part V.⁶⁰

C. *The Buckley Aftermath*

In order to harmonize FECA with the *Buckley* result, further amendments were enacted in 1976 and 1979.⁶¹ The years following *Buckley* generated several encumbrances for reform proponents: soft money,⁶² sham

56. *Buckley*, 424 U.S. at 19. Indeed, "[t]he 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." *Id.*; see also Whittaker, *supra* note 1, at 1072 (confirming that "[t]o overcome this heightened burden, the Government would have to show a substantial governmental interest").

57. See Whittaker, *supra* note 1, at 1073. Because the risk of corruption was not a sufficient governmental interest in the context of expenditure limitations, and because the Government's additional justification of equalizing access was mistaken, the Court found *all* of FECA's independent expenditure limitations unconstitutional. See *Buckley*, 424 U.S. at 45-50.

58. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 134 (2003); *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000); *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 610 (1996) (plurality opinion); *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 259-60 (1986); *FEC v. Nat'l Conservative Political Action Comm. (NPAC)*, 470 U.S. 480, 491 (1985); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 194-95 (1981) (plurality opinion).

59. See *Randall v. Sorrell*, 126 S. Ct. 2479, 2488-91 (2006) (plurality opinion) (stating that "this Court has repeatedly adhered to *Buckley*'s constraints," that "[s]tare decisis . . . avoids the instability and unfairness that accompany disruption of settled legal expectations," and that "we do not perceive the strong justification that would be necessary to warrant overruling so well established a precedent").

60. See *infra* notes 167-258 and accompanying text.

61. See Hoover Institution, Important Dates: Federal Campaign Finance Legislation, <http://www.campaignfinancesite.org/history/financing1.html> (last visited June 20, 2007). These modifications placed a ceiling of \$20,000 per year on individual contributions to national parties, as well as a maximum of \$5,000 per year on individual contributions to any one PAC. *Id.* The permissible value of in-kind donations by volunteers was increased, together with the amounts triggering disclosure of contributions. *Id.* Unlimited spending was permitted by state and local parties in their efforts to register voters, conduct get-out-the-vote campaigns, and distribute materials to volunteers. *Id.*

62. See *McConnell*, 540 U.S. at 122-26. The Court clarifies the distinction between "federal" or "hard" money and "nonfederal" or "soft" money. *Id.* at 122. The former is money that is subject to the contribution limits of FECA. *Id.* Based on FECA's definition of "contribution"—giving a gift or anything of value "for the purpose of influencing any election for Federal office"—contributions intended for state and local politics are outside of the ambit of the Act. *Id.* (quoting 2 U.S.C.A. § 431(8)(A)(i)). Thus, at this juncture in time, individuals could contribute this "soft" money to political parties—even national affiliates—so long as they were for the purpose of impacting non-

issue advertising,⁶³ and certain practices during the 1996 elections.⁶⁴ As politicians were able to skirt many FECA requirements, members of Congress realized that some of the Act's provisions were ringing hollow.⁶⁵

federal elections. *Id.* As a result of this money-mixing, the line between hard and soft money blurred. *See id.* at 123-24. Parties were able to use soft money to partially fund certain events, such as get-out-the-vote drives and the costs of some advertisements. *Id.* The *McConnell* Court was quite critical of this practice, and rightfully so. *See generally id.* at 122-26. The nominal (or sham) purposes for these contributions were non-federal, while the manipulation of federal elections was the truly intended result. *See id.*; *see also* Shays v. FEC, 414 F.3d 76, 80 (2005). With soft money increasingly out of the purview of federal campaign finance law, the channeling of contributions to national political parties became the name of the game. *McConnell*, 541 U.S. at 124 (indicating that the two major parties spent soft money in "exponentially" increasing increments: of total spending, "soft money accounted for 5% (\$21.6 million) in 1984, 11% (\$45 million) in 1988, 16% (\$80 million) in 1992, 30% (\$272 million) in 1996, and 42% (\$498 million) in 2000"). In fact, soft money was further distributed to state parties, who could even more loosely (and secretly) attribute non-federal money to federal purposes. *Id.* Interestingly, the *McConnell* Court explored the psychological component underlying contributions by big corporations, whose executives often feel that if they do not give large amounts, they will be "shun[ned] or disfavor[ed]" by legislators and thus at a political and economic disadvantage. *Id.* at 125 n.13 (citing declaration of Gerald Greenwald, United Airlines). The Court also cited evidence that "not only were such soft-money contributions often designed to gain access to federal candidates," candidates frequently and deliberately persuaded donors to contribute soft money to sources that would eventually pass the benefit back to them. *Id.* at 125. This loophole provided the central basis upon which Congress enacted the BCRA. *See id.*

63. *See McConnell*, 540 U.S. at 126-29. Under FECA, "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" were subject to its restrictions. *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (emphasis added) (footnote omitted). As *McConnell* describes, this led to a new brand of advertising: the "issue ad." *McConnell*, 540 U.S. at 126-29. Therefore, while the funding of commercials using the candidate's name and containing "magic words" such as "vote" or "elect" were proscribed, issue ads could be financed with soft money and circulated without complying with FECA's disclosure requirements. *Id.* at 126. Similar to how the line between soft money and hard money became blurred by national party collection, the line between issue ads and express advocacy became distorted as the two grew to be "functionally identical." *Id.* In fact, it has been said that "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.* at 126-27 n.16. Through these ads, large corporations and unions were able to use money from their general treasuries to skirt FECA regulations. *Id.* at 127-28; *see also* Linda Greenhouse, *Justices Revisit Campaign Finance Issue*, N.Y. TIMES, Jan. 19, 2007, available at <http://www.nytimes.com/2007/01/20/Washington/20scotus.html?ex=1326949200&en=90292ee8584e453f&ei=5088&partner=rssnyt&emc=rss> (discussing the BCRA's blackout period on corporate-sponsored election ads and how it must be reconciled "with the free-speech rights of groups that say they are engaged in grass-roots lobbying, the sort of genuine issue advertising the First Amendment protects").

64. *See McConnell*, 540 U.S. at 129-132. The Court in *McConnell* relied heavily on a 1998 Senate Committee on Governmental Affairs report, which evaluated campaign finance in the 1996 elections. *Id.* at 129. The report detailed the raising of soft money, the practice of which entailed granting large contributors special access to high-ranking officials and candidates. *Id.* at 130. Coffees, overnights, dinners, and meetings were just some examples of "quality time" allowed donors, whose funds would be used for sham issue advertising and other roundabout ways to dodge FECA's restrictions. *Id.* at 130 n.28.

65. *See id.* at 129-30 (recognizing one Senator's observation that there was "overwhelming evidence that the twin loopholes of soft money and bogus issue advertising have virtually destroyed

It was manifest that new legislation was necessary, but twenty-six years of cases came before it.⁶⁶

*First National Bank of Boston v. Bellotti*⁶⁷ was decided in 1978, just two years after *Buckley* was handed down. The Massachusetts statute at issue criminalized bank and corporate expenditures made in connection with select referendum proposals.⁶⁸ The Court concluded that the statute violated the First Amendment.⁶⁹ The Commonwealth advanced several justifications for the law, including that corporate participation in the referendum proposals would “destroy the confidence of the people in the democratic process,” as corporations are generally more wealthy and influential than individuals.⁷⁰ However the Court disagreed, stating that “there has been no showing that the relative voice of corporations has been overwhelming”⁷¹ Furthermore, the risk of corruption that necessarily accompanies the election of *candidates* for public office is simply not present when the vote is on *issues* of public concern, as with a referendum vote.⁷²

our campaign finance laws, leaving us with little more than a pile of legal rubble” (citing S. REP. S. 105-167, at 4535 (1988)); *id.* at 129 (stating that “the ‘soft money loophole’ had led to a ‘meltdown’ of the campaign finance system that had been intended ‘to keep corporate, union and large individual contributions from influencing the electoral process’”).

66. See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386 (2000); *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 610 (1996) (plurality opinion); *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 259-60 (1986); *FEC v. Nat’l Conservative Political Action Comm. (NPAC)*, 470 U.S. 480, 491 (1985); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 194-95 (1981) (plurality opinion). FECA was enacted in 1972, but the next big renovation of campaign finance laws did not come until the BCRA in 2002. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. FEC*, 540 U.S. 93, 122 (2003) (observing that three chief developments in the years following *Buckley*—soft money, sham advertising, and the Senate report on the 1996 elections— influenced Congress and its bid for further legislation “regulat[ing] the role that corporations, unions, and wealthy contributors play in the electoral process”).

67. 435 U.S. 765 (1978).

68. See *Bellotti*, 435 U.S. at 767-68; see also MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977). The appellants in *Bellotti* were two national banking associations and three business corporations prohibited by the statute from donating or spending “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.” *Bellotti*, 435 U.S. at 756 (citing ch. 55, § 8). Additionally, “[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.” *Id.* at 768 (citing ch. 55, § 8).

69. See *Bellotti*, at 777.

70. *Id.* at 789.

71. *Id.* at 789 (declining to really consider the appellants’ argument that corporations “would exert an undue influence on the outcome of [] referendum vote[s]” because there was no support for it in the record).

72. *Id.* at 789-90. (“Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution ‘protects expression which is eloquent no less than that which is

Although FECA's expenditure limitations were invalidated in *Buckley*, a similar matter resurfaced in *Austin v. Michigan Chamber of Commerce*,⁷³ where the Court upheld—most notably under a strict scrutiny analysis—a Michigan statute that prohibited corporations from drawing on general treasury funds to make independent expenditures in association with candidates for state office.⁷⁴ At the outset, the Court reasoned that if the statute's restriction of political corporate expenditures burdened free speech, then it would have to be narrowly tailored to serve a compelling state interest.⁷⁵ By reference to *Federal Election Commission v. Massachusetts Citizens For Life, Inc. (MCFL)*,⁷⁶ the Court determined that requiring a corporation to spend only out of a special segregated fund indeed implicated the First Amendment freedoms of expression and speech.⁷⁷ Nevertheless, the State's interests in preventing corruption and the appearance of corruption were sufficiently compelling to sustain the statute's corporate expenditure limits.⁷⁸ This was so because a corporation is capable of accumulating considerable assets and therefore may be in the position to

unconvincing.” (footnote omitted) (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)). Further support for this premise is offered by *Buckley*, which states that: “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .” *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

73. 494 U.S. 652 (1990).

74. *See id.* at 660-61 (noting that corporations could however, under the statute, use funds from a separate fund for political purposes, and that “[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views”). In *Austin*, it was asserted that the interest in preventing corruption and the “corrosive and distorting effects [on the political process] of immense aggregations of wealth” was vulnerable to the effect of free corporate communication, and thus such communication must be censored. *Id.* at 684 (Scalia, J., dissenting). However, in an atypical display of support for strict scrutiny, the Court upheld the statute under that standard. *Id.* at 666 (“Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest. We find that, even under such strict scrutiny, the statute's classifications pass muster under the Equal Protection Clause.” (citation omitted)).

75. *Id.* at 655.

76. *FEC v. Mass. Citizens For Life, Inc. (MCFL)*, 479 U.S. 238, 251 (1986) (plurality opinion) (discussing violation of the First Amendment as applied to a non-profit organization). The Chamber asserted that it was a non-profit organization similar to that in *MCFL*, and thus should not be restricted from disbursing funds from its general treasury account. *See Austin*, 494 U.S. at 658.

77. This corporate requirement had to pass First Amendment muster because, the Court reasoned, a small non-profit corporation would face certain pecuniary and tactical hardships in administering a segregated fund. *See Austin*, 494 U.S. at 657. The Court further acknowledged that this might act as a deterrent for political speech. *Id.* at 658.

78. *See id.* at 660 (holding that the State's rationale for the independent expenditure limits on corporation was sufficient before going on to complete a proper strict scrutiny analysis by determining whether the statute was narrowly tailored to complete its objective).

“obtain ‘an unfair advantage in the political marketplace.’”⁷⁹ Because this “‘resource[] amassed[ing]’” structure is essentially a state-created entity, the Court was readily able to conclude that the State’s proffered justifications were sufficient.⁸⁰ Finally, the Court found these justifications were suitably tailored to meet its objective of “eliminating from the political process the corrosive effect of political ‘war chests’ amassed with the aid of the legal advantages given to corporations.”⁸¹

Turning away from the corporate variety for a time, the Court in *Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I)*⁸² concluded that application of FECA’s Party Expenditure Provision, which limited expenditures “in connection with” a general congressional campaign,⁸³ to independent individual and political committee expenditures did not comport with the First Amendment.⁸⁴ The Colorado Republican Federal Campaign Committee (“Committee”) had purchased radio advertisements attacking an anticipated Democratic senatorial candidate, after having already exhausted its FECA allotment.⁸⁵ Under the *Buckley* rubric, FECA provisions that impose limits on direct—or indirect but coordinated—contributions are enforceable.⁸⁶ However, in *Colorado I*, the “advertising campaign [had been] developed by the [Committee] independently and not pursuant to any . . . understanding with a candidate.”⁸⁷ Of course, the FEC advanced its routine compelling interest: the need to disconnect corruption from American politics.⁸⁸ However, the

79. *Id.* at 659 (quoting *MCFL*, 479 U.S. at 257).

80. *See id.* at 659 (quoting *MCFL*, 479 U.S. at 257). Essentially, the economic advantages enjoyed by corporations are given to them by the State. *Id.* Thus, the political power that incidentally accompanies this economic enhancement can and should be subject to greater State control. *See id.* at 658-59.

81. *See id.* at 666; *see also* Whittaker, *supra* note 1, at 1079 (arguing that the Court’s definition of corruption was moving further than the traditional quid pro quo approach employed in *Buckley*, and speculating on this new brand of corruption).

82. 518 U.S. 604 (1996).

83. *Id.* at 608. “The evil of coordinated expenditures is that they allow the candidate to control resources that he would otherwise be legally precluded from controlling.” Scott E. Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?*, 49 CATH. U. L. REV. 133, 145 (1999) (citing Rep. Comments of the Nat’l Republican Senatorial Comm. to the FEC, 15 (May 30, 1997)).

84. *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 613 (1996). This case eventually returned to the Supreme Court in 2001 to resolve certain issues unaddressed in 1996. *See FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431 (2001).

85. *Colorado I*, 518 U.S. at 612.

86. *See Buckley v. Valeo*, 424 U.S. 1, 23-26, 46-48 (addressing the argument that “expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse”).

87. *Colorado I*, 518 U.S. at 614 (treating the “expenditure, for constitutional purposes, as an ‘independent’ expenditure, not an indirect campaign contribution”).

88. *Id.* at 616. The Court’s response: “We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction.” *Id.* The Court compared its previous observation in *Buckley*, that the lack of coordination in the context of

Court found that the disconnect lay in the legislative record, where the justifications for the “markedly greater burden on basic freedoms” came up short.⁸⁹ Thus, the Provision was constitutionally invalid *as applied* to the Committee.⁹⁰

The Court, in *Nixon v. Shrink Missouri Government PAC*,⁹¹ determined whether *Buckley* controlled similar state campaign finance statutes.⁹² Obedient to its by-then-settled precedent, the Court again endorsed *Buckley* and declared its applicability to the several states.⁹³ In attempting to invoke the First Amendment’s protections, a political action committee and a candidate for Missouri state auditor together alleged that a Missouri statute

independent PAC expenditures helps to lessen the danger of quid pro quo exchanges, with the similar effect of independence on party expenditures. *See id.* (citing *FEC v. Nat’l Conservative Political Action Comm. (NPAC)*, 470 U.S. 480, 498 (1985)).

89. *Id.* at 617 (quoting *Buckley*, 424 U.S. at 44).

90. *Id.* at 618-19, 635-44. *Cf.* *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431 (2001) (upholding statute on facial challenge).

91. 528 U.S. 377 (2000).

92. *See id.* at 381-82; *see generally id.* (approving “the appearance of corruption” as a justification for First Amendment restrictions imposed by a Missouri statute).

93. *See id.* at 385-89 (giving a detailed account of the analytical structure laid out in *Buckley* and rejecting the request to relax *Buckley*’s standards). While the Court has not always articulated well its intention to apply differing standards to expenditure and contribution limits “affecting associational rights,” it did so explicitly in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 259-60 (1986), when it said that, “[W]e have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.’ It has, in any event, been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387 (2000) (quoting *MCFL*, 479 U.S. at 259-60). Interestingly, the *Shrink Missouri* majority avoids directly articulating its own standard, instead leaving the dissent to address it in a rather scornful tone. *Id.* at 405-10 (Kennedy, J., dissenting). Justice Kennedy argues that political speech during the electoral process is “the speech upon which democracy depends,” and that “the Court’s approach is unacceptable for a case announcing a rule that suppresses one of our most essential and prevalent forms of political speech.” *Id.* at 405. The Justice accuses the majority of failing to acknowledge the Court’s flawed precedent, and believes that “[i]t is our duty to face up to adverse, unintended consequences flowing from our own prior decisions . . . [T]he Court does not accept this obligation in the case before us. Instead, it perpetuates and compounds a serious distortion of the First Amendment resulting from our own intervention in *Buckley*.” *Id.* at 406. *Randall v. Sorrell* was thus not the first instance in which Justice Kennedy conveyed his disdain for *Buckley* and the Court’s willingness to adhere to it. *Id.*; *see also Randall v. Sorrell*, 126 S. Ct. 2479, 2501 (Kennedy, J., concurring only in the judgment). Consistent with his attitude in *Shrink Missouri*, the Justice expresses support for the *Randall* result, but remains cynical about the way it arrived there. *See id.* Justice Kennedy’s argument is that “[t]he universe of campaign finance regulation is one this Court has in part created and in part permitted by its course of decisions.” *Id.* He criticizes the plurality’s endorsement of its own ability to determine whether a contribution limit is too generous or restrictive, a feat he believes the Court should not attempt. *Id.*; *see also McConnell v. FEC*, 540 U.S. 93, 286-87 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Colorado I*, 518 U.S. at 626-31 (Kennedy, J., concurring in part and dissenting in part); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 695-713 (1990) (Kennedy, J., dissenting).

limiting contributions to state candidates for public office was unconstitutional.⁹⁴ Dissatisfied with the Eighth Circuit's misguided application of strict scrutiny, the Supreme Court insisted that a contribution limit be only "'closely drawn' to match a 'sufficiently important interest,'" and that the "dollar amount of the limit need not be 'fine tun[ed].'"⁹⁵ Missouri advocated the usual interests of preventing corruption, both real and apparent.⁹⁶ However, opponents of the statute argued that the Legislature ignored the substantial lack of empirical evidence identifying actual corrupt practices.⁹⁷ Rather, the evidence adduced was the Missouri voters' approval of an even more stringent ballot initiative.⁹⁸ The Court agreed with the Government that the public *perception* of corruption was enough to demonstrate the nexus between the contribution limits and the asserted governmental interest.⁹⁹ Although the proffered facts must be more

94. *Shrink Mo.*, 528 U.S. at 383. The Missouri statute at issue imposed limits ranging from \$275 to \$1,075 (adjusted for inflation and applying in the year the *Shrink Missouri* lawsuit was filed). See MO. REV. STAT. § 130.032 (1994). In fact, Missouri voters had previously approved a ballot initiative with more stringent limits. *Shrink Mo.*, 528 U.S. at 382. Shrink Missouri Government PAC had given the candidate, Fredman, the maximum amount allowable under the statute. *Id.* at 383. Suit was filed on the basis that the PAC would have given more to Fredman if permitted, and Fredman would have been able to "campaign effectively only with more generous contributions than § 130.032.1 allowed." *Id.*

95. *Shrink Mo.*, 528 U.S. at 387-88 (quoting *Buckley v. Valeo*, 424 U.S. 1, 30 (1976)). The court of appeals had held that contribution limits had to satisfy a higher level of scrutiny than that made compulsory by *Buckley*. *Id.* at 384. The Eighth Circuit had not only required Missouri to show compelling interests for the contribution limits and that they were narrowly tailored, but also found that Missouri's proffered interest in preventing corruption or the appearance thereof was insufficient to survive the applicable standard. *Id.* The Supreme Court reversed and articulated the appropriate lower standard for contribution limitations. *Id.* at 385. But see Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government PAC*, 66 MO. L. REV. 141, 152 (2001) ("The Court's current use of either strict or immediate scrutiny, however, is firmly grounded, and *Shrink*'s refusal to confront and clarify its standard of review in light of the prevailing approach is inexcusable.").

96. *Shrink Mo.*, 528 U.S. at 390 (recognizing that even without *Buckley* as precedent, the interests would certainly be legitimate).

97. *Id.* at 390-91 (reiterating the Eighth Circuit's mistake in faulting the State for not having actual evidence of corrupt practices or the perception thereof).

98. *Id.* at 382.

99. *Id.* at 390-91. In holding that the statute was not unconstitutional for lack of empirical evidence, the Court reasoned that perception was enough because of the need for a healthy system of government. *Id.* "Democracy works '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.'" *Id.* at 390 (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)). Despite the lack of quid pro quo evidence, the Court upheld the statute under the premise that the mere appearance of corruption is a sufficient governmental interest. See *id.* at 390; see also D. Bruce La Pierre, *The Bipartisan Campaign Reform Act, Political Parties, and the First Amendment: Lessons From Missouri*, 80 WASH. U. L.Q. 1101, 1105 (2002) ("[T]he Court transformed the government's interest in preventing actual quid pro quo corruption or the appearance of such corruption into a much broader . . . justification [for] contribution limits."). But see *Shrink Mo.*, 528 U.S. at 406 (Kennedy, J., dissenting) ("The Court is concerned about voter suspicion of the role of money in politics. Amidst an atmosphere of skepticism, however, it hardly inspires confidence for the Court to abandon the rigors of our

than “merely conjectural,” “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”¹⁰⁰

A facial challenge to the limit on coordinated spending finally came in *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado II)*.¹⁰¹ Because FECA’s definition of “contribution” was functional rather than formal, it included “expenditures made by any person in cooperation, consultation, or concert, with . . . a candidate, his authorized political committees, or their agents.”¹⁰² Thus, although independent expenditure limitations were unconstitutional under *Buckley*, “[e]xpenditures coordinated with a candidate” were contributions under the Act.¹⁰³ Without this qualification, the FEC argued, donors could circumvent lawful individual contribution restrictions by donating to political parties who would then inevitably spend toward their intended beneficiary.¹⁰⁴ Indeed, it was for this reason that the Court, under the lower standard of scrutiny, found that FECA’s limits on coordinated party spending were closely drawn to correspond with the governmental interest in preventing corruption.¹⁰⁵ In therefore finding the provision to be in accord with the First Amendment, the Court rejected the Commission’s facial challenge.¹⁰⁶

traditional First Amendment structure.”)

100. *Shrink Mo.*, 528 U.S. at 391-92.

101. 533 U.S. 431 (2001). *Colorado II* was a facial challenge to the same statute found unconstitutional as applied to the Colorado Republican Party’s independent expenditures in connection with a senatorial campaign. *Id.* at 437. The case was remanded for a consideration of the facial challenge, which posed the question of whether *all* limits on expenditures by a political party in connection with congressional campaigns are unconstitutional. *Id.* The Court rejected the constitutional claims in *Colorado II*. *Id.*

102. *Id.* at 438.

103. *Id.*

104. *Id.* at 447. The Government asserted that the controversial expenditures should be dealt with the same because they are “as useful to the candidate as cash, and that such ‘disguised contributions’ might be given ‘as a *quid pro quo* for improper commitments from the candidate.’” *Id.* at 446 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)). In this sense, coordinated expenditures would, in effect, be camouflaged contributions—a mere pretext at best. *See id.* at 447. Thus, the Court agreed with the FEC that coordinated party expenditures are the “functional equivalent” of contributions. *Id.*

105. *Id.* at 456. Because coordinated party expenditures were treated as the “functional equivalent” of contributions, the Court was able to apply the lower standard of scrutiny commonly applied to contribution limits under *Buckley*’s mandate. *See id.* at 447; *see generally* *Buckley v. Valeo*, 424 U.S. 1 (1976) (applying the “closely drawn” standard to contributions, rather than the more stringent “compelling interests narrowly tailored” standard).

106. *Colorado II*, 533 U.S. at 465 (holding that coordinated party expenditures, unlike expenditures in fact independent, may be constitutionally limited to reduce circumvention of contribution limits).

D. A New Era: The BCRA and *McConnell v. FEC*

The Bipartisan Campaign Finance Reform Act of 2002 (“BCRA”), also dubbed the McCain-Feingold bill, was an overhaul of all methods of regulating political capital.¹⁰⁷ Notable provisions of the BCRA included its blanket prohibition on all soft money flowing in and out of national parties.¹⁰⁸ Analogous restrictions were placed on state and local party operations, although autonomy with respect to contributions to Political Action Committees (“PACs”) was preserved.¹⁰⁹ Not surprisingly, federal candidates and officeholders were not permitted to raise, receive, or spend soft money.¹¹⁰ Furthermore, issue ads purporting to be non-partisan, but pointing to specific federal candidates and being paid for by soft money from corporations and labor unions, were given temporal, source, and disclosure requirements.¹¹¹ The BCRA also required source disclosures

107. See Pub. L. No. 107-155, 116 Stat. 81 (2002). “BCRA is the most recent federal enactment designed ‘to purge national politics of what was conceived to be the pernicious influence of “big money” campaign contributions.’” *McConnell v. FEC*, 540 U.S. 93, 115 (2003) (quoting *Automobile Workers*, 352 U.S. 567, 572 (1957)). The bill was propagated by Senators John McCain and Russ Feingold, but President George W. Bush signed the bill into law with some reservations: “I believe that this legislation, although far from perfect, will improve the current financing system for Federal campaigns.” Press Release, The White House, President Signs Campaign Finance Reform Act (Mar. 27, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020327.html>.

108. *McConnell*, 540 U.S. at 134. Section 323(a) is added by the BCRA to FECA, and “takes national parties out of the soft-money business.” *Id.* at 133. Section 323(a) provides that “national committee[s] of a political party . . . may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.” 2 U.S.C.A. § 441i(a)(1) (West Supp. II 2003).

109. *McConnell*, 540 U.S. at 133-34. This is a general prohibition on the spending of soft money by state and local party political groups to fund a “federal election activity.” *Id.* at 134. A federal election activity is narrowly defined as one of the following: (1) voter registration efforts if occurring within 120 days before an election; (2) get-out-the-vote activities for an election in which a federal candidate is on the ballot; (3) public communications that, in conjunction with identifying a particular candidate, either promote or oppose him one way or another; or (4) services performed by an employee of a state or local party affiliate who spends at least twenty-five percent per month of his paid time on activities associated with a federal election. 2 U.S.C.A. § 431(20)(A)(i)-(iv) (West Supp. 2003). As a corollary to § 323(b), § 323(f) prevents circumvention of the limits on party committees by disallowing state and local candidates from collecting and using soft money to fund communications supporting or opposing a federal candidate. See *McConnell*, 540 U.S. at 134.

110. *McConnell*, 540 U.S. at 134. More specifically, § 323(e) prohibits Members of Congress, federal officials, and candidates from raising soft money *in connection with a federal election* (except for non-profits). *Id.*

111. See BCRA, tit. II, § 203(b) (codified at 2 U.S.C.A. § 441b(b)(2)(C) (West Supp. 2003)). BCRA labels these ads “electioneering communications,” and prohibits the use of corporate or union money to purchase advertisements that refer to a clearly identified federal candidate with sixty days prior to a general election or thirty days prior to a primary. See § 201(a) (codified at 2 U.S.C.A. § 434(f) (West Supp. 2003)); also, see *supra* note 63 for a discussion of “sham” advertising. Any advertisements run within those times and which identify a federal candidate must be financed with regulated, hard money or with individual donor contributions. BCRA, tit. II, § 201(a).

under certain circumstances.¹¹² Finally, hard-money limits were raised, perhaps to offset the effect of newly-stifled soft money sources.¹¹³

Constitutional challenge to the BCRA came in *McConnell v. Federal Election Commission*,¹¹⁴ where the Court upheld most provisions of the mixed-bag piece of legislation. The Court again applied the less rigorous “closely drawn” standard employed by *Buckley* and its progeny to campaign contributions.¹¹⁵ In rejecting the plaintiffs’ argument that strict scrutiny was the relevant standard, the Court noted that, “[c]onsiderations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.”¹¹⁶ The fact that § 323 restricted not only contributions, but also the *spending* and *solicitation* of soft money, was of no moment to the Court, which stated only that “it is irrelevant that Congress chose in § 323 to regulate contributions on the demand rather than the supply side.”¹¹⁷ The Court opined that the spending limits, designed to prevent circumvention of the contribution limits, did not burden speech any more heavily than

112. See BCRA, tit. II, § 201(a) (codified at 2 U.S.C.A. § 434(a)(11)(B) (West Supp. 2003)).

113. See BCRA, tit. III, § 307 (amending 2 U.S.C.A. § 441a(a)(1)(A) (West Supp. 2003)). The limits for individual contributions were raised from \$1,000 to \$2,000 per candidate per election. *Id.* Furthermore, the limit for individual contributions to national party committees was originally capped at \$20,000, but raised to \$25,000 by the BCRA. *Id.* Finally, the limit on individual contributions to state and local party committees was raised from \$5,000 to \$10,000. *Id.* Thus, while Title I focuses heavily on soft money bans, Title II grappled with sham issue advertising. See generally *McConnell v. FEC*, 540 U.S. 93 (2003).

114. Senator Mitch McConnell filed his constitutional challenge in district court only twenty minutes after the BCRA had been enacted. Whittaker, *supra* note 1, at 1086 (citing *Supreme Court Rules on Campaign Finance Case: The Legal and Political Impact of McConnell v. FEC* (C-SPAN television broadcast Dec. 11, 2003) (statement of Kenneth W. Starr), available at <http://www.brookings.edu/comm/events/20031211cfr.pdf>). A tripartite majority opinion was issued in the case, which was a 5-4 decision in favor of upholding most of the BCRA’s provisions. See generally *McConnell*, 540 U.S. 93 (2003).

115. See *McConnell*, 540 U.S. at 138 n.40; see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 23-26 (1976) (applying less rigorous scrutiny to FECA’s limits on contributions); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 195-96 (1981) (plurality opinion) (applying less rigorous scrutiny to contribution limits); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208-11 (1982) (applying less rigorous scrutiny); *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 456 (2001) (applying less rigorous scrutiny to coordinated expenditures because they were considered “functionally equivalent” to contributions by the Court); *Randall v. Sorrell*, 126 S. Ct. 2479, 2491-95 (2006) (plurality opinion) (applying less rigorous scrutiny to contribution limits, although limits still unable to pass muster); *Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 649-52 (9th Cir. 2007) (applying less rigorous scrutiny in the context of contributions to candidates during the signature-gathering phase of a recall election).

116. *McConnell*, 540 U.S. at 137-38.

117. *Id.* at 138.

traditional restraints on contribution.¹¹⁸ It then proceeded to uphold most of the BCRA's prohibitions and mandates.¹¹⁹

III. BACKGROUND ON VERMONT LAW

While their durability remains uncertain even after *Randall*, cases like *Buckley* and *McConnell* may be used by states to gauge the constitutionality of their own campaign finance laws. Vermont legislators, much like members of Congress, have grappled with campaign finance regulation for years.¹²⁰ In 1916, to dilute the influence of political money, the Vermont Legislature enacted mandatory disclosure requirements, which compelled the reporting of candidate expenditures and expenditures on a candidate's behalf.¹²¹ Limits on campaign spending in primaries followed in 1961,¹²² and then in 1971, expenditure ceilings were increased and imposed on general elections.¹²³ In the aftermath of *Buckley*, the Legislature repealed its spending restrictions.¹²⁴

Despite these efforts, the corrosive effect of quid pro quo arrangements had made corruption a prominent feature in State politics during the 1990s.¹²⁵ Public cynicism about campaign money received ample attention in the media—demonstrating the existence of a recognized governmental interest: the prevention of *perceived* corruption.¹²⁶ Indeed, several telling

118. *Id.* at 138-39 (“The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. That is not the case here.”)

119. *See generally id.* However, two major components of the BCRA were declared unconstitutional. *See* FEC Watch, *McConnell v. FEC*, Summary of the Supreme Court's Decision (Dec. 10, 2003), <http://www.fecwatch.org/law/court/mcconnelltable.asp> (last visited June 25, 2007). The first forced political parties, during a general election campaign, to choose between making limited coordinated or unlimited independent expenditures in aid of their chosen candidates. *Id.* The second prohibited minors from making contributions to political parties and candidates. *Id.*

120. *See* Landell v. Sorrell, 118 F. Supp. 2d 459, 464 (D. Vt. 2000), *aff'd in part and vacated in part*, 382 F.3d 91 (2d Cir. 2002), *rev'd sub nom.* Randall v. Sorrell, 126 S. Ct. 2479 (2006).

121. *See id.* at 464 n.3.

122. *See id.* at 464 n.4. Each state candidate was allowed \$7,500 in expenditures, a remarkable amount in 1961 dollars and relative to *Buckley's* limits. *Id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 7 (1976). The cost of media advertising, even when purchased by another, was regarded as the candidate's own disbursement under the 1961 laws. *See* Landell, 118 F. Supp. 2d at 464 n.4.

123. *See* Landell, 118 F. Supp. 2d at 464 n.5. Contribution limits of \$1,000 were introduced and applied to sources other than political parties. *Id.* While political parties retained their limitless spending capacities, contributions to parties were capped at \$1,000. *Id.*

124. *Id.* at 465.

125. *Id.*

126. *Id.* On the subject of newspaper coverage of citizen concern about campaign finance reform, the Court said that, “[w]hile much of the coverage is anecdotal and thus is not persuasive evidence of actual corruption, it does nevertheless demonstrate the attention these issues received in Vermont and conveys the type of pressure that legislators must have felt to react.” *Id.*; *cf.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (upholding statute without evidence of actual corruption and on the basis that perception of corruption is a sufficient concern).

examples of clandestine persuasion were recounted in *Landell v. Sorrell*, a district court case consolidated as *Randall v. Sorrell*, the subject of this Note.¹²⁷ At the same time, out-of-state control-seekers dumped large sums into the campaign accounts of Vermonters¹²⁸ and the pressure for reform in Vermont culminated, as it had for Congress, with the 1996 elections.¹²⁹

The state of Vermont law in 1997, when legislators resurrected campaign finance regulations for discussion, was not uncommon.¹³⁰ Candidates were not permitted to receive more than \$1,000 from any single individual, corporation, or labor union, whereas PACs could contribute up to \$3,000 to a candidate.¹³¹ Contributions to these same PACs were similarly limited to \$3,000.¹³² Perhaps decreasing the efficacy of these provisions, political parties were left unregulated.¹³³ Notably, Vermont provided candidates with a “voluntary” opportunity to comply with the State’s pre-*Buckley* limitations—a system which proved more idealistic than practical.¹³⁴

IV. FACTS AND PROCEDURAL HISTORY OF *RANDALL V. SORRELL*

Mindful of the rising public suspicion of big money in politics, the Vermont General Assembly enacted Act 64 during the 1997 legislative session after extensive hearings on the subject.¹³⁵ Enjoying scant opposition,

127. See, e.g., *Landell*, 118 F. Supp. 2d at 466 (noting that “[r]egarding donations from tobacco companies, . . . ‘it’s disturbing that Republican lawmakers, armed with \$25,450 in donations from tobacco giant Philip Morris, weakened an anti-smoking bill in the final hours of the 1997 session’”).

128. *Id.* (recognizing that the purchase of influence by out-of-state contributors has a substantial downside: “the cost is public trust”).

129. *Id.* (noting the large influx of special interest money to candidates during this time).

130. *Id.* at 465. See, e.g., ME. REV. STAT. ANN. tit. 21-A, § 1015(1) (1993) (\$500 per election limit on contributions for governor, \$250 for other statewide offices); FLA. STAT. § 106.08(1)(a) (2003) (\$500 limit per election contribution limit); S.D. CODIFIED LAWS § 12-25-1.1 (2004) (\$1,000 per year, or \$500 per election); MONT. CODE ANN. § 13-37-216(1)(a) (2005) (\$500 per election for governor, \$250 for other statewide offices).

131. *Landell*, 118 F. Supp. 2d at 465. Political committees were defined as a non-party group that received or distributed money “for the purpose of supporting or opposing one or more candidates or affecting the outcome of an election.” *Id.* (quoting former VT. STAT. ANN. tit. 17, § 2801(4) (2002)).

132. *Id.*

133. *Id.*

134. *Id.* (citing former VT. STAT. ANN. tit. 17, §§ 2841-42). However, there were significant decreases in participation each election cycle, going from ninety percent adherence in 1993 to under ten percent adherence in 1998. *Id.*

135. See VT. STAT. ANN. tit. 17, §§ 2801-2883 (“Act 64”); see also *Landell*, 118 F. Supp. 2d at 466. Many legislative committees considered Act 64 during its drafting phase. *Id.* Over sixty-five hearings were held and more than 145 witnesses interviewed. *Id.* Evidence considered by the Legislature included campaign finance summaries for various elections, media statistics during election times, citizens’ polls, and testimony regarding the pressure to raise funds. *Id.* at 467. In

the bill was passed by bipartisan enthusiasts in both houses of the Legislature, and Governor Howard Dean signed the bill into law without hesitation.¹³⁶

A. Campaign Expenditures

If one thing was clear at the outset, it was that the Act was bold: it limited campaign expenditures of the non-corporate variety for the first time since *Buckley* declared them unlawful in a fairly transparent opinion.¹³⁷ The Act took effect immediately following the 1998 elections and each of its limitations was expressed in terms of a “two-year general election cycle.”¹³⁸ Key provisions limited the spending of major political players, including candidates for governor (\$300,000 maximum), lieutenant governor (\$100,000 maximum), other statewide offices (\$45,000 maximum), state senator (\$4,000 base, plus \$2,500 for additional seats in the district), two-member district state representative (\$3,000 maximum), and one-member district state representative (\$2,000 maximum).¹³⁹ Incumbents to statewide offices were capped at eighty-five percent of the amounts afforded their challengers,¹⁴⁰ and candidates seeking reelection to the State Senate or House encountered a similar ninety percent ceiling.¹⁴¹

turn, the Legislature made certain findings that were relied upon by the District Court, in addition to other evidence proffered at trial. *Id.* This became a strong point for critics of the *Randall* Court’s choice to not reevaluate *Buckley*, in light of the lower court’s extensive record.

136. Vermont Governor Howard Dean was a staunch supporter of Act 64, addressing the State’s legislature in 1997: “[M]oney does buy access, and we’re kidding ourselves and Vermonters if we deny it.” *Landell*, 118 F. Supp. 2d at 465. Compare Press Release, *supra* note 107 (describing President Bush’s reservations in signing BCRA).

137. See *Buckley v. Valeo*, 424 U.S. 1, 58 (holding that “the First Amendment requires the invalidation of the Act’s independent expenditure ceiling”). So why then did Vermont dare? Vermont legislators wanted to get the Court to reconsider *Buckley*. See Memorandum from Deborah L. Markowitz, Vt. Sec’y of State, to Senate Gov’t Operations/House Local Gov’t Comms. (Jan. 9, 2001) (asserting that some of Act 64’s provisions were enacted with the “express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in *Buckley v. Valeo*”), available at <http://vermont-elections.org/elections1/2001gamemocf.html>; see also Brain L. Porto, *Less is More and Small is Beautiful: How Vermont’s Campaign-Finance Law can Rejuvenate Democracy*, 30 VT. L. REV. 1, 8-9 (2005) (“Since its enactment, then, Vermont’s Act 64 has been on a collision course with *Buckley v. Valeo*. *Buckley* invalidated limits on campaign expenditures, but Act 64 imposed limits on campaign expenditures. This important disparity reflects the Vermont Legislature’s intent to challenge *Buckley* when it enacted Act 64.”).

138. This includes the primary and the general election. *Randall v. Sorrell*, 126 S. Ct. 2479, 2486 (plurality opinion) (2006). The Act defines expenditure as the “payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.” § 2801(3).

139. See *Randall*, 126 S. Ct. at 2486 (plurality opinion) (citing § 2805a(c)). Note here that, based on the Consumer Price Index, the expenditure limitations are indexed for inflation in odd-numbered years. § 2805a(e).

140. *Randall*, 126 S. Ct. at 2486 (plurality opinion).

141. *Id.*

Coordinated expenditures¹⁴² of greater than fifty dollars, made by individuals, political parties, and political committees, were attributed to the candidates themselves; as such, they were deducted from the candidates' own expenditure allowances.¹⁴³ Notably, the Act provided for "presumed" coordinated expenditures where party spending "primarily benefit[ed] six or fewer candidates . . . associated with the political party."¹⁴⁴

B. Campaign Contributions

The contribution limits imposed by Act 64 were at the time unparalleled. While these limitations were also based on a "two-year general election cycle," the ceilings on individual donations were not indexed for inflation.¹⁴⁵ The Act imposed a \$400 cap on contributions to candidates for governor, lieutenant governor, and other statewide offices.¹⁴⁶ Donors were also restricted in the amounts they could give to candidates for state representative (\$200) and state senate (\$300).¹⁴⁷ These limits were not confined to individuals; indeed they applied to political committees and parties as well.¹⁴⁸ Under these parameters, financial assistance by political parties was nearly foreclosed, especially since the local, state, and national levels of any political party were treated as a single entity for purposes of giving to any particular campaign.¹⁴⁹ Furthermore, political parties could

142. Coordinated expenditures are defined by Act 64 as expenditures "intentionally facilitated by, solicited by or approved by" the candidate's campaign. § 2809(b), (c). Essentially, this includes all funds greater than fifty dollars spent "on a candidate's behalf" or "that is coordinated with the campaign and benefits the candidate." See *Randall*, 126 S. Ct. at 2486 (plurality opinion).

143. *Randall*, 126 S. Ct. at 2486 (plurality opinion) (noting that "[t]hese provisions apply so as to count against a campaign's expenditure limit any spending by political parties or committees that is coordinated with the campaign and benefits the candidate").

144. *Id.* (citing § 2809(b), (d)).

145. *Id.* at 2486.

146. *Id.* (citing § 2805(a)). The Act defines contribution as "[a]ny expenditure made on a candidate's behalf . . . if it is 'intentionally facilitated by, solicited by or approved by' the candidate." *Id.* at 2486-87 (citing § 2809(a), (c)). Furthermore, "a party expenditure that 'primarily benefits six or fewer candidates who are associated with the' party is 'presumed' to count against the party's contribution limits." *Id.* at 2487 (citing § 2809(a), (d)). Thus, the effect of coordinated expenditures was duplicative: they counted against both the party's contribution limit and the candidate's expenditure limit. See *id.*

147. *Id.* (citing § 2805(a)).

148. *Id.* The Act defined a political party as "'any subsidiary, branch or local unit' of a party, as well as any 'national or regional affiliates' of a party (taken separately or together)." *Id.* (citing § 2801(5)).

149. *Id.* As the Court points out, any political party—its national, state, and local parties combined—may only give \$400 to a particular candidate. *Id.* While this may arguably have been a way to bait the Court into reevaluating *Buckley*, Act 64's proponents argued that it was grounded in legislative findings and evidence. See *Landell v. Sorrell*, 118 F. Supp. 2d 459, 466-74 (D. Vt. 2000).

receive no more than \$2,000 from any individual in a corresponding two-year cycle.¹⁵⁰

The impact of the above limitations was only slightly alleviated by the Act's exceptions. A candidate's own capital, the contributions of his family,¹⁵¹ the services of volunteers,¹⁵² and the costs of some meet-the-candidate functions¹⁵³ were excepted from regulation. The Act did, however, limit the amount of money candidates, political committees, and parties could amass from out-of-state sources.¹⁵⁴ This final limitation was held unconstitutional by the district court and was not afterwards contested.¹⁵⁵

C. Procedural Disposition

Neil Randall, a state legislator, initiated suit in federal court against Vermont Attorney General William Sorrell, charging that the Act's provisions were unconstitutional regulations of First Amendment freedoms.¹⁵⁶ By his complaint, Randall asserted that Act 64's expenditure limits were unlawful under *Buckley*, and further that its contribution limits were unconstitutionally low.¹⁵⁷ In response, Sorrell contended that *Buckley* was outdated.¹⁵⁸ He further disputed that the contribution limits were excessively low, pointing to Vermont's increase in either, or both, actual corruption or the public perception thereof.¹⁵⁹ The district court struck down the expenditure limits, staunchly relying on *Buckley* as precedent and in fact holding that they were *per se* unconstitutional.¹⁶⁰ In addition, while it held some of the contribution limits lawful, it invalidated on constitutional grounds the limits on political party contributions to candidates.¹⁶¹ However

150. *Randall*, 126 S. Ct. at 2486 (plurality opinion) (citing § 2805(a)).

151. *Id.* at 2487 (citing § 2805(f)).

152. *Id.* (citing § 2801(2)).

153. *Id.* (citing § 2809(d), which allows expenditures up to \$100).

154. *Id.* (citing § 2805(c)).

155. *Id.* Other provisions not disputed in *Randall* include disclosure and reporting requirements, and the voluntary public financing system for gubernatorial elections. *Id.*

156. *See id.* at 2487. Neil Randall was joined by individuals who had run for state office, Vermont voters and campaign contributors, and political parties and committees involved in State politics. *Id.*

157. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 462 (D. Vt. 2000).

158. *Id.*

159. *Id.* at 474.

160. *Id.* at 463-64; *see also Buckley v. Valeo*, 424 U.S. 1 (1976). *But cf. Randall*, 126 S. Ct. at 2511 ("We said in *Buckley* that 'expenditure limitations impose far greater restraints on the freedom of speech and association than do . . . contribution limitations,' but the *Buckley* Court did not categorically foreclose the possibility that some spending limit might comport with the First Amendment. Instead, *Buckley* held that the constitutionality of an expenditure limitation 'turns on whether the governmental interests advanced in its support satisfy the [applicable] exacting scrutiny.'" (citation omitted) (quoting *Buckley*, 424 U.S. 1, 44 (1976))).

161. *Randall*, 126 S. Ct. at 2487 (plurality) (citing *Landell*, 118 F. Supp. 2d 459).

the Second Circuit disagreed,¹⁶² and reversed the lower court on two bases: (1) that the Act's contribution limitations were all plainly constitutional, and (2) that its expenditure limitations might also be found constitutional if, on remand, the Government could prove the existence of compelling governmental interests.¹⁶³ Both sides sought appeal.¹⁶⁴

The United States Supreme Court granted certiorari and reversed, holding that both the contribution and expenditure violated the Free Speech Clause of the First Amendment.¹⁶⁵ The implications of the suit were significant: the Supreme Court had declined the opportunity to reexamine the paradigm set forth in *Buckley*, and at the same time, endorsed its own ability to determine how much is too much (or too little) when it comes to campaign finance.¹⁶⁶

V. ANALYSIS OF THE COURT'S OPINION

More than three decades after *Buckley*, the Supreme Court was faced with questions akin to those presented by FECA.¹⁶⁷ In holding that Act 64's expenditure limitations could be upheld if the Government demonstrated compelling, narrowly tailored interests in support of the regulations, the Second Circuit recognized that content-based speech was implicated and thus had to be protected by a higher level of scrutiny—that is, strict scrutiny.¹⁶⁸ Indeed this was not a novel scheme.¹⁶⁹ However, it further

162. See *Landell v. Sorrell*, 382 F.3d 91, 107 (2d Cir. 2004) (“Although the clear language of *Buckley* requires that courts should review expenditure limits with exacting scrutiny, the District Court in this case (and it is by no means alone) apparently felt that *Buckley* categorically prohibits expenditure limitations. We disagree.” (citations omitted)).

163. See *id.* at 108. Specifically, the Government would have to substantiate its claims of corruption or the appearance of corruption in politics, and its assertion that there was a need to limit the time candidates spend fundraising. *Id.* at 115-25.

164. The cases consolidated were: *Randall v. Sorrell*, 545 U.S. 1165 (2005); *Sorrell v. Randall*, 545 U.S. 1165 (2005); *Vt. Republican State Comm. v. Sorrell*, 545 U.S. 1165 (2005).

165. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

166. See generally *id.*; see also *Supreme Court 2005, supra* note 14, at 283-88 (calling the case the “redheaded stepchild of Supreme Court jurisprudence” and noting the dashed hopes of scholars when the *Randall* Court declined to set forth a better framework than *Buckley*).

167. See *Randall*, 126 S. Ct. at 2487 (plurality opinion) (considering the constitutionality of Act 64's contribution and expenditure limits). The Court had, of course, considered other cases under the *Buckley* framework since FECA, but arguably none had created such anticipation that the framework would be clarified. See, e.g., *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 251 (1986) (violation of First Amendment as applied to non-profit organization); *FEC v. Nat'l Conservative Political Action Comm. (NPAC)*, 470 U.S. 480, 493 (1985) (violation of First Amendment); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 193-94 (1981) (plurality opinion) (no violation of the First Amendment); *Buckley v. Valeo*, 424 U.S. 1, 23-25, 55 (1976).

168. See *Landell v. Sorrell*, 382 F.3d 91, 110 (2d Cir. 2004) (recognizing that “[a]s a regulation of the amount that a candidate can spend on speech made ‘for the purpose of influencing an election,’

indicated that the Government's proffered interests were sufficiently compelling to overcome the barrier imposed by the test—not a trivial suggestion given the Court's consistency in invalidating expenditure provisions.¹⁷⁰ Further still, the Second Circuit's treatment of the Act's contribution limits went astray from the Supreme Court's long-standing jurisprudence.¹⁷¹ Historically, the Court has distinguished between expenditure and contribution limitations, giving inequitable treatment to both.¹⁷² Indeed, the *Buckley* Court, viewing contribution restrictions as only "marginal" restraints on free speech, insisted on a less rigorous standard requiring only the demonstration of sufficiently important, closely drawn interests.¹⁷³ Yet in *Randall*, the Second Circuit disregarded this precedent in favor of strict scrutiny across the board.¹⁷⁴ Ultimately, however, the

Vermont's expenditure limits are a content-based restriction on speech"). "Content-based speech restrictions, the Court says, are constitutional if they are 'narrowly tailored to serve a compelling state interest'; many have aptly called this an 'ends and means' inquiry." Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA L. REV. 2417, 2418 (1996). While the most prevalent compelling interest is preventing corruption and the perception of corruption, the Court has accepted other interests as sufficient, including "maintaining a stable political system"; ensuring that 'criminals do not profit from their crimes'; . . . protecting voters from confusion, undue influence and intimidation; preventing vote-buying; [and] 'eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations'" *Id.* at 2420-21. As a result of so many "compelling interests," most cases striking down speech restrictions rely instead on the narrow-tailoring prong. *See id.* at 2421; *but cf. Buckley*, 424 U.S. at 48-49 (holding the Government's proffered justification of "equalizing the relative ability of individuals and groups to influence the outcome of elections" insufficient to justify restrictions); *id.* at 57 (finding the interest in "reducing the allegedly skyrocketing costs of political campaigns" insufficient); *NPAC*, 470 U.S. at 496-97 (1985) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

169. *See, e.g., Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

170. *Randall*, 126 S. Ct. at 2487 (plurality opinion).

171. In *Landell*, the Second Circuit had determined that the Government's interests were sufficient to overcome strict scrutiny. *Landell*, 382 F.3d at 125. It remanded to the lower court for a determination of whether the Act's expenditure limits were narrowly tailored to its objectives. *Id.* at 136. The Supreme Court has only once upheld such regulations under a strict scrutiny framework, so *Landell*'s implications would have been far-reaching—had they not been halted by the Court on appeal. For a detailed description of strict scrutiny and its applications, see generally EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* (2d ed. 2005).

172. *See Buckley*, 424 U.S. 1. As mentioned previously, *Buckley* distinguished between campaign contributions and expenditures. *Id.* at 20-21; *see also* 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 20.51 (3d ed. 2007). Because campaign contributions are only an undifferentiated demonstration of support for any candidate, they are viewed as marginal restrictions of free speech. ROTUNDA & NOWAK, *supra*, § 20.51. As a result of this seemingly minute distinction, *Buckley*'s holding remains contentious today. *See* Batchis, *supra* note 38, at 35.

173. *See Buckley*, 424 U.S. at 21-22.

174. *Landell*, 382 F.3d at 110 ("As a regulation of the amount that a candidate can spend on speech made 'for the purpose of influencing an election,' Vermont's expenditure limits are a content-based restriction on speech 'Content-based regulations are presumptively invalid'. . . . To uphold a content-based restriction on speech, the government must prove the existence of a compelling state interest to support the restriction, and that the restriction is narrowly tailored to advance that interest.").

modified intermediate scrutiny test—the same principle subscribed to in *Buckley*—was resurrected by the Supreme Court on appeal.¹⁷⁵

A. Justice Breyer's Plurality Opinion

Justice Breyer makes use of *Buckley*'s bifurcated analysis in structuring his opinion.¹⁷⁶ Following a review of the operative Act 64 provisions and the dispositions of the courts below, he examines the Act's expenditure and contribution limits independently.¹⁷⁷ To begin, the Justice analyzes whether the expenditure limits offend the First Amendment guarantees of free speech and political association.¹⁷⁸

1. Expenditure Restrictions

Justice Breyer plunges directly into an instructive account of *Buckley*, where, as previously mentioned, the Court considered the constitutionality of FECA.¹⁷⁹ There, the Court found that statute's expenditure ceilings violative of the First Amendment.¹⁸⁰ The Justice further notes that, although the Government's proffered justifications in that case—corruption and the perception thereof—were sufficient to preserve the FECA's contribution

175. *Randall*, 126 S. Ct. at 2495 (plurality opinion) (reversing the Second Circuit and holding that “[t]aken together, Act 64’s substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives” (second emphasis added)).

176. *See id.* at 2485-500 (discussing contribution and expenditure limitations separately).

177. *Id.* at 2485-87.

178. *Id.* at 2487 (stating the issue presented as whether the Act’s expenditure limits “violate the First Amendment’s free speech guarantees”).

179. *Id.* at 2487-88; *see also Buckley v. Valeo*, 424 U.S. 1 (1976).

180. *Randall*, 126 S. Ct. at 2488. Justice Breyer appears to be setting the stage for one of two things: following *Buckley* or abandoning it. He builds up his discussion of the *Buckley* decision, following his summary with the reminder that the Court has repeatedly adhered to *Buckley*'s constraints for over thirty years. *Id.* However, this does not stop many of *Buckley*'s critics, who argue that despite the fundamental importance of *stare decisis*, the Court should do its “duty” and “face up to adverse, unintended consequences flowing from [its] own prior decisions.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting). “Despite expressions of discomfort by many justices with the way modern campaign finance is regulated, the Court declined to rework *Buckley v. Valeo* Nor did it sanction a more lenient constitutional test to satisfy those other justices who would prefer to give legislatures and Congress leeway to regulate politics.” Hayward, *supra* note 6, at 196; *see also id.* at 197 (describing how *Randall* took great pains to explain why sparing *Buckley* reconstructive surgery was necessary and favorable); *Randall*, 126 S. Ct. 2489 (plurality opinion) (“The respondents recognize that, in respect to expenditure limits, *Buckley* appears to be a controlling—and unfavorable—precedent.”).

limits, they could not save its spending limitations.¹⁸¹ By reference to the *Buckley* opinion, he articulates the underlying—and critical—basis for this distinction: that expenditure limitations are significantly more abrasive to the freedoms of political expression and association than are contribution restrictions.¹⁸² Setting the stage for his response to the respondents’ pleas to dispense with (or at least clarify) the *Buckley* framework, Justice Breyer underscores the Court’s whopping thirty-year reliance on *Buckley* as precedent.¹⁸³

Justice Breyer then undertakes a deliberate and careful examination of the Government’s two main contentions.¹⁸⁴ The first asks the Court to essentially overrule *Buckley* on the basis that contribution limits alone cannot successfully thwart corruption or its appearance.¹⁸⁵ Second, if the Court finds this argument futile, the Attorney General contends that *Buckley* should be distinguished from the case *sub judice*, because the *Buckley* Court did not overtly contemplate as a justification the notion that expenditure limitations would keep candidates from spending an excessive amount of time raising campaign money rather than reaching the voting public.¹⁸⁶ As to the first, Justice Breyer dwells for some time on the doctrine of stare

181. *Randall*, 126 S. Ct. at 2487 (plurality opinion).

182. *Id.* at 2488 (explaining that “the basic reason for this difference between the two kinds of limitations is that expenditure limitations ‘impose significantly more severe restrictions on protected freedoms of political expression and association than’ do contribution limitations” (quoting *Buckley*, 424 U.S. at 23)). Justice Breyer carefully tailors his discussion to the language in *Buckley*. *See id.* at 2487-88. In fact, he cites few other authorities in his discussion of Act 64’s expenditure limitations. *See id.* at 2487-90. In light of the Justice’s ensuing discourse on *stare decisis*, perhaps this is an additional attempt to reinforce and clarify the Court’s position on *Buckley* as precedent. *See id.* at 2488-90.

183. *See id.* at 2487. The Court refers to the most significant campaign finance cases in its jurisprudence, each of which adhered to *Buckley* on some level: *McConnell v. FEC*, 540 U.S. 93, 134 (2003); *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 386 (2000); *Colorado Republican Federal Campaign Committee v. FEC (Colorado I)*, 518 U.S. 604, 610 (1996) (plurality opinion); *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 259-60 (1986); *FEC v. National Conservative PAC*, 470 U.S. 480, 491 (1985); *California Medical Association v. FEC*, 453 U.S. 182, 194-95 (1981) (plurality opinion). *See Randall*, 126 S. Ct. at 2488 (plurality opinion).

184. *See Randall*, 126 S. Ct. at 2488 (plurality opinion).

185. *Id.* An underlying assumption in *Buckley* was that contribution limits are effective in deterring corruption, and so the Government in *Randall* essentially seeks to unearth, what it believes, “post-*Buckley*” experience has shown not to work. *Id.*; *see also Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (“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 Of almost equal concern . . . is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”). Despite the Government’s contention that “sound reasons exist to revisit the applicable standard of review,” the Court simply dismisses this request on the basis of *stare decisis*. *But see Randall*, 126 S. Ct. at 2500-01 (Alito, J., concurring in part and concurring in the judgment) (stating that the Government only mentioned overruling *Buckley* as a peripheral argument and thus it should not be reached).

186. *Randall*, 126 S. Ct. at 2489 (plurality opinion).

decisis, asserting that adherence to settled precedent must be the “norm” and that departure from it “requires ‘special justification.’”¹⁸⁷ He notes that “[t]his is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.”¹⁸⁸ In concluding that the Government did not demonstrate the requisite “special justification,” Justice Breyer accentuates the substantial reliance that Congress and state legislatures placed on *Buckley* when enacting campaign finance regulations, and the “instability and unfairness” that would result from its disruption.¹⁸⁹

In response to the respondents’ second contention, Justice Breyer implies that the Government is grasping for a distinction that is simply not present.¹⁹⁰ Indeed, he perceives no substantial difference between the expenditure limits discarded in *Buckley* and the corresponding provisions of

187. *Id.* at 2489 (quoting *Arizona v. Runsey*, 467 U.S. 203, 212 (1984)). Rather than addressing the deficiencies of *Buckley* as perceived by his fellow justices and academics alike, Justice Breyer seems to use *stare decisis* as a shield. *See id.* As Justice Alito points out in his concurring opinion, that the issue was not even explicitly briefed by the parties. *See id.* at 2500-01 (Alito, J., concurring in part and concurring in the judgment). Why, then, does Justice Breyer insist on reaching it? Given the sea of critics speculating on this issue, it seems plausible that he was on the early defensive. *See id.* Or, one might argue, *stare decisis* was simply more convenient than having to articulate an entirely new or modified structure. *See* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) (“[S]tare decisis has always been a doctrine of convenience, to both conservatives and liberals Its friends, for the most part, are determined by the needs of the moment.”); *see also* Robert Barnhart, Note, *Principled Pragmatic Stare Decisis in Constitutional Cases*, 80 NOTRE DAME L. REV. 1911, 1916 (2005) (stating that “*stare decisis* may just be a judicial shortcut”).

188. *Randall*, 126 S. Ct. at 2489 (plurality opinion).

189. *Id.* Customary factors for ignoring or overturning prior precedent include, “workability, reliance, intervening developments in the law, and changed or perceived changes in fact,” while less traditional factors may include, “margin of victory, age of the prior decision, and merits of the prior decision.” *See* Barnhart, *supra* note 187, at 1914-15. Under this paradigm, reconsideration of *Buckley* in *Randall* would have been on the basis of “workability” or “intervening developments in the law.” *See Randall*, 126 S. Ct. at 2489 (plurality opinion). The Court explicitly addressed the second in the plurality opinion, where it rejected the claim that “[p]ost-*Buckley* experience” has changed the ability to combat corruption. *Id.* The Court declines to directly discuss a change in the *Buckley* structure based on the fact that it does not provide a workable standard for lower court. *See id.* This is a gaping hole in the plurality’s opinion, which Justice Breyer unconvincingly patches with his reference to the substantial reliance that *Buckley* has invoked. *Id.* at 2490 (“Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent.”). Indeed, many skeptics bristle at the idea of *Buckley* becoming superprecedent, but with the *Randall* opinion, that seems to be where the Court is headed. *See* Hayward, *supra* note 6, at 195-98. It has also been recognized that the application of *stare decisis* is selective, and therefore a more unstable solution than simply discarding the precedent altogether. *Id.* (recognizing that the Court used its bifurcated *Buckley* analysis in *Randall*, but not in *Shrink Missouri*).

190. *Randall*, 126 S. Ct. at 2490 (plurality opinion) (finding no basis for the distinction offered). The “sole basis” on which the Government sought to justify the distinction was that the *Buckley* court did not consider the argument that “expenditure limits are necessary in order to reduce the amount of time candidates spend raising money.” *Id.*

Act 64.¹⁹¹ Furthermore, the core justifications for each were the same.¹⁹² The Justice rationalizes that the additional justification of the Act as a time-saving mechanism, even if tendered by the Government in *Buckley*, would not have transposed the Court's decision.¹⁹³ Then, without added discussion—or really any discussion—of the appropriate standard, Justice Breyer brushes aside Act 64's expenditure provisions by concluding that they are unconstitutional.¹⁹⁴

2. Contribution Restrictions

Justice Breyer begins once more with a discourse on *Buckley*, where in the face of a \$1,000 limitation the Court ruled that FECA's contribution limits were, as a general matter, constitutional.¹⁹⁵ He acknowledges in this discussion that, like expenditure limits, contribution limits fall within the ambit of the First Amendment's protections.¹⁹⁶ However, he relies on *Buckley*'s declaration that contribution limits involve “‘little direct restraint’” on the donor's speech.¹⁹⁷ Again, without identifying the precise

191. *Id.* Both FECA's and Act 64's expenditure ceilings contained dollar limits on individual candidate spending. *Id.*

192. *Id.* (acknowledging that the primary justifications for both were the prevention of corruption and the public's perception thereof). Because this was the same justification proffered and rejected in *Buckley* concerning expenditure limits, Justice Breyer acts somewhat like he is wasting his breath. *See id.* In any event, he does not spend much time on the issue. *See id.* at 2490-91.

193. *Id.* at 2490 (“In our view, it is highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley*'s result.”). Further still, irrespective of the lack of an explicit consideration of time preservation as a rationale for the FECA's spending caps, Justice Breyer thinks it unlikely that the *Buckley* Court did not make the “perfectly obvious” connection between time and fundraising. *Id.*

194. *Id.* at 2491. Nowhere in his entire discussion of contribution limitations does Justice Breyer pinpoint the level of scrutiny to be applied. *See id.* at 2488-91. Indeed, he provides no clarity for lower courts—other than that they should rely on *Buckley*. *See id.* Furthermore, the word “scrutiny” appears only once in the entire plurality opinion, and there it is in the context of “First Amendment scrutiny,” generally. *See id.* at 2492.

195. *Id.* at 2491 (referring to *Buckley*'s “general approval” of contribution limits).

196. *Id.*

197. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). Recognizing, as *Buckley* did, that First Amendment interests are implicated by the regulation of campaign contributions, Justice Breyer addresses why the freedoms of political expression and political association can be burdened by contribution limits more so than expenditure limits:

[U]nlike expenditure limits, (which “necessaril[re]duc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,”) contribution limits “involv[e] little direct restraint on” the contributor's speech. They do restrict “one aspect of the contributor's freedom of political association,” namely, the contributor's ability to support a favored candidate, but they nonetheless “permi[t] the symbolic expression of support evidenced by a contribution,” and they do “not in any way infringe the contributor's freedom to discuss candidates and issues.”

Id. (citations omitted). In this noteworthy endorsement of the dichotomous approach used in *Buckley*, Justice Breyer reasons that contribution limitations still allow donors to endorse specific candidates, and thus may fairly be subjected to some obscure, lesser level of scrutiny. *Id.*

category of scrutiny, the Justice refers only to the Government's obligation in *Buckley*—to demonstrate that the limits were “‘closely drawn’ to match a ‘sufficiently important interest.’”¹⁹⁸

Justice Breyer then weighs in on Act 64's contribution limits, and whether they “prevent candidates from ‘amassing the resources necessary for effective [campaign] advocacy.’”¹⁹⁹ He finds that “danger signs” exist, meaning that Act 64's contribution limits are so low that the statute itself may advance the very electoral unfairness it seeks to avert.²⁰⁰ Red flags indicating that the Act's provisions may not have been “closely drawn” include its underlying two-year election cycle and its application of the same limitations to individuals and political parties.²⁰¹ When these facets of Act 64 are taken into account, the Act's limits are *considerably* lower than those upheld in *Buckley*.²⁰² Another sticking point for the Justice: the Vermont

198. *Id.* (quoting *Buckley*, 424 U.S. at 25). It is in the “closely drawn” component of this analysis that the Court gets to decide: In running an effective campaign for office, how much is too much? *See id.* at 2492. Justice Breyer conveys his valid concern that a limit that is too low can shield incumbents from challenge because of the irrefutable advantages provided by name recognition and a media-established reputation. *Id.*

199. *See id.* at 2492 (brackets in original) (quoting *Buckley*, 424 U.S. at 21). Although he recognizes that the Court “cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives,” and that the “legislature is better equipped to make such empirical judgments,” he makes an unsubstantiated leap to the Court's apparent need to “recognize the existence of some lower bound.” *Id.* Furthermore, no mathematical formula follows. *See id.* Indeed, the Court does not provide any FEC study that has fairly and accurately determined the amounts that should be spent on a competitive campaign. Instead, Justice Breyer posits “[A]t some point, the constitutional risks to the democratic electoral process become too great.” *Id.* But at what point is that? And who decides? Justice Breyer says the Court must ultimately decide because there is “no alternative to the exercise of independent judicial judgment as a statute reaches [these] outer limits.” *Id.* This failure reaps criticism from Justice Thomas. *See id.* at 2506 (Thomas, J., concurring only in the judgment) (“[T]he plurality does not purport to offer any single touchstone for evaluating the constitutionality of such laws. Indeed, its discussion offers nothing resembling a rule at all. From all appearances, the plurality simply looked at these limits and said, in its ‘independent judicial judgment,’ that they are too low.” (internal citation omitted)).

200. *See id.* at 2492 (plurality opinion). The Court however, does not articulate a standard for determining when “danger signs” are present. *See id.* This seems like a rather subjective analysis, as Justice Breyer provides little numerical or evidentiary analysis. *See id.*; *see also id.* at 2505 (Thomas, J., concurring only in the judgment) (stating that “it is entirely unclear how to determine whether limits are so low as to constitute ‘danger signs’ that require a court to ‘examine the record independently and fairly’” (citing *id.* at 2492 (plurality opinion))).

201. *Id.* at 2492-93 (plurality opinion).

202. *See id.* at 2493. In fact, as Justice Breyer reveals, they are the lowest of any state when evaluated collectively. *Id.* (calculating that Vermont's limit on individual contributions to a gubernatorial candidate is just over one-twentieth of the limits on federal candidacy upheld in *Buckley*). In addition, it must be considered that Act 64's limits are applicable to a two-year cycle, whereas most other limits are expressed yearly. *Id.* Thus, when engaging in comparison, Act 64's limits must often be halved. *See id.* Finally, as the Court recognized, Vermont's population is significantly less than that of other states. *Id.* This is a weak point for Justice Breyer because some

limits are not indexed for inflation.²⁰³ Because these “danger signs” exist, Justice Breyer says, the next inquiry is to determine whether the contribution limits are indeed “closely drawn” to corresponding government interests.²⁰⁴

The Justice then concludes that Act 64’s contribution provisions suffer from a fatal flaw: the limits are simply too low for the Court to view them as bona fide restrictions.²⁰⁵ This is exacerbated by the Act’s regulation of political parties and volunteers.²⁰⁶ Justice Breyer sets forth five factors which led to the plurality’s determination.²⁰⁷

First, the Act too severely impinges on the political activity of challengers who wish to mount effective, albeit more costly, campaigns.²⁰⁸

Second, as Justice Breyer recognizes, the Act’s already low ceilings on individuals are also applicable to political parties.²⁰⁹ At the crux of this factor is the right of political association.²¹⁰

of the contribution limits actually are less-stringent *per voting citizen* than some of these jurisdictions. *See id.* at 2494. However, he summarily rejects this as a dispositive factor, stating only that “this does not necessarily mean that Vermont’s limits are less objectionable than the limit upheld in *Shrink*.” *Id.*

203. *See id.* at 2493; *see also* *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000). Missouri’s contribution limit, although the lowest ever upheld, was adjusted for inflation. *Shrink Mo.*, 528 U.S. at 383–84. Although, *per citizen* Vermont’s is slightly more generous, Justice Breyer reasons that a campaign for state auditor (the position at issue in *Shrink*) will be less costly. *Randall*, 126 S. Ct. at 2494 (plurality opinion).

204. *Randall*, 126 S. Ct. at 2494 (plurality opinion).

205. *Id.* at 2495 (specifically describing them as “too restrictive”).

206. *Id.* (“*Taken together*, Act 64’s substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives.”). Once again, Justice Breyer avoids labeling the standard to be used for contribution limits, articulating only that they must be “closely drawn.” *Id.*

207. *See id.* at 2495–500.

208. *Id.* at 2495. To support his finding, Justice Breyer uses rather specific empirical evidence indicating that challengers receive a large percentage of their funding from their political party affiliates. *See, e.g., id.* (sharing one expert’s calculation that the Act’s contribution regulations would have reduced the funding in 1998 to Republican challengers in competitive races in amounts ranging from 18% to 53% of their total campaign income). Political parties, in turn, may contribute a trivial \$200 per election for some important statewide offices under the Act. *Id.* at 2494. Thus, as Justice Breyer observes, the stringent party limitations are not so remote from the insulation of incumbents that democratic principles seek to avoid. *Id.* at 2496. The Government submitted findings that reflected the financing of “*average*” campaigns, rather than “*strongly contested*” ones. *Id.* Indeed, a challenger in a competitive race must generate greater funding to defeat an opponent who enjoys the benefits of incumbency. *Id.* Justice Breyer reveals the fallacy of the Government’s proffered statistics and soundly rejects them. *Id.* (clarifying the Government’s misplaced reliance on *average* race statistics and asserting that “the [accurate] studies, taken together with low *average* Vermont campaign expenditures and the typically higher costs that a challenger must bear to overcome the name-recognition advantage enjoyed by an incumbent, raise a reasonable inference that the contribution limits are so low that they may pose a significant obstacle to candidates in competitive elections”).

209. *See id.* In the Justice’s own carefully chosen words, “Act 64’s insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a particularly important political right . . .” *Id.* The use of the term “*exactly*” indicates that there may

Third, the Act's approach to volunteer services provides an additional and important basis for the Justice's dissatisfaction with its contribution limits.²¹¹ He observes that although the statute exempts the actual services provided by a volunteer, it does not allow volunteers to exclude their travel expenses and other incidental costs.²¹²

Fourth, Justice Breyer points out that the contribution limits imposed by Act 64 are not adjusted for inflation.²¹³

not have to be a wide gap between party and individual limitations to satisfy Justice Breyer. *Id.* In his dissent, Justice Souter makes clear that, in his opinion, identical limits on these two types of contributions "does not condemn the Vermont scheme." *Id.* at 2515 (Souter, J., dissenting). He argues that "[t]he capacity and desire of parties to make large contributions to competitive candidates with uphill fights are shared by rich individuals, and the risk that large party contributions would be channels to evade individual limits cannot be eliminated." *Id.*

210. *Id.* at 2496 (plurality opinion). As the limits on parties included contributions from all levels of a party's organization, in addition to coordinated expenditures and expenditures-in-kind, Justice Breyer paints a picture of the near impossibility of "amassing [enough] funds." *See id.* at 2497-98. Furthermore, the Justice urges that the low party contribution limits will "thwart[] the aims of [small-amount] donors from making a meaningful contribution to state politics" through political parties that can no longer pass on these donations to their intended beneficiaries. *Id.* at 2497. However, he defends the Court's prior decisions upholding limits on money flowing from political parties to candidates, and distinguishes them from the instant case. *Id.* at 2498. He further recognizes, as the Court did in those cases, the need to balance the capacity of individuals to donate to political parties with the need to prevent the use of parties to circumvent individual contribution limits. *Id.* Indeed, these two cannot be reconciled where, as here, a statute applies equal, meager contribution limits to both individuals and political parties. *Id.* (agreeing with the lower court that the Act's contribution limits "'would reduce the voice of political parties' in Vermont to a 'whisper'" (quoting *Landell v. Sorrell*, 118 F. Supp. 2d 459, 487 (D. Vt. 2000))).

211. *See id.* at 2498-99.

212. *See* VT. STAT. ANN. tit. 17, § 2801(2) (2002). Rather, any such expenses incurred count against the volunteer's contribution limits. *See Randall*, 126 S. Ct. at 2498 (plurality opinion) (recognizing that expenses that volunteers incur must count as a contribution (or coordinated expenditure) given the broad nature of the Act's definition of coordinated expenditures). Thus, when evaluated against the low individual donation limits, the benefit of volunteer services dissolves. *See id.* Further still, volunteers unfamiliar with campaign finance laws would be required to keep scrupulous records of money spent in the course of service for a candidate. *See id.* at 2498-99. Justice Breyer acknowledges that higher limitations do not have the same devastating effect on volunteer services, and in those instances it may be proper to include incidental expenses as contributions. *See id.* at 2499. However, where an Act's contribution limitations are "so low, and its definition of 'contribution' so broad," it is manifest that volunteers' rights to associate politically will be crippled. *Id.*

213. *See Randall*, 126 S. Ct. at 2499 (plurality opinion). The inevitable shrinking of the real value of the limitations will require a future Vermont Legislature, full of disinclined incumbents, to enact supplementary legislation. *Id.* Justice Breyer reasons that the failure to do so will certainly result—if it has not already—in limits that are unconstitutionally low. *Id.* There seems to be a hint of distrust coming from the Justice here, as he deliberately incorporates "incumbent" into his description of legislators who "may not diligently police the need for changes in limit levels to assure the adequate financing of electoral challenges." *Id.* The problem to be inferred here is that incumbents might place campaign finance limits too low, and then utilize their contact with the media to compensate for their own supply reduction—an option unavailable to many challengers.

And finally, the Justice quickly asserts that no special justification can cure the inadequacies identified by the considerations above.²¹⁴ In light of these issues, he concludes that the Act's contribution limits are "not narrowly tailored" to its objectives.²¹⁵ Where First Amendment interests are so acutely abridged, as by Act 64, it is axiomatic that disproportionate regulations must be struck down as constitutionally infringing.²¹⁶ After a brief summary of his reasons for doing so, Justice Breyer declines to sever any legitimate portions of the Act.²¹⁷

B. Justice Alito's Concurring Opinion

Justice Alito agrees that Act 64's expenditure and contribution restrictions are constitutionally flawed.²¹⁸ However, the Government's secondary request—that the Court "revisit *Buckley*"—was not supported by any argument as to why the doctrine of *stare decisis* should be scrapped for this case.²¹⁹ Furthermore, Justice Alito points out that the respondents indeed rely on *Buckley* as support for Act 64's contribution limits.²²⁰ Thus, by extension, the Court would have to reconsider only *part* of the *Buckley* holding, the part relating to FECA's expenditure limitations.²²¹ This is a

Contra Landell, 118 F. Supp. 2d 459, 468-70 (finding many politicians have run effective campaigns on low budgets).

214. *Randall*, 126 S. Ct. at 2499 (plurality opinion) ("[W]e have found nowhere in the record 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 The record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere.").

215. *See id.* at 2499-500. This is reminiscent of strict scrutiny, yet in the context of contribution limits. *See, e.g., Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658-60 (1990) (strict scrutiny analysis applied to independent expenditure limits by determining whether the statute was narrowly tailored to complete its objective). Even though the Court endorses its own ability to decide what limits are appropriate (i.e., how much is too much), and fails to declare an exact standard, the Court attempts to eliminate some ambiguity by delineating the five-factor test. *See Randall*, 126 S. Ct. at 2494-2500.

216. *See generally Randall*, 126 S. Ct. at 2494-500 (plurality opinion).

217. *See id.* at 2500. To decide otherwise, he recognizes, would be "writ[ing] words into the statute (inflation indexing), or . . . leav[ing] gaping loopholes (no limits on party contributions)" *Id.* Suggesting the legislature would be the better forum for this, Justice Breyer invites Vermont's lawmakers to remedy the Act's deficiencies in accordance with the plurality's opinion and the First Amendment's mandates. *Id.*

218. *Id.* at 2500 (Alito, J., concurring in part and concurring in the judgment).

219. *Id.* Justice Alito argues that the Government's call for *Buckley* to be overturned was read into its brief. *Id.* In fact, it was only a "backup argument, an afterthought almost." *Id.* This raises the question of why Justice Breyer would delve so deeply into the issue. His judicial overreaching might be more controversial if he had decided to overrule *Buckley*. However since he did not, it is reasonable to postulate that he had ulterior motives, including a desire to respond to critics of the Court's reliance on a case with such amorphous standards.

220. *Id.* (indicating that these "incongruous" assertions do not amount to a colorful claim for reconsideration of *Buckley*).

221. *Id.* ("[R]espondents fail to explain why it would be appropriate to reexamine only one part of

partial examination the Justice is unwilling to perform and, in any event, he feels the Court should not even reach the issue because of the Government's "incomplete presentation."²²²

C. Justice Kennedy's Concurring Opinion

Justice Kennedy is a skeptic when it comes to the Court's entire body of campaign finance law.²²³ Thus, although he agrees with the determination that both limitations are unconstitutional, he feels it is suitable for him to only concur in the judgment.²²⁴ Justice Kennedy supports the plurality's application of a higher level of scrutiny to expenditure limitations given the nature of the restrictions on political expression.²²⁵ However, he questions the "unduly lenient review" the Court has frequently applied to contribution limits, and asserts that Vermont's limits are "even more stifling" than others that have endured the Court's review.²²⁶

D. Justice Thomas's Concurring Opinion

Justice Thomas elects to only concur in the judgment because of his belief that the Court's application of its hybrid standard of review is misguided, at best.²²⁷ In arguing that *Buckley* provides inadequate protection

the holding in *Buckley* . . . [R]espondents fail to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision.").

222. *Id.* at 2500-01.

223. *Id.* at 2501 (Kennedy, J., concurring only in the judgment) (recognizing his "own skepticism regarding that system and its operation").

224. *Id.*

225. *See id.*; *see also* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405-06 (2000) (Kennedy, J., dissenting) (arguing that the Court in *Shrink* "perpetuates and compounds a serious distortion of the First Amendment resulting from our own intervention in *Buckley*," and that it "is concerned about voter suspicion of the role of money in politics[, but a]midst an atmosphere of skepticism, however, it hardly inspires confidence for the Court to abandon the rigors of our traditional First Amendment structure"). Justice Kennedy recognizes that the Court has upheld contribution restrictions that do "not come even close to passing any serious scrutiny," but that Vermont's limits are significantly more restrictive than those. *Randall*, 126 S. Ct. at 2501 (Kennedy, J., concurring only in the judgment) (quoting *Shrink Mo.*, 528 U.S. at 410 (Kennedy, J., dissenting)).

226. *See Randall*, 126 S. Ct. at 2501 (Kennedy, J., concurring only in the judgment). The Justice furthermore criticizes the part of the framework that requires the Court to play a numbers game—that is, "to explain why \$200 is too restrictive a limit while \$1,500 is not." *Id.* As a result of the Court's willingness to participate, he believes that political parties have been denied fundamental First Amendment rights. *Id.* In light of this contested history, Justice Kennedy prefers to distance himself from the Court's campaign finance jurisprudence. *Id.*

227. *See id.* at 2501-02 (Thomas, J., concurring only in the judgment); *see also* *Buckley v. Valeo*, 424 U.S. 1 (1976).

to political expression, he boldly asserts that strict scrutiny should be the rule of the day.²²⁸ He would overrule *Buckley* and its bipartite classifications, eliminating the amorphous standards applied to each.²²⁹ Instead, Justice Thomas asserts, the Court should view both expenditure and contribution limits as equally severe restrictions on the freedoms of speech and association.²³⁰ He further declares that in the face of the strict scrutiny that should be applied, all of Act 64's limitations are unconstitutional.²³¹

Furthermore, Justice Thomas finds that the basis for Justice Breyer's cultivation of "danger signs" is entirely nebulous and therefore "constitutionally problematic."²³² With a hint of disdain, he criticizes Justice Breyer's "newly-minted, multifactor test," which improperly allows the Court to determine the suitability of statutory amounts "based upon little more than its *impression* of the appropriate limits."²³³ The crux of his

228. *Randall*, 126 S. Ct. at 2502 (Thomas, J., concurring only in the judgment) ("I continue to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment.").

229. *Id.* Justice Thomas is highly critical of the Court's inability to articulate consistent standards and apply them in a "coherent and principled fashion." *Id.* Unlike Justice Breyer, Justice Thomas has no qualms about dispensing with long-existing precedent. *See id.* Justice Thomas believes that the Court erred in *Buckley*, and he subsequently wrote several dissenting opinions expressing his distaste for the Court's approach. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 465-66 (2001) (Thomas, J., dissenting); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410-418 (2000) (Thomas, J., dissenting); *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 635-44 (1996) (Thomas, J., concurring in the judgment and dissenting in part). Justice Thomas would not have distinguished between contribution and expenditure limitations when performing his constitutional analysis, because he "believe[s] that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits." *Colorado I*, 518 U.S. at 640 (Thomas, J., concurring in the judgment and dissenting in part).

230. *Randall*, 126 S. Ct. at 2502 (Thomas, J., concurring only in the judgment). Justice Thomas adds: "*Buckley*'s suggestion that contribution caps only marginally restrict speech, because '[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,' even if descriptively accurate, does not support restrictions on contributions." *Id.* (citations omitted). Indeed, "statements of general support are as deserving of constitutional protection as those that communicate specific reasons for that support." *Id.*

231. *Id.* Justice Thomas disapproves of the form of limited scrutiny applied in *Buckley*, and contrary to the plurality, would not give it *stare decisis* effect. *Id.* at 2503. In fact, he condemns the plurality's entire scheme as an unworkable approach. *Id.*

232. *Id.* at 2504. Here, Justice Breyer is accused of basing his "danger signs" on "a moving target." *Id.* at 2503-04. For example, his comparison of Act 64 to other states' provisions creates, rather than a workable standard, a target that will change as various states modify their laws. *Id.* Thus, if another state that has higher limits than Act 64 lowers its allowable contributions, then, suddenly, Act 64 would be constitutional under the plurality's approach. *Id.*

233. *Id.* This then begs the question: How much is too much, and who decides? Justice Thomas argues that the plurality engages in an "odd review" of contribution restrictions and requires the assimilation of "unrelated factors." *Id.* This criticism is at the root of his desire to uproot *Buckley* and create a new, workable standard. *See id.* at 2501-04. He discounts two of Justice Breyer's factors as wholly irrelevant to the "closely drawn" analysis, and then accuses the Court of the faulty application of another. *Id.* at 2503-04. With the remaining two factors the only ones left to render the contribution limits impermissible, Justice Thomas explains why both are poor justifications. *Id.*

argument is that Justices of the Court are not qualified to draw the line between which limits are acceptable and which are not.²³⁴

Despite his scathing critique of the plurality's opinion, Justice Thomas makes clear that Justice Breyer gets it right when he concludes that the Act's limits are impermissibly low—even though Justice Breyer's result is reached under *Buckley*'s "lenient standard."²³⁵

E. Justice Stevens's Dissenting Opinion

Although giving credence the considerations of *stare decisis*, Justice Stevens would choose to overrule *Buckley* and hold that reasonable limitations on campaign expenditures should be allowed.²³⁶ Relying on *Buckley*'s own disturbance of sixty-five years of settled precedent, which had allowed limits on both expenditures and contributions, Justice Stevens expresses his view that these limits are quite plausibly regulations of conduct and not of speech.²³⁷ Further still, he points out that *Buckley*'s holding on contribution limits has consistently been tested and upheld, but that *stare decisis* has yet to be explicitly applied to its holding on expenditures.²³⁸ Justice Stevens additionally opines that while the federal and state

at 2505.

234. *Id.* "Certainly, the First Amendment does not authorize us to judge whether a restriction of political speech imposes a sufficiently severe disadvantage on challengers that a candidate should be able to complain . . . Courts have no yardstick by which to judge the proper amount and effectiveness of campaign speech." *Id.* (quoting *Shrink Mo.*, 528 U.S. 377, 427 (2000) (Thomas, J., dissenting)).

235. *Id.* at 2506. Indeed, an effective quid pro quo arrangement would be hard to come by for the low prices set by Act 64. *See id.* (stating that "it is almost impossible to imagine that any legislator would ever find his scruples overcome by a \$201 donation"). He also recognizes that these limits severely impose upon the abilities of candidates to fund competitive campaigns. *Id.* Nevertheless, Justice Thomas views the plurality's feeble attempt to draw a constitutional line as unprecedented and irrational. *See id.* "*Buckley* provides no consistent protection to the core of the First Amendment, and must be overruled." *Id.*

236. *See id.* at 2506-07 (Stevens, J., dissenting). Justice Stevens believes that while *stare decisis* is important, "it is not an inexorable command." *Id.* at 2507. Note, however, that *Buckley* didn't actually hold that the government could *never* assert sufficient compelling interests that would justify expenditure limits. *Id.*; *see also* *Buckley v. Valeo*, 424 U.S. 1 (1976).

237. *See Randall*, 126 S. Ct. at 2507 (Stevens, J., dissenting). *But cf. Buckley*, 424 U.S. at 16 (stating that the Court could not "share the view that [FECA's] contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien* . . . Some forms of communication made possible by the giving and spending of money involve speech alone . . . [T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment").

238. *Randall*, 126 S. Ct. at 2507-08 (Stevens, J., dissenting).

legislatures have relied on *Buckley* in enacting contribution limits, they have not so relied on the Court's rejection of expenditure regulations.²³⁹

To buttress his own position, Justice Stevens's references Justice White's similar resistance to this part of *Buckley*'s holding.²⁴⁰ The latter's view was that it was "wrong to equate money and speech," and that spending limits created only indirect burdens on political speech.²⁴¹ He asserts that the mild effects that such limits do have on speech are viewpoint-neutral.²⁴² Piggybacking on this approach, Justice Stevens says he would uphold expenditure limitations under the same premise.²⁴³ He then engages in a metaphorical discussion—though the metaphors exploited are more convenient than logical.²⁴⁴

In addition to Act 64's stated objective—that is, to prevent corruption—Justice Stevens endorses two complementary governmental interests: that of providing equal political opportunities for the rich and poor, and that of preventing candidates from spending egregious amounts of time raising money.²⁴⁵ Consistent with his metaphorical theme, the Justice likens the

239. *Id.* at 2508.

240. *Id.*

241. *Id.* (citing *Buckley*, 424 U.S. at 263 (White, J., concurring in part and dissenting in part)). This may not be realistic, however, as media is a common vehicle for candidate speech and must be purchased at an often considerable price. Certainly, at least in the campaign context, speech serves little or no purpose when it cannot be heard. Justice Stevens alternatively argues that "these limits on expenditures are far more akin to time, place, and manner restrictions . . ." *Id.*; see also *Colorado II*, 518 U.S. 638-39 (Thomas, J., dissenting) (stating that "[e]ven in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message" so the line between direct and indirect communication is somewhat blurred).

242. *Randall*, 126 S. Ct. at 2508 (Stevens, J., dissenting) ("I would uphold them 'so long as the purposes they serve are legitimate and sufficiently substantial.'" (quoting *Buckley*, 424 U.S. at 264)).

243. *Id.*

244. See *id.* Justice Stevens distinguishes a car without fuel from a candidate without money. *Id.* ("[W]hile a car cannot run without fuel, a candidate can speak without spending money."). However, his analogy fails because candidates—at times—can also not speak without money. *Id.* If a candidate cannot pay to advertise his speaking engagement, then this is arguably an abridgment of speech. Justice Stevens fumbles this metaphor because venues where speeches are given necessarily cost money. When the Justice says that "there is no limit on the number of speeches or interviews a candidate may give on a limited budget," he loses a modicum of credibility. See *id.* A candidate cannot control who will be willing to interview him. In fact, this is precisely the reason why a challenger buys commercials—because he may not have the same access to the media as an incumbent or an actor-turned-politician. Next, Justice Stevens uses the examples of Abraham Lincoln and John F. Kennedy, neither of whom "paid for the opportunity to engage in the debates with Stephen Douglas and Richard Nixon that may well have determined the outcomes of Presidential elections." *Id.* at 2509. But who would have listened to these people if they had not been widely-known before they entered into these cost-free debates? What came before these debates was likely the expenditure of money. See Kenneth Jost, *Campaign Finance Reform*, 6 C.Q. RESEARCHER 121, 129 (1996) (revealing that former President John F. Kennedy spent roughly \$10 million during his 1960 presidential campaign).

245. See *Randall*, 126 S. Ct. at 2509 (Stevens, J., dissenting). "When campaign costs are so high . . . we fail 'to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government.'" *Id.* (quoting *United States v.*

latter to freeing candidates and their staffs from “the fundraising straitjacket.”²⁴⁶ Furthermore, Justice Stevens does not believe that expenditure ceilings favor incumbents.²⁴⁷ Until a careful study is completed, he would defer to legislative determinations of *how much is too much* with which to run a corruption-free campaign.²⁴⁸

F. Justice Souter’s Dissenting Opinion

Justice Souter’s conclusion stands in stark contrast to that of the plurality. Justice Souter wants the case remanded to determine whether Act 64’s expenditure limits do in fact comport with First Amendment guarantees.²⁴⁹ He argues that *Buckley* did not “categorically foreclose” all reasonable spending limits.²⁵⁰ Thus, the Act’s expenditure provisions should have been fully analyzed under the appropriate level of exacting scrutiny.²⁵¹ Because the *Buckley* Court’s treatment of the Government’s newest justification was overly cursory, Justice Souter wants Vermont’s statute examined in light of this interest and its associated legislative findings.²⁵²

UAW-CIO (*Automobile Workers*), 352 U.S. 567, 590 (1957)). Indeed, “[s]tates have recognized this problem . . .” *Id.*

246. *Id.* at 2509. Justice Stevens calls it a “fundraising straitjacket,” but then ignores how he might instead be imposing an “expenditure straitjacket.” See Sullivan, *supra* note 4, at 311-12. Because of the higher threshold required to render expenditure limits valid, federal and state governments generally only regulate contributions to a candidate, not his expenditures. *Id.* at 311. The natural result is that politicians must reach large amounts of donors to compensate for the monies they are not able to collect from wealthy donors and political parties. See *id.* at 312. This requires a candidate to spend large portions of his time fundraising, at the expense of attention to other political issues. See *id.* (recognizing that this would not “be necessary under a system permitting reliance on venture capital from a few fat cats”). Indeed, much of his contact with constituents will be asking for money. *Id.* Regardless, Justice Stevens urges that states be given the opportunity to test expenditure limits, and thus determine how they, in practice, affect incumbents. See *Randall*, 126 S. Ct. at 2510 (Stevens, J., dissenting).

247. See *Randall*, 126 S. Ct. at 2509 (Stevens, J., dissenting). *But cf.*, *supra* note 198.

248. *Randall*, 126 S. Ct. at 2510 (Stevens, J., dissenting).

249. See *id.* at 2511 (Souter, J., dissenting). This was a similar stance taken by the Second Circuit, which remanded to the district court to “decide whether Vermont’s spending limits are the least restrictive means of accomplishing what the court unexceptionably found to be worthy objectives.” *Id.* at 2512 (referring to *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004)).

250. See *id.* at 2511; see also *Landell*, 382 F.3d at 107 (“Although the clear language of *Buckley* requires that courts should review expenditure limits with exacting scrutiny, the District Court in this case (and it is by no means alone) apparently felt that *Buckley* categorically prohibits expenditure limitations. We disagree.” (citations omitted)).

251. *Randall*, 126 S. Ct. at 2511 (Souter, J., dissenting).

252. *Id.* (noting that “[w]hatever the observations made to the *Buckley* Court about the effect of fundraising on candidates’ time, the Court did not squarely address a time-protection interest as support for the expenditure limits, much less one buttressed by as thorough a record as we have here”). *Randall* boasts a more complete record than *Buckley*, and Justice Souter argues that this new

Moreover, Justice Souter is persuaded that the Act's contribution limits satisfy the mandates of the First Amendment.²⁵³ Because there is no constitutional minimum to which the Court must adhere, and because Vermont's limits are not "remarkable departures" from past precedent, Justice Souter favors judicial deference in this instance.²⁵⁴ He points out that the record is replete with facts and testimony on the subject of corruption and its correlate, public suspicion.²⁵⁵ Justice Souter accuses the plurality of making its decision based upon an unfounded, albeit implied assertion—that Vermont legislators, as incumbents themselves, "cannot be trusted to set fair limits."²⁵⁶ He does, however, clarify that he is not an advocate of absolute deference and that he can, of course, "imagine dollar limits that would be laughable . . ."²⁵⁷ In the end, the Justice believes that Act 64's contribution limits are constitutionally sound and would, against the plurality, uphold them.²⁵⁸

VI. IMPACT OF THE *RANDALL V. SORRELL* DECISION

Essentially, the *Buckley* legacy continues.²⁵⁹ While the framework established in 1976 has been criticized by legal scholars and Justices of the Court, it has made one thing (and *only* one thing) clear: it has staying

"time-protection" interest must be addressed in light of the associated record. *Id.* Note that the Justice does not say which way the case should turn out on remand, just that "the evidentiary work that remained to be done would have raised the prospect for a sound answer to that question, whatever the answer might have been." *Id.* at 2512.

253. *Id.* at 2512 ("Low though they are, one cannot say that 'the contribution limitation[s] are' so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000)) (brackets in original)).

254. *Id.* at 2512-13 ("Vermont is not an eccentric party of one.").

255. *Id.* at 2513 (discussing the legislative findings regarding politicians who grant special access and give generally better treatment to donors over non-donors).

256. *Id.* at 2514; *see also id.* at 2499 (plurality opinion) (making the argument that incumbents will be less likely to amend Act 64 to compensate for the no-inflation problem). Justice Souter takes issue with four other facets of the plurality opinion. *Id.* at 2515 (Souter, J., dissenting). The first, that volunteer expenses will count against the volunteer's contribution limit, is regarded by him as having only little significance in Act 64's overall scheme. *Id.* Second, Justice Souter finds that the lack of an inflation-indexing feature holds even less clout. *Id.* Third, equal application of the Act's contribution limits to both political parties and individuals effectively prevents wealthy citizens from circumventing these limits by rerouting funds through political parties. *Id.* Finally, the Justice is satisfied that the presumption of coordinated expenditures applied to certain party disbursements will not have the effect of "chilling speech." *Id.* This is because, he asserts, the statute merely imposes a burden of production, and thus a presumption more easily rebuttable than the burden of persuasion. *Id.*

257. *Id.* at 2514.

258. *Id.* at 2516.

259. *See Randall*, 126 S. Ct. 2479 (plurality opinion) (embracing the unequal treatment of contribution and expenditure limits and applying *Buckley* to its fullest extent, although reaching a different decision on the validity of campaign contributions); *see also Buckley v. Valeo*, 424 U.S. 1 (1976).

power.²⁶⁰ Although *Buckley* maintained the status quo, future implications for campaign finance are three-fold and mutually exclusive: (1) the *Buckley* framework will live on to be misapplied by courts and to serve as a source of confusion for practicing lawyers and law students;²⁶¹ (2) the distinction between contributions and expenditures will be eliminated, and both types of restrictions will be granted fortified First Amendment protections;²⁶² or (3) the distinction between contributions and expenditures will be eliminated, but both will be constitutionally regulated.²⁶³ Depending on the political view that one espouses, one of the last two options will generally be preferred.²⁶⁴ For those inclined to see consistency in the threads of First Amendment jurisprudence, the first is fatally flawed.

Until five Justices hold a vision more consonant with one of the unitary analyses proposed above, the debate about money as speech will continue to be characterized negatively by critics. Indeed, several members of the Court have expressed restlessness when addressing campaign finance restrictions

260. See *Randall*, 126 S. Ct. at 2488 (plurality opinion) (“Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley*’s constraints . . .”).

261. See, e.g., *Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 649-51 (9th Cir. 2007) (applying *Buckley* to contribution limits in the context of the signature-gathering phase of a recall election; also citing *Randall*); see also Hayward, *supra* note 6, at 202-03. As the application of *Buckley* ensues, the complexity of the cases seems to increase. *Id.* at 212. In the context of campaign contributions, the trend will be for the Court to hear cases similar to *Randall*, but with somewhat differing facts of course. *Id.* If *Randall* and *Buckley* are followed, then contribution limits will continue to receive a lower level of scrutiny, requiring a more fact-intensive analysis. *Id.*; see also *Randall*, 126 S. Ct. at 2495-98. The continued application of *Buckley* has been reasoned to be a result of “inertia.” See also Sullivan, *supra* note 4, at 313. Indeed, that seems an appropriate characterization of *Randall*, as the Court relied so heavily on *Buckley* and was coming off of several years of cases doing the same. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 134 (2003); *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386 (2000); *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 610 (1996) (plurality opinion).

262. See Sullivan, *supra* note 4, at 313. Essentially, this would require a partial overruling of *Buckley*. The portion that found contribution limits constitutional would have to be reevaluated, as the Court declined to do in *Randall*. See *Randall*, 126 S. Ct. at 2489-90 (plurality opinion). Justice Thomas has at least twice indicated that he would have gone in this direction if the majority would extend the opportunity. See Sullivan, *supra* note 4, at 313 (citing *Colorado I*, 518 U.S. at 638 (Thomas, J., concurring in the judgment and dissenting in part)); see also *Randall*, 126 S. Ct. at 2501-05 (Thomas, J., concurring only in the judgment).

263. See Sullivan, *supra* note 4, at 314. This approach would essentially require the Court to overrule *Buckley*’s ban on expenditure limits. *Id.* At the same time, the Court would probably be inclined to expand the accepted rationales. *Id.* Congress and the state legislatures would consequently be given the power to regulate, in addition to time, place, and manner restrictions, expenditure and contribution limits in the context of election fundraising. *Id.*

264. See Batchis, *supra* note 38, at 43-46 (discussing *Buckley*’s “muddled jurisprudential landscape”).

under the *Buckley* framework.²⁶⁵ However, each decision entails much of the same: bifurcation of the approach, reliance on *Buckley*, some evidentiary analysis, and strongly-worded dissenting opinions.²⁶⁶ In *Randall*, Justice Breyer articulated a five-pronged analysis for the campaign contribution context, and it remains to be seen whether the test will be well-received.²⁶⁷ While these factors might help bring greater clarity to the “how much is too much” (or too little) determination, the supreme dilemma is the current bipartisan treatment of campaign regulations.

In any event, the FEC will continue to promulgate rules in accordance with the provisions of the BCRA that were upheld in *McConnell*.²⁶⁸ Table 1 provides the latest examples of acceptable contribution limits. While the states are ultimately sovereign in their regulation of state elections, all campaign finance restrictions must be upheld under the same Constitution.²⁶⁹ Thus, the Table provides an illustrative guide for current and future constitutional limits. At first glance, Justice Breyer would be pleased: the amounts are indexed for inflation.²⁷⁰

Table 1: 2007-2008 Federal Contribution Limits²⁷¹

265. See Hayward, *supra* note 6, at 214-15.

266. See, e.g., *McConnell*, 540 U.S. at 134; *Colorado II*, 533 U.S. at 441; *Shrink Mo.*, 528 U.S. at 386; *Colorado I*, 518 U.S. at 610 (plurality opinion); *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 259-60 (1986); *FEC v. Nat’l Conservative Political Action Comm. (NPAC)*, 470 U.S. 480, 491 (1985); *Cal. Med. Ass’n. v. FEC*, 453 U.S. 182, 194-95 (1981) (plurality opinion).

267. See *Randall*, 126 S. Ct. at 2495, 2500 (plurality opinion).

268. See generally *McConnell*, 540 U.S. 93.

269. See U.S. CONST. amend. I.

270. See *Randall*, 126 S. Ct. at 2499 (plurality opinion) (taking issue with Act 64’s non-indexed contribution limits and discussing as one of five factors).

271. Press Release by FEC Announcing Updated Contribution Limits (Jan. 23, 2007), available at <http://www.fec.gov/press/press2007/20070123limits.html>. As per the Bipartisan Campaign Finance Reform Act of 2002, the Federal Election Commission indexes some contribution limits for inflation. *Id.* The limits in Table 1 were effective beginning January 1, 2007 (or, for limits on contributions from individuals to candidates, the day after each last general election ended), and are applicable to elections for President, U.S. Senate, and U.S. House of Representatives. *Id.*

| | To each candidate or candidate committee per election | To national party committee per calendar year | To state, district & local party committee per calendar year | To any other political committee per calendar year | Special limits |
|--|---|---|--|--|---|
| Individual contribution limit | \$2,300 | \$28,500 | \$10,000 (combined) | \$5,000 | \$108,200 overall biennial limit: \$42,700 to all candidates + \$65,000 to all PACs & parties |
| National Party Committee contribution limit | \$5,000 | No limit | No limit | \$5,000 | \$39,000 to Senate candidate per campaign |
| State, District & Local Party Committee contribution limit | \$5,000 (combined limit) | No limit | No limit | \$5,000 | No limit |
| Multicandidate PAC contribution limit | \$5,000 | \$15,000 | \$5,000 (combined limit) | \$5,000 | No limit |
| Non-multicandidate PAC contribution limit | \$2,300 | \$28,500 | \$10,000 (combined limit) | \$5,000 | No limit |
| Candidate Committee may contribute | \$2,000 | No limit | No limit | \$5,000 | No limit |

On a societal level, *Randall v. Sorrell* will not have a tremendous impact, given that it merely reiterated what the Court has “repeatedly adhered to.”²⁷² However, the BCRA’s amendments to FECA remain in force, and as such, affect ordinary individuals, corporations, candidates, parties, and others.²⁷³ The greater impact is on legal scholars, who continue to grapple with the aftermath of *Buckley*.

VII. CONCLUSION

While campaign finance jurisprudence has its blunders, it also makes for an interesting case study. With its decision in *Randall v. Sorrell*, the Supreme Court remains in charted waters. Where, as here, an Act dips below the radar, the Court will continue to determine important constitutional questions: How much is *too much* to allow before the risk of corruption materializes? How much is *too little* with which to run an effective campaign? And who should decide, the judiciary or the legislature?

Finally, a rather tactless statement made by former Congressman Richard Gephardt encapsulates the confusion—or perhaps the general pessimism—of campaign finance reform: “What we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can’t have both.”²⁷⁴

Natalie A. Rainforth ²⁷⁵

272. See *Randall*, 126 S. Ct. at 2488 (plurality opinion).

273. See generally BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002).

274. Nancy Gibbs, *The Wake-up Call*, TIME, June 24, 2001, available at <http://www.time.com/time/magazine/article/0,9171,137205,00.html>.

275. J.D. Candidate, Pepperdine School of Law, May 2008; Bachelor of Science, Cognitive Science with An Emphasis in Neuroscience, Minor in Political Science, University of California at San Diego, December 2004. Sincerest gratitude and thanks to Michael L. Rainforth and Professor Steven M. Schultz, two people of the highest character and integrity.