

# **WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law**

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*The first term of the Roberts Court was a potentially pivotal moment in campaign finance law. The Court both broke its pattern of deference to federal and state regulations that had marked the last half-dozen years and began to take a more critical approach to campaign finance restrictions. In Randall v. Sorrell, the Court struck down a Vermont law that sought to limit expenditures and to lower contributions in state and local elections. The expenditure restriction decision was no surprise, as it essentially reaffirmed the Court's rejection of expenditure limits in Buckley v. Valeo three decades ago. But the ruling that Vermont's contribution limits were too low marked the first time the Court had invalidated a contribution limit in a candidate election. Although Randall subjected contribution limits to closer scrutiny than in previous cases, the fragmented Court failed to articulate a clear standard of review.*

*In Wisconsin Right to Life v. FEC ("WRTL"), the Court determined that the 2003 decision in McConnell v. FEC, rejecting a First Amendment challenge to the "electioneering communication" title of the Bipartisan Campaign Reform Act ("BCRA") of 2002, only dealt with a facial attack, thus permitting an as-applied challenge. WRTL, thus, recognized the new and difficult question of determining when political ads that fall within the statutory definition "electioneering" ought nevertheless be exempt from election regulation. The Court, however, said nothing about the standards for determining when an as-applied exception should be granted. That question—and the long-term significance of the decision—may be resolved when the case returns to the Court this term.*

*It is unclear whether Randall and WRTL simply mark the end of a period of judicial deference to new campaign finance limits or whether they signal the beginning of an era in which the Court will reconsider older decisions and move in a more sharply deregulatory direction. At the very least, the cases reopen old questions, create new uncertainties, and underscore the divisions within the Court concerning the constitutional framework for addressing campaign finance restrictions. Together, they provide new impetus to the idea that campaign finance reformers should redirect their energies away from limiting private funds and give greater attention to increasing the role of constitutionally unexceptionable public funds in our campaign finance system.*

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## I. INTRODUCTION

In its first year under Chief Justice Roberts, the Supreme Court handed down two campaign finance decisions—one very brief, with a per curiam opinion for a unanimous Court, and the other relatively lengthy, consisting of six opinions from a fragmented Court. Neither case made a significant departure from prior doctrine directly, but both injected new uncertainties into the law. Together, the two decisions may constitute a pivotal moment in the Court's evolving campaign finance jurisprudence.

*Wisconsin Right to Life v. Federal Election Commission* (“*WRTL*”)<sup>1</sup> was decided in the closing days of January 2006, and was one of the last cases in which retiring Justice Sandra Day O'Connor participated. *WRTL* determined that the Court's 2003 decision in *McConnell v. Federal Election Commission*<sup>2</sup> did not fully resolve the constitutional question presented by the provision of the Bipartisan Campaign Reform Act of 2002 (“*BCRA*”)<sup>3</sup> extending the longstanding prohibitions on the use of corporate and union treasury funds in federal election campaigns to a new category of “electioneering communication,” as defined by the Act.<sup>4</sup> Instead, *WRTL* held that corporations and unions subject to the Act's restrictions may seek an as-applied exception.<sup>5</sup> Although a modest holding, *WRTL* was the first campaign finance decision by the Court in a decade in which the anti-regulatory side prevailed and the pro-regulatory side lost.<sup>6</sup> By raising the possibility that some corporate or union ads that fall within the statutory definition of “electioneering communication” may not be barred, *WRTL* reopens the vexing question of how to distinguish electioneering ads—which

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<sup>1</sup> *Wis. Right to Life, Inc. v. Fed. Election Comm'n* (“*WRTL*”), 126 S. Ct. 216 (2006).

<sup>2</sup> *McConnell v. FEC*, 540 U.S. 93 (2003).

<sup>3</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 931 (2002).

<sup>4</sup> *WRTL*, 126 S. Ct. at 1017–18.

<sup>5</sup> *Id.* at 1018.

<sup>6</sup> Before *WRTL*, the last time the anti-regulatory side prevailed before the Court in a campaign finance case was in *Colorado Republican Federal Campaign Committee v. FEC* (“*Colorado Republican P*”), 518 U.S. 604 (1996). Since then, the pro-regulatory side won in whole or in part in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), *FEC v. Colorado Republican Federal Campaign Committee* (“*Colorado Republican IP*”), 533 U.S. 431 (2001), *FEC v. Beaumont*, 539 U.S. 146 (2003), and *McConnell v. FEC*, 540 U.S. 93 (2003). Richard Hasen refers to these as the “New Deference Quartet.” See Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 886 (2005).

may be subject to restriction—from constitutionally protected issue speech. The Court may provide an answer to that question shortly.<sup>7</sup>

In the second case, *Randall v. Sorrell*,<sup>8</sup> the Court, by a vote of six to three, invalidated the expenditure and contribution limits Vermont had imposed on candidates in state elections.<sup>9</sup> The Court's rejection of the spending limits was unsurprising. With one exception,<sup>10</sup> the Court has, since the foundational *Buckley v. Valeo*<sup>11</sup> decision in 1976, consistently rejected spending limits. The more striking development was the invalidation of the contribution limits. *Randall* marks the first time the Court has ever struck down a law imposing monetary limits on the size of contributions to candidates.<sup>12</sup> Although the Court has never intimated that contribution limits are *immune* from challenge, recent cases treated contribution restrictions relatively deferentially.<sup>13</sup> *Randall* gave the Vermont contribution limits much closer scrutiny than heretofore. The Court, however, failed to articulate anything like a clear standard of review. As a result, *Randall* surely created more uncertainty than it resolved. Moreover, with six Justices writing opinions and the opinion for the Court signed only by a plurality of three (and for some points just two), *Randall* underscores the ongoing division within the Court concerning the constitutional framework for addressing campaign finance law. As in other recent cases, a majority of the Justices repudiated *Buckley's* central doctrinal formulation—the distinction in the constitutional treatment accorded to contributions and expenditures—even as the Court as an institution continued to adhere to it.

This Article considers *WRTL*, *Randall*, and their implications for the future of campaign finance law. Part II examines *WRTL*, the relationship between the question raised in *WRTL* and the issues addressed in *McConnell*, and the potential definition of an as-applied exception to the ban on corporate and union “electioneering communication.” Part III turns to *Randall*, with particular attention to Justice Breyer's plurality opinion for the Court. Although attracting the votes of only two other Justices, the plurality opinion

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<sup>7</sup> See *FEC v. Wis. Right to Life, Inc.*, 127 S.Ct. 1145 (2007) (“*WRTL II*”) (accepting appeal from decision of the district court on remand from *WRTL* and setting forth briefing schedule).

<sup>8</sup> *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (plurality opinion).

<sup>9</sup> *Id.* at 2489, 2500.

<sup>10</sup> *Austin v. Mich. Chamber of Commerce.*, 494 U.S. 652 (1990).

<sup>11</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>12</sup> Before *Randall*, the Court had invalidated a contribution restriction just once, in a case involving contributions to a committee formed to make expenditures in connection with a ballot proposition campaign. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

<sup>13</sup> See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 377 (2000).

may tell us the most about the future direction of campaign finance doctrine because it represents the middle of the Court and because those two Justices—Chief Justice Roberts and Justice Alito—are the Court’s newest members. Part III also focuses on the contribution-expenditure distinction, which was central to the plurality opinion. Although the Court is sharply divided over the propriety of the distinction, and many members of the Court now reject it, the distinction structured the plurality opinion and continues to provide an organizing framework for campaign finance law. Finally, Part IV concludes with brief observations about the potential future of two areas of campaign finance regulation not directly before the Court in either of these cases, but potentially affected by them—the prohibition on the use of corporate and union treasury funds in election campaigns, and public funding of candidates.

*WRTL* and *Randall* are plainly setbacks for campaign finance reform. At the very least, they unsettled pro-reform precedents, and the cases could provide precedents for more restrictions on campaign finance regulation in the future. By the same token, by making a limits-based reform strategy more constitutionally uncertain, the cases could, paradoxically, have the salutary effect of directing greater attention to a more constitutionally secure reform technique—public funding of candidates.

## II. *WRTL* AND THE ELECTION/POLITICS DISTINCTION

### A. From “*Express Advocacy*” to “*Electioneering Communication*”

A central issue in campaign finance law is the constitutionally permissible scope of campaign finance regulation. The Supreme Court has repeatedly determined that certain restrictions or requirements that would be unconstitutional if extended to political activity in general are constitutionally justified when applied to election-related activity. Thus, the importance of an informed electorate has been relied on to uphold disclosure requirements for election-related activity that would probably be unconstitutional if applied to non-electoral political activity.<sup>14</sup> So, too, the concern that donations to candidates and political parties raise the danger of corruption and the appearance of corruption has been held to justify contribution restrictions that would surely be invalid if applied to gifts to support non-electoral political activity.<sup>15</sup> Given the interconnection and overlap between electioneering and the pursuit of political goals, the elections/politics line is inevitably elusive. Any distinction must avoid the twin perils of vagueness and overbreadth, provide an administratively

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<sup>14</sup> See, e.g., *Buckley*, 424 U.S. at 60–84.

<sup>15</sup> See *id.* at 12–38.

manageable rule, and permit effective regulation of the election-related behavior that gives rise to the constitutionally justified needs for regulation.<sup>16</sup>

In *Buckley*, the Court, in interpreting the Federal Election Campaign Act Amendments of 1974 (“FECA”),<sup>17</sup> fastened on the concept of express advocacy in mapping the elections/politics divide. Candidates and groups spending money on communications that expressly advocate the election or defeat of a clearly identified federal candidate would be subject to federal disclosure requirements, but individuals and groups engaged in other political advocacy—subsequently referred to as “issue advocacy”—were not subject to disclosure.<sup>18</sup> Subsequently, the Court applied the express advocacy/issue advocacy distinction in determining the scope of the longstanding ban on the use of corporate and union treasury funds in federal elections.<sup>19</sup>

Within a few election cycles, the express advocacy/issue advocacy distinction in law completely failed to map onto the elections/politics distinction in practice. With the courts making the inclusion of the “magic words” of express advocacy a prerequisite to regulation, parties, interest groups, and campaign specialists had little difficulty crafting hard-hitting ads, aired in the weeks immediately preceding the election, that effectively promoted or opposed federal candidates but escaped regulation.<sup>20</sup> By the 2000 election, more than \$500 million was being spent on so-called “issue ads” that were plainly electoral in intent and effect.<sup>21</sup> Closing the issue advocacy loophole was a major concern driving the enactment of BCRA. Mindful of the underlying vagueness, overbreadth, administrability, and efficacy concerns, Congress extended election regulation to a newly defined category of “electioneering communication,” consisting of (i) broadcast, cable, or satellite communications that (ii) refer to a clearly identified candidate for federal office, (iii) are aired within sixty days before a general election or thirty days before a primary election, and (iv) are targeted at the candidate’s constituency.<sup>22</sup> In case the Court found this definition reached too many non-electioneering messages, Congress added a “backup” definition that would kick in if the four-part primary definition were

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<sup>16</sup> For a more thorough examination of the role of the elections/politics line in campaign finance doctrine, see Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999).

<sup>17</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974).

<sup>18</sup> *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

<sup>19</sup> *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 249 (1986).

<sup>20</sup> See Briffault, *Issue Advocacy*, *supra* note 16, at 1755–63.

<sup>21</sup> *McConnell v. FEC*, 540 U.S. 93, 127 n.20 (2003).

<sup>22</sup> 2 U.S.C. § 434(f)(3)(A)(i) (2000 & Supp. 2004).

invalidated.<sup>23</sup> Like the primary definition, the backup definition applied only to “broadcast, cable or satellite communication,” and was further limited to ads that promote, attack, support, or oppose a candidate and that are “suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.”<sup>24</sup>

Citing the evident failure of the express advocacy/issue advocacy distinction to capture most electioneering ads,<sup>25</sup> *McConnell* upheld the primary definition. The Court concluded it was not vague, but instead, “easily understood and objectively determinable,”<sup>26</sup> and not overly broad. Relying on the expert evidence presented to, and the findings of, the district court, *McConnell* determined that “the issue ads broadcast during the 30-day and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy.”<sup>27</sup> Acknowledging that some issue ads might actually have been aimed at affecting issues and not the election of candidates and that “the precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief pre-election timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court,” the Court nonetheless concluded that “the vast majority of ads clearly had such a purpose.”<sup>28</sup> As a result, it upheld the primary definition, including its application to ads funded by corporate and union treasury funds, as constitutional.<sup>29</sup> Indeed, *McConnell* gave the overbreadth problem short shrift by observing that “whatever the precise percentage” of non-electioneering ads in the 30-day and 60-day windows “in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund,”<sup>30</sup> that is, from the corporation’s or union’s political action committee. In a footnote, the Court explained that it had “no occasion to discuss the backup definition” because it had “uph[e]ld all applications of the primary definition” of electioneering communication.<sup>31</sup>

Despite this strong statement, however, *McConnell* involved only a facial challenge to BCRA and did not consider the application of the ban on

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<sup>23</sup> 2 U.S.C. § 434(f)(3)(A)(ii) (2000 & Supp. 2004).

<sup>24</sup> *Id.*

<sup>25</sup> *McConnell*, 540 U.S. at 207.

<sup>26</sup> *Id.* at 194 (2003).

<sup>27</sup> *Id.* at 206.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 206.

<sup>31</sup> *McConnell*, 540 U.S. at 190 n.73.

corporate and union electioneering communications to any particular ad. Moreover, the Court observed that “we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.”<sup>32</sup>

### B. WRTL: *From the District Court to the Supreme Court and Back Again*

In *WRTL*, an incorporated Wisconsin right-to-life organization aired ads starting in July 2004 urging Wisconsin listeners to contact their two senators, Russell Feingold and Herbert Kohl, to urge them to oppose the filibustering of federal judicial appointments.<sup>33</sup> With Senator Feingold running for reelection in 2004, the ads became electioneering communications on August 15—thirty days before the September primary—and, with the sixty-day general election blackout period kicking in even before the primary, the corporate-funded ads could not be aired again until after the November 2, 2004 general election.<sup>34</sup>

Claiming the ads were purely “grass-roots lobbying” aimed at influencing legislators’ votes and not their reelection, *WRTL* contended the ads were constitutionally immune from restriction.<sup>35</sup> *WRTL* initially sought a preliminary injunction barring the FEC from enforcing BCRA against them.<sup>36</sup> The three-judge court required by BCRA denied the request, and Chief Justice Rehnquist, sitting as a circuit justice, denied a request for a preliminary injunction pending appeal.<sup>37</sup> The district court subsequently dismissed the case, finding that *McConnell*’s statement that it had upheld “all applications” of the BCRA’s “electioneering communication” definition barred any as-applied exception.<sup>38</sup> Moreover, the district court suggested that even if an as-applied exception was available in theory, it probably would not protect the *WRTL* ads, noting that *WRTL*’s political action committee had endorsed three candidates opposing Senator Feingold, those candidates had made Feingold’s support of filibusters against judicial nominees a campaign

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<sup>32</sup> *Id.* at 206 n.88 (2003).

<sup>33</sup> *Wis. Right to Life, Inc. v. FEC*, No. 04-1260, 2004 WL 3622736, at \*5 (D.D.C. Aug. 17, 2004).

<sup>34</sup> *Id.* at \*2.

<sup>35</sup> *WRTL*, 126 S. Ct. at 1017.

<sup>36</sup> *Id.*

<sup>37</sup> *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1305 (2004). The district court opinion is unreported.

<sup>38</sup> *Wis. Right to Life v. FEC*, No. 04-1260, 2006 WL 3746669, at \*3 (D.D.C. Aug. 17, 2004), *subsequent determination by* *Wis. Right to Life, Inc. v. FEC*, No. Civ.04-1260DBS, 2005 WL 3470512 (D.D.C. May 10, 2005).

issue, and WRTL's political action committee had made a priority of "sending Feingold packing."<sup>39</sup> Tracking *McConnell*'s reasoning, the district court also minimized the burden BCRA placed on WRTL, explaining that the organization could comply with the statute and still get its message out by using print and electronic media, as it had in the months before the blackout period<sup>40</sup> or use its political action committee to pay for the broadcast ads.<sup>41</sup>

In a terse, five-paragraph per curiam opinion, a unanimous Supreme Court reversed, holding the district court had erred in concluding that *McConnell*'s rejection of the facial challenge also operated to "foreclos[e] any 'as-applied' challenges."<sup>42</sup> The Court did not reach the question of whether WRTL's ads qualified for an as-applied exception but remanded the issue to the district court.<sup>43</sup>

If the *WRTL* oral argument is any indication, the unanimity of the Court's very limited decision masks a deep division, closely tracking the split in *McConnell* over the ultimate question of the constitutionality of regulating pre-election corporate and union broadcast ads. In questioning WRTL advocate James Bopp Jr., the Justices who had been in the *McConnell* majority repeatedly asserted that *McConnell* resolved the issue.<sup>44</sup> Justices Breyer and Souter emphasized that the combination of references to a legislative issue and to a candidate in the WRTL ads was indistinguishable from the mix of candidate and issue themes in many of the so-called "sham issue ads" that *McConnell* had held could be treated as electioneering.<sup>45</sup> Justices Breyer, Souter, and Stevens strongly doubted that there were any objective criteria for marking off a distinct category of ads that fall within the statutory definition of electioneering communication but are "really" "genuine" issue ads and not election ads.<sup>46</sup> Justice O'Connor, the co-author of the *McConnell* opinion, cited *McConnell*'s point that "corporations and unions may finance genuine issue ads during election blackout periods by simply avoiding any specific reference to Federal candidates or, in doubtful

<sup>39</sup> *Wis. Right to Life*, 2006 WL 3746669, at \*3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at \*4.

<sup>42</sup> *Wis. Right to Life, Inc. v. FEC*, 126 S. Ct. 1016, 1018 (2006).

<sup>43</sup> *Id.*

<sup>44</sup> Transcript of Oral Argument at \*3–5 (questions of Justice Souter), \*13–14 (same), \*17 (same), \*10 (questions of Justice Breyer), *Wis. Right to Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006) (No. 04-1581), 2006 WL 164632.

<sup>45</sup> *Id.* at \*3–5 (questions of Justice Souter), \*13–14 (same), \*17 (same), \*10 (questions of Justice Breyer).

<sup>46</sup> *See, e.g., id.* at \*10 (Justice Breyer: "[t]here's simply no way to know whether an ad like yours is a genuine issue ad or isn't"); *id.* at \*15 (Justice Souter: "[t]here isn't a practical way to tell the difference"); *id.* at \*18 (Justice Stevens).



cases, by paying for the ad from a segregated fund.”<sup>47</sup> She concluded “that language” from *McConnell* “indicates, to me at least, that the Court was saying there are no genuine issue ads meeting the definition as you would have us apply it here.”<sup>48</sup>

By contrast, *McConnell* dissenters Justices Kennedy and Scalia repeatedly emphasized the First Amendment values implicated by a law that “stop[s] people from criticizing incumbents during . . . the election blackout period.”<sup>49</sup> But the most vigorous critic of the FEC’s position in *WRTL* was the Court’s newest member, Chief Justice Roberts, who was hearing his first campaign finance case. Solicitor General Clement had barely begun his argument when the Chief Justice asserted that the government’s contention that *McConnell* precluded an as-applied challenge when the government in its *McConnell* argument had emphasized that *McConnell* presented only a facial challenge was “a classic bait and switch.”<sup>50</sup> Thereafter, the Chief Justice, who had spoken only briefly during the petitioner’s argument, hammered away at the government. Some of the Chief Justice’s interventions focused on the specific facts of the *WRTL* ads in ways that bolstered *WRTL*’s position. When, for example, the Solicitor General sought to cast doubt on *WRTL*’s argument that the ads were really anti-filibuster ads and not anti-Feingold ads by noting that the ads were not aired until after the start of a 45-day summer Senate recess—when filibusters were not a pending legislative issue—the Chief Justice replied: “Well, if you’re trying to influence the Senators who are presumably or possibly in their home state during a recess, that’s perfect timing to influence the Senators who are the ones engaging in the filibuster.”<sup>51</sup> At other times, the Chief Justice underscored the First Amendment interest in the availability of an as-applied exception to a law restricting political activity.<sup>52</sup>

In the end, Justice O’Connor, in a colloquy with Solicitor General Clement, may have provided the formula for the divided Court’s brief, unanimous resolution of the case, when she observed: “Well, I suppose you can say, yes, you can have an as-applied challenge, but this one doesn’t meet the test.”<sup>53</sup> Following this line, the Court, without dissent, concluded that *McConnell* did not literally foreclose an as-applied challenge, so that *WRTL* was entitled to make one, but gave no hint as to how it would resolve the

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<sup>47</sup> *Id.* at \*7.

<sup>48</sup> *Id.* at \*7–8.

<sup>49</sup> *Id.* at \*48 (Justice Scalia); see also *id.* at \*28 (Justice Kennedy: “it does seem[ ] strange to me in a speech case to say we’re foreclosing as-applied challenges.”).

<sup>50</sup> Transcript of Oral Argument, *supra* note 44, at \*25.

<sup>51</sup> *Id.* at \*40–41.

<sup>52</sup> *Id.* at \*27.

<sup>53</sup> *Id.* at \*29.

merits of WRTL's case.<sup>54</sup> Indeed, the Court said absolutely nothing about what factors the district court ought to take into account in deciding whether WRTL should receive an as-applied exception.

The *WRTL* decision initially had little impact. In May 2006, a three-judge panel of the federal district court for the District of Columbia denied a motion for a preliminary injunction brought by the Christian Civic League of Maine, Inc. ("CCLM") for an as-applied exception to BCRA that would enable CCLM to broadcast, during the pre-primary blackout period, a radio ad calling on listeners to contact Senators Olympia Snowe (who was seeking her party's renomination) and Susan Collins (who was not up for election in 2006), to urge them to support the Marriage Protection Amendment, which was scheduled to come before the Senate in June 2006.<sup>55</sup> Subsequently, in September 2006, a different three-judge panel of the District of Columbia district court denied a motion for a temporary restraining order and a preliminary injunction brought by Wisconsin Right to Life for an as-applied exception to BCRA to enable the organization to broadcast radio ads in the pre-election blackout period calling on listeners to contact Senators Kohl (running for reelection in 2006) and Feingold (not up for reelection in 2006), urging them to "stop efforts by the Senate Democratic leadership to hold up a bill which will prevent secret abortions [the Child Custody Protection Act, or CCPA]."<sup>56</sup>

The situation changed dramatically on December 21, 2006, when a divided three judge-panel of the federal district court for the District of Columbia, on remand from the Supreme Court, ruled that WRTL was entitled to an as-applied exception from BCRA for its 2004 "anti-judicial filibuster ads."<sup>57</sup> Writing for the majority, Judge Leon determined that the as-applied exemption question must be based solely on the content of the ads, that is, the "language within the four corners of the anti-filibuster ads."<sup>58</sup>

The district court applied a five-part test that considered whether an ad (i) "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future"; (ii) "refers to the prior voting record or current position of the named candidate on the issue described"; (iii) "exhorts the listener to do anything

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<sup>54</sup> *Wis. Right to Life, Inc. v. FEC*, 126 S. Ct. 1016, 1018 (2006).

<sup>55</sup> *Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 84–85 (D.D.C. 2006). The Supreme Court subsequently dismissed CCLM's appeal as moot. *Christian Civic League of Me., Inc. v. FEC*, 127 S. Ct. 336, 336 (2006).

<sup>56</sup> *Wis. Right to Life, Inc. v. FEC*, No. 04-1260, 2006 WL 2666017, at \*2–3 (D.D.C. Sept. 14, 2006).

<sup>57</sup> *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 210 (D.D.C. 2006). Circuit Judge Sentelle joined Judge Leon; Judge Roberts dissented.

<sup>58</sup> *Id.* at 207.

other than contact the candidate about the described issue”; (iv) “promotes, attacks, supports, or opposes” the candidate; and (v) “refers to the upcoming election, candidacy, and/or political party of the candidate.”<sup>59</sup> Although the WRTL ads were run in the pre-election period, were critical of judicial filibusters, and mentioned Senator Feingold by name, the ads refrained from criticizing Feingold directly and also refrained from either express electoral advocacy or express reference to an election, to a party, or to Feingold’s candidacy. Hence, the panel majority concluded, the ads were entitled to an exemption from BCRA’s prohibition on the use of corporate treasury funds for “electioneering communication.”

Less than a month after the district court decision, and almost exactly a year after the initial *WRTL* decision opening up the possibility of an as-applied exception, the Supreme Court agreed to hear the FEC’s appeal of the district court’s decision.<sup>60</sup> Clarification of the scope of the as-applied exception, and the impact on the effectiveness of BCRA’s regulation of the use of corporate and union treasury funds in federal elections, may soon be forthcoming.

### *C. Defining an As-Applied Exception to BCRA*

As has been apparent since the Supreme Court’s first stab at it in *Buckley*, drawing the distinction between election-related speech, which triggers the concerns that justify regulation, and non-election-related speech beyond the scope of election regulation is inherently difficult. *Buckley*’s “express advocacy” test failed to work in practice, in part because it failed to recognize that context can matter as much as the literal content of an ad. Political advertising can have a powerful impact on voters’ thinking about an election even when the ads eschew the language of express electoral advocacy. Both Congress and the Supreme Court learned from the *Buckley* experience. BCRA’s definition of “electioneering communication” incorporates attention to the timing and the medium of the ad, as well as its content. And the Court in *McConnell* agreed with BCRA’s approach. As *McConnell* recognized in explaining why the “express advocacy” test failed, “[l]ittle difference existed, for example, between an ad that urged viewers to ‘vote against Jane Doe,’ and one that condemned Jane Doe’s record on a

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<sup>59</sup> *Id.* Judge Leon’s test resembles the Interim Final Rule proposed by Federal Election Commission member Hans A. von Spakovsky in August 2006, to define a grassroots lobbying exemption from BCRA’s electioneering communication restriction. See FEC, Agenda Doc. No. 06-53, proposed Interim Final Rule 45-46 (2006). The Commission, on a 3-3 vote, declined to adopt the proposal. See FEC, Agenda Doc. No. 06-58, Minutes of an Open Meeting, Aug. 29, 2006, approved Sept. 14, 2006.

<sup>60</sup> *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 1145 (2007).

particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’”<sup>61</sup>

In focusing exclusively on the “language within the four corners of the anti-filibuster ads,”<sup>62</sup> the district court in the *WRTL* remand plainly failed to abide by *McConnell* or to learn the lesson of the failure of “express advocacy.” The district court’s test could easily lead to the widespread evasion of the electioneering communication regulation. It is hard to imagine what campaign issue is not “currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future.”<sup>63</sup> Surely, it would be child’s play for a corporation to develop an election-period ad that takes an emphatic position on an issue associated with a candidate, blasts the opposing position, links the candidate to the opposing position, and calls on voters to contact the candidate—all without explicitly criticizing the candidate on the issue or referring to an election or party. As before BCRA, a corporation would be able to use treasury funds to sponsor election-period ads that “condemn[ ] Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’”<sup>64</sup> Even if such an ad is not primarily intended to influence the election, it is likely to have some electoral impact. Under the district court’s test, the as-applied exemption would eat up the rule, and the advertising tactics BCRA was enacted to prevent would flourish again.<sup>65</sup>

A better approach would be to follow the model set by the Supreme Court when it adopted an as-applied exception to the prohibition on the use of corporate treasury funds in election campaigns in *Federal Election Commission v. Massachusetts Citizens for Life* (“*MCFL*”).<sup>66</sup> As the *MCFL* Court noted, the restriction on corporate treasury funds serves two compelling state interests—addressing the “unfair advantage” corporations would have if they could deploy “resources amassed in the economic marketplace” in the electoral arena,<sup>67</sup> and protecting the interests of dissenting shareholders opposed to the use of their money in election

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<sup>61</sup> *McConnell v. FEC*, 540 U.S. 93, 126–27 (2003).

<sup>62</sup> *Wis. Right to Life v. FEC*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006).

<sup>63</sup> *Id.*

<sup>64</sup> *McConnell*, 540 U.S. at 127.

<sup>65</sup> Although the *WRTL* litigation is focused solely on BCRA’s prohibition on the use of corporate treasury funds to pay for electioneering communication, the logic of the district court’s reasoning could also support a significant evasion of BCRA’s disclosure requirement, since BCRA’s requirement of the disclosure of those paying for “electioneering communication” relies on the same statutory definition of “electioneering communication” as the restriction on corporate treasury funds. I owe this observation to Rick Hasen.

<sup>66</sup> 479 U.S. 238 (1986).

<sup>67</sup> *Id.* at 257–58.

campaigns.<sup>68</sup> In *MCFL*, the Court held that when a corporation's electoral expenditures do not implicate these two state interests, the First Amendment requires that the corporation be granted an as-applied exemption. The Court provided that such an exemption would be available for any corporation that (i) relies on donations from ideological supporters rather than business activities; (ii) takes no money from business corporations; and (iii) has no shareholders.<sup>69</sup> For a corporation that satisfies the three *MCFL* factors, "the concerns underlying the regulation of corporate political activity are simply absent"<sup>70</sup> so that an exception to an otherwise constitutional rule is constitutionally mandated.<sup>71</sup>

To be sure, the comparison with *MCFL* only highlights the difficulty of crafting an as-applied exception from the electioneering communication ban. *MCFL* provided a bright-line rule, closely congruent with the reasons for the corporate spending ban, which defines a category of ideological corporations that do not raise the campaign finance dangers posed by business corporation spending. There does not appear to be any similar set of relatively straightforward criteria that can be used to determine which ads broadcast in the pre-election period that combine references to named officeholders running for reelection with references to an issue currently pending before Congress or the President are electioneering communications and which are not. Nonetheless, the logic of *MCFL* is instructive.

Following *MCFL*, an as-applied exception from BCRA's extension of the ban on the election-related expenditure of corporate treasury funds to "electioneering communication" should be available only when airing a corporate ad does not implicate the "corrosive and distorting"<sup>72</sup> effects corporate wealth can have on federal elections or the potential for the misuse of dissenting shareholder funds. Given Congress's findings, which the Court sustained in *McConnell*, that "the vast majority of [such] ads"<sup>73</sup> are engaged in electioneering, the exception ought to be a small one, limited to the unusual situation in which such ads are unlikely to have an appreciable impact on voters' decisions in the upcoming election.

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<sup>68</sup> *Id.* at 260.

<sup>69</sup> *Id.* at 263–64.

<sup>70</sup> *Id.*

<sup>71</sup> WRTL presumably satisfies the first and third criteria listed in *MCFL* but because it accepts contributions from for-profit corporations, and, thus, could function as a conduit for business corporation funds, it did not seek an *MCFL* exemption. See Defendant FEC's Supplemental Brief in Support of Motion for Summary Judgment at 12, *Wis. Right to Life, Inc. v. FEC*, No. 1:04cv01260 (D.D.C. Sept. 11, 2006), available at <http://electionlawblog.org/archives/fec-wrtl-supp%20msj.pdf>.

<sup>72</sup> *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>73</sup> *McConnell*, 540 U.S. at 206.

One type of potentially exempt situation is suggested by an advisory opinion the FEC handed down in 2004, in which the Commission determined that a corporate automobile dealership could run ads in the pre-election period which mentioned the dealership's name, even though that name was the same as that of the business's founder and former head—and of the founder's son, who currently headed the dealership—who was a candidate for the U.S. Senate.<sup>74</sup> In such a situation it seems unlikely that a commercial ad that does not discuss political issues will have an appreciable effect on voters' election day decision-making even though the commercial sponsor and a candidate share the same name.

Similarly, it might make sense to create an exemption for a broadcast ad—even one discussing political issues—that refers to a candidate in an uncontested election, such as when an incumbent is unopposed for reelection.<sup>75</sup> In an uncontested election, political advertising is not likely to have an appreciable effect on the election, so the burden on speech is not justified by the interests underlying the restrictions on electioneering communication. The case for an uncontested election exception seems particularly strong if the ad avoids reference to the election or the language of electoral advocacy, and runs at a time when Congress is in session. In such a case, the likely impact of such an ad on an election is minimal, while restricting the ad would burden non-electoral political speech.

To be sure, the *CCLM* district court declined to create an as-applied exception for ads referring to Senator Snowe in the pre-primary period even though she was running unopposed in the June 2006 Maine Republican primary.<sup>76</sup> The district court suggested that “the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to

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<sup>74</sup> Russ Darrow Group, Inc., FEC Advisory Op. No. 2004-31 (Sept. 10, 2004), available at <http://www.fec.gov/aos/2004/ao2004-31final.pdf> (then follow “Search” hyperlink). The FEC declined to create an exemption for all situations in which a candidate and a business share the same name, noting that such ads could be used to promote a candidate, but the Commission determined that in the peculiar circumstances of the dealership case the electioneering communication restriction ought not apply.

<sup>75</sup> In the hotly contested 2006 Congressional elections, incumbents ran unopposed in the November general election in four of California's fifty-three Congressional districts, and in five of Florida's twenty-five Congressional districts. See [http://www.ss.ca.gov/elections/sov/2006\\_general/congress.pdf](http://www.ss.ca.gov/elections/sov/2006_general/congress.pdf); see also <http://election.dos.state.fl.us/elections/resultsarchive/index.asp?ElectionDate=11/7/2006> (choose “U.S. Representative” from the “Select Office” menu).

<sup>76</sup> Maine Bureau of Corps., Elections & Commissions, <http://www.maine.gov/sos/cec/elec/2006/Candidatelistng.htm>.

gather such support, including by raising funds for her reelection.”<sup>77</sup> It is possible that electioneering ads that refer to an incumbent running unopposed in a primary might have an impact on the upcoming general election even though Congress has treated primary and general elections as separate elections under both FECA and BCRA. But if the only potential impact of running an ad that combines discussion of a legislative issue with reference to an unopposed incumbent at a time when Congress is in session is that the broadcast might reduce the candidate’s total vote even though it could not affect the election’s outcome, that may not be sufficient to justify a restriction on political speech.

Given the substantial overlap of electioneering ads on the one hand, and legislative or policy ads on the other, there do not appear to be any *MCFL*-style criteria that would create a sharply marked category of ads that fall within BCRA’s statutory definition but that are unlikely to have an electoral impact. As a result, any as-applied exemption that respects the judgments of Congress in BCRA and of the Court in *McConnell* that most “electioneering communication” is election-related is likely to be both more discretionary in application than the exception created by *MCFL* and relatively narrow in scope.

The 2004 WRTL ads currently before the Court present a weak case for an as-applied exception. The ads linked a candidate to a campaign issue during the pre-election period. The ads were aired while the Senate was in recess. As a result, despite Chief Justice Roberts’ heroic effort during the 2006 oral argument to situate them in the filibuster controversy, the ads had little prospect of influencing legislative action—other than by persuading the Wisconsin electorate to vote out Senator Feingold. Indeed, the radio scripts for each of WRTL’s ads included the following disclaimer: “Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by *any candidate or candidates’ committee*.”<sup>78</sup> The disclaimer plainly indicates WRTL’s recognition that the ads would be perceived by the voters who heard them as electoral ads, thus confirming that even their sponsor understood they were likely to have an electoral effect. By specifically using the terms “candidate” and “candidate’s committee,” the ads employ the language of electoral ads, which reinforces their foreseeable electoral effect. Thus, even under the district court’s flawed

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<sup>77</sup> *Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 89 (D.D.C. 2006).

<sup>78</sup> *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 200 nn.3–5 (D.D.C. 2006) (emphasis added).

content-only test, the disclaimer ought to render the electioneering communications ineligible for an as-applied exemption.<sup>79</sup>

The significance of the case likely to be known as *WRTL I* cannot be determined until the decision in the case likely to be known as *WRTL II*. As of this writing, that case has been briefed before the Supreme Court but not argued. *WRTL I* opened the door to an as-applied exception from BCRA's prohibition on the use of corporate and labor union treasury funds in federal elections. But whether that exception is a relatively modest one, informed by the values that led Congress to enact BCRA and *McConnell* to sustain it, or a more open-ended one that provides significant opportunities for evasion will be up to the Supreme Court. *WRTL II* raises, and provides the Supreme Court the opportunity to reopen, basic questions concerning the scope of election regulation. The key question for the Roberts Court this Spring—and this time it will be a Court without Justice O'Connor—is just how much it is willing to readjust the balance set in *McConnell* just three years ago.

### III. *RANDALL V. SORRELL* AND THE PERSISTENCE OF THE CONTRIBUTION-EXPENDITURE DISTINCTION

When the Supreme Court first agreed to hear *Randall v. Sorrell* in the early fall of 2005,<sup>80</sup> there was some possibility that the Court would use the case to revisit and reconsider *Buckley's* rejection of candidate campaign spending limits. Not only had the reform position prevailed in the last four Supreme Court campaign finance cases, but the Court had begun to speak more positively about the value of campaign finance regulation. *McConnell* treated campaign finance laws not simply as burdens on speech and association, but as positive “measures aimed at protecting the integrity of the [political] process.”<sup>81</sup> Justices Stevens and Ginsburg, dissenting in *Colorado*

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<sup>79</sup> If the fact that a candidate is running unopposed provides a basis for an as-applied exception, then *WRTL* might have been entitled to an exemption from BCRA's restriction for roughly two weeks of the seventy-eight-day blackout period. Senator Feingold ran unopposed in the 2004 Wisconsin Democratic primary. See WISCONSIN STATE ELECTIONS BOARD, RESULTS OF FALL PRIMARY ELECTION 2 (2004), <http://elections.state.wi.us/docview.asp?docid=1382&locid=47>. The last two weeks of the thirty-day primary blackout period overlapped the sixty-day general election blackout period. With Senator Feingold facing a Republican challenger in the November election, the electioneering communication restriction for the general election started on September 2. When the primary period actually overlaps the general election period, however, the concerns raised by the *CCLM* district court about the impact of primary ads in the general election seem particularly pertinent.

<sup>80</sup> The Court granted the writ of certiorari on September 27, 2005. See *Randall v. Sorrell*, 126 S. Ct. 35, 35 (2005).

<sup>81</sup> *McConnell v. FEC*, 540 U.S. 93, 137 (2003).



*Republican I* in 1997, had found that a number of interests “provide a constitutionally sufficient predicate” for some spending limits.<sup>82</sup> In 2000, the number of Justices apparently ready to support some spending limits rose to three, when Justice Breyer suggested that *Buckley* might be reinterpreted “in light of the post-*Buckley* experience” to “mak[e] less absolute the contribution-expenditure line” and permit some spending limits.<sup>83</sup> He concluded that if *Buckley* could not be so read, “I believe the Constitution would require us to reconsider *Buckley*.”<sup>84</sup>

At the same time, a number of lower court judges, concerned about the intensification and increased significance of fundraising as a campaign activity under *Buckley*’s regime of limited contributions combined with unlimited spending, had sought to limit *Buckley*’s scope and find ways around the spending limits ban without tackling *Buckley*’s specific holdings head-on.<sup>85</sup> The principal opinion of a Tenth Circuit panel<sup>86</sup> determined that *Buckley* did not prohibit all spending limits. Instead, Judge Lucero contended that *Buckley* had held only that the specific arguments put forward to justify expenditure limits—preventing corruption, equalizing candidate resources, and limiting campaign costs—were constitutionally insufficient to the task,<sup>87</sup> and that the Supreme Court had not resolved whether other concerns, such as reducing the time burdens of fundraising or promoting competition, might be sufficient to justify spending limits.<sup>88</sup> In this view, *Buckley* “leaves open the possibility that at least in some circumstances expenditure limits may withstand constitutional scrutiny”<sup>89</sup>—although the Tenth Circuit concluded that the city of Albuquerque had failed to produce sufficient evidence that its

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<sup>82</sup> Colo. Republican Fed. Campaign Comm’n v. FEC, 518 U.S. 604, 648 (1996) (Stevens, J., dissenting).

<sup>83</sup> Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 405 (2000) (Breyer, J., concurring).

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Kruse v. City of Cincinnati, 142 F.3d 907, 919–20 (6th Cir. 1998) (Cohn, J., concurring) (suggesting that spending limits might be justified by the “interest in preserving faith in democracy” and contending that “*Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional”).

<sup>86</sup> Homans v. City of Albuquerque, 366 F.3d 900, 902 (10th Cir. 2004). Although the “principal opinion” in the case, no other member of the panel joined the opinion. See also *id.* at 914 n.1 (Tymkovich, J., concurring). However, Judge Tymkovich’s concurrence, joined by Judge O’Brien, agreed that *Buckley* “did not adopt a per se rule against campaign spending limits.” *Id.* at 915.

<sup>87</sup> See *id.* at 906 n.7, 907.

<sup>88</sup> See *id.* at 911–13.

<sup>89</sup> *Id.* at 906.

spending limits were actually necessary to meet the potentially compelling governmental interests it asserted.<sup>90</sup>

The Second Circuit, when it heard the challenge to the spending limits in the Vermont Campaign Finance Act of 1997, followed the Tenth Circuit's lead and concluded that *Buckley* did not slam the door shut on all possible justifications for spending limits. Like *Buckley*, the Second Circuit eschewed reliance on promoting candidate fiscal equality. Instead, the circuit court turned first to the one governmental concern the Supreme Court had determined to be of constitutional magnitude—the prevention of corruption and the appearance of corruption. Although *Buckley* had concluded that the corruption danger could be met adequately by contribution limits so that the expenditure limits were not narrowly tailored, the Second Circuit, relying on the findings of the district court, concluded that “the reality of campaign financing in Vermont” demonstrated that contribution limits alone were inadequate to deal with the corruption concern.<sup>91</sup> The combination of limited contributions and unlimited spending had provided an opening for individuals and interest groups capable of “bundling” together large numbers of capped individual contributions to obtain undue influence over the candidates dependent on their support. The bundling problem was a post-*Buckley* development not anticipated by the *Buckley* Court—and directly attributable to the *Buckley* holding—and thus provided an anti-corruption justification that *Buckley* had neither addressed nor resolved. The Second Circuit also relied on a second justification—protecting the time of candidates and officeholders from the burdens of fundraising. The court found that the State of Vermont had proven that “the pressure to raise large sums of money” forces candidates to devote extra time and attention to contributors, thus reducing their accessibility to “non-contributing citizens” and inevitably skewing governance accordingly.<sup>92</sup> The Second Circuit panel decision reviewed by the Supreme Court in *Randall* did not actually uphold the Vermont limits, but simply determined that anti-bundling and time-protection provided constitutionally compelling justifications for limits and then remanded to the district court to see whether the Vermont limits were the least restrictive means of achieving those goals.<sup>93</sup>

Of course, even with the stirrings in the lower courts and among the Justices, getting the Supreme Court to reopen the thirty-year ban on spending

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<sup>90</sup> *Id.* at 908–13.

<sup>91</sup> *Landell v. Sorrell*, 382 F.3d 91, 118 (2d Cir. 2004).

<sup>92</sup> *Id.* at 122.

<sup>93</sup> The panel opinion drew a strong dissent from Judge Winter, see *id.* at 149–212, and even more sharply worded criticism from five judges on the full court who dissented from the denial of a petition for rehearing en banc. *Landell v. Sorrell*, 406 F.3d 159, 167–79 (2d Cir. 2005).

limits would be a stretch. Having three Justices sympathetic to some regulation of spending is nowhere close to five, and the prospects for reconsideration of *Buckley* dimmed considerably when Justice O'Connor, the coauthor of the *McConnell* majority opinion, retired. Indeed, by the time the *Randall* oral argument was over, it was clear that *Buckley*'s spending limits ban was safe but that Vermont's new and tighter contribution limits—which were also adopted in its 1997 Act and had also been upheld by the district court and Second Circuit<sup>94</sup>—were in trouble. Ultimately, the Supreme Court invalidated both the spending and contribution limits by identical 6-3 votes.

In so doing, *Randall* reaffirmed the Court's continued adherence to the contribution-expenditure distinction, which has long been at the heart of our campaign finance jurisprudence, while demonstrating that a majority of the Court rejects the distinction. Indeed, with six separate opinions, no majority opinion, and a plurality opinion written by Justice Breyer announcing the judgment of the Court that was signed by just three—and, in one key part, just two—Justices, *Randall* sharply reveals the Court's current fragmentation with respect to several key campaign finance issues. In this Part, I will follow the Court's—really the plurality's—structure, and consider first *Randall*'s treatment of the expenditure limits question, and then its analysis of the Vermont contribution limits, before turning to the general question of the status and significance of the contribution-expenditure distinction.

### A. *The Expenditure Limits Ruling*

The plurality opinion's expenditure limits ruling relied entirely on *stare decisis*. Justice Breyer restated *Buckley*'s analysis, quoted *Buckley* at length, and listed the Court's decisions adhering to the contribution-expenditure distinction—including cases upholding contribution limits as well as those invalidating spending limits.<sup>95</sup> Claiming that Vermont was asking the Court to overrule *Buckley*,<sup>96</sup> Justice Breyer found that the expenditure limitation

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<sup>94</sup> *Landell v. Sorrell*, 118 F. Supp. 2d 459, 476–81 (D. Vt. 2000) (upholding limits on individual donations to candidates); *id.* at 484–86 (upholding limits on individual donations to political parties); *id.* at 488–89 (upholding limits on donations to and by political action committees), *aff'd* *Landell v. Sorrell*, 382 F.3d 91, 137–43 (2d Cir. 2004). The district court struck down the provision of the Vermont law imposing low limits on individual donations to political parties. *See* 118 F. Supp. 2d at 486–87. The Second Circuit reversed on this point, upholding the limitations on donations to parties. *See* 382 F.3d at 142–43. The district court invalidated the provision of the 1997 Act limiting out-of-state contributions to candidates. *See* 118 F. Supp. 2d at 483–84. The Second Circuit affirmed. *See* 382 F.3d at 146–48. The restriction on out-of-state donations did not come before the Supreme Court.

<sup>95</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2487–88 (2006) (plurality opinion).

<sup>96</sup> *Id.* at 2489.

ban had “become settled through iteration and reiteration over a long period of time,” that it had not become a “legal anomaly” due to subsequent case law, and that campaign finance practices had not “changed so radically as to undermine *Buckley*’s critical factual assumptions.”<sup>97</sup> Reciting a paean to the stability-promoting virtues of adherence to precedent,<sup>98</sup> Justice Breyer found that “*Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws.”<sup>99</sup>

Having rejected what it deemed an overture to overrule *Buckley*, the plurality then turned to one of Vermont’s and the Second Circuit’s specific arguments for upholding spending limits—protecting candidates from the time burden and distractions of fundraising. Noting the fundraising burden argument had been raised in the *Buckley* litigation and that it had been alluded to in the portion of the *Buckley* opinion upholding presidential public funding, the plurality concluded that even though *Buckley*’s analysis of spending limits did not address the burdens of fundraising, the time-burden argument was still precluded as “it is highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley*’s result.”<sup>100</sup>

The plurality opinion’s treatment of the expenditure limits question is brief, disingenuous, mechanical, and largely abstracted from any serious consideration of the merits or demerits of spending limits. Despite the plurality’s assertion, neither Vermont nor the Second Circuit had called for overruling *Buckley*, as Justice Alito—who joined most of the plurality opinion and concurred in the result—expressly pointed out in his concurring opinion in explaining why he did not join this part of the plurality.<sup>101</sup> Similarly, in his concurring opinion, Justice Kennedy pointed out that the parties had not asked the Court to overrule *Buckley*.<sup>102</sup> And Justice Thomas, joined by Justice Scalia in his concurrence, also sought to distance himself from the plurality’s reliance on stare decisis.<sup>103</sup> Justice Breyer’s specific argument for adherence to precedent—that Congress and the state legislatures rely on *Buckley* when drafting campaign finance laws—is a real howler in the expenditure limits setting. Congress and the states may have felt compelled by *Buckley* to decline to enact spending limits because of the *Buckley*-created constitutional prohibition. But it seems odd to speak of a state’s refraining from adopting laws that a majority of its lawmakers might have preferred to adopt as reliance.

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 2490.

<sup>100</sup> *Id.*

<sup>101</sup> *Randall*, 126 S. Ct. at 2500 (Alito, J., concurring).

<sup>102</sup> *Id.* at 2501 (Kennedy, J., concurring).

<sup>103</sup> *Id.* at 2501–02 (Thomas, J., concurring).

The plurality never addressed the Second Circuit's anti-bundling argument or the facts relied on by the circuit court to support it, except perhaps in its conclusory statement that there had been no "radical[]" change in campaign circumstances since *Buckley*. The plurality declined to consider the merits of whether protecting the time of officeholders and candidates from the burdens and distraction of fundraising is a constitutionally compelling justification for spending limits. Instead, the plurality focused solely on the proceduralist question of whether time-protection was addressed in *Buckley*. In other words, in emphatically rejecting spending limits, the plurality said nothing about why the arguments raised by Vermont, the Second Circuit, and other courts were substantively inadequate.

To be sure, the plurality was not the only opinion that gave little or no attention to the substance of the spending limits question. Justice Alito, who broke with the plurality's reliance on stare decisis but joined the judgment, gave no reasons for his vote. Justice Kennedy, in a sentence, simply agreed with the plurality that "respondents' attempts to distinguish the present limitations from those we have invalidated are unavailing."<sup>104</sup> Other than joining the judgment, Justices Thomas and Scalia said nothing about spending limits at all. While the three dissenters—Justice Souter having joined Justices Stevens and Ginsburg in expressing a willingness to consider spending limits—gave considerable attention to the spending limits issue,<sup>105</sup> the majority seemed uninterested in the question.

Justice Breyer's position is particularly puzzling. As already noted, in *Shrink* he went out of his way to call for "making less absolute the contribution-expenditure line"<sup>106</sup> and to express the view that when campaign finance restrictions are at stake "constitutionally protected interests lie on both sides of the legal equation,"<sup>107</sup> including "the integrity of the electoral process" and "democratiz[ing] the influence that money itself may bring to bear upon the electoral process."<sup>108</sup> As he observed: "In such circumstances—where a law significantly implicates competing constitutionally protected interests in complex ways—the Court has closely scrutinized the statute's impact on those interests but refrained from employing a simple test that effectively presumes unconstitutionality."<sup>109</sup> Similarly in his recent book, *Active Liberty*, Justice Breyer explained:

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<sup>104</sup> *Id.* at 2501 (Kennedy, J., concurring).

<sup>105</sup> *Id.* at 2506–11 (Stevens, J., dissenting), 2511–12 (Souter & Ginsburg, JJ., dissenting).

<sup>106</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405 (2000) (Breyer, J., concurring).

<sup>107</sup> *Id.* at 400.

<sup>108</sup> *Id.* at 401.

<sup>109</sup> *Id.* at 402.

[C]ampaign laws . . . seek to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process . . . . Ultimately, they seek thereby to maintain the integrity of the political process . . . . [T]hose laws, despite the limits they impose, will help to further the kind of open public discussion that the First Amendment seeks to sustain, both as an end in itself and as a means of achieving a workable democracy.<sup>110</sup>

Although Justice Breyer never specifically called for overturning *Buckley*'s invalidation of candidate campaign spending limits—the closest he came was a reference to making less absolute the contribution-expenditure distinction “particularly in respect to independently wealthy candidates,”<sup>111</sup>—surely the tenor of his writing implied that he would engage in a “close scrutiny” of the potential costs and benefits of the Vermont spending limits, much as the contribution limits portion of the plurality opinion discussed in the next Section of this Part undertakes an extremely fact-sensitive multi-factored review of the Vermont contribution limits. But by incorporating the contribution-expenditure distinction into the methodology of his opinion as well as its holding, Justice Breyer gave virtually no consideration either to the specifics of spending limits in the Vermont campaign context, or the costs or benefits of spending limits more generally for “democrati[z]ing the influence that money itself may bring to bear upon the electoral process,” “building public confidence in that process” or “protect[ing] the integrity of the electoral process.”<sup>112</sup>

In short, the six Justices in the *Randall* majority, perhaps treating the resolution of the issue as a foregone conclusion, gave little attention to the substantive question of spending limits at all.

### B. *The Contribution Limits Ruling*

As with the expenditure limits, *Randall* by a 6-3 vote invalidated the Vermont contribution limits. Again, there was no majority opinion. Rather the majority consisted of a plurality opinion, with additional opinions concurring in the judgment. But headcount, division, and outcome aside, the two halves of the *Randall* decision have little in common. The contribution limits plurality enjoyed the support of three Justices, not just two, although at least two of the three concurring Justices strongly disagreed with the plurality's reasoning. *Stare decisis* played relatively little role; indeed, Justice Breyer engaged in a far more rigorous review of the contribution limits than

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<sup>110</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 47 (2005).

<sup>111</sup> *Shrink*, 528 U.S. at 405 (Breyer, J., concurring).

<sup>112</sup> *Id.* at 401.

the Court had in any of its prior contribution limit cases.<sup>113</sup> By the same token, both the specifics of the Vermont law and the details of Vermont campaigns—which had been ignored in the spending limits discussion—received considerable attention. Moreover, whereas the spending limits analysis largely ignored substantive values, the plurality’s assessment of the Vermont contribution limits concentrated on a substantive concern: the impact of the law on electoral competition.

The Vermont limits were struck down because the plurality found them to be so low that they threatened to “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”<sup>114</sup> The specific provisions of the Vermont law, including the relatively low monetary ceilings, the failure to index the limits for inflation, the application of the contribution limits to volunteers’ out-of-pocket expenses, and the low limits on party donations to candidates were each problematic—and, taken together, unconstitutional. Although the limits were challenged on First Amendment grounds, the plurality’s focus was not on the impact of the limits on the speech of donors or volunteers but, instead, on the consequences for competitive elections and the “democratic electoral process.”<sup>115</sup> Indeed, to a considerable extent the plurality shifted the focus of constitutional concern from the First Amendment rights of donors to a more structural interest in competitive elections. Competitiveness had been referred to by the Court in earlier campaign finance cases,<sup>116</sup> but it had never before been so central.

To be sure, First Amendment concerns did not disappear entirely. The plurality suggested that Vermont’s tight limits on party donations to candidates burdened the *associational* interest of party members.<sup>117</sup> But, even that discussion occurred within the broader framework of the plurality’s focus on the role of parties in promoting competition. *Buckley*’s original concern that contribution restrictions burden the free speech rights of donors—a concern mitigated by *Buckley*’s determination that the speech burden of a monetary cap on contributions is “marginal”<sup>118</sup> and justified by the interests in preventing corruption and the appearance of corruption—was replaced by the *Randall* plurality’s worry that low contribution limits unduly constrain electoral competition.

The *Randall* plurality opinion could be a watershed in campaign finance law and election law more generally. Leading election law scholars—most

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<sup>113</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2491–2500 (2006) (plurality opinion).

<sup>114</sup> *Id.* at 2492.

<sup>115</sup> *Id.*

<sup>116</sup> *Shrink*, 528 U.S. at 395–96.

<sup>117</sup> *Randall*, 126 S. Ct. at 2499.

<sup>118</sup> *Buckley v. Valeo*, 424 U.S. 1, 20 (1976).

prominently Sam Issacharoff and Rick Pildes—have long urged that courts give more attention to “political markets”<sup>119</sup> and structural concerns like competitiveness in reviewing laws that affect elections.<sup>120</sup> In taking the structural/competitiveness turn, the *Randall* plurality opinion was thus in step with the latest academic developments. In so doing, the *Randall* plurality opinion also nicely illustrates some of the difficulties of framing doctrine around the competitiveness model. As Nate Persily has recently pointed out, there are multiple ways of thinking about competitiveness, including rates of contestation, margins of victory, and the frequency with which challengers defeat incumbents.<sup>121</sup> Different approaches to competitiveness might have different implications for how contribution limits are seen to affect electoral competitiveness. There is some political science evidence that contribution limits benefit certain aspects of competitiveness, particularly rates of contestation<sup>122</sup> and margins of victory.<sup>123</sup> Given the built-in advantages that incumbents enjoy in obtaining large contributions, any law that limits the size of contributions is likely to have a greater absolute monetary impact on incumbents, so it would not be surprising if contribution limits curbed the ability of incumbents to financially outdistance challengers, and thus generally reduced the incumbent-challenger spending gap and, potentially, the vote gap.<sup>124</sup> On the other hand, contribution limits may limit the ability of well-funded, already competitive challengers who are attractive to large donors to actually catch up to and overtake incumbents. The challenger-

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<sup>119</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Political Process*, 50 STAN. L. REV. 643 (1998). For a negative assessment of the structural argument, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* 143–55 (2003).

<sup>120</sup> See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

<sup>121</sup> See Nathaniel Persily, *The Place of Competition in American Election Law*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 172–74 (Michael P. McDonald & John Samples eds., 2006).

<sup>122</sup> See Thomas Stratmann & Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 PUB. CHOICE 177, 186–89 (2006).

<sup>123</sup> See, e.g., Kedron Bardwell, *Campaign Finance Laws and the Competition for Spending in Gubernatorial Elections*, 84 SOC. SCI. Q. 811, 819–20 (2003); Robert E. Hogan, *The Costs of Representation in State Legislatures: Explaining Variations in Campaign Spending*, 81 SOC. SCI. Q. 941 (2000).

<sup>124</sup> See, e.g., Stratman & Aparicio-Castillo, *supra* note 122, at 199; Bardwell, *supra* note 123, at 822–23; Hogan, *supra* note 123, at 950–51.



success measure of competitiveness, thus, may be impaired by restrictive contribution limits.<sup>125</sup>

In *Randall*, the plurality opted for the challenger-success definition of competitiveness. The plurality rejected the lower court findings, backed by expert testimony, that the contribution limits would not curtail competition in most races.<sup>126</sup> Instead, the plurality focused solely on the potential consequences of the limits, especially of the limits on party donations to candidates, in “*strongly contested campaigns*.”<sup>127</sup> The plurality did not explain why competitiveness in already competitive races is the metric for assessing competitiveness, as opposed to improving competitiveness in other races by increasing rates of contestation or reducing margins of victory. Nor did the plurality discuss the constitutional consequences if a contribution restriction has different effects for different definitions of competitiveness. Even if contribution limits constrain challenger success in the closest elections, it could be that by encouraging more challengers or by narrowing the challenger-incumbent gap generally, contribution limits serve the interests in offering voters alternatives, promoting civic engagement, and making incumbents more sensitive to constituent concerns that undergird the value of competitiveness. Thus, *Randall*'s attention to competitiveness was inexplicably truncated.

Of course, not only is the particular definition of competitiveness analytically debatable but determining the consequences of particular laws will often be highly speculative. A central theme of much of the campaign finance literature is just how uncertain we are about the effects of particular campaign finance laws. The political science journals are filled with dueling studies, with each finding soon rebutted by a counter-finding, or by a study determining that a particular campaign finance law has little provable impact on campaign results. Campaign finance provisions interact with each other as well as with a host of cross-cutting factors in the surrounding legal and political environments, including districting schemes, ballot access laws, political issues, and electoral trends. A competitiveness standard, thus, increases the judicial role, requires a close engagement with the record, and is open to conflicting readings of the same evidence.

The *Randall* plurality was certainly marked by both a close appraisal of the evidence—trial testimony and supporting political science findings—and a trial court-like weighing and balancing of conflicting evidence. The plurality developed a multi-factor analysis that probably opens many more

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<sup>125</sup> See Thad Kousser & Ray LaRaja, *The Effect of Campaign Finance Laws on Electoral Competition: Evidence from the States*, POL'Y ANALYSIS (Cato Institute), Feb. 14, 2002, at 5, available at <http://www.cato.org/pubs/pas/pa426.pdf>.

<sup>126</sup> See, e.g., *Landell v. Sorrell*, 118 F. Supp. 2d 459, 470–71 (D. Vt. 2000).

<sup>127</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2496 (2006) (emphasis in original).

contribution limits to challenge, without definitively indicating that any of those challenges will prevail. As already noted, Justice Breyer cited a plethora of factors in determining that the Vermont limits were fatally anti-competitive: the low absolute level of the dollar ceilings; the application of one limit to the entire election cycle rather than separate limits for the primary and general elections; the application of limits to volunteers' out-of-pocket expenses; the failure to index; the low party limits; and Vermont's failure to provide specific evidence of a corruption danger that would justify such low limits. The plurality concluded that it was the interplay of the factors rather than any single factor that rendered the Vermont limits unconstitutional.<sup>128</sup>

On inspection, the first three criteria collapse into one, as the election-cycle definition of the limit and the inclusion of out-of-pocket expenses simply make the dollar limits tighter. The fourth factor—to which the plurality devoted just a paragraph<sup>129</sup>—seems beside the point. As Justice Souter observed in dissent, “[t]his challenge is to the law as it is, not to a law that may have a different impact after future inflation if the state legislature fails to bring it up to economic date.”<sup>130</sup> The plurality did not mention that the federal contribution limits upheld in *Buckley* were not indexed and that the federal indexing of individual contribution limits did not begin until after the enactment of BCRA a quarter-century later. The failure to document evidence of corruption under Vermont's old limits goes more to the justification for the limits rather than proof of an impact on competitiveness.

The heart of the competitiveness analysis, then, is the combination of low limits on individual contributions with low limits on party contributions. Indeed, it appears that the low party limit was the Vermont law's Achilles heel. The plurality relied extensively on petitioners' expert testimony and supporting political science studies that the ability of the political parties to target funds to their strongest challengers plays a major role in promoting the competitiveness of Vermont elections. The tight limits on party donations to candidates would directly interfere with this critical party function.<sup>131</sup> Although the plurality acknowledged that the Court had previously upheld limits on party contributions to candidates,<sup>132</sup> and it declined to hold that parties are entitled either to an absolutely high limit or to a limit relatively higher than that applied to individuals or non-party political committees, the plurality treated the low party limit as especially problematic.

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<sup>128</sup> *Id.* at 2495, 2499.

<sup>129</sup> *Id.* at 2499.

<sup>130</sup> *Id.* at 2515.

<sup>131</sup> *Id.* at 2495–98.

<sup>132</sup> *Id.* at 2497–98.

It is, thus, something of a mystery that the plurality did not consider limiting its decision to striking down the party limits. The district court had taken that approach—invalidating the limits on party donations to candidates but not the limits on donations to candidates or to parties. Like the Supreme Court plurality, the district court recognized that “[p]olitical parties speak with a different voice than individuals” and found that the limits were “[m]ore stringent, even, than the small scale of Vermont politics would justify.”<sup>133</sup> Relying on Vermont law, the district court found that both the state code and Vermont case law preferred severability over broad invalidation of a statute, so that a “court must sever only the unconstitutional feature, phrase, or word of a statute leaving the remainder of the statute as an operative whole.”<sup>134</sup> The Supreme Court plurality briefly considered and rejected the severance option, explaining that “[t]o sever provisions to avoid constitutional objection here would require us . . . to leave gaping loopholes (no limits on party contributions).”<sup>135</sup> But, of course, that was the exact result of the *Randall* decision. By invalidating the limits adopted in 1997, the Court effectively reinstated Vermont’s preexisting limits: \$1000 on contributions from an individual to a candidate, \$3000 on contributions from a non-party political committee to a candidate—each per election—and no limits on party contributions.<sup>136</sup> The Court’s decision created just as gaping a loophole in Vermont’s contribution limits as the severance of the party limits would have done. Given the centrality of the competitiveness of hotly contested races to the plurality’s analysis and the major role targeted party funding can play in those races, a limited invalidation of the low party limits would have been a sensible reconciliation of the plurality’s competitiveness concern with the Court’s past deference to legislative judgments concerning contribution limits.

Of course, the plurality did not limit itself to criticism of the party limit; it also relied heavily on the low limit on individual donations to candidates. The Vermont law capped individual contributions at \$200 to candidates for the lower house of the state legislature, \$300 for candidates to the upper house, and \$400 to candidates for statewide office.<sup>137</sup> As already indicated, these limits applied to an entire election cycle, not to primary and general elections separately.<sup>138</sup> To a candidate facing both a primary and a general election—and such a candidate is more likely to be a challenger than an incumbent—the limits might be seen as effectively halved for each election.

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<sup>133</sup> *Landell v. Sorrell*, 118 F. Supp. 2d 459, 487 (D. Vt. 2000).

<sup>134</sup> *Id.* at 492.

<sup>135</sup> *Randall*, 126 S. Ct. at 2500.

<sup>136</sup> *Landell*, 118 F. Supp. 2d at 465.

<sup>137</sup> *Randall*, 126 S. Ct. at 2486.

<sup>138</sup> *Id.*

These are low limits in terms of absolute dollar amounts when compared to limits in other states,<sup>139</sup> the federal limits,<sup>140</sup> and the limits the Court had seen in previous cases.<sup>141</sup>

But it is unclear why the absolute dollar amount alone renders the limits unconstitutional, particularly from the competitiveness perspective that the plurality embraced. The plurality devoted exactly one paragraph<sup>142</sup> to an appraisal of how the low individual limits—as distinct from the low party caps—would cut into the funds available to the challengers in competitive races. It gave no consideration to the possibility—noted in *Buckley*—that contribution caps would stimulate candidates to expand their donor bases, so that the lost large donations could be replaced by large numbers of smaller donations. The plurality dismissed the significance of the fact that the contribution caps, which also apply to local governments, had no impact on the ability of candidates, including challengers, to finance a competitive race for mayor of Burlington, Vermont's largest city.<sup>143</sup> Most importantly, the plurality also dismissed the significance of the small size of Vermont's electoral constituencies in assessing the likely impact of the donation caps on state campaigns.<sup>144</sup>

With just 623,000 people, Vermont is the nation's second smallest state in population.<sup>145</sup> Moreover, it has a relatively large state legislature for such a small state. Its 30-member senate is roughly the size of Ohio's, and its 150-member lower house is as large as those of Texas or New York and significantly larger than the lower houses in California and Florida.<sup>146</sup> As a

<sup>139</sup> *Id.* at 2493–94 (reviewing limits in other states).

<sup>140</sup> The federal limit on individual donations to federal candidates is \$2000 per election—with primary and general elections counted as separate elections—adjusted for inflation. See 2 U.S.C. §§ 441a(a)(1)(A), 441a(c) (2000 & Supp. 2004). In the 2005–2006 election cycle, the federal limit was \$2100. See Federal Election Commission, New Federal Contribution Limits Announced, Feb. 3, 2005, <http://www.fec.gov/press/press2005/20050203limits1.html>.

<sup>141</sup> See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 383–83 (2000) (reviewing and upholding Missouri limits of \$1075 for candidates for statewide office and \$275 for candidates for state representative and any office in which fewer than 100,000 people were represented).

<sup>142</sup> *Randall*, 126 S. Ct. at 2495.

<sup>143</sup> *Id.* at 2496.

<sup>144</sup> *Id.* at 2494.

<sup>145</sup> See Fact Monster, Population by State, <http://www.factmonster.com/ipja/A0004986.html> (state-by-state population figures as of July 2005).

<sup>146</sup> See National Conference of State Legislatures, Constituents per State Legislative District, Legislatures Ranked by Size, <http://www.ncsl.org/programs/legismgt/elect/cnstprst.htm>.

result, its legislative constituencies are remarkably small—roughly 20,000 for the state senate (the second smallest in the country) and 4000 for the state house (again, the second smallest in the country).<sup>147</sup> As the district court found, candidates can campaign in these tiny constituencies with relatively small amounts of money.<sup>148</sup>

Surely, the size of the constituency is an important factor in determining the impact of contribution limits on the ability to compete. It simply costs less money to reach a small number of voters. Broadcast media are likely irrelevant, and even newspapers may be less significant than flyers, yard signs, and door-to-door campaigning. Indeed, Vermont constituencies are territorially small, too—the state is the fifth smallest in area<sup>149</sup>—so the costs of travel are likely to be less significant. With few voters to contact and little ground to cover, it is not surprising that the district court found that “many politicians have run effective and winning campaigns with very little money, and some with no money at all.”<sup>150</sup> While the district court failed to distinguish between the campaigns of incumbents and those of challengers, and the *Randall* plurality was no doubt correct in contending that “campaign costs do not automatically increase or decrease in precise proportion to the size of an electoral district,”<sup>151</sup> surely the *Randall* plurality should have given some weight to the extremely small territorial size and electorate of Vermont’s electoral units in assessing whether the individual contribution limits were consistent with the ability of challengers to run competitive elections.

Indeed, when compared to FECA’s limits, Vermont’s limits seem appropriately scaled to the small size of Vermont’s constituencies. With lower house constituencies of 4000 people,<sup>152</sup> the \$200 contribution cap for lower house elections, even if treated as just \$100 per election because the cap applies to the primary and general together, is actually *eight times greater* as a per capita ratio than the \$2100 contribution cap applicable to donations to candidates for the House of Representatives, which has an average constituency of approximately 690,000 people.<sup>153</sup> The \$300, reduced

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<sup>147</sup> *Id.*

<sup>148</sup> *Landell v. Sorrell*, 118 F. Supp. 2d 259, 470–71 (2000).

<sup>149</sup> See Fact Monster, Land and Water Area of States, 2000, <http://www.factmonster.com/ipka/A0108355.html> (last visited Feb. 27, 2007).

<sup>150</sup> *Landell*, 118 F. Supp. 2d at 470–71.

<sup>151</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2494 (2006) (plurality opinion).

<sup>152</sup> See National Conference of State Legislatures, Constituents per State Legislative District, <http://www.ncsl.org/programs/legman/elect/cnstprst.htm> (last visited Apr. 10, 2007).

<sup>153</sup> At the time of the 2000 redistricting, the average size of a Congressional district was 646,952, based on a census apportionment population of more than 281 million See

to \$150, contribution cap for Vermont's Senate elections, on a per constituent basis, is more generous than the contribution cap applicable to the United States Senate candidates in every state and more than 100 times more generous than in our largest state.<sup>154</sup> Even the Vermont limit for statewide elections—\$400, reduced to \$200 on a per election basis—compares favorably on a per constituent basis with the federal limit on donations in presidential elections. The \$2100 cap on donations to presidential candidates is 10.5 times as large as the donation cap on Vermont gubernatorial candidates. But the United States has roughly 500 times the population and 350 times the area of Vermont.

Thus, even accepting the plurality's narrow definition of competitiveness, it is difficult to see what is so troubling from a competitiveness perspective about the Vermont limits—apart from the very tight cap on party contributions—that would justify the departure from the Court's past deference to legislative judgments in setting contribution limits.

However, there is much to admire in the plurality opinion. Surely, Justice Breyer is right in admonishing campaign finance reformers that money is not intrinsically an evil, and that lower is not always better in campaign money limits.<sup>155</sup> Competition is a critical value, competitive elections require adequately funded challengers, and tight limits can make obtaining adequate funding difficult. Vermont's election cycle approach to caps probably tends

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Infoplease, Congressional Apportionment, 2000, <http://www.infoplease.com/ipa/A0884841.html> (last visited Feb. 28, 2007). The population of the United States has since risen to more than 300 million, *see* Press Release, U.S. Census Bureau, Census Bureau Projects Population of 300.9 Million on New Year's Day (Dec. 28, 2006), *available at* <http://www.census.gov/Press-Release/www/releases/archives/population/007996.html>, thereby increasing the size of the average Congressional district by 45,000 people. Applying the Vermont cap of \$100 per election per district to the Vermont districts of 4000 people, the cap is two and one half cents per resident. Applying the federal cap of \$2100 per election to federal Congressional districts of 690,000 people, the cap is just three-tenths of one cent per resident.

<sup>154</sup> Vermont senate districts have an average population of 20,294. *See* National Conference of State Legislatures, Constituents per State Legislative District, *supra* note 152. Applying the \$150 donation cap, that works out to roughly seven-tenths of one cent per resident. The smallest state, Wyoming, has an estimated population of 515,000, U.S. Census Bureau, Annual Estimates of the Population for Counties of Wyoming: April 11, 2001 to July 1, 2006, <http://www.census.gov/popest/counties/tables/CO-EST2006-01-56.xls>, so that the \$2100 federal contribution cap works out to a little less than four-tenths of one cent per resident in donations to Senate candidates. In California, with more than 36,000,000 people, *id.*, the \$2100 ceiling amounts to just .006 of a cent per voter in donations to California Senate candidates. Of course, United States Senate candidates are not limited to donations from residents of their state. But neither are Vermont State Senate candidates limited to donations from residents of their districts.

<sup>155</sup> *Randall*, 126 S. Ct. at 2492.

to favor incumbents, who rarely face primary challenges—and thus can apply all of their contributions to the general election—over challengers who have to fund two elections out of the same capped donations. To be sure, there is no evidence that Vermont intended to favor incumbents. To the contrary, the same Vermont law that adopted an election cycle cap for contributions also imposed a spending cap for incumbents that was only 85% of the ceiling applied to challengers.<sup>156</sup> Moreover, the district court noted that the use of a single cap gives candidates “greater freedom to decide how to allocate their funds between the primary and general elections,”<sup>157</sup> and that, with primary elections in mid-September, less than two months before the general election, funds used in the primary might benefit the primary winner in the general election. Still, a cycle cap may often be a special burden on challengers who have to compete in two elections while the incumbent has only one. The plurality is also surely right that capping volunteers’ out-of-pocket expenses will inhibit citizen participation, that indexing is a desirable way of assuring that contribution limits keep pace with campaign costs, and that higher contribution limits for political parties is a particularly appropriate mechanism for promoting competitive elections.

Justice Breyer has laid out a set of wise legislative campaign finance policies. What is much more debatable is whether the plurality opinion constitutes good judicial campaign finance doctrine. As Justice Breyer repeatedly notes, none of these specific policies is a constitutionally-mandated condition for contribution limits. The plurality’s policies appear to have been framed with an eye to competitiveness, but the plurality opinion gave little attention to explaining or defending its particular approach to competitiveness, and, apart from its critique of the party contribution limit, the plurality did little to determine exactly how the contribution limits, under the circumstances of Vermont elections, actually interfered with competitiveness. The opinion seems to have been much more impressed with the absolute size of the contribution limits, at least relative to the absolute size of limits in other states and in other cases, rather than with the size of the contribution limits relative to the needs of campaigning, which would seem to be the appropriate inquiry when competitiveness is the central issue. Moreover, as with all totality of the circumstances, multi-factorial analyses, the plurality opinion gives little guidance to federal and state lawmakers as to how to frame constitutional contribution limits in the future. Lawmakers now know that the Court will be less deferential to contribution limits than previously. Pragmatically, they would be well-advised to index their limits, exempt volunteers’ expenses, have separate limits for primary and general elections, and use dollar figures that are comparable to those employed by

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<sup>156</sup> *Id.* at 2486.

<sup>157</sup> *Landell v. Sorrell*, 118 F. Supp. 2d 259, 480 (2000).

their sister states. But *Randall* gives no sense of the standard the Court will apply in assessing future challenges to campaign contribution limits.

Indeed, the indeterminacy of the plurality's approach drew sharp criticism from two of the three concurring Justices, as well as from the three dissenters. Justice Thomas, joined by Justice Scalia, reiterated the position those two Justices had previously embraced: that contribution limits, like expenditure limits, burden political speech and should, like expenditure limits, be subject to strict judicial scrutiny and held unconstitutional.<sup>158</sup> While agreeing with the plurality's conclusion, Justice Thomas lambasted its "newly minted, multifactor test,"<sup>159</sup> noting that "the 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."<sup>160</sup> On this point, it is hard to disagree with Justice Thomas. The combination of a lack of a "workable rule of law"<sup>161</sup> within the plurality opinion and the lack of majority support for the plurality's analysis makes the future of the law concerning contribution limits highly uncertain.

### C. *The Future of the Contribution-Expenditure Distinction*

*Randall* simultaneously strengthens and undermines the contribution-expenditure distinction. It strengthens the distinction by continuing it doctrinally and inscribing it in the very methodology of the plurality's analysis. Doctrinally, once again, expenditure limits are unconstitutional, while contribution limits can be constitutional. Methodologically, the Vermont expenditure limits were analyzed formally, as a matter of stare decisis, and without reference to the specifics of the law, their implications for the jurisdiction subject to the law, substantive values (like electoral competitiveness), or the costs or benefits of such a restriction. By contrast, the Vermont contribution limits were considered substantively, with attention to the specifics of the law and the politics of the affected jurisdiction, and the consequences for competitiveness, in particular, given great weight. With the plurality giving relatively little direct attention to *Buckley's* free speech concerns in either half of its opinion, the disconnect between contributions and expenditures seems greater than ever.

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<sup>158</sup> *Randall*, 126 S. Ct. at 2502 (plurality opinion).

<sup>159</sup> *Id.* at 2503.

<sup>160</sup> *Id.* at 2506. Justice Kennedy, the other concurring Justice, avoided any criticism of the plurality's analysis but nonetheless chose to concur only in the result, not in the plurality's reasoning. *See id.* at 2501.

<sup>161</sup> *Id.* at 2506.



On the other hand, once again, at least five Justices—Thomas,<sup>162</sup> Scalia,<sup>163</sup> Stevens,<sup>164</sup> Souter,<sup>165</sup> and Ginsburg<sup>166</sup>—have expressed their willingness to break with *Buckley*'s central holding, while a sixth, Kennedy, continues to voice his “skepticism regarding that system and its operation”<sup>167</sup> without expressly calling for its overruling. The contribution-expenditure distinction has always drawn criticism from within the Court. Even in *Buckley*, three of the eight participating Justices objected to it.<sup>168</sup> But the movement from a majority in favor of the distinction to a majority in opposition is more recent. Moreover, by toughening up the review of contribution limits, *Randall* may have reduced some of the distance between the Court's treatment of the two types of restrictions.

The discontent with the contribution-expenditure distinction is partly conceptual and partly attributable to the distinction's consequences. Conceptually, both contributions and expenditures are quite similar. Both involve the use of money for electoral purposes, so that for both activities statutory limits implicate questions about the scope of the power of the state to regulate electoral activity. The two activities are sufficiently alike that, in practice, contributions and expenditures may be difficult to distinguish. Thus, some Justices who have supported the distinction have argued that a candidate's expenditure of personal funds should be treated as a contribution rather than an expenditure,<sup>169</sup> and both the Court<sup>170</sup> and the FEC<sup>171</sup> have struggled to determine which nominally “independent” expenditures are actually coordinated and thus may be treated as “contributions” and which are truly “expenditures.”

Consequentially, the contribution-expenditure distinction gives rise to a host of problems. By permitting candidates to spend unlimited amounts but requiring them to collect campaign funds in only limited sums, the *Buckley*

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<sup>162</sup> *Id.* at 2501–06.

<sup>163</sup> *Id.*

<sup>164</sup> *Randall*, 126 S. Ct. at 2506–11.

<sup>165</sup> *Id.* at 2511–16.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 2501.

<sup>168</sup> Chief Justice Burger and Justice Blackmun would have invalidated both contribution and expenditure limits. See *Buckley v. Valeo*, 424 U.S. 1, 241–46 (1976) (Burger, C.J., concurring in part and dissenting in part); *id.* at 290 (Blackmun, J., concurring in part and dissenting in part). Justice White would have upheld both limits. See *id.* at 257–66 (White, J., concurring in part and dissenting in part).

<sup>169</sup> See, e.g., *id.* at 286–90 (Marshall, J., concurring in part and dissenting in part).

<sup>170</sup> See, e.g., *Colo. Republican Fed. Campaign Comm'n v. FEC*, 518 U.S. 604 (1996).

<sup>171</sup> See, e.g., *FEC, Coordinated Communications, Final Rules*, 71 Fed. Reg. 33,190–33,211 (June 8, 2006).

regime pushes candidates to devote enormous amounts of time and effort to fundraising. Fundraising ability itself becomes a prerequisite to candidacy, which reinforces the advantages of incumbency, and creates a barrier to entry for potential candidates, especially challengers, who do not have the same access as incumbents enjoy to large numbers of major donors. The *Buckley* system provides a strategic opportunity for political and electoral influence for intermediaries like PACs and bundlers who enable candidates to deal with the fundraising problem by collecting large numbers of capped contributions and forwarding them to candidates. So, too, *Buckley* advantages wealthy candidates, who can self-fund their campaigns, constitutionally immunized from statutory limitation. More generally, the contribution-expenditure distinction creates an environment in which candidates, donors, and interest groups are constantly probing for weak links in the regulatory system and new ways of injecting money into campaigns. These political consequences of the *Buckley* regime arise from the practical interconnectedness of contributions and expenditures. They, thus, reflect and reinforce the conceptual tension built into the contribution-expenditure distinction.

To be sure, there is an underlying logic to the distinction. Campaign finance regulation grows out of a profound dilemma: how to hold together the principle of political equality in a society of privately funded elections and substantial wealth inequalities that provide the wealthy with an opportunity to dominate elections and governance *with* a well-founded concern that any campaign restrictions enacted by incumbent officeholders are likely to interfere with free elections, disfavor political newcomers and entrench the governing individuals, parties, and interests. This is a dilemma that all free-market democracies must face and many have dealt with through electoral finance laws,<sup>172</sup> and one which our own society has repeatedly addressed since the combination of a mass electorate, costly campaigning, and extremes of wealth emerged in the late nineteenth century.<sup>173</sup> *Buckley* represents an attempt to reconcile these fundamentally conflicting concerns.

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<sup>172</sup> See, e.g., FOUNDATIONS FOR DEMOCRACY: APPROACHES TO COMPARATIVE POLITICAL FINANCE (Karl-Heinz Nassmacher ed., 2001); FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS (Reginald Austin & Maja Tjernström eds., International Institute for Democracy and Electoral Assistance 2003); INGRID VAN BIEZEN, FINANCING POLITICAL PARTIES AND ELECTION CAMPAIGNS—GUIDELINES (Council of Europe, Dec. 2003); PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE (K. D. Ewing & Samuel Issacharoff, eds., Hart Publishing 2006); see also *Bowman v. United Kingdom*, 26 E.H.R.R. 1 (1998) (decision of the European Court of Human Rights finding that a British law imposing a very low limit on independent expenditures violates the European Convention on Human Rights).

<sup>173</sup> See LOUISE OVERACKER, MONEY IN ELECTIONS 228–373 (1932) (discussing early federal and state campaign finance laws).

Congress and state legislatures are forbidden to limit electoral campaigning directly, but are permitted to enact contribution restrictions that curb the ability of the wealthy to obtain undue influence over elected officeholders. Electoral competition is immunized from direct restriction, but wealth-based political influence over government may be constrained. Like all compromises, the *Buckley* regime may not stand up to a principled critique, but it is a plausible means of holding together these deep-seated but irreconcilable values.

Of course, the survival of *Buckley* thus far has not been a matter of logic but of the lack of an alternative that commands the support of a majority of the Court. On the one hand, two Justices—Thomas and Scalia—would condemn all electoral monetary limits as a violation of the First Amendment and a third—Kennedy—has expressed sympathy for this approach and skepticism about the current doctrine. On the other hand, one Justice—Stevens—would hold that the First Amendment does not apply at all to campaign finance limits, while two more—Souter and Ginsburg—would uphold some expenditure limits as well as most contribution limits.

Until *Randall*, it seemed more likely that if the contribution-expenditure distinction were scrapped and a new rule adopted in its place, that rule would be more pro-regulatory—that is, it would accept some limitation of expenditures. In *Shrink*, Justices Stevens, Ginsburg, and Breyer suggested that approach,<sup>174</sup> and Justice Kennedy expressed some openness to it;<sup>175</sup> while in *McConnell*, Justices O'Connor and Souter accepted a broad expansion of regulation, albeit one consistent with the contribution-expenditure divide. After *Randall*, limitation of expenditures is firmly off the table for the foreseeable future. Justice Kennedy no longer speaks of an openness to more regulation, and—while Justice Souter has embraced the constitutionality of expenditure regulation—Justice Breyer, Chief Justice Roberts and Justice Alito have clearly rejected it.

Any change in the contribution-expenditure distinction, then, would have to come from the opposite direction, that is, by subjecting contribution restrictions to the same strict scrutiny as expenditure restrictions. Justices Thomas and Scalia have repeatedly endorsed that position, and Justice Kennedy's repeated criticism of the status quo suggests he may be open to it as well. On the other hand, four Justices are plainly opposed—Stevens, Souter, Ginsburg, and Breyer. Although Justice Breyer may have toughened up the standard of review in *Randall*, his opinion reiterates continued support

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<sup>174</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398–99 (2000) (Stevens, J., concurring); *id.* at 399–405 (Breyer, J., joined by Ginsburg, J., concurring).

<sup>175</sup> *Id.* at 405–10 (Kennedy, J., dissenting).

for the constitutionality of contribution limits in principle,<sup>176</sup> and he refrained from disavowing any of the Court's prior decisions sustaining such limits.<sup>177</sup> Indeed, his multi-factor test, with its emphasis on Vermont's very low monetary caps, the low party cap in particular, and the other specifics of the Vermont statute, may be seen as an effort to treat the Vermont law as an oddity, way out of the mainstream, thus minimizing the implications of the decision for contributions law generally.

The crucial votes, then, belong to the Court's two newest members. Neither wrote on the contribution limits question and neither has a track record on campaign finance generally. The fact that they both joined the *Randall* plurality suggests they may agree with Justice Breyer and that they support the *Buckley* compromise more generally. On the other hand, it may mean no more than that they found the Vermont limits unconstitutional and saw no need to say anything more.

Justice Alito's separate opinion on the expenditure limits is suggestive of the latter reading.<sup>178</sup> As previously noted, Justice Breyer opened his discussion of the Vermont expenditure limits with a tribute to stare decisis and he framed his expenditure analysis entirely in terms of respecting the stare decisis effect of *Buckley*. This may have been an effort to lock those who joined his opinion into a broader embrace of *Buckley* as stare decisis generally. If so, it failed to ensnare Justice Alito. Noting that Vermont had not asked for *Buckley* to be overruled, Justice Alito declined to join the stare decisis-based argument, explaining, "[w]hether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue."<sup>179</sup> Plainly, Justice Alito was making the point that he is not committed to *Buckley*. While this does not make him opposed to *Buckley*—he did not, for example, write a separate opinion taking exception to the plurality's recitation of contribution restriction precedents—the fact that he thought it necessary to make the anti-stare decisis point ought to be enough to make those supporting contribution restrictions at least a little bit nervous.

There is not even that much of a tea leaf for divining Chief Justice Roberts's views. He wrote nothing in the case, participated less in the oral argument than in *WRTL*, and his *Randall* oral argument interventions were focused more on the expenditure limits question than the contribution limits

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<sup>176</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2491 (2006) (plurality opinion).

<sup>177</sup> *Id.* at 2494 (distinguishing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000)).

<sup>178</sup> *Randall*, 126 S. Ct. at 2500–01 (Alito, J., concurring).

<sup>179</sup> *Id.* at 2501.

issue.<sup>180</sup> Although, as in *WRTL*, his interventions were consistently skeptical about the law, they were no more so than Justice Breyer's. If, as he presented himself in his confirmation hearings, he is generally committed to stare decisis and incremental change, he may be disinclined to cast the key vote uprooting one of the fundamental principles of campaign finance law. On the other hand, consistent with his *Randall* vote, he might be willing to ratchet up the level of review in practice without tackling *Buckley* head on in principle.

It is, thus, too soon to write off the contribution-expenditure distinction. Conceptually, it is difficult to justify. Its consequences for elections are troublesome. A majority of the Justices have rejected it. But it has been the foundation for campaign finance regulation in the United States for three decades. There are clearly four votes to sustain at least some contribution restrictions; it is not clear that there are five votes to invalidate all of them. Still, contribution restrictions may be in for much closer scrutiny than they had received in the years before *Randall*.

#### IV. CONCLUSION: THE FUTURE OF CAMPAIGN FINANCE REGULATION

Together, *WRTL* and *Randall* indicate that the Supreme Court has ended a period of relative deference to federal and state campaign finance legislation. What is less clear is whether these cases signal the start of a new period of much closer scrutiny, with the rejection of many campaign finance restrictions which had previously passed muster, or that they, instead, constitute just a stopping point in the development of the law so that more restrictive rules like those adopted by Vermont may be invalidated, but other requirements or prohibitions that are constitutional under existing standards will continue to be found constitutional.

Viewed in terms of the major modes of campaign finance regulation, disclosure laws are probably still pretty safe. *McConnell* upheld BCRA's enhanced disclosure requirements by 8-1,<sup>181</sup> as even campaign finance regulation skeptics like Justices Scalia and Kennedy voted in favor of disclosure. Nothing in either *WRTL* or *Randall* provides a basis for inferring any changes in the Court's thinking about disclosure. Indeed, in the *Randall*

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<sup>180</sup> See Transcript of Oral Argument at \*14, *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (Nos. 04-1528, 04-1530, 04-1697), 2006 WL 560656 (questioning concerning contribution limits); *id.* at \*26-28 (questioning concerning expenditure limits); *id.* at \*30 (question concerning contribution limit); *id.* at \*41 (questioning concerning definition of coordinated expenditures); *id.* at \*46-47 (question concerning expenditure limits); *id.* at \*53-55 (question concerning expenditure limits).

<sup>181</sup> *McConnell v. FEC*, 540 U.S. 93, 194-202 (2003) (majority opinion); *id.* at 321 (Kennedy, J., concurring, joined by Chief Justice Rehnquist, and joined in part by Justice Scalia).

oral argument Chief Justice Roberts and Justices Kennedy and Scalia repeatedly cited the ability of voters to cast out of office elected officials who take or spend large sums of money as the constitutionally appropriate remedy for corruption or the appearance of corruption, thus, implicitly validating the importance of disclosure.<sup>182</sup> The longstanding federal ban on corporate and union treasury fund expenditures—and the many state counterparts to these laws<sup>183</sup>—may be more threatened. In *McConnell*, the four dissenters to the Court's upholding of BCRA's extension of the ban to electioneering communication focused little attention on the definition of electioneering communication per se or on the justifications for widening the prohibition. Instead, they aimed their fire on the underlying rule itself and called for the overruling of the 1990 decision in *Austin v. Michigan Chamber of Commerce*,<sup>184</sup> which had upheld a state corporate spending ban. *McConnell* was thus really a 5-4 decision on the corporate and union ban, and not just the electioneering communication restriction. The departures of Justice O'Connor from the *McConnell* majority and Chief Justice Rehnquist from the *McConnell* dissenters puts the Court at 4-3 on the corporate and union spending prohibition. Chief Justice Roberts's comments in the *WRTL* oral argument suggest that he is at least sympathetic to the constitutional claims likely to be mounted against the ban and thus could very well agree with the position of his predecessor, Chief Justice Rehnquist. If so, the Court would be at 4-4, with the issue up to Justice Alito. Moreover, the corporate and union expenditure ban sits uneasily with the Court's general, and now reaffirmed, hostility to expenditure limitations.

The *WRTL* litigation—which grows out of the ban on the electioneering communications of corporations—could bring the question back to the Court. Although not technically at issue in *WRTL II*, the *Austin* decision inevitably

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<sup>182</sup> See Transcript of Oral Argument, *supra* note 180, at \*10 (Justice Kennedy: “The voters can see what’s going on and throw the legislator out if they choose.”); *id.* at \*30 (Chief Justice Roberts: “And they [the voters] can—and presumably they act accordingly at the polls. If they think someone has been bought, I assume they don’t reelect the person.”); *id.* at \*45 (Justice Scalia: “The mere fact that it’s on the public record that he got \$10,000, if—if what you say is correct, that—that people are worried about, the—the corruptive effect of such donations, people should logically vote against that candidate who accepts so much money.”).

<sup>183</sup> Twenty-two states prohibit corporations from making campaign contributions from corporate treasuries. See National Conference of State Legislatures, Contribution Limits, <http://www.ncsl.org/programs/legismgt/about/ContribLimits.htm> (last visited Mar. 1, 2007). Fifteen states prohibit unions from making campaign contributions from their treasury funds. See FEC, Campaign Finance Law 2002, Chart 2-A, Contribution and Solicitation Limitations, <http://www.fec.gov/pubrec/cfl/cf102/cfl102chart2a.htm> (last visited Mar. 1, 2007).

<sup>184</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

shadows the case. Moreover, *McConnell* importantly reframed the issue by emphasizing that the PAC mechanism enables corporations and unions to participate in electoral politics. In effect, *McConnell* read federal law less as a ban on corporate and union campaign spending and more as a channeling rule, requiring the use of PAC—not treasury—funds, thus seeming to downplay the burden and the constitutional significance, of the restriction.<sup>185</sup> If *WRTL II* calls *McConnell*'s analysis into question, that could make the prohibition of corporate and union election spending seem more constitutionally troubling. It is certainly too soon to predict that the Court will invalidate one of our oldest federal campaign finance laws,<sup>186</sup> but if the Court were to choose to move in a sharply more deregulatory direction, this could be the area where the change in doctrine first shows up.

Finally, *WRTL* and *Randall* bolster the case for public funding, if not in the courts, then in the political process. With spending limits out and contribution limits potentially more constrained, public funding provides the primary constitutionally acceptable means of advancing the classic reform goals—reducing the potentially corrupting effects of large contributions on government decision-making, ameliorating the role of private wealth in elections, and “free[ing] candidates from the rigors of fundraising.”<sup>187</sup> Unlike limits, public funding does not curtail political activity. Instead it “facilitate[s] communication by candidates with the electorate.”<sup>188</sup> Public funding promotes political equality without curbing speech. The Court upheld the presidential public funding system in *Buckley*,<sup>189</sup> and nothing in *Randall* or any other case undermines that determination.

Moreover, public funding fits particularly closely with the *Randall* plurality's emphasis on electoral competitiveness. The greatest campaign finance barrier to competitive elections—putting aside other legal issues like ballot access rules and partisan gerrymandering—is the built-in advantage incumbents enjoy in raising contributions and funding their campaigns. Contribution limits and expenditure limits do nothing to put money in the treasuries of challengers. Nor does the repeal (in the one case) or prohibition (in the other) of such laws. Public funding is the only campaign finance

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<sup>185</sup> *McConnell*, 540 U.S. at 204.

<sup>186</sup> The first federal campaign finance restriction was the Tillman Act of 1907, 34 Stat. 864 (1907), which prohibited corporate contributions to federal candidates. Congress prohibited corporate expenditures in connection with a federal election in 1947, when it also extended the wartime prohibition on labor union campaign contributions and included a ban on union campaign expenditures. See Labor-Management Relations Act, 61 Stat. 136 (1947).

<sup>187</sup> *Buckley v. Valeo*, 424 U.S. 1, 91 (1976).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 86.

technique that has the potential—depending, of course, on the specifics of the law—actually to help challengers by providing them with the additional funds they need to be competitive.<sup>190</sup> Public funding is consistent with the spirit as well as the letter of the *Randall* plurality opinion.

To be sure, the opening days of 2007 have not been the most auspicious for the future of the federal presidential public funding program. Three of the most prominent Democratic candidates for President have opted out of the program for both the primary and the general elections.<sup>191</sup> If one of them is nominated, she or he would be the first major party nominee since the presidential public funding took effect in 1974 to raise and spend private funds in the general election—although Senator Obama has modified his original position to indicate a willingness to shift to public funds in the general election.<sup>192</sup> More generally, the presidential public funding system is underfunded, its long-term survival is uncertain,<sup>193</sup> and Congress has expressed little interest in creating a public funding system for Congressional elections. Nonetheless, some form of public funding remains the most constitutionally viable means of promoting meaningful campaign finance reform

Indeed, despite the psychological blow *Randall* may have dealt to reformers, the precedent it might provide for further restrictive decisions, and the analytical shortcomings of the plurality opinion, *Randall* could ultimately be a boost to true campaign finance reform if it leads reformers to redirect

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<sup>190</sup> See Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 565 (1999).

<sup>191</sup> See Dan Balz & Matthew Mosk, *Clinton Bid Heralds Demise of Public Financing*, WASH. POST, Jan. 23, 2007, at A1; Jill Lawrence & Fredreka Schouten, *Edwards Latest to Decline Public Funds for Presidential Campaign*, USA TODAY, Feb. 6, 2007, at 2A; Chris Cillizza & Matthew Mosk, *Obama to Seek FEC Ruling on Financing*, WASH. POST, Feb. 8, 2007, at A9.

<sup>192</sup> Senator Obama sought and obtained from the Federal Election Commission an advisory opinion that he could solicit and receive private contributions for the general election but change his mind and opt into the public funding program once he is nominated provided that he keeps the private contributions for the general election in a separate account; refrains from using these contributions; and refunds them in full if he decides to take public funds. See Sen. Barack Obama, FEC Advisory Op. 2007-03 (Mar. 1, 2007), <http://www.fec.gov/agenda/2007/agenda20070301.shtml>. Senator McCain has expressed interest in a similar arrangement—raising private funds but returning them unused once nominated—if he is nominated and his general election opponent agrees to do the same. See David D. Kirkpatrick, *McCain and Obama in Deal on Public Financing*, N.Y. TIMES, Mar. 2, 2007, at A15.

<sup>193</sup> See, e.g., CAMPAIGN FINANCE INSTITUTE, TASK FORCE ON FINANCING PRESIDENTIAL NOMINATIONS, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM (Apr. 2005), <http://www.cfinst.org/president/pdf/VotersChoose.pdf>.



their political and legislative energies away from the traditional definition of the influence of money as the central campaign finance problem and limits as the preferred campaign finance regulatory technique toward greater thinking about the maldistribution (from a competitiveness perspective) of campaign funds as the problem and public funding as a solution. That would improve campaign finance policy, and, in a potentially changing constitutional environment, would produce a more constitutionally secure campaign finance law.

