



2007

**Constitutional Law—Campaign Finance Law & the First Amendment—Can You See the Light?: Illuminating Precedent and Creating a New Tier of Judicial Scrutiny for Campaign Finance Laws. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).**

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**Recommended Citation**

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**Cover Page Footnote**

Acknowledgements:

CONSTITUTIONAL LAW—CAMPAIGN FINANCE LAW & THE FIRST AMENDMENT—CAN YOU SEE THE LIGHT?: ILLUMINATING PRECEDENT AND CREATING A NEW TIER OF JUDICIAL SCRUTINY FOR CAMPAIGN FINANCE LAWS. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

I. INTRODUCTION

Anyone who reads the newspaper or follows politics knows that the amount of money a candidate for political office raises is an accurate indicator of how a candidate will perform at the polls. Often headlines read “Candidate A Raises More Money Than Candidate B” rather than highlighting the candidates’ differences on important issues.<sup>1</sup> Inevitably, a scandal about misappropriation of campaign funds saturates the news, or the public becomes frustrated with the inordinate amount of money involved in campaigns. In response, legislators pass a law to alleviate the problem. Consequently, someone, usually a politician or a political party, challenges this new law as a violation of their right to free speech and association because they cannot raise as much money as they want and spend it the way they want. Like a vicious cycle, these events have reoccurred since the genesis of campaign finance laws in this country.<sup>2</sup>

Recently, this cycle occurred in Vermont. The United States Supreme Court granted certiorari to hear a challenge to the Vermont Campaign Finance Reform Act (Act 64),<sup>3</sup> which established limits on the amount of money a candidate could accept—contribution limits—and the amount of money a candidate could spend—expenditure limits. In *Randall v. Sorrell*,<sup>4</sup> a plurality of the justices held that both Act 64’s contribution limits and expenditure limits were unconstitutional.<sup>5</sup> This result was somewhat surprising, as many legal scholars and political pundits thought the Court would change its stance on expenditure limits, which had been unconstitutional since *Buckley v. Valeo*,<sup>6</sup> a watershed campaign finance case.<sup>7</sup> In *Randall*,

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1. See Dan Balz, *Fundraising Totals Challenge Early Campaign Assumptions*, WASH. POST, Apr. 17, 2007, at A24; David D. Kirkpatrick & Aron Pilhofer, *Filings on Campaign Finances Offer Glimpses Into Operations of the Candidates*, N.Y. TIMES, Apr. 17, 2007, at A1; Lynn Sweet, *Obama Gaining in the Money Race; Clinton Has More on Hand, but Illinois Senator Outraised Her in the First Three Months of '07, According to Reports They've Filed*, CHI. SUN-TIMES, Apr. 16, 2007, at News 8.

2. See discussion *infra* Part II.A.

3. VT. STAT. ANN. tit. 17, §§ 2801–2883 (1997).

4. 126 S. Ct. 2479 (2006).

5. *Id.* at 2500.

6. 424 U.S. 1 (1976) (per curiam).

however, the plurality quickly ruled Act 64's expenditure limits unconstitutional because of *Buckley* and stare decisis.<sup>8</sup> The plurality gave no indication that it would change its stance on expenditure limits, and only Justice Stevens argued for their constitutionality.<sup>9</sup> For the first time in its history the Court struck down contribution limits.<sup>10</sup> The plurality, still relying on *Buckley*, ruled that Act 64's contribution limits were unconstitutionally low.<sup>11</sup> An unexpected importance of *Randall*, therefore, is its re-enforcement of *Buckley* as the binding authority for contribution and expenditure limits.

Just as *Randall* helped reaffirm *Buckley*, it also clarified what standard of review the Court uses for contribution limit challenges. The *Buckley* Court ruled that contribution limits must be "closely drawn" to serve a "sufficiently important" governmental interest.<sup>12</sup> But the Court never stated whether this standard was rational basis, intermediate, or strict scrutiny.<sup>13</sup> This note suggests that *Randall* illuminates what the *Buckley* Court hinted at thirty years prior—that the Court established a new tier of scrutiny for contribution limits.

This note begins by examining the history of campaign finance laws in the United States, paying special attention to *Buckley*, the seminal 1976 decision that provided the framework for the *Randall* Court.<sup>14</sup> Next, the note sets forth the facts leading up to the Court's decision in *Randall*.<sup>15</sup> The note then explores the *Randall* opinion—including important concurrences and dissents.<sup>16</sup> Finally, the note analyzes the importance of the decision and why the term "semi-strict scrutiny" best describes the Court's standard of review for contribution limits.<sup>17</sup>

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7. See Richard Briffault, *A Changing Supreme Court Considers Major Campaign Finance Questions: Randall v. Sorrell, and Wisconsin Right to Life v. FEC*, 5 ELECTION L.J. 74, 82–93 (2006) (proposing that with two new members to the Court and the other members sharply divided over *Buckley*, the Court may overrule *Buckley* and allow expenditure limits); Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 67–72 (2004) (arguing that *McConnell* set up the Court to allow expenditure limits); Linda Greenhouse, *Justices Take on Spending Limits for Candidates*, N.Y. TIMES, Sept. 28, 2005, at A1 (suggesting that by taking *Randall v. Sorrell* the Court might be ready to change its jurisprudence on spending limits).

8. See *Randall*, 126 S. Ct. at 2488–91.

9. *Id.* at 2506–11 (Stevens, J., dissenting).

10. Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2d 335, 344 (2006).

11. *Randall*, 126 S. Ct. at 2500; see discussion *infra* Part III.B.1.

12. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (citing *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

13. See discussion *infra* Part IV.B.

14. See discussion *infra* Part II.

15. See discussion *infra* Part III.A.

16. See discussion *infra* Part III.B.

17. See discussion *infra* Part IV.

## II. BACKGROUND

This section traces the history of Supreme Court campaign finance law jurisprudence regarding contribution and expenditure limits.<sup>18</sup> First, it will briefly discuss the history of campaign finance laws in this country and the Supreme Court's approach to campaign finance law before *Buckley*.<sup>19</sup> Second, this section will examine *Buckley*, the seminal campaign finance case that established the current constitutional framework for campaign finance laws.<sup>20</sup> This section will conclude with an overview of the Court's post-*Buckley* jurisprudence.<sup>21</sup>

### A. Pre-*Buckley*: Campaign Finance Law History and Case Law Before 1976

Campaign finance laws in America originated as a response to changing social conditions in the late nineteenth century.<sup>22</sup> The expansion of industry after the Civil War led to a concentration of wealth in the higher levels of society.<sup>23</sup> As money began to accumulate in the upper class, a sentiment grew among the general public that these "deep pockets" were negatively influencing politics.<sup>24</sup> State legislatures responded in the 1890s by passing laws that required campaigns to disclose accepted contributions to the public.<sup>25</sup> After Theodore Roosevelt's victory in the 1904 presidential election, the influence of corporations in politics became a national issue.<sup>26</sup> Soon Congress began to conduct hearings and to propose legislation "designed to cleanse the political process."<sup>27</sup> The result was legislation forbidding corporations from making monetary contributions to political cam-

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18. See discussion *infra* Part II.

19. See discussion *infra* Part II.A.

20. See discussion *infra* Part II.B.

21. See discussion *infra* Part II.C.

22. See generally *United States v. Int'l Union United Auto., Aircraft and Agric. Implement Workers of Am.*, 352 U.S. 567 (1957) ("*Automobile Workers*"). The Supreme Court provided an excellent history of campaign finance law in America in this case. See *id.* at 570–84.

23. *Id.* at 570.

24. *Id.*

25. *Id.* at 570–71.

26. *Id.* at 571–72. Shortly after losing the election, Roosevelt's opponent, Alton Parker, said, "[t]he greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?" *Id.* at 572 (quoting *Hearings Before House Comm. on Elections*, 59th Cong. 56 (1906)). Roosevelt responded to the concerns by calling on Congress to completely prohibit contributions by corporations. *Id.*

27. *Id.* at 573.

paigns.<sup>28</sup> In 1910, in a further attempt to eliminate the appearance of the influence of wealth in politics, Congress passed a law with various disclosure requirements mandating that contributors publicly acknowledge the amount of money they gave to a candidate or political committee.<sup>29</sup>

In 1925, Congress passed the Corrupt Practices Act, in part due to public uproar following the Teapot Dome scandal.<sup>30</sup> Another factor that led Congress to pass the Corrupt Practices Act was the Supreme Court's decision in *Newberry v. United States*,<sup>31</sup> in which the Court struck down federal regulation of Senate primary races.<sup>32</sup> The most important aspect of the Corrupt Practices Act was the increased public disclosure requirements.<sup>33</sup> During the New Deal era Congress passed several more campaign finance laws, but the Court never handed down any significant rulings about their constitutionality.<sup>34</sup> The Court's approach to defining the constitutionality of campaign finance laws before *Buckley* was to avoid the issue altogether.<sup>35</sup>

In *United States v. International Union United Automobile, Aircraft and Agriculture Implement Workers of America*<sup>36</sup> ("*Automobile Workers*"), the government appealed a Michigan district court decision dismissing an indictment against a labor union for allegedly violating the Corrupt Practices Act.<sup>37</sup> The relevant provision of that law provided that no corporations or labor organizations could make a contribution or expenditure that had any connection with a candidate for federal office.<sup>38</sup> In determining whether the Corrupt Practices Act was constitutional, the majority did not discuss the First Amendment implications.<sup>39</sup> The Court decided that it was unnecessary to determine the "more or less abstract issues of constitutional law" in order

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28. *Automobile Workers*, 352 U.S. at 575.

29. *Id.* at 575-76.

30. Bradley A. Smith, *Hamilton at Wits End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform*, 4 CHAP. L. REV. 117, 132 (2001). The Teapot Dome scandal involved the Secretary of the Interior, who awarded an oil magnate a lucrative oil lease of federal land in return for money and gifts. Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1161 (2006) (suggesting that the Watergate scandal was the type of event necessary to lead to effective campaign finance reform).

31. 256 U.S. 232 (1921) (holding that Congress did not have the power to limit expenditures in federal primary elections).

32. *Automobile Workers*, 352 U.S. at 576 (citing *Newberry v. United States*, 256 U.S. 232 (1921)).

33. Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 281 (1991).

34. Smith, *supra* note 30.

35. See *Automobile Workers*, 352 U.S. at 592-93.

36. 352 U.S. 567 (1957).

37. *Id.* at 568.

38. *Id.* at 568-69.

39. *Id.* at 570-84.

to adjudicate the case.<sup>40</sup> It simply remanded the case, holding that the district court incorrectly interpreted the statute in making its decision to dismiss the indictment.<sup>41</sup> Justice Douglas, however, in his dissenting opinion, viewed the challenged law as a clear violation of the First Amendment right of free speech.<sup>42</sup> Indeed, he argued that the law did not pass the strict scrutiny standard required for laws challenged on the basis of free speech.<sup>43</sup> By not ruling on the constitutionality of the expenditure and contribution limits, the law stayed intact, and, more importantly, the Court did not establish a precedent for the *Buckley* Court to follow nineteen years later.<sup>44</sup>

## B. *Buckley* Sets the Bar

In the late 1960s and early 1970s, another wave of public sentiment that money was influencing politics on a large scale hit the national scene, leading Congress to pass the Federal Election Campaign Act (FECA) in 1971.<sup>45</sup> The Watergate scandal and further congressional findings of corruption in politics led to amendments to FECA, which included the creation of the Federal Election Commission (FEC).<sup>46</sup> In response to a constitutional challenge to FECA, the Court in *Buckley v. Valeo*<sup>47</sup> finally ruled on the constitutionality of contribution and expenditure limits.<sup>48</sup> The *Buckley* Court ruled that FECA's contribution limits were constitutional but its expenditure limits were not.<sup>49</sup> Response to the *Buckley* decision was mostly negative then and still is among a majority of the Justices, but it remains the binding authority on campaign finance law.<sup>50</sup>

### 1. *Contribution Limits Are Constitutional*

The challenged provision of FECA called for a \$1000 limit on contributions from individuals or groups to candidates or a candidate's political

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40. *Id.* at 592.

41. *Id.* at 592–93.

42. *Automobile Workers*, 352 U.S. at 594–98 (Douglas, J., dissenting).

43. *Id.* at 596–97.

44. Allison R. Hayward, *The Per Curiam Opinion of Steel: Buckley v. Valeo as Super-precedent? Clues from Wisconsin and Vermont*, 2006 CATO SUP. CT. REV. 195, 206 (2006).

45. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 610 (1982) (arguing that *Buckley* actually allows money to negatively influence politics).

46. Eber, *supra* note 30, at 1163–65.

47. 424 U.S. 1 (1976) (per curiam).

48. *Id.* at 58–59.

49. *Id.* at 23.

50. *Freedom of Speech and Expression: Campaign Finance Regulation*, 120 HARV. L. REV. 283, 283 (2006).

action committee (PAC) during any federal election.<sup>51</sup> It also prohibited any contributor from giving more than \$25,000 in one year.<sup>52</sup> The government argued that FECA's provision "regulated conduct, and that its effects on free speech and association were incidental."<sup>53</sup> The petitioners contended that the contribution limits directly violated the First Amendment right of political speech.<sup>54</sup>

As opposed to the Court in *Automobile Workers*, the *Buckley* Court directly addressed the First Amendment concerns implicated by the contribution limits.<sup>55</sup> The main problem raised by contribution limits was the burden imposed on the freedom of political association, thus subjecting the law "to the closest scrutiny."<sup>56</sup> The Court acknowledged that the right to associate was not absolute, however, and the government could impose even a significant interference if the law was "closely drawn" to meet a "sufficiently important interest."<sup>57</sup> As this note will explore later, *Buckley* was unclear as to whether the Court considered the closest scrutiny standard as intermediate or strict scrutiny, or something in between.<sup>58</sup>

The Court agreed with the government's argument that the contribution limits served a sufficiently important government interest—preventing the corruption and the appearance of corruption caused by the real and perceived influence of large contributions in political campaigns.<sup>59</sup> The Court noted that in light of the actual corruption Congress uncovered after the 1972 presidential elections and the effect that actual and perceived corruption had on the public, the government had a strong interest that justified the \$1000 contribution limit.<sup>60</sup>

Turning to the second element of its standard of review, the Court rejected the petitioners' argument that the contribution limits were not closely drawn because bribery laws and disclosure requirements presented less restrictive means of fulfilling the governmental interest.<sup>61</sup> The Court deferred

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51. See *Buckley*, 424 U.S. at 24.

52. *Id.* at 7.

53. *Id.* at 15.

54. *Id.*

55. See *id.* at 24–26.

56. *Id.* at 24–25 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958)).

57. *Buckley*, 424 U.S. at 25 (citing *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

58. See discussion *infra* Part II.C.

59. *Buckley*, 424 U.S. at 25.

60. *Id.* at 26–27. See also the United States Court of Appeals for the District of Columbia Circuit's decision in *Buckley v. Valeo*, 519 F.2d 821, 839–40 & nn.36–38 (1975) (noting that congressional findings of corruption included large contributions by the dairy lobby to President Nixon's campaign in order to get White House meetings, by the American Dental Association, by current and potential ambassadors, and by Ross Perot).

61. *Buckley*, 424 U.S. at 27–28.



to Congress, which believed that the bribery and disclosure laws were not sufficient to prevent corruption and its appearance, thus making the contribution ceilings necessary.<sup>62</sup> The Court believed that contribution limits only marginally restricted free speech rights because a contribution serves more as a symbolic gesture that does not change with the size of the contribution.<sup>63</sup> According to the Court, contribution limits bear more heavily on the right of political association than on free speech rights, but FECA's limits were not so stringent that they prevented contributors from joining a political association or volunteering in a political association's efforts to elect or defeat a candidate.<sup>64</sup> Concluding that the government had satisfied both elements of the standard of review, the Court held that the \$1000 contribution limits served the "weighty" government interests sufficiently to justify the limited infringements on First Amendment freedoms.<sup>65</sup>

## 2. *Expenditure Limits Are Unconstitutional*

### a. Limitations on campaign expenditures by a candidate

FECA placed a limit on the amount of money that a candidate could spend during primary and general elections.<sup>66</sup> The Court held that these limitations violated the First Amendment protection of political expression.<sup>67</sup> The Court applied an "exacting scrutiny" standard, which applied when determining whether governmental interests justify the burden placed on political expression rights.<sup>68</sup> The Court concluded that the government had not suggested an interest in capping the amount of money a candidate could spend that was sufficient to justify the restrictions on political speech.<sup>69</sup> The main interest served by expenditure limitations, the Court noted, was preventing candidates from depending on large contributions to run their campaigns.<sup>70</sup> The Court reasoned that the contribution limits served this interest

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62. *Id.* at 28.

63. *Id.* at 20–21. The Court stated that "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." *Id.* at 21.

64. *Id.* at 22.

65. *Id.* at 29.

66. *Id.* at 54.

67. *Buckley*, 424 U.S. at 58–59.

68. *Id.* at 44–45. The Court gave no citations for where it derived the "exacting scrutiny" standard. *See id.* Based on later opinions, however, it appears that "exacting scrutiny" is actually "strict scrutiny." *See Randall v. Sorrell*, 126 S. Ct. 2479, 2502 (2006) (Thomas, J., concurring); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 307 (2003).

69. *Buckley*, 424 U.S. at 55.

70. *Id.*

and imposed less restrictions on political speech, thus nullifying the need for expenditure limits.<sup>71</sup>

The Court also disagreed that reducing the “skyrocketing” costs of campaigns was an important governmental interest.<sup>72</sup> To restrict spending in turn restricts the scope of the campaign, and “[t]he First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.”<sup>73</sup> Thus, the Court held that FECA’s limit on how much a candidate could spend on a campaign was an unconstitutional violation of political speech.<sup>74</sup>

b. Limitation of expenditures by a non-candidate

Expenditure limits placed on non-candidates was also an unacceptable burden on the First Amendment right of political speech.<sup>75</sup> FECA placed a \$1000 limitation on how much an individual or group could spend “relative to a clearly identified candidate.”<sup>76</sup> The government again argued that this limit served the important interest of preventing corruption and its appearance.<sup>77</sup> The government added that non-candidates wishing to influence the election could avoid the contribution limits by directly paying for advertisements supporting the candidate.<sup>78</sup> In rejecting these arguments, the Court decided that the expenditure limits did not sufficiently serve the government’s interests to justify the heavy burdens placed on the First Amendment guarantee of freedom of expression.<sup>79</sup> The government had not proved large expenditures by non-candidates posed the same dangers as large contributions to candidates.<sup>80</sup> In response to the government’s suggestion that non-candidates could avoid the contribution limits by directly paying for advertisements, the Court reasoned that if a non-candidate coordinated the expenditure with the candidate, then the expenditure would count as a contribution under FECA.<sup>81</sup> As for expenditures not coordinated with the candidate, the Court maintained those types of expenditures may not provide much assistance to a campaign and may even be counterproductive.<sup>82</sup> Ac-

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71. *Id.*

72. *Id.* at 57.

73. *Id.*

74. *Id.* at 58–59.

75. *Buckley*, 424 U.S. at 50.

76. *Id.* at 39. Act 64’s most similar provision is § 2809(b)–(c). See discussion *infra* Part III.A.1.c.

77. *Buckley*, 424 U.S. at 47–48.

78. *Id.* at 46.

79. *Id.* at 47–48.

80. *Id.* at 45.

81. *Id.* at 46–47.

82. *Id.* at 47.

ording to the Court, instead of preventing a non-candidate from avoiding the contribution limits, expenditure limits substantially restricted independent advocacy even though there is little possibility that non-candidates could effectively circumvent contribution limits.<sup>83</sup>

In the alternative, the government argued the expenditure limits on persons other than the candidate helped equalize the ability of non-candidates to influence the outcome of elections.<sup>84</sup> The Court flatly rejected this contention, stating, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>85</sup> The plain effect of the independent expenditure limits, according to the Court, was to prevent all individuals and groups other than the press and political organizations from advocating their opinion about a candidate if it cost them more than \$1000 a year.<sup>86</sup> Although contribution limits only marginally restricted speech freedoms, the expenditure limits restricted the quantity of speech, the depth of the issues discussed, and the size of the audience.<sup>87</sup> The Court held that the expenditure limits violated the First Amendment right to freedom of political expression.<sup>88</sup>

### C. Post-*Buckley*

#### 1. *The Court Attempts to Clarify Buckley and Extends It to the States*

For over two decades, the *Buckley* decision percolated throughout the circuits, with the lower courts confused about exactly what standards *Buckley* required.<sup>89</sup> It was unclear, for example, whether *Buckley*'s holding on

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83. *Buckley*, 424 U.S. at 47.

84. *Id.* at 48.

85. *Id.* at 48–49.

86. *Id.* at 39–40. The Court noted that this provision would make it a federal offense for such an individual or group to buy a single quarter-page advertisement in support of a candidate in a major newspaper. *Id.* at 40.

87. *Id.* at 19.

88. *Id.* at 51.

89. For example, four cases define the Eighth Circuit's jurisprudence regarding contribution limits since *Buckley*. See Erin Buford Vinett, Note, *The Supreme Court Halts the Eighth Circuit's Invalidation of State Campaign Contribution Limits*, 23 U. ARK. LITTLE ROCK L. Rev. 243 (2001). In *Day v. Holahan*, the court held that the \$100 limit per year contribution limit to political committees imposed by the Minnesota legislature was so low that it violated contributors' rights to free political association and expression. 34 F.3d 1356, 1365 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995). In *Carver v. Nixon*, the court invalidated a Minnesota law that limited contributions to candidates for statewide office to \$300 for the same reason. 72 F.3d 633, 645 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The Eighth Circuit struck down an Arkansas law limiting contributions to \$300 to candidates for statewide offices on the same basis. *Russell v. Burris*, 146 F.3d 563, 568–71 (8th Cir.

contribution limits applied to candidates for state office.<sup>90</sup> Courts also were uncertain whether *Buckley* defined the dollar amount that states could impose.<sup>91</sup> The level of scrutiny for contribution limits was also unknown.<sup>92</sup>

In *Nixon v. Shrink Missouri Government PAC*<sup>93</sup> (“*Shrink*”), the Court held that *Buckley* applied to state election laws, but the contribution limits did not have to “be pegged to *Buckley*’s dollars.”<sup>94</sup> The Missouri statute under review used a complicated formula to determine the contribution limit for each candidate.<sup>95</sup> At the time the plaintiff filed the lawsuit, the highest limit was \$1075 for candidates for statewide office and for other candidates in districts with more than 250,000 people, and the lowest limit was \$275 for candidates for state representative and for other candidates in districts with less than 100,000 people.<sup>96</sup>

In deciding whether *Buckley* should apply to state regulations, the *Shrink* Court was short and direct.<sup>97</sup> In the opening paragraph of the decision, the Court stated that the issue was in front of the Court, and *Buckley* indeed applied to state election laws.<sup>98</sup> Obviously, *Buckley* applied to state election laws because of incorporation—*Buckley* concerned First Amendment issues, and those issues are incorporated to the states through the due process clause of the Fourteenth Amendment.<sup>99</sup> Thus, the question before the Court was whether the states, and in this case Missouri, could assert the same governmental interests that Congress asserted in *Buckley*—preventing corruption and its appearance.<sup>100</sup> The Court answered this question affirmatively, noting that even without the authority of *Buckley*, there would be no serious doubt about the legitimacy of the governmental interests claimed.<sup>101</sup>

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1998), *cert. denied*, *Burris v. Russell*, 525 U.S. 1001 (1998). The court applied strict scrutiny in each case. *Id.* at 568. Additionally, in *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000) (“*Shrink*”), *rev’d*, *Shrink Mo. Gov’t Committee PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), the Supreme Court reversed the Eighth Circuit’s ruling that Missouri’s contribution limits were unconstitutionally low. *Shrink*, 528 U.S. at 385 (2000); *see discussion infra* Part II.C.1.

90. *See Shrink*, 528 U.S. at 381–82 (2000).

91. *See id.* at 382.

92. *Id.* at 386. “Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion.” *Id.*

93. 528 U.S. 377 (2000).

94. *Id.* at 381–82.

95. *Id.* at 382–83.

96. *Id.* at 383.

97. *See id.* at 381–82.

98. *Id.* at 381–82.

99. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996).

100. *Shrink*, 528 U.S. at 390.

101. *Id.*

The *Shrink* Court also held that *Buckley* did not specify a floor under which states could set contribution limits.<sup>102</sup> The Court rejected the argument that when adjusted for inflation, Missouri's contributions limits were below the *Buckley* limit and thus unconstitutional.<sup>103</sup> Instead, *Buckley* established a test for determining whether contribution limits were too low—a limit is constitutionally impermissible if it prevents a candidate from raising sufficient money and resources to run an effective campaign.<sup>104</sup> Thus, although the contribution limit established by the Missouri legislature was lower than the limit upheld in *Buckley* when adjusted for inflation, the Missouri statute did not prevent a candidate from running an effective campaign.<sup>105</sup> Therefore, the law was constitutional.<sup>106</sup>

Finally, the *Shrink* Court attempted to clarify what standard of scrutiny courts should use when determining whether contribution limits violated the First Amendment.<sup>107</sup> First, the Court commented that although *Buckley* was clear that contribution limits infringed more on the right to associate than on the right to free speech, a challenge based on either right would receive the same standard of review.<sup>108</sup> Further, the Court reasoned that if a contribution limit could survive an associational right challenge then it would also survive a free speech challenge.<sup>109</sup> Significantly, the Court expressly rejected the notion that contribution limits were subject to intermediate scrutiny, regardless of whether the challenge was on association or speech grounds.<sup>110</sup> According to the *Shrink* Court, to be constitutional under *Buckley*'s standard of scrutiny, a contribution limit that significantly interfered with the right of association must be "closely drawn" to serve a "sufficiently important interest."<sup>111</sup> Although the *Shrink* Court denied using intermediate scrutiny to review challenges to contribution limits,<sup>112</sup> it did not clarify exactly what level of scrutiny it applied in reviewing these cases.

## 2. *Soft Money Is Subject to the Same Scrutiny as Contribution Limits*

In the years following *Buckley*, several new species of campaign tools emerged that enabled politicians, lobbyists, and large contributors to avoid

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102. *Id.* at 396.

103. *Id.*

104. *Id.* at 397 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam)).

105. *Id.* at 396–97.

106. *Shrink*, 528 U.S. at 397–98.

107. *Id.* at 387–88.

108. *Id.*

109. *Id.* at 388.

110. *Id.* at 386.

111. *Id.* at 387–88 (citing *Buckley v. Valeo*, 424 U.S. 1, 25, 30 (1976)).

112. *Shrink*, 528 U.S. at 386.

FECA's regulation of contributions.<sup>113</sup> One of the new tools was the use of "soft money," which, unlike "hard money," was not subject to FECA and *Buckley* contribution limits.<sup>114</sup> Soft money is a contribution to a political party—usually made by corporations, unions, and individuals who have already exceeded the contribution limit—for activities intended to influence an election.<sup>115</sup> Hard money—sometimes called federal money—is a contribution that is subject to FECA's disclosure requirements and limitations.<sup>116</sup> Many of the soft money contributions to political parties were substantially larger than FECA allowed.<sup>117</sup> Organizations primarily used soft money for "issue advocacy," which political parties could use without FECA regulation as long as they did not use the "magic words" that expressly advocated voting for or against a certain candidate.<sup>118</sup> The Court cited "Elect John Smith" and "Vote Against Jane Doe" as examples of magic words that separated express advocacy from issue advocacy.<sup>119</sup> In response to this circumvention of federal regulations, Congress passed the Bipartisan Reform Act of 2002 (BCRA),<sup>120</sup> which amended several campaign reform laws and made soft money subject to FECA regulations.<sup>121</sup>

In *McConnell v. Federal Election Commission*,<sup>122</sup> several parties challenged BCRA on free speech and association grounds.<sup>123</sup> The petitioners argued strict scrutiny should apply to the BCRA limitations because it affected both contributions and expenditures.<sup>124</sup> What mattered to the Court, however, was whether BCRA burdened speech in a way that contribution limits alone did not.<sup>125</sup> The Court concluded that BCRA did not impose restrictions on speech any more than the contribution limits upheld in *Buckley*.<sup>126</sup> The Court also rejected the argument that BCRA imposed associa-

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113. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 122 (2003).

114. *Id.* at 123.

115. *Id.*

116. *Id.* at 122.

117. *Id.* at 125.

118. *Id.* at 126.

119. *McConnell*, 540 U.S. at 126.

120. *Id.* at 132. The Bipartisan Reform Act of 2002 is more popularly known as the McCain-Feingold Act and has been described as the most sweeping change in campaign finance law since FECA. Adam Winkler, "Other People's Money": *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 935 (2004).

121. *McConnell*, 540 U.S. at 114, 123. BCRA amended FECA, the Communications Act of 1934, and sections of the United States Code. *Id.* at 114.

122. 540 U.S. 93 (2003). *McConnell* is a long and complicated case that dealt with more issues than just soft money, but for the purposes of this note only its holding regarding contribution limits is important. *Id.*

123. *Id.* at 93.

124. *Id.* at 138.

125. *Id.* at 138–39.

126. *Id.* at 139.

tional burdens different from the contribution limits in *Buckley* because BCRA prohibited any cooperation among national, state, and local political committees in conducting campaigns.<sup>127</sup> The Court did not interpret BCRA as the petitioners did and concluded that the “modest” impact that BCRA placed on party committees’ associational rights did not warrant strict scrutiny.<sup>128</sup> Thus, the Court applied “the less rigorous scrutiny applicable to contribution limits” upheld in *Buckley* to the BCRA soft money and issue ad provisions.<sup>129</sup>

In upholding these provisions, the Court broadened its view of what the governmental interest in preventing the reality and appearance of corruption entailed.<sup>130</sup> The Court moved beyond only quid pro quo corruption that emanates from direct contributions, concluding the soft money donations that averted congressional regulation were just as dangerous to the democratic election system as were direct contributions.<sup>131</sup> The record in *McConnell* indicated copious examples of national parties giving access to federal candidates and incumbents in exchange for large soft money contributions.<sup>132</sup> The dangers of these types of donations were the same posed by direct donations—officeholders deciding issues based on who contributed to their election, not on the merits or what his or her constituents wanted.<sup>133</sup> The Court also found the effects of soft money contributions were more difficult to detect, so it decided the best way to prevent soft money’s corrupting influences was to remove it as a temptation.<sup>134</sup> Thus, the government’s strong interests in preventing corruption and its appearance led the Court to uphold BCRA’s soft money provision.<sup>135</sup>

Just as in *Buckley* and *Shrink*, the Court acknowledged that the government’s interest—to prevent the actual and apparent corruption of candidates and government officials—was a sufficiently important interest to justify contribution limits.<sup>136</sup> Although the petitioners argued that Congress had not provided any evidence proving the existence of real or perceived corruption, the Court, just as it did in *Shrink*, deferred to legislative findings

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127. *Id.* at 141.

128. *McConnell*, 540 U.S. at 141.

129. *Id.*

130. Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155, 176 (2006).

131. *McConnell*, 540 U.S. at 152–53.

132. *Id.* at 150.

133. *Id.* at 153.

134. *Id.*

135. *Id.* at 154.

136. *Id.* at 143.

that soft money had influenced the congressional agenda.<sup>137</sup> The Court emphasized that it had consistently interpreted the definition of corruption very broadly and did not limit it to the “simple cash-for-votes corruption.”<sup>138</sup> Because the government’s important interest in preventing actual corruption and its appearance satisfied the less rigorous scrutiny standard applicable for regulations such as BCRA, the Court upheld the constitutionality of Congress’s regulation over soft money contributions.<sup>139</sup>

Neither the *Shrink* nor the *McConnell* case directly challenged *Buckley*’s holding on expenditure limits.<sup>140</sup> Consequently, *Randall* was the first case to raise the constitutionality of expenditure limits since the landmark case thirty years earlier.<sup>141</sup> Because of the increasing hostility toward *Buckley* by members of the Court, many legal scholars and political pundits alike thought that *Randall* might be the case that changed *Buckley*’s holding on expenditure limits.<sup>142</sup> The Court used *Randall*, however, as a chance to illuminate *Buckley*’s holding on contribution limits and paid little attention to expenditure limits, leaving *Buckley* as strong a precedent as ever.<sup>143</sup>

### III. THE CASE

#### A. Facts

The *Randall* case began as a consolidation of three separate civil actions by candidates, voters, political parties and political action committees (PACs) from Vermont.<sup>144</sup> All three suits challenged Act 64, which set contribution and expenditure limits on campaigns for state offices in Vermont.<sup>145</sup> The parties alleged that certain provisions violated the First

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137. *McConnell*, 540 U.S. at 149–50. The Court cited evidence that Congress failed to pass tobacco and generic drug legislation and tort reform because of the influence of soft money. *Id.* at 150 (citations omitted).

138. *Id.* at 150.

139. *Id.* at 224.

140. *Randall v. Sorrell*, 126 S. Ct. 2479, 2507 (2006) (Stevens, J., dissenting).

141. *Id.*

142. See sources cited *supra* note 7, 50.

143. See discussion *infra* Part IV.

144. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 463 (Vt. 2000) (“*Landell I*”). The three separate actions were: Marcella Landell, Donald Brunelle, and the Vermont Right to Life Committee, Inc., Political Committee, who sued Vermont Attorney General William Sorrell and Vermont’s fourteen state attorneys on May 18, 1999, alleging that Act 64 violated their right to speech and association under the First Amendment. *Id.* Three months later, a group including Neil Randall and the Vermont Libertarian Party sued on similar grounds, and the court consolidated the case with *Landell I*. *Id.* In February 2000, the Vermont Republican State Committee filed a similar suit but also challenged the application of Act 64 to political parties and committees, and the court consolidated the case with *Landell I* in March. *Id.*

145. *Id.* at 462.



Amendment rights to speech and association of individuals, candidates, political parties, and PACs.<sup>146</sup> There were several other groups and individuals interested in keeping Act 64 intact, and these “Defendant-Intervenors” successfully intervened in each case.<sup>147</sup> *Landall I*, which included three different parties—the Vermont Attorney General’s office, the plaintiffs, and the Defendant-Intervenors—finally made it to trial in the United States District Court of Vermont in the summer of 2000.<sup>148</sup>

### 1. *The Challenged Provisions*

#### a. Act 64’s contribution limits

Act 64 set various limits on the contribution amount that a candidate could receive from a “single source” in a two-year election cycle.<sup>149</sup> Candidates for state representative could receive no more than \$200 from a single source.<sup>150</sup> The limit was \$300 for candidates for state senator.<sup>151</sup> The legislature allotted a slightly higher contribution limit of \$400 for candidates for statewide offices such as governor, lieutenant governor, secretary of state, state treasurer, state auditor and attorney general.<sup>152</sup> Act 64 allowed political parties and PACs to raise significantly more money, permitting those entities to take contributions up to \$2000 from a single source.<sup>153</sup> In addition to these limitations, no candidate, political party or PAC could allow more than twenty-five percent of total contributions to come from non-residents of Vermont or a political party or committee that was not organized in Vermont.<sup>154</sup>

#### b. Act 64’s expenditure limits

The legislature also set limits on how much a candidate could spend on his or her campaign.<sup>155</sup> Act 64 restricted gubernatorial candidates from

146. *Id.* at 463–64.

147. *Id.* at 463. The defendant-intervenors include the following: the Vermont Public Interest Research Group; the League of Women Voters of Vermont; Rural Vermont; Vermont Older Women’s League; Vermont Alliance of Conservation Votes; Mike Fiorello; Marion Gray; Phil Hoff; Frank Huard; Karen Kitzmiller; Marion Milne; Daryl Pillsbury; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson. *Id.*

148. *Id.*

149. VT. STAT. ANN. tit. 17, § 2805 (1997). A single source included not only individuals but also political parties and PACs. *Id.* at § 2805(a).

150. *Id.* § 2805(a).

151. *Id.*

152. *Id.*

153. *Id.* § 2805(c).

154. *Id.* § 2805(c).

155. VT. STAT. ANN. tit. 17, § 2805(a).

spending more than \$300,000 during a two-year election cycle,<sup>156</sup> and a candidate for lieutenant governor could spend no more than \$100,000.<sup>157</sup> Act 64 also limited candidates for secretary of state, state treasure, state auditor, and attorney general to \$45,000.<sup>158</sup> Finally, citizens seeking office for state senator and state representative could spend no more than \$4000 and \$2000, respectively, in a two-year election cycle.<sup>159</sup>

c. Act 64's related campaign expenditures

Several of Act 64's other challenged provisions broadened the scope of what constitutes a contribution and an expenditure.<sup>160</sup> For instance, the statute considered any "related campaign expenditure" by someone other than a candidate "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates" an expenditure by and contribution to that candidate, if it was "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee."<sup>161</sup> If the related campaign expenditure was not more than fifty dollars, then Act 64 considered it to be a contribution to the candidate and not an expenditure by the candidate.<sup>162</sup> Lastly, Act 64 set limits on how much money political parties and committees could spend on behalf of a candidate.<sup>163</sup> If a political party or political committee had an expenditure that "primarily benefits" six or fewer candidates associated with that party or committee, then a presumption existed that this related campaign expenditure was for the candidate or candidates involved and thus considered a contribution.<sup>164</sup> That presumption did not exist, however, if the expenditure "substantially benefits" more than six candidates and was for the purpose of voter turnout, platform promotion or similar activities, all of which must fit criteria set by Act 64.<sup>165</sup>

156. *Id.* § 2805a(a)(1).

157. *Id.* § 2805a(a)(2).

158. *Id.* § 2805a(a)(3).

159. *Id.* § 2805a(a)(4)-(5).

160. *Id.* § 2809.

161. VT. STAT. ANN. tit. 17, § 2809(b)-(c).

162. *Id.* § 2809(a)-(c).

163. *Id.* § 2809(d).

164. *Id.*

165. *Id.* § 2809(d). For an expenditure not to be a "related campaign expenditure," it must satisfy the following three qualifications:

(1) The expenditures were made in connection with a campaign event whose purpose was to provide a group of voters with the opportunity to meet the candidate personally. (2) The expenditures were made only for refreshments and related supplies that were consumed at that event. (3) The amount of the expenditures for the event was less than \$100.00.

*Id.* §2809(d)(1)-(3).

## 2. *The Lower Courts' Decisions*

The United States District Court for Vermont found that the contribution limits imposed by Act 64 were constitutional because they passed the test promulgated by the Supreme Court in *Buckley*.<sup>166</sup> The expenditure limits, however, were an “unprecedented and impermissible extension of *Buckley*” and thus unconstitutional.<sup>167</sup> The district court also determined that the twenty-five percent limit on out of state contributions was an unconstitutional infringement on both a candidate’s and contributor’s First Amendment rights of free speech and association.<sup>168</sup> Finding that the provision regarding contributions from political parties to candidates was not *per se* unconstitutional, the court ruled nevertheless that the respective monetary levels of the restriction was unconstitutionally low.<sup>169</sup> The district court, however, upheld the \$2000 contribution limit to political parties and PACs and the various contributions limits by PACs to candidates.<sup>170</sup> Finally, the district court held that the provision requiring related campaign expenditures by non-candidates to be considered a contribution was constitutional.<sup>171</sup> The parties subsequently cross-appealed the district court’s ruling.<sup>172</sup>

On appeal, the Second Circuit Court of Appeals upheld the district court’s holdings regarding contribution limits but not expenditure limits.<sup>173</sup> The court decided that *Buckley* allowed expenditure limits as long as they were narrowly tailored to protect a compelling government interest, which is the strict scrutiny standard of review.<sup>174</sup> Based on the evidence and findings of the district court, the court of appeals held that the Vermont legislature had established the following two compelling interests to validate the expenditures limits: “preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials.”<sup>175</sup> Although the evidence and findings at trial showed compelling interests, the court of appeals could not discern from the record whether Act 64 was narrowly tailored enough to maintain the government’s interests.<sup>176</sup> The district court had determined that a candidate could run an effective campaign with the expendi-

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166. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 463 (Vt. 2000) (“*Landell I*”).

167. *Id.* at 463–64.

168. *Id.* at 464.

169. *Id.*

170. *Id.*

171. *Id.*

172. *See Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004) (“*Landell II*”).

173. *Id.* The Second Circuit remanded the case for the district court to decide whether the expenditure limits were narrowly tailored to protect a compelling governmental interest. *Id.* at 124–26.

174. *Id.* at 124–26.

175. *Id.* at 124.

176. *Id.* at 135.

tures limits but did not examine whether there was a way to continue to serve the government's interests and infringe less on the plaintiffs' First Amendment rights.<sup>177</sup> The court of appeals thus remanded the case to determine whether there were viable alternatives, such as a higher ceiling, to the expenditure limits established in Act 64.<sup>178</sup> The parties appealed and the Supreme Court granted certiorari to determine the constitutionality of Act 64's contribution limits and expenditure limits.<sup>179</sup>

## B. Reasoning

This section examines the Supreme Court's decision in *Randall*. The Court's ruling consisted Justice Breyer's plurality opinion.<sup>180</sup> The plurality held that Act 64's contribution limits were unconstitutional.<sup>181</sup> The plurality dealt with Act 64's expenditure limits very briefly, holding that because of the doctrine of stare decisis and because *Buckley* was a well-established precedent, the expenditure limits were unconstitutional.<sup>182</sup> Chief Justice Roberts joined in the entire opinion, and Justice Alito joined the portions governing contribution limits.<sup>183</sup> Justice Alito wrote a concurring opinion, in which he concurred in part and concurred in the judgment.<sup>184</sup> Justice Kennedy concurred in the judgment but did not join in the plurality opinion.<sup>185</sup> Justice Thomas, joined by Justice Scalia, filed an opinion and concurred only in the judgment, arguing that contribution limits should be *per se* un-

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177. *Id.*

178. *Landell II*, 382 F.3d at 135.

179. *Randall v. Sorrell*, 126 S. Ct. 2479, 2487 (2006).

180. See discussion *infra* Part III.B.1.

181. *Randall*, 126 S. Ct. at 2499.

182. *Id.* at 2487–91.

183. *Id.* at 2481.

184. *Id.* at 2500–01 (Alito, J., concurring). In his concurring opinion, Justice Alito believed that the respondents failed to appropriately ask the Court to revisit *Buckley*, so he did not concur in Justice Breyer's opinion concerning expenditure limits. *Id.* at 2500. "Only as a backup argument, an afterthought almost," Justice Alito argued, "do respondents make a naked plea for us to 'revisit *Buckley*.'" *Id.* Further, Justice Alito felt that the respondents did not discuss *stare decisis* or why the Court should reconsider precedent. *Id.* Because of the respondents' "incomplete presentation," he thought the Court should have refused to reexamine *Buckley* at all. *Id.* at 2500–01.

185. *Id.* at 2501 (Kennedy, J., concurring). Although Justice Kennedy agreed with the plurality that Vermont's contribution limits were unconstitutional, he was skeptical of the current campaign finance system and thus concurred only in the judgment. *Id.* He noted the Court was responsible for the creation and propulsion of the campaign finance system today. *Id.* Nevertheless, Justice Kennedy admitted that Supreme Court Justices have little if any experience on which to base these judgments, and there is no body of law to offer guidance. *Id.* Despite his exasperation with the political system, Justice Kennedy concurred in the judgment because he felt Vermont's contribution limits were too low. *Id.*

constitutional.<sup>186</sup> Agreeing with the court of appeals, Justice Stevens filed a dissenting opinion in which he advocated a remand to determine if the expenditure limits were too low.<sup>187</sup> Finally, Justice Souter, joined by Justice Ginsburg and in part by Justice Stevens, argued in his dissenting opinion that the contribution limits were not unconstitutionally low.<sup>188</sup>

1. *Under Buckley, Act 64's Contribution Limits Were Unconstitutionally Low*

Deciding whether Act 64's contribution limits were constitutional required a complex analysis.<sup>189</sup> The parties in *Randall* agreed with the *Buckley* Court's approach to determining whether contribution limits were constitutional, but they disagreed whether Act 64's limits were so restrictive that they violated the First Amendment.<sup>190</sup> The *Buckley* Court applied a standard of scrutiny that required contribution limits to be "closely drawn" to meet a "sufficiently important interest."<sup>191</sup> The *Randall* plurality adopted this standard to determine the constitutionality of Act 64's contribution limits but implemented a two step review.<sup>192</sup> First, the plurality conducted a quick review of Act 64 to determine if any "danger signs" were present.<sup>193</sup> The presence of danger signs raised a suspicion that contribution limits were not closely drawn, which could have the undesired effect of undermining electoral fairness by impeding a challenger's efforts to unseat an incumbent, thus reducing democratic accountability.<sup>194</sup>

The plurality identified four danger signs present in Act 64's contribution limits.<sup>195</sup> The first danger sign was that the limits applied per election cycle, not per election.<sup>196</sup> Thus, Act 64 grouped primary and general elec-

186. See discussion *infra* Part III.B.2.

187. *Randall*, 126 S. Ct. at 2506–11 (Stevens, J., dissenting). Mainly arguing for the constitutionality of expenditure limits, Justice Stevens argued that *Buckley* was not so strong a precedent that the Court should not overrule it. *Id.* at 2507. He also believed that the Court should not equate money with speech, which he contended it was doing by prohibiting expenditure limits. *Id.* at 2508. Finally, he argued that protecting the time of elected officials was an important governmental interest, stating that the Framers of the Constitution would "have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities." *Id.* at 2510.

188. See discussion *infra* Part III.B.3.

189. See *Randall*, 126 S. Ct. at 2491.

190. *Id.*

191. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

192. *Id.* at 2492.

193. *Id.*

194. *Id.* at 2492–93.

195. *Randall*, 126 S. Ct. at 2493–94. Justice Thomas also examined these danger signs in his concurring opinion. *Id.* at 2503 (Thomas, J., concurring).

196. *Id.* at 2493.

tions into the same category.<sup>197</sup> The second danger sign was Act 64's application of the same limitations "to both contributions from individuals and from political parties."<sup>198</sup> The plurality identified the following as the third and fourth danger sign, on which it seems to place the most importance:<sup>199</sup> Act 64's limits were the lowest in the country<sup>200</sup> and were much lower than any contribution limits the Court previously had upheld.<sup>201</sup> To the plurality, the presence of these danger signs meant that Act 64's contribution limits may violate the First Amendment, so it must continue to the second step of its analysis.<sup>202</sup>

Because danger signs were present, the plurality then "examine[d] the record independently and carefully to determine whether Act 64's contribution limits are 'closely drawn' to match the State's interests."<sup>203</sup> In conducting this independent examination of the record, the plurality found five factors, discussed below, that convinced it to believe that Act 64's contribution limits were too stringent and thus violated the First Amendment.<sup>204</sup>

a. Act 64 restricted a challenger's ability to run a competitive campaign

Based on the evidence presented by the petitioners' and the respondents' expert witnesses in the district court, the plurality decided that although the limits might not affect the average race, they had a considerable effect on competitive races.<sup>205</sup> The petitioners' experts focused on the competitive races in Vermont and determined that in 1998 Republican legislative challengers for competitive seats would have had the funds available reduced between eighteen percent and fifty-three percent.<sup>206</sup> The experts also testified that political parties target competitive races, resulting in the party contributing more money to these campaigns in an effort to win.<sup>207</sup> Their studies showed that Act 64 reduced political party contributions in these

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197. *Id.*

198. *Id.*

199. *See id.* at 2494.

200. *Id.*

201. *Randall*, 126 S. Ct. at 2493–94. The plurality noted that Act 64's limit was roughly one-sixth of the limit the Court upheld in *Shrink*. *Id.* at 2494.

202. *Id.* at 2494. If no danger signs were present, the plurality presumably would have deemed the contribution limits constitutional because they were similar to limits in other states and to limits the Court had upheld previously. *See id.*

203. *Id.*

204. *Id.* at 2494–95.

205. *Id.* at 2495–96.

206. *Id.* at 2495. The 1998 elections were the last elections to take place before the regulations took effect. *Id.*

207. *Randall*, 126 S. Ct. at 2495.

paces an average of eighty-five percent in legislative races and ninety-nine percent in gubernatorial races.<sup>208</sup>

The respondents' expert evidence was not as persuasive to the plurality.<sup>209</sup> The respondents' experts focused on Vermont's average campaign and concluded that Act 64 would have a minimal effect in the state.<sup>210</sup> The centerpiece of the experts' evidence was a series of studies indicating that Act 64 would have affected only a small proportion of the contributions made to all the campaigns in Vermont over the last three election cycles.<sup>211</sup> The plurality noted that the trial and appellate courts had erroneously relied on this evidence, which was based on averages, in finding the contribution limits constitutional.<sup>212</sup> Evidence relating to average races did not effectively answer the question of whether a challenger could run an effective campaign against an incumbent, because competitive races are usually much more expensive than the average race.<sup>213</sup> Consequently, the petitioners' evidence raised an inference that the contributions limits violated the First Amendment.<sup>214</sup>

b. Act 64 infringed on individuals' right to associate in a political party

Because Act 64's contribution limits were the same for political parties and individuals, the plurality concluded the statute infringed on Vermonters' right to associate.<sup>215</sup> Under the limits, a statewide political party consisting of smaller local parties around the state could contribute a maximum of \$400 to a gubernatorial candidate.<sup>216</sup> Additionally, Act 64 treated in kind contributions the same as direct monetary contributions, so giving campaign buttons and food counted against the amount of money the political party contributed to a candidate.<sup>217</sup> The plurality felt this restriction impinged on an individual's right to associate under the First Amendment and considered it another factor supporting the unconstitutionality of Act 64.<sup>218</sup>

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208. *Id.*

209. *See id.* at 2496.

210. *Id.*

211. *Id.* at 2496.

212. *Id.*

213. *Randall*, 126 S. Ct. at 2496.

214. *Id.*

215. *Id.*

216. *Id.* at 2497.

217. *Id.*

218. *Id.* at 2497–98.

- c. Act 64's language concerning volunteer services was too broad

Although Act 64 did not recognize time spent as a volunteer as a contribution to a candidate, the plurality concluded that money spent by volunteers during their volunteer services would be considered a contribution.<sup>219</sup> If the contribution limits were reasonably high, the plurality noted, the absence of more precise language would make little difference.<sup>220</sup> Act 64's limits, however, were low, so whether such volunteer expenditures counted as contributions would make a significant difference on the nature and extent of activities in which volunteers could participate.<sup>221</sup> The uncertainty of the provision, the high likelihood of an inadvertent violation of the provision, and its serious adverse effects on a candidate led the plurality to add the volunteer provision to the list of factors weighing against the contribution limits being closely drawn to pass scrutiny.<sup>222</sup>

- d. Act 64 had no inflation provision

The plurality also distinguished Act 64's contribution limits from those the Court upheld in the past based on the Vermont legislature's failure to insert an inflation provision.<sup>223</sup> According to the plurality, the \$200 contribution limit for House races in 1997 had a real value in 2006 of \$160.66.<sup>224</sup> As a result of the lack of such a provision, legislation would be necessary to prevent the real value from continuously declining.<sup>225</sup> The plurality also pleaded its case once more that Act 64 disadvantaged challengers, noting that this legislative burden fell on incumbents who may choose to protect their seat and not enact a legislative adjustment for inflation in order to further limit the effectiveness of a challenger's campaign.<sup>226</sup>

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219. *Randall*, 126 S. Ct. at 2498.

220. *Id.* at 2499.

221. *Id.* at 2498–99. Justice Breyer provided the following example of an adverse effect that a provision violation could have on a candidate: “Such supporters will have to keep careful track of all miles driven, postage supplied (500 stamps equals \$200), pencils and pads used, and so forth. And any carelessness in this respect can prove costly, perhaps generating a headline, ‘Campaign laws violated,’ that works serious harm to the candidate.” *Id.*

222. *Id.* at 2499.

223. *Id.*

224. *Id.*

225. *Randall*, 126 S. Ct. at 2499.

226. *Id.*



- e. No special justification existed for Act 64's infringements on rights of free speech and association

The fifth and final factor leaning toward the unconstitutionality of Act 64's contribution limits was the lack of any "special justification" that would allow the plurality to rationalize the burdens placed on the rights of free speech and association by Act 64's low contribution limits.<sup>227</sup> According to the plurality, the governmental interests advocated by Vermont in this case were no different than those promoted in *Buckley*.<sup>228</sup> Further, the State failed to show that its interest in preventing corruption or its appearance was more pressing in Vermont than in any other state.<sup>229</sup> The plurality concluded that these five factors—the adverse effect on a challenger's ability to run a competitive campaign, the infringement on associational rights, the broad language concerning volunteer services, the lack of an inflation provision, and the absence of special justification for the great imposition on free speech and association rights—taken together,<sup>230</sup> forced it to conclude that Act 64's contribution limits "disproportionately burden[s] numerous First Amendment interests, and consequently, . . . violates the First Amendment."<sup>231</sup>

## 2. Justice Thomas's Concurring Opinion

Justice Thomas's concurrence, which Justice Scalia joined, advocated overturning *Buckley* because it did not provide enough protection for political speech and because the Court had not provided a workable standard to apply its principles.<sup>232</sup> He disagreed with *Buckley*, and the plurality in this case, for distinguishing expenditure and contribution limits on the basis that contribution limits are less of an infringement on political speech because there is an intermediary (the candidate) between the contributor and the actual speech.<sup>233</sup> Expenditure limits also include an intermediary, Justice Thomas maintained, because a candidate usually uses some vehicle to communicate his or her message.<sup>234</sup> In his view, the Court should overrule *Buckley* and strike down all contribution and expenditure limits as unconstitutional

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227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* The plurality briefly addressed the option of severing the provisions and deciding their constitutionality piecemeal. *Id.* at 2499–2500. While noting that the plurality objected to severing because of constitutional ramifications, the severability of Act 64 is beyond the scope of this note. *Id.* at 2500.

231. *Randall*, 126 S. Ct. at 2499–2500.

232. *Id.* at 2502 (Thomas, J., concurring).

233. *Id.*

234. *Id.* at 2502.

because both limits violate the heart of the First Amendment—the freedom of political expression.<sup>235</sup>

Justice Thomas also disagreed with the plurality's stare decisis argument for not overruling *Buckley*.<sup>236</sup> In addition to inadequately protecting political speech, he believed that the Court's ongoing failure to apply *Buckley* consistently was further reason not to allow stare decisis to interfere with its demise.<sup>237</sup> When precedent has faulty reasoning and an unworkable outcome, the Supreme Court "has never felt constrained to follow precedent."<sup>238</sup> In Justice Thomas's mind, the plurality's two-pronged test provided an unfeasible guide for states attempting to conform to the Court's rule.<sup>239</sup> Justice Thomas criticized as unclear the plurality's reasoning regarding when contribution limits were so low as to cause danger signs to appear.<sup>240</sup>

He also considered the plurality's comparison of Vermont's limits to other states as "nothing more than a moving target."<sup>241</sup> Further, he disagreed with the plurality's comparison of Act 64 to limits the Court previously upheld.<sup>242</sup> The Court in *Shrink* reiterated that *Buckley* did not create a constitutional minimum for contribution limits, but according to Justice Thomas, the plurality here effectively used *Shrink* as a constitutional minimum.<sup>243</sup> Although these danger signs confirmed the plurality's suggestion that Act 64's limits are low, Justice Thomas concluded that they provided no guidance as to whether the limits were closely drawn to fit their objectives.<sup>244</sup> According to Justice Thomas, the plurality's application of *Buckley* gives the Court a "license to simply strike down any limits that just *seem* to be too stringent, and to uphold the rest. The First Amendment does not grant [the Court] this authority."<sup>245</sup>

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235. *Id.*

236. *Id.*

237. *Randall*, 126 S. Ct. at 2502.

238. *Id.* at 2503 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion)).

239. *Id.*

240. *Id.*

241. *Id.* at 2504. Justice Thomas argued that if the Vermont legislature was able to persuade other state legislatures to lower their contribution limits, then Act 64 would pass this part of the plurality's test. *Id.*

242. *Id.*

243. *Randall*, 126 S. Ct. at 2504 (Thomas, J., concurring).

244. *Id.*

245. *Id.* at 2506.

### 3. *Justice Souter's Dissent*

In the second part of his dissent,<sup>246</sup> Justice Souter elaborated on why the Court should have upheld the court of appeals' decision that the contribution limits were constitutional.<sup>247</sup> He argued that Vermont's contribution limits were not significant departures from those the court upheld in earlier cases and those adopted recently by other states.<sup>248</sup> Further, he contended that the Court should defer to the legislature on this issue because it had better knowledge of the measures necessary to accomplish their objectives.<sup>249</sup> Justice Souter acknowledged that there are instances where the Court should not defer to state legislatures, but there was sufficient evidence in the record in this case to allow the Court to defer to the Vermont legislature.<sup>250</sup>

In the final section of his dissent, Justice Souter examined some of the key sections of the plurality's reasoning for finding the contribution limits unconstitutional.<sup>251</sup> First, he refuted the plurality's view that Act 64's provision that a volunteer's expenses count as a contribution to the candidate would limit volunteerism.<sup>252</sup> He argued that only if the contribution limits were "teetering on the edge of unconstitutionality," the volunteer provision might render the limits unconstitutional.<sup>253</sup> Second, the plurality's opinion that the absence of an inflation provision is another factor weighing against the contribution limits constitutionality was even less persuasive to Justice Souter.<sup>254</sup> He countered by arguing the challenge to Act 64 was "to the law as it is, not to a law that may have a different impact after future inflation."<sup>255</sup> Third, Justice Souter disagreed with the plurality's view that political parties should not be subject to the same contribution limit as individu-

246. *Id.* at 2512 (Souter, J., dissenting). Justice Ginsburg joined in the entire dissenting opinion, while Justice Stevens joined in only parts two and three. *Id.* In the first part of his dissent, Justice Souter argued that *Buckley* did not address all of the governmental interests that Vermont advocated in regard to expenditure limits. *Id.* at 2511–12. Vermont argued it had a significant interest in reducing the amount of time that candidates and state officials spent raising money for their campaigns. *Id.* According to Justice Souter, the Court should have applied *Buckley*'s framework to determine whether the expenditure limits were the least restrictive means of meeting the state's objectives. *Id.* at 2512.

247. *Id.* at 2512–16.

248. *Id.* at 2512–13 (citations omitted).

249. *Randall*, 126 S. Ct. at 2513 (Souter, J., dissenting). Justice Souter cited the testimony of one candidate: "If I have only got an hour at night when I get home to return calls, I am much more likely to return [a donor's] call than I would [a non-donor's]." *Id.*

250. *Id.* at 2513–14.

251. *Id.* at 2515.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Randall*, 126 S. Ct. at 2515.

als, because in his view, rich individuals have the same interests as political parties in putting money into competitive races.<sup>256</sup> Additionally, individuals may use political parties to avoid the individual limits and still get their money to certain candidates.<sup>257</sup> In his final point, Justice Souter argued that Act 64's provision regarding "related campaign expenditures,"<sup>258</sup> which promulgated rules about which political party activities constitute a contribution to a candidate, did not place such a burden on parties and candidates to cause a "constitutionally offensive encumbrance."<sup>259</sup> Thus, Justice Souter advocated upholding the constitutionality of the Act 64's contribution limits.<sup>260</sup>

#### IV. ANALYSIS

##### A. *Buckley* Is Here to Stay

Despite the anticipation that *Randall* would change the state of campaign finance laws,<sup>261</sup> the Court remained steadfast to *Buckley* and showed no signs of changing anytime soon. Justice Breyer and Chief Justice Roberts are clearly in favor of staying with *Buckley* regarding both contribution and expenditure limits.<sup>262</sup> Although Justice Alito avoided answering the question of whether the Court should overrule *Buckley*, he would probably side with Justice Breyer and the Chief Justice in a similar situation in the future. He had the option to dissent or side with Justices Thomas and Scalia and chose not to, indicating that he wants to preserve the constitutionality of contribution limits and the unconstitutionality of expenditure limits. Justice Thomas and Justice Scalia would like to overturn *Buckley* and render all contribution limits unconstitutional,<sup>263</sup> and they concurred in the judgment only because the plurality struck down Vermont's contribution limits. Justice Kennedy would have joined with Justice Breyer and the Chief Justice, but he said his skepticism of the campaign finance systems prevented him from doing so.<sup>264</sup> The dissenters—Justices Stevens, Souter and Ginsburg—disagreed with the plurality on contributions limits only because they believed Vermont's limits were not too low.<sup>265</sup> One important result of *Randall*, therefore, is it

256. *Id.*

257. *Id.*

258. For Act 64's definition of related campaign expenditures, see VT. STAT. ANN. tit. 17, § 2809(b)–(c); see also discussion *supra* Part III.A.1.c.

259. *Randall*, 126 S. Ct. at 2515–16.

260. *Id.* at 2516.

261. See sources cited *supra* note 7.

262. See discussion *supra* Part III.B.1.

263. See discussion *supra* Part III.B.2.

264. *Randall*, 126 S. Ct. at 2501 (Kennedy, J., concurring).

265. *Id.* at 2512–16. See discussion *supra* Part III.B.3.

shows that the Court—by a seven to two margin—favors contribution limits and disfavors expenditure limits by a six to three margin. Because the two new Justices, Chief Justice Roberts and Justice Alito, are in favor of contribution limits and not expenditure limits, it appears that *Buckley*'s holding on these limits will continue to be the law of the land.

Much of the anticipation of the *Randall* decision was in regards to expenditure limits, however, not contribution limits.<sup>266</sup> As stated in the Introduction to this note, *Randall* did not change the law regarding expenditure limits,<sup>267</sup> nor did it provide an indication that it will change in the future.<sup>268</sup> Thus, constitutional laws limiting the amount of money a candidate may spend on his or her campaign are not on the horizon.

#### B. A New Standard of Review for Contribution Limits: Semi-Strict Scrutiny

*Randall* illuminated what the *Buckley* Court hinted at thirty years ago—the Court had created a new tier a scrutiny for contribution limits. The scrutiny employed in *Buckley* was a mix of intermediate and strict scrutiny.<sup>269</sup> For the first prong of this new standard, the governmental interest, the Court borrowed the “important” interest the government must demonstrate for the intermediate scrutiny standard.<sup>270</sup> In *Shrink*, the Court denied that it used intermediate scrutiny in *Buckley*, claiming intermediate scrutiny was not an appropriate standard for communicative action.<sup>271</sup> The Court’s analysis and language in *Buckley* and *Randall*, however, is strikingly similar to analysis and language used in cases where the Court expressly applied its intermediate scrutiny standard. For example, in *Craig v. Boren*,<sup>272</sup> a sex discrimination case that established intermediate scrutiny as a standard of review,<sup>273</sup> the Court set out a standard that required a law to serve an “important” governmental interest that is “substantially related” to that interest.<sup>274</sup> In *Buckley* and again in *Randall*, the Court said that contribution limits must

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266. See sources cited *supra* note 7.

267. See Chemerinsky, *supra* note 10.

268. See discussion *supra* Part I.

269. See *Buckley v. Valeo*, 424 U.S. 1, 25–28 (1976).

270. *Id.* at 25–27.

271. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386 (2000).

272. 429 U.S. 190 (1976).

273. *Id.* at 220 (Rehnquist, J., dissenting) (arguing that the new standard seemed to come “out of thin air”); see also Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 987 (1984).

274. *Craig*, 429 U.S. at 199–200; see also *Califano v. Goldfarb*, 430 U.S. 199, 210–11 (1977) (holding that classifications by gender must be substantially related to an important government interest).

serve a “sufficiently important” governmental interest.<sup>275</sup> Thus, the difference between intermediate scrutiny and the scrutiny employed in *Buckley* and *Randall* is simply that contribution limits must serve a sufficiently important interest instead of just an important interest. The first prong of the standard of review for contribution limits looks incredibly similar to the first prong of intermediate scrutiny.

For the second prong of its review of contribution limits, the *Buckley* Court said contribution limits must be “closely drawn” to serve a sufficiently important governmental interest.<sup>276</sup> In *Randall*, the Court borrowed the language from *Buckley*,<sup>277</sup> but began using the term “narrowly tailored” interchangeably with “closely drawn.”<sup>278</sup> The term “narrowly tailored” is one the Court uses when it applies its strict scrutiny standard, but the law must be narrowly tailored to serve a “compelling” governmental interest, not an “important” one.<sup>279</sup> Further, in *McConnell* Justice Kennedy maintained that *Buckley* used ““closely drawn”” scrutiny for contribution limits and strict scrutiny for expenditure limits,<sup>280</sup> and Justice Thomas’s concurrence in *Randall* indicated that the Court does not use strict scrutiny to review contribution limits.<sup>281</sup> Thus, the *Randall* Court did not use strict scrutiny, but borrowed the term “narrowly tailored” and a term it coined in *Buckley*, “closely drawn,”<sup>282</sup> and created a new standard of review: semi-strict scrutiny. This new scrutiny derives its first prong from intermediate scrutiny and its second prong from strict scrutiny, and on the scale of standards of review, falls somewhere between the two.

How does a legislature make sure that its contribution limits can survive semi-strict scrutiny? *Randall* indicates that a legislature should ensure that its limits are not the lowest in the nation and are not lower than what the Court has upheld previously.<sup>283</sup> Somewhat less importantly, a legislature should make its contribution limits applicable per election, not per election cycle, and should not apply the same limits to political parties and individuals.<sup>284</sup> If the Court does not detect these danger signs, it will most likely not

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275. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Randall v. Sorrell*, 126 S. Ct. 2479, 2491 (2006) (quoting *Buckley v. Valeo*).

276. *Buckley*, 424 U.S. at 25.

277. *Randall*, 126 S. Ct. at 2491.

278. *See id.* at 2494, 2499.

279. *See Johnson v. California*, 543 U.S. 499, 505 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002).

280. *McConnell v. FEC*, 540 U.S. 93, 307 (2003).

281. *Randall*, 126 S. Ct. at 2502 (Thomas, J., concurring) (“I would overrule *Buckley* and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny.”).

282. A Westlaw word search for the term “closely drawn” in Supreme Court cases indicates the Court first used the term in any context in *Buckley*.

283. *Randall*, 126 S. Ct. at 2493–94.

284. *Id.* at 2493.

conduct an independent review of the record and will rule the limits constitutional.<sup>285</sup> Although a Court will not automatically invalidate contribution limits if one or more of the danger signs are present, it seems more likely that when it conducts an independent review it will find that the limits are not closely drawn.<sup>286</sup>

Another important result of *Randall* may very well be the Court demonstrating that it will not allow any and all contribution limits to pass constitutional muster. But the case also elucidated and reemphasized *Buckley*, which many scholars suspected would soon fall, as the law of the land.<sup>287</sup> *Randall* also succeeded in doing what the cases since *Buckley* failed to do—identifying semi-strict scrutiny as the standard of review, which courts will use when deciding contribution limit challenges. State legislatures have received a shot across the bow warning them that if they are unsure at what level to set their contribution limits, it should err on the high rather than low side. Whether legislatures will heed that warning in order to avoid litigation remains to be seen.

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285. *See id.* at 2494. The Court did not mandate that these were the only danger signs that would cause it to conduct an independent review; it is the only instruction, however, the Court has given on the matter. *Id.*

286. *See id.* A constitutional challenge to Arkansas's contribution limits would probably fail. Pursuant to law that went into effect in 2003, a person may contribute a maximum of \$2000 to a candidate per election for statewide office or any other public office. ARK. CODE ANN. § 7-6-203(a)(1)(A)–(2)(A) (LEXIS Supp. 2005). Arkansas law, however, treats primary and general elections separately, so a candidate may receive \$2000 from the same contributor in each the primary and general election. *Id.* § 7-6-201(7) (LEXIS Supp. 2005). With a contribution limit of \$2500, political parties may contribute slightly more to a candidate than individuals and corporations. *Id.* § 7-6-203(d) (LEXIS Supp. 2005). None of the danger signs cataloged in *Randall* exist in the Arkansas statutes.

287. *See* sources cited *supra* note 7.

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