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Limitations on Campaign Contributions and Expenditures Are Invalid for Lack of Legitimate Governmental Interest and Insufficient Tailoring: *Randall v. Sorrell*

CONSTITUTIONAL LAW — FIRST AMENDMENT — FREEDOM OF SPEECH — FREEDOM TO ASSOCIATE — The Supreme Court of the United States held that Act 64, Vermont's campaign finance law, was in contravention of the First Amendment guarantees of freedom of speech and freedom of association with respect to the statute's contribution and expenditure limitations.

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

In 1997, Vermont enacted a campaign finance reform bill (hereinafter "Act" or "Act 64")[1] that imposed strict contribution limits on individuals, political parties, and committees, as well as rigid expenditure restrictions on candidates running for office.[2] Upon codification, a group consisting of Vermont candidates, voters, contributors, political parties, and committees that participated in Vermont politics (hereinafter "Vermont contingency") brought suit in federal district court against the state officials charged with enforcement of the Act.[3] The Vermont contingency asserted that the broad definitions of "contribution"[4] and "expenditure,"[5] in

1. Pub. Act No. 64, 1997 VT. ACTS & RESOLVES 64 (codified at VT. STAT. ANN. tit. 17, § 2801 (2002)).

2. Randall v. Sorrell, 126 S. Ct. 2479 (2006). Act 64 took effect immediately after the 1998 elections and placed the following campaign contribution limits on single individuals for a two-year general election cycle that encompassed both the primary and general election: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200. tit. 17, § 2805. Political parties were likewise restricted, as their donations to candidates could not surpass $2000 during the course of the election cycle. *Id.* In addition, the Act created the following expenditure constraints on candidates: governor, $300,000; lieutenant governor, $100,000; other statewide offices, $45,000; state senator, $4000; state representative (two-member district), $3000; and state representative (single-member district), $2000. *Id.* § 2805a.

3. *Randall*, 126 S. Ct. at 2487. In addition, several other private groups and individual Vermont citizens joined with state officials in the proceedings in support of the Act. *Id.*

4. The definition of "contribution" contained within the Act incorporated any donation on a candidate's behalf that was "intentionally facilitated by, solicited by or approved by" the candidate. tit. 17, § 2809(c). Likewise, any party's payment that principally benefited six or fewer candidates who were associated with the party counted towards the party's contribution allowance. *Id.* § 2809(d).

combination with the lack of governmental interest in enacting the limitations, compromised the legislation's constitutional validity.[6]

The Vermont contingency initially brought suit in the United States District Court for Vermont.[7] The district court agreed with the Vermont contingency's assertion that the Act's expenditure limits violated the First Amendment to the United States Constitution.[8] The court also held that the limitations Act 64 placed on contributions from political parties were similarly unconstitutional.[9] However, the district court stopped short of invalidating the entire Act, finding that the statute's other contribution limits were within constitutional bounds.[10] As a result of each side's dissatisfaction with the verdict, both parties lodged appeals in the United States Court of Appeals for the Second Circuit.[11]

A divided panel of the circuit court concluded that, not only were all of the Act's contribution limits constitutional, but the Act's expenditure limits might also withstand constitutional scrutiny, in light of Vermont's compelling interests in preventing corruption or the appearance thereof and in limiting the amount of time state officials spend raising campaign funds.[12] The panel left undecided the question of whether the Act's expenditure limits were narrowly tailored to meet those interests and, accordingly, remanded the case to the district court in order for such determi-

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5. Similarly broad was the Act's definition of "expenditure," which the Legislature labeled as any "payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates." *Id.* § 2801(3).

6. Landell v. Sorrell, 118 F. Supp. 2d 459, 476 (D. Vt. 2000).

7. *Landell*, 118 F. Supp. 2d at 459.

8. *Id.* at 493. The First Amendment states: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. More specifically, the district court found that the restraints on expenditures worked iniquitous harm on the freedoms of speech and association. *Landell*, 118 F. Supp. 2d at 493. Although the limitations furthered "effective representation, equal access to the political system, and honest, responsive government," the court concluded that the advancement of these interests could not overcome the inherent damage to free speech and association. *Id.*

9. *Landell*, 118 F. Supp. 2d at 493.

10. *Id.*

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

12. Landell v. Sorrell, 382 F.3d 91, 119-20 (2d Cir. 2004). In assessing the validity of the expenditure limitations, the panel determined that the level of scrutiny to be applied was predicated upon the importance of the political activity at issue with respect to effective speech or political association. *Landell*, 382 F.3d at 106. Because limits on campaign spending are considered a direct restraint on speech, the panel concluded that Vermont had the burden of proving a compelling interest in the enactment of the legislation. *Id.*

nation to be made.[13] Thereafter, the United States Supreme Court granted certiorari to consider whether Act 64's expenditure limits, contribution limits, and a related definitional provision passed constitutional muster.[14]

Justice Breyer delivered the plurality opinion of the Supreme Court and concluded that the expenditure restraints were incompatible with First Amendment interests and well-established precedent.[15] In addition, he found that the contribution limits were too low and insufficiently tailored to the statute's legitimate objectives to be constitutionally permissible.[16] The Court was unable to sever the constitutionally repugnant provisions, rendering the entire act invalid.[17]

The Court commenced its constitutional analysis of Act 64 by examining the expenditure limits and their relation to the free speech guarantees of the First Amendment.[18] In *Buckley v. Valeo*,[19] the Supreme Court was faced with a similar campaign finance regulation.[20] There, it held that the Federal Election Campaign Act of 1971 (FECA)[21] was unconstitutional with respect to its restraints on expenditures, but valid with regard to its curbing of campaign contributions.[22] In reaching this conclusion, the Court stated that both kinds of limitations implicate fundamental First Amendment rights.[23] The *Buckley* Court decided that the

13. *Landell*, 382 F.3d at 136.

14. *Randall*, 126 S. Ct. at 2487. Because the Court invalidated Act 64 with respect to its contribution and expenditure limitations, the plurality found it unnecessary to decide the constitutionality of the Act's definitional provision, which presumed that certain party expenditures were coordinated with a particular candidate. *Id.* at 2500.

15. *Id.* at 2485. Chief Justice Roberts joined in the judgment of the Court, and Justice Alito joined as to all but parts II-B-1 and II-B-2; Justices Alito and Kennedy each filed concurring opinions; Justice Thomas filed a concurring opinion, in which Justice Scalia joined; Justice Stevens filed a dissenting opinion; Justice Souter filed a dissenting opinion, in which Justice Ginsburg joined, and Justice Stevens joined as to parts II and III. *Id.* at 2485.

16. *Id.*

17. *Id.* at 2500. Justice Breyer found that severing sections of Act 64 to avoid constitutional infractions was not feasible, as the Court would then be thrust into the legislative decision-making process. *Id.* Instead, he adjudged the prudent course to be that of leaving the Legislature free to structure the Act according to its own dictates, so long as the regulation complied with the Court's opinion. *Id.*

18. *Id.* at 2487. Namely, the Court addressed the effect of spending constraints on the freedom of political expression. *Id.* at 2491.

19. 424 U.S. 1 (1976) (per curiam).

20. *Buckley*, 424 U.S. at 1.

21. Pub. L. No. 92-225, 86 Stat. 3 (1972), *amended by* 2 U.S.C § 431 (2002). The Act imposed limits on contributions to candidates running for federal elective office and restraints on candidates' campaign expenditures. *Buckley*, 424 U.S. at 7.

22. *Buckley*, 424 U.S. at 143.

23. *Id.* at 23.

Government's proposed justification of the statute's infringement upon those rights was sufficient to sustain the contribution limits.[24] However, in the Court's view, the state's interest in preventing corruption and its appearance did not warrant the constraints on expenditures.[25]

The *Buckley* Court's delineation between the two kinds of limitations was premised on the notion that expenditure limitations inflict substantially harsher restrictions on protected freedoms of political expression and association than do their contribution counterparts.[26] Constraints on contributions do not prevent the contributor from conversing about candidates and issues, whereas limits on expenditures restrict the number of issues that candidates are able to discuss, reduce the depth to which they are explored, and stifle the transmission of the issues to larger audiences.[27]

Vermont, recognizing the unfavorable shadow cast by *Buckley* with respect to expenditure limitations, sought to surmount the precedent by first arguing that it should be overruled.[28] However, Justice Breyer could find no justification for the repudiation of *Buckley*.[29] In the alternative, the State contended that its statute was distinguishable from that in *Buckley*.[30] The State's lone argument differentiating its legislation from the statute in *Buckley* was that Act 64's expenditure limits reduced the amount of time candidates spend raising money.[31] The plurality found this rationale equally unconvincing, concluding that the *Buckley* Court had been aware of the correlation between expenditure limits and a reduction in fundraising time.[32]

Having invalidated the expenditure limitations imposed by Act 64, the Court next addressed whether the law's limitations on campaign contributions had more severe effects than *Buckley* con-

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24. *Id.* at 29.
25. *Id.* at 45.
26. *Id.* at 23.
27. *Buckley*, 424 U.S. at 19-21, 23.
28. Randall v. Sorrell, 126 S. Ct. 2479, 2489 (2006).
29. *Randall*, 126 S. Ct. at 2489-90. The Court found dubious Vermont's contention that post-*Buckley* experience had shown that contribution limits alone could not deter corruption and its appearance. *Id.* Supporting its conclusion was the plurality's determination that the case law following *Buckley* had not confined *Buckley* to the status of an aberration nor vitiated its underlying legal principles. *Id.* at 2489. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).
30. *Randall*, 126 S. Ct. at 2489.
31. *Id.* at 2490.
32. *Id.* The *Buckley* Court acknowledged that in enacting FECA, Congress was attempting to "free candidates from the rigors of financing." *Buckley*, 424 U.S. at 91.

templated.[33] Justice Breyer, recognizing the damaging effects of contribution limitations set too low, stressed the imperativeness of setting a constitutional threshold.[34] Establishing this floor, he deduced, would ensure that challengers are able to maintain effective campaigns against incumbent officeholders and that all candidates are able to accumulate the necessary resources for constructive campaigning.[35] Because Act 64's limits were comparatively low in relation to contribution restrictions upheld by the Court in the past, the plurality concluded that they were not closely drawn to further Vermont's interests.[36]

To illustrate the significant discrepancy between the limits upheld in *Buckley* and Act 64's restraints, the Court pointed out that Vermont's contribution limit on campaigns for statewide office amounted to approximately $57 per election, while the statute in *Buckley* prescribed a limit of $1000.[37] Further, the plurality noted that Vermont's contribution limits, when considered as a whole, were the lowest in the nation and well below the lowest limit the Court had previously upheld in Missouri.[38] Vermont's comparable limit was roughly $200 per election, less than one-fifth of Missouri's, and the Court found this to be too large a gap, notwithstanding Vermont's relatively smaller population.[39]

In addition to Act 64's considerably low contribution limits, Justice Breyer detailed five equally relevant factors that influenced the Court's decision that the statute was not narrowly drawn to effectuate the State's legitimate interests.[40] First, the Court found that the record emitted a logical inference that Vermont's constraints on campaign contributions would substantially and adversely affect the amount of funding challengers were able to raise in order to be competitive against incumbents.[41] This determination largely rested upon the testimony of the Vermont contingency's expert, who studied the most recent election and found

33. *Randall*, 126 S. Ct. at 2491.
34. *Id.* at 2492.
35. *Id.*
36. *Id.* at 2492-93.
37. *Id.* at 2493. The *Randall* Court adjusted the Vermont contribution limit figure to reflect its value in 1976, which was the year *Buckley* was decided. *Id.*
38. *Randall*, 126 S. Ct. at 2493-94. The lowest limit sustained by the Court prior to *Randall* was the limit of $1075 per election for state auditor in Missouri. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).
39. *Randall*, 126 S. Ct. at 2494.
40. *Id.* at 2495.
41. *Id.* The Court did, however, admit that the record lacked conclusive proof in this regard. *Id.*

that challengers in competitive races would have suffered a reduction in available funds as a result of contribution restrictions.[42]

Rather than challenging the figures submitted by the Vermont contingency's expert, the State conceded the legitimacy of the percentages and instead chose to highlight the opinion of its own expert.[43] This expert deduced that only a small quantity of all contributions made during the previous three election cycles would have been affected by Act 64's limits.[44] However, the plurality dismissed the State's statistics as irrelevant to the Court's central concern for preserving the viability of challengers in competitive races.[45] Information respecting average races, Justice Breyer maintained, fails to consider the vastly more expensive realities of a competitive race.[46] Consequently, the plurality held that Vermont's analysis of the impact its contribution limits would have on average races could not refute the conclusion that Act 64's restraints on contributions would unduly impede challengers in competitive races.[47]

The second feature of Act 64 that the Court found problematic was that it subjected political parties to the same low contribution limits as other contributors.[48] This, Justice Breyer avowed, was a direct infringement upon the vital political right to associate in a political party.[49] The plurality also stressed the baleful influence of the contribution limit on those who wish to donate small amounts of money to a party.[50] Hypothesizing a scenario in which six thousand Vermont citizens contributed one dollar to the Democratic Party to ensure a Democratic majority, the Court theorized that if control of the Legislature rested upon the outcome of three races, the party would be forbidden by the Act from giving $2000 of the $6000 to each of the candidates embroiled in the crucial races.[51] This reduction in the strength of the political parties

42. *Id.* The expert conducted a race-by-race analysis of the 1998 legislative elections and determined that contribution limits would have reduced available funds to Republican challengers in competitive races by 18% to 53% of their entire campaign income. *Id.*

43. *Id.* at 2496.

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

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 2497.

49. *Randall*, 126 S. Ct. at 2497. The Court noted, for instance, that the low contribution limits could interfere with a party's ability to contribute to a candidate's election advertising and campaign-related events. *Id.*

50. *Id.*

51. *Id.*

to effectuate the will of its citizens was untenable in the plurality's view and weighed against the statute's constitutional validity.[52]

The third aspect of Vermont's campaign finance law that concerned the Court was its handling of volunteer services.[53] Act 64 prescribed that expenses volunteers incurred in the course of campaign activities, such as travel costs, be counted as contributions.[54] Justice Breyer emphasized that the absence of an exemption for such services is magnified when contribution limits are as low as Vermont's.[55] Thus, because the probability of unjustified interference was particularly high with respect to campaign volunteers, the broad construction of "contribution" was another element weighing in favor of the Act's unconstitutionality.[56]

The fourth characteristic the Court focused on was the Act's failure to adjust its contribution limits for inflation.[57] Such a defect, the plurality noted, would cause the already low limits to further decline over time.[58] Inevitably, future legislation would be necessary to curtail the abatement; legislation, the Court surmised, the incumbent legislators would be in no hurry to pass.[59]

The fifth and final distressing feature of Act 64 in the Court's estimation was the lack of any special justification in the record for the severe restrictions on contributions other than what was already advanced in *Buckley*.[60] In the plurality's view, Vermont had the burden to do more than simply invoke the need to eradicate corruption or its appearance; rather, the State needed to prove that corruption or its appearance in Vermont warranted the extreme limitations promulgated by Act 64.[61] This it failed to do.[62]

Considering these five factors together, the Court found that the Act constituted an encumbrance on First Amendment liberties that was disproportionate to the public interests for which the

52. *Id.* at 2498.
53. *Id.*
54. VT. STAT. ANN. tit. 17, § 2801(3) (2002).
55. *Randall*, 126 S. Ct. at 2498.
56. *Id.* at 2499.
57. *Id.*
58. *Id.* Indeed, the Court found that in real dollars, the Act's limits had declined by 20% since the statute was enacted in 1997. *Id.*
59. *Id.*
60. *Randall*, 126 S. Ct. at 2499.
61. *Id.*
62. *Id.*

legistlation was enacted.[63] As a result, the contribution limitations were deemed constitutionally invalid.[64]

In a brief concurrence, Justice Alito agreed that both the contribution and expenditure limitations of Act 64 were unconstitutional, but took issue with the plurality's decision to revisit *Buckley*.[65] As the State failed to address the doctrine of stare decisis,[66] Justice Alito found it unnecessary to reach that issue.[67] Although Justice Kennedy approved of the plurality's analysis and verdict, his concurrence expressed concern regarding the Court's role in the shaping of campaign finance regulation.[68] Without any experience in the area or the guidance of a well-established body of law, Justice Kennedy opined that the Court is unequipped for the legal realm that it has created and perpetuated.[69]

While Justice Thomas concurred with the judgment of the plurality that both the expenditure and contribution limitations set forth by Act 64 were unconstitutional, he went farther than Justice Breyer and called for the overruling of *Buckley*.[70] This belief stemmed from Justice Thomas's refusal to distinguish between contribution and expenditure limitations.[71] In his view, restraints on contributions have equally nefarious effects upon the freedom of political expression and association.[72]

In addition to advocating for similar treatment for the two types of limitations, Justice Thomas indicated that the Court's inability to apply the *Buckley* standard in a consistent and principled fash-

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63. *Id.* Specifically, the Court held that the Act burdened "First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation." *Id.*

64. *Id.* at 2500.

65. *Randall*, 126 S. Ct. at 2500 (Alito, J., concurring).

66. Stare decisis is the fundamental legal principle advocating judicial respect for a court's earlier decisions and the rules of law they enumerated. Harris v. United States, 536 U.S. 545, 556-57 (2002) (plurality opinion). As the Court has remarked: "[d]eparture from precedent is exceptional, and requires 'special justification.'" *Randall*, 126 S. Ct. at 2489. *See also* Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (requiring "special justification" to overrule precedent in constitutional cases).

67. *Randall*, 126 S. Ct. at 2500-01 (Alito, J., concurring).

68. *Id.* at 2501 (Kennedy, J., concurring).

69. *Id.* Justice Kennedy stated: "[v]iewed within the legal universe we have ratified and helped create, the result the plurality reaches is correct; given my own skepticism regarding that system and its operation, however, it seems to me appropriate to concur only in the judgment." *Id.*

70. *Id.* at 2501-02 (Thomas, J., concurring).

71. *Id.* at 2502. *See also* Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 640 (1996) (Thomas, J., concurring in judgment and dissenting in part).

72. *Randall*, 126 S. Ct. at 2502 (Thomas, J., concurring).

ion should have compelled the plurality to reject *Buckley*.[73] Justice Thomas felt that the plurality's constitutional analysis of contribution limits is incapable of being reduced to a workable formula that states can use to comply with the Court's decisions.[74] Such a deficiency, Justice Thomas argued, rendered the Court an ill-suited arbitrator of campaign finance regulation.[75]

Similar to Justice Thomas's concurring opinion, Justice Stevens's dissent observed that the fundamental importance of stare decisis called for *Buckley*'s holding on expenditure limits to be overruled.[76] Unlike Justice Thomas, however, Justice Stevens argued that the constraints placed upon expenditures by Act 64 were constitutionally sustainable in light of several factors.[77] First, *Buckley*'s holding on expenditure limitations itself disturbed a long-established practice of subjecting campaigns to legislative limits on both expenditures and contributions.[78] Moreover, Justice Stevens contended that *Randall* represented the first post-*Buckley* challenge to the constitutionality of expenditure limitations in the campaign context.[79] Thus, while Congress and state legislatures have consistently relied upon *Buckley*'s handling of contribution limits, Justice Stevens found no such comparable dependence generated by *Buckley*'s rejection of expenditure constraints.[80]

More substantively, Justice Stevens argued that limits on expenditures were closer in kind to time, place, and manner restrictions than to inhibitions on the content of speech.[81] Therefore, Justice Stevens proposed, the restrictions should be upheld as long as the functions they serve are "legitimate and sufficiently

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73. *Id.* at 2503.

74. *Id.*

75. *Id.*

76. *Id.* at 2506-07 (Stevens, J., dissenting).

77. *Randall*, 126 S. Ct. at 2507 (Stevens, J., dissenting).

78. *Id.* Justice Stevens pointed to the Federal Corrupt Practices Act of 1925, 2 U.S.C. § 241 (repealed 1972); FECA, Pub. L. No. 92-225, 86 Stat. 3 (1972), *amended by* 2 U.S.C. § 431 (2002); and the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263. Earlier decisions by the Court gave credence to the notion that these limits were permissible regulations of conduct rather than speech. *See* United States v. Harriss, 347 U.S. 612 (1954); Burroughs v. United States, 290 U.S. 534 (1934).

79. *Randall*, 126 S. Ct. at 2507 (Stevens, J., dissenting).

80. *Id.* at 2508. Accordingly, Justice Stevens argued, the effect of overruling *Buckley*'s holding on expenditure restraints would be negligible. *Id.*

81. *Id.* Justice Stevens argued that it was erroneous to liken restraints on money to infringement of speech, because the freedom of political expression is maintained in the former and essentially eviscerated in the latter. *Id.* Thus, Justice Stevens asserted, Act 64's shackles on expenditures were not antithetic to free speech in the same manner that direct and substantive restraints would be. *Id.*

substantial."[82] In Justice Stevens's opinion, Act 64's dual capacity to safeguard the political arena from usurpation by the rich and to free candidates from the rigors of fundraising were legitimate interests that could warrant the conclusion that the Act's expenditure limitations were constitutional.[83]

Justice Souter, in his dissent, advocated both affirming the court of appeals' decision to remand the case for further inquiries with respect to Act 64's expenditure limitations and upholding the legislation's contribution limits.[84] Central to Justice Souter's disposition was his belief that it was too soon to characterize Act 64's expenditure limits as a violation of the tenets set forth in *Buckley*.[85] For one, Justice Souter pointed out that the *Buckley* Court gave no indication that it considered earnestly the particular justification Vermont set forth for its restrictions.[86] Therefore, in Justice Souter's opinion, the question was not whether *Buckley* should be overruled, but instead, whether careful application of the *Buckley* framework, in light of the time-protection interest proffered by Vermont, would actually *validate* Act 64's restrictions.[87] Since the Vermont Legislature found pestiferous effects flowing from the relentless fundraising of its candidates, Justice Souter concluded a remand was necessary.[88]

Conceding that Vermont's contribution limits were low, Justice Souter nevertheless found that they were not a significant departure from those previously approved by the Court[89] or those enacted by other states.[90] Indeed, Justice Souter argued that this was suggestive of a widespread clamp-down on campaign contributions rather than an aberration.[91] Thus, Justice Souter opined,

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82. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 264 (White, J., concurring in part and dissenting in part)).

83. *Id.*

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

85. *Id.*

86. *Id.* Rather than assess the viability of a state's interest in assuaging the burden on candidates to fundraise incessantly, Justice Souter contended that the *Buckley* Court focused almost exclusively on the reduction of corruption and its appearance. *Id.*

87. *Id.* at 2512.

88. *Id.* On remand, it would be decided if the Act's spending limits were the least restrictive means of accomplishing its aspirations. *Id.*

89. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (validating $1075 limit on contributions to candidates for Missouri state auditor).

90. *Randall*, 126 S. Ct. at 2512-13 (Souter, J., dissenting). *See* Mont. Right to Life Ass'n v. Eddleman, 343 F.3d 1085 (9th Cir. 2003) (approving $400 limit for candidates filed jointly for Governor and Lieutenant Governor); Daggett v. Comm'n on Gov't Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) (upholding $500 limit for gubernatorial candidates in Maine).

91. *Randall*, 126 S. Ct. at 2513 (Souter, J., dissenting).

the Court would do best to defer to the legislatures instead of treading into an area where it has little expertise.[92]

Throughout the eighteenth and early nineteenth centuries, concerns surrounding the origin of campaign funds and their capacity to compromise a candidate's actions while in office were rarely voiced.[93] Not until later in the nineteenth century, when voters were deciding between lower class politicians, did the financing of elections surface as a potential malignancy on civic service.[94] Responding to corporations' ever more involved role in the financing of campaigns for the highest offices, from 1907 to 1911, Congress outlawed corporate political contributions, mandated that congressional candidates divulge the finances of their campaigns, and limited candidate spending.[95] A decade later, in *Newberry v. United States*,[96] the Supreme Court made its first foray into the arena of campaign finance law in order to test the constitutionality of the recently enacted regulations.[97]

In *Newberry*, the Supreme Court considered Thomas H. Newberry's expenses in pursuit of the Republican nomination for United States Senator for the State of Michigan.[98] The federal law regulating campaign spending provided that no senatorial candidate's expenditures could exceed the lower of $10,000 or the limit provided by state law.[99] In *Newberry*, Michigan's law was more restrictive, prohibiting expenditures by or on behalf of a candidate in any amount surpassing twenty-five percent of the annual salary for the office sought.[100] In 1919, a federal grand jury indicted Newberry, his campaign staff, and some of his supporters for conspiring to violate the spending limit provisions of the legislation.[101] One year later, Newberry was convicted.[102] The Su-

92. *Id.*

93. ROBERT E. MUTCH, CAMPAIGN, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW, at xvii (1988).

94. *Id.* at xvii. This phenomenon, Mutch argued, was the result of a growing concern among the electorates that the policymaking power of their elected representatives was being compromised by the influence of those who provided campaign funds. *Id.* Such increased scrutiny led several states to enact disclosure laws supplying voters with information on the origins and uses of campaign donations and ultimately precipitated the first federal campaign finance law in 1907. *Id.*

95. *Id.* at xviii.

96. 256 U.S. 232 (1921).

97. *Newberry*, 256 U.S. at 232.

98. *Id.* at 244.

99. *Id.* at 244-45.

100. *Id.* at 244. In 1918, this equated to $1875 for a senatorial primary. MUTCH, *supra* note 93, at 16. Newberry spent nearly one hundred times that amount in his attempt to defeat his opponent, Henry Ford. *Id.*

101. *Newberry*, 256 U.S. at 240.

preme Court granted certiorari to determine whether Congress' power to regulate the manner in which elections are held extended to the practice of fixing the maximum sum a candidate may spend or cause to be contributed to secure his nomination.[103]

The *Newberry* Court established that congressional authority over elections is specified, and thus restricted, by Article I, Section 4 of the Constitution.[104] Although elections must satisfy a plethora of prerequisites and are subject to a myriad of potentially determinative variables, the Supreme Court held that Congress' right to regulate elections did not equate to a broad power to control either the prerequisites or the variables.[105] On federalism principles,[106] the *Newberry* Court struck down the federal campaign finance regulation as an impermissible interference with the domestic affairs of the state and an equally menacing infringement upon liberties held by the public.[107] The Supreme Court left untouched the constitutionality of spending thresholds, choosing instead to rest its decision on the basis that Congress had no power to regulate primary elections.[108]

The Supreme Court's decision in *Newberry* created a chilling effect on Congress that manifested itself in the absence of stringent legislation designed to penetrate campaign finance matters.[109] During this period, congressional aversion to legislation that would significantly curb contributions to and expenditures of can-

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102. *Id.* at 240. Fifteen supporters were also found guilty. *Id.*

103. *Id.* at 247.

104. *Id* at 247-48. Article IV, Section 1 of the Constitution provides: "[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." U.S. CONST. art. I, § 4, cl. 1.

105. *Newberry*, 256 U.S. at 257. The *Newberry* Court pointed to such possible electoral determinative factors as "voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate . . . ." *Id.*

106. The Supreme Court's invocation of federalism principles was a consequence of how senators were elected at the time the law was passed. MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 16 (2005). Unlike modern practice, senators were chosen by state legislatures in 1911. *Id.*

107. *Newberry*, 256 U.S. at 258.

108. *Id. See also* MUTCH, *supra* note 93, at 18. The failure of the *Newberry* Court to explicitly address the constitutionality of campaign and expenditure limitations in combination with the fragmented nature of the Court's opinion left Congress unclear as to the boundaries of its legislative power with respect to campaign financing. *Id.* at 18-19. Furthering the confusion was the fact that four Justices in the dissent found the provisions regulating House races completely constitutional. UROFSKY, *supra* note 106, at 16.

109. MUTCH, *supra* note 93, at 22. Although Congress enacted the Federal Corrupt Practices Act of 1925 to strengthen the 1907-1911 amendments, the limits prescribed by the legislation could easily be evaded, and successful prosecutions were rare. *Id.*

didates running for office diluted the Supreme Court's case load with respect to campaign finance reform.[110] When a challenge did reach the Court in the immediate years following *Newberry*, it pertained only to an ancillary regulation requiring the disclosure of contributions and expenditures.[111] While *Burroughs v. United States* did not directly address the constitutional implications of spending ceilings, it did foreshadow a number of the essential components of the constitutional debate.[112]

In *Burroughs*, the Supreme Court considered federal legislation that required the treasurer of certain political committees to keep a detailed account of all contributions made to the committee.[113] The petitioners, who had been indicted by a federal grand jury on charges of specified reporting violations, argued that congressional authority did not extend to the regulating of presidential electors' campaigns.[114] Rather, the petitioners contended that this power was vested in the states, as Congress was limited by Article II, Section 1 of the Constitution.[115]

The Supreme Court rejected such a narrow view and reaffirmed Congress' right to pass regulations pertaining to campaign finance.[116] In addition, the *Burroughs* Court indicated that it was the responsibility of the Legislature, not the courts, to determine the best approach to vitiate the presence of corruption in elections.[117] Since Congress reasonably determined that there was a correlation between the public disclosure of political contributions and a reduction of corruption in elections, the Supreme Court saw

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110. *Id.*

111. Burroughs v. United States, 290 U.S. 534 (1934).

112. *Burroughs*, 290 U.S. at 544-48.

113. *Id.* at 541-42. The term "political committee" included any organization that "accept[ed] contributions for the purpose of influencing or attempting to influence the election of presidential and vice presidential electors in two or more states." *Id.* at 541.

114. *Id.* at 540, 544. The violations centered on Burroughs's willful failure to submit statements concerning campaign contributions. *Id.* at 543.

115. *Id.* Article II, Section 1 of the Constitution states that Congress has the power to appoint electors and specify the day on which they shall give their vote. U.S. CONST. art. II, § 1, cl. 3.

116. *Burroughs*, 290 U.S. at 545. The *Burroughs* Court considered this power "essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Id.*

117. *Id.* at 547-48. The Supreme Court held that so long as the means adopted are "really calculated to attain the end, the degree of their necessity, the extent to which they conduct to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone." *Id.* *See also* Stephenson v. Binford, 287 U.S. 251, 272 (1932) (refusing to inquire into the extent the legislative means actually accomplish their legitimate ends).

no reason to displace the means designed to achieve this purpose.[118]

In *United States v. UAW-CIO*,[119] the Supreme Court had the occasion to make its first attempt at resolving the constitutional questions surrounding contribution and expenditure restraints.[120] The legislation at issue prohibited corporations and labor organizations from making any contribution or expenditure in connection with the campaign of candidates for federal office.[121] The UAW-CIO was charged with using union dues to fund commercial broadcasts calculated to persuade the electorate to select certain candidates for Congress in the 1954 elections.[122] However, after providing a detailed history of Congress' efforts to curtail the influence of money in politics, the Supreme Court sidestepped the question of whether Congress' regulation of contributions and expenditures was constitutional.[123]

Buckley v. Valeo is the seminal case in campaign finance law, as the Supreme Court finally addressed the constitutionality of limits on political contributions and expenditures.[124] The suit was originally brought by an assortment of political entities who challenged provisions of FECA,[125] which limited contributions to $1000 to any single candidate, with an overall annual limitation of $25,000 by any one contributor.[126] Additionally, the statute incorporated an expenditure restriction of $1000 per year on individuals and groups "relative to a clearly identified candidate."[127]

The United States Court of Appeals for the District of Columbia, finding a "clear and compelling interest" on the part of the Government in preserving the integrity of the electoral process, upheld the validity of the statute's limitations on contributions and expenditures.[128] The political candidates and groups in opposition to the legislation argued on appeal that the restrictions on the use

118. *Burroughs*, 290 U.S. at 548.
119. 352 U.S. 567 (1957).
120. *UAW-CIO*, 352 U.S. at 568.
121. *Id.*
122. *Id.*
123. *Id.* at 590-91. The Supreme Court instead only determined a question of statutory construction that allowed the prosecution of the labor organization to continue in the district court. *Id.* at 591.
124. Buckley v. Valeo, 424 U.S. 1 (1976).
125. Pub. L. No. 92-225, 86 Stat. 3 (1972), *amended by* 2 U.S.C § 431 (2002).
126. *Buckley*, 424 U.S. at 7. The plaintiffs were a candidate for the Presidency of the United States, a United States Senator who was a candidate for re-election, a potential contributor and various political organizations. *Id.* at 7-8.
127. *Id.*
128. *Id.* at 10 (citing Buckley v. Valeo, 519 F.2d 821, 841 (D.C. Cir. 1975)).

of money for political objectives constituted an infringement on communication that was in derogation of the First Amendment.[129]

The Supreme Court, noting that Congress' power to regulate federal elections is undisputed, confined its inquiry to whether the specific legislation enacted by Congress hindered First Amendment interests or detrimentally affected a challenger's attempt to run a successful campaign.[130] The *Buckley* Court found that the stark demarcation between how the limitations were viewed by the parties further sharpened the constitutional analysis.[131] The group in charge of enforcing the legislation argued that the restrictions served to regulate conduct and that any resulting interference with the freedoms of speech and association were minimal.[132]

The conflicting contention, as enunciated by the political candidates and groups, framed the limitations on contributions and expenditures as a direct and invidious intrusion upon First Amendment liberties.[133] The Supreme Court ruled somewhere in the middle, as the Court contrasted expenditure and contribution limitations by alluding to their divergent effects.[134] Where expenditure limitations unavoidably reduce the quantity and quality of a candidate's expression to a significant degree, the *Buckley* Court

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129. *Id.* at 11. The challengers' argument was premised on the notion that "meaningful political communication in the modern setting" could be accomplished only through the expenditure of money. *Id.*

130. *Id.* at 13-14. The Supreme Court indicated the gravity of this examination, explaining that contribution and expenditure limitations function "in an area of the most fundamental First Amendment activities." *Id.* at 14. The *Buckley* Court considered the ability to discuss and debate the qualifications of candidates central to the operational capacity of the government as provided for by the Constitution. *Id.*

131. *Buckley*, 424 U.S. at 15.

132. *Id.* The respondents included the Secretary of the United States Senate and the Clerk of the United States House of Representatives as well as the Federal Election Commission, the Attorney General of the United States and the Comptroller General of the United States. *Id.* at 8.

133. *Id.* at 15. The court of appeals found that the provisions should be viewed as regulating conduct, not speech. *Id.* at 16. In arriving at this determination, the court of appeals relied upon the Supreme Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968). *Buckley*, 424 U.S. at 16. In *O'Brien*, a defendant claimed that the First Amendment prohibited his prosecution for burning his draft card because his act was "symbolic speech" insofar as it was a "demonstration against the war and against the draft." *O'Brien*, 391 U.S. at 376. The Supreme Court upheld the conviction on the grounds that the Government had a substantially important interest in regulating the nonspeech element that was not connected to the inhibition on speech. *Id.* at 376-77. Further, the *O'Brien* Court found that the encroachment on First Amendment freedoms was incidental in comparison to the furtherance of this governmental interest. *Id.* The *Buckley* Court distinguished *O'Brien* on the basis that expenditures of money could not be equated with such conduct as the destruction of a draft card. *Buckley*, 424 U.S. at 16.

134. *Buckley*, 424 U.S. at 19-21.

found that a restriction on the amount one person or group may contribute to a candidate imposes only a minor encumbrance on the contributor's capacity to partake in free communication.[135]

In *Buckley*, the Supreme Court upheld FECA's $1000 contribution limit, finding such restraints permissible, provided that the Government establishes that the limits are closely drawn to a "sufficiently important interest."[136] The *Buckley* Court found that the Government's purported interest, preventing corruption and its appearance, qualified as "sufficiently important" to substantiate the statute's contribution limits.[137] In addition, the *Buckley* Court concluded that the contribution limits were closely drawn, while cautioning that this might not always be the case if the level or amount of the limit is particularly harsh.[138] Moreover, the Supreme Court found no evidence supporting the political candidates' and groups' contention that the limitations disadvantaged major party challengers.[139] Since the threat of corruption and its appearance pertained to challengers and incumbents alike, the *Buckley* Court determined that Congress had sufficient motive for establishing the same contribution parameters upon each of the factions involved in the political race.[140]

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135. *Id.* The Supreme Court stated that the nocuous effects of expenditure restraints stem from money's essential role in communicating ideas in modern mass society. *Id.* at 19. In contrast, contribution limitations are less harmful because a contribution is only a general show of support for a candidate and his views, as opposed to an illustration of the rationale behind that support. *Id.* at 21. Likewise, the *Buckley* Court found that limits on expenditures place a more onerous burden on associational freedoms than their contribution counterpart. *Id.* at 22.

136. *Id.* at 25.

137. *Id.* at 25-26. The Government also proffered two additional supplementary interests justifying the restrictions. *Id.* First, the Government contended that the limitations hindered the power of affluent persons and groups to disproportionately influence elections thereby allowing all citizens an equal opportunity to affect the outcome of elections. *Id.* Second, the Government argued that the restrictions served to dissipate the cost of political campaigns, thus opening the political field to candidates devoid of large amounts of capital. *Id.* at 26. However, the Supreme Court decided that it was unnecessary to look past the legislation's primary corruption-preventing purpose. *Buckley*, 424 U.S. at 26.

138. *Id.* at 21. The Supreme Court concluded that the $1000 contribution ceiling was engineered precisely to effectuate the Government's aspiration to reduce corruption and its appearance. *Id.* at 28. Because it was narrowly tailored, the Supreme Court found that the restriction did not substantively undermine political discussion concerning candidates and campaign issues. *Id.*

139. *Buckley*, 424 U.S. at 32.

140. *Id.* at 33. The Supreme Court also explained that major party challengers have a tendency to be known throughout the district or state in which they are running, which helps to alleviate the political candidates' and groups' concerns about visibility. *Id.* at 32. Moreover, the Court cited statistics in the record showing that challengers are capable of raising large amounts of money for campaigning and that a substantial number of recent challengers have actually outspent their incumbent rivals. *Id.* at 33 nn.35-37.

The Supreme Court found the expenditure limitations imposed by the Act to be substantially more deleterious than the restrictions on contributions.[141] The majority held that the Government's rationale in preventing corruption and its appearance was insufficient to justify the fetters on expenditures, because the limitations did not adequately correlate with the eradication of those hazards.[142] The Supreme Court concluded that this chasm between the Government's intention and the actual effects of the legislation developed from the inherent shortcomings of the expenditure provision.[143] The *Buckley* Court theorized that, so long as persons and groups avoided expenditures that expressly backed an identifiable candidate, their expenditures would fall outside the scope of the Act.[144]

In addition to the Act's failure to further a substantial governmental interest, the majority observed that the legislation markedly infringed upon First Amendment freedom of expression.[145] Although the Government asserted its interest in smoothing the financial discrepancies between individuals and groups intending to influence the outcome of elections, the Supreme Court rejected this justification.[146] The First Amendment, the *Buckley* Court declared, did not comport with the principle of silencing one sector of society for the betterment of another.[147]

Following *Buckley*, the Supreme Court further clarified the scope of congressional power to regulate contributions in *California Medical Ass'n v. Federal Election Commission*.[148] The California Medical Association (hereinafter "CMA"), an unincorporated organization, challenged a provision of FECA[149] that prohibited individuals and unincorporated associations from contributing more than $5000 per year to any multi-candidate political commit-

141. *Id.* at 39. The Supreme Court declared that the expenditure limitations could not be justified by merely reiterating the necessity to maximize the utility of the constitutionally permissible contribution restraints. *Id.* at 44.

142. *Id.* at 45. In making this point, the Supreme Court assumed for the sake of argument that the peril of large expenditures was as great as that of large contributions. *Id.*

143. *Id.*

144. *Buckley*, 424 U.S. at 45.

145. *Id.* at 47-48. The Supreme Court pointed out that the act of promoting the election or defeat of candidates for office is entitled to the same protection under the First Amendment as general political dialogue. *Id.* at 48.

146. *Id.* at 48-49.

147. *Id.*

148. 453 U.S. 182 (1981).

149. Pub. L. No. 92-225, 86 Stat. 3 (1972), *amended by* 2 U.S.C. § 431 (2002).

tee.[150] The CMA contended that the Act's contribution limitations amounted to a restraint on expenditures, since they interfered with the CMA's ability to engage in political speech through a political committee.[151]

The Supreme Court rejected the CMA's equation of the challenged contribution limit with the expenditure restraints in *Buckley* and held that the CMA's political speech was neither the type contemplated by Buckley nor the kind protected by the First Amendment.[152] The Supreme Court's decision rested on the fact that the CMA's political committee was engaged in independent political advocacy and thus was not the "mouthpiece" of the CMA.[153] In making this determination, the Supreme Court established a natural extension of *Buckley*.[154] Thus, in *California Medical Ass'n*, limitations on contributions to a multi-candidate political committee enjoyed the same validation as the restraints on contributions to a particular candidate's campaign that were upheld in *Buckley*.[155]

A more profound expansion of *Buckley* was undertaken by the Supreme Court in *Nixon v. Shrink Missouri Government PAC*.[156] In *Nixon*, the question confronting the Court was whether the federal limits approved in *Buckley* also defined the range of permissible state regulations.[157] In 1994, the Missouri Legislature enacted restrictions on contributions to candidates for state office.[158] Con-

150. *CMA*, 453 U.S. at 185. The Federal Election Commission believed that the CMA had violated this provision, and just prior to the initiation of a civil enforcement action against it, the CMA filed this declaratory judgment action in the United States District Court for the Northern District of California. *Id.* at 186. The CMA challenged the constitutionality of the contribution limitations. *Id.*

151. *Id.* at 195. In addition, the CMA argued that, because the provision regulated contributions made to multi-candidate political committees, the Government's interest in the reduction of corruption and its appearance, recognized in *Buckley* as sufficient to sustain the limitations, was inapplicable. *Id.* The Supreme Court disagreed, finding that if Congress was prohibited from regulating the contributions from individuals and groups to multi-candidate political committees, the contribution limitations upheld in *Buckley* would be rendered ineffective. *Id.* at 198-99.

152. *Id.* at 196.

153. *Id.* Although the Supreme Court admitted that the CMA would probably not donate money to the political committee unless it adhered to its political philosophy, this alignment of interests was insufficient to transform the political committee's speech into CMA's. *Id.*

154. *Id.* at 197.

155. *CMA*, 453 U.S. at 197.

156. 528 U.S. 377 (2000). Shrink Missouri Government PAC is a political action committee. *Nixon*, 528 U.S. at 383.

157. *Id.* at 381-82.

158. *Id.* at 382. The statute at issue imposed contribution limits varying from $250 to $1000 depending on the specific state office for which the candidate was campaigning. *Id.*

sequently, PAC sought to enjoin the enforcement of the contribution regulation, arguing that the legislation was unconstitutional.[159]

The Supreme Court once again reiterated its delineation between expenditures and contributions, treating limits on expenditures as direct constraints on speech, while finding restrictions on contributions less detrimental to expression.[160] In defense of its statute, Missouri asserted the same interest in the prevention of corruption and its appearance that was held to sustain similar contribution regulations in *Buckley*.[161] PAC, in deference to *Buckley*, did not dispute the validity of the corruption-prevention interest.[162] Instead, it chose to challenge the constitutionality of the contribution limits on the basis that Missouri lacked the evidence to demonstrate that this interest actually existed here.[163]

However, the Supreme Court found that *Buckley* sufficiently illustrated the dangers of munificent, corrupt contributions.[164] Thus, the Supreme Court held that Missouri was justified in relying on the evidence and findings accepted in *Buckley*.[165] Accordingly, Missouri's contribution limitations were upheld as the Supreme Court adopted the *Buckley* analysis for examining state contribution and expenditure restrictions.[166]

The juxtaposition of our political structure — steeped in democratic ambition and guided by First Amendment protections — with the inevitable excesses fostered by such a system has relegated campaign finance reform to a study in constitutional vagaries. The perversion of electoral discourse, due to unequal and inordinate campaign contributing and spending, requires legisla-

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159. *Id.* at 383. More specifically, PAC claimed that the contribution statute violated its First and Fourteenth Amendment rights. *Id.*

160. *Id.* at 386. Thus, the Supreme Court stated, "restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* *See also* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259-60 (1986) (holding that restraints on donations need not be justified to the same degree as expenditure limitations).

161. *Nixon*, 528 U.S. at 390.

162. *Id.*

163. *Id.* at 391. PAC demanded that Missouri prove the corrosive effect of unrestricted contributions on Missouri elections or a belief on the part of Missouri's voters that such a malignant influence existed. *Id.*

164. *Id.* *See also* Buckley v. Valeo, 424 U.S. 1, 27 (1976) (finding that the 1972 election demonstrated that the problems posed by large contributions were not illusory).

165. *Nixon*, 528 U.S. at 393. In addition to the *Buckley* evidence, Missouri submitted an affidavit of the co-chair of the state legislature committee on campaign finance reform that expressed concern about large contributions. *Id.* The district court also cited a number of newspaper stories detailing large contributions made to campaigns which supported inferences of misconduct. *Id.*

166. *Id.* at 397-98.

tive action to distance our elected representatives from the influential and unrelenting monetary turnstile that their pockets have become.

As legislatures have moved to alleviate this threat, judicial interference has stymied their efforts.[167] Although the Supreme Court has recognized a governmental interest in the realm of campaign finance, the Court has provided little consistency, imperfect logic, and artificial distinctions in its handling of attempted reform.[168] Consequently, a nebulous analytical framework has arisen that splintered the Court into a cacophony of divergent views while lending little clarity to states in their pursuit of compliance.[169]

What the *Buckley* Court set forth with respect to campaign finance regulation, the *Randall* opinion blithely followed, departing only to establish a lower threshold on contribution restrictions.[170] At the crux of Justice Breyer's analysis was the principle recognized in *Buckley* that both contribution and expenditure limitations substantially compromise First Amendment interests in speech.[171] The plurality opinion implicitly dismissed Justice Stevens's contention that restrictions on campaign finance were permissible time, place, and manner limitations on conduct which only incidentally burden speech.[172]

The Court's rejection of and refusal to even address this contention is troubling. For one, political contributions and expenditures cannot in any way be equated with pure speech. Rather, they are merely mediums of exchange which promote speech.[173] There-

167. *See* Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n (FEC), 518 U.S. 604 (1996) (striking down expenditure limitations on political parties in connection with a general election campaign for congressional office); *Buckley*, 424 U.S. 1 (invalidating constraints on expenditures instituted by FECA).

168. For instance, *Buckley* and its progeny have made the distinction between expenditures and contributions. Randall v. Sorrell, 126 S. Ct. 2479, 2488 (2006). However, the Court has continually overlooked the fact that independent expenditures by an individual or political action committee on behalf of a candidate can function with all the same corruptive force as a contribution directly to that candidate. FREDERICK G. SLABACH, THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, at xxii (Frederick G. Slabach ed., 1998). Moreover, as Slabach suggests: "[t]he size of a contribution to a political action committee has just as much of an effect on the quantity and quality of debate about the issues as the amount of that committee's expenditures, since without the contribution, it can make no expenditures." *Id.*

169. *See Randall*, 126 S. Ct. 2479 (2006); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); CMA v. FEC, 453 U.S. 182 (1981); *Buckley*, 424 U.S. 1 (1976).

170. *Randall*, 126 S. Ct at 2485.

171. *Id.* at 2488.

172. *Id.* at 2508 (Stevens, J., dissenting).

173. SLABACH, *supra* note 168, at xxi.

fore, the giving or spending of capital is more akin to a physical act.[174] This argument does not presuppose a fissure between campaign finance reform and political expression. To the contrary, the inquiry acknowledges that limitations interfere with the intrinsic speech protections of the First Amendment, and instead shifts the focus to what level of scrutiny should be applied.[175]

In *O'Brien*, the Supreme Court sustained the constitutionality of a statute that banned the burning of draft cards.[176] O'Brien claimed that by burning his draft card, he was exercising his right to free speech.[177] However, the Court disagreed and found that his act was not pure speech but expression-related conduct.[178] The function of O'Brien's draft card pyrotechnics to articulate his stance on the Vietnam War is analogous to the contribution of money to political campaigns as a statement of support for a candidate or his party.[179] Both are little more than a vehicle for political expression and thus, cannot be considered a direct and substantial First Amendment intrusion.

The *Randall* Court bypassed this issue, ostensibly deferring to the *Buckley* Court's rationale for treating contribution and expenditure limitations as blunt restraints on free expression.[180] In *Buckley*, the Court determined that because of money's exalted place "in today's mass society," the utilization of capital has become imperative for "effective political speech."[181] However, legislatures should not be confined by the First Amendment in their attempt to break, or merely slacken, political entities' dependence on the use of such extravagant forms of dissemination.

Act 64's stringent contribution and expenditure limitations have the capacity to shape political discourse in Vermont in a new and appealing manner without "restricting the number of issues dis-

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174. *Id.*

175. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, *supra* note 168, at 53, 57.

176. United States v. O'Brien, 391 U.S. 367 (1968).

177. *O'Brien*, 391 U.S. at 367.

178. *Id.* The Court additionally concluded that an important governmental interest was served by preventing the burning of draft cards. *Id.* at 379-80. *See also supra* note 133 and accompanying text.

179. Wright, *supra* note 175, at 53, 59. The Vermont law targeted the money itself and, significantly, did not apply to the communication or other campaign services that the money could buy. *Id.*

180. Randall v. Sorrell, 126 S. Ct. 2479, 2488-89 (2006).

181. Buckley v. Valeo, 424 U.S. 1, 19 (1976). The *Buckley* Court stated: "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." *Id.*

cussed, the depth of their exploration, and the size of the audience reached."[182] By compelling candidates to concentrate more on local organizing, informative mailings or door-to-door canvassing and less on transient television infomercials and glossy print ads, the restrictions could actually engender a more complex analysis of the issues broached.[183]

The Vermont Legislature's decision to rein in campaign finances promoted real dialogue by emphasizing the substance of the speaker's voice over the depth of his pockets.[184] Far from suffocating political expression, Act 64 elevates it.[185] As the political advantages of wealthy citizens, candidates, and organizations dissipate, the pertinent concerns of the Vermont constituencies would come to the forefront, away from the dizzying glare of glitzy expenses designed to obscure them.[186] Consequently, the Vermont legislation's contribution and expenditure limitations can only be seen as a minimal infringement upon First Amendment liberties and should be upheld as long as their purpose is "legitimate and sufficiently substantial."[187]

In a break with precedent,[188] the *Randall* Court went on to hold that the governmental interest in the prevention of corruption or its appearance could not sustain Vermont's contribution limits.[189] Although *Randall* is the first case to do so, Justice Breyer was correct in noting that previous cases had foretold such a fate should contribution constraints reach a point of particular severity.[190] Yet, Vermont's contribution limits could hardly be classified as a significant departure from those validated by the court in *Nixon*, when factoring in Vermont's substantially smaller population.[191]

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182. *Buckley*, 424 U.S. at 19.
183. Wright, *supra* note 175, at 53, 66.
184. *Id.* at 72-73.
185. *Id.* at 72.
186. *Id.*
187. Randall v. Sorrell, 126 S. Ct. 2479, 2508 (Stevens, J., dissenting).
188. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (upholding $1075 limit on contributions to candidates for Missouri state auditor); CMA v. FEC, 453 U.S. 182 (1981) (validating $5000 limit on contributions to multi-candidate political committees).
189. *Randall*, 126 S. Ct. at 2492-93.
190. *Id.* at 2492. In *Nixon*, the Court stated that, in making its determination concerning the constitutionality of contribution limitations, it considered "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon*, 528 U.S. at 397. In *Buckley*, the Court similarly asserted that "contribution restrictions could have severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." Buckley v. Valeo, 424 U.S. 1, 21 (1976).
191. Vermont has 1/9th the population of Missouri. *Randall*, 126 S. Ct. at 2494.

If the contribution constraints upheld in *Nixon* could not "drive the sound of a candidate's voice below the level of notice,"[192] it seems specious to hold that Vermont's admittedly more generous per citizen limitations can.[193]

Perhaps the most egregious error by the plurality was its failure to adequately address Vermont's purported interest in reducing the amount of time candidates spend raising money.[194] The Court dismissed the claim in one paragraph on the basis that the *Buckley* Court was aware of the connection between campaign finance regulation and a reduction in fundraising time but was, nevertheless, not persuaded.[195] Yet, in 1976, at the time *Buckley* was decided, candidate time protection was not viewed as a main objective of campaign finance reform.[196] Indeed, the *Buckley* Court mentions it only in passing.[197]

Candidate time distraction has since evolved into a far more serious predicament as a corollary to the momentous change in the institutional procedures governing both fundraising and campaigning.[198] As the arms race mentality dominates candidates' approach to securing finances, more time is given to dinners, banquets, and golf outings that produce the necessary monetary ammunition. Consequently, less concern is given to the needs of the citizens these candidates are bound to serve. The Court, in summarily rebuffing Vermont's professed interest in protecting its citizens, failed to use due diligence to ensure that the passage of time had not rendered the slight findings in *Buckley* anachronistic.

Campaign contribution and expenditure limitations are rooted in the premise that unregulated financial disbursements made to and by candidates running for office illegitimatizes the electoral process. When big money infiltrates our highest offices and emanates from our most esteemed representative positions, voters become disillusioned. Legislatures must be allowed to act to restore faith in the social contract at the foundation of our political struc-

192. *Nixon*, 528 U.S. at 397.

193. The plurality conceded that, per citizen, Vermont's limit is "slightly more generous." *Randall*, 126 S. Ct. at 2494.

194. *Id.* at 2490.

195. *Id.*

196. Vincent Blasi, *Free Speech and the Widening Gyre of Fund Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, *supra* note 168, at 215, 220.

197. Buckley v. Valeo, 424 U.S. 1, 91 (1976).

198. Blasi, *supra* note 196, at 215, 224.

ture. Where state and federal governments prove that cosmetic changes are not enough to salvage the integrity of campaigns, the Court must afford them reasonable deference to carry out what is in the best interests of their citizens.

Matt Monsour