Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Campaign Finance

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Randall v. Sorrell, 548 U.S. 230 (2006)

Neil Randall was a prominent Libertarian/Republican who served several terms in the Vermont legislature. In 1997, the Vermont legislature passed sharp restrictions on campaign expenditures and contributions in state elections. Persons could contribute a maximum of $400 to candidates in statewide elections, a maximum of $300 to state senate campaigns and a maximum of $200 to campaigns for the lower house of the senate legislature. Political parties were subject to the same limits. Randall filed a lawsuit against William Sorrell, the attorney general of Vermont, claiming that the expenditure and contribution limits violated the First and Fourteenth Amendments. The federal district court struck down the expenditure limits and the limits on political parties, but sustained the other contribution limits. The Court of Appeals for the First Circuit ruled that all the contribution limits were constitutional, but remanded for further fact-finding on the expenditure limits. All parties appealed to the Supreme Court of the United States.

The Supreme Court by a 6–3 vote declared all the provisions unconstitutional. Justice Breyer's majority opinion asserted that the expenditure limits were inconsistent with Buckley v. Valeo *(1976) and the contribution limits were too low. How did Justice Breyer determine that the contribution limits were too low? Why did the Thomas concurrence and Souter dissent criticize that argument? Who was correct? Did Vermont adequately distinguish the expenditure limits from* Buckley? *Justice Breyer was clearly trying to establish a middle ground between the view that campaign finance laws are (almost) always unconstitutional and the view that campaign finance laws are (almost) always constitutional. Does that middle ground have any basis in the Constitution or in theories of the judicial function? Should justices decide cases on pure principle or try to find a middle ground?*

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joins, and in which JUSTICE ALITO joins in part.

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In *Buckley v. Valeo* (1976), the Court considered the constitutionality of the Federal Election Campaign Act of 1971, a statute that, much like the Act before us, imposed both expenditure and contribution limitations on campaigns for public office. The Court, while upholding FECA's contribution limitations as constitutional, held that the statute's expenditure limitations violated the First Amendment.

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Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to Buckley's constraints, including those on expenditure limits. . . .

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We can find here no such special justification that would require us to overrule *Buckley*. Subsequent case law has not made *Buckley* a legal anomaly or otherwise undermined its basic legal principles. We cannot find in the respondents' claims any demonstration that circumstances have changed so radically as to undermine Buckley's critical factual assumptions. The respondents have not shown, for example, any dramatic increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem. At the same time, Buckley has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting

campaign finance laws. And, as we have said, this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Overruling Buckley now would dramatically undermine this reliance on our settled precedent.

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Following *Buckley*, we must determine whether Act 64's contribution limits prevent candidates from "amassing the resources necessary for effective [campaign] advocacy," whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny. . . . In practice, the legislature is better equipped to make such empirical judgments, as legislators have "particular expertise" in matters related to the costs and nature of running for office. Thus ordinarily we have deferred to the legislature's determination of such matters.

. . . [C]ontribution limits that are too low can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote. Thus, we see no alternative to the exercise of independent judicial judgment as a statute reaches those outer limits. And, where there is strong indication in a particular case, i.e., danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's "tailoring," that is, toward assessing the proportionality of the restrictions.

We find those danger signs present here. As compared with the contribution limits upheld by the Court in the past, and with those in force in other States, Act 64's limits are sufficiently low as to generate suspicion that they are not closely drawn. The Act sets its limits per election cycle, which includes both a primary and a general election. Thus, in a gubernatorial race with both primary and final election contests, the Act's contribution limit amounts to $200 per election per candidate (with significantly lower limits for contributions to candidates for State Senate and House of Representatives). These limits apply both to contributions from individuals and to contributions from political parties, whether made in cash or in expenditures coordinated (or presumed to be coordinated) with the candidate.

These limits are well below the limits this Court upheld in Buckley. Indeed, in terms of real dollars (i.e., adjusting for inflation), the Act's $200 per election limit on individual contributions to a campaign for governor is slightly more than one-twentieth of the limit on contributions to campaigns for federal office before the Court in Buckley. Adjusted to reflect its value in 1976 (the year Buckley was decided), Vermont's contribution limit on campaigns for statewide office (including governor) amounts to $113.91 per 2-year election cycle, or roughly $57 per election, as compared to the $1,000 per election limit on individual contributions at issue in Buckley. (The adjusted value of Act 64's limit on contributions from political parties to candidates for statewide office, again $200 per candidate per election, is just over one one-hundredth of the comparable limit before the Court in Buckley, $5,000 per election.) . . . .

Moreover, considered as a whole, Vermont's contribution limits are the lowest in the Nation. Act 64 limits contributions to candidates for statewide office (including governor) to $200 per candidate per election. We have found no State that imposes a lower per election limit. Indeed, we have found only seven States that impose limits on contributions to candidates for statewide office at or below $500 per election, more than twice Act 64's limit. . . .

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Our examination of the record convinces us that, from a constitutional perspective, Act 64's contribution limits are too restrictive. We reach this conclusion based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections. Taken together, Act 64's substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives. In particular, five factors together lead us to this decision.

First, the record suggests, though it does not conclusively prove, that Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns. . . .

For another thing, the petitioners' expert witnesses produced evidence and analysis showing that Vermont political parties (particularly the Republican Party) "target" their contributions to candidates in competitive races, that those contributions represent a significant amount of total candidate funding in such races, and that the contribution limits will cut the parties' contributions to competitive races dramatically.

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Second, Act 64's insistence that political parties abide by exactly the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a political party.

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[T]he Act would severely limit the ability of a party to assist its candidates' campaigns by engaging in coordinated spending on advertising, candidate events, voter lists, mass mailings, even yard signs. And, to an unusual degree, it would discourage those who wish to contribute small amounts of money to a party, amounts that easily comply with individual contribution limits. . . .

Third, the Act's treatment of volunteer services aggravates the problem. . . . [T]he Act does not exclude the expenses those volunteers incur, such as travel expenses, in the course of campaign activities. The Act's broad definitions would seem to count those expenses against the volunteer's contribution limit, at least where the spending was facilitated or approved by campaign officials.

The absence of some such exception may matter in the present context, where contribution limits are very low. That combination, low limits and no exceptions, means that a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit. So too will a volunteer who offers a campaign the use of her house along with coffee and doughnuts for a few dozen neighbors to meet the candidate, say, two or three times during a campaign. . . .

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Fourth, Act 64's contribution limits are not adjusted for inflation.

Fifth, we have found nowhere in the record any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described. . . .

These five sets of considerations, taken together, lead us to conclude that Act 64's contribution limits are not narrowly tailored. Rather, the Act burdens 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. Vermont does not point to a legitimate statutory objective that might justify these special burdens. We understand that many, though not all, campaign finance regulations impose certain of these burdens to some degree. We also understand the legitimate need for constitutional leeway in respect to legislative line-drawing. But our discussion indicates why we conclude that Act 64 in this respect nonetheless goes too far. It disproportionately burdens numerous First Amendment interests, and consequently, in our view, violates the First Amendment.

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JUSTICE ALITO, concurring in part and concurring in the judgment.

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JUSTICE KENNEDY, concurring in the judgment.

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JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

. . . [S]tare decisis should pose no bar to overruling *Buckley v. Valeo* (1976) and replacing it with a standard faithful to the First Amendment. Accordingly, I concur only in the judgment.

[T]his Court erred in *Buckley* when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights. "[U]nlike the Buckley Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits." . . . Accordingly, I would overrule Buckley and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would fail. . . .

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[I]t is entirely unclear how to determine whether limits are so low as to constitute "danger signs" that require a court to "examine the record independently and carefully." The plurality points to several aspects of the Act that support its conclusion that such signs are present here: (1) The limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld.

The first two elements of the Act are indeed constitutionally problematic, but they have no bearing on whether the contribution limits are too low. The first substantially advantages candidates in a general election who did not face a serious primary challenge. In practice, this restriction will generally suppress more speech by challengers than by incumbents, without serving the interests the Court has recognized as compelling, i.e., the prevention of corruption or the appearance thereof. The second element has no relation to these compelling interests either, given that "'[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes.'" That these provisions are unconstitutional, however, does not make the contribution limits on individuals unconstitutionally low.

[T]he relative limits of other States cannot be the key factor, for such considerations are nothing more than a moving target. After all, if the Vermont Legislature simply persuaded several other States to lower their contribution limits to parallel Act 64, then the Act, which would still "significantly restrict the amount of funding available for challengers to run competitive campaigns" would survive this aspect of the plurality's proposed test.

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The plurality recognizes that the burdens which lead it to invalidate Act 64's contribution limits are present under "many, though not all, campaign finance regulations." As a result, the plurality does not purport to offer any single touchstone for evaluating the constitutionality of such laws. Indeed, its discussion offers nothing resembling a rule at all. From all appearances, the plurality simply looked at these limits and said, in its "independent judicial judgment" that they are too low. The atmospherics—whether they vary with inflation, whether they are as high as those in other States or those in . . . *Buckley*, whether they apply to volunteer activities and parties—no doubt help contribute to the plurality's sentiment. But a feeling does not amount to a workable rule of law.

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JUSTICE STEVENS, dissenting.

I am convinced that *Buckley*'s holding on expenditure limits is wrong, and that the time has come to overrule it.

To begin with, *Buckley*'s holding on expenditure limits itself upset a long-established practice. For the preceding 65 years, congressional races had been subject to statutory limits on both expenditures and contributions. . . .

W]hile Congress and state legislatures have long relied on Buckley's authorization of contribution limits, *Buckley*'s rejection of expenditure limits "has not induced [comparable] detrimental reliance."

As Justice White recognized, it is quite wrong to equate money and speech. To the contrary:

> The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained. Even under the campaign laws as originally enacted, everyone was free to spend as much as they chose to amplify their views on general political issues, just not specific candidates. The restrictions, to the extent they do affect speech, are viewpoint-neutral and indicate no hostility to the speech itself or its effects.

Accordingly, these limits on expenditures are far more akin to time, place, and manner restrictions than to restrictions on the content of speech. Like Justice White, I would uphold them "so long as the purposes they serve are legitimate and sufficiently substantial."

. . . [P]rovided that this budget is above a certain threshold, a candidate can exercise due care to ensure that her message reaches all voters. Just as a driver need not use a Hummer to reach her destination, so a candidate need not flood the airways with ceaseless sound-bites of trivial information in order to provide voters with reasons to support her.

. . . Not only do [expenditure] limits serve as an important complement to corruption-reducing contribution limits, but they also "protect equal access to the political arena, [and] free candidates and their staffs from the interminable burden of fundraising." These last two interests are particularly acute. When campaign costs are so high that only the rich have the reach to throw their hats into the ring, we fail "to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government."

The interest in freeing candidates from the fundraising straitjacket is even more compelling. Without expenditure limits, fundraising devours the time and attention of political leaders, leaving them too busy to handle their public responsibilities effectively. . . .

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Nevertheless, I am firmly persuaded that the Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities. I think they would have viewed federal statutes limiting the amount of money that congressional candidates might spend in future elections as well within Congress' authority. And they surely would not have expected judges to interfere with the enforcement of expenditure limits that merely require candidates to budget their activities without imposing any restrictions whatsoever on what they may say in their speeches, debates, and interviews.

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JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, and with whom Justice STEVENS joins in part, dissenting.

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We said in *Buckley v. Valeo* (1976) that "expenditure limitations impose far greater restraints on the freedom of speech and association than do . . . contribution limitations," but the *Buckley* Court did not categorically foreclose the possibility that some spending limit might comport with the First Amendment. Instead, *Buckley* held that the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the [applicable] exacting scrutiny." In applying that standard in *Buckley* itself, the Court gave no indication that it had given serious consideration to an aim that Vermont's statute now pursues: to alleviate the drain on candidates' and officials' time caused by the endless fundraising necessary to aggregate many small contributions to meet the opportunities for ever more expensive campaigning. . . . Whatever the observations made to the *Buckley* Court about the effect of fundraising on candidates' time, the Court did not squarely address a time-protection interest as support for the expenditure limits, much less one buttressed by as thorough a record as we have here.

Vermont's argument therefore does not ask us to overrule *Buckley*; it asks us to apply Buckley's framework to determine whether its evidence here on a need to slow the fundraising treadmill suffices to

support the enacted limitations. Vermont's claim is serious. Three decades of experience since Buckley have taught us much, and the findings made by the Vermont Legislature on the pernicious effect of the nonstop pursuit of money are significant.

The legislature's findings are surely significant enough to justify the Court of Appeals's remand to the District Court to decide whether Vermont's spending limits are the least restrictive means of accomplishing what the court unexceptionably found to be worthy objectives. . . . I would not, therefore, disturb the Court of Appeals's stated intention to remand.

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The limits set by Vermont are not remarkable departures either from those previously upheld by this Court or from those lately adopted by other States. [O]n a per-citizen measurement Vermont's limit for statewide elections "is slightly more generous," than the one set by the Missouri statute approved by this Court in *Nixon v. Shrink Missouri Government PAC* (2000). . . . The point is not that this Court is bound by judicial sanctions of those numbers; it is that the consistency in legislative judgment tells us that Vermont is not an eccentric party of one, and that this is a case for the judicial deference that our own precedents say we owe here.

To place Vermont's contribution limits beyond the constitutional pale, therefore, is to forget not only the facts of Shrink, but also our self-admonition against second-guessing legislative judgments about the risk of corruption to which contribution limits have to be fitted. And deference here would surely not be overly complaisant. Vermont's legislators themselves testified at length about the money that gets their special attention,

Still, our cases do not say deference should be absolute. We can all imagine dollar limits that would be laughable, and per capita comparisons that would be meaningless because aggregated donations simply could not sustain effective campaigns. The plurality thinks that point has been reached in Vermont, and in particular that the low contribution limits threaten the ability of challengers to run effective races against incumbents. Thus, the plurality's limit of deference is substantially a function of suspicion that political incumbents in the legislature set low contribution limits because their public recognition and easy access to free publicity will effectively augment their own spending power beyond anything a challenger can muster. The suspicion is, in other words, that incumbents cannot be trusted to set fair limits, because facially neutral limits do not in fact give challengers an even break. But this received suspicion is itself a proper subject of suspicion. The petitioners offered, and the plurality invokes, no evidence that the risk of a pro-incumbent advantage has been realized; in fact, the record evidence runs the other way. . . The Legislature of Vermont evidently tried to account for the realities of campaigning in Vermont, and I see no evidence of constitutional miscalculation sufficient to dispense with respect for its judgments.

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Four issues of detail call for some attention, the first being the requirement that a volunteer's expenses count against the person's contribution limit. The plurality certainly makes out the case that accounting for these expenses will be a colossal nuisance, but there is no case here that the nuisance will noticeably limit volunteering, or that volunteers whose expenses reach the limit cannot continue with their efforts subject to charging their candidates for the excess. . . .

Second, the failure of the Vermont law to index its limits for inflation is even less important. This challenge is to the law as it is, not to a law that may have a different impact after future inflation if the state legislature fails to bring it up to economic date.

Third, subjecting political parties to the same contribution limits as individuals does not condemn the Vermont scheme. . . . The capacity and desire of parties to make large contributions to competitive candidates with uphill fights are shared by rich individuals, and the risk that large party contributions would be channels to evade individual limits cannot be eliminated. . . .

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Because I would not pass upon the constitutionality of Vermont's expenditure limits prior to further enquiry into their fit with the problem of fundraising demands on candidates, and because I do not see the contribution limits as depressed to the level of political inaudibility, I respectfully dissent.