

**THE SLOW, JUST, UNFINISHED DEMISE OF
THE *BUCKLEY* COMPROMISE:
Randall v. Sorrell, 126 S. Ct. 2479 (2006)**

In 1976, the Supreme Court decided *Buckley v. Valeo*,¹ laying out the fundamental compromise that has guided campaign finance decisions ever since. *Buckley* held that though the government could not restrict how much a campaign spent, it could restrict how much a person contributed to a campaign.² This compromise has been under constant attack.³ On one side are those who think that contribution limits violate the First Amendment;⁴ on the other side are those who think that expenditure limits are necessary to improve the democratic process.⁵ As it attempts to straddle this divide, the Court's jurisprudence has constantly threatened to veer to the left or the right. The distinction underlying the compromise has also proved slippery. The Court has struggled to define when a person's purportedly independent expenditure is so coordinated with his favored candidate that it is really a contribution. It has also failed to express how much a contribution limit can be lowered before it functions as an unconstitutional limit on a candidate's spending. Last Term in *Randall v. Sorrell*,⁶ the Supreme Court held that Vermont's contribution limits violated the First Amendment because they were too low.⁷ Though the plurality correctly found the contribution limits unconstitutional, its narrow and unpersuasive opinion does not provide enough protection for First Amendment interests. The plurality opinion

1. 424 U.S. 1 (1976).

2. *See id.* at 23–29, 39–51.

3. *See* Stephanie A. Sprague, Note, *The Restriction of Political Associational Rights under Current Campaign Finance Reform First Amendment Jurisprudence*, 40 NEW ENG. L. REV. 947, 986 (2006) (“The *Buckley v. Valeo* decision has been criticized since the moment it was handed down. Hundreds of law review articles offer dozens of reasons why the decision must be overturned”).

4. *See, e.g.*, ROBERT BORK, COERCING VIRTUE: THE WORLD RULE OF JUDGES 31–33 (2003) (criticizing *Buckley* campaign finance jurisprudence from constitutional and ideological perspectives).

5. *See, e.g.*, Brian L. Porter, *Less Is More and Small Is Beautiful: How Vermont's Campaign Finance Law Can Rejuvenate Democracy*, 30 VT. L. REV. 1, 25–41 (2005).

6. 126 S. Ct. 2479 (2006).

7. *Id.* at 2485.

illustrates why *Buckley's* compromise is untenable and should be overruled.

In 1997, Vermont adopted campaign finance legislation that imposed new restrictions on how much a person or party could contribute to a campaign and on how much a campaign could spend.⁸ Both the expenditure and contribution limits applied to the total campaign, including both the primary and the general election.⁹ The contribution limits were very low: \$400 for state-wide offices, \$300 for state senators, and \$200 for state representatives.¹⁰ They were not indexed for inflation.¹¹ Moreover, they applied equally to individuals and parties.¹² Soon after the new law took effect, candidates, contributors, and parties sued the state officials who were required to enforce it.¹³

The United States District Court for the District of Vermont largely stuck to the *Buckley* dichotomy. Bound by respect for *Buckley's* precedent, the court struck down the Vermont Act's expenditure limits¹⁴ and upheld the contribution limits for individuals.¹⁵ In a slight departure from *Buckley*, however, it struck down the contribution limits as applied to parties, judging them unconstitutionally low.¹⁶

The Second Circuit agreed with the trial court that the Act's contribution limits on individuals were constitutional, noting that the Act allowed more contribution dollars per citizen in the relevant jurisdiction than the Missouri limits that were upheld in *Nixon v. Shrink Missouri Government PAC*.¹⁷ The Second

8. See VT. STAT. ANN., tit. 17, §§ 2801–2883 (2002).

9. *Id.* §§ 2805(a), 2805a(a).

10. *Id.* § 2805(a).

11. *Randall*, 126 S. Ct. at 2483.

12. Tit. 17, § 2805(a).

13. *Randall*, 126 S. Ct. at 2487.

14. *Landell v. Sorrell*, 118 F.Supp.2d 459, 481–83 (D.Vt. 2000) (“Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill. Nevertheless, this Court is bound by the doctrine of *stare decisis* to adhere to Supreme Court precedent.”).

15. *Id.* at 476–81.

16. *Id.* at 486–87.

17. *Landell v. Sorrell*, 382 F.3d 91, 137–39 (2d Cir. 2004) (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 396–98 (2000)). It is unclear why this statistic is relevant. If voters generally donate to campaigns in their own state, then assuming similar rates of donation, candidates in small states would have just as much money to spend per voter as candidates in large states. For example, if State A has 100,000 citizens and 2,000 of them give \$250 each, the candidate will have \$500,000 to spend, which is \$5 per citizen. If State B has 10,000,000 citizens and 200,000 of

Circuit also held, however, that the limits on parties were constitutional, reversing the District Court.¹⁸ It further held that even the expenditure limits might be constitutional, finding them supported by two compelling interests: the need to prevent corruption and the appearance of corruption, which the Supreme Court had recognized in *Buckley*;¹⁹ and the need to reduce the time officeholders have to devote to fundraising.²⁰ The Second Circuit remanded the case to the District Court to decide whether the expenditure limits were narrowly tailored to serve these interests.²¹

The Supreme Court reversed.²² Announcing the judgment of the Court and writing for a plurality, Justice Breyer invalidated both the expenditure and the contribution limits.²³ In his opinion, joined by Chief Justice Roberts and joined in part by Justice Alito,²⁴ Justice Breyer explained that *Buckley* demanded that the spending caps be struck down.²⁵ He stated that there was no “special justification” for overruling *Buckley* that could overcome the principle of stare decisis.²⁶ Justice Breyer found that *Buckley* could not be distinguished by a supposedly newfound interest in protecting officeholders’ time; he concluded that that interest had already been considered by the *Buckley* Court.²⁷ Moving to the contribution limits, Justice Breyer found that they were too low to be constitutional, “prevent[ing] candidates from amassing the resources necessary for effective [campaign] advocacy” and “put[ting] challengers to a significant disadvantage” compared to incumbents.²⁸ Thus, for the

them give \$250 each, the candidate will have \$50,000,000 to spend, which is also \$5 per citizen.

18. *Id.* at 142–43.

19. *Buckley*, 424 U.S. at 25–26.

20. *Landell*, 382 F.3d at 106–35.

21. *Id.* at 135–37.

22. *Randall*, 126 S. Ct. at 2500.

23. *Id.* at 2485.

24. *Id.*

25. *Id.* at 2487–91.

26. *Id.* at 2489 (“Departure from precedent is exceptional and requires ‘special justification.’” (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))).

27. *Randall*, 126 S. Ct. at 2490–91. For a discussion of the “time protecting” rationale, see Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 34 LOY. U. CHI. L.J. 669 (2006).

28. *Randall*, 126 S. Ct. at 2491–500 (second alteration in original) (quoting *Buckley*, 424 U.S. at 21).

first time, the Supreme Court held that a system of contribution limits was unconstitutional.²⁹

Justice Breyer laid out a two-step test for determining whether a contribution limit is too low. First, a court should look for “danger signs” that a contribution limit would “prevent[] challengers from mounting effective campaigns against incumbent officeholders.”³⁰ If a court finds danger signs, then it should then “review the record independently and carefully” to “assess[] the proportionality of the restrictions.”³¹ The plurality found danger signs in the Vermont contribution limits because they were lower than in most states, applied to parties as well as individuals, included both the primary and general campaigns, and were not indexed for inflation.³² Justice Breyer’s subsequent review of the record convinced him that the limits were too low, based on five considerations “[t]aken together”:³³ (1) “the record suggests . . . that [the] contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns”;³⁴ (2) limits were applied to parties as well as contributors, threatening freedom of association;³⁵ (3) the limits included expenses incurred by volunteers;³⁶ (4) the limits were not indexed for inflation;³⁷ and (5) there was no special justification for extremely low limits in Vermont.³⁸ The plurality concluded that it could not determine how Vermont would want it to sever the unconstitutional aspects of the contribution limits and thus struck the entire system of contribution limits down.³⁹

Justice Alito wrote a short separate opinion, concurring in part and concurring in the judgment,⁴⁰ to note that he did not find that *stare decisis* required adherence to *Buckley*.⁴¹ Justice Alito concluded that the respondent Vermont officials had not

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

30. *Randall*, 126 S. Ct. at 2492.

31. *Id.*

32. *Id.* at 2492–94.

33. *Id.* at 2495; see also *id.* at 2499.

34. *Id.* at 2495.

35. *Id.* at 2496–98.

36. *Randall*, 126 S. Ct. at 2498–99.

37. *Id.* at 2499.

38. *Id.*

39. *Id.* at 2500.

40. *Randall*, 126 S. Ct. (Alito, J., concurring in part and concurring in judgment).

41. *Id.* at 2500–01.

adequately raised the question of overturning *Buckley* and so it was unnecessary to consider whether that would be wise.⁴²

Justice Kennedy wrote an opinion concurring in the judgment, finding that he could not follow the Court's campaign finance jurisprudence because of his "skepticism regarding that system and its operation."⁴³ Justice Kennedy stated that current jurisprudence "may cause more problems than it solves."⁴⁴ Specifically, he noted that it created the problem of determining when contribution limits are too low—a line-drawing problem outside the Court's competence.⁴⁵ He also mentioned his concern that the Court's wider campaign finance jurisprudence denied political parties their First Amendment rights.⁴⁶

Justice Thomas wrote an opinion, joined by Justice Scalia, concurring in the judgment because of his continuing belief that *Buckley* should be overruled.⁴⁷ Justice Thomas argued that contributions cannot be distinguished from expenditures because direct expenditures, like contributions, generally require some "intermediary between a contributor and the speech eventually produced."⁴⁸ In addition, he noted that even if contributions are only "statements of general support," such statements are still protected by the First Amendment.⁴⁹ Next, Justice Thomas argued that the plurality's test for determining whether a contribution limit is too low is unworkable, demonstrating the problems with *Buckley's* compromise.⁵⁰ He noted that the plurality does not offer any rule at all for how a court should explain how to detect danger signs,⁵¹ or how to decide whether the limits are truly too low if danger signs are present.⁵² Justice Thomas concluded that the plurality's test gave no guidance in determining how low is too low, that no such

42. *Id.* at 2500–01. Justice Alito gave no indication of whether he would overturn *Buckley*. His words give little away: "Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue." *Id.*

43. *Randall*, 126 S. Ct. at 2501 (Kennedy, J., concurring in judgment).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Randall*, 126 S. Ct. at 2501–02 (Thomas, J., concurring in judgment).

48. *Id.* at 2502.

49. *Id.* at 2502.

50. *See id.* at 2503–06.

51. *See id.* at 2503 ("It is entirely unclear how to determine whether limits are so low as to constitute 'danger signs.'").

52. *See id.* at 2506 ("[The plurality's discussion] offers nothing resembling a rule at all.").

line is possible, and that consequently *Buckley* was unworkable and must be overruled.⁵³

Justice Stevens dissented, arguing that *Buckley*'s holding on expenditure limits should be overturned.⁵⁴ He argued that such limits would still allow many avenues for speech and would free candidates from the burden of fundraising.⁵⁵ He also pointed out the lack of evidence that spending limits would disproportionately harm challengers.⁵⁶

Justice Souter wrote a dissenting opinion, joined by Justice Ginsburg in full and Justice Stevens in part.⁵⁷ He argued that the interest in freeing candidates from fundraising had not been sufficiently considered by the *Buckley* Court and said he would have held that the Court of Appeals correctly found that this new interest could justify narrowly tailored limits on expenditures.⁵⁸ Justice Souter also attacked the plurality's conclusion that the contribution limits were too low and disadvantaged challengers.⁵⁹ He pointed to several studies suggesting that contribution limits do not harm challengers and may even help them.⁶⁰

The controlling plurality was correct to find that Vermont's contribution limits were too low. But the two-part test it used to reach this conclusion is far too vague to be a workable rule of law, leaving legislatures and courts with almost no guidance in crafting and assessing contribution limits. Whatever support there once was for *Buckley*'s compromise has now broken down, and the Court's decision in *Randall* indicates why *Buckley*'s holding on contribution limits must be overruled. It cannot produce administrable rules to enforce the distinctions it sets up, it relies on contradictory assumptions about the motives of lawmakers, and it cannot sufficiently protect the First Amendment right to engage in political speech and association.

Buckley's distinction between contributions and expenditures has never won a consensus. In *Buckley*, six members of the Court signed on to the compromise that authorized limiting contributions to campaigns but forbade limiting a campaign's

53. *Id.*

54. *Randall*, 126 S. Ct. at 2506 (Stevens, J., dissenting).

55. *Id.* at 2508–09.

56. *See id.* at 2510.

57. *Id.* at 2511 (Souter, J., dissenting).

58. *See Randall*, 126 S. Ct. at 2511–12.

59. *See id.* at 2512–15.

60. *See id.* at 2514–15.

expenditures.⁶¹ Justices Burger and Blackmun dissented, arguing that contribution limits were unconstitutional;⁶² Justice White dissented because he believed that expenditure limits *were* constitutional.⁶³ Since then, Justices Kennedy, Scalia, and Thomas have consistently called for *Buckley* to be overruled because they believe that contribution limits are unconstitutional.⁶⁴ Now in *Randall*, Justice Stevens has supported overruling *Buckley* because he would allow expenditure limits. Justices Souter and Ginsburg have stated that they would reinterpret *Buckley* to allow expenditure limits, removing its core compromise. Thus, only Justices Alito, Breyer, and Roberts are left as possible defenders of *Buckley*. Justice Alito declined to defend *Buckley's* holding on expenditure limits in *Randall*. Only Justice Breyer has defended *Buckley's* holding on contribution limits.⁶⁵

Buckley has been unable to generate consensus because it tried to distinguish the indistinguishable. Enforcing *Buckley* has been difficult because of methods of getting around contribution limits. For instance, contribution limits are largely meaningless if a potential donor can consult with the candidate on how to spend his own money to help the campaign. Thus the limit on contributions given to the candidate would have no effect because a donor could benefit the candidate just as effectively by spending money himself. Yet consultation between a candidate and her supporters is integral to freedom of speech and freedom of association, and banning these consultations strikes at the heart of those freedoms. Consequently, the Court has been faced with the dilemma of either eviscerating the power of contribution limits or stripping away First Amendment freedoms. Unfortunately, in *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*,⁶⁶ the Court chose to protect the effect of contribution limits at the expense of free-

61. See *Buckley*, 424 U.S. at 23–29, 39–51.

62. *Id.* at 241–46, (Burger, J., dissenting); *id.* at 290 (Blackmun, J., dissenting).

63. *Id.* at 257–66 (White, J., concurring in part and dissenting in part).

64. See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 465–66 (2001) (Thomas, J., dissenting); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. at 409–10 (Kennedy, J., dissenting); *id.* at 410 (Thomas, J., dissenting).

65. See *Shrink*, 528 U.S. at 399–405 (Breyer, J., concurring). Even Justice Breyer has expressed doubts about *Buckley*. *Id.* at 405. The signs clearly indicate growing dissatisfaction on the Supreme Court with *Buckley*. But see RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:14.60 (2006) (stating the likelihood “there is no clear five-Justice majority to overturn it”).

66. 533 U.S. 431 (2001).

dom of association, ruling that the government could punish parties for consulting with their candidates.⁶⁷

Randall's treatment of contribution limits highlights another problem with *Buckley's* compromise. That compromise was based on the idea that government could attack corruption without seriously limiting the political speech of *candidates*, because contribution limits only targeted the actions of *donors*. But if a legislature can set contribution limits as low as it pleases, then it can effectively limit expenditures as well. At some point contribution limits are so low that they severely limit the amount of money a candidate can raise to finance his speech. This undermines *Buckley's* compromise because it effectively allows the government to curtail the political speech of candidates. This problem is exacerbated by public financing for campaigns that is conditioned on accepting expenditure limits. If a legislature could set the contribution limit low enough, even modest public financing could effectively coerce nearly all candidates into accepting expenditure limits. Given the drastic contribution limits, candidates could never raise the amount of money they would receive by accepting public financing and the consequent expenditure limits. Again, the law would effectively limit what a candidate could spend on her speech. Thus, if it refuses to ban contribution limits altogether, the Court must somehow define a lower boundary for such limits. *Randall* illustrates the impossibility of this task.

The plurality tried to define the lower bound for contribution limits principally in terms of the effect a contribution limit would have on challengers' campaigns.⁶⁸ On these terms, however, Justice Breyer's argument is unconvincing, and the shadowy rule it outlines is unhelpful. He argues that "contribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."⁶⁹ This statement seems to be based on the existence of "reputation-related or media-related advantages of incumbency" that might be amplified by low contribution limits.⁷⁰ It is also supported by another quite reasonable intuition,

67. *See id.* at 463–65.

68. As Justice Thomas noted, they did not address whether the limits infringed the rights of contributors. *Randall*, 126 S. Ct. at 2505 n.3 (Thomas, J., concurring in judgment).

69. *Id.* at 2492.

70. *Id.* (quoting *Shrink*, 528 U.S. at 403–04 (Breyer, J., concurring)).

noted by the dissent in the Second Circuit. The premise of campaign finance laws is that legislators are so set on reelection that they would betray their principles and neglect their duties in order to amass enough contributions to ensure their reelection.⁷¹ Yet campaign finance laws are written by the same legislators who claim that they would do almost anything to be reelected. Thus if one takes these “reforming” legislators at their word, one should expect them to enact laws that will disadvantage challengers.

One problem with using these concerns and intuitions to support the plurality’s judgment is that they apply equally to all campaign finance legislation. Thus, they suggest that all contribution limits should be struck down. Also, the plurality could only find meager evidence to support these intuitions, however reasonable they might seem. Justice Breyer pointed to substantial evidence that contribution limits would limit the money available to campaigns, particularly in competitive races,⁷² but he did not turn up any evidence that limiting money in those races would specifically harm the *challengers* in those races.⁷³ In fact, Justice Souter was able to produce more evidence on the precise question, which directly contradicted the intuition that contribution limits aid incumbents.⁷⁴ If Justice Souter is right, then legislators have not been acting to enhance their own chances of reelection and the whole premise of campaign finance reform should be called into question. The record may have been inadequate and further study may show that contribution limits do favor incumbents. Such an outcome, however, would demonstrate the folly of adjudicating the constitutionality of contribution limit statutes on an individual basis. When the mas-

71. *Landell*, 382 F.3d at 180–81 (Winter, J., dissenting) (“Act 64’s major factual premise is that Vermont incumbents so crave reelection that they ignore official duties and personal honor to that end. My colleagues abandon this premise in reassuring us that self-interest will not influence campaign finance regulation despite the considerable evidence that self-interest contributed, albeit below the public radar, to the level of expenditure limits set by Act 64 and to adoption of the two-year cycle.”).

72. *Randall*, 126 S. Ct. at 2495–96.

73. The Court mentions a study that concluded that certain challengers would have received reduced funds under contribution limits, but that study does not seem to have compared this to any effects on incumbents. *See id.* at 2495.

74. *See id.* at 2514–15 (Souter, J., dissenting) (citing Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity Between Gubernatorial Candidates*, 59 POL. RESEARCH Q. 99, 99 (2006); Kedron Bardwell, *Money and Challenger Emergence in Gubernatorial Primaries*, 55 POL. RESEARCH Q. 653 (2002); Robert E. Hogan, *The Costs of Representation in State Legislatures: Explaining Variation in Campaign Spending*, 81 SOC. SCI. Q. 941, 952 (2000)).

sive record in a Supreme Court case like *Randall* cannot even establish that low limits disadvantage challengers at all, how can lower courts determine whether a limit is so low that it “put[s] challengers to a significant disadvantage?”⁷⁵

In any case, the test that the plurality lays out to draw this line is largely useless. This is one of the few points that a majority of the Court seems to agree upon.⁷⁶ The plurality does not tell us how low limits must be before danger signs become an issue. Nor does it describe how a court’s subsequent review of the record should decide whether the limits are too low. Furthermore, some of the points considered by the court are of very dubious relevance. As Justice Souter notes, failure to index for inflation should not be a major concern: “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.”⁷⁷ As Justice Thomas notes, if the individual limit is too low when applied to parties, “then the limits are unconstitutional as applied to parties. But limits on *individuals* cannot be transformed from permissible to too low simply because they also apply to political parties.”⁷⁸

In fact, as Justice Thomas argues, it is impossible to make a functional rule that would define the lower bound for contribution limits. “There is simply no way to calculate just how much money a person would need to receive before he would be corrupt Likewise, there is no meaningful way of discerning just how many resources must be lost before speech is disproportionately burden[ed].”⁷⁹ Courts are institutionally incapable of drawing these sorts of lines.⁸⁰

75. *Id.* at 2492.

76. *See id.* at 2506 (Thomas, J., concurring in judgment) (“From all appearances, the plurality simply looked at these limits and said, in its ‘independent judicial judgment,’ that they are too low But a feeling does not amount to a workable rule of law.”) (internal citations omitted); *id.* at 2514 (Souter, J., dissenting) (“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 petitioner offered, and the plurality invokes, no evidence that the risk of a pro-incumbent advantage has been realized.”).

77. *Randall*, 126 S. Ct. at 2515 (Souter, J., dissenting).

78. *Id.* at 2504–05 (Thomas, J., concurring in judgment).

79. *Id.* at 2506 (alteration in original) (internal quotation omitted).

80. This suggests that campaign finance reform should happen, if at all, by constitutional amendment: courts are not institutionally competent to do the kind of line drawing that reform requires and if legislatures are corrupt enough to require such laws, they should not be allowed to draft them.

Thus, *Randall* effectively illustrates the problem with retaining the *Buckley* compromise and its distinction between expenditures and contributions. First, it is impossible to craft workable rules that will police *Buckley*'s distinctions. One cannot define when a contribution limit is so low that it places too heavy a burden on political speech or a challenger's campaign.

Second, there is a contradiction at the heart of *Buckley* and the Court's campaign finance jurisprudence. If legislators are so corrupt that they need campaign finance reform legislation, they are too corrupt to draft it. Perhaps the evidence cited by Justice Souter indicates that their reform is not self-serving. If so, it is hard to see how the interest in preventing corruption is so compelling that it can justify the significant restrictions on political activity approved by *Buckley* and *Colorado II*. If there are so few corrupt legislators that they cannot turn election laws to their advantage, then surely bribery laws and public opinion are enough to combat them. Certainly, the government should not be allowed to stifle political speech when other tools are available.

Third, contributions are a vital form of speech and association. They are an expression of general political support that should be protected by the First Amendment. Moreover, as the plurality notes, contributions to a party are a crucial method of allowing citizens to combine their voices to influence their democracy;⁸¹ thus, contribution limits on parties place a heavy burden on a citizen's right to freedom of association.

In short, the Court's fractured opinions in *Randall* show that the *Buckley* compromise is falling apart, and the plurality's opinion demonstrates the reason: *Buckley* is no longer workable. The First Amendment demands that it be replaced with a standard that provides more protection to political speech.

James Coleman

81. See *Randall*, 126 S.Ct. at 2497-98.