

***Randall v. Sorrell:***  
**Taking Mandatory Campaign Expenditure Limits Off the Table, For Now**

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### **I. Introduction**

In *Randall v. Sorrell*<sup>1</sup>, the United States Supreme Court held that both the spending and contribution limitation provisions of Vermont’s 1997 campaign finance reform act (“Act 64”) violated the free speech and association guarantees of the First Amendment.<sup>2</sup> The splintered decision contained six separate opinions. At one end, Justices Thomas and Scalia, concurring in the judgment, voiced their general opposition to any limits upon campaign contributions or expenditures.<sup>3</sup> At the other end, Justices Stevens, Souter, and Ginsberg, dissenting, offered that Vermont had provided sufficient justification to possibly uphold both the spending and contribution limits of Act 64.<sup>4</sup> *Randall v. Sorrell* presents two important implications. First, the Court’s complex, multi-faceted analysis provides little guidance by which state legislators may fashion future campaign finance laws. Second, the concurring and dissenting opinions reflect a brewing desire among the bench to reexamine the Court’s landmark decision in *Buckley v. Valeo*<sup>5</sup> in light of modern campaign finance practices.

### **II. Factual Background**

The 1990’s saw increased debate amongst Vermont public officials, regarding the corrupting effect of money in politics. Politicians and citizens alike began to publicly debate the need for more stringent campaign finance regulations. Heeding the call, Vermont’s legislature launched extensive hearings into its campaign finance practices.<sup>6</sup> Nearly six months of investigatory hearings were conducted, with over 145 witnesses giving testimony concerning

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<sup>1</sup> 126 S. Ct. 2479 (2006).

<sup>2</sup> *Id.* at 2485.

<sup>3</sup> See *Id.* at 2502.

<sup>4</sup> *Id.* at 2511.

<sup>5</sup> 424 U.S. 1 (1976).

<sup>6</sup> *Randell v. Sorrell*, 118 F. Supp. 2d 459, 465 (D. Vt. 2000).

statewide races in Vermont from 1978 to 1996.<sup>7</sup> As a result, three separate bills were introduced during the 1997 Legislative Session. Ultimately, House Bill 28 was adopted by both houses of Vermont's legislature and signed into law by Governor Howard Dean on June 26, 1997 as "Act 64".<sup>8</sup>

As a result of Act 64, Vermont became the only state to impose mandatory expenditure limits upon candidates for state office, ranging from \$2,000 for state representatives in single-member districts to \$300,000 for governor.<sup>9</sup> Contributions to candidates and political groups were also limited by Act 64.<sup>10</sup> Individual contributions to candidates could not exceed \$200 to \$400, depending upon office.<sup>11</sup> Political parties and committees were limited in both the contributions they could receive from individual sources and amounts which they could contribute to candidates.<sup>12</sup>

Act 64 went into effect immediately following the 1998 elections.<sup>13</sup> Soon thereafter, voters, candidates for state office, and organizations brought a consolidated suit against Vermont Attorney General William H. Sorrell and Vermont's fourteen State Attorneys, alleging nine provisions of Act 64 violated their First Amendment free speech and associational rights.<sup>14</sup> The plaintiffs challenged all of Act 64's contribution and expenditure limitation provisions, as well as several related definitional provisions.<sup>15</sup>

Following a ten day bench trial, the district court upheld Act 64's contribution limits from individuals and political committees to candidates for state office, but struck the limit upon contributions from political parties to candidates as unconstitutionally low.<sup>16</sup> The court also struck Act 64's expenditure limits as unconstitutional, noting that the Supreme Court's decision in *Buckley v. Valeo* and lack of subsequent interpretation addressing expenditure limits required it to do so.<sup>17</sup> On appeal, a divided panel of the U.S. Court of Appeals for the Second Circuit

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<sup>7</sup> Id. at 466-67.

<sup>8</sup> Id. at 467.

<sup>9</sup> Id. at 483.

<sup>10</sup> Id. at 462.

<sup>11</sup> Id.

<sup>12</sup> *Randall v. Sorrell*, 126 S. Ct. at 2486.

<sup>13</sup> Id. at 2487.

<sup>14</sup> *Randell*, 118 F. Supp. 2d at 463.

<sup>15</sup> Id.

<sup>16</sup> Id. at 463-64.

<sup>17</sup> Id. at 483.

upheld all of Act 64's contribution limits as constitutional.<sup>18</sup> For the first time since the Supreme Court struck the expenditure limits at issue in *Buckley*, the court held that Vermont's expenditure limits may be constitutional, but remanded the case to determine whether the limits were "narrowly tailored" to the state's asserted interests.<sup>19</sup> The Supreme Court granted certiorari to consider the constitutionality of Act 64's contribution and expenditure limitations.<sup>20</sup>

### III. Legal Background

The seminal Supreme Court decision on campaign finance reform is the 1976 per curiam decision in *Buckley v. Valeo*. In *Buckley*, the Supreme Court reviewed the constitutionality of the 1974 amendments to the Federal Election Campaign Act of 1971 ("FECA"), which imposed contribution and expenditure limits upon campaigns for federal public office.<sup>21</sup> Specifically, FECA provided for (1) a contribution limit from individuals to candidates of \$1000 per year with an annual limitation of \$25,000 (2) expenditure limits upon individuals or groups which were "relative to a clearly identified candidate" of \$1000, as well as various expenditure limitations upon candidates, depending upon which federal office was sought.<sup>22</sup> The primary interest asserted by the government in defense of the limitations was the "prevention of corruption and the appearance of corruption spawned by the real or imagined influence of large financial contributions on candidates."<sup>23</sup> Though the court found both the expenditure and contribution limitations of FECA implicated First Amendment freedoms, it upheld only those provisions of the Act pertaining to contribution limitations.<sup>24</sup> The Court explained the result in terms of each limitation's implication upon First Amendment freedoms. Contribution limits were viewed by the Court as only a "marginal restriction" upon the contributor's ability to engage in political speech.<sup>25</sup> Expenditure limits, by contrast, imposed a more direct restraint on speech by "restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."<sup>26</sup> Without expressly equating money with speech, the distinction allowed the

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<sup>18</sup> *Landall v. Sorrell*, 382 F.3d 91, 148 (2nd Cir. 2004).

<sup>19</sup> *Id.* at 136.

<sup>20</sup> *Randall*, 126 S. Ct. at 2487.

<sup>21</sup> *Buckley v. Valeo*, 424 U.S. at 6.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.* at 25.

<sup>24</sup> *Id.* at 23.

<sup>25</sup> *Id.* at 20.

<sup>26</sup> *Id.*

Court to assign the greatest degree of constitutional protection to campaign expenditures. Under this heightened scrutiny, the *Buckley* Court deemed the government's asserted interests of deterring quid pro quo corruption, stemming the high cost of campaigns, and establishing a level campaigning field insufficient to uphold the expenditure limits of FECA.<sup>27</sup> The contribution/expenditure distinction developed in *Buckley* continues to guide the Court today, some 30 years later.

A significant challenge to FECA with regard to political parties would come in 1996, when the Supreme Court rejected the government's presumption in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*<sup>28</sup> ("Colorado I") that all expenditures by a political party were coordinated with a candidate for office.<sup>29</sup> At issue was the "Party Expenditure Provision" of FECA which prevented political parties from making indirect contributions to candidates by applying the \$5000 contribution limit to all expenditures of a party which were made in coordination with a candidate for federal office.<sup>30</sup> As applied to the particular expenditures in question, the Court ruled the provision to be unconstitutional.<sup>31</sup> The Colorado Republican Party had spent the funds in question before selecting its own candidates and arranging any expenditures with nominees. The expenditures in question were, therefore, "independent" rather than coordinated.<sup>32</sup>

The Court in *Colorado I* did not reach the broader question raised by the Colorado Republican Party: whether the First Amendment prevents limitations upon coordinated expenditures by political parties. That particular question was answered by the Court five years later in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*<sup>33</sup> ("Colorado II"). In opposing the coordinated expenditure provision, the Colorado Republican Party argued that because of the unique nature and roll of political parties in political discourse, political parties should be given unlimited coordinated spending, unlike other donors regulated by FECA's coordinated expenditure provision.<sup>34</sup> The court rejected the argument and held that a party's coordinated expenditures, unlike spending which is truly independent, "may be restricted

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<sup>27</sup> Id. at 22.

<sup>28</sup> 518 U.S. 604 (1996).

<sup>29</sup> Id. at 619.

<sup>30</sup> Id. at 611.

<sup>31</sup> Id. at 626.

<sup>32</sup> Id. at 614-15.

<sup>33</sup> 116 Stat. 81.

<sup>34</sup> Id. at 449-51.

to minimize circumvention” of FECA’s contribution limits.<sup>35</sup> Rather than subject the “Party Expenditure Provision” of FECA to the demanding scrutiny applied to the expenditure limits at issue in *Buckley*, the Court applied the scrutiny level appropriate for contribution limits.<sup>36</sup>

In 2002, Congress sought to overhaul FECA by enacting the Bipartisan Campaign Finance Reform Act<sup>37</sup> (“BCRA”), also coined the McCain-Feingold Act, as an amendment. The purpose of the BCRA was to curb the circumvention of FECA’s limitations by bringing “soft money” contributions into regulation.<sup>38</sup> Prior to the BCRA, FECA defined “contribution” as anything of value “made by a person for the purpose of influencing any election for Federal office.”<sup>39</sup> Donations made by individuals and groups for the purpose of influencing state and local elections were therefore unaffected by FECA’s regulations. Through various rulings of the Federal Election Commission (“FEC”), political parties were able to use unlimited and unregulated funds known as “soft money” for activities intended to influence both state and federal elections, such as get-out-the-vote drives and television ads, so long as a party did not advocate a candidate’s election or defeat.<sup>40</sup> Title I of the BCRA eliminated donations of soft money to national parties, while Title II restricted the broadcasting of “issue ads” funded by soft money to thirty days prior to primary elections and sixty days prior to the general elections.<sup>41</sup>

Shortly after taking effect in 2003, the Supreme Court addressed the constitutionality of the BCRA under, *inter alia*, a First Amendment challenge, in *McConnell v. Federal Election Commission*.<sup>42</sup> The Court declined the invitation of the petitioners to subject BCRA’s restrictions to strict scrutiny, noting that while the Act regulated more than contributions received by political parties, no provision limited the total amount of money a party may spend.<sup>43</sup> Because the restrictions of BCRA were deemed to only marginally impact political speech, the Court upheld both Title I and Title II under the less rigorous scrutiny applicable to contribution limitations.<sup>44</sup>

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<sup>35</sup> *Id.* at 456.

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

<sup>37</sup> 116 Stat. 81.

<sup>38</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93, 115 (2003).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 123-24.

<sup>41</sup> *Id.* at 133-34.

<sup>42</sup> 540 U.S. 93 (2003).

<sup>43</sup> *Id.* at 138.

<sup>44</sup> *Id.* at 141.

The most significant decision applying *Buckley's* rationale to state campaign finance legislation would occur in 2000, with the Supreme Court's decision in *Nixon v. Shrink Missouri Government*.<sup>45</sup> At issue was a Missouri statute limiting contributions to candidates for state office. The precise limitations were indexed for inflation and ranged from \$250 to \$1,000 at the time of the decision.<sup>46</sup> In upholding the contribution limits, the Court noted as an initial matter that *Buckley* is the authority for reviewing state legislation imposing contribution limits upon candidates for office.<sup>47</sup> Though *Buckley* provided the framework for reviewing subsequent campaign finance legislation, the Court explicitly stated legislators need not fashion contribution limits in terms of the amounts approved in *Buckley*.<sup>48</sup> Rather than focus on the precise dollar amounts of campaign finance limits, the more relevant inquiry is whether the limitations are "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."<sup>49</sup> The Court reasoned Missouri's statute did not adversely affect these interests, as evidence showed the majority of contributions in recent elections were below the permissible amount.<sup>50</sup>

The high threshold established in *Buckley* with regard to expenditure limits has created much debate as to whether the court actually established a per se rule against such limits, or what interests, if any, would support upholding campaign spending limits. Since *Buckley*, only one circuit has evaluated the constitutionality of expenditure limits.<sup>51</sup> In *Kruse v. City of Cincinnati*<sup>52</sup>, the Sixth Circuit struck down spending limits imposed by the City of Cincinnati upon candidates for city counsel.<sup>53</sup> In defense of the expenditure limits, the City argued that more than twenty years of post-*Buckley* experience had shown that contribution limitations are insufficient to effectively battle the corrupting effect of money in politics.<sup>54</sup> Further, the City argued that the *Buckley* Court's judgment that contribution limits would serve to effectively curb corruption, or its appearance, was mistaken or, at best, has proven ineffective over time.<sup>55</sup> Brushing over these

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<sup>45</sup> 528 U.S. 377 (2000).

<sup>46</sup> Id. at 383.

<sup>47</sup> Id. at 381.

<sup>48</sup> Id. at 397.

<sup>49</sup> Id.

<sup>50</sup> Id. at 395-96.

<sup>51</sup> See *Randall v. Sorrell*, 118 F. Supp. 2d at 481-82.

<sup>52</sup> 142 F.3d 907 (6th Cir. 1998), cert denied, 525 U.S. 1001 (1998).

<sup>53</sup> Id. at 909.

<sup>54</sup> Id. at 915.

<sup>55</sup> See Id.

concerns, the Court reasoned that because the City had offered essentially the same interests as those asserted in favor of the expenditure limits in *Buckley*, it was required to strike them.<sup>56</sup> Advocates of campaign finance reform were hopeful the Court in *Randall v. Sorrell* would come to a different conclusion, as Vermont presented a justification not expressly addressed in *Buckley*, buttressed by extensive factual findings.

#### IV. Court's Rationale

For the first time since its 1976 decision in *Buckley*, the Supreme Court granted certiorari in *Randall v. Sorrell* to determine the constitutionality of both expenditure and contribution limits imposed upon candidates for state office in Vermont.<sup>57</sup> In a plurality opinion, the Court held both provisions contained in Vermont's newly amended campaign finance law violated the First Amendment.<sup>58</sup>

##### A. Expenditure Limits

The respondents presented two arguments as to why Act 64's expenditure limits should be upheld in light of *Buckley*. First, the respondents posited that contribution limits alone can no longer effectively deter corruption or its appearance in politics, and therefore, *Buckley v. Valeo* should be overruled based upon its contribution/expenditure distinction.<sup>59</sup> Second, and in the alternative, the respondents asked the court to distinguish *Buckley* based upon a justification not explicitly addressed in the opinion, namely that expenditure limits are necessary in order to reduce the amount of time candidates devote to fundraising.<sup>60</sup> Justice Breyer's plurality opinion declined both requests.<sup>61</sup>

Relying upon stare decisis, the Court found no special justifications present to depart from the principles established in *Buckley*. Specifically, the Court noted that Vermont failed to offer any evidence which suggested a dramatic increase in corruption or its appearance in the state.<sup>62</sup> Furthermore, because over thirty years of campaign finance jurisprudence was founded

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<sup>56</sup> Id. at 909.

<sup>57</sup> *Randall v. Sorrell*, 126 S. Ct. at 2487.

<sup>58</sup> Id. at 2485.

<sup>59</sup> Id. at 2489.

<sup>60</sup> Id. at 2490.

<sup>61</sup> Id.

<sup>62</sup> Id.

upon *Buckley*, the Court concluded that overruling the decision would dramatically undermine settled precedent.<sup>63</sup>

The Court was equally unpersuaded by Vermont’s invitation to distinguish *Buckley* from the provisions of Act 64.<sup>64</sup> Vermont explained that its expenditure limits were necessary in order to reduce the amount of time devoted by candidates to fundraising rather than campaigning among ordinary voters—a justification, it argued, *Buckley* did not fully consider.<sup>65</sup> While the Court did not explicitly disagree with the respondents, it reasoned that fuller consideration of the time protection justification would likely not have changed the result in *Buckley*.<sup>66</sup> Furthermore, the Court noted Act 64’s expenditure limits were similar to those at issue in *Buckley*.<sup>67</sup> Given no reason to depart from the result in *Buckley*, the Court concluded Act 64’s expenditure limits violated the First Amendment.<sup>68</sup>

## B. Contribution Limits

The plurality relied upon a two-fold analysis to ultimately conclude Act 64’s contribution limits were unconstitutionally low.<sup>69</sup> First, the Court sought to determine whether there existed “danger signs” which suggested a statute’s limits might “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability”.<sup>70</sup> The inquiry was necessary, the Court noted, despite its usual deference to a legislature’s judgment as to what contribution limits would be effective, in order to recognize a lower bound to contribution limits.<sup>71</sup>

The Court found such “danger signs” present in Act 64’s contribution limitations for three reasons: (1) Vermont’s contribution limits are well below those upheld in *Buckley* (“adjusted 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*), (2) Vermont’s contribution limits are

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<sup>63</sup> Id.

<sup>64</sup> Id. at 2489.

<sup>65</sup> Id. at 2490.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id. at 2491.

<sup>69</sup> Id. at 2492.

<sup>70</sup> Id.

<sup>71</sup> Id.

the lowest in the Nation, and (3) Vermont’s contribution limit is well below the next lowest limit which the Court previously upheld (\$1075 for state office candidates, per election in *Nixon v. Shrink Missouri Government*).<sup>72</sup>

Second, because of these “danger signs”, the Court examined the proportionality of Act 64’s restrictions to determine whether the statute was appropriately tailored.<sup>73</sup> The Court addressed five factors which it considered, taken together, established that Act 64’s contribution limits were not “closely drawn” to match Vermont’s asserted objectives, and were, therefore, impermissible burdens upon First Amendment freedoms.<sup>74</sup>

First, the Court concluded the record before it suggested that challengers will be severely restricted in their ability to wage competitive campaigns against incumbents based upon Act 64’s contribution limits.<sup>75</sup> The record showed that most of Vermont’s most competitive races were funded predominately by political parties, and that Act 64’s contribution limits would cut party contributions in certain races from 85-99%.<sup>76</sup> Combined with the average reduction in available funding to challengers from 18-53%, the Court reasoned the higher costs which a challenger must usually bear support the inference that Act 64’s contribution limitations will impose significant barriers to challengers.<sup>77</sup>

Second, the Court addressed the potential negative effect of Act 64’s contribution limits upon political parties. In particular, the Court noted that Act 64 not only imposes the same dollar limit on contributions to candidates from political parties as it places upon contributions from other groups, but such limits apply to virtually all affiliates of a state political party, as if they were one entity.<sup>78</sup> For instance, The Vermont Democratic Party, together with all city and county affiliates, would be able to contribute a maximum of \$400 to any one candidate for state office.<sup>79</sup> The Court concluded that such a limitation would effectively reduce the voice of Vermont’s political parties “to a whisper”.<sup>80</sup>

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<sup>72</sup> Id. at 2493-2494.

<sup>73</sup> Id. at 2392.

<sup>74</sup> Id. at 2499-2500.

<sup>75</sup> Id. at 2495.

<sup>76</sup> Id.

<sup>77</sup> Id. at 2495-96.

<sup>78</sup> Id. at 2497.

<sup>79</sup> See Id.

<sup>80</sup> Id. at 2498.

Third, the Court found Act 64's treatment of volunteer services problematic. Much like the FECA, Act 64 excluded from its definition of contribution any service "provided without compensation by individuals volunteering their time on behalf of a candidate".<sup>81</sup> However, unlike FECA, expenses which these volunteers incur are not excluded. Rather, expenses incurred by volunteers in the course of their campaign activities would reduce the amount by which they would be able to contribute to the candidate.<sup>82</sup> The lack of an exception differentiating such expenses was particularly troublesome to the Court in light of Act 64's low contribution limits.<sup>83</sup>

Fourth, the Court took issue with the absence from Act 64 of any automatic adjustment for inflation. Unlike the contribution limits upheld in *Shrink*, those of Act 64 are not indexed for inflation. As such, the Court noted that Vermont's already low limits would "inevitably become too low over time".<sup>84</sup>

Finally, the basic justifications asserted by Vermont in support of Act 64's contribution limits were, in the Court's view, essentially the same as those advanced by the government in *Buckley*.<sup>85</sup> Because Vermont has not offered any special justifications for its low contribution limits, the Court concluded that corruption or its appearances are no more significant in Vermont than elsewhere, and therefore, do not warrant the disproportional burdens upon the First Amendment associational and expressive freedoms.<sup>86</sup>

Based upon these five factors, taken in the aggregate, the Court held that Act 64's contribution limits placed disproportionate burdens upon the First Amendment associational and expressive freedoms compared to any interests which they serve.<sup>87</sup> As such, the Court concluded the limits were not narrowly tailored and were, therefore, unconstitutional violations of the First Amendment.<sup>88</sup>

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<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> Id. at 2499.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id. at 2500.

### C. Concurring Opinions

Justice Alito wrote separately from Justice Breyer and Chief Justice Roberts to address only the respondents request to overrule *Buckley*. He noted the respondents failed to fully address why a reexamination of *Buckley* is warranted and, therefore, would not have reached the issue.<sup>89</sup>

Justice Kennedy also wrote separately, concurring only in the judgment of the Court. While he agreed that both the contribution and expenditure limitation provisions of Act 64 violate the First Amendment, Justice Kennedy noted his skepticism regarding the “universe of campaign finance regulation” that *Buckley* and its progeny have fashioned. The Court, in his opinion, has little basis with which to judge what dollar amounts of contribution limits are too restrictive.<sup>90</sup>

Justice Thomas, joined by Justice Scalia, concurred only in the judgment of the Court. Justice Thomas continues to disagree with the Court’s distinction in *Buckley* between contribution and expenditure limitations. Contribution limits, he wrote, “infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits”.<sup>91</sup> Thomas further articulated that *Buckley* has provided an unworkable framework, and should therefore be overruled in favor of a standard “faithful to the First Amendment”.<sup>92</sup> Drawing upon the plurality’s reasoning, Thomas rejected the premise that one could calculate the amount of funds which would result in corruption or its appearance, or what amount of limitation would disproportionately burden one’s speech.<sup>93</sup> Accordingly, in his opinion, *Buckley* provides little guidance to both legislators in fashioning appropriate limits or to courts in evaluating those limits.<sup>94</sup> Instead, courts use *Buckley* as a means to strike limits which, based upon the court’s own perceptions, merely seem or appear to be overly burdensome to First Amendment freedoms.<sup>95</sup>

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<sup>89</sup> Id. at 2500-01.

<sup>90</sup> Id. at 2501.

<sup>91</sup> Id. at 2502.

<sup>92</sup> Id.

<sup>93</sup> Id. at 2506.

<sup>94</sup> Id.

<sup>95</sup> Id.

#### D. Dissenting Opinions

In his own dissent, Justice Stevens<sup>96</sup> explicitly called for the overruling of *Buckley* with regard to expenditure limits.<sup>97</sup> He based his opinion, in part, on the notion that reducing the amount of time candidates devote to fundraising can serve as a compelling interest, sufficient to uphold expenditure limits in light of their burdens upon First Amendment freedoms.<sup>98</sup> Justice Stevens concluded that *Buckley's* silence on the issue suggests that it felt such a justification insufficient, and in doing so, was incorrect.<sup>99</sup> In further support, Justice Stevens argued that equating money with speech is misguided, noting that “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”.<sup>100</sup> Finally, Justice Stevens suggested that expenditure limits were not merely guises to protect incumbents, but rather enhance equal access to the political stage.<sup>101</sup> In support, he pointed to the City of Albuquerque, New Mexico, where incumbent mayors have been defeated in every election despite mandatory spending limits.<sup>102</sup> Justice Stevens concluded by addressing the Framers’ likely disdain of current candidate expenditure limits, stating they “would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities”.<sup>103</sup>

Justice Souter, writing for himself and Justice Ginsberg, dissented as to the plurality’s evaluation of Act 64’s expenditure limits. Justice Souter argued that the Court in *Buckley* failed to fully consider whether the seemingly endless fundraising struggle in which candidates engage can support expenditure limits.<sup>104</sup> In his opinion, the Court failed to give due credit to Vermont’s justification. Justice Souter pointed out that nearly 30 years of post-*Buckley* experience had revealed much about the effect of money in politics.<sup>105</sup> Accordingly, the expenditure limits of Act 64, he argued, did not directly contravene *Buckley*, but instead, presented a different factual

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<sup>96</sup> Though not participating in the decision in *Buckley*, Justice Stevens remains the only current Justice who was serving at the time *Buckley* was decided.

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

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

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

<sup>100</sup> *Id.* at 2509.

<sup>101</sup> *Id.* at 2510.

<sup>102</sup> *Id.* (The expenditure limits were applicable to all municipal elections from 1974 to 2001, when the limits were successfully challenged in *Homans v. Albuquerque*, 217 F. Supp. 2d 1197).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2511.

<sup>105</sup> *Id.* at 2512.

scenario in which to apply its framework.<sup>106</sup> Justice Souter concluded that Vermont's justifications, buttressed by its extensive record of findings before court, permit affirming the Court of Appeal's remand to the District Court in order to determine whether Vermont's expenditure limits are the least restrictive means by which to achieve its interest.<sup>107</sup>

Justice Stevens joined Justice Souter and Ginsberg in dissenting with regard to Act 64's contribution limits. Justice Souter posited that the limitations at issue were not significant departures from those previously upheld by the Court or those recently adopted by other states.<sup>108</sup> Conceding that Vermont's limits are low, the Justices agreed that the limits imposed by Act 64 are not so low as to prevent deference to the judgment of Vermont legislators, particularly here, where Vermont has offered such an extensive factual record to buttress its arguments.<sup>109</sup>

## V. Implications

Two important conclusions can be drawn from the Court's decision in *Randall v. Sorrell*. First, the Court's decision offers little guidance to state legislators in fashioning future campaign finance reform laws. Rather than clarify a myriad of post-*Buckley* progeny addressing the contribution limitations of campaign finance reform, the Court's multi-faceted rationale leaves legislators guessing as to what lower limits it may place upon campaign contributions. In striking the contribution limits of Act 64, the plurality stressed the aggregate effect of its numerous specific features upon First Amendment freedoms.<sup>110</sup> Schemes differing in one or two respects from Act 64 are not necessarily unconstitutional. What of future contribution limits that are similar in amount to Act 64, but are indexed for inflation? Though the plurality conducted a sophisticated analysis of the contribution limits, it bypassed an opportunity to articulate a framework that would both assist legislators in crafting campaign finance legislation and future courts in conducting judicial review of such legislation. For now, state legislators are left with only the guidance that \$400 serves as a floor to campaign contribution limits, at least within the context of Act 64.

Second, in light of the Court's evaluation of Act 64, future litigation seems inevitable to test how far the Court is willing to go in striking state limits upon campaign contributions and

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<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id. at 2513-14.

<sup>110</sup> Id. at 2499.

expenditures. While the Court has dismissed the notion that *Buckley* serves as a per se rule against expenditure limits, it has yet to uphold any such limits. As future cases come before the Court, there appears to be a sufficient number of Justices who are willing to revisit whether *Buckley's* rationale is practical in light of modern campaign finance practices.

Most glaring are the opinions of Justices Thomas and Scalia. In addition to Thomas's concurrence in *Buckley*, Thomas and Scalia have consistently called for the overruling of *Buckley* in prior decisions due to the Court's inability to rationally apply the decision and its distinction between contribution and expenditure limitations. Justice Stevens also calls for the explicit overruling of *Buckley* in his dissent, noting that the *Buckley* court was wrong when it failed to consider endless candidate fundraising as insufficient to justify expenditure limits.<sup>111</sup> Justice Kennedy, however, does not specifically address the implications of Vermont's fundraising-reducing justification in his dissent. This seems odd considering his dissent in *Shrink* in which he explicitly stated, "I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising."<sup>112</sup> Justice Kennedy's brief concurrence only expresses his disapproval of the post-*Buckley* framework for evaluating campaign finance legislation.<sup>113</sup> Justices Souter and Ginsberg, in their dissents, though not advocating the express overruling of *Buckley*, note that post-*Buckley* experience has shown the "pernicious effect of the nonstop pursuit of money" is significant.<sup>114</sup> The language used by Justices Souter, Ginsberg, and Kennedy suggest that while the justifications offered in *Buckley* were viewed as insufficient to support expenditure limits, a modern realistic view of political campaigning might warrant their approval. While expenditure limits do not remain categorically prohibited under the First Amendment, the ultimate questions are what, if any, justifications will support future limits and if those offered in *Buckley* will be revisited by the Court in subsequent cases.

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<sup>111</sup> Id. at 2506.

<sup>112</sup> *Shrink*, 528 U.S. at 409.

<sup>113</sup> See *Randall v. Sorrell*, 126 S. Ct. at 2501.

<sup>114</sup> Id. at 2512.