

## CHAPTER ONE: THE CONSTITUTIONAL FRAMEWORK OF BUCKLEY V. VALEO

Campaign finance reformers should not proceed without some understanding of the 1976 Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Supreme Court considered broad-based constitutional challenges to the Federal Election Campaign Act (“FECA”), as amended in 1974. FECA’s opponents challenged the statute’s contribution and spending limits, reporting and disclosure requirements, the public financing system for presidential campaigns, and the legitimacy of the Federal Election Commission. Although FECA applies only to candidates for federal office, *Buckley* is the leading case on campaign finance regulation and the analytical starting point for all state and local campaign finance laws.

This chapter is designed to provide the lay reader with a rudimentary understanding of the structure, reasoning, and conclusions of *Buckley* with respect to the substantive campaign finance provisions in FECA. We have included citations to the official opinion for those interested, but we hope that the summary will stand on its own. Some overlap with later discussions of specific areas of campaign finance has been unavoidable. But the legal analysis in Part Two of this book is more technical and should offer lawyers and aficionados of the law a more complete understanding of *Buckley*’s implications.

In 2000, 2003, and 2006, there were major Supreme Court decisions with important implications for the interpretation of *Buckley*. The first is *Nixon v. Shrink Missouri Government PAC*, the second is *McConnell v. FEC*, and the third is *Randall v. Sorrell*. Because it is impossible to understand campaign finance law without also understanding these more recent cases, this chapter summarizes their analyses and holdings as well, with particular attention to their implications for *Buckley*.

For those not familiar with constitutional analysis, the following preliminary remarks may be helpful. When a statute is challenged under the First Amendment, courts first ask whether the law really burdens protected rights. If there is no burden, the law is constitutional. But if there is some burden, courts must weigh the First Amendment right against the government’s interest in enforcing the law. Severely burdensome restrictions are subject to “strict scrutiny” and can be justified only when the law is narrowly tailored to serve a compelling state interest; less burdensome provisions are subject to less exacting review, sometimes called “intermediate scrutiny.” As a practical matter, laws are far more likely to survive intermediate scrutiny than strict judicial review.

Over time, certain categories of restrictions have become identified with specific levels of constitutional scrutiny. For example, restrictions that are based on the viewpoint

of the speaker are subject to strict scrutiny, while restrictions that merely regulate the time, place, or manner of First Amendment activity are subject to intermediate review. Where restrictions do not fit neatly into any recognized category, courts must analyze the impact of the restrictions to determine the appropriate level of scrutiny, as the Supreme Court does in *Buckley*.

## I. CONTRIBUTION AND EXPENDITURE LIMITATIONS

### A. General Principles

*Buckley* began by recognizing that campaign finance regulation operates in an area of core First Amendment activities. Candidates and contributors express their political opinions and affiliate with like-minded persons by giving and spending money in connection with electoral campaigns. Under *Buckley*, limits on contributions and expenditures thus inescapably burden rights of free speech and association.

As a preliminary matter, *Buckley* rejected the argument that such limits are merely time, place, or manner regulations that would automatically be subject to intermediate scrutiny. The Court therefore proceeded to analyze the extent of the First Amendment burden.

The Court determined that limits on contributions and expenditures differ significantly in their impact on speech and association. According to the Court, expenditure limitations “represent substantial . . . restraints on the quantity and diversity of political speech” because “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”<sup>1</sup> *Id.* at 19.

By contrast, the *Buckley* Court regarded a contribution largely as a “symbolic expression of support” for a candidate,<sup>2</sup> *id.* at 21, which is not transformed into political debate until it is spent by the recipient to convey views to the voters.<sup>3</sup> *Id.* Because the contributor’s right to discuss candidates and issues remains otherwise unimpaired, contribution limits ordinarily involve “little direct restraint” on political communica-

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1 This point is sometimes (inaccurately) encapsulated in the phrase: “Money is speech.”

2 The Court thought that the expression involved in contributions was largely symbolic, because a contribution usually does not communicate the basis for the contributor’s support, and the size of the contribution is only a “very rough index” of the intensity of support. *Id.*

3 Communication effected through someone other than the contributor is sometimes called “speech by proxy.” *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638 (1996) (Thomas, J., concurring in the judgment and dissenting in part); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 196 (1981).

tion. *Id.* The limits could have “a severe impact on political dialogue,” however, if they “prevented candidates and political committees from amassing the resources necessary for effective advocacy.” *Id.*

*Buckley* also distinguished contribution and expenditure limits with respect to their impact on freedom of association. Contribution caps were found to limit “one important means of associating,” because contributions serve to affiliate the contributor with the recipient and other persons who pool resources in support of common political goals. *Id.* at 22. Contribution limits leave open other avenues of association, however, and allow recipients to aggregate large sums for advocacy. Expenditure limits were seen to impose “significantly more severe restrictions” on freedom of association, because they cut off the ability of candidate organizations and political committees (“PACs”) to amplify the voices of their adherents.

## B. Contribution Limitations

### 1. *The \$1,000 Limit on Contributions to Candidates*

*First Amendment.* FECA imposed a limit on contributions by individuals and certain PACs of \$1,000 per candidate, per election. *Buckley* noted that this limit primarily affected one aspect of the contributor’s freedom of association and determined that the limit could be sustained if the government showed “a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgement” of that right. *Id.* at 25.

In defense of the \$1,000 limit, the government had proffered three interests:

- preventing corruption and the appearance of corruption;
- equalizing the ability of citizens to affect elections, by muting the voices of wealthy contributors; and
- opening the process to more candidates, by curbing the costs of campaigns.

The Court did not even discuss the latter two interests as applied to contribution limits, finding that the interest in preventing the reality and appearance of corruption was a “constitutionally sufficient justification” for the \$1,000 limit. *Id.* at 26.

Having identified the “sufficiently important interest,” *Buckley* proceeded to consider whether contribution limits were “closely drawn” to avoid unnecessary abridgement of First Amendment rights. The Court determined that the limits were indeed precisely focused on the problems of real and perceived corruption, “while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.” *Id.* at 28. *Buckley* specifically

rejected arguments seeking to prove that higher limits would alleviate those problems, stating that “[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind.” *Id.* at 30.

*Equal Protection.* FECA’s opponents also raised an equal protection challenge to the contribution limits, claiming that the caps discriminated against major-party challengers and against minor-party and independent candidates. *Buckley* rejected this challenge, concluding that there was no basis in the record of “invarious and invidious discrimination” against these classes of candidates. *Id.* at 32-34.

## 2. *Other Contribution Limitations*

*Buckley* upheld three additional limitations on contributions:

- a \$5,000 limitation on contributions to candidates by certain PACs, *id.* at 35;<sup>4</sup>
- limitations on volunteers’ incidental expenses, *id.* at 36-37; and
- a \$25,000 limit on total contributions from any one individual to all candidates, during any calendar year, *id.* at 38.

The Court held that these provisions encouraged participation in the political process, while preventing evasion of the basic \$1,000 limits. *Id.* at 35-38.

## C. Expenditure Limitations

After upholding FECA’s caps on contributions, the Court turned its attention to a series of monetary limits on expenditures. According to the Court, the expenditure limits imposed a severe burden on First Amendment rights and were therefore subject to the most rigorous standard of constitutional review—strict scrutiny—which requires proof that a challenged restriction is narrowly tailored to serve a compelling state interest. None of the expenditure limits survived that exacting scrutiny.

### 1. *The \$1,000 Limitation on Independent Expenditures*

FECA prohibited all persons from making total expenditures “relative to a clearly identified candidate” in excess of \$1,000 per year. 18 U.S.C. §608(e)(1). The statute defined “expenditures” to include only spending that was not coordinated with a candi-

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<sup>4</sup> The PACs at issue in *Buckley* were FECA’s “multicandidate political committees,” which are PACs that have 50 or more contributors and make contributions to five or more candidates.

date. Opponents argued that the statutory limit on such “independent” expenditures was both vague and unjustified.

The Court agreed that the phrase “relative to” did not clearly identify what candidate-related expenditures were subject to the statutory limit. Advertising meant to address important political issues, which is fully protected by the First Amendment, might be thought subject to the expenditure limit if the public identified the issue with a particular candidate. Consequently, the vague statute threatened to chill free expression guaranteed under the Constitution. To eliminate the vagueness problem, *Buckley* therefore determined that FECA’s expenditure limits covered only communications that “in express terms advocate[d] the election or defeat of a clearly identified candidate for federal office” (as opposed to those that merely discussed issues or candidates, without expressly advocating election or defeat of candidates). The distinction between “express advocacy” and “issue advocacy” originates here.<sup>5</sup> 424 U.S. at 44.

Notwithstanding the new clarity imparted to the statutory language, *Buckley* determined that FECA’s \$1,000 expenditure limit was unconstitutional. The Court considered but rejected two state interests proffered as justifications for the restriction:

- preventing actual and apparent corruption; and
- equalizing the relative ability of individuals and groups to affect the outcome of elections.

The state interest in preventing the reality and appearance of corruption could not justify the expenditure limit for two reasons. First, the *Buckley* Court’s narrowing interpretation of “expenditures relative to a clearly defined candidate” undermined the ability of such limits to advance the anti-corruption interest. As the Court noted: “It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate’s campaign.”<sup>6</sup> *Id.* at 45.

Second, the expenditure limits governed only “independent expenditures”—those not coordinated with a candidate. The Court believed that the absence of coordination made it less likely that independent expenditures would be an effective tool for buying influence. “Unlike contributions,” the Court said, “such independent expenditures

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5 See later in this chapter and Chapter Seven for further discussions of this distinction and its implications for efforts to regulate campaign advertising.

6 The millions of dollars spent on so-called “issue ads” during the 1996, 1998, and 2000 federal election campaigns cynically illustrate *Buckley*’s point. For an analysis of television advertising in the 1998 and 2000 campaigns, see Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000* (Brennan Center 2001); Jonathan S. Krasno & Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center 2000).

may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Id.* at 47.

*Buckley* also held that the asserted interest in equalizing the relative ability of individuals and groups to affect election outcomes could not justify the \$1,000 limit on independent expenditures. In rather hyperbolic terms, the Court stated: “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .” *Id.* at 48-49. The Court therefore invalidated the limit on independent expenditures.

## 2. *Other Expenditure Limitations*

Continuing to apply strict scrutiny, *Buckley* struck down two additional expenditure limits, one on candidates’ spending from their personal or family resources and the other on overall campaign expenditures. The Court reasoned that candidates could not be corrupted by spending their own money. With regard to spending limits on campaigns, *Buckley* held that contribution limits would be sufficient to address the perception and reality that large contributions were corrupting candidates. The Court also determined that the interest in equalizing candidates’ resources was insufficient to override the candidate’s interest in free speech. Moreover, the Court noted, the “skyrocketing costs of political campaigns” did not in and of themselves justify restrictions on First Amendment activity, even if the spending were “wasteful, excessive, or unwise.” *Id.* at 57.

## II. REPORTING AND DISCLAIMER REQUIREMENTS

FECA imposed record-keeping and quarterly reporting requirements on PACs and candidates. The law also required reporting by individuals and groups other than PACs, who made independent expenditures or contributions to an entity other than a PAC or candidate of more than \$100 per year, and required certain disclosures on campaign advertising.<sup>7</sup> Opponents challenged the general reporting requirements as overbroad and the independent expenditure reporting requirement as unconstitutionally vague.

The Court began by admitting that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley*, 424 U.S. at 64. *Buckley* acknowledged, however, three categories of governmental interests that were “sufficiently important to outweigh the possibility of infringement”:

- providing the electorate with information about where money comes from and how it is spent, to help voters place candidates on the political spectrum

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<sup>7</sup> The minimum amounts triggering the reporting requirement are now \$250 and \$200 per year, for independent expenditures and contributions, respectively. 2 U.S.C. § 434(c).



and identify the interests to which candidates are likely to be responsive;

- deterring the reality and appearance of corruption by exposing large contributions and expenditures to the light of publicity, to help the electorate detect post-election special favors; and
- providing the essential means of gathering the data necessary to detect violations of contribution limits.

*Id.* at 66.

The Court recognized that mandatory reporting might deter some individuals who would otherwise contribute, but concluded that reporting was “the least restrictive means of curbing the evils of campaign ignorance and corruption.” *Id.* at 68. *Buckley* acknowledged, however, that if a group could show a reasonable probability that disclosure of its contributors would subject them to harassment or retaliation, an exception from the reporting requirements could be carved out to protect their First Amendment rights. *Id.* at 74.

The Court then turned to the vagueness claim asserted against the reporting requirements for independent expenditures. To ensure that only election-related spending was subject to those requirements, the Court construed them to apply only to independent expenditures that expressly advocated the election or defeat of candidates. In addition, the Court interpreted the term “political committee” to include only those organizations “that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Id.* at 79. Thus, independent expenditures by political committees would be reportable, but the donations received and spending undertaken by organizations devoted primarily to issue discussion would remain outside the sweep of the reporting requirements.

Finally, *Buckley* considered the monetary thresholds set for record-keeping (\$10) and reporting (\$100). *Buckley* acknowledged that “there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure.” *Id.* at 83. The Court determined, however, that such line-drawing is a matter for legislative judgment, unless the limits chosen are “wholly without rationality.” *Id.*

### III. PUBLIC FINANCING OF PRESIDENTIAL ELECTION CAMPAIGNS

FECA established a fund, financed by an income tax check-off, whereby individuals would earmark payment of (then) one dollar of their taxes for presidential campaigns. The fund would pay for party nominating conventions, general election campaigns, and a portion of primary campaigns for those candidates who agreed to limit overall spending on their campaigns.

Major parties (those whose presidential candidate received more than 25 percent of the vote in the previous election) and their candidates who accepted the voluntary spending limits were entitled to receive more funding than minor parties (whose candidate received 5-25 percent of the vote) and their candidates. Minor-party candidates who accepted voluntary spending limits could receive a reduced grant of public funds and could raise private funds to make up the difference between the amount of their grant and the major-parties' grant. "New" parties (whose candidate received less than 5 percent of the vote), independent candidates, and parties not holding a convention received no pre-election funding at all. But minor- and new-party candidates could get post-election funds if they (or electors pledged to them) were on the ballot in at least 10 states, and their share of the popular vote exceeded certain percentages.

FECA also established a matching funds program for primary elections. Candidates could receive matching funds for the first \$250 of each private contribution, up to 50 percent of the overall expenditure ceiling, if they accepted the ceiling and raised at least \$5,000 in each of 20 states (counting only the first \$250 of each person's contributions).

FECA's opponents first claimed that the public funding scheme was unconstitutional because it did not promote the "general welfare" and was therefore outside the scope of Congress's legislative power. *Buckley* determined that "Congress was legislating for the 'general welfare'—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91.

*Buckley* also rejected the opponents' First Amendment challenge. Rather than abridging speech, the Court held, the public funding system helped "to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. *Buckley* therefore recognized that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limits." *Id.* at 57 n.65.

Finally, *Buckley* held that the public funding scheme did not invidiously discriminate against non-major parties or their candidates. The Court attributed any difficulty minor-party candidates might have in waging effective campaigns to their inability to raise private contributions and thus, "presumably," to their general lack of public support. *Id.* at 94-95 & n.128. Congress could treat parties and candidates with broad public support (as measured by prior vote totals) differently than those without, to avoid frivolous candidacies, splintered parties, and unrestrained factionalism. *Id.* at 96-98, 101. Moreover, the Court was not persuaded, on the record available in *Buckley*, that non-major-party candidates would be worse off under the public financing scheme, with its voluntary expenditure limits for major-party candidates, than in an unlimited private funding system.



## *BUCKLEY REAFFIRMED: NIXON v. SHRINK MISSOURI GOVERNMENT PAC*

On January 24, 2000, the Supreme Court decided *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), a case challenging the constitutionality of \$1,075 limits on contributions to statewide candidates in Missouri. Because the Missouri cap was virtually identical to FECA's, *Shrink Missouri* presented an opportunity for the Supreme Court to reconsider *Buckley's* analysis of contribution limits, and opponents of campaign finance reform urged the Court to overrule *Buckley* and declare contribution limits unconstitutional.

Instead, in a 6-3 decision, the Court resoundingly reaffirmed the constitutionality of contribution limits at or even below the \$1,000 level. In so doing, the Court also clarified several aspects of *Buckley* that had caused confusion and controversy in recent years, including:

- the standard of review: contribution limits are governed by a different, and less strict, standard of review than expenditure limits;
- what counts as a state interest justifying contribution limits: contribution limits can be justified by the state's interests in combating not only the reality but also the appearance of corruption;
- what "corruption" means: "corruption" is not confined to outright bribery but also extends to the "broader threat from politicians too compliant with the wishes of large contributors";
- what is needed to prove the state's interest: the state need not document actual corruption but may rely on the findings in *Buckley* and other types of evidence that tend to show an appearance of corruption;
- the significance of inflation since *Buckley*: none; neither \$1,000 nor any other amount is a constitutional minimum below which legislatures cannot regulate.

Most importantly, *Shrink Missouri* articulated a new standard for the "outer limits of contribution regulation." 528 U.S. at 397. According to the Court, no limit is too low, unless it is "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." *Id.* This test raises the constitutional threshold so high that, in the future, contribution limits should be upheld in all but the most extraordinary of circumstances. In more than eight years since the decision in *Shrink Missouri*, only one individual contribution limit has been held unconstitutional.<sup>8</sup>

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<sup>8</sup> The Supreme Court invalidated Vermont's contribution limits in *Randall v. Sorrell*, discussed below, with no discussion of the *Shrink Missouri* standard.

*Shrink Missouri* is also notable for the separate opinions written by Justices Stevens, Breyer, and Kennedy. (Justice Thomas also wrote a dissenting opinion, joined by Justice Scalia, but there was little surprising in their attack on campaign finance regulation.)

For the first time in so many words, Justice Stevens stated: “Money is property; it is not speech.” *Id.* at 910 (Stevens, J., concurring); *cf Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part) (“[T]he argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.”). He explicitly questioned the view that the First Amendment provides the same measure of protection to the use of money in politics as it does to the use of ideas. All the same, he recognized that the right to use one’s own money in political contexts does merit significant constitutional protection.

Justice Breyer wrote separately to emphasize that “constitutionally protected interests lie on both sides of the legal equation” in contribution limit cases. *Id.* at 911 (Breyer, J., joined by Ginsburg, J., concurring). In his view, legislatures may appropriately seek “to democratize the influence that money itself may bring to bear upon the electoral process,” *id.*, notwithstanding *Buckley*’s comment that “the speech of some . . . [may not be restricted] to enhance the relative voice of others,” 424 U.S. at 48-49. According to Justice Breyer, “those words cannot be taken literally” because the Constitution often permits restrictions “to prevent a few from drowning out the many.” *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). He also endorsed a reading of *Buckley* that permits substantial campaign finance reform—including proposals to regulate soft money, to provide reduced-price media time, and even to limit some expenditures. *Id.* at 404-05. If *Buckley* could not be read to permit such reform, Justice Breyer concluded, “the Constitution would require us to reconsider *Buckley*.” *Id.*

Justice Kennedy dissented from the decision in *Shrink Missouri*. But his opinion was important because it recognized the serious problems plaguing the federal system—including soft money and “so-called issue advocacy.” *Id.* at 914 (Kennedy, J., dissenting). He would have overruled *Buckley*, but only in such a way as to leave a clean slate for new approaches to campaign finance reform. Notably, he left open the possibility that expenditures as well as contributions could be limited constitutionally (although he expressed considerable skepticism on that score).

*Shrink Missouri* was a huge win for campaign finance reform. The Court rejected every effort to cut back on *Buckley*’s analysis of contribution limits—and several Justices signaled openness to additional regulation of money in politics. Unfortunately, campaign finance decisions by the Supreme Court since the confirmation of Chief Justice Roberts and Justice Alito suggest that the tide may be turning. The periodic updates of this handbook should help to alert you to key developments and new trends.

## GIANT LOOPHOLE SUCCESSFULLY CLOSED: *McCONNELL v. FEC*

In 2002, Congress passed the Bipartisan Campaign Reform Act (“BCRA”), enacting into law what had been commonly known as the “McCain-Feingold Bill.” The principal purpose of BCRA was to close two huge loopholes that had opened in federal campaign finance law: the “soft money” loophole and the “sham issue advocacy” loophole. The soft money loophole allowed corporations, unions, and wealthy individuals to escape limitations on contributions to national political parties. Millions of dollars were funneled through the parties to federal candidate campaigns, in violation of the intent of FECA. The sham issue advocacy loophole allowed advertisers to escape regulation as long as their ads did not “expressly advocate” the election or defeat of a federal candidate. Much of the soft money was used for sham issue ads.

Before the President’s ink was dry on the McCain-Feingold Bill, opponents of the law filed 11 separate lawsuits challenging it on constitutional grounds. They challenged the provisions closing the soft money and sham issue advocacy loopholes, as well as a raft of other provisions, many of which had been added during the amendment process. Although Senator Mitch McConnell was not the first to file his lawsuit (the National Rifle Association filed first), when the cases were consolidated for trial, he insisted that his name appear as the lead plaintiff.

Senator McConnell is probably ruining that decision now. In December 2003, the Supreme Court upheld BCRA almost in its entirety. *See McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003). The Supreme Court emphasized the authority of Congress to engage in incremental legislative change to adjust the campaign finance laws to changing circumstances and the most pressing problems. The Court’s deference to the political judgments of Congress provides strong support for campaign finance laws at the state and local level that are designed to address problems similar to those addressed in BCRA.

The first two sections of this overview of *McConnell* focus on the Court’s decisions upholding the loophole-closing provisions. At the end, is a schematic summary with bullets identifying the full scope of the decision.

### I. SOFT MONEY

The first major component of BCRA upheld in *McConnell* was the statute’s ban on “soft money” donations to national political parties. A contribution to a party is “soft money” if it is not subject to restrictions as to source or amount. For example, although corporations have been banned from contributing to federal candidates for a century, they could freely give hundreds of thousands of dollars to the Republican and Democratic National Committees before BCRA. Now, as *McConnell* explains, BCRA “takes national parties out of the soft-money business.”

With respect to the national parties, BCRA's principal soft-money limitations are:

- the parties (and federal officials and candidates) are banned from “soliciting, receiving, directing, or spending” any soft money;
- corporations and labor unions cannot make donations to the parties; and
- individuals can contribute no more than \$25,000 to a party annually, and there are also limitations on contributions to and by PACs.

Because FEC regulations gave the parties an incentive to funnel much of their federal electioneering activity through state and local party committees even when soft money was legal, BCRA tries to anticipate and prevent a similar end-run around the soft-money ban by imposing the following restrictions on state and local committees and candidates:

- if state and local committees raise soft money, they cannot use it for “federal election activities” as defined in the statute;
- state and local candidates cannot use soft money to run ads promoting or attacking federal candidates; and
- like national committees, state and local committees cannot solicit soft-money contributions to tax exempt organizations that engage in federal electioneering.

There is a minor exception to the ban on engaging in “federal election activities” with soft money: if state law authorizes them, state and local parties can maintain “Levin accounts” to finance get-out-the-vote drives and a handful of similar activities that affect both state and federal races.

The Supreme Court upheld all of these provisions. After documenting the long history of banning corporate and union spending in federal elections, and the very good reasons for the ban, the Court turned to a discussion of soft money. The Court noted that soft money entered the campaign finance system through rulings by the FEC, rather than through FECA, and that soft money contributions were “dramatically larger” than “hard money” (regulated) contributions. 124 S. Ct. at 649. The Court also summarized evidence, including the fact that corporate contributions were often made to both political parties, demonstrating that the large contributions were made to secure access to candidates or to avoid retribution, rather than for ideological reasons. *Id.* Applying the reduced standard of review reaffirmed in *Shrink Missouri*, *id.* at 655-59, the *McConnell* Court held that the interests in combating real and apparent corruption fully justified the soft money ban and the measures enacted to prevent circumvention of the ban.

In so doing, the Court asserted that the “crabbed view of corruption”—which would limit the term to actual *quid pro quo* corruption— “ignores precedent, common sense, and the realities of political fundraising.” *Id.* The Court made it clear that Congress was entitled to consider historical evidence and the context in which a particular practice takes place in deciding how to limit campaign fundraising. *Id.* at 666. In particular, the Court recognized that “it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect.” *Id.* at 667.

## II. EXPRESS ADVOCACY, ISSUE ADVOCACY, AND ELECTIONEERING COMMUNICATIONS

Earlier in this chapter when discussing *Buckley*, we introduced the distinction between “express advocacy” and “issue advocacy.” “Express advocacy” is advertising that explicitly urges voters to vote for or against a particular candidate. “Issue advocacy” referred to communications that were supposed to take positions on issues. But most lower courts believed that express advocacy covered an extremely narrow category of communications—ads using so-called “magic words” such as “elect” or “vote against”—so that advertising that was clearly designed to tell voters how to vote, but did not use those terms, was usually categorized as issue advocacy and shielded from regulation. For example, a television advertisement that ran a week before the election, criticized the incumbent’s environmental record, and concluded, “Call Joe Incumbent and tell him to stop helping big polluters destroy our environment,” would have been considered issue advocacy in most of the country.

Why did this matter? Because it was generally (but not universally) believed after *Buckley* that governments were precluded from almost any meaningful regulation of issue advocacy. For example, in candidate elections:

- Corporations and unions could be prohibited from sponsoring express advocacy, but not issue advocacy;
- Individuals could be required to disclose their spending on independent express advocacy, but not issue advocacy; and
- PACs that engaged in express advocacy had to disclose their funders, but groups that limited themselves to issue advocacy often did not.

Trying to avoid raising difficult constitutional questions, courts often interpreted broadly worded campaign finance reform laws to apply only to express advocacy. For example, disclosure laws in some jurisdictions were narrowed so that voters had no way of finding out who was paying for expensive media blitzes against various candidates, so long as the advertisers were careful not to use any of the “magic words” that would turn their messages into express advocacy. Avoiding express advocacy was easy, and the

issue advocacy loophole was so large that effective regulation of independent advertising was virtually impossible.

*McConnell* changed all this by upholding provisions of BCRA that regulate “electioneering communications.” With some exceptions, BCRA defined “electioneering communications” as any broadcast, cable, or satellite communication that refers to a clearly identified candidate within 30 days of a primary election or 60 days of a general election and that can be received by at least 50,000 people in the candidate’s constituency. The candidate is considered to be “clearly identified” if his or her name or picture appears in the communication or if his or her identity is “apparent by unambiguous reference.” Thus, a television commercial saying “The President is wonderful” or “The President is horrible” would be an electioneering communication if broadcast in October 2004.

“Electioneering communications” include many advertisements that are not express advocacy. The *McConnell* Court found that the distinction between “express advocacy” and “issue advocacy” as interpreted by most lower courts was “functionally meaningless.” *Id.* at 689. The Court explained that the distinction was purely the product of statutory construction and not a constitutional requirement. *Id.* at 688. Because the electioneering communications provisions were neither vague nor overbroad, they were fully compliant with First Amendment requirements.

The Court upheld the following restrictions, among others:

- corporate and union money may not be used for electioneering communications;<sup>9</sup> and
- individuals, PACs, and other associations must disclose the source of funding for electioneering communications and the amount they spend on the ads.

These restrictions are quite similar to the restrictions on express advocacy upheld in *Buckley*. In addition, *McConnell* upheld a requirement that funders of electioneering communications disclose their expenditures when they sign contracts to produce or broadcast ads, even if they do not actually make payments until after the election. Thus, the information voters need will be available while it is still relevant.

### III. OTHER HOLDINGS IN *McCONNELL*

In addition to upholding restrictions pertaining to soft money and electioneering communications, the Court addressed challenges to a number of additional provisions. The remaining holdings are listed below:

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9 In *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (“*WRTL I*”), the Supreme Court created an exemption to this rule for ads that were not express advocacy or its functional equivalent. For a detailed discussion of *WRTL II*, see Chapter Seven. The exemption does not apply to disclosure requirements. See Chapter Eight.



## A. Coordination

Different rules apply depending upon whether spending is done independently or in coordination with candidates or parties. It therefore becomes very important to have clear and enforceable rules concerning coordination. One of the things that BCRA did was to invalidate inadequate coordination rules that had been promulgated by the FEC.<sup>10</sup>

With regard to BCRA's coordination provisions, the Supreme Court:

- Upheld treating third-party expenditures coordinated with party committees as contributions to those committees.
- Struck down the requirement that parties choose between making expenditures coordinated with candidates and making uncoordinated expenditures of unlimited amounts.

The Court did not hold that requiring parties to make the choice was inherently improper. The problem was that once a state or local party made the choice, its decision was binding on the national party and all of the other state and local affiliates. The Court left open the possibility that a revised version that did not give such power to one entity to bind dozens of others could survive constitutional review.

Upheld the requirement that the Federal Election Commission redraft its regulations and held that the specific regulations that the FEC has adopted in response were not yet reviewable.

## B. Miscellaneous

With regard to other provisions, the Supreme Court:

- Upheld a requirement that the sponsor of an election-related ad (whether or not broadcast) identify itself in the ad.
- Allowed the "Millionaire Provisions" to stand (held not yet reviewable).
- Allowed the higher contribution limits to stand (held not reviewable).
- Struck down a ban on contributions by minors. The Court's decision focused on the breadth of the ban and the lack of any showing that it was narrowly tailored to a real problem, such as parents' using their children as conduits to evade contribution limits.

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<sup>10</sup> Since the enactment of BCRA, the FEC has twice promulgated regulations defining coordination, and BCRA's congressional sponsors have twice successfully challenged them. *See* Chapter Six.

- Upheld requirements for record-keeping and disclosure of information about broadcast ads.

## TWO STEPS FORWARD, NOW ONE STEP BACK:

### *RANDALL v. SORRELL*

After the victories in *Shrink Missouri* and *McConnell*, the composition of the Supreme Court changed. Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O'Connor. Campaign finance decisions since then have taken a decidedly deregulatory turn. In *Randall v. Sorrell*, 548 U.S. 230, 126 S. Ct. 2479 (2006), the Roberts Court rejected an envelope-pushing lawsuit seeking to establish the constitutionality of mandatory spending limits, and it cut back on longstanding jurisprudence upholding contribution caps.

There were six different opinions in *Randall*, and the controlling opinion commanded the votes of only three Justices. Their opinion is known as a “plurality opinion,” and our discussion here will focus on it.

#### I, SPENDING LIMITS

In enacting spending limits, the Vermont legislature was well aware that it was setting the stage for reconsideration of the decision in *Buckley*, which held that all of the expenditure ceilings in FECA were unconstitutional. Since that decision, lower courts had consistently regarded mandatory spending caps as per se unlawful. *Randall*'s holding therefore was disappointing to reformers hoping to make new law, but it was not a big surprise.

In following *Buckley*, the plurality ruled that the evidence in *Randall* did not demonstrate the “special justification” required to overturn a long-established precedent. *Id.* at 2489. The plurality rejected the argument that spending limits were necessary because experience since *Buckley* had shown that contribution limits and disclosure requirements alone were insufficient to deter the reality and appearance of corruption. In addition, the plurality held that the new justification asserted in defense of Vermont's spending limits—that such limits reduced the time that candidates had to spend on fundraising and left them more time to communicate with voters—was not weighty enough to preclude the constitutional challenge. *Id.*

#### II, CONTRIBUTION LIMITS

*Randall*'s decision holding Vermont's contribution ceilings unconstitutionally low was the first time that the Supreme Court recognized a “lower bound” for such limits. The plurality repeated *Buckley*'s statement that “we have no scalpel to probe each possible contribution level,” and it reaffirmed that “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.” *Id.* at 2492 (citation and internal quotation omitted). But the plurality ignored the approach to contribution limits it had taken in *Shrink Missouri* and instead applied a completely different two-step analysis to Vermont’s law.

The plurality first asks whether there are “danger signs” that suggest the limits may “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.” *Id.* at 2492. Those danger signs, the plurality said, were present with respect to the Vermont limits because:

- Vermont’s limits applied across an entire election cycle, instead of applying separately to the primary and general election, *id.* at 2493;
- Vermont’s limits were, overall, the lowest in the nation, *id.*; and
- “Vermont’s limit is well below the lowest limit this Court has previously upheld, the limit of \$1075 (adjusted for inflation every two years),” *id.* at 2494.

Because of those “danger signs,” the plurality went on to consider five factors that, in its view, cumulatively justified invalidation of Vermont’s contribution limits, *id.* at 2495-2500:

- The contribution limits would significantly restrict the funding available to challengers seeking to mount competitive campaigns against incumbents;
- The Vermont law placed the same dollar limit on contributions from political parties to candidates as on individual contributions to candidates;
- The law had no exceptions for some kinds of volunteer expenses;
- The limits were not automatically adjusted for inflation; and
- There was no special justification for the lower Vermont contribution limits.

Under the plurality’s decision, it was the combined effect of all these factors, “*taken together*,” that rendered Vermont’s contribution limits unconstitutional. *Id.* at 2495 (emphasis in original).

In finding Vermont’s limits unconstitutional, the plurality’s approach contrasts with its analysis in *Shrink Missouri*. In 2000, the Court relied on evidence from elections held under the Missouri limits in finding that the limits did not preclude candidates from amassing sufficient funds for effective advocacy, but the *Randall* plurality gave no credence to similar evidence from the special election held under Vermont’s limits. The

plurality also appeared to accept arguments that *Shrink Missouri* had rejected, using an inflation-adjusted figure to compare Vermont's limits to those upheld in *Buckley*.

But the impact of *Randall* should not be overstated. The standard of review in challenges to contribution limits remains something less than strict scrutiny. Moreover, the plurality's danger signs and five factors do not apply to any other contribution limits in the country. Careful drafting of campaign finance laws should enable contribution limits to avoid the fate they suffered in *Randall*.