SO THERE ARE CAMPAIGN CONTRIBUTION LIMITS THAT ARE TOO LOW

by James Bopp, Jr.* and Susan Lee**

INTRODUCTION

When Congress approved contribution limits for candidates for president of the United States and Congress in 1974, it was the first time in our nation's history that contributions to federal candidate campaigns had been limited. The U.S. Supreme Court in *Buckley v. Valeo* approved these limits because they precluded "large" contributions, which the Court found gave rise to the specter of "actual or perceived corruption."[1] But after the Supreme Court's 2000 decision in *Nixon v. Shrink Missouri Gov't PAC*,[2] courts[3] and commentators[4]

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1. 424 U.S. 1, 26 (1976).

2. 528 U.S. 377, 904 n.3 (2000).

3. *See* Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000).

4. *See, e.g.*, Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1756-57 (2001) ("After *Shrink Missouri*, it is difficult to see how, from the donors' perspective, contributions are protected by the First Amendment at all . . . . [R]elatively little would be needed to prove that contributions presented a serious danger of corruption, thereby justifying contribution limits.").

believed that no contribution limit was too low. The 2006 Supreme Court case of *Randall v. Sorrell*[5] tested that proposition and by a six to three vote found Vermont's campaign contribution limits too low. The 1974 federal contribution limit was set at $1000 per election; Vermont's limits varied by office with a gubernatorial candidate limited to $400 per election cycle.[6] Adjusted for inflation and per election, Vermont's gubernatorial limit amounted to about fifty-seven 1976 dollars.[7] If the Supreme Court had upheld the Vermont limits, there truly would have been no contribution limit too low.

The Supreme Court has used "intermediate" rather than "strict" scrutiny to examine contribution limits. While they "impinge on the protected freedoms of expression and association,"[8] the limits need only be "closely drawn" to a "'sufficiently important interest'" for the limits "to avoid unnecessary abridgment of First Amendment freedoms."[9] The only sufficiently important interest so far found is the interest in preventing real or apparent corruption.[10] If the government can show that its limits further this interest, it must further show that the limits are closely drawn by establishing that challengers can mount effective campaigns under the limits. Finally, limits on contributions from parties to their candidates will fail constitutional scrutiny if they prevent candidates from effectively campaigning and will also fail if they infringe on the associational or speech rights of parties.[11] The first Part of this Article will briefly recount the history of contribution limits and the constitutional rights that are implicated by such limits. The second Part will outline the analysis the Supreme Court has provided to guide lower courts, governments, and litigants when dealing with this issue and will also discuss the current and future status of contribution limits.

I. THE HISTORY OF CONTRIBUTION LIMITS AND ASSOCIATIONAL INTERESTS

A. CONTRIBUTION LIMITS INFRINGE ON ASSOCIATIONAL INTERESTS.

Contribution limits "operate in the area of the most fundamental First Amendment activities."[12] Because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of

5. 126 S. Ct. 2479 (2006).
6. *Id.* at 2483.
7. *Id.* at 2493.
8. McConnell v. FEC, 540 U.S. 93, 231 (2003).
9. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).
10. See *infra* Part II.A.
11. See *infra* Part II.C.
12. *Buckley,* 424 U.S. at 14.

government established by our Constitution," the Supreme Court has proclaimed that "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[13]

In reviewing whether a statute violates the right to associate for politically expressive purposes, it is critical to recall that "[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."[14] So important is this right that the Supreme Court reaffirmed in the context of campaign finance limits that "the freedom to associate is subject to the closest scrutiny."[15] Infringements on such rights "may be justified by regulations adopted to serve compelling state interests, *unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational freedoms."[16] This standard affirms *Buckley*, which has long been cited for the proposition that the "right of association may be limited by state regulations necessary to serve a compelling interest unrelated to the suppression of ideas."[17]

In practice, judicial scrutiny of associational infringements has generally followed a two-tiered approach depending on whether or not the restriction served to prohibit an expressive element of the association. This distinction is demanded because a restriction that leaves the expressive purpose intact while targeting non-expressive elements of the association does not "abridge the freedom of speech," while a restriction that thwarts the expressive purpose does abridge the freedom of speech and thereby violates the First Amendment. For example, statutes barring political parties from endorsing candidates have been struck down under a standard of strict scrutiny,[18] as have those which prevented parties from setting their own criteria for who could vote in their nominating elections.[19] But a provision that allowed candidates to be listed on the ballot as the nominee of only one party was upheld under a lesser standard because it left a party "free to try to convince" candidates to accept its nomination rather than that of another party.[20]

Similarly, a state law requiring a Boy Scout troop to allow homosexuals to serve as scoutmasters was struck down because such a forced association

13. *Id.* (quoting Roth v. United States*,* 354 U.S. 476, 484 (1957)).

14. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

15. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 904 n.3 (2000) (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958)).

16. *Id*. (quoting *Roberts*, 468 U.S. at 623) (emphasis added).

17. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

18. *See* Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214 (1989).

19. *See* Tashjian v. Republican Party, 479 U.S. 208 (1986).

20. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 360 (1997).

would compel the organization to "propound a point of view contrary to its beliefs."[21] In contrast, a similar law forcing business clubs to admit female members was permissible as applied to groups for which admitting women would not "impede the organization's ability to . . . disseminate its preferred view."[22] Likewise, laws requiring voters in party primaries to declare their party affiliations long before the primary were allowed only where they enabled all voters with sufficient foresight to vote in their desired primaries.[23] With regard to campaign contributions, the Supreme Court has identified two expressive purposes of the political association created by such a contribution. The lesser of these is a "symbolic expression of support," which "serves to affiliate a person with a candidate."[24] Because the symbolic endorsement of a candidate by a donor "does not increase perceptibly with the size of his contribution,"[25] a contribution limit which only implicates this interest does not suppress ideas and may be sustained where "closely drawn" to a "sufficiently important interest."[26]

Stronger scrutiny is necessary when contribution limits thwart the more crucial aspect of donor-candidate associations of "enabl[ing] like-minded persons to pool their resources in furtherance of common political goals."[27] Where contribution limits are high enough to permit candidates "to aggregate large sums of money to promote effective advocacy," this purpose is not defeated.[28] However, contribution limits which are set too low can create "a system of suppressed political advocacy that would be unconstitutional."[29]

B. LOW CONTRIBUTION LIMITS SUPPRESS EXPRESSION BY PREVENTING CANDIDATES FROM EFFECTIVELY CAMPAIGNING AND OPERATE AS DE FACTO EXPENDITURE LIMITS.

When limits are set too low, they act as back-door expenditure limits due

21. Boy Scouts of Am. v. Dale, 530 U.S. 640, 654 (2000) (quoting Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group, 515 U.S. 557, 575 (1995)).

22. Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984).

23. *Compare* Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding law limiting party primary participation to voters who had registered for the primary at least 30 days prior to the previous general election) *with* Kusper v. Pontikes, 414 U.S. 51 (1973) (striking requirement that primary voters not have voted in a different party's primary within the prior 23 months, thereby effectively forcing voters to skip a primary to change parties).

24. Buckley v. Valeo, 424 U.S. 1, 21-22 (1976).

25. *Id.* at 21.

26. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387-88 (2000).

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

28. *Id.* at 22.

29. *Shrink*, 528 U.S. at 396.

to their effect of limiting the funds candidates can amass for their campaigns, resulting in a reduction of campaign speech. Such a scheme is illegitimate under the First Amendment. As the Supreme Court stated in *Buckley*:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people–-individually as citizens and candidates and collectively as associations and political committees–-who must retain control over the quantity and range of debate on public issues in a political campaign.[30]

Furthermore, legislating for the impermissible purposes of the "suppression of ideas" is unconstitutional,[31] and was fatal to the limits at issue in *Colorado Republican Federal Campaign Committee v. FEC* ("*Colorado I*"):

> This Court's opinions suggest that Congress wrote the . . . [p]rovision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending.[32]

Likewise, the contribution limits enacted by the Vermont legislature that were considered in the recent case of *Randall v. Sorrell*,[33] were enacted with the intent to force a reduction in overall campaign spending. The limits to candidates ranged from $200 to $400 per election cycle depending on the office sought and applied to individuals, political committees, and political parties.[34] The legislature also enacted expenditure limits, ranging from $2000 per election cycle for state house representatives in single member districts to $300,000 election cycle for gubernatorial candidates.[35] The original version of the bill did not include the mandatory spending limits but did include the low contribution limits[36] and was lauded by Governor Howard Dean as a plan which "limits the amount of money candidates can spend in both primary and general elections."[37] Similarly, the bill's sponsor testified in the committee hearings, before the mandatory spending limits were inserted in the bill, that the bill had two principal goals: (1) "to reduce and control expenditures on

30. *Buckley*, 424 U.S. at 57.

31. *Shrink*, 528 U.S. at 388 n.3; *see also* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 540 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

32. 518 U.S. 604, 618 (1996) (citations omitted).

33. 126 S. Ct. 2479 (2006). James Bopp, Jr. was lead counsel in that case and argued before the U.S. Supreme Court on behalf of plaintiffs-petitioners.

34. *Id.* at 2483.

35. *Id.* at 2486.

36. Exhibits in Oral Argument at E-0001-25, Landell v. Sorrell, 118 F. Supp. 2d 459 (D. Vt. 2000) (No. 2:99-cv-146) (on file with author) [hereinafter Landell Exhibits].

37. *Id.* at E-0903.

election campaigns" and (2) to provide public funding.[38] The legislative counsel also described a principal goal of this bill as "to reduce and control the expenditures on election campaigns" through low contribution limits.[39] Once the bill had been amended to include mandatory spending limits, the legislative counsel reiterated that "[t]he bill as amended would control campaign expenditures by establishing mandatory campaign expenditure limits applicable to all candidates . . . . The bill would also limit campaign expenditures by limiting the amounts . . . of contributions made to candidates."[40]

Vermont's desire to force a reduction in overall candidate campaign spending was motivated in part by nostalgia for the time when campaigns in that state were perceived to be less sophisticated and were thought to rely on personal contact rather than mass media advertising.[41] With drastically reduced overall campaign spending enforced by the limits, Vermont argued that modern, more costly means of communicating with the electorate could be replaced by candidates personally delivering their campaign messages door-to-door.[42] However, while some candidates might prefer grassroots campaigning, forego more expensive campaigns due to lack of resources, or find it adequate to get themselves elected in non-competitive races, many candidates find it necessary to utilize mass media communications. Vermont's contribution limits attempted to impose one method of campaigning by severely limiting the resources needed for others.

The *Randall* Court recognized that Vermont's contribution limits placed "substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election."[43] The Court held that the statute "burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; [and] they hamper participation in campaigns through volunteer activities."[44] Limiting candidates' ability to campaign, in essence, limits candidates' ability to communicate to voters their qualifications and positions on issues:

> [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative

38. *Id.* at E-2839, E-2894.

39. *Id.* at E-2813.

40. *Id.* at E-2821.

41. *Id.* at E-0902; Transcript of Oral Argument at V-147, *Landell*, 118 F. Supp. 2d 459 (No. 2:99-cv-146) (on file with author) [hereinafter Landell Transcript].

42. Brief for the Defendants at 44-46, Landell v. Sorrell, 406 F.3d 159 (2d Cir. 2005) (No. 2:99-cv-146).

43. Randall v. Sorrell, 126 S. Ct. 2479, 2495 (2006).

44. *Id.* at 2499.

> that they be allowed freely to express themselves on matters of current public importance. [As a result, w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.[45]

So "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the source of the money spent is from his own funds or is raised through legal contributions.[46]

II. THE TEST

Contribution limits must undergo intermediate scrutiny analysis: they may only be upheld if "there is a 'sufficiently important interest,'"[47] and if the limits are "'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms."[48] The government must show that its limits further the only recognized interest that can justify them: the interest in preventing real or apparent corruption. Even if the government can prove its limits further such a bona fide interest, it must also show that the limits are closely drawn by allowing candidates to amass the resources necessary to mount effective campaigns. The government should also be prepared to show that the limits do not significantly increase the advantages of incumbents, thereby insulating them from challenge, and that the limits from parties to candidates do not trample on constitutional rights.

A. THE INTEREST IN PREVENTING REAL OR APPARENT CORRUPTION IS THE ONLY RECOGNIZED INTEREST SUFFICIENT TO UPHOLD CONTRIBUTION LIMITS.

The only sufficiently important interest that has been recognized to support a candidate contribution limit is the reality or appearance of a "threat from politicians too compliant with the wishes of *large* contributors."[49] *Buckley* "reiterated this [large contribution] interest at least seven times."[50] Thus, the Supreme Court's test for evaluating the government's corruption interest has two elements: (1) the contribution must be large enough to give rise to a legitimate suspicion of corruption, and (2) there must be a bona fide "suspicion

45. Republican Party of Minn. v. White, 536 U.S. 765, 781-82 (2002) (citations and internal quotation marks omitted); *see also id.* at 805-06 (Ginsburg, J., dissenting).

46. Buckley v. Valeo, 424 U.S. 1, 54 (1976).

47. McConnell v. FEC, 540 U.S. 93, 231 (2003).

48. *Id.* (quoting *Buckley*, 424 U.S. at 25).

49. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000) (emphasis added).

50. Carver v. Nixon, 72 F.3d 633, 638 (8th Cir. 1995) (citing *Buckley*, 424 U.S. at 25-28); *see also Buckley*, 424 U.S. at 45-46, 55, 67.

that [the] large contributions are corrupt."[51]

Although contribution limits can be upheld based on their value in preventing corruption, this justification is not automatic. Low contribution limits require a strong evidentiary showing because it is implausible that they will corrupt. In contrast, "the dangers of *large*, corrupt contributions and the suspicion that *large* contributions are corrupt are neither novel nor implausible."[52]

The Supreme Court upheld the $2150 per election cycle limit on contributions to candidates for Missouri state auditor in *Shrink* because the record evidence in the case and the related Eighth Circuit case of *Carver v. Nixon*[53] included substantial reports of alleged corruption in relation to contributions in Missouri. One reported incident was the decision of the state treasurer to use a bank for state business after that bank contributed $20,000 to the treasurer's campaign.[54] In addition, there were reports of three scandals, including one in which a state legislator was accused of sponsoring legislation in exchange for kickbacks. There was another report about Missouri's former Attorney General pleading guilty to conspiracy charges for misusing state property after being indicted for using a workers' compensation fund to profit campaign contributors.[55] In spite of these seemingly serious problems in Missouri, the Supreme Court cautioned that "there might, of course, be need for a more extensive evidentiary documentation if petitioners had made *any* showing of their own to cast doubt on the apparent implications of . . . the record."[56]

While the possibility that a candidate may be unduly influenced by gifts in excess of a $2150 per-cycle limit raises a plausible concern, such plausibility disappears long before the contributions are limited to $200 to $400 per cycle such as those at issue in *Randall*. As that Court noted, "one might reasonably believe that a contribution of, say, $250 (or $450) to a candidate's campaign was less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases we have considered."[57] Such contributions cannot be used toward new automobiles or children's college funds, but can instead be used only in efforts to win election to a position of public service. The quantum of evidence needed to support such low limits is therefore higher than that which justified the more plausibly tailored limits in

51. *Shrink*, 528 U.S. at 390-91.
52. *Id.* (emphases added).
53. 72 F.3d 633 (8th Cir. 1995).
54. *Shrink*, 528 U.S. at 393.
55. *Id*. at 394.
56. *Id.* (emphasis added).
57. Randall v. Sorrell, 126 S. Ct. 2479, 2499 (2006).

Shrink or *Buckley*. Indeed, several courts have found the small size of limits to be a factor which suggested they were not appropriately drawn to combating corruption.[58]

The state's evidence in *Randall*, however, was "largely sparse, anecdotal, and conclusory,"[59] contained "gross hyperbole . . . with precisely the same scripted sound-bites that are used in every talk-show discussion of the issues,"[60] and presented an absurdly contradictory "portrait of Vermont politics."[61] Despite a ten-day trial and testimony from the chief drafters and promoters of this legislation, veteran legislators, and campaign managers, the state failed to uncover a single incident of real or apparent corruption. Defense witnesses conceded that they could not point to any such incident in their own extensive experience in politics.[62] Karen Kitzmiller, a state representative, complained that "two particular groups, the tobacco industry and the pharmaceutical industry . . . freely give contributions to people *who support their views*," but she could not say "whether votes are changed because of that."[63]

Much of the state's evidence of corruption was based on evidence of dubious relevance and little magnitude. Most of it pertained to a supposed erosion of public confidence.[64] However, such a showing of a general distrust of political actors "is not sufficient" and is "irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates."[65]

Vermont failed to bring forth convincing evidence of real or apparent corruption, especially in light of the extremely low level of the limits and in light of the considerable evidence weighing against the legitimacy of the interest. The *Randall* Court recognized this, stating that "the record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere."[66]

The "hallmark of corruption" is a financial *quid pro quo*: dollars for political favors, where "elected officials are influenced to act contrary to their obligations of office by the prospect financial gain to themselves or infusions

58. *See, e.g.*, Citizens for Responsible Gov't State PAC v. Buckley, 60 F. Supp. 2d 1066, 1083 (D. Colo. 1999).

59. Landell v. Sorrell, 382 F.3d 91, 189 (2d Cir. 2005).

60. *Id.* at 190.

61. *Id.* at 189.

62. Landell Transcript, *supra* note 41, at VIII-79.

63. *Id.* at X-180 (emphasis added). *See also id.* at V-115; Landell Exhibits, *supra* note 36, at E-1362-64.

64. Landell v. Sorrell, 118 F.Supp. 2d 459, 478 (D. Vt. 2000).

65. FEC v. Nat'l Conservative PAC, 470 U.S. 480, 499 (1985).

66. Randall v. Sorrell, 126 S. Ct. 2479, 2499 (2006).

of money into their campaigns."[67] It is also true that the Supreme Court, in *McConnell v. FEC*, found that the interest in corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence."[68] It was however, "the manner in which parties *sold* access to federal candidates and officeholders" in *McConnell* "that has given rise to the appearance of undue influence."[69] In *McConnell*, a systematic scheme of the national party committee "peddl[ed] access to federal candidates and officeholders in exchange for large soft-money donations."[70]

In *Randall*, the state attempted to show that its interest in preventing access in return for contributions was tantamount to the interest in corruption. The state's witnesses emphasized that they were "not talking about selling votes . . . [but] about gaining access,"[71] such as "through the fundraising system,"[72] or because "officials are more likely to return donors' phone calls."[73] This evidence, however, was related to contributions of a thousand dollars or more, far above Act 64's new limits.[74] In fact, the plaintiffs' evidence in that case demonstrated that, of those members of the public who thought that persons making large contributions were "trying to buy special favors," fifty-three percent picked $20,000 or more, seventeen percent picked a contribution from $1000 to $5000, and only two percent said "any amount."[75] Indeed, the only finding by the Vermont legislature that even remotely related to "corruption" was that Vermont politicians would "give access to contributors who make large contributions in preference to those who make small or no contributions."[76] There was no evidence of pre-access demands for contributions conditioned on granting access, only evidence postcontribution of "officials . . . more likely to return donors' phone calls."[77]

This minimal evidence was countered by considerable evidence that even gaining access to legislators by large campaign contributions is not reasonably

67. *Nat'l Conservative PAC*, 470 U.S. at 496-97.

68. 540 U.S. 93, 150 (2003) (citation and internal quotation marks omitted).

69. *Id.* at 153.

70. *Id.* at 150.

71. Landell Transcripts, *supra* note 41, at VII-105-06.

72. Landell v. Sorrell, 382 F.3d 91, 100 (2d Cir. 2005).

73. *Id.* at 122.

74. Landell Transcripts, *supra* note 41, at VII-50 ($1000), IX-167-69 ($1000 to $2000).

75. Landell Exhibits, *supra* note 36, at E-2742.

76. This language is taken from the second finding of the Vermont State Legislature in passing Act 64. H.R. 28, 1997 Gen. Assem. 1997-1998 Leg. Sess. (Va. 1997), *available at* http://www.leg.state.vt.us/DOCS/1998/BILLS/PASSED/H-028.HTM

77. *Landell*, 382 F.3d at 122.

perceived in Vermont politics. Several witnesses with extensive experience in Vermont government testified that they were not aware of any Vermont politician ever providing preferential access in exchange for campaign contributions. For example, Steve Howard testified that in his six years of service in the Vermont House of Representatives and as chairman of the State Democratic Committee he was never aware of any situations in which contributions have purchased access to Vermont legislators.[78] Moreover, there was considerable evidence in the record that politicians in Vermont are readily accessible to all constituents. Legislators in Vermont will typically see anyone who wants to see them.[79] The record shows that Vermont officials are readily and easily accessible to *all* constituents.

In addition to claiming that access is equal to corruption, the defendants in *Randall* attempted to tie the concept of "bundling" to the existence of corruption: "Because of the pressures to avoid being bested in the race for campaign funding, the consequences of losing an entire industry as a source of donations directly influence the actions of legislators."[80] However, the *Buckley* Court dismissed the "bundling" concern in its discussion in footnote 64,[81] and, in upholding the Federal Election Campaign Act's (FECA) contribution limit, the Court emphasized, rather than bemoaned, the fact that "persons [remained] free" to "assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources."[82] The Court cited with approval the fact that "the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents."[83]

In addition to access and bundling, supposed erosion of public confidence also fails as evidence of corruption. A showing of a general distrust of political actors "is not sufficient" and is "irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates."[84] "Citizens' confidence in the electoral process" is certainly desirable, but it was defined too broadly by the state in *Randall* as "Vermonters . . . troubled by how

78. Landell Transcript, *supra* note 41, at IV-180.

79. *Id.* at VII-28.

80. Brief for Respondents-Cross-Petitioners-Intervenors at 12, Randall v. Sorrell, 126 S. Ct. 2479 (2006) (Nos. 04-1528, 04-1530, 04-1697).

81. Buckley v. Valeo, 424 U.S. 1, 57 n.64 (1976) ("If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication?").

82. *Id.* at 28.

83. *Id*. at 28 n.31.

84. FEC v. Nat'l Conservative PAC, 470 U.S. 480, 499 (1985).

money influences campaigns,"[85] "voters . . . extremely concerned about the influence of special interest in the political process,"[86] and "94 percent of Vermonters believe that too much money is spent in politics, and 76 percent believe that ending private contributions would 'reduce the power of special interests.'"[87] This is simply a description of the healthy skepticism that the American people have about politics and politicians and, if credited with the power to uphold low contribution limits, would justify abolition of private funding of campaigns generally.

If this description of corruption were extended to the "perception of corruption" and credited even without factual support, it would have no bounds. A subjective perception of corruption that has no basis in fact cannot be refuted.[88] "The confidence of citizens in their government is unlikely to be substantially enhanced so long as proponents of low contribution limits make unsupported claims about the corrupt nature of that government."[89] There was also evidence in *Randall* from a national poll that only eight percent of the public thinks that contributions as low as $1000 look like attempts to buy special favors and that over half the public does not perceive such an attempt from contributions below $50,000.[90]

The government must show, then, that it is only limiting contributions large enough to give rise to a legitimate suspicion of corruption, and there must be a bona fide suspicion that the large contributions are corrupt. Evidence of access, bundling, or an "erosion of public confidence" will not suffice.

B. CONTRIBUTION LIMITS MUST BE HIGH ENOUGH TO ALLOW CANDIDATES TO ENGAGE IN EFFECTIVE ADVOCACY.

In addition to furthering the interest in preventing real or apparent corruption, contribution limits must also allow candidates to mount effective campaigns. "Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'"[91] Thus, "[p]lacing limits on

85. Landell v. Sorrell, 118 F. Supp. 2d 459, 478 (D. Vt. 2000).

86. Landell v. Sorrell, 382 F.3d 91, 116 (2d Cir. 2005).

87. *Id.*

88. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067 n.113 (1996).

89. *Id*.

90. Landell Exhibits, *supra* note 36, at E-2742.

91. McConnell v. FEC, 540 U.S. 93, 135 (2003) (quoting Buckley v. Valeo, 424 U.S.

contributions which in turn limit expenditures plainly impairs freedom of expression,"[92] which would make the limits a "difference[] in kind," not just a "[d]istinction[] in degree."[93] Such a "system of suppressed political advocacy . . . would be unconstitutional under *Buckley*."[94]

Since the Court's concern is whether the limits could have a "severe impact on political dialogue,"[95] the focus must not be on how many individual contributions were over the limit, but rather the total amount of campaign *funds* that candidates would lose. The evidence in *Shrink* failed to show any impact on the total amount of funds available to campaigns beyond the dubious and singular example of one candidate, who could identify only one contributor who would have given him more than the limit. This evidence failed, since "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*."[96]

In contrast to *Shrink*, the evidence in *Randall* confirmed that Vermont campaigns would lose significant funds, over twenty-eight percent in 1998 for all state senate campaigns and over twenty-two percent in all state house campaigns.[97] The impact on statewide candidates since 1994 showed several candidates losing more than fifty percent of their funding, with impacts of thirty percent or more being quite common.[98] Such statistics dwarf the 5.1% of funds affected by the contribution limits in *Buckley*, which provided the basis

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1, 21 (1976)); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 395-96 (2000) (quoting the same). To determine whether the limits prevented candidates from mounting effective campaigns, the Second Circuit in *Landell* erroneously looked to whether the limits are "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." 382 F.3d at 104. This language, borrowed from *Shrink*, 528 U.S. at 397, is not the constitutional standard; instead, the standard looks to a candidate's "power to mount a campaign with all the dollars likely to be forthcoming." *Id*. When low contribution limits act as expenditure limits, candidates still must have sufficient funds to mount effective campaigns. Read otherwise, this would represent a complete abandonment of the First Amendment mandate that citizens "retain control over the quantity and range of debate on public issues in a political campaign," and that the government may not limit certain spending because it deems it "wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57.

92. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299 (1981).

93. *Buckley*, 424 U.S. at 30.

94. *Shrink*, 528 U.S. at 396. For analogous situations, compare Rosario v. Rockefeller, 410 U.S. 752 (1973) with Kusper v. Pontikes, 414 U.S. 51 (1973); also compare Hill v. Colorado, 530 U.S. 703 (2000) with Schenck v. Pro-Choice Network of Western N.Y., 519 U.S. 357 (1997).

95. *Buckley*, 424 U.S. at 21.

96. *Shrink*, 528 U.S. at 396.

97. Landell Exhibits, *supra* note 36, at E-976-78. These percentages are actually significant understatements of funds lost due to the expert's assumption that all non-filing candidates each raised $500, and that none of those candidates received contributions over the applicable $200 or $300 limit. *Id.* at E-946-47. Neither assumption is correct.

98. *Id.* at E-970-74.

for the Court's finding that "[t]here is no indication . . . that the contribution limitations . . . would have any dramatic[ally] adverse effect on the funding of campaigns and political associations."[99]

The *Randall* Court understood that the state's expert incorrectly analyzed the effect on all campaigns when the focus should be on competitive elections:

> [T]he critical question concerns not simply the *average* effect of contribution limits on fundraising but, more importantly, the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*. And information about *average* races, rather than *competitive* races, is only distantly related to that question, because competitive races are likely to be far more expensive than the average race.[100]

There are many races where campaigns are irrelevant to the outcome, such as where candidates run unopposed, against only token opposition, or in a district that overwhelmingly favors one party. Furthermore, minor party candidates rarely run to win but only to show the flag. Because of these factors, over one-third of victorious candidates for the Vermont House of Representatives in 1998 spent less than $500 in their campaigns,[101] and many more won with little candidate spending. As *Randall* taught, the correct model for evaluating the effect of campaign finance limits is to examine the fraction of races that are truly competitive. In competitive races, an effective campaign can contribute to the outcome and often determine which party controls legislative assemblies. Since competitive races are where effective campaigns are most often conducted and can have an impact, the relevant measure of contribution limits is their effect on competitive races.

The plaintiffs' expert in *Randall* found that twenty percent of both Senate and House campaigns in 1998 would have experienced a loss of over thirty percent of their contribution funds as a result of the contribution limit.[102] Furthermore, in analyzing the most competitive elections, those targeted by the Vermont Republican Party, the plaintiff's expert found that in fifteen of those seventeen 1998 House races, the Republican candidates would have lost between $550 and $3761 in raw dollars and between 8.7% and 54.8% in total funds as a result of the contribution limit.[103] Similarly, the fourteen targeted Senate candidates would have lost from $3150 to $6900 in raw dollars and thirteen percent to 43.7% of their total funds.[104] When the "single source" rule

99. *Buckley*, 424 U.S. at 21.

100. Randall v. Sorrell, 126 S. Ct. 2479, 2496 (2006) (citing N. ORNSTEIN, T. MANN & M. MALBIN, VITAL STATISTICS ON CONGRESS 2001-2002, at 89-98 (2002)).

101. Landell Exhibits, *supra* note 36, at E-0945.

102. *Id.* at E-2351.

103. *Id.* at E-2360-75.

104. *Id.* at E-2354-59.

is applied to Republican Party contributions, the candidates would have lost more funds.[105] These candidates would have been forced to forego substantial communications as a result.[106]

The amount of money needed to mount an effective campaign[107] varies widely.[108] Some candidates are well known; others have a substantial advantage due to their party affiliation. Some districts might consist of a single town with a single media market while others may have several towns or large rural areas with multiple media markets. Still others could be located in metropolitan areas where media ads are especially expensive.

Another key factor is the well-established principle of diminishing marginal returns. After an initial surge of very effective spending, each successive communication dollar is likely to reach and motivate fewer voters. Conversely, each successive voter will cost more to reach than the one before.[109] Reaching such additional voters is critical in the most competitive races. For this reason, mounting an effective campaign in a competitive race costs far more than less competitive ones.[110]

1. CONTRIBUTION LIMITS ARE INVALID IF THEY PREVENT EFFECTIVE ADVOCACY FOR A SIGNIFICANT NUMBER OF CANDIDATES.

To determine the validity of contribution limits, the test is not whether some candidates will still be able to raise substantial resources in spite of the candidate contribution limits, but whether some significant number of candidates will lose access to the resources they need to mount effective

105. *Id.* at E-2602.

106. Landell Transcripts, *supra* note 41, at II-81-95.

107. Generally, a candidate is able to mount an effective campaign when she is able to effectively communicate to at least seventy-five to eighty percent of potential voters the candidate's name, something about the candidate as a person, the candidate's positions on key issues, and some contrast of the candidate's positions with her opponent's. *Id.* at I-95-97, IV-80, II-71. This requires communicating a minimum of four to five messages at least four to five times to each potential voter, *Id* at. I-98-100, II-72. The candidate must also have sufficient funds to respond to an opponent. *Id.* at II-126. Many candidates do not run effective campaigns. *Id.* at I-95-96.

108. For an unknown challenger to run an effective campaign, it would cost $4000 to $6000 in the House and $30,000 to $50,000 in the Senate, *Id.* at IV-169, 171; an effective statewide gubernatorial race costs between $600,000 and $800,000. *Id.* at IV-81, I-39-40, IV-27-28.

109. *Id.* at III-163-64.

110. In addition, because of the low contribution limits, candidates will face increased competition from independent expenditures, which could drown out or at least dilute the candidate's own message. In fact, the "tight contribution limits" caused an "unprecedented amount" of independent expenditures in the 2000 election. Landell v. Sorrell, 382 F.3d 91, 176 (2d Cir. 2005) (Winter, J., dissenting).

campaigns. This is in accord with the Supreme Court's original concern that such limits could have a "severe impact on political dialogue."[111] A statute which reduces the sound of a significant number of candidates' voices would certainly have such a severe impact on dialogue regardless of how loudly other candidates might be able to speak.

That the impact on candidate speech need not be universal to be unconstitutional is also shown by *Buckley*'s treatment of spending limits. The Court explained that the "expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[112] Specifically, the "limitations on expenditures by campaign organizations . . . would have required restrictions in the scope of a number of past congressional and Presidential campaigns."[113] One of these, the limit on expenditures for the House of Representatives, had been exceeded by less than three percent of the major party candidates in either of the two most previous elections.[114]

Buckley also illustrated this point with its analogy to two primary voter eligibility cases. In the first case, the Supreme Court had upheld a New York law that limited party primary participation to voters who had registered for that party at least thrity days before the previous general election.[115] During its following term, the Court struck down an Illinois law that required primary voters to sign an affidavit stating that they had not voted in a different party's primary within twenty-three months.[116] Each state sought to justify its restraint on voter-party association as a means of protecting party primaries from being "raided" by voters whose allegiances actually lay with the opposing party. In many ways, the Illinois restriction was better tailored to the threat because it affected only those voters who had actually voted in a recent opposing primary and placed no burden at all on anyone who had not done so. In contrast, New York's rule required voters to register for the primary at least eight months beforehand, thereby requiring all unaffiliated voters to exercise considerable foresight. The critical difference was that "[t]he Illinois law, unlike that of New York thus 'lock[ed]' voters into a pre-existing party affiliation from one primary to the next, and the only way to break the 'lock' [was] to forgo voting in *any* primary for a period of almost two years."[117] According to *Buckley*'s analogy, a contribution limit that interfered with a donor's association without

111. Buckley v. Valeo, 424 U.S. 1, 21 (1976).
112. *Id.* at 19.
113. *Id.* at 20.
114. *Id.* at 20 n.3.
115. Rosario v. Rockefeller, 410 U.S. 752 (1973).
116. Kusper v. Pontikes, 414 U.S. 51 (1973).
117. *Id.* at 61.

preventing its ultimate purpose was like the New York law. Such laws may place greater burdens on association than are absolutely necessary—earlier registration or broader fund-raising techniques—but so long as the burdens can be overcome with proper diligence, these excesses remain permissible "distinctions in degree."[118] But where such restraints actually make it impossible for some citizens to exercise their constitutional rights, these burdens become impermissible "differences in kind," even if the class so deprived is a small one.[119]

This distinction is also reflected in other areas of First Amendment law. For example, in assessing the constitutionality of "floating buffer zones," in which would-be speakers and pamphleteers are prohibited from approaching women entering abortion clinics, the Supreme Court has found the size of the buffer zone to be a crucial factor. A fifteen-foot zone was deemed to be unconstitutional because it prevented protesters "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks."[120] However, an eight-foot zone was acceptable because it would "leave[] ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an eight-foot gap with ease."[121] The eight-foot zone did not materially alter the attempted communications while a fifteen-foot zone was outside the range of normal conversation.

The fifteen-foot buffer zone did not foreclose all speech near abortion clinics but only prevented attempts to address clinic patrons in a conversational tone. But it does not matter how much speech remains; what is important is whether or not there is protected speech that is prohibited. At fifteen feet, the buffer zone prevented a particular type of communication and thereby violated the Constitution; at eight feet it did not and therefore was permissible.

Similarly, candidates and contributors have a right to the First Amendment's protection of "the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention."[122] As with buffer zones and preregistration requirements, the State's interest supporting contribution limits is based on a concern that a nonexpressive harm will arise if the speech takes on certain quantifiable characteristics. As the buffer zone cases permitted restrictions on how close protestors could get only if they allowed the protestors to get close enough to communicate their desired message in a materially similar manner as intended,

118. Buckley v. Valeo, 424 U.S. 1, 30 (1976).
119. *Id.*
120. Schenck v. Pro-Choice Network of Western N. Y., 519 U.S. 357, 377 (1997).
121. Hill v. Colorado, 530 U.S. 703, 729 (2000).
122. *Id.* at 728 (internal quotation marks omitted).

and the pre-registration cases permitted restrictions on when voters could register only if they allowed the voters to vote in each election, so must contribution limits be required to allow candidates to communicate their message in a materially similar manner as intended.

Thus, the case law recognizes two categories of contribution limits. A high limit that is shown to have little impact on speech is permissible, but a lower limit shown to restrict a significant amount of candidate speech cannot be tolerated by the First Amendment. For example, the Tenth Circuit held that the enactment of higher contribution limits mooted a challenge to the lower limits they had replaced, which had been struck down by the district court, because the difference between the lower and higher limits was "too fundamental to preserve our jurisdiction."[123] The evidence in both *Buckley* and *Shrink* suggested that the significantly higher contribution limits challenged in those cases would have scant impact on the funding of political campaigns. *Buckley* addressed a limit which would have impacted only 5.1% of the funds contributed to congressional candidates in the prior election, an impact which the Court anticipated could be readily overcome by raising funds from a greater number of sources so that the limits would not "reduce the total amount of money potentially available to promote political expression."[124]

A quarter-century later, the Supreme Court again considered a contribution limit which raised the narrow issue of "whether the federal limits approved in *Buckley*, with or without adjustment for inflation, define the scope of permissible state limitations today."[125] Other than the candidate plaintiffs' allegation that he could campaign effectively only with larger contributions, of which he identified only one source, the only evidence regarding the impact of the limit at issue showed that it affected only about two percent of donors.[126] The Court narrowly held "*Buckley* to be authority for comparable state regulation, which need not be pegged to *Buckley*'s dollars."[127] In doing so, the Court pointed out that the impact of a contribution limit could not be measured merely by the dollar value of the limit, but by "showing that the limits were so low as to impede the ability of candidates to 'amass the resources necessary for effective advocacy.'"[128] Such a standard looks to a candidate's "power to mount a campaign with all the dollars likely to be forthcoming."[129]

123. Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000).

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

125. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 382 (2000).

126. *Id.* at 396.

127. *Id.* at 382.

128. *Id.* at 397 (citing *Buckley*, 424 U.S. at 21).

129. *Id.*

While the evidence before it failed to show any impact of the contribution limit beyond the dubious and singular example of the plaintiff, the Court reiterated that higher scrutiny is required where limits go beyond merely adjusting the non-expressive composition of an association and instead thwart their expressive purpose by precluding them from "effectively amplifying the voice of their adherents."[130] Where limits operate to defeat the associational purpose in such a fashion, then the campaign's association is rendered ineffective and its component contributions pointless.

It is likely that the limits reviewed in *Shrink* were located near the borderline of unconstitutionality and may well have been declared unconstitutional on a more complete record. The concurrence by Justice Breyer, though agreeing that the empirical evidence did not show an unconstitutional impact, emphasized that legislatures were not entitled to deference in determining whether a contribution limit was too low, and that "[t]he statutory limit here, $1,075 (or 378, 1976 dollars), is low enough to raise such a question."[131] Between these two concurring justices and the three dissenters, there was therefore a majority of the Supreme Court describing Missouri's contribution limit as constitutionally suspect.[132]

The record in *Randall* was replete with evidence that the contribution limits were too low to permit effective campaigning. George McNeill, a political consultant for hundreds of Vermont races, testified that many 1998 Vermont state senate and house candidates would not have been able to run effective campaigns under the limits.[133] Ninety percent of house races targeted by the Republican Party in 1998 and sevnty-nine percent of targeted 1998 senate races would have been unable to run effective campaigns.[134] The money

130. *Id.* at 387 (citing *Buckley*, 424 U.S. at 22).

131. *Id.* at 404 (Breyer, J., concurring).

132. Missouri allowed contributors to give a candidate $1075 in the primary campaign, and another $1075 in the general campaign, for a total of $2150 per cycle. Vermont only allows a single contribution of $400 for the entire cycle. *Shrink*, 528 U.S. at 382 (quoting Mo. Rev. Stat. § 130.032.1(1)).

133. Landell Transcripts, *supra* note 41, at II-73-101.

134. *Id*. at II-74-92, II-99-102. For instance, Gerald Morrissey would have lost one-quarter of his contribution revenue under the contribution limits and could not have effectively campaigned for state senate against an "entrenched senator." *Id*. at II-76. Neither could Dennis Delaney because Chittenden County is Vermont's largest county with much higher expenses. *Id*. at II-80-81. Ruth Harvie could not have effectively campaigned because advertising for mass media in her state senate district is expensive since there are a lot of "small, individual newspapers." *Id.* at II-84-85. Joseph Tully, a "relative newcomer," would have been unable to "get the name recognition and the issue recognition that he was able to get" before the limits. *Id.* at II-87-88. Patricia Welch, who had "been out of the political scene for approximately five to six years," would not have acquired the necessary name recognition. *Id.* at II_89. Harvey Smith could not have effectively campaigned because, in his district, he would have had to advertise in more than one newspaper and on two or three

lost could not have been regained by additional fundraising.[135] William Meub, who had run for governor, testified that the contribution limits would have prohibited him from amassing the resources he needed to mount an effective campaign and would have drained his time, making it even more difficult to campaign. "What you have done [by imposing the $400 limit] is you have required an increased amount of time at fundraising, at much lower levels, so that the candidate really can't be effectively out there campaigning . . . ."[136] Vermont's exceedingly low contribution limits created a "system of suppressed political advocacy," just as the legislature intended. Because candidates could not mount effective campaigns under the limits, Vermont's contribution limits were unconstitutional.

2. CONTRIBUTION LIMITS ARE UNCONSTITUTIONALLY LOW IF THEY INSULATE LEGISLATORS FROM CHALLENGE.

The *Randall* Court considered the question of whether Vermont's low limits "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage,"[137] and several of the justices in *Shrink* expressed concern that too low of a contribution limit could "significantly increase[] the reputation-related or media-related advantages of incumbency and thereby insulate[] legislators from effective electoral challenge."[138] This concern acknowledges that challengers will normally face the harshest impact of contribution limits due both to their greater need for funds to introduce themselves, and because of the difficulties in developing broad donor bases. Because of these phenomena, a contribution limit which significantly impacts challenger campaigns poses a severe threat not only to the First Amendment but also to the fundamental integrity of the electoral process.[139]

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radio stations. *Id.* at II-91. If $2000 had been removed from David Brown's campaign funds, he would have had to reduce advertising, "whether in the newspapers, TV or lawn signs . . . [or] walking banners," and "you couldn't have run an effective campaign against someone of [the incumbent's] stature with this kind of money." *Id.* at II-92.

135. *Id*. at II-74-92, II_99-102. Act 64's contribution limits also had a chilling effect on individuals deciding whether to run for office. McNeill testified that prospective candidates, after having Act 64 explained to them, told him, "I have decided not to do this. This is too complicated. I don't think I can raise the money to do this." *Id.* at II-65.

136. *Id.* at IV-36.

137. Randall v. Sorrell, 126 S. Ct. 2479, 2492 (2006).

138. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 404 (2000) (Breyer, J., concurring).

139. *Randall*, 126 S. Ct. at 2492 ("[C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.").

"[A]n incumbent usually begins the race with significant advantages."[140] The data compiled by both the state's and plaintiffs' experts in *Randall* showed that Vermont's limits would impose a greater burden on most challengers. In Vermont, challengers routinely outspend incumbents because they are more dependent on spending for developing their reputations with the voters.[141] According to the state's expert, the limits would have banned thirty-six percent of the funds raised in 1998 senate races by all non-incumbents compared with 20.2% of the funds raised by all incumbents.[142] Similarly, in 1998 house races, the limits would have prohibited 24.6% of all non-incumbent funds compared with 19.7% of all incumbent funds.[143] Seventy-five house challengers (out of 150 seats) would have lost $44,680, while the sixty-seven incumbents would have lost only $15,493.[144] This understates the full extent of the problem because the data examined all candidates, not just the candidates in competitive races. Furthermore, this disparate impact on challengers would have been compounded because challenger spending is more effective than incumbent spending on a dollar-for-dollar basis.[145] Non-incumbent candidates therefore would have been greatly disadvantaged under Vermont's limits.[146] The *Randall* Court considered the "critical question" to be "the ability of a candidate running against an incumbent officeholder to mount an effective challenge."[147] The Court held that the contribution limits statute "burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election."[148]

Incumbent legislators cannot be allowed to pass laws which debilitate their opponents' campaigns. While such insulation "cannot be inferred automatically," a legislature is not entitled to deference where competent evidence demonstrates such an effect.[149]

140. Buckley v. Valeo, 424 U.S. 1, 31 n.33 (1976).

141. Landell Exhibits, *supra* note 36, at E-2352; i*d.* at E-987-92.

142. *Id*. at E-0976.

143. *Id*. at E-0978.

144. *Id*. at E-2360.

145. Landell Transcripts, *supra* note 41, at X-81.

146. This is especially true for nontraditional candidates, such as "a woman, an openly gay candidate, an African American candidate." *Id.* at IV-174. As an openly gay candidate himself, Steve Howard had the "added burden" of proving himself to voters. *Id.* at IV-175.

147. Randall v. Sorrell, 126 S. Ct. 2479, 2496 (2006).

148. *Id.* at 2499.

149. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 404 (2000) (Breyer, J., concurring).

C. LIMITS ON CONTRIBUTIONS TO CANDIDATES FROM POLITICAL PARTIES CAN BE TOO LOW TO PASS HEIGHTENED SCRUTINY.

In *Colorado II*, the Supreme Court considered a federal law imposing robust limits on a party's coordinated spending for a candidate.[150] The Court applied heightened scrutiny, inquiring whether the restriction was "closely drawn" to further a "'sufficiently important' government interest in combating political corruption."[151] The Court held that the evidence demonstrated "beyond serious doubt" that contribution limits to candidates would be eroded if coordinated spending were unlimited,[152] since there was "substantial evidence" that candidates, contributors, and parties had tested the limits of the law.[153] Because political parties were found to be conduits for some contributors who sought to support a specific candidate through contributions to a party,[154] unlimited coordinated spending by a party could raise the risk of real or apparent corruption though circumvention of candidate contribution limits.[155] The Court based this conclusion on record evidence that the Democratic Party utilized a method known as "tallying," a system that "helps to connect donors to candidates through the accommodation of a party."[156] A former Democratic senator explained that "[d]onors would be told the money they contributed could be credited to any Senate candidate."[157] The Court also found that the Democratic Senatorial Campaign Committee had set up exclusive clubs for large contributors, who were invited to meet with senators and candidates.[158]

In *Randall*, however, the courts below found no evidence that candidate contribution limits were circumvented by donors who contribute to parties in order to benefit a specific candidate. There was no evidence of a tally system or of special clubs set up for large contributors. Furthermore, the Court noted that "the contribution limits at issue in *Colorado II* were far less problematic, for

150. FEC v. Colo. Republican Fed. Campaign Comm. ("*Colorado II*"), 533 U.S. 431 (2001). 2 U.S.C. § 441a(d)(3) allowed parties to spend in coordination with a congressional candidate the greater of $20,000 (adjusted for inflation, § 441a(c)) or two cents multiplied by the voting age population. In 2000, the Senate limits ranged from $67,560 to $1,636,438; the House limits ranged from $33,780 to $67,560. *Colorado II,* 533 U.S. at 439 n.3. Vermont's limits of $200-$400 are much lower.

151. *Colorado II*, 533 U.S. at 456 (citations and quotation marks omitted).

152. *Id.* at 457.

153. *Id*.

154. *Id*. at 451-52.

155. *Id*. at 456.

156. *Id.* at 459.

157. *Id*.

158. *Id.* at 461 n.25.

they were significantly higher" than the limits in Vermont.[159]

1. BECAUSE OF THE DIFFERENCES BETWEEN POLITICAL PARTIES AND OTHER CONTRIBUTORS, POLITICAL PARTIES ARE ENTITLED TO ROBUST CONTRIBUTION LIMITS TO THEIR CANDIDATES.

The notion that a political party would seek to corrupt its own candidates is contrary to the consensus among political scientists that political parties and their candidates have uniquely shared interests because (1) a party recruits and nominates its candidates and is their first and natural source of support and guidance; (2) a candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books; (3) a successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns; (4) a party's public image largely is defined by what candidates say and do; (5) a party's candidate is held accountable by voters for what his or her party says and does; and (6) a party succeeds or fails depending on whether its candidates succeed or fail. Individual and special-interest contributors do not share comparable ties with a candidate.

Furthermore, political parties have a different primary goal to achieve than other contributors: political parties contribute to their candidates in order to gain a majority, while others contribute to gain support for their public policy agenda. Left to their own devices, political parties tend to target their limited resources on challengers in competitive races. Non-ideological political action committees representing economic interests, however, tend to contribute to incumbents. The difference in contribution strategies is explained by their different motivations. Political parties pursue an "electoral" strategy, to gain or keep a governing majority, which is best achieved by supporting challengers (or vulnerable incumbents) in competitive races. Economic Political Action Committees (PACs), however, recognize that incumbency is the best predictor of election results, so contributing to incumbents helps maintain relationships with those most likely to affect the PAC's interests (and to avoid offending them by giving to challengers). Political scientists refer to this as a "legislative" strategy.[160] "Candidates without significant amounts of money are lost. Poorly

159. Randall v. Sorrell, 126 S. Ct. 2479, 2498 (2006) (noting that the party limits in *Colorado II* were at least $67,560 in coordinated spending and $5000 in direct cash contributions for U.S. Senate candidates and at least $33,780 in coordinated spending and $5000 in direct cash contributions for U.S. House candidates).

160. Landell Transcripts, *supra* note 41, at X-149-50; ANTHONY GIERZYNSKI, MONEY RULES: FINANCING ELECTIONS IN AMERICA 124-26 (1999); Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing,* 15 AM. REV. POL. 171, 173

funded candidates cannot build an effective campaign organization to contact voters on a personal level nor can they purchase direct access to citizens through the media."[161] Furthermore, "a larger role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns."[162]

In fact, "targeting" by political parties is good for democracy, promotes more competition, helps challengers overcome the natural advantages of incumbency, equalizes competition, decreases the influence of the wealthy, and gives the voters more choice.[163] Furthermore, "a larger role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns."[164]

2. LOW PARTY CONTRIBUTION LIMITS TO CANDIDATES CAN HAVE A SEVERE IMPACT ON POLITICAL DIALOGUE, PREVENTING CANDIDATES FROM MOUNTING EFFECTIVE CAMPAIGNS AND THUS CANNOT SURVIVE HEIGHTENED SCRUTINY.

Low limits on contributions from parties to candidates can also severely weaken the ability of candidates to raise the funds necessary for effective advocacy. The evidence in *Randall* established that many candidates would lose a large portion of their funds which would prevent candidates from engaging in effective advocacy. The Court found that "Vermont political parties (particularly the Republican Party) 'target' their contributions to candidates in competitive races, that those contributions represent a significant amount of total candidate funding in such races, and that the contribution limits will cut the parties' contributions to competitive races dramatically."[165] For instance, the limits would decrease contributions from parties by eighty-five to ninety-nine percent.[166] The Court credited the plaintiffs' expert testimony, which focused on the effect of competitive campaigns, remarking that the state's evidence focused on average races, which are only "distantly related" to the critical question of whether a challenger can mount an effective challenge against an incumbent officeholder.[167]

Parties also engage in other activities that are important to effective

(1994); *see also* MICHAEL J. MALBIN & THOMAS GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 145-47 (1998).

161. Gierzynski & Breaux, *supra* note 160, at 171.

162. *Id*. at 172.

163. Landell Transcripts, *supra* note 41, at VIII-139-41.

164. Gierzynski & Breaux, *supra* note 160, at 172.

165. Randall v. Sorrell, 126 S. Ct. 2479, 2495 (2006).

166. *Id.*

167. *Id.* at 2496.

campaigning by candidates. During the 1998 election cycle, the Vermont Republican Party spent $200,000 to $300,000 on get-out-the-vote and absentee-ballot programs which were often coordinated with particular candidates.[168] Because of Vermont's broad "related expenditure" provision, these activities were treated as contributions and would have to be done by the candidates themselves or by the party completely independently, which would be less effective. The *Randall* Court found that this provision would "severely limit the ability of a party to assist its candidates' campaigns by engaging in coordinated spending on advertising, candidate events, voter lists, mass mailings, even yard signs."[169] The overall effect of Vermont's statute on parties would be to "reduce the voice of political parties in Vermont to a whisper."[170]

Thus, if candidates will lose substantial campaign funds under limits on contributions from parties, restricting their ability to amass the necessary resources for effective advocacy, the party contribution limits are too low to survive constitutional scrutiny.

3. LOW CONTRIBUTION LIMITS FROM PARTIES TO THEIR CANDIDATES ALSO UNDERMINE THE PARTIES' ABILITY TO ENGAGE IN EFFECTIVE ADVOCACY, THE PURPOSE FOR SUCH POLITICAL ASSOCIATION, WHICH MEANS THAT THEY ARE UNCONSTITUTIONAL.

The purpose of parties is frustrated by low contribution limits, which unconstitutionally preclude the parties "from effectively amplifying the voice of their adherents"[171] and thereby thwart the purpose of the association of "enabl[ing] like-minded persons to pool their resources in furtherance of common political goals."[172]

a. POLITICAL PARTIES ARE POLITICAL ASSOCIATIONS FORMED TO ENGAGE IN EFFECTIVE ADVOCACY.

Political parties play a constitutionally significant role in American political life:

> It is this ability and propensity of our citizenry to unite and pursue

168. Landell Transcripts *supra* note 41, at I-194-95.

169. *Randall,* 126 S. Ct. at 2497.

170. *Id.* at 2498.

171. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000) (citing Buckley v. Valeo, 424 U.S. 1, 22 (1976)).

172. *Buckley*, 424 U.S. at 22; *see also* FEC v. Beaumont, 539 U.S. 146, 161 (2003) (noting that the level of scrutiny applied to "political financial restrictions" is "based on the importance of the political activity at issue to effective speech or political association").

> desired goals that form the foundation of American political thought. Indeed, the very existence of this nation stands as a testament to the efficacy of political organization. The bundle of freedoms bestowed by the first amendment, often perceived as safeguarding the individual from the will of the group, also serves to protect the group against the tyranny of the state. Having just emerged from an impassioned struggle for independence, the framers appreciated that effective political change could best be achieved through collective activities, and further recognized that the right to associate for political purposes was a natural concomitant of the right to espouse political views.[173]

Moreover, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself."[174]

The *Randall* Court disapproved of Vermont's low party contribution limits, in part, because they would "discourage those who wish to contribute small amounts of money to a party, amounts that easily comply with individual contribution limits."[175] The Court explained that the limits would prevent party contributions to candidates that were pooled from individuals who do not know individual legislative candidates but wish to support candidates who would advance Republican interests.[176] The Court also explained that the statute would prevent a party from pooling one-dollar contributions given by six thousand individuals in Vermont and giving $2000 to three of its candidates in races that could determine control of the state house.[177] The Court found such a result unacceptable because it would "severely inhibit collective political activity by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate."[178]

b. LOW CONTRIBUTION LIMITS ON POLITICAL PARTIES PREVENT THEM FROM ENGAGING IN EFFECTIVE POLITICAL ADVOCACY.

The plaintiffs' expert in *Randall*, Professor Gerald Pomper, testified that

173. Republican Party of Conn. v. Tashjian, 770 F.2d 265, 267 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986); *see also* Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214 (1989).

174. Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

175. *Randall,* 126 S. Ct. at 2497.

176. *Id.*

177. *Id.*

178. *Id.*

parties "do a kind of triage."[179] Parties give little to candidates who are sure to win or lose; instead, they "concentrate on the ones which are closely competitive."[180] A low limit on contributions to candidates by parties, coupled with treating much traditional party voter registration and get-out-the-vote activity as in-kind contributions, "severely weakens the political parties . . . [because] it severs any relationship . . . between the political parties and the candidates, and worsens the electoral process in the state."[181] In sum, Pomper concluded that the Vermont statute essentially abolished political parties from Vermont and subverted basic principles of democracy.[182]

Furthermore, low contribution limits frustrate the electoral goals of political parties by making it more difficult for them to help challengers. State expert Gierzynski testified that when political parties are unfettered by low contribution limits they tend to focus their resources by giving large amounts to challengers in competitive races.[183] Because of this, campaign finance laws should have higher contribution limits from political parties than from other contributors.[184]

c. LIMITS ON POLITICAL PARTY CONTRIBUTIONS TO ITS CANDIDATES IMPLICATE POLITICAL PARTY SPEECH, NOT JUST ASSOCIATION, WHICH REQUIRES GREATER JUSTIFICATION.

A political party's financial support for its candidates is not the same thing as a "contribution" made by an individual or a political committee. A political party's spending "bears little resemblance to the contributions discussed in *Buckley*."[185] Furthermore, courts "should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving . . . restrictions on political party spending."[186] Limits on a party's financial support of its own candidates operate like expenditure limits because, "in the context of an election, a party speaks in large part through its identified candidates;

179. Landell Transcripts *supra* note 41, at VIII-139.

180. *Id.* at VIII-140.

181. *Id.* at VIII-103.

182. *Id.* at VIII-104, VIII-106-07, VIII-119-20, VIII-132-33, VIII-140-41.

183. *See* Landell Exhibits, *supra* note 36, at E-2748.

184. GIERZYNSKI, *supra* note 160, at 121-26; Gierzynski & Breaux, *supra* note 160, at 171-89.

185. Colo. Republican Fed. Campaign Comm. v. FEC ("*Colorado I*"), 518 U.S. 604, 629 (1996) (Kennedy, J., concurring in the judgment and dissenting in part); *see id.* at 628-29 ("Political party spending 'in cooperation, consultation, or concert with' a candidate does not fit within our description of 'contributions' in *Buckley*.").

186. *Id*. at 629.

candidates, in significant measure, speak for their political parties."[187] Thus, in contrast to limits on individual or PAC contributions, which "bear 'more heavily on the associational right than on freedom to speak'" and which normally "'entail[] only a marginal restriction'" on a contributor's speech, "a limit upon the amount a [political] party can spend in coordination with its candidates certainly entails more than a 'marginal restriction' upon the party's free speech."[188]

In *California Democratic Party v. Jones*, the Supreme Court confirmed that a political party's association with its own candidates enjoys heightened protection because a party's nominee "becomes the party's ambassador to the general public in winning it over to the party's views."[189] In *Daggett v. Commission on Governmental Ethics and Election Practices*, the First Circuit upheld general $500 per election cycle contribution limits, but in dicta opined that they *might* be constitutional as applied to parties:

> Although the district court dismissed, due to lack of standing, the challenge on contributions from political parties, we see no reason to parse political parties from the more general "association" and "committee" referenced by the statute. . . . That is not to say, however, that political parties might not later mount a challenge to the limits once the effect of their application to parties becomes clear.[190]

Thus, candidate contribution limits, as applied to political parties, require a more substantial justification than is required for candidate contributions generally.

Even the state's expert witness in *Randall*, Anthony Gierzynski, testified that his empirical studies reveal that when political parties are unfettered by low contribution limits they tend to focus their resources by giving large amounts to challengers in competitive races. On the other hand, non-ideological PACs—that is, those representing economic interests—tend to contribute to incumbents.[191] Because of this, Gierzynski testified that his research indicates that campaign finance laws ought to have higher contribution limits from political parties than from other contributors.[192] Additionally, "[m]ost political scientists who study American politics believe that the U.S.

187. FEC v. Colo. Republican Fed. Campaign Comm., 213 F.3d 1221, 1227 (10th Cir. 2000), *rev'd*, 533 U.S. 431 (2001).

188. *Id*. (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388 (2000) and Buckley v. Valeo, 424 U.S. 1, 20 (1976)).

189. 530 U.S. 567, 574-75 (2000).

190. 205 F.3d 445, 472 (1st Cir. 2000).

191. *See* Landell Transcripts *supra* note 41, at X-150-151.

192. *Id.* at X-151-52; *see also* Landell Exhibits, *supra* note 36, at E-2748; Gierzynski & Breaux, *supra* note 160, at 171-189 ("[I]ncreasing the party role would reduce the gap between incumbent revenues and challenger revenues.").

political system is a pluralistic democracy with a few majoritarian institutions (namely, elections and political parties)."[193]

III. THE CURRENT AND FUTURE STATUS OF CONTRIBUTION LIMITS

Randall explained that contribution limits are unconstitutional if they are set too low. In that case, the Supreme Court adhered to its prior contribution limits jurisprudence that was first established in *Buckley*. The *Randall* Court reiterated *Buckley*'s holding that contribution limits are permissible only if the government can show that the limits are closely drawn to further the sufficiently important interest of preventing real or apparent corruption.[194] The Court followed its traditional intermediate scrutiny contribution limits analysis, setting out the following five factors that led to its decision that Vermont's contribution limits were unconstitutionally low: (1) the limits significantly reduced the funds available to challengers to mount competitive campaigns, (2) the limits on party contributions to candidates were too low, (3) the statute's inclusion of volunteer services under its related expenditures provision added to the lack of tailoring, (4) the contribution limits were not adjusted for inflation, and (5) the record did not show that corruption was such a serious problem in Vermont that it could warrant such low limits.[195] Because the Court has affirmed that there is a lower boundary for contribution limits, governments must be prepared to show that limits they enact further the anticorruption interest and that the limits are high enough to allow candidates to campaign competitively and effectively. The limits on party contributions must also be high enough to avoid infringing on the constitutional rights of the parties, their members, and their candidates and generally should be much more robust than the limits on contributions from other donors.

Moreover, both *Randall* and *Shrink* leave doubt as to whether contribution limits can ever satisfy proper First Amendment scrutiny. Justices Thomas and Scalia made clear in their *Randall* concurrence that they would subject all contribution limits to strict scrutiny and would overrule *Buckley*, given the

193. GIERZYNSKI, *supra* note 160, at 11-12 (2000); *see also id.* at 121-22, 124-26 ("[C]ampaign finance regulations should not restrict money in campaigns but should manage the money by encouraging it to flow to political parties because they enhance political equality"); MALBIN & GAIS, *supra* note 160, at 145-158 ("Political parties . . . consistently gave disproportionately to candidates who were in close races, especially challengers and open-seat candidates. Party spending, therefore, seems to be an important vehicle for satisfying one of the two major goals of campaign finance reform: encouraging electoral competition.").

194. Randall v. Sorrell, 126 S. Ct. 2479, 2491 (2006).

195. *Id.* at 2495-99.

opportunity.[196] Justice Kennedy expressed his continuing discontent with the campaign finance jurisprudence of the Court, only concurring, rather than joining, in the judgment of the Court because of his "skepticism regarding that system and its operation."[197] Although Justice Alito did not join with Justices Thomas, Scalia, or Kennedy, he did write his own concurring opinion. He wrote to clarify that, in his view, the state had not genuinely asked the Court to consider overturning *Buckley*, but that it had instead mentioned the issue "only as a backup argument, an afterthought almost."[198] In essence, Justice Alito left open the question of overturning *Buckley*'s holding regarding contribution limits if the Court should be asked to do so in the future. Finally, although Chief Justice Roberts joined Justice Breyer's opinion, that opinion relied on the precedent of *Buckley* for its holding. Because the litigants had not asked the Court to consider reversing *Buckley*'s decision regarding contribution limits, that issue was not before the Court. Thus, Roberts could join, with clear conscience, four other justices in a future case striking down contribution limits or at least subjecting them to strict scrutiny. Likewise, all three dissenters in *Shrink* suggested that contribution limits may be inherently unconstitutional.[199] In response, the *Shrink* majority stated only that the parties had not asked them to reverse *Buckley*.[200]

Thus, the future of contribution limits is uncertain. For now, however, contribution limits must be high enough to allow candidates to effectively campaign. In addition, they must be high enough to protect the associational and speech rights of parties and the government must be able to show that the limits further a bona fide interest in preventing real or apparent corruption.

196. *Id.* at 2502 (Thomas, J., concurring in the judgment).

197. *Id.* at 2501 (Kennedy, J., concurring in the judgment).

198. *Id.* at 2500 (Alito, J., concurring in part and concurring in the judgment).

199. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409-10 (2000) (Kennedy, J., dissenting); *id.* at 410 (Thomas, J., dissenting).

200. *Id.* at 397.