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Randall v. Sorrell: Campaign-Finance Regulation and the First Amendment as a Facilitator of Democracy

Rachel Gage*

INTRODUCTION

In the constitutional analysis of campaign-finance regulation, the starting point makes all the difference. The United States Supreme Court, in the seminal case *Buckley v. Valeo*,1 approached its analysis from the starting point that the individual right to free speech is absolute, and that the First Amendment requires protection of this right at the expense of many societal interests served by campaign-finance regulation.2 Subsequent cases, particularly *Nixon v. Shrink Missouri Government PAC*3 and *McConnell v. Federal Election Commission*,4 adhered to this view, but struggled to reconcile it with the strength of the societal interests served by campaign-finance regulation. This struggle manifested itself in the Court’s difficulty in defining the appropriate level of scrutiny applicable to campaign contribution limits.

After the Court decided *McConnell* in 2003, commentators speculated that the next campaign-finance case would finish the process of undermining *Buckley’s* uncompromising protection of individual free speech.5 For that reason, they closely watched *Randall v. Sorrell*,6 an

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5. See, e.g., Richard L. Hasen, *Buckley is Dead, Long Live Buckley*, 153 U. PA. L. REV. 31, 57 (2004) (arguing that the *McConnell* Court merely paid disingenuous lip-service to *Buckley* and was actually attempting to transition away from *Buckley’s* anti-corruption rationale for campaign finance regulation in order to take into account a wider variety of societal interests). But see Daniel H. Lowenstein, *BCRA and McConnell in Perspective*, 3 ELEC. L.J. 272, 282 (countering Hasen with the argument that *McConnell* actually strengthened *Buckley*).
action challenging the constitutionality of a Vermont campaign-finance statute. On June 26, 2006, the Court issued a three-vote plurality opinion, authored by Justice Stephen Breyer, that asserted *Buckley*’s continued vitality.\(^7\) The opinion utilized *Buckley*’s basic structure of bifurcation of the constitutional analysis of campaign-finance regulation into two tests: one for contribution limits and one for expenditure limits. Within that structure, however, Justice Breyer began the process of fundamentally changing the role of the First Amendment in campaign-finance cases.

Justice Breyer views the First Amendment—indeed the Constitution as a whole—as “centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government[.]”\(^8\) In authoring the plurality opinion in *Randall*, Justice Breyer began from a different starting point than did the *Buckley* Court. He focused on what he sees as a goal of the First Amendment apart from the protection of individual speech—the preservation of citizen participation in democracy.\(^9\) Whereas the *Buckley* Court took the view that only corruption or apparent corruption could justify a restriction on individual speech via campaign contributions, the *Randall* plurality went beyond the balancing of individual free-speech rights against an interest in preventing corruption.\(^10\) Justice Breyer discussed not only an individual First Amendment right to speech and association in making campaign contributions, but also a societal interest, embodied in the First Amendment, in protecting the integrity of the political process. He was thus able to use *Buckley* to expand First Amendment considerations in campaign-finance regulation while still adhering to precedent, thereby

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7. *Id.* at 2485 (characterizing *Buckley* as “well-established precedent”).


9. *Id.* at 39 (advocating “the importance of reading the First Amendment not in isolation but as seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions”).

10. Because the plurality opinion recognized other possible justifications for campaign finance regulation beyond preventing corruption, *Randall* was immediately considered good news for campaign finance reformers, despite the fact that the Vermont law was struck down. See, e.g., Editorial, *Campaign Finance Bellwether: The Supreme Court’s Vermont Ruling Seems Like a Defeat for Reformers. In the Long Run It May Not Be*, WASH. POST, July 3, 2006 at A20.
gaining the votes of Chief Justice John Roberts and Justice Samuel Alito, the two newest justices on the Court.\textsuperscript{11}

In recognizing the merits of Justice Breyer’s broader conception of the First Amendment implications of campaign-finance regulation, this Note finds the approach he takes in \textit{Randall} to be unsustainable. Its lynchpin is an amorphous reliance on “careful, precise, and independent judicial review.”\textsuperscript{12} This independent review does not sufficiently protect individual rights of free expression and association. With no accompanying rule or standard, this review is not guided by any fundamental measure of protection for the individual. Justice Breyer argues that the First Amendment functions primarily to protect our democratic system of government, especially when the regulation at issue directly implicates that system.\textsuperscript{13} But assurances for individuals must be an element of that protection in every realm of legislative action, including campaign-finance regulation.

Part I of this Note traces the Supreme Court’s approach to analyzing campaign-finance regulation over the past three decades, beginning with \textit{Buckley}. This section pays special attention to the role of the First Amendment in the Court’s campaign-finance cases, and demonstrates how a struggle to define the appropriate level of scrutiny cleared the way for \textit{Randall}. Part II discusses \textit{Randall v. Sorrell} and its relationship to prior campaign-finance jurisprudence. Part III.A introduces \textit{Randall} as the beginning of a paradigm shift and examines Justice Breyer’s view that both the First Amendment and campaign-finance regulation advance the goal of protecting the integrity of the political process, and should only be seen as competing interests when such regulation fails to serve that goal. Part III.B asks whether Justice Breyer’s approach to campaign-finance is viable, both on its own merits, as well as in relation to the positions of the other justices on the Court. Finally, Part III.C highlights the major difficulty with Justice Breyer’s approach: the central and unchecked role of independent judicial review.

\textsuperscript{11} John Roberts was sworn in as Chief Justice of the United States on September 29, 2005, replacing the late Chief Justice William Rehnquist. Samuel Alito was sworn in as Associate Justice on January 31, 2006, replacing retiring Associate Justice Sandra Day O’Connor.


\textsuperscript{13} See generally BREYER, supra note 8.
I. PRE-RANDALL CAMPAIGN-FINANCE JURISPRUDENCE

A. Buckley v. Valeo

The Supreme Court established its modern approach to analyzing the constitutionality of campaign-finance regulation in *Buckley v. Valeo*.\(^{14}\) The opinion has been criticized, questioned, and followed with varying degrees of faithfulness for the past thirty years.\(^{15}\) *Buckley* was a per curiam decision that has been criticized as hastily decided.\(^{16}\) Despite calls to replace it,\(^{17}\) the Court has continued to use *Buckley* as the basis of decision in campaign-finance reform cases.

\(^{14}\) 424 U.S. 1 (1976).


Buckley arose out of a challenge to the Federal Election Campaign Act (FECA), which was first passed in 1971 and then amended in 1974 to include limits on campaign contributions. FECA imposed limits on expenditures by and for candidates for federal office, as well as on individual and group contributions to candidates, party committees, and PACs. The Court struck down the Act's expenditure limits and upheld its contribution limits, finding each type of restriction to have different First Amendment implications.

The government presented three interests to justify FECA's contribution and expenditure limits: (1) the prevention of corruption or the appearance of corruption; (2) the equalization of the relative ability of all citizens to affect the outcome of elections; and, (3) the opening of the political system to more candidates by controlling the cost of campaigns. The Court soundly rejected the second and third proffered interests, famously declaring that "the 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.

The court did recognize the corruption rationale as a potentially compelling reason to restrict speech, but found it insufficient to justify FECA's expenditure limits. Expenditure limits were viewed as "heavily burden[ing] core First Amendment expression," and were found not to

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18. David Schultz, Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws, 18 REV. LITIG. 85, 91-92 (1999). FECA was originally enacted in response to the Watergate scandal and to reported financial abuses in the 1972 Presidential campaign. Id.

20. Id. at 56-57.
21. Id. at 26-27.
22. Id. at 44 ("[T]he Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations." (alteration added)).
23. Id. at 25. This was advanced as the "primary interest" served by FECA. Id.
24. Id. at 25-26.
25. Id. at 26. The second and third justifications were advanced as "ancillary interests." Id. at 25.
26. Id. at 48-49.
27. Id. at 26.
28. Id. at 47-48 (alteration added).
be directly related to the prevention of corruption. The expenditure limits were therefore invalidated.

Unlike campaign expenditures, however, the Court did not view campaign contributions as directly analogous to free political expression by the contributor. Because "the transformation of contributions into political debate involves speech by someone other than the contributor," contribution limits do not directly burden expressive rights. Such limits do affect associational rights, but to a permissible degree: when an individual makes a contribution subject to a statutory limit, she still expresses her support for that candidate, and this expression is limited only in its ability to convey the intensity of her support. FECA's contribution limit was also found to be justified by the government's asserted interest in preventing corruption or the appearance of corruption. In arriving at this conclusion, the Court asked whether the limit was so low as to "prevent candidates and political committees from amassing the resources necessary for effective advocacy," and found that it was not.

The disparate treatment of contribution and expenditure limits is Buckley's most lasting and controversial feature. It has been disparaged for both its practical effects and its constitutional reasoning. Justice Kennedy has criticized the Buckley dichotomy for causing

29. Id.
30. Id. at 48.
31. Id. at 21.
32. Id.
33. Id. Contribution limits place only a "marginal restriction" on the contributor's ability to speak on behalf of and associate with political candidates. Id.
34. Id. at 25-26.
35. Id. at 21. The Court declined to scrutinize the dollar amount of the contribution limits, stating that, "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind.'" Id. at 30 (alteration in original) (quoting Buckley v. Valeo, 519 F.2d 821, 842 (D.C. Cir. 1975)).
36. Id. at 21 ("There is no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.") (citation omitted).
37. See, e.g., Kathleen Sullivan, Political Money and Freedom of Speech, 30 U.C. DAVIS L. REV. 663, 666-667 (1997) (arguing that contribution and expenditure limitations should be treated alike by the Court).
He has noted that skyrocketing campaign expenses, in the absence of a statutory limit on expenditures, result in an endless need for more contributions. Since the amount of individual contributions is limited, candidates are forced to find "elaborate methods of avoiding contribution limits," which turns political speech into "covert speech." Justice Thomas has attacked the constitutional foundation for the dichotomy, pointing out that just like an expenditure, "a contribution, by amplifying the voice of the candidate, helps to ensure the dissemination of the messages that the contributor wishes to convey." Thus, according to Justice Thomas, limits on contributions are as unconstitutional as impinging the individual right to free speech.

The *Buckley* Court was ambiguous as to the standard of review it applied in upholding FECA's individual contribution limit. It described the standard as "rigorous" and also stated that any campaign-finance reform measures must be subjected to the "exacting scrutiny required by the First Amendment." The Court cited First Amendment cases applying strict scrutiny to laws burdening associational rights, but failed to use the precise language normally invoked by a strict scrutiny

38. See Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 407 (2000) (Kennedy, J., dissenting) ("Buckley, which by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures) created a misshapen system" where supply of political money is limited but demand is unlimited, causing politicians to seek loopholes.).

39. See *id.*

40. *Id.* at 406.

41. *Id.*

42. *Id.* at 415 (Thomas, J., dissenting).

43. Buckley v. Valeo, 424 U.S. 1, 29 (1976) ("We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1000 contribution ceiling.").

44. *Id.* at 16.

45. See, e.g., *id.* at 25 ("In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."" (quoting NAACP v. Alabama, 357 U.S. 449, 460-461 (1958))).
One commentator has observed that "[t]he decision in Buckley may be viewed as a case in which the strictest First Amendment review was applied . . . . The fact that contribution limitations were upheld may simply mean that those restrictions alone were found to be necessary to further a compelling government interest." The more common view, and the one later taken by the Court in Nixon v. Shrink Missouri Government PAC and McConnell v. FEC, is that the Buckley Court applied a more deferential test to contribution limits than to expenditure limits.

B. Shrink Missouri and McConnell: Deference Replaces Exacting Scrutiny

Nixon v. Shrink Missouri Government PAC and McConnell v. FEC emphasized Buckley's expenditure/contribution dichotomy, which ultimately led the Court to explicitly lower the level of scrutiny it applied to contribution limits. These cases were surprising to those who, after Buckley, wondered "whether, as experience . . . accumulates, the Court can continue to sustain the distinction it drew in Buckley." Those skeptical of the distinction were wrong about its staying power, but right about the fact that the distinction "lies at the heart of the . . . uncertainty surrounding many of the constitutional issues left unresolved by

46. The Court characterized its standard of review respecting contribution limits as "rigorous" and the government interests served by the legislation "weighty." Id. at 29.


50. 540 U.S. 93.

51. See Lowenstein, supra note 5, at 281.

While both cases purported to follow *Buckley*, they each resolved *Buckley*’s ambiguity regarding the appropriate standard of review for contribution limits by significantly relaxing that standard.

*Shrink* was a challenge to a Missouri statute that set contribution limits for campaigns at amounts ranging from $250 to $1000, based on the specific state office sought and the number of constituents affected by the race. The Eighth Circuit Court of Appeals invalidated the law, citing *Buckley*’s “strict scrutiny standard of review” and holding that “Missouri was bound to demonstrate ‘that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest.’” The Supreme Court, however, overturned the Eighth Circuit. It too purported to follow *Buckley*, reiterating that in order to strike down a contribution restriction, it would require a “showing that the limits were so low as to impede the ability of candidates to ‘amass the resources necessary for effective advocacy.’” In articulating its construction of the *Buckley* test, however, the Court actually set out a far more lenient test for the constitutional validity of contribution limits: “We asked, in other words, whether the contribution limitation was 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.”

As Professor Richard Hasen has noted, “[i]n an era of faxes, web pages, and e-mails, it is hard to imagine any contribution limit that would fail this test of constitutionality.” The Court justified its clarification of the *Buckley* test by explaining, “[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley* per curiam opinion.”

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53. *Id.*
54. *Shrink*, 528 U.S. at 382 (citing MO. REV. STAT. § 130.032.1 (1998 Cum. Supp.)). The amounts were indexed for inflation, to be adjusted every other year according to the Consumer Price Index. *Id.* at 382-383.
55. *Id.* at 384 (quoting *Shrink* Mo. Gov’t PAC v. Adams, 161 F.3d 519, 521 (8th Cir. 1998)).
56. *Id.* (quoting *Adams*, 161 F.3d at 521).
57. *Id.* at 397 (quoting *Buckley* v. Valeo, 424 U.S. 1, 21 (1976)).
58. *Id.* at 397 (emphasis added).
60. *Shrink*, 528 U.S. at 386 (alteration added).
One commentator has offered this view of the *Shrink* Court’s choice of scrutiny, noting that the Missouri law should have failed under strict scrutiny, but that consistency with *Buckley* pointed to upholding it:

Application of *Buckley* in light of the Court’s usual treatment of strict scrutiny thus presented the *Shrink* Court with a dilemma—should it openly acknowledge that *Buckley* meant to apply a lower standard of scrutiny than its rhetoric indicated, or should it acknowledge strict scrutiny as the appropriate standard but find a way to justify upholding the law?\(^61\)

The Court’s struggle with this dilemma was evident when compared to the Eighth Circuit’s holding below. In its application of what it understood to be the *Buckley* level of scrutiny, the appellate court held that Missouri had not met its evidentiary burden of showing that there were real and actual instances of corruption that justified the specific contribution limits that its law imposed.\(^62\) The Supreme Court, however, was unconcerned with the lack of evidence to back up the law, stating, “\[t\]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.”\(^63\) This casual approach to Missouri’s evidentiary burden stemmed from the Court’s loose construction of the *Buckley* test. The Court claimed that evidence of actual corruption had only been required to support expenditure limits, but had never been required to support contribution limits.\(^64\) It re-emphasized the *Buckley* dichotomy, insisting

\(^{62}\) *Shrink*, 528 U.S. at 384-385. The evidence Missouri presented was indeed scant. It included an affidavit from a state senator saying that “large contributions have ‘the real potential to buy votes,’” newspaper articles alleging impropriety resulting from large campaign contributions, and the passage of a voter initiative enacting contribution limits, offered as evidence that voters perceived campaign contributors to have undue influence on the political process. *Id.* at 393 (quoting Shrink Mo. Gov’t PAC v. Adams, 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998)).
\(^{63}\) *Id.* at 395 (alteration added).
\(^{64}\) *Id.* at 392. The challengers cited Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996), to support their charge that the Court had added to the
"[w]e have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." Here, the Shrink Court explicitly admitted what the Buckley Court would not: contribution limits receive lower scrutiny than expenditure limits. Instead of undertaking a strict balancing of the individual First Amendment right to speak via political contributions against the compelling governmental interest in preventing corruption, the Court deferred to the Missouri legislature’s determination of what type of restriction was necessary to prevent corruption. Such deference is associated with intermediate scrutiny, not strict scrutiny.

The Court confirmed its newfound deference to legislative determinations of the need for contribution limits in *McConnell v. FEC*.

In *McConnell*, the Court was especially deferential to Congress’s determinations in crafting the Bipartisan Campaign Reform Act ("BCRA") of 2002, known as the McCain-Feingold Act. The Court upheld almost all the provisions of the Act, which regulated soft money, limited corporate and political party spending on issue ads, and raised FECA’s limits on individual contributions. The Court once again relied on the government’s asserted interest in preventing corruption and its appearance. In explaining its approach to analyzing BCRA, the Court included explicit language about legislative deference: "The less rigorous standard of review we have applied to contribution limits (Buckley’s ‘closely drawn’ scrutiny) shows proper deference to Congress’s ability to

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*Buckley* test a strict evidentiary requirement to show that corruption was "real, not merely conjectural." Shrink, 528 U.S. at 392. The Court responded: "Although the principal opinion in that case charged the Government with failure to show a real risk of corruption, the issue in question was limits on independent expenditures by political parties, which the principal opinion expressly distinguished from contribution limits . . . ." *Id.* (internal citation omitted).

65. *Id.* at 387 (alteration added) (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986)).

66. Wells, *supra* note 61, at 165 ("Shrink’s review of the state’s evidence reflects the phenomenon of deference associated with an untethered balancing test like intermediate scrutiny.").


70. *See id.* at 143.
weigh competing constitutional interests in an area in which it enjoys particular expertise."\textsuperscript{71}

C. The First Amendment and Pre-Randall Campaign-Finance Jurisprudence

The fluctuating level of scrutiny the Court has applied to campaign-finance regulations is attributable, at least in part, to the uncertain role of the First Amendment in these cases. The \textit{Buckley} opinion is the seed of the Court's ambiguity in this area. One commentator has argued that "\textit{Buckley} attempted to find a middle road between two alternatives—[that of] regulating campaign-finance activity like ordinary economic activity and that of protecting it as core First Amendment speech."\textsuperscript{72} Despite the tension between those alternatives, the \textit{Buckley} Court created a close link between campaign-finance and political speech. It declared that FECA's "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities,"\textsuperscript{73} and stressed that although a contribution is "a general expression of support for the candidate and his views"\textsuperscript{74} rather than a specific message, it is still political speech meriting First Amendment protection.\textsuperscript{75} Highlighting the divide over this fundamental issue, Justice White wrote in dissent that FECA's limitations on contributions and expenditures did not control the content of political speech, either directly or indirectly.\textsuperscript{76} Rather, he argued that the Act regulated the giving and spending of money—acts that while having some First Amendment significance, are not speech themselves.\textsuperscript{77} The debate over the degree to which campaign contributions are entitled to First

\textsuperscript{71} Id. at 137.


\textsuperscript{73} Buckley v. Valeo, 424 U.S. 1, 14 (1976).

\textsuperscript{74} Id. at 21.

\textsuperscript{75} Id. at 16 ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." (alteration added)).

\textsuperscript{76} Id. at 260 (White, J., dissenting).

\textsuperscript{77} Id. (White, J., dissenting).
Amendment protection as individual speech continued on the Shrink Court, as demonstrated by concurring and dissenting opinions by Justices Stevens and Thomas. Justice Stevens asserted, “[m]oney is property; it is not speech.”78 He characterized campaign contributions and expenditures as “speech by proxy,”79 stating that there are property rights affected by campaign-finance regulation that merit “significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases.”80 Justice Thomas, on the other side of the spectrum, saw political contributions as political speech entitled to full First Amendment protection. In his view, “contributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on core speech, should be met with the utmost skepticism and should receive the strictest scrutiny.”81

Although the justices in Buckley, Shrink, and McConnell disagreed about the location of political contributions on the spectrum between property and “essential political speech,”82 the Court always kept at the center of its analysis the question of the degree to which contributions are protected as political speech. It also consistently held that there existed only one compelling interest to justify campaign-finance regulation—the prevention of corruption or apparent corruption. Though it afforded legislatures more leeway to determine the best method of preventing corruption via contribution limits, the Court would not recognize another compelling purpose advanced by champions of campaign-finance regulation: creating equality in the political marketplace. The Buckley Court soundly rejected this interest, declaring that “the 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.”83 The individual First Amendment right to free speech and society’s interest in equalizing the

79. Id. at 399 (Stevens, J., concurring).
80. Id. (Stevens, J., concurring).
81. Id. at 412 (Thomas, J., dissenting).
82. Id. (Thomas, J., dissenting).
political marketplace were seen as completely at odds with each other, and the only legitimate question was how much protection contribution limits—as individual speech—deserved. The *Buckley* Court explained the primacy of individual over societal interests under the First Amendment:

> 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.  

*Randall v. Sorrell* began to change this conception of the First Amendment. In crafting the plurality opinion, Justice Breyer attempts to lead the Court toward a recognition of marketplace correction as an interest that is not at odds with the First Amendment, but rather, serves the same goals as the First Amendment itself. Under the new conception that Justice Breyer advances, the societal need for campaign-finance regulation does not need to overcome the individual right to free speech in order for such regulation to be constitutional—individual speech rights and the creation of a functional, democratic political marketplace are both protected under the First Amendment.

II. *RANDALL V. SORRELL*

It was against the backdrop of *Buckley*, *Shrink*, and *McConnell* that *Randall v. Sorrell* came down in June 2006. *Randall* was a constitutional challenge to Act 64, Vermont's Campaign Finance Reform Act. Because the Supreme Court had applied *Buckley*'s contribution limits test in an increasingly relaxed manner in *Shrink* and *McConnell*, there was speculation among Court-watchers that the Court would accept political equality (as opposed to solely the prevention of

84. *Id.* at 57.
86. VT. STAT. ANN. tit. 17, § 2801 et seq. (2002).
corruption) as a compelling interest to justify campaign-finance regulation. It was projected that the Buckley dichotomy between contribution and expenditure limits would be overruled in the process, opening the door for constitutionally compliant expenditure limits. As it were, the case yielded a badly splintered decision. The controlling plurality opinion was written by Justice Breyer and joined by Chief Justice Roberts and Justice Alito. In total, six different opinions were written. The plurality purported to adhere faithfully to the Buckley framework, though its reasoning did not follow the precedential trajectory toward greater legislative deference on the question of contribution limits. Instead, Justice Breyer crafted a new standard of constitutional review consistent with his view of the First Amendment as a guardian of the “integrity of our electoral process.”

Act 64 imposed mandatory expenditure limits on candidates for state office for an entire two-year general election cycle. It also imposed contribution limits, which were not indexed for inflation. Individuals and political parties and committees were subject to the same limits: $400 for candidates for governor, lieutenant governor and other statewide offices; $300 for candidates for state senator; and $200 for

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87. See, e.g., Richard L. Hasen, Shrink Missouri, Campaign Finance, and “The Thing That Wouldn’t Leave,” 17 CONST. COMMENT. 483, 485 (2000) (suggesting that, after Shrink, the Court was “preparing to erect in place of Buckley a jurisprudence more hospitable to campaign finance regulation, possibly by accepting the equality rationale”).

88. Id.

89. See Randall, 126 S. Ct. at 2500 (Alito, J., concurring) (stating that respondents’ plea to “revisit Buckley” was not properly presented); id. at 2501 (Kennedy, J., concurring in the judgment) (criticizing Buckley for leading to the creation of entities such as PACs, which operate out of sight of the ordinary citizen); id. at 2502 (Thomas, J., concurring in the judgment) (“The illegitimacy of Buckley is further underscored by the continuing inability of the Court... to apply Buckley in a coherent and principled fashion.”); id. at 2509 (Stevens, J., dissenting) (arguing that expenditure limits are constitutional and serve compelling governmental interests in reducing candidates’ fundraising time and “protect[ing] the political process from undue influence of large aggregations of capital” (alteration added) (citation omitted)); id. at 2511 (Souter, J., dissenting) (arguing that “the contribution limits satisfy controlling precedent”).

90. Id. at 2492 (citation omitted).

91. Id. at 2486. The expenditure limits were adjusted for inflation. They included “spending by political parties or committees that is coordinated with the campaign and benefits the candidate.” Id. (quoting § 2809(b)).
candidates for state representative. Additionally, the Act limited individual contributions to political parties to $2,000 per election cycle. Act 64 defined “contribution” to include any expenditure made on a candidate’s behalf if it was “intentionally facilitated by, solicited by or approved by” the candidate. The Court interpreted this provision to include expenses incurred by volunteers. Exceptions to the contribution limits included contributions by the candidate and the candidate’s family, direct volunteer services, and the cost of a meet-and-greet function up to $100.

The plurality struck down both the expenditure limits and contribution limits. In holding the expenditure limits unconstitutional, the plurality cited Buckley as controlling precedent for the proposition that “expenditure limits violate the First Amendment,” and added little independent analysis of the particular limits at issue in the case. In striking down the contribution limits, the Randall plurality acknowledged that under Buckley, contribution limits had generally been upheld. However, the plurality distinguished the contribution limits in Randall, finding that these particular limits were so low as to “generate suspicion that they are not closely drawn.” Justice Breyer identified several “danger signs” giving rise to this “suspicion.” To begin, the Vermont contribution limits were lower than those upheld in Buckley, and were also lower than those upheld in Shrink. In fact, they were the

92. Id. (citing § 2805(a)).
93. Id. (citing § 2805(a)).
94. Id. at 2486-87 (quoting §§ 2809(a), (c)).
95. Id. at 2498.
96. Id. at 2487.
97. Id. at 2485 ("Well-established precedent makes clear that the expenditure limits violate the First Amendment." (citing Buckley v. Valeo, 424 U.S. 1, 54-58 (1976))). Later in the plurality opinion, Justice Breyer asserted that "Buckley has promoted considerable reliance .... Overruling Buckley now would dramatically undermine this reliance on our settled precedent." Id. at 2490.
98. Id. at 2491.
99. Id. at 2492-93.
100. Id. at 2492.
101. The statute in Buckley limited individual contributions to no more than $1,000 to a single candidate, per election cycle. Buckley, 424 U.S. at 13.
102. The statute upheld in Shrink limited individual contributions to $1,075 and adjusted for inflation every two years. Nixon v. Shrink Mo. Gov't PAC, 528
lowest imposed by any state in the nation. Further, the limits applied to an entire election cycle, including the primary and general election, and subjected political parties to the same contribution limits as individuals. Justice Breyer wrote that these elements created a “danger” that Act 64’s contribution limits were so low as to actually “prove an obstacle to the very electoral fairness [they sought] to promote.”

After finding these danger signs, the plurality undertook a legitimate tailoring analysis and identified five factors leading it to conclude that the contribution limits were not “closely drawn to meet [the Act’s] objectives.” These five factors included: (1) the contribution limits “significantly restrict[ed] the amount of funding available for challengers to run competitive campaigns”; (2) the Act subjected political parties to the same low limits as individuals; (3) the Act counted expenses made by volunteers toward their contribution limit, “imped[ing] a campaign’s ability effectively to use volunteers, thereby making it more difficult for individuals to associate in this way”; (4) the limits were not adjusted for inflation and could not be adequately monitored and adjusted by legislators; and (5) the record did not contain any special justification for such low and restrictive limits.

U.S. 377, 383-384 (2000). In 2006, the limit was $1,275. Randall, 126 S. Ct. at 2493.

103. Randall, 126 S. Ct. at 2493.
104. Id.
105. Id. at 2492 (alteration added). What Justice Breyer meant by “electoral fairness” is not readily apparent. However, in the context of the opinion as a whole, which went on to discuss the competitiveness of elections, see id. at 2495-96, it seems that Justice Breyer was acknowledging that fairness—as the rationale for Act 64—meant more than merely the absence of corruption.

106. Id. at 2495 (alteration added).
107. Id. (alteration added).
108. Id. at 2496.
109. Id. at 2499 (alteration added).
110. Id.
111. Id.
III. RANDALL v. SORRELL AS THE BEGINNING OF A PARADIGM SHIFT

Randall’s five-factor “closely drawn” test represents Justice Breyer’s attempt to base the Randall opinion on Buckley and its progeny. The section of the opinion dealing with harm to associational rights, though distinguishing Buckley, anchors Randall in the Buckley realm by its close analysis of the extent to which Act 64 infringed individual speech rights. It also demonstrates that protection of individual rights is part of the protection of the integrity of the political process, thereby providing Justice Breyer with a bridge between Buckley’s focus on individual rights and Randall’s overarching concern with societal interests.

Act 64 subjected political parties to the very same contribution limits as individuals, counting every expenditure by a party on behalf of a candidate as a contribution, as long as it was facilitated, solicited, or approved by the candidate’s campaign. Additionally, the Act included in the definition of “contribution” campaigning expenses incurred by volunteers. The plurality found that the effect of these restrictions was to hinder the ability of individuals to associate politically, and that therefore the limits were “different in kind” from those upheld in Buckley. The plurality illustrated several ways these features of the Act functioned to unduly restrict political activity. It pointed out that the treatment of political parties made it very difficult for a party to act as an enabling mechanism for individuals wishing to participate in politics on the party level rather than the individual level. For example, a number of individuals could each give a small amount to their party, but the party was not allowed to spend that money on a particular candidate engaged in an expensive campaign.

The plurality applied a high evidentiary standard to the state of Vermont to prove that the contribution restrictions were “closely drawn.”

112. See Randall, 126 S. Ct. at 2496-2499.
113. Id. at 2496 (citing VT. STAT. ANN., tit. 17, §§ 2809(a), (c) (2002)).
114. Id. at 2498.
115. Id. at 2499.
116. See, e.g., id. at 2498-99 (pointing out that a volunteer could exceed the limit by making a few trips, hosting a party, or buying more than 500 stamps).
117. Id. at 2497.
118. Id.
While the plurality opinion successfully distinguished *Buckley* in striking down Act 64's contribution limits, its careful evaluation of the evidence presented and its emphasis on the inconsistencies and gaps in the evidence stands in stark contrast to the low evidentiary requirement in *Shrink*. The plurality's movement away from the legislative deference in *Shrink* and *McConnell* re-establishes (as did *Buckley*) that there are individual First Amendment consequences of campaign-finance regulation that must be examined closely. Even when there are important societal interests at play, individual free speech rights are entitled to some degree of protection. The difference from the past cases, however, is that here individual free speech protection is a part of the First Amendment's broader goal of facilitating democratic participation. As Justice Breyer pointed out, the plurality invalidated Vermont's contribution limits not because they overvalued a societal interest at the expense of individual rights, but because they "prove[d] an obstacle to the very electoral fairness [they sought] to promote."  

*A. Divining Justice Breyer's Approach to Randall*

Justice Breyer's "danger signs" test is the most explicit signal in the *Randall* opinion of his understanding of the role of the First Amendment in campaign-finance regulation. While Justice Breyer uses the *Buckley* framework to analyze Act 64, he works to distance his analysis from *Buckley's* close connection between campaign contributions and individual free speech rights. Instead, his focus is on the integrity of the political process. As Justice Thomas points out in his concurring opinion in *Randall*, the five factors Justice Breyer considered in his tailoring analysis do not actually bear much relation to whether the Act was "closely drawn" to effect its anti-corruption objective, but

119. *Id.* at 2494-95.
122. *See supra* text accompanying notes 96-103.
123. *See supra* text accompanying notes 104-09.
rather focus on the promotion of "electoral fairness."\textsuperscript{125} Justice Breyer imputes his own view of the purpose of campaign-finance regulation to Vermont's enactment of Act 64, thereby re-framing on his own terms the grounds on which such regulation should be analyzed. Justice Breyer's earlier writings shed light on his approach to \textit{Randall}:

\begin{quote}
[The First Amendment] helps to maintain a form of government open to participation. . . .

[C]ampaign finance laws also seek to further [that] objective. They hope to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation. They consequently seek to maintain the integrity of the political process—a process that itself translates political speech into governmental action. Seen in this way, campaign finance laws, despite the limits they impose, help to further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy.\textsuperscript{126}
\end{quote}

Justice Breyer's approach departs from the debate over whether money is speech. For Justice Breyer, the answer to that question is not the end of the analysis. He answers it simply: money is not speech, but it enables speech.\textsuperscript{127} Therefore campaign contributions are "a matter of First Amendment concern."\textsuperscript{128} This conclusion led Justice Breyer to diverge from \textit{Buckley} and take his analysis in a new direction. To Justice

\begin{quote}
\textsuperscript{125} See id. at 2492 ("[A] statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote." (alteration added)).


\textsuperscript{127} Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) ("On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern—not because money \textit{is} speech (it is not); but because it \textit{enables} speech.").

\textsuperscript{128} \textit{Id.}
Breyer, the proper approach in *Randall* was not to balance free speech rights against anticorruption interests, as did *Buckley* and its progeny. Rather, he saw the Vermont law as working toward the same ideal that the First Amendment was designed to protect—the integrity of the political process—and invalidated the law insofar as it went beyond its stated purpose and acted to degrade the process rather than enhance it.

**B. Legislative Deference, Independent Judicial Review, and the Problem with Justice Breyer's Approach**

Justice Breyer does not mention “participatory self-government” in the *Randall* opinion; however, he has written extensively about this principle. Examination of these materials leads to the conclusion that, in Justice Breyer’s eyes, the integrity of the political process depends on the preservation and facilitation of participatory self-government.

In his book *Active Liberty*, Justice Breyer promotes an understanding of the First Amendment as “seeking primarily to encourage the exchange of information and ideas necessary for citizens themselves to shape that public opinion which is the final source of government in a democratic state.” Deference to legislative determinations regarding what measures are needed to preserve and further the democratic state is an important element of Justice Breyer’s equation. Too strong a guarantee of individual free speech would unreasonably limit substantive legislative choice and the ability to regulate the political marketplace, thus “depriving the people of the democratically necessary room to make decisions, including the leeway to make regulatory mistakes.” In other words, Justice Breyer emphasizes the First Amendment role in creating a space for democratic self-governance. In order to exchange political speech effectively, citizens must be able to build their own forum, and in doing so, protect the interests that they value, including electoral competitiveness and financial equality among candidates. This view was evident in Justice Breyer’s *Shrink* concurrence, where he advanced the governmental interest in protecting the integrity of the political process and proclaimed,

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129. Breyer, supra note 8.
130. Id. at 47 (citation omitted).
131. Id. at 41.
[If it were true that] Buckley denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance[. . .]. I believe the Constitution would require us to reconsider Buckley.\textsuperscript{132}

In Randall, Justice Breyer used Buckley to strike down a "comprehensive solution" to problems posed by campaign finance—a result contrary to his apparent belief that the integrity of the political process will improve by way of deference, self-regulation, and experimentation. But this result may not have been altogether unexpected. In his Shrink concurrence, Justice Breyer cautioned that there may be instances in which deference is inappropriate. Unchecked legislators can harm the integrity of the political process through the same method they use to protect it: for example, by using campaign-finance regulation to prevent successful challenges to their incumbency.\textsuperscript{133} Protecting the integrity of the political process from self-entrenching legislators is to be achieved by "careful, precise, and independent judicial review,"\textsuperscript{134} which Justice Breyer advocates as a necessary corollary of legislative deference. Justice Breyer used this independent judicial review to strike down Act 64's contribution limits in Randall. Justice Souter, in his dissenting opinion in Randall, criticized Justice Breyer's departure from the Shrink precedent of affording legislative deference:

To place Vermont's contribution limits beyond the constitutional pale, therefore, is to forget not only the facts of Shrink, but also our own self-admonition against second-guessing legislative judgments about the risk of corruption to which contribution limits have to be fitted.\textsuperscript{135}


\textsuperscript{133} Id. at 402 (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments—at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge.").

\textsuperscript{134} Id. at 400 (Breyer, J., concurring).

To Justice Breyer, however, the question of legislative deference—as well as the question of the degree to which the First Amendment should protect campaign contributions as individual speech—is subordinate to the larger First Amendment interest of protecting the integrity of the political process in order to achieve a more perfect self-government.

Justice Breyer wrote in his concurring opinion in *Shrink* that “this is a case where constitutionally protected interests lie on both sides of the legal equation,” precluding the use of an “oversimplified formula.” He supported his position, and highlighted the heart of his theoretical departure from *Buckley*, by attacking *Buckley’s* sound rejection of “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others.”

In *Shrink*, he compared campaign-finance regulation to election regulation, “where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate.” Similarly, the contribution limits at issue in *Shrink* were enacted for the purpose of “seek[ing] a fairer electoral debate.”

In *Randall*, the same purpose was undoubtedly one of Vermont’s reasons for enacting Act 64. But, by setting contribution limits at a level that was simply too low to be constitutional, the Vermont law allowed Justice Breyer to draw the line limiting deference at the point he deemed appropriate, while keeping participatory self-government—the reason for affording deference in the first place—at the center of his analysis.

The problem with Justice Breyer’s approach, however, is this very line-drawing. If the First Amendment can require restrictions on individual speech in order to protect democracy-facilitating speech-in-
the-aggregate, it is left to the courts to decide the point at which the restriction on the individual fails to serve society’s interests, and also to determine when an individual deserves protection despite the fact that such protection may be at odds with democratic self-governance. The result, according to one commentator, is that:

[F]ree speech, instead of being a guarantee of some sort which individuals enjoy as against the rest of society, becomes just the opposite—a guarantee that the Congress will attempt to maximize free speech over the entire society, even if it means silencing certain individuals and groups in order to do it.141

The solution that Justice Breyer offers to counter this threat to individual speech rights is independent judicial review,142 and he in fact uses this review to conclude that Act 64 impermissibly interferes with individual associational rights.143 But as Professor Hasen points out, “there is going to be enough flexibility in the Randall plurality’s [“danger signs”] test that judges hearing from competing experts will (albeit subconsciously) hear what they want to hear about how particular campaign contribution limits are likely to affect the competitiveness of close elections.”144 After Randall, lower courts have little guidance as to when deference is appropriate and when it is not. Justice Breyer’s nuanced view of the interplay of the First Amendment with the ultimate goals of campaign-finance regulation does not translate well into a workable framework for lower courts to follow. Each court will have to make its own determination of the requirements of “the Constitution’s democratic objective.”145 And as Justice Souter points out in his Randall dissent:

141. Polsby, supra note 2, at 12 (examining the Court’s choice to give primacy to individual free speech rights in Buckley) (alteration added).


143. See supra text accompanying notes 112-118.


145. BREYER, supra note 8, at 50.
[T]he plurality's limit of deference is substantially a function of suspicion that political incumbents in the legislature set low contribution limits because their public recognition and easy access to free publicity will effectively augment their own spending power beyond anything a challenger can muster . . . . But this received suspicion is itself a proper subject of suspicion.  

Justice Souter's observation points out the subjective nature of Justice Breyer's analysis. When the First Amendment is seen as protecting individual free speech, the question the judge must answer is more straightforward: is the individual's right to free speech unduly burdened by the government? But under the conception of the First Amendment as a guardian of democracy, someone has to decide what is best for democracy. In *Randall*, Justice Breyer leaves this task to judges.

Before *Randall* came down, a critic of Justice Breyer's theory of *Active Liberty* lamented, "[t]he deference to the legislature advocated by Breyer represents a degree of trust in the legislative expertise unmatched by either an appreciation of its potential abuse or a feasible proposal for judicial monitoring and controls."  

But what *Randall* does is just the opposite: judges will be able to use "independent judicial review" whenever they feel it is appropriate, even if circumstances are such that deference is appropriate.

### C. Is Justice Breyer's Approach Viable?

An examination of the current positions of the other Justices on this issue shows that Justice Breyer's approach in *Randall* could potentially gain ground in the future. This is especially true if the Court eventually overturns the *Buckley* framework—a proposition that has drawn support from a number of Justices.

The approaches taken by Justices Thomas and Stevens are built on the question of whether a campaign contribution is speech, and if so,

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146. *Randall*, 126 S. Ct. at 2514 (Souter, J., dissenting) (alteration added).

what level of First Amendment protection does it merit? Justice Thomas believes that both campaign expenditures and contributions are political speech, that the First Amendment does not tolerate limits on such speech, that Buckley should be overturned, and that the Court should apply strict scrutiny to both expenditure and contribution limits. Justice Thomas’ approach is thus fundamentally at odds with Justice Breyer’s. Justice Scalia joined Justice Thomas on both his Shrink and Randall opinions, suggesting that neither justice would vote for Justice Breyer’s approach. Justice Stevens asks the same questions as does Justice Thomas, but provides the opposite answers: “[m]oney is property; it is not speech,” and legislatures have the power to regulate money in elections. Because he merely asserts that political money is not protected speech, it is unclear whether Justice Stevens would be receptive to the idea that the First Amendment works to protect the political marketplace as a whole. However, he may vote with Justice Breyer to uphold contribution limits in any event, based on his view that the Constitution does not constrain the regulation of campaign-finance.

Justice Kennedy does not see the issue in the absolute terms of Justices Thomas and Stevens. In his dissenting opinion in Shrink, he agreed with Justice Thomas that campaign contributions are “one of our most essential and prevalent forms of political speech.” But, he was more concerned with what he considered to be the false dichotomy created by Buckley, which he believes has resulted in a seriously distorted campaign-finance system. Unlike Justice Thomas, Justice

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148. See supra Part I.C.
150. Randall, 126 S. Ct. at 2505 (Thomas, J., concurring).
151. Id. (Thomas, J., concurring).
152. Id. at 2502 (Thomas, J., concurring).
153. Shrink, 528 U.S. at 398 (Stevens, J., concurring) (alteration added).
154. Randall, 126 S. Ct. at 2510 (Stevens, J., dissenting).
155. Shrink, 528 U.S. at 405 (Kennedy, J., dissenting).
156. Id. (Kennedy, J., dissenting). As Daniel Polsby pointed out following Buckley, contribution and expenditure limits can be distinguished practically, as it is supposedly easier to corrupt with a contribution than an expenditure. However, constitutionally, the distinction makes no sense. To the individual being regulated, the only difference when dealing with a contribution is one extra step between the individual and the speech. See Polsby, supra note 2 at 22-25.
Kennedy believes that Congress may be able to devise a constitutional scheme limiting both contribution and expenditure limits, which would provide candidates some relief from perpetual fundraising.\footnote{157} Justice Kennedy is thus one possible vote for Justice Breyer’s approach. However, other than his disagreement with \textit{Buckley}, there is nothing to affirmatively suggest that Justice Kennedy would sign on to Justice Breyer’s First Amendment theory.

Justice Souter dissented from the plurality in \textit{Randall}. In his dissenting opinion, he asserted that Act 64’s contribution limits actually satisfied \textit{Buckley}.\footnote{158} Justice Souter expressed concern over the plurality’s lack of deference to the Vermont legislature,\footnote{159} a concern that came as no surprise, given that Justice Souter was the author of the deferential \textit{Shrink} majority opinion. It is difficult to predict whether Justice Souter would join Justice Breyer’s First Amendment theory in the future. He does push for the consideration of compelling reasons for campaign-finance regulation other than corruption.\footnote{160} He also never mentions “strict” or “exacting” scrutiny, nor does he enter the “money as speech” debate. However, in order to vote together, Justices Breyer and Souter would first have to come to an understanding on the proper level of legislative deference.\footnote{161} Justice Ginsburg joined Justice Breyer’s concurrence in \textit{Shrink}, but joined Justice Souter’s dissent in \textit{Randall}. This demonstrates that she may agree with Justice Breyer’s approach generally, but not with its constrained application in \textit{Randall}.

The positions of Chief Justice Roberts and Justice Alito are more difficult to determine. Both Justices joined the \textit{Randall} plurality, allowing it to control. Justice Alito, however, added a concurring opinion in which he claimed that the possibility of overruling \textit{Buckley} had not been properly presented by the parties.\footnote{162} This may be seen as a willingness to overrule \textit{Buckley} in the future. At oral argument, Justice

\begin{footnotes}
\item 157. \textit{Shrink}, 528 U.S. at 410 (Kennedy, J., dissenting).
\item 158. \textit{Randall}, 126 S. Ct. at 2511-12 (Souter, J., dissenting).
\item 159. \textit{Id.} at 2514 (Souter, J., dissenting).
\item 160. \textit{See id.} at 2511-2512 (arguing for the constitutional validity of Vermont’s proffered interest in preserving candidate time).
\item 161. \textit{See supra} text accompanying note 133.
\item 162. \textit{See Randall}, 126 S. Ct. at 2500 (Alito, J., concurring) (“Only as a backup argument, an afterthought almost, do respondents make a naked plea for us to ‘revisit \textit{Buckley.’”’) (citation omitted).
\end{footnotes}
Alito may have been questioning the *Buckley* dichotomy when he asked whether candidates in Vermont could run effective campaigns on Act 64’s contribution limits if there were no expenditure limits. This question contrasts somewhat with a statement that Chief Justice Roberts made at oral argument regarding the corruption rationale for campaign-finance regulation: “If [the voters] think someone has been bought, I assume they don’t reelect the person.” Justice Alito was thinking through the mechanics of campaign-finance regulation and the effects of disturbing only one part of a multi-faceted law, while Chief Justice Roberts implied that the political process itself was an adequate remedy for corruption. Based on these limited statements, it appears that Justice Alito would consider overruling *Buckley*, though there is nothing to affirmatively suggest that he would subscribe to Justice Breyer’s theory. Based on his apparent belief in the self-regulation of the political process, it appears unlikely that Chief Justice Roberts will ever agree with Justice Breyer in this area.

In sum, Justices Ginsburg and Stevens are the justices most likely to vote with Justice Breyer in favor of the constitutionality of campaign-finance reform as protecting democratic self-governance. Justice Souter could potentially join the Breyer bloc if those justices offer an acceptable answer to the question of when legislative deference is appropriate. Justice Kennedy is unlikely to subscribe to Justice Breyer’s view. Justice Alito may be even less likely to join Justice Breyer, but it is not entirely out of the question, as it probably is for Justices Thomas, Scalia, and Roberts.

**CONCLUSION**

*Buckley* established the Supreme Court’s approach to campaign-finance regulation by asserting the primacy of the individual right to free speech and characterizing political money as such speech. As *Shrink* and *McConnell* demonstrated, that characterization is not entirely appropriate. Classifying political money as protected speech has a

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164. *Id.* at 30 (alteration added).
number of externalities. The ability of one voice to drown out others has more serious consequences in the political marketplace than in the broader marketplace of ideas generally. Since our Constitution creates and preserves a democratic form of government, the pursuit of equality in the political marketplace through campaign-finance reform should not focus on individual opportunity, but rather on the health of our democracy as a whole. In this context, the purpose of the First Amendment is the facilitation of “governmental preservation of the essential premise of democracy itself.”

In *Randall*, Justice Breyer moves campaign-finance jurisprudence toward greater recognition of this view. But, by adhering to the *Buckley* framework, he does so in an indirect way. Keeping *Buckley* alive—at least temporarily—allowed him to effectively sneak in his paradigm shift under the auspices of following precedent, making *Randall* a bridge between *Buckley* and a more democratic approach to campaign-finance jurisprudence.

Justice Breyer’s preservation of *Buckley* also redefines the importance of individual free-speech rights within this new conception of the democracy-preserving role of the First Amendment. But he can offer only “independent judicial judgment” as protection for individual speech rights. True difficulty will arise if and when a court upholds new campaign-finance regulation that advances electoral fairness, but does so in a way that, according to the judges hearing the case, does not undermine that fairness by harming individual free-speech rights.

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166. See supra text accompanying notes 117-119.