

BRENNAN

CENTER

FOR JUSTICE

ELECTORAL
COMPETITION
AND LOW
CONTRIBUTION
LIMITS

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INTRODUCTION

Electoral competition is essential to democracy. Yet the incumbency rate in state-house legislative campaigns is nearly 95 percent. This report examines campaign contribution limits and the impact limits can have on electoral competition.

The research on which this report is based was inspired by a 2006 U.S. Supreme Court decision that overturned low contribution limits. The data presented here refutes the Court's assumptions that low contribution limits damage challengers and shows that the lowest contribution limits, those set at \$500 or below, enhance challengers' ability to campaign against incumbents in state legislative races.

Though public financing systems also increase electoral competition, the Brennan Center's research suggests that incumbents nonetheless continue to opt for public financing systems.

Of course, enhanced competition under low limits is only one factor to be considered. Competition, after all, is one key goal in electoral reform, but not the only one. We may wish also to encourage citizen participation and voter engagement. But if we are looking for reasons not to enact low limits, a deleterious impact on competition is not one of them. For this reason, the Supreme Court was wrong in *Randall v. Sorrell*.

Our joint findings make it plain: low contribution limits and public financing substantially narrow the gap between incumbents and challengers. These reforms can be mutually enhancing as reasonable contribution limits are central to a well-functioning public financing system. Incumbency will continue to provide electoral advantages. However, decreasing the vote margins between votes cast for incumbents and their challengers signals greater electoral competitiveness and, as such, strengthens democracy.

EXECUTIVE SUMMARY

Incumbency rates for house assemblies across America are nearly 95 percent. Frequently, voters do not have a meaningful choice between candidates; and, in many races, incumbents run unopposed or against opponents who are so weak they are not viable candidates. In our 26-year, 42-state, sample, more than 40 percent of state assembly incumbents did not face a viable challenger.

The question of contribution limits has long sparked debate. Some argue that low contribution limits helped incumbents; others claim the opposite. Lately, a consensus emerged around the idea that low contribution limits hurt challengers because they inhibit their ability to raise funds needed to wage winning campaigns. There was, however, little empirical evidence on the matter.

The U.S. Supreme Court furthered debate when it invalidated campaign finance reforms, partly because of the assumed problems contribution limits create for challengers. In *Randall v. Sorrell*, the Supreme Court found Vermont's contribution limits – which ranged from \$200 to \$400 – unconstitutionally low. That was in 2006. Time has disproved the assumptions the *Randall* Court

made about low contribution limits and the adverse affect these had on challengers. In this report, we show that high contribution limits or the absence of limits – which serve to increase their campaign funds and the magnitude of their vote totals – benefit incumbents.

New research by Dr. Thomas Stratmann and the Brennan Center for Justice¹ shows that the rationale undergirding the Supreme Court's *Randall* decision was flawed. The Court incorrectly concluded that low contribution

limits act as an incumbency protection plan. To the contrary, the new data culled from elections in 42 states over 26 years (1980–2006) show that lower contribution limits of \$500 or less for individual contributors and political action committees (PACs) made elections for state assembly more competitive. In real-world elections, the benefits of low contribution limits largely redound to challengers. In addition, the new data show that public financing has a similar, pro-competitive effect on elections.

This research builds on the work of previous studies that examined effects of the existence of contribution limits on electoral competitiveness. These studies, however, lumped high and low contribution limits together and were, thus, unable to show the impact on competition of lower contribution limits. Dr. Stratmann disaggregated the data to reveal – for the first time – the effect of individual and PAC contribution limits of \$500 or less. In addition, Dr. Stratmann examined the effect of different contribution limits on the fundraising gaps between incumbents and challengers. Finally, Dr. Stratmann analyzed the two states with public financing for single member house

IN REAL-WORLD ELECTIONS,
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elections over the relevant period, Maine and Minnesota, to measure the effect of the availability of public financing on electoral competitiveness.

In sum, this new statistical analytic research on state house races demonstrates:

- Contribution limits lead to more competitive elections: the lower the limit, the more competitive the election.
- Lower contribution limits (\$500 and below) increase the likelihood that challengers will beat incumbents.
- Lower contribution limits reduce incumbents' considerable financial fundraising advantage.
- State public financing programs, like low contribution limits, can increase the competitiveness of elections.

The Brennan Center concludes that the Supreme Court's decision in *Randall v. Sorrell* was grounded in a mistaken assumption about the effects of low contribution limits.

The research shows that low contribution limits increase the number of contested races, improve the rate of competitive races, and reduce the fundraising gaps between incumbents and challengers. From this, it is reasonable to suggest that states with high contribution limits, and those without any contribution limits, consider adopting low contribution limits as one means of increasing electoral competition and choices for voters at the ballot box.

Moreover, a meaningful system of contribution limits provides a useful foundation for successful and attractive public funding systems. States that offer only privately financed elections should add the benefits of enhanced electoral competition to the long list of other reasons that favor the adoption of public financing systems for campaigns, such as freeing lawmakers from the burdens of fundraising and reducing corruption by giving candidates access to funds that are not tied to special interests. To enhance participation and improve democracy, while allowing candidates to collect sufficient funds to run a viable campaign, these reforms work best when they are implemented together.

PART I. THE LEGAL AND ACADEMIC CONTEXT

The Constitutional stakes of the academic debate over low contribution limits are high. In the 2006 case of *Randall v. Sorrell*, 548 U.S. 230 (2006), the U.S. Supreme Court invalidated Vermont’s contribution limits, which ranged from \$200 to \$400, as unconstitutionally low. The Court found that these low limits presented a constitutionally unacceptable risk of “preventing challengers from mounting effective campaigns against incumbent office holders.”²

Randall was based, in part, on Clark Bensen’s expert opinion that Vermont’s contribution limits reduced the funds available to certain challengers in competitive races.³ *Randall*’s analysis ignored three scholarly papers (cited by Justice Souter in his dissent) that showed that contribution limits in general do not harm challengers and may in fact help them to compete.⁴

How did the Court get this fundamental assumption wrong? The Court simply opted for one of two choices in what was, then, an open question among social scientists. The role of contribution limits in promoting or inhibiting electoral competition has been a hotly debated topic. One theory proposed that contribution limits work as a form of incumbent protection,⁵ arguing that contribution limits inhibit

a challenger’s ability to mount a credible race when he or she is already facing a name-recognition and fundraising disadvantage.⁶ The Supreme Court embraced this theory in *Randall*.⁷

ONE OF THE STRIKING FINDINGS OF DR. STRATMANN’S RESEARCH, WHICH RECONFIRMS THE WORK OF OTHERS IN THE FIELD OF ELECTORAL POLITICS, IS JUST HOW RESILIENT THE POWER OF INCUMBENCY IS IN AMERICA.

A second theory posited that contribution limits actually benefit challengers. This theory is supported by the research in the field by political scientist Gary Jacobson.⁸ Under this theory, contribution limits are good for challengers, because they reduce the ability of incumbents to accumulate huge war chests, which may deter high-quality challengers⁹ from entering the race in the first place.¹⁰ Where effective contribution limits do not exist, incumbents may garner large sums of money from individuals or moneyed

interests seeking to gain access and influence over legislation. Challengers (at least those not holding some other elected office) have difficulty competing with those resources and, therefore, limits may narrow the fundraising gap between incumbents and challengers by eliminating the types of large contributions that place challengers at a distinct disadvantage.¹¹

Before *Randall*, researchers had analyzed the electoral impact of having any contributions limits—lumping together both high and low limits. Thus, prior to *Randall*, studies did not show which of these competing theories was accurate because academics had not focused on the specific impact of low (\$500 or less) contribution limits on electoral competition.¹²

Dr. Stratmann empirically tests which of these economic theories holds true for individual and PAC contribution limits in state house races over the past two and a half decades and disaggregates the data so that low limits can be compared with higher limits.

One of the striking findings of Dr. Stratmann's research, which reconfirms the work of others in the field of electoral politics,¹³ is just how resilient the power of incumbency is in America.¹⁴ In this comprehensive survey of state house elections in 42 states from 1980 to 2006, an incumbent won the election a staggering 94.7 percent of the time. On average, an incumbent's margin of victory was 56.4 percentage points, meaning that incumbents garnered roughly 78 percent of the vote.¹⁵ Only 13.1 percent of all races were actually close, where "close" is defined as an election with an incumbent receiving less than 55 percent of the vote. In this study, 42.5 percent of all incumbents did not face a viable challenger.¹⁶ In measure after measure, incumbents clearly possess a strong electoral advantage—in most cases they face little risk of a close election.

Randall suggests that comparable limits of \$500 per election cycle or less in other states also might be in jeopardy.¹⁷ As of 2006, limits of \$500 or less per election cycle were in effect for house races in eight states (Arizona, Colorado, Connecticut, Maine, Michigan, Montana, South Dakota, Wisconsin).¹⁸

The Brennan Center has sought to expand the current research regarding the competitive impact of contribution limits for three principal reasons:

- 1) Contribution limits improve the health of democratic institutions because they help to allay concerns about corruption and the appearance of corruption inherent in a system that allows large contributions.
- 2) We encourage states to adopt lower contribution limits, because they have a democratizing effect by making candidates reach out to a broader group of citizens rather than relying on a few large contributors.
- 3) We hope to assist reform advocates, who have long held the view that low contribution limits promote competition. The new Brennan Center data show that campaign finance reform advocates were correct: low contributions do, in fact, have a positive impact for challengers in terms of increased vote share, and also produce more close races and more candidates.

PART II. FINDINGS IN BRIEF: CONTRIBUTION LIMITS ENHANCE COMPETITION

Dr. Stratmann's research uses states as laboratories of democracy. His study¹⁹ examines the election results in single member races for state representative in 42 states²⁰ over a 26-year period (1980-2006), and analyzes the effects of the applicable contribution limits in place during each election.²¹

The “competitiveness” of elections is measured in five ways:

- (1) the incumbent's vote share minus the challenger's vote share;
- (2) whether the incumbent won;
- (3) whether the incumbent had a viable challenger (defined as a race where the incumbent gets less than 85 percent of the vote);
- (4) the number of candidates in an election;²² and
- (5) whether the election is close (where close is defined as an election in which the incumbent receives less than 55 percent of the vote).

In most state campaign finance laws, there is a matrix of specific contribution limits that are defined by the contributor (an individual, a PAC, a political party, a union or a corporation) and the nature of the recipient (a PAC, a political party, or a candidate for the house, senate, statewide office, or governor). Dr. Stratmann's 42-state, 26-year data set includes a variety of contribution limits, ranging from unlimited contributions to limits of less than \$500.²³ For example, in 2006, in states with individual contribution limits, the limits ranged from \$130 in Montana to \$10,000 in Ohio. Dr. Stratmann analyzed two key types of contribution limits: (1) limits that apply to contributions from individuals to candidates for the state house of representatives and (2) limits that apply to contributions from PACs to candidates for the state house of representatives. He focused on individual and PAC contribution limits because these make up the majority of funds received by house candidates. By contrast, party contributions historically are only a small percentage of such candidates' funding.²⁴

Dr. Stratmann finds that:

- (1) contribution limits reduce an incumbent's considerable financial advantage; and
- (2) the lower the contribution limit, the more competitive the election.

Based on Dr. Stratmann's research, it appears that the Supreme Court's holding that Vermont's contribution limits were unconstitutionally low in *Randall* rested on an incorrect presumption about the effect of low campaign contribution limits on challengers' chances of winning elections. In real-world elections, the benefits of low contribution limits largely redound to challengers. In addition, Dr. Stratmann found that the availability of public financing also increases the competitiveness of elections.

PART III. THE STRATMANN/BRENNAN CENTER FINDINGS IN DETAIL

THE IMPACT OF LOWER CONTRIBUTION LIMITS ON ELECTORAL OUTCOMES

The new data show²⁵ that contribution limits increase the competitiveness of elections, even after controlling for term limits, party affiliation of incumbents, differences in state characteristics that are constant across time, and effects specific to each election cycle, such as a nation-wide mood against incumbents, socio-economic characteristics,²⁶ as well as whether or not a given state had election-day registration. The pro-competitive effect of contribution limits is most striking in states with the lowest contribution limits. Dr. Stratmann grouped states with contribution limits into four discrete categories: those states with limits of (a) \$500 or less, (b) \$501 to \$1,000, (c) \$1,001 to \$2,000 and (d) \$2,001 or more.²⁷ He considered both individual and PAC contribution limits on donations to candidates for the state house of representatives.

DR. STRATMANN'S
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Incumbency Remains High

Incumbents in races with any individual contribution limits continued to win 94.3 percent of elections, and enjoyed an average margin of victory of 55.2 percentage points; compared to 94.7 percent for the general incumbency rate and a 56.4 percentage point margin of victory for races both with and without individual contribution limits.

Margin of Victory and Incumbency Rate Fall in Low Contribution States

After controlling for the variables identified above, relative to states that have individual contribution limits of \$2,000 or more, an individual contribution limit between \$1,001 and \$2,000 reduces an incumbent's margin of victory by 5 percentage points; an individual contribution limit between \$501 and \$1,000 reduces an incumbent's margin of victory by 9.5 percentage points; and an individual contribution limit set at \$500 or lower reduces an incumbent's margin of victory by 14.5 percentage points.²⁸ Relative to races without any contribution limits, the tightest limit considered – a \$500 cap on contributions by individuals – reduces the average margin of victory of incumbents by 16.7 percentage points.

More Viable Challengers

This general pattern is repeated for other measures of competitiveness. For example, relative to states that have individual contribution limits of over \$2,000, the likelihood of an incumbent having a viable challenger (defined as an incumbent's vote share of less than 85 percent) increases by 14 percent in elections where the limit is between \$501 and \$1,000, and by 15 percent where the individual contribution limit is set at \$500 or less.

Challengers Have a Greater Chance of Winning

Moreover, relative to states that have individual contribution limits of \$2,000 and above, those with limits set at \$500 or less have roughly a 10 percent greater likelihood of electing challengers.²⁹

PAC Contribution Limits Have Similar Results

The results for states with low PAC limits were similar to those of low individual limits. This is not surprising given that states with low individual limits tend to also have low PAC limits, and states with high or no individual limits tend to have high or no PAC limits. However, limits on PAC contributions have less effect than limits on individual contributions. For example, relative to states

in which the PAC contribution limit is over \$2,000, a limit of \$500 or less decreases the incumbent's margin of victory by 11.3 percentage points, while the corresponding decrease for individual limits is 14.5 percentage points. However, the increased likelihood of electing challengers is almost identical for low PAC and low individual contributions—around 10 percent.

MOREOVER, RELATIVE TO STATES THAT HAVE INDIVIDUAL CONTRIBUTION LIMITS OF \$2,000 AND ABOVE, THOSE WITH LIMITS SET AT \$500 OR LESS HAVE ROUGHLY A 10 PERCENT GREATER LIKELIHOOD OF ELECTING CHALLENGERS.

Only Low Limits Have an Impact; High Limits Do Not

High contribution limits (those at \$2,000 or above) do not have a meaningful impact on incumbency rates or electoral competitiveness. One explanation for this is that when these states introduced contribution limits,

they opted for limits that are fairly high, and higher limits are not binding³⁰ for many candidates because they tend to collect contributions below the legal ceiling. This implies that lowering contribution limits from, for example, \$3,000 to \$2,000, has very little, or even no, effect on the competitiveness of elections because candidates for state houses rarely raise \$2,000 from a single contributor. If, for example, contributors tend to give up to \$1,000, then reducing a limit from \$3,000 to \$2,000 has no effect on amounts raised and the competitiveness of elections, while reducing the limit to \$500 would have an effect because with this limit, contributors can no longer give \$1,000 to candidates.

Dr. Stratmann's findings are consistent with the empirical research of other scholars in the field, who found that contribution limits produce closer margins of victory and help challengers at the expense of incumbents.³¹

THE IMPACT OF LOWER CONTRIBUTION LIMITS ON FUNDRAISING SPREADS

Dr. Stratmann also considered the difference in fundraising between challengers and incumbents by studying how much money candidates actually raised.³² In the fundraising part of the study, he examined results over a shorter period of time: 1996 through 2006. Dr. Stratmann considered the

same 42 states and the same types of contribution limits as in the electoral results study: individual and PAC. However, only Democrat and Republican candidates were considered.³³

Most Incumbents Roundly Outspend Most Challengers

Across the board, incumbents raise more money than challengers, by a ratio of more than 4 to 1, but there is a narrowing of the fundraising gap in states with low limits. In 2006, incumbents in states with individual limits over \$2,000 collected contributions of \$172,000, on average, while challengers collected \$37,000. This is a difference of \$135,000. But in states with limits of \$500 or less, incumbents collected, on average, \$48,000 in contributions, and challengers collected \$11,000.³⁴ By contrast, this is a difference of \$37,000. These averages show that contributions to both incumbents and challengers are lower in states with stricter limits. Moreover, the ratio of incumbent-to-challenger contributions is similar in both high- and low-limit states (4.6 vs. 4.4). But the absolute difference, a gap of \$135,000 vs. a gap of \$37,000, is a marked difference.

Challengers Raise a Higher Percentage of Funds in Low Limit States

Applying regression analysis, Dr. Stratmann found that lower contribution limits lead to a smaller fundraising gap in the amount of money that incumbents and challengers raise. Incumbents in the entire dataset raised between 70 percent and 71 percent of all contributions; challengers raised between 29 percent and 30 percent. However, the percentage raised by incumbents differed by whether the state has limits of \$500 or less, or higher limits than that. In states with limits of \$500 or less, challengers raised 39 percent of total contributions, while in states with higher limits challengers raised 28 percent of total contributions.

Low Limits Lead to Smaller Fundraising Gaps

States that limit individual contributions to \$500 or less show a 20 percentage point smaller fundraising gap between incumbents and challengers, relative to states with an individual contribution limit of \$2,000 or higher.³⁵

Individual contribution limits of \$500 or below lower the amount by which an incumbent outspends the challenger by 7 percentage points, a statistically significant drop. This is a large effect given that, on average, a challenger's share of total spending is 30 percent. Thus, a 7 percent drop indicates that low limits increase challenger's share of spending to 37 percent— a more than 23 percent increase in a given race. However, individual contribution limits greater than \$1,000 have no effect on the share of challenger spending.

The Effect of PAC Limits Mirrors Individual Limits

Similarly, limits on PAC contributions tighten the fundraising gap between incumbents and challengers, with the lowest limits (*i.e.*, \$500 or less) having a greater effect than limits in the range of \$501-\$2,000. In states with PAC contribution limits of \$500 or lower, the fundraising gap is closed by 19.6 percentage points.

Thus, Dr. Stratmann's fundraising research demonstrates that incumbents are in fact able to raise more money than challengers where limits are not present, and, thus, that lower contribution

limits impact incumbents more than challengers. These findings are consistent with previous work by political scientists Kihong Eom and Donald Gross, who studied the impact of contributions in gubernatorial races and suggested that contribution limits do not increase the disparities in fundraising between challengers and incumbents, and that, in some cases, limits help challengers.³⁶

THE EFFECT OF PUBLIC FINANCING

Finally, Dr. Stratmann examined electoral competition in the context of states with functioning public financing systems over the relevant period to test whether the availability of public financing made state house races more or less competitive. Public funding makes it easier for candidates to finance viable campaigns thus enabling challengers to enter races in which they would otherwise not run. On the other hand, all public financing systems require participants to abide by spending limits. Candidates who participate in elections with high-spending privately funded opponents, may well be outspent by an opponent who has access to private wealth or large donations. Theoretically, then, public financing could lead to an uncompetitive race between a candidate who is constrained by spending limits and one who is not.

Minnesota and Maine Offer Public Financing for State House Races

While 14 states have some type of public financing on the books,³⁷ during the 1980 to 2006 period, only Maine and Minnesota had functioning public financing systems for single-member house races.³⁸ Dr. Stratmann compared results in these two states to the remaining 40 states in the same 42-state sample used throughout this study.

Minnesota's Partial Public Financing System

Minnesota was the first state to enact public financing for both legislative and gubernatorial candidates in the 1970s. Candidates who agree to a spending limit set by the state receive public funding equal to 50 percent of the limit.³⁹ Public funds come from a tax check-off that allows taxpayers to direct those funds to a qualified political party, and from an annual appropriation. Minnesota's public financing system is considered a "partial" public financing system because participating candidates also raise private funds throughout their campaigns.⁴⁰ Minnesota candidates apply for public financing by filing a Public Subsidy Agreement (PSA) by September 1 of the election year, and candidates cannot reverse their decision to participate in the public financing program. Any candidate signing this agreement qualifies to receive public funds, though unopposed candidates are not eligible for public funding.

Maine's Full Public Financing System

Maine was the first state to enact a so-called "clean election law" or a "full" public financing program. Maine's campaign finance law, known as the Maine Clean Elections Act (or "MCEA"), is different from those in other states, except for present-day systems in Connecticut and Arizona, because those who agree to accept public funding must forego any private contributions (beyond a small amount of seed money and qualifying contributions) and run an entirely publicly funded campaign. The law was passed by Maine voters in a referendum in 1996 and went into effect in 2000.⁴¹

To run for the Maine state house, candidates must collect 50 contributions of \$5 from voters within their districts. Once those 50 contributions are collected, candidates are eligible for a lump sum grant from the Clean Election Fund. To receive public funds, candidates must agree to forgo all private contributions (including self-financing), and limit spending to the public grant from the Clean Election Fund.⁴² Candidates who reject the option of participating in the public financing program, or who fail to qualify, are still free to collect private money. Participating candidates are also given an additional one-for-one match if they are outspent by opponents who do not participate in the public funding program, or if they are the target of independent expenditures, such as ads produced by a group not associated with the opposing candidate. However, these additional funds are capped, and therefore a well-financed opponent or independent expenditures campaign could potentially spend more than a participating candidate.⁴³

Closer Elections in Public Financing States

In the public financing part of the study, which included all incumbents, Dr. Stratmann found that on average, the mean incumbent's margin of victory is 57 percentage points in states with contribution limits but no public financing, and 30 percentage points in the two states classified here as having public financing (Minnesota from 1980 to 2006 and Maine from 2000 onwards). Furthermore, the winner's margin of victory and the incumbent's margin of victory are 16.7 percentage points lower in states with public financing than in those without.⁴⁴ States with public financing have a 4 percent higher likelihood of having a close election, and a 29 percent lower likelihood that the incumbent wins with more than 85 percent of the popular vote. Only low individual and PAC contribution limits of \$500 and below are as effective as public financing in enhancing the competitiveness of elections. In public financing states, slightly fewer incumbents win reelection and more candidates run for office, but these last two effects are not statistically significant. In his analysis of Maine's full public financing system from 2000 to 2006, Dr. Stratmann found that accepting public financing increases incumbents' vote share by 2 percentage points and challengers' vote share by 3 percentage points.

Incumbents Still Use Public Financing

Interestingly, the Brennan Center found in a separate analysis that even though public financing in Maine increases the competitiveness of elections, incumbents continue to opt-in to the public financing system in large numbers. Indeed, when Maine state senate races from 2000 to 2006 are considered in addition to the house races Dr. Stratmann examined, nearly every incumbent whose previous margin of victory was less than 5 percent opted to participate in the MCEA.⁴⁵

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PART IV. CONSEQUENCES FOR THE LAW: FLAWS IN *RANDALL'S* LOGIC

In *Randall* the Supreme Court considered a law with many facets. The Vermont law included both expenditure and contribution limits, and included limits on parties and restrictions on volunteers. In its final opinion, the Court rejected all elements of the law. Considering contribution limits, the Supreme Court asked whether limits:

prevent candidates from ‘amassing the resources necessary for effective advocacy’; whether they magnify the advantages of incumbency to the point where they would put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny.⁴⁶

The Court noted five factors indicating that Vermont’s contribution limits imposed substantial restrictions on First Amendment rights:⁴⁷ (1) a record that suggests the “contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns,”⁴⁸ (2) limits on contributions from political parties to candidates at exactly the same low

levels that apply to other contributors,⁴⁹ (3) the lack of an exception for expenses incurred by volunteers in the course of campaign activities,⁵⁰ (4) limits that are not adjusted for inflation,⁵¹ and (5) the lack of any special justification for such a low contribution level.⁵² In the final analysis, the *Randall* Court found Vermont’s contribution limits (ranging from \$200 to \$400) unconstitutionally low.⁵³

THIS RESEARCH INDICATES
THAT THE SUPREME COURT’S
HYPOTHESIS ABOUT CLOSE
ELECTIONS WAS MISTAKEN.

The Supreme Court explicitly concerned itself with the power of incumbency. Justice Breyer, joined by Chief Justice Roberts, writing the controlling plurality

opinion, noted that “contribution 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.”⁵⁴ And Justices Scalia and Thomas in their concurring opinion worried that Vermont’s limits “will generally suppress more speech by challengers than by incumbents.”⁵⁵

The *Randall* Court specifically addressed electoral competitiveness. The opinion suggested that evidence before the Court concerning the effect of contribution limits on elections in Vermont showed only the effect of limits in the *average* race, and therefore shed no light on the effect of limits in *close elections*, which are more expensive than an average election.⁵⁶ The Court’s reasoning suggests that lower contribution limits might both reduce an incumbent’s share of the vote in an

average uncompetitive race, and also reduce a challenger's ability to remain competitive in a close race by limiting a viable challenger's ability to raise much-needed funds.

However, this research indicates that the Supreme Court's hypothesis about close elections was mistaken. First, obviously, incumbents may only lose in races where the challenger has overtaken the incumbent. The data show that low contribution limits increase the overall likelihood of incumbent defeat, which could occur only in races in which an incumbent does not lead by overwhelming vote margins.

To confirm the effect of lower contribution limits of \$500 or less on incumbent victory rates in close elections in particular, as opposed to all races, Dr. Stratmann considered the subset of competitive elections in which incumbents received less than 60 percent of the vote.⁵⁷ Within this sample, Dr. Stratmann found that the likelihood of incumbent defeat increases to 16 percent, which is 6 percentage points higher than the 10 percent increase observed over the full set of competitive and non-competitive races. Similarly, when considering only those races with contributions limits of \$500 or less in which the incumbent received less than 55 percent of the vote, Dr. Stratmann found that the likelihood of incumbent defeat increases by 10 percent, which is the same increase observed over the full sample.

Also, lower contributions limits produce tighter fundraising spreads among candidates. Thus, in states with low contribution limits, both candidates are likely to have more similar amounts of money to spend.

In sum, contrary to the opinion of the majority in *Randall*, lower contribution limits reduce incumbents' rate of re-election, make it more likely that a viable challenger will enter the race, and increase the likelihood that the election will be close and that fundraising spreads among candidates will be tighter. Ultimately, contribution limits actually increase the competitiveness of races. These facts should be considered should future challenges to low contribution limits come before the Court.

PART V. DRAFTING TIPS: POLICY SUGGESTIONS FOR STATE LAW MAKERS FROM THE BRENNAN CENTER

The Brennan Center/Stratmann research shows both low contribution limits and public financing increase the competitiveness between incumbents and challengers in the states studied.

The Brennan Center routinely offers advice to state law makers and reform advocates on how to improve legislative bills on campaign finance. Based on this experience with legislative drafting as well as these new findings from Dr. Stratmann's work, we offer the following practical advice about implementing new contribution limits or lowering existing contribution limits.

- Before drafting a bill or ballot initiative to lower campaign contribution limits, gather data on the existing size of contributions (such as the average contribution, the size of contributions in heavily contested races, and the average size of the contributions from the top quintile of contributors). These figures aid in determination of whether the current contribution limits actually bind donors.
- A key step in drafting a good contribution limits bill is to gather data about the sources of campaign spending in the state. (Does the majority of money come from individuals, businesses, unions, PACs or parties, and have independent spenders had a large impact?) This information will help to determine whether there are loopholes in the system and to better tailor contribution limits.
- In addition, advocates should investigate whether there have been any campaign finance scandals in the state's recent history. These could range from *quid pro quo* scandals, to personal use of campaign funds by candidates, to pay-to-play scandals involving state contractors or lobbyists. If any such scandals have happened, this fact can be used as a reason why the limits are necessary to protect the state's democratic processes from corruption.

- Bill drafters should familiarize themselves with Supreme Court case law on contribution limits including: *Randall v. Sorrell*, 548 U.S. 230 (2006), *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), *Cal. Med. Ass'n. v. Fed. Election Comm'n*, 453 U.S. 182 (1981) and *Buckley v. Valeo*, 424 U.S. 1 (1976) and with case law from the state's controlling federal circuit so that they do not pass a law that is likely to be struck down as unconstitutional.
- Drafters can tailor the limits to the offices sought and to the nature of the donor. House race limits can be low, governor's race limits can be highest. Individuals, PACs and parties should each have distinct limits. Corporations and unions can be banned from giving. Finally, if the bill is being passed by a legislature, explain in legislative history why the state is adopting the contribution limits that are chosen.
- A carefully crafted bill that lowers limits is more likely to withstand judicial scrutiny, and, if limits are set low enough, could lead to increased electoral choice for voters.

ENDNOTES

- 1 Dr. Thomas Stratmann is responsible for doing all of the statistical analysis and analytical research cited in this paper, unless otherwise noted. The staff at the Brennan Center for Justice is responsible for all discussions of law and policy proposals. While Dr. Stratmann's empirical work is the basis for the Brennan Center's policy proposals, the policy proposals are solely authored by the Brennan Center.
- 2 *Randall*, 548 U.S. at 249.
- 3 *Id.* at 253.
- 4 *Id.* at 287-88 (Souter dissenting) (citing “Eom & Gross, *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 POL. RESEARCH Q. 99, 99 (2006) (“Analyses of both the number of contributors and the dollar amount of contributions [to gubernatorial candidates] suggest no support for an increased bias in favor of incumbents resulting from the presence of campaign contribution limits. If anything, contribution limits can work to reduce the bias that traditionally works in favor of incumbents. Also, contribution limits do not seem to increase disparities between gubernatorial candidates in general” (emphasis deleted)); Kedron Bardwell, *Money and Challenger Emergence in Gubernatorial Primaries*, 55 POL. RESEARCH Q. 653 (2002) (finding that contribution limits favor neither incumbents nor challengers); Robert Hogan, *The Costs of Representation in State Legislatures: Explaining Variations in Campaign Spending*, 81 SOC. SCI. Q. 941, 952 (2000) (finding that contribution limits reduce incumbent spending but have no effect on challenger or open-seat candidate spending).”).
- 5 Bradley A. Smith, *Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences*, CATO POL'Y ANALYSIS, No. 238 (1995).
- 6 John R. Lott, Jr., *The Effect of Nontransferable Property Rights on the Efficiency of Political Markets, Some Evidence*, 32 J. PUB. ECON., 231–246 (1987); Dennis C. Mueller & Thomas Stratmann, *Informative and Persuasive Campaigning*, Vol. 81 No. 1 PUB. CHOICE 55-77 (1994).
- 7 *Randall*, 548 U.S. at 256 (concluding “the petitioners’ studies, taken together with low average Vermont campaign expenditures and the typically higher costs that a challenger must bear to overcome the name-recognition advantage enjoyed by an incumbent, raise a reasonable inference that the contribution limits are so low that they may pose a significant obstacle to candidates in competitive elections.”).
- 8 Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, Vol. 72 No. 2 AM. POL. SCI. REV. 469-91 (1978).
- 9 Here “high quality challengers” is used as a political science term of art. Different authors have varied definitions of this term, but this term is meant to encompass highly qualified, competent individuals who are running for an office that they have not held before.
- 10 Janet M. Box-Steffensmeier, *A Dynamic Analysis of The Role of War Chests in Campaign Strategy*, Vol. 40 No. 2 AM. J. OF POL. SCI. 352-371 (1996); Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions between Gubernatorial Candidates*, Vol. 59 No. 1 POL. RES. Q. 99-110 (2006).
- 11 See Thomas Stratmann & Francisco Aparicio-Castillo, *Competition Policy for Elections: Do*

Campaign Contribution Limits Matter?, 127 PUB. CHOICE 177, 198 (2006).

- 12 *Id.* at 177.
- 13 Gary Cox & Scott Morgenstern, *The Increasing Advantage of Incumbency in the U.S. States*, Vol. 18 No. 4 LEG. STUD. Q. 495 (1993); Andrew Gelman & Gary King, *Estimating the Incumbency Advantage Without Bias*, Vol. 34 No. 4 AM. J. POL. SCI. 1142 (1990).
- 14 As an extreme example of this phenomenon, the Brennan Center has found that in New York State from 1995 to 2006, incumbent legislators were more likely to die in office than lose their seats through an electoral defeat. See Testimony of Justin Levitt, Associate Counsel and Kahlil Williams, Policy Analyst Before the Assembly Standing Committee on Governmental Operations and the Assembly Legislative Task Force on Demographic Research and Reapportionment (Oct. 17, 2006), available at http://www.brennancenter.org/content/resource/testimony_of_justin_levitt_and_kahlil_williams_before_the_new_york_state_as/.
- 15 This 78 percent presumes a two person race. In a multi-person race, the percentages would change.
- 16 “Viable challenger” means one who can garner 15 percent of the vote or more.
- 17 *Randall*, 548 U.S. at 249-250.
- 18 South Dakota has since raised its contribution limits.
- 19 Dr. Stratmann’s data for the 1980 to 2001 period were obtained from Stratmann & Aparicio-Castillo (2006), data from 2002-2006 were obtained from (a) states’ web sites, (b) the Practising Law Institute, (c) Professor Keith Hamm of Rice University and (d) the Brennan Center for Justice at NYU School of Law.
- 20 Since the empirical study is of single member districts, Arizona, Maryland, New Jersey, South Dakota and North Dakota are omitted because they have multi-member districts. Nebraska is omitted because its legislature is unicameral. Louisiana is omitted since its relevant competition occurs in primaries. New Hampshire is omitted because the vast majority of its seats are in multi-member districts. Multi-member districts in Georgia and Illinois were also omitted.
- 21 Between 1980 and 2006 in the 42 states being considered, 59 percent of all races for state house seats were subject to a campaign contribution restriction. In races with contribution limits, the average limit was \$3,459 in 2006 dollars. Almost 7 percent of all races were subject to a \$500 or lower contribution limit. About 20 percent of the races subject to limits took place where the limit was greater than \$500 but less or equal to \$1,000, and 19 percent have contribution limits greater than \$1,000 but less or equal to \$2,000.
- 22 This measure was not particularly illuminating because in our two party system, in a general election, there are often exactly two candidates vying for a seat or only one candidate running unopposed. The average number of candidates in an electoral race is 1.8. This number includes minor party candidates. The average number of candidates is very similar in the full sample containing all 42 states (1.781) and the subsample of states with contribution limits (1.796).
- 23 States that have an individual contribution limit for the entire time period of this data set are

AK, AR, CT, DE, FL, HI, KS, KY, MA, ME, MI, MN, MT, NC, NY, OK, VT, WI, WV, and WY. States with no individual contribution limits for the entire time period include AL, CO, ID, IL, IN, IA, MS, NM, PA, TX, and VA. States that switched from no contribution limits to contribution limits include CA (2000), GA (1990), HI (1982), MO (1996), NV (1996), OH (1996), OR (1996), RI (1990), SC (1992), TN (1996), UT (1990), WA (1994), with the date when the new limit became effective in parentheses. Oregon's contribution limits were repealed by the Oregon Supreme Court in 1997. See *Vannata v. Keisling*, 931 P.2d 770 (Or. 1997).

- 24 Anthony Giersynski & David Breaux, *Money and Votes in State Legislative Election*, Vol.16 No. 2 LEGIS. STUD. Q. 203-17 (1991).
- 25 To read Dr. Stratmann's studies of the effects of low contributions, please contact him at George Mason University or download his research from <http://www.ssrn.com/> or at <http://www.brennancenter.org>.
- 26 Socio-economic characteristics include the fraction of the state's population who are Black, Hispanic, less than 18 years old, or 65 years and older.
- 27 All contribution limits in Dr. Stratmann's study are per election cycle. An election cycle includes both the primary and general election. In 2006, states with elections subject to limits of \$500 and less included CO, CT, ME, MI, MT, WI; limits between \$501 and \$1,000 included FL, KS, MA, MN, MO; limits between \$1,001 and \$2,000 included AK, DE, HI, ID, KY, RI, SC, TN, VT, WA, WV, WY; limits above \$2,000 and unlimited included AL, AR, CA, GA, IA, IL, IN, NC, NM, NV, NY, OH, OK, OR, PA, TX, UT. Mississippi and Virginia have off-year elections so they did not have elections in 2006.
- 28 These results are statistically significant at least at the 5 percent level. By statistically significant at the 5 percent level, we are referring to standard statistical models. When a finding is statistically significant at the 5 percent level, this means that there is 95 percent level of confidence that the null hypothesis is rejected and that the effect we are measuring is having the stated impact. Throughout this paper, findings are statistically significant at the 5 percent level unless otherwise noted.
- 29 This effect was statistically significant at the 10 percent level, meaning that there is 90 percent level of confidence that the effect we are measuring is having the stated impact.
- 30 Here "binding" means restraining contributors from giving what they are otherwise predisposed to give.
- 31 Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions between Gubernatorial Candidates*, Vol. 59 No. 1 POL. RES. Q. 99-110 (2006); Jeffrey Milyo, David Primo & Timothy Groseclose, *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, in *THE MARKETPLACE OF DEMOCRACY* 268-85 (Michael McDonald & John Samples eds., 2006); Thomas Stratmann & Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 PUB. CHOICE 177 (2006).
- 32 Contribution data come from the National Institute on Money in State Politics.

- 33 Only major party candidates were studied because this allowed for a straightforward computation of the fundraising gap between two candidates. For the fundraising aspect of the study, Dr. Stratmann only considered those races in which both candidates raised money.
- 34 In this dataset of 42 states over 10 years, in races where both candidates spent some money, the average total contribution to incumbents was \$117,000; and to challengers was \$45,000, expressed in 2006 dollars.
- 35 The average fundraising gap is 0.49. (This 0.49 average would mean that the incumbent would have \$1,000 in funding and the challenger would have \$340 in funding.) Low limits of \$500 or less bring the 0.49 average to 0.29 (a reduction of 20 percentage points). The 0.29 indicates a situation of either 1. holding the incumbent contributions fixed at \$1,000, while the challenger has \$550 in contribution, or, 2. holding challenger contributions fixed at \$340, while the incumbent has \$630 in contributions.
- 36 Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions between Gubernatorial Candidates*, Vol. 59 No. 1 POL. RES. Q. 99-110 (2006).
- 37 Public funding for gubernatorial candidates exists in Arizona, Connecticut, Florida, Hawaii, Maine, Maryland, Michigan, Nebraska, New Jersey and Vermont. This funding also exists for statewide offices in Arizona, Connecticut, Florida, Nebraska, and Rhode Island. Systems providing at least some public funding for state legislative candidates exist in Arizona, Hawaii, Maine, Minnesota, Nebraska, and Wisconsin. North Carolina has public financing for appellate judges. New Mexico has public financing for a number of minor offices.
- 38 Arizona, like Maine provides full public financing for house races, however, Arizona has multi-member districts and is therefore excluded from the 42 state sample. UNITED STATES GENERAL ACCOUNTING OFFICE, *CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES* (2003), <http://www.gao.gov/new.items/d03453.pdf>.
- 39 For the 2006 election, this limit was \$28,400 for a candidate running for the Minnesota House.
- 40 Peter L. Francia & Paul S. Herrnson, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections* Vol. 31 No. 5 AM. POL. RES. 520 (2003).
- 41 The discussion of Maine's law is taken from the New Rules Project Institute for Local Self-Reliance, *Maine's Clean Election Act*, <http://www.newrules.org/gov/cleanME.html>.
- 42 In 2000, 2002, 2004, and 2006 initial payments amounts for the general election to clean election candidates to the Maine house were \$3,252, \$4,255, \$4,032, and \$4,362, respectively. Candidates could receive twice this amount when they run against a non-clean election candidate who has raised contributions over a particular threshold. MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, *2007 STUDY REPORT: HAS PUBLIC FUNDING IMPROVED MAINE ELECTIONS?* (2007), http://mainegov-images.informe.org/ethics/pdf/publications/2007_study_report.pdf.
- 43 Candidates in Maine may receive a maximum of matching funds equal to twice the amount of the initial grant payment. In 2006, the initial payment was \$4,362 for a contested general election for the house. Thus the maximum match would have been \$8,724. *See id.*

- 44 These findings are statistically significant at the 1 percent level, meaning that there is 99 percent level of confidence that the effect we are measuring is having the stated impact.
- 45 The Brennan Center has examined the results in Maine senate elections for 2000-2006 to see if incumbents were rejecting or opting into the public financing system, especially after particularly close elections. We found that incumbents in Maine stay in the public financing system even after a close electoral race in a previous election. See Brennan Center, *Public Financing and Competitiveness in Maine Senate Elections* (2009), www.brennancenter.org.
- 46 *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).
- 47 See *id.* at 253 (stating that “Act 64’s contribution limits may fall outside tolerable First Amendment limits.”).
- 48 *Id.*
- 49 *Id.* at 256.
- 50 *Id.* at 259 (noting also that the lack of an exception has a greater effect where contribution limits are very low).
- 51 *Id.* at 261.
- 52 *Id.*
- 53 See *id.* at 253 (stating that the statute’s “contribution limits are too restrictive.”); *id.* at 238 (Vermont’s Act 64 limited contributions from individuals, political parties, and PACs during a two-year general election cycle to \$400 to candidates for statewide office, \$300 to state senators, and \$200 to state representatives, as well as limiting contributions by individuals to a political party to \$2,000 for a two-year election cycle).
- 54 *Id.* at 249.
- 55 *Id.* at 268.
- 56 *Id.* at 255. (“the 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.”)
- 57 Dr. Stratmann used 60% as the threshold because this is the same threshold used by the study cited by the Supreme Court in defending their argument that close elections lead to different results for incumbents than the average election. See *Randall*, 548 U.S. at 255 (citing NORMAN ORNSTEIN, THOMAS MANN, & MICHAEL MALBIN, *VITAL STATISTICS ON CONGRESS 2001-2002*, 89-98 (2002) (data showing that spending in competitive elections, *i.e.*, where incumbent wins with less than 60% of vote or where incumbent loses, is far greater than in most elections, where incumbent wins with more than 60% of the vote)).

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