CHAPTER ONE
THE CONSTITUTIONAL FRAMEWORK: BUCKLEY V. VALEO

Campaign finance reformers should not proceed without some understanding of the 1976 Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Supreme Court considered broad-based constitutional challenges to the Federal Election Campaign Act (“FECA”), as amended in 1974, 2 U.S.C. §§ 431 et seq. FECA’s opponents challenged the statute’s contribution and spending limits, reporting and disclosure requirements, the public financing system for presidential campaigns, and the legitimacy of the Federal Election Commission (“FEC”). Although FECA applies only to candidates for federal office, *Buckley* is the leading case on campaign finance regulation and the analytical starting point for all state and local campaign finance laws.

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

In 2000, 2003, 2006, 2007 and 2008 there were major Supreme Court decisions with important implications for the interpretation of *Buckley*. The first is *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the second is *McConnell v. FEC*, 540 U.S. 93 (2003), the third is *Randall v. Sorrell*, 548 U.S. 230 (2006), the fourth is *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (“WRTL II”), and the fifth is *Davis v. FEC*, 128 S. Ct. 2759 (2008). Because it is impossible to understand campaign finance law without also understanding these more recent cases, this chapter summarizes their analyses and holdings as well, with particular attention to their implications for *Buckley*. Finally, in 2010, the Supreme Court altered the landscape for campaign finance once more in its decision, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), by allowing corporations and unions to spend their treasury funds directly on political advertisements about candidates.

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

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1 *McConnell* was overruled in part by *Citizens United v. FEC*, 130 S. Ct. 876 (2010).
Over time, certain categories of restrictions have become identified with specific levels of constitutional scrutiny. For example, restrictions that are based on the viewpoint of the speaker are subject to strict scrutiny, while restrictions that merely regulate the time, place, or manner of First Amendment activity are subject to intermediate review. Where restrictions do not fit neatly into any recognized category, courts must analyze the impact of the restrictions to determine the appropriate level of scrutiny, as the Supreme Court did in *Buckley*.

I. Contribution and Expenditure Limitations

A. General Principles

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

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

The Court determined that limits on contributions and expenditures differ significantly in their impact on speech and association. According to the Court, expenditure limitations “represent substantial . . . restraints on the quantity and diversity of political speech” because “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” *Buckley*, 424 U.S. at 19.2

By contrast, the *Buckley* Court regarded a contribution largely as a “symbolic expression of support” for a candidate, *id.* at 21,3 which is not transformed into political debate until it is spent by the recipient to convey views to the voters. *Id.*4 Because the contributor’s right to discuss candidates and issues remains otherwise

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

3 The Court thought that the expression involved in contributions was largely symbolic, because a contribution usually does not communicate the basis for the contributor’s support, and the size of the contribution is only a “very rough index” of the intensity of support. *Buckley*, 424 U.S. at 21.

unimpaired, contribution limits ordinarily involve “little direct restraint” on political communication. *Id.* The limits “could have a severe impact on political dialogue,” however, if they “prevented candidates and political committees from amassing the resources necessary for effective advocacy.” *Id.*

*Buckley* also distinguished contribution and expenditure limits with respect to their impact on freedom of association. Contribution caps were found to limit “one important means of associating,” because contributions serve to affiliate the contributor with the recipient and other persons who pool resources in support of common political goals. *Id.* at 22. Contribution limits leave open other avenues of association, however, and allow recipients to aggregate large sums for advocacy. Expenditure limits were seen to “impose significantly more severe restrictions” on freedom of association, because they cut off the ability of candidate organizations and political committees (“PACs”) to amplify the voices of their adherents. *Id.* at 23.\(^5\)

**B. Contribution Limitations**

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

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

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

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

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\(^5\) *Buckley* is an interpretation of federal law. Individual states can potentially determine that there is no free speech distinction between contributions and expenditures under state election laws. *See, e.g.*, Vannatta v. Keisling, 931 P.2d 770 (Or. 1997); *but see* Vannatta v. Or. Gov’t Ethics Comm’n, 222 P.3d 1077, 1084-86 (Or. 2009).
The Court did not even discuss the latter two interests as applied to contribution limits, finding that the interest in preventing the reality and appearance of corruption was a “constitutionally sufficient justification” for the $1,000 limit.\(^6\) *Id.* at 26.

Having identified the “sufficiently important interest,” *Buckley* proceeded to consider whether contribution limits were “closely drawn” to avoid unnecessary abridgement of First Amendment rights. The Court determined that the limits were indeed precisely focused on the problems of real and perceived corruption, “while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.” *Id.* at 28. *Buckley* specifically rejected arguments seeking to prove that higher limits would alleviate those problems, stating that “[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind.” *Id.* at 30.\(^7\)

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

**2. Other Contribution Limitations**

*Buckley* upheld three additional limitations on contributions:

- a $5,000 limitation on contributions to candidates by certain PACs, *id.* at 35-36;\(^8\)
- “[l]imitations on [v]olunteers’ [i]ncidental [e]xpenses, *id.* at 36-37; and
- a $25,000 limit on total contributions from any one individual to all candidates, during any calendar year, *id.* at 38.

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\(^6\) Although “the perception of corruption, not just actual corruption” is sufficient to enact contribution limits, the presence of both actual and perceived corruption creates the strongest rationale for such limits. See *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199-200 (2d Cir. 2010).

There is no longer a limit on contributions to organizations that make independent expenditures in federal elections, because the D.C. Circuit has found after *Citizens United* that “the government has no anti-corruption interest in limiting contributions to an independent expenditure group.” *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010), cert. denied sub nom *Keating v. FEC*, ___ S. Ct. ___, 2010 WL 4272775 (Nov. 1, 2010).

\(^7\) An example of contribution limitations that failed for not being “closely drawn” are restrictions on contributing after the date of the election, bans on contributing within 28 days of an election, and bans on contributing cash. See *Anderson v. Spear*, 356 F.3d 651, 671 (6th Cir. 2004).

\(^8\) The PACs at issue in *Buckley* were FECA’s “multicandidate political committees,” which are PACs that have 50 or more contributors and make contributions to five or more candidates, 2 U.S.C. § 431.
The Court held that these provisions encouraged participation in the political process, while preventing evasion of the basic $1,000 limits. *Id.* at 35-38.

**C. Expenditure Limitations**

After upholding FECA’s caps on contributions, the Court turned its attention to a series of monetary limits on expenditures. *See id.* at 39-58. According to the Court, the expenditure limits imposed a severe burden on First Amendment rights and were therefore subject to the most rigorous standard of constitutional review—strict scrutiny—which requires proof that a challenged restriction is narrowly tailored to serve a compelling state interest. None of the expenditure limits survived that level of scrutiny.⁹

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

FECA prohibited all persons from making total expenditures “relative to a clearly identified candidate” in excess of $1,000 per year. 2 U.S.C. § 441a note 9. The statute defined “expenditures” to include only spending that was not coordinated with a candidate. Opponents argued that the statutory limit on such “independent” expenditures was both vague and unjustified.

The Court agreed that the phrase “relative to” did not clearly identify what candidate-related expenditures were subject to the statutory limit. Advertising meant to address important political issues, which is fully protected by the First Amendment, might be thought subject to the expenditure limit if the public identified the issue with a particular candidate. Consequently, the vague statute threatened to chill free expression guaranteed under the Constitution. To eliminate the vagueness problem, *Buckley* therefore determined that FECA’s expenditure limits covered only “communications that in express terms advocate[d] the election or defeat of a clearly identified candidate for federal office” (as opposed to those that merely discussed issues or candidates, without expressly advocating election or defeat of candidates). *Buckley*, 424 U.S. at 44. The distinction between “express advocacy” and “issue advocacy” originates here. *Id.*¹⁰

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

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

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¹⁰ See later in this chapter and Chapter Seven for further discussions of this distinction and its implications for efforts to regulate campaign advertising.
The state interest in preventing the reality and appearance of corruption could not justify the expenditure limit for two reasons. First, the *Buckley* Court’s narrowing interpretation of “expenditures relative to a clearly defined candidate” undermined the ability of such limits to advance the anti-corruption interest. As the Court noted: “It would naively understate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate’s campaign.” *Id.* at 45.\(^\text{11}\)

Second, the expenditure limits governed only “independent expenditures”—those not coordinated with a candidate. The Court believed that the absence of coordination made it less likely that independent expenditures would be an effective tool for buying influence. “Unlike contributions,” the Court said, “such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Id.* at 47.

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

2. Other Expenditure Limitations

Continuing to apply strict scrutiny, *Buckley* struck down two additional expenditure limits, one on candidates’ spending from their personal or family resources and the other on overall campaign expenditures.\(^\text{12}\) The Court reasoned that candidates could not be corrupted by spending their own money. With regard to spending limits on campaigns, *Buckley* held that contribution limits would be sufficient to address the perception and reality that large contributions were corrupting candidates.\(^\text{13}\) The Court also determined that the interest in equalizing candidates’ resources was insufficient to override the candidate’s interest in free speech.\(^\text{14}\) Moreover, the Court

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\(^{12}\) However, campaign expenditure restrictions on governmental bodies are permissible. *Sweetman v. State Elections Enforcement Comm’n*, 732 A.2d 144, 162 (Conn. 1999).

\(^{13}\) See *State v. Brookins*, 844 A.2d 1162, 1180 (Md. 2004) (holding that a law preventing a candidate from hiring workers to distribute literature near polls on election day was unconstitutional because it neither combated the appearance of corruption nor was narrowly tailored).

\(^{14}\) However, expenditure limitations are permissible in limited forums, such as for college student office elections. *See Flint v. Dennison*, 488 F.3d 816, 819 (9th Cir. 2007) (holding that the educational interests outweighed the free speech interests in student elections).
noted, the “skyrocketing costs of political campaigns” did not in and of themselves justify restrictions on First Amendment activity, even if the spending were “wasteful, excessive, or unwise.”

II. Reporting and Disclaimer Requirements

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

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

• “provid[e] the electorate with information” about “where . . . money comes from and how it is spent,” to help voters place candidates on the political spectrum and identify the interests to which candidates are likely to be responsive;
• deterring the reality and “appearance of corruption by exposing large contributions and expenditures to the light of publicity,” to help the electorate detect post-election special favors; and
• providing the “essential means of gathering the data necessary to detect violations of contribution limits.”

Id. at 66-68 (citation & internal quotation marks omitted).

The Court recognized that mandatory reporting might deter some individuals who would otherwise contribute, but concluded that reporting was “the least restrictive means of curbing the evils of campaign ignorance and corruption.” Id. at 68. Buckley acknowledged, however, that if a group could show a reasonable probability that

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15 It is also impermissible to restrict the failure to expend contributions by taking unexpended privately financed contributions. See Anderson, 356 F.3d at 669-70 (6th Cir. 2004) (holding that a statute that requires unexpended contributions to be given to the state violates the Fifth Amendment).

But see Humans v. City of Albuquerque, 160 F. Supp. 2d 1266, 1273 (D.N.M. 2001) (refusing to grant a preliminary injunction against an expenditure limit preventing a mayoral candidate from spending more than twice the mayor’s salary on the election because the limit met strict scrutiny).

16 The minimum amounts triggering the reporting requirement are now $250 and $200 per year, for independent expenditures and contributions, respectively. 2 U.S.C. § 434(c)(1), (c)(2)(C).

17 See Perry v. Schwarzenegger, 591 F.3d 1126, 1145 (9th Cir. 2009) (quashing a discovery request seeking internal communications and strategy of a pro-Proposition 8 organization on First Amendment grounds).

18 Disclosure requirements have also been explicitly held to an intermediate scrutiny standard. Koerber v. FEC, 583 F. Supp. 2d 740, 745 (E.D.N.C. 2008).
disclosure of its contributors would subject them to harassment or retaliation, an exception from the reporting requirements could be carved out to protect their First Amendment rights.\textsuperscript{19} \textit{Id.} at 74.

The Court then turned to the vagueness claim asserted against the reporting requirements for independent expenditures. To ensure that only election-related spending was subject to those requirements, the Court construed them to apply only to independent expenditures that expressly advocated the election or defeat of candidates.\textsuperscript{20} In addition, the Court interpreted the term “political committee” to include only those organizations “that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” \textit{Id.} at 79. Thus, independent expenditures by political committees would be reportable, but the donations received and spending undertaken by organizations devoted primarily to issue discussion would remain outside the sweep of the reporting requirements.\textsuperscript{21}

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

III. Public Financing of Presidential Election Campaigns

FECA established a fund, financed by an income tax check-off, whereby individuals would earmark payment of (then) $1 of their taxes for presidential campaigns.\textsuperscript{22} The fund would pay for party nominating conventions, general election campaigns, and a portion of primary campaigns for those candidates who agreed to limit overall spending on their campaigns.

\textsuperscript{19} See Nat’l Ass’n of Mfrs v. Taylor, 582 F.3d 1, 22 (D.C. Cir. 2009) (upholding disclosure as applied to a trade association and holding that the fear of association with controversial speech is insufficient and does not rise to levels of harm in \textit{NAACP v. Alabama ex rel. Patterson}, 357 U.S. 449 (1958) (finding association led to economic reprisal, physical coercion, and other hostility toward members)). The Supreme Court has also carved out an exception for certain anonymous speech. See \textit{McIntyre v. Ohio Elections Comm’n}, 514 U.S. 334, 342 (1995).


\textsuperscript{21} However, if an organization primarily concerned with an issue distributes voter guides, the organization can be subject to contributor reporting. See \textit{Human Life of Wash. Inc. v. Brumsickle}, No. 09-35128, 2010 WL 3987316, at *2, *28 (9th Cir. Oct. 12, 2010).


\textsuperscript{22} In 1993, the tax check-off was increased from $1 to $3.
Major parties (those whose presidential candidate received more than 25 percent of the vote in the previous election) and their candidates who accepted the voluntary spending limits were entitled to receive more funding than minor parties (whose candidate received 5-25 percent of the vote) and their candidates. Minor-party candidates who accepted voluntary spending limits could receive a reduced grant of public funds and could raise private funds to make up the difference between the amount of their grant and the major-parties' grant. “New” parties (whose candidate received less than 5 percent of the vote), independent candidates, and parties not holding a convention received no pre-election funding at all. However, minor and new party candidates could get post-election funds if they (or electors pledged to them) were on the ballot in at least 10 states, and their share of the popular vote exceeded certain percentages.

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

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

Buckley also rejected the opponents’ First Amendment challenge. Rather than abridging speech, the Court held, the public funding system helped “to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” Id. at 92-93. Buckley therefore recognized that “Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.” 23 Id. at 57 n.65.

Finally, Buckley held that the public funding scheme did not invidiously discriminate against non-major parties or their candidates. The Court attributed any difficulty minor-party candidates might have in waging effective campaigns to their inability to raise private contributions and thus, “presumably,” to their general lack of public support. Id. at 94-96 & n.128. Congress could treat parties and candidates with broad public support (as measured by prior vote totals) differently than those without, to avoid “frivolous candidacies, . . . splintered parties, and . . . unrestrained factionalism.” Id. at 97, 101. 24 Moreover, the Court was not persuaded, on the record available in Buckley, that non-major-party candidates would be worse off under the public financing scheme, with its voluntary expenditure limits for major-party candidates, than in an unlimited private funding system.

23 State governments can condition the receipt of public funds on acceptance of expenditure limits by participating candidates. See Daggett v. Comm’n on Gov’t Ethics and Elections Practices, 205 F.3d 445, 466 (1st Cir. 2000).

24 See Anderson, 356 F.3d at 676 (holding that the government’s substantial interest in allocating scarce resources permits the establishment of access requirements for public funds and is permissible under the Fourteenth Amendment).
BUCKLEY REAFFIRMED:
NIXON V. SHRINK MISSOURI GOVERNMENT PAC

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

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

- the standard of review: contribution limits are governed by a different, and less strict, standard of review than expenditure limits, see Shrink Missouri, 528 U.S. at 387-88;
- what counts as a state interest justifying contribution limits: contribution limits can be justified by the state’s interests in combating not only the reality, but also the appearance, of corruption, see id. at 388;
- what “corruption” means: “corruption” is not confined to outright bribery but also extends to the “broader threat from politicians too compliant with the wishes of large contributors,” id. at 389;
- what is needed to prove the state’s interest: the state need not document actual corruption but may rely on the findings in Buckley and other types of evidence that tend to show an appearance of corruption, see Shrink Missouri; 528 U.S. at 378-79, 393-94;
- the significance of inflation since Buckley: none; neither $1,000 nor any other amount is a constitutional minimum below which legislatures cannot regulate, see Shrink Missouri, 528 U.S. at 396-97.

Most importantly, Shrink Missouri articulated a new standard for the “outer limits of contribution regulation.” Id. at 397. According to the Court, no limit is too low, unless it is “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” Id. This test raises the constitutional threshold so high that, in the future, contribution limits should be

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25 For example, a limit of $250 in contributions per person for state legislative candidates has been upheld. Daggett, 205 F.3d at 459. Limits as low as $100 have been upheld. See, e.g., Mont. Right to Life Ass’n v. Eddleman, 343 F.3d 1085, 1087-88 (9th Cir. 2003).

These restrictions are permissible for political campaigns, but are not for ballot issue campaigns, which may include recall campaigns. Citizens for Clean Gov’t v. City of San Diego, 474 F.3d 647, 654 (9th Cir. 2007).

26 This includes not only limitations on contributions per person, but can also ban contributions from certain classes of organizations, such as casinos and riverboat gambling businesses. See Casino Ass’n of La. v. State ex rel. Foster, 820 So. 2d 494, 509 (La. 2002). Contributions between candidates’ committees can also be banned. Minn. Citizens Concerned for Life, Inc. v. Kelley, 427 F.3d 1106, 1113 (8th Cir. 2005). However, Citizens United may have limited what the Court considers to be “corruption.” See 130 S. Ct. at 908-11.
upheld in all but the most extraordinary of circumstances. In more than eight years since the decision in *Shrink Missouri*, only one individual contribution limit has been held unconstitutional.\(^{27}\)

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

For the first time in so many words, Justice Stevens stated: “Money is property; it is not speech.” *Id.* at 398 (Stevens, J., concurring); cf. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part) (“[T]he argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.”). Justice Stevens explicitly questioned the view that the First Amendment provides the same measure of protection to the use of money in politics as it does to the use of ideas. All the same, he recognized that the right to use one’s own money in political contexts does merit significant constitutional protection.

Justice Breyer wrote separately to emphasize that “constitutionally protected interests lie on both sides of the legal equation” in contribution limit cases. *Id.* at 400 (Breyer, J., joined by Ginsburg, J., concurring). In his view, legislatures may appropriately seek “to democratize the influence that money itself may bring to bear upon the electoral process,” *id.* at 401, notwithstanding *Buckley*’s comment that “the speech of some . . . [may not be restricted] to enhance the relative voice of others,” 424 U.S. at 48-49. According to Justice Breyer, “those words cannot be taken literally” because the Constitution often permits restrictions “to prevent a few from drowning out the many.” *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). He also endorsed a reading of *Buckley* that permits substantial campaign finance reform—including proposals to regulate soft money, to provide reduced-price media time, and even to limit some expenditures. *Id.* at 404-05. If *Buckley* could not be read to permit such reform, Justice Breyer concluded, “the Constitution would require us to reconsider *Buckley*.” *Id.* at 405.

Justice Kennedy dissented from the decision in *Shrink Missouri*. But his opinion was important because it recognized the serious problems plaguing the federal system—including soft money and “so-called issue advocacy.” *Id.* at 406-07 (Kennedy, J., dissenting). He would have overruled *Buckley*, but only in such a way as to leave a clean slate for new approaches to campaign finance reform. *Id.* at 409-10. Notably, he left open the possibility that expenditures as well as contributions could be limited constitutionally (although he expressed considerable skepticism on that score). *Id.* at 409.

*Shrink Missouri* was a huge win for campaign finance reform. The Court rejected every effort to cut back on *Buckley*’s analysis of contribution limits—and several Justices signaled openness to additional regulation of money in politics. Unfortunately, campaign finance decisions by the Supreme Court since the confirmation of Chief Justice Roberts and Justice Alito suggest that the tide has turned. Those cases will be discussed later.

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\(^{27}\) The Supreme Court invalidated Vermont’s contribution limits in *Randall v. Sorrell*, discussed below, with no discussion of the *Shrink Missouri* standard.
GIANT LOOPOLES SUCCESSFULLY CLOSED:  
McConnell v. FEC

In 2002, Congress passed the Bipartisan Campaign Reform Act (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.), enacting into law what had been commonly known as the “McCain-Feingold Bill.” The principal purpose of BCRA was to close two huge loopholes that had opened in federal campaign finance law: the “soft money” loophole and the “sham issue advocacy” loophole. The soft money loophole allowed corporations, unions, and wealthy individuals to escape limitations on contributions to national political parties. Millions of dollars were funneled through the parties to federal candidate campaigns, in violation of the intent of FECA. The sham issue advocacy loophole allowed advertisers to escape regulation as long as their ads did not “expressly advocate” the election or defeat of a federal candidate. Much of the soft money was used for sham issue ads.

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

Senator McConnell is probably rueing that decision now. In December 2003, the Supreme Court upheld BCRA almost in its entirety. See McConnell v. FEC, 540 U.S. 93 (2003). The Supreme Court emphasized the authority of Congress to engage in incremental legislative change to adjust the campaign finance laws to changing circumstances and the most pressing problems. See id. at 158. Over 30 years the Court’s deference to the political judgments of Congress provided strong support for campaign finance laws at the state and local level that are designed to address problems similar to those addressed in BCRA. Recently, however, hostility by the Roberts Court to legislative judgments, as typified by the Citizens United decision in 2010, casts some doubt upon whether as much deference will be given in the future.

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

I. Soft Money

The first major component of BCRA upheld in McConnell was the statute’s ban on “soft money” donations to national political parties. 28 A contribution to a party is “soft money” if it is not subject to restrictions as to source or amount. For example, although corporations have been banned from contributing to federal candidates for a century, they could freely give hundreds of thousands of dollars to the Republican and Democratic National

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28 Non-profits continue to be able to utilize soft money without restriction. Emily’s List v. FEC, 581 F.3d 1, 14 (D.C. Cir. 2009).
Committees before BCRA.\(^{29}\) Now, as McConnell explains, BCRA “takes national parties out of the soft-money business.” 540 U.S. at 133.

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

- the parties (and federal officials and candidates) are banned from “soliciting, receiving, directing, or spending any soft money,”\(^{30}\) *id.*;
- corporations and labor unions cannot make donations to the parties; and
- individuals can contribute no more than $25,000 to a party annually, and there are also limitations on contributions to and by PACs.

The soft money ban survived *Citizens United* where it was not at issue.\(^{31}\) Because FEC regulations gave the parties an incentive to funnel much of their federal electioneering activity through state and local party committees even when soft money was legal, BCRA tries to anticipate and prevent a similar end-run around the soft-money ban by imposing the following restrictions on state and local committees and candidates:

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

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

\(^{29}\) *After Citizens United*, corporations may now make unlimited independent expenditures on political speech, but are still banned from making direct contributions to federal candidates. 130 S. Ct. at 913. Unlimited independent expenditures can be made not just by corporations, but any “non-connected entities—including individuals, unincorporated associations, non-profit organizations, labor unions, and for-profit corporations.” *Republican Nat’l Comm. v. FEC*, No. 08-1953, 2010 WL 1140721, at *1 (D.D.C. Mar. 26, 2010).

\(^{30}\) This has been held to cover both direct and indirect requests. *Shays v. FEC*, 414 F.3d 76, 107 (D.C. Cir. 2005). Initially, 527 groups emerged as a faction through which soft money may be funneled, but a court ordered the FEC to justify its “case-by-case adjudication or to promulgate a rule if necessary” covering 527 groups that are also political committees. *Shays v. FEC*, 424 F. Supp. 2d 100, 103 (D.D.C. 2006) (holding that the FEC’s Explanation and Justification was insufficient to justify case-by-case adjudication).

The Supreme Court upheld all of these provisions. After documenting the long history of banning corporate and union spending in federal elections, and the very good reasons for the ban, the Court turned to a discussion of soft money. The Court noted that soft money entered the campaign finance system through rulings by the FEC, rather than through FECA, and that soft money contributions were “dramatically larger” than “hard money” (regulated) contributions. *Id.* at 124. The Court also observed the fact that corporate contributions were often made to both political parties, demonstrating that the large contributions were made to secure access to candidates or to avoid retribution, rather than for ideological reasons. *Id.* at 124-25. Applying the reduced standard of review reaffirmed in *Shrink Missouri, McConnell*, 540 U.S. at 134, the McConnell Court held that the interests in combating real and apparent corruption fully justified the soft money ban and the measures enacted to prevent circumvention of the ban.32

In so doing, the Court asserted that the “crabbed view of corruption”—which would limit the term to actual *quid pro quo* corruption—“ignores precedent, common sense, and the realities of political fundraising.” *Id.* at 152. The Court made it clear that Congress was entitled to consider historical evidence and the context in which a particular practice takes place when deciding how to limit campaign fundraising. *Id.* at 153. In particular, the Court recognized that “it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect.” *Id.* at 154-55.33

II. **Express Advocacy, Issue Advocacy, and Electioneering Communications**

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

32 A district court recently noted that limiting actual and apparent corruption is the only justification that has been used to uphold contribution limitations. Thalheimer v. City of San Diego, No. 09-cv-2862, 2010 WL 596397, at *3 (S.D. Cal. Feb 16, 2010).

33 In *Citizens United*, the Court held that the governmental interest in preventing corruption or the appearance of corruption was limited to *quid pro quo* corruption. 130 S. Ct. at 910. The Court reasoned that, in the context of independent expenditures, the fact that an elected official may be influenced by or grant access to certain speakers does not mean that the official is necessarily corrupt. *Id.*
Why did this matter? Because it was generally (but not universally) believed after Buckley that governments were precluded from almost any meaningful regulation of issue advocacy. For example, in candidate elections:

- corporations and unions could be prohibited from sponsoring express advocacy, but not issue advocacy;\textsuperscript{34}
- individuals could be required to disclose their spending on independent express advocacy, but not issue advocacy; and
- PACs that engaged in express advocacy had to disclose their funders, but groups that limited themselves to issue advocacy often did not.

Trying to avoid raising difficult constitutional questions, courts often interpreted broadly worded campaign finance reform laws to apply only to express advocacy. For example, disclosure laws in some jurisdictions were narrowed so that voters had no way of finding out who was paying for expensive media blitzes against various candidates, so long as the advertisers were careful not to use any of the “magic words” that would turn their messages into express advocacy. Avoiding express advocacy was easy, and the issue advocacy loophole was so large that effective regulation of independent advertising was virtually impossible.\textsuperscript{35}

McConnell changed all this by upholding provisions of BCRA that regulate “electioneering communications.” With some exceptions, BCRA defined “electioneering communications” as “any broadcast, cable, or satellite communication that . . . refers to a clearly identified candidate . . . within 60 days before a general election . . . or within 30 days before a primary . . . election . . . [and that] can be received by 50,000 or more persons [in the candidate’s constituency].” 2 U.S.C. § 434(f)(3)(A)-(C). The candidate is considered to be “clearly identified” if his or her name or picture appears in the communication or if his or her identity is “apparent by unambiguous reference.” 2 U.S.C. § 31(18)(C). Thus, a television commercial saying “The President is wonderful” or “The President is horrible” would be an electioneering communication if broadcast in October of an election year.

\textsuperscript{34} The restriction on express advocacy was rescinded in Citizens United, which held that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.” 130 S. Ct. at 913.

\textsuperscript{35} See, e.g., Wash. State Republican Party, 4 P.3d at 822 (holding that attacking a candidate’s stand on criminal law issues did not expressly tell people to vote for or against the candidate, and was thus issue advocacy).
“Electioneering communications” include many advertisements that are not express advocacy. The *McConnell* Court found that the distinction between “express advocacy” and “issue advocacy” as interpreted by most lower courts was “functionally meaningless.” Even after *McConnell*, courts continued to distinguish between express and issue advocacy, but have since expanded express advocacy regulation to include both express advocacy and the functional equivalent of express advocacy. See, e.g., *Ohio Right to Life, Inc. v. Ohio Elections Comm’n*, No. 2:08-cv-00492, 2008 WL 4186312, at *6-7 (S.D. Ohio Sept. 5, 2008) (holding that a blackout period on “express advocacy or its functional equivalent” was constitutional, but that a blackout period on ads that are not “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” was not) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470), overruled in part by *Citizens United*, which found bans on the use of corporate treasury funds for electioneering communications and independent expenditures unconstitutional; *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 282 (4th Cir. 2008) (holding that the “functional equivalent of express advocacy” must be: (1) an electioneering communication, and (2) “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”). It should be noted that *Citizens United* rejected the functional equivalence test for disclosure requirements. *Citizens United*, 130 S. Ct. at 915-917.

The Court upheld the following restrictions, among others:

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

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

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37 However, if the statute is vague, the statute may be limited to restricting express advocacy along *Buckley*’s line-drawing exercise. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) (citing *Anderson*, 356 F.3d at 664-65). Electioneering communications may be found to be overly broad if they are too expansive in geography or cover issue advocacy. *Anderson*, 356 F.3d at 666.

38 In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (“WRTL II”), the Supreme Court created an exemption to this rule for ads that were not express advocacy or its functional equivalent. For a detailed discussion of *WRTL II*, see Chapter Seven. The exemption does not apply to disclosure requirements. See Chapter Eight.
III. Other Holdings in *McConnell*

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

A. Coordination

Different rules apply depending upon whether spending is done independently or in coordination with candidates or parties.\(^{39}\) It therefore becomes very important to have clear and enforceable rules concerning coordination. One of the things that BCRA did was to invalidate inadequate coordination rules that had been promulgated by the FEC.\(^{40}\)

With regard to BCRA’s coordination provisions, the Supreme Court in *McConnell*:

- Upheld treating third-party expenditures coordinated with party committees as contributions to those committees.
- Struck down the requirement that parties choose between making expenditures coordinated with candidates and making uncoordinated expenditures of unlimited amounts. The Court did not hold that requiring parties to make the choice was inherently improper. The problem was that once a state or local party made the choice, its decision was binding on the national party and all of the other state and local affiliates. The Court left open the possibility that a revised version that did not give such power to one entity to bind dozens of others could survive constitutional review.
- Upheld the requirement that the FEC redraft its regulations and held that the specific regulations that the FEC has adopted in response were not yet reviewable.

\(^{39}\) For example, there is no limit to the amount that a political party can spend independently, without coordination with any candidate *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 616.

For example, contributions by an affiliate to a lobbyist or a lobbyist’s client must be disclosed if they exceed $5,000 in a quarter and the affiliate actively participates in the planning, supervision, or control of activities. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 207, 121 Stat. 735 (codified as amended in scattered sections of 2 U.S.C.) (upheld as constitutional in *Nat’l Ass’n of Mfrs.*, 549 F. Supp. 2d at 68).

\(^{40}\) Since the enactment of BCRA, the FEC has twice promulgated regulations defining coordination, and BCRA’s congressional sponsors have twice successfully challenged them. *See* Chapter Six.
B. Miscellaneous

With regard to other provisions, the Supreme Court in *McConnell*:

- Upheld a requirement that the sponsor of an election-related ad (whether or not broadcast) identify itself in the ad.\(^{41}\)
- Allowed the “Millionaire Provisions” to stand (held not yet reviewable).\(^{42}\)
- Allowed the higher contribution limits to stand (held not reviewable).
- Struck down a ban on contributions by minors. The Court’s decision focused on the breadth of the ban and the lack of any showing that it was narrowly tailored to a real problem, such as parents using their children as conduits to evade contribution limits.
- Upheld requirements for record-keeping and disclosure of information about broadcast ads. \(^{43}\)

**TWO STEPS FORWARD, ONE STEP BACK: RANDALL V. SORRELL**

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

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

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\(^{41}\) *See also Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004) (upholding an Indiana law that required a disclosure of the sponsor of express advocacy literature if distributed to more than 100 people); *but see ACLU of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004) (holding that a statute that required a disclosure of the sponsor of “any material or information relating to an election, candidate or any question on a ballot” was unconstitutional).

\(^{42}\) The so-called Millionaires’ Amendment of the BCRA, 2 U.S.C. § 441a-1(a) (2006), came into play when a candidate spent more than a certain threshold in personal funds ($350,000 for the House, and for the Senate, the sum of $150,000 plus an amount equal to the voting age population of the State in question multiplied by $0.04). Once the threshold was reached, that candidate’s opponent could have qualified to receive additional individual contributions at triple the normal limit, including from individuals who have reached the normal aggregate contributions maximum, and unlimited coordinated party expenditures. The Millionaire’s Amendment has subsequently been held to violate the First Amendment. *Davis v. FEC*, 128 S. Ct. 2759, 2770 (2008).

\(^{43}\) The requirements that a speaker identify itself in broadcast advertisements and that any speaker who spends more than $10,000 in electioneering communications in a year must file a disclosure statement with the FEC were upheld in *Citizens United*, 130 S. Ct. at 916.
I. Spending Limits

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

In following *Buckley*, the plurality ruled that the evidence in *Randall* did not demonstrate the “special justification” required to overturn a long-established precedent. *Id.* at 244. The plurality rejected the argument that spending limits were necessary because experience since *Buckley* had shown that contribution limits and disclosure requirements alone were insufficient to deter the reality and appearance of corruption. In addition, the plurality held that the new justification asserted in defense of Vermont’s spending limits—that such limits reduced the time that candidates had to spend on fundraising and left them more time to communicate with voters—was not weighty enough to preclude the constitutional challenge. *Id.* at 245.

II. Contribution Limits

*Randall’s* decision holding Vermont’s contribution ceilings unconstitutionally low was the first time that the Supreme Court recognized a “lower bound” for such limits. *Id.* at 248-49. The plurality repeated *Buckley*’s statement that “we have no scalpel to probe each possible contribution level,” and it reaffirmed that “the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related to the costs and nature of running for office.” *Id.* at 248 (citation & internal quotation omitted). But the plurality ignored the approach to contribution limits it had taken in *Shrink Missouri* and instead applied a completely different two-step analysis to Vermont’s law.

The plurality first asks whether there are “danger signs” that suggest the limits may “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.” *Id.* at 249. Those danger signs, the plurality said, were present with respect to the Vermont limits because:

- Vermont’s limits applied across an entire election cycle, instead of applying separately to the primary and general election, *id.*;
- Vermont’s limits were, overall, the lowest in the nation, *id.* at 250; and
- “Vermont’s limit is well below the lowest limit this Court has previously upheld, the limit of $1,075 per election (adjusted for inflation every two years),” *id.* at 251 (citation omitted).

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44 Another court has found that, even if restricting contributions from certain contractors may in some instances legitimately eliminate the appearance of impropriety, such restrictions are impermissibly overbroad if applied to all state and local offices. *Dallman v. Ritter*, 225 P.3d 610, 628 (Colo. 2010).
Because of those “danger signs,” the plurality went on to consider five factors that, in its view, cumulatively justified invalidation of Vermont’s contribution limits, id. at 253-62:

- contribution limits would significantly restrict the funding available to challengers seeking to mount competitive campaigns against incumbents;
- Vermont law placed the same dollar limit on contributions from political parties to candidates as on individual contributions to candidates;\(^{45}\)
- the law had no exceptions for some kinds of volunteer expenses;
- limits were not automatically adjusted for inflation; and
- there was no special justification for the lower Vermont contribution limits.\(^{46}\)

Under the plurality’s decision, it was the combined effect of all these factors, “taken together,” id. at 253 (emphasis in original), that rendered Vermont’s contribution limits unconstitutional, id. at 261-62.

In finding Vermont’s limits unconstitutional, the plurality’s approach contrasts with its analysis in Shrink Missouri. In 2000, the Court relied on evidence from elections held under the Missouri limits in finding that the limits did not preclude candidates from amassing sufficient funds for effective advocacy, but the Randall plurality gave no credence to similar evidence from the special election held under Vermont’s limits. The plurality also appeared to accept arguments that Shrink Missouri had rejected, using an inflation-adjusted figure to compare Vermont’s limits to those upheld in Buckley.

But the impact of Randall should not be overstated. The standard of review in challenges to contribution limits remains something less than strict scrutiny.\(^{47}\) Moreover, the plurality’s danger signs and five factors do not apply to any other contribution limits in the country. Careful drafting of campaign finance laws should enable contribution limits to avoid the fate they suffered in Randall.

\(^{45}\) The U.S. District Court for the Northern District of New York granted a temporary injunction stopping a complete ban on contributions by political parties in primary elections because the statute was not narrowly tailored enough, so that it was underinclusive. *Kermani v. N.Y. State Bd. of Elections*, 487 F. Supp. 2d 101, 113 (N.D.N.Y. 2006).

\(^{46}\) A New Jersey court has since upheld a pay-to-play limit of $300 on the “special justification” that there was a “danger that contractors’ campaign contributions may influence the discretionary decisions of State contracting officials or create a public perception of such influence.” *In re Earle Asphalt Co.*, 950 A.2d 918, 926-27 (N.J. Super. Ct. App. Div. 2008).

\(^{47}\) *See Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 691 (9th Cir. 2010) (distinguishing the “‘closely drawn’ to match a ‘sufficiently important interest’” standard for contribution limits in Randall from the stricter standard for expenditure limits), cert. denied, ___ S. Ct. __, 2010 WL 3834471 (Oct. 4, 2010); *Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 650-51 (9th Cir. 2007) (referring to the Randall standard as “less rigorous” scrutiny); *Ex parte Ellis*, 279 S.W.3d 1, 16 (Tex. App. 2008) (holding that closely drawn scrutiny, not strict scrutiny, is the appropriate standard); *but see DePaul v. Commonwealth*, 969 A.2d 536, 548 (Pa. 2009) (“[W]e hold that the instant legislative restriction upon the expressive conduct represented by political donations is subject to strict scrutiny”).
The Court dealt campaign finance reform another blow in *Davis v. FEC*, 128 S. Ct. 2759 (2008). Primarily at issue in the case was a portion of the “Millionaires’ Amendment” of BCRA which involved raising contribution limits for certain candidates when their opponents spent their own personal funds beyond a certain threshold. The Court found the law unconstitutional by a vote of 5-4.

At the time, under BCRA, a candidate could receive no more than $2,300 in contributions from an individual. Additionally, individuals could not contribute more than $42,700 in the aggregate to all candidates over a two-year period. However, if a House candidate (a “self-financing” candidate) spent more than $350,000 of his own personal money on the campaign, then individual contributors to that candidate’s opponents (“non-self-financing” candidates) were permitted to give triple the normal amount (meaning, three times $2,300, which is $6,900), regardless of whether those individuals had reached their personal contribution maximum for that two-year period. Additionally, non-self-financing candidates could receive unlimited coordinated party expenditures. Once a non-self-financing candidate’s receipts reached the same threshold as the self-financing candidate’s personal funds expenditure, the normal limits were put back in place. In order to determine whether a self-financing candidate had reached the $350,000 threshold, he was required to make more extensive disclosures not required of non-self-financing candidates.

The Court explained that it had previously upheld limits on contributions and coordinated party expenditures. *Davis*, 128 S. Ct. at 2770. Such restrictions, however, are permissible only where they “are closely drawn to serve a sufficiently important interest, such as preventing corruption and the appearance of corruption.” *Id.* (citation & internal quotation marks omitted). The Court also reaffirmed its interest in providing some deference to the legislature. *Id.* at 2771.

The Court compared the *Buckley* Court’s treatment of an expenditure ceiling with the provision at issue in *Davis*. In *Buckley*, personal expenditure limits had been struck down as “substantial ... restraints on the quantity and diversity of political speech.” 424 U.S. at 19, 52-53. Similarly, the Court, objected to the imposition of “a scheme of discriminatory fundraising limitations” on self-financing candidates who exceeded to expenditure threshold. *Id.* at 2772. Accordingly, the Court held that this scheme “impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech . . . [which could not] stand unless it [was] justified by a compelling state interest.” *Id.* (citation & internal quotation marks omitted). 48

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48 In the wake of *Davis*, a series of lawsuits have challenged so-called “triggered matching funds” in public financing systems – which provide supplemental grants to publicly financed candidates facing high-spending opponents or hostile independent expenditures – arguing that such provisions create a burden analogous to that in *Davis*. See *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), cert. granted, No. 10-239 (Nov. 29, 2010); *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010); *Respect Maine PAC v. McKee*, No. 10-2119, 2010 WL 4263390 (1st Cir. Oct. 5, 2010), writ of injunction denied, (Oct. 22, 2010) (No. 10A362). However, the *Davis* Court had specifically distinguished public financing systems, noting that *Buckley* had held that public financing was constitutionally permissible in that “a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures.” *Id.* at 2771. Accordingly, the *Davis* Court distinguished *Buckley*, holding that the choice imposed by the Millionaire’s Amendment – either to refrain from spending in excess of the threshold or to be subject to asymmetrical fundraising limitations – “is not remotely parallel to that in *Buckley*.” *Id.* Whether the Supreme Court will extend the
There were three possible justifications for the law, all of which were rejected by the Court. First, a law could help eliminate corruption or the perception of corruption, a justification that has been previously approved by the Court. However, the Court had reasoned in *Buckley* that a candidate spending his or her own personal funds actually “reduces the threat of corruption,” *Davis*, 128 S. Ct. at 2773, by reducing dependence upon outside sources for campaign funding. Therefore, this justification was not available in this case.

Second, the FEC argued that the law “leveled the playing field” for candidates who were at a disadvantage because they were not personally wealthy and had no personal funds to spend. The Court was not persuaded, saying there is “no support for the proposition that this is a legitimate government objective.” *Id.* at 2773. Indeed, it would be ill-advised for reformers to attempt to assert a “level the playing field” rationale as a justification for campaign finance regulation, as the justification has repeatedly found little traction with the Justices.

Third, the FEC argued that the law “ameliorate[d] the deleterious effects that result from the tight limits that federal election law places on individual campaign contributions and coordinated party expenditures.” *Id.* at 2774. This justification was based on the idea that a wealthy candidate has a significant competitive advantage because he or she can circumvent the contribution limits through personal expenditures, thereby putting a less wealthy candidate at a disadvantage because he must fund most or all of his campaign through contributions that are statutorily limited. Dismissing this rationale, the Court reiterated the division drawn in *Buckley* between contributions and expenditures and counseled that if this is such a significant concern, contribution limits should be raised or eliminated entirely. *Id.*

Having rejected the above justifications, the Court found the law to be an unconstitutional burden upon First Amendment rights and struck it down. As a result of finding the campaign contribution scheme unconstitutional, the Court also struck down the Millionaires’ Amendment’s increased disclosure requirements.

In his dissent, which was joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens explained that, in contrast with *Buckley*, he believed that Congress could constitutionally impose maximum expenditure limits on all candidates. *Id.* at 2779. Additionally, he found that the Millionaire’s Amendment imposed no burden upon a self-financing candidate’s speech because it “quiets no speech at all.” *Id.* at 2780. Justice Stevens also explained that the Court has “long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.” *Id.* at 2781.

*Davis* reaffirmed that the Supreme Court has not budged from its initial distinction in *Buckley* between campaign expenditures and campaign contributions. This decision, coupled with additional deregulatory decisions over the last few years, suggest that reform in the area of candidate expenditures would face a very steep hill, at least in the immediate future.

logic of *Davis* to the arena of public financing – where the participating candidate is already entitled to benefits and subject to disadvantages not applicable to the privately-financed candidate -- will be determined in the *McComish* case.
On January 21, 2010, the Supreme Court, by a margin of 5-4, announced a landmark decision in Citizens United v. FEC, 130 S. Ct. 879 (2010), when it overruled Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) and partially overruled McConnell v. FEC, 540 U.S. 93 (2003), to strike down federal restrictions on independent expenditures and electioneering communications from corporations and unions. Section 441(b) of the federal election code prohibited corporations and unions from using general treasury funds (1) to make independent expenditures that expressly advocated the election or defeat of a federal candidate through any form of media or (2) to broadcast electioneering communications (broadcast advertisements that mentioned a federal candidate within a set period before an election). 2 U.S.C. § 441b (2006). Instead, corporations and unions could fund such communications only through establishing a separate segregated fund, or political action committee (“PAC”), that was funded by officers, directors, or shareholders of a corporation or by members of a union.

Citizens United, a non-profit corporation that accepts a small portion of its funds from for-profit corporations, brought action seeking injunctive relief against the FEC. The FEC had signaled that Citizens United could be subject to civil and criminal penalties under § 441b of the BCRA if it distributed through video-on-demand Hillary: The Movie (Hillary), a documentary critical of then-presidential primary candidate Senator Hillary Clinton, within thirty days of a primary election. The FEC argued that since a portion of the funds used to produce the film were raised from for-profit corporations, the film violated § 441b. Id. Citizens United initially challenged the FEC’s ruling on the basis that the documentary film did not constitute an electioneering communication and should not be regulated as such. Citizens United, 130 S. Ct. at 888. However, rather than ruling on this narrow statutory issue, the Court took the unusual step of requesting reargument, asking the parties to address the question whether Section 441(b) was unconstitutional and whether the Court’s precedents in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) and McConnell v. FEC, 540 U.S. 93 (2003) which had upheld Section 441(b), should be overruled. This request for reargument vastly expanded the scope of the case.

After a second oral argument and supplemental briefing, the Supreme Court in Citizens United overturned the ruling in Austin, thereby permitting corporations and unions to use their treasuries to spend directly on independent campaign expenditures for or against candidates, and thus bypass their Political Action Committees (“PACs”).49 In justifying this sweeping opinion, Justice Kennedy writing for the majority in Citizens United argued that the question of whether § 441b applies to Hillary could not be resolved on narrower grounds because he “decline[d] to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if [the Court is] convinced that, in the end, this corporation has a constitutional right to speak on this subject.” Id. at 892. In lifting the decades-old ban on corporate independent expenditures in federal campaigns,50 the ruling shifted in favor of corporations the delicate balance between

49 Citizens United, 130 S. Ct. at 913 (“[O]verruling Austin ‘effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b’s prohibition on the use of corporate treasury funds for express advocacy.’”).

50 Id. at 930 (Stevens, J., dissenting) (“The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of Austin.”; see also id. at 940 (“Today’s decision takes away a power
regulating special interest influence in politics and not stifling free speech. The Court’s holding in *Citizens United* changed this balance by allowing corporations and union to draw directly from their treasuries for independent expenditures and electioneering communications. While *Citizens United* is primarily a deregulatory decision, however, the decision upheld federal campaign finance reporting and disclaimer requirements by a vote of eight-to-one. 51

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51 *Id.* at 915.