

## CHAPTER FIVE

### LIMITS ON CANDIDATE SPENDING

The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), held that public financing could be conditioned upon candidates' voluntary acceptance of campaign spending limits.<sup>1</sup> But the Court invalidated a mandatory limit on candidate spending as an unconstitutional burden on candidate speech, and efforts to challenge that decision have so far proven unsuccessful.<sup>2</sup> As a result, reformers have turned to a variety of mechanisms that encourage candidates to accept voluntary spending limits, which curb the influence of big money on campaigns, preserve office holders' time for legislative duties (instead of fundraising), and encourage candidates who would otherwise be deterred by the high costs of campaigns to run for office, thereby increasing political dialogue.

#### I. Voluntary Spending Limits

Most jurisdictions adopting voluntary spending ceilings have used some form of public subsidy as an inducement for candidates to limit expenditures. The law governing voluntary spending limits therefore has developed principally within the context of challenges to public financing. A legal analysis of voluntary spending limits therefore is provided in Chapter Nine (Public Financing of Candidates' Campaigns), together with a discussion of the variety of subsidies that may be offered as incentives for acceptance of a spending limit and practical tips on setting such limits in public financing programs.

Other mechanisms for encouraging acceptance of a spending limit include “cap gaps”—under which candidates who agree to the limit are allowed to receive private contributions capped at higher levels than those who reject the limit—and publicity concerning whether a candidate has accepted spending limits, through “informed voter provisions” on the ballot, in official voter guides, or on advertising. These additional inducements are discussed below. Many jurisdictions include a mix of these or other incentives, including public subsidies.

#### A. Contribution “Cap Gaps”

Some states have implemented a statutory scheme that allows candidates who agree to spending limits to accept larger contributions than those who reject such limits. Limits in such a scheme are sometimes known as “variable contribution limits,” and the scheme is sometimes known as a “cap gap” because it creates a gap between the caps on contributions permitted to participating and nonparticipating candidates. Rhode Island,

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<sup>1</sup> *Buckley*, 424 U.S. at 57 n.65 (“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.”).

<sup>2</sup> *Id.* at 54-58 (invalidating mandatory candidate spending limit). See Section II below for further discussion of efforts to implement mandatory campaign spending caps.

for instance, has a 2-1 cap-gap: candidates who agree to limit spending are permitted to accept contributions twice the size of those that nonparticipating candidates may accept. See *Vote Choice v. DiStefano*, 4 F.3d 26, 37-40 (1st Cir. 1993).<sup>3</sup>

### **Tips**

**Tip:** *If cap gaps are used to encourage participation, contribution limits for nonparticipating candidates must be high enough to permit those candidates to raise sufficient funds for effective advocacy.* See Chapter Three, section I(A), for a discussion of basic limits on contributions to candidates.

**Tip:** *The government may not impose a system that asymmetrically increases the contribution limits of one candidate after a privately financed rival candidate's spending exceeds a given amount.*

### **Legal Analysis**

Under current law, the mere existence of a cap gap does not present a constitutional problem. Variable contribution limits raise serious First Amendment concerns only if the base limit is so low that candidates operating under that limit will be unable to raise adequate funds for effective advocacy and thus are coerced into accepting a spending limit. Compare *Vote Choice*, 4 F.3d at 38 (describing the \$1,000 base limit as constitutional), with *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) (describing \$100, \$250, and \$500 base limits as unconstitutionally low), and *Wilkinson v. Jones*, 876 F. Supp. 916, 929 (W.D. Ky. 1995) (holding that \$100 base limit was too low).<sup>4</sup> If the base contribution cap is not unconstitutionally low, the additional amount that candidates who accept spending limits are allowed to raise will generally be permitted as a regulatory incentive to accept those limits. See *Kennedy v. Gardner*, No. CV 98-608-M, 1999 WL 814273, \*5-\*6 (D.N.H. Sept. 30, 1999) (unpublished opinion) (upholding New Hampshire's five-to-one cap gap, with a basic limit of \$1,000). “[A] statutory framework which merely presents candidates with a voluntary alternative to an otherwise applicable, assuredly constitutional, financing option imposes [no] burden on first amendment rights.” *Vote Choice*, 4 F.3d at 39.

The additional amount that participating candidates may accept could be constitutionally questionable, however, if the gap is too large. The *Wilkinson* court invalidated Kentucky's variable contribution limits in part because, combined with the state's two-to-one matching program, the five-to-one cap gap created a disparity of fifteen-to-one in favor of those who accepted the spending limits. See 876 F. Supp. at 929 (“In reality, a privately-financed candidate may receive his contributions at most \$100 at a time, while a publicly-funded candidate may receive as much as \$1,500 per contribution.”). This sharp disparity unconstitutionally

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<sup>3</sup> See also R.I. Gen. Laws § 17-25-30(c) (West 2010).

<sup>4</sup> Although the reasoning of *Cal. ProLife Council PAC* and *Wilkinson* is flawed, and it was expressly rejected in *Colorado Right to Life Comm., Inc. v. Buckley*, No. 96-S-2844, slip op. at 13 (D. Colo. Apr. 17, 1998), vacated as moot sub nom. *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), reformers should be aware that some courts may regard the existence of the higher limit as evidence that the lower limit is not necessary to deter real or apparent corruption.

transformed the “carrot” that is offered to publicly financed candidates into a “stick” used upon privately-financed candidates.” *Id.* at 930.

The Supreme Court recently struck down a cap gap that was not conditioned on accepting public financing. In *Davis v. FEC*, 128 S. Ct. 2759 (2008), the Court considered the “Millionaires’ Amendment” of the federal Bipartisan Campaign Reform Act. Under that provision, when a candidate’s personal expenditures exceeded \$350,000, the limit on individual contributions to rival candidates would triple. Unlike the voluntary spending limit in *Buckley*, the system at issue in *Davis* triggered strict scrutiny because it did “not provide any way in which a candidate c[ould] exercise th[e] right [to make unlimited personal expenditures] without abridgment.” *Id.* at 2772. In the absence of a compelling state interest to justify this involuntary cap gap, the Court held that it unconstitutionally burdened the “unfettered right to make unlimited personal expenditures.” *Id.* at 2772. The Court stressed that the “asymmetrical” effect on candidates motivated its conclusion. *Id.* at 2772 n.7. While legislation “rais[ing] the contribution limits for all candidates” would be permissible, this provision forced a candidate to choose between a limit on personal expenditures or the “activation of a scheme of discriminatory contribution limits.” *Id.* at 2770-72. It should be noted, however, that the Millionaires’ Amendment applied to congressional races where both candidates’ campaigns were *privately* financed.

## **B. Informed Voter Provisions**

One of the incentives that have been explored as means to encourage voluntary acceptance of spending limits is publicity concerning the candidate’s participation. Information may be provided in the form of a ballot notation, a statement in an official voter guide, or a disclosure requirement for candidate advertising. Sometimes disparaged as “scarlet letters,” informed voter provisions have met with considerable skepticism in the courts.

### *1. Ballot Notations*

Ballot notations are just what they sound like: information appearing on the face of the ballot that a voter uses when voting in an election. The political party with which a candidate is affiliated is a common type of ballot notation. A ballot notation informing voters whether a candidate was participating in a voluntary spending limit scheme might read along the lines of: “Accepted voluntary spending limits” or “Declined voluntary spending limits.”

### *Tips*

**Tip:** *Ballot notation requirements have never survived constitutional scrutiny.*

### *Legal Analysis*

There have been no published opinions ruling directly on the constitutionality of ballot notations indicating whether a candidate has chosen to accept a voluntary spending limit. The Maine district court in *Daggett v.*

*Webster* suggested, however, that *any* official labeling would be “most troubling,” 74 F. Supp. 2d 53, 57 (D. Me. 1999), and the First Circuit rejected objections to the Maine Clean Election Act’s certification requirement on representations that the state did not intend to classify candidates as “clean.” See *Daggett v. Committee. on Government Ethics & Election Practices*, 205 F.3d 445, 470 (1st Cir. 2000). In addition, there is one unpublished decision specifically invalidating requirements that the primary and general election ballots clearly indicate which candidates have and have not accepted Colorado’s voluntary spending limits.<sup>5</sup> See *Colorado Right to Life Committee v. Buckley*, No. 96-S-2844, slip op. at 10, 15-23 (D. Colo. Apr. 17, 1998), vacated as moot sub nom. *Citizens for Responsible Government State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).<sup>6</sup>

These rulings are consistent with case law involving other ballot notations. The Supreme Court struck down a ballot notation indicating whether candidates had taken certain actions with respect to term limits. See *Cook v. Gralike*, 531 U.S. 510, 525 (2001) (invalidating ballot notations stating: “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” or “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS” as improper regulation of congressional elections under the Elections Clause); accord *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1096 (D.S.D. 1998) (finding it “hard to imagine a more chilling impact on political speech” than such notation).<sup>7</sup> *Daggett* and *Colorado Right to Life* suggest that courts may well regard ballot notations indicating a candidate’s acceptance or rejection of spending limits in the same way.

## 2. *Statements in Official Voter Pamphlets*

Some jurisdictions publish guides to inform voters about candidates who will be on the ballot. In some cases, candidates may draft their own statements and pay the costs of publication. Offering candidates who accept spending limits the opportunity to publish such statements for no cost is a form of public subsidy that is unlikely to raise any constitutional questions. Requiring that the voter guide indicate whether or not a candidate has accepted a spending limit raises different concerns, as do limits on what candidates can say in their statements.

### *Tips*

**Tip:** *Any statement that the government places in a voter pamphlet must be scrupulously factual and neutral.* If the statement is slanted in favor of participating candidates, courts may find that candidates have no real choice but to accept the limits. Even using the term “clean” is very risky.

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<sup>5</sup> California’s ballot notation provision was preliminarily enjoined without discussion, along with the rest of Proposition 208, a comprehensive campaign finance initiative. See *Cal. Prolife Council PAC*, 164 F.3d at 1190.

<sup>6</sup> A copy of the unpublished opinion is on file at the Brennan Center.

<sup>7</sup> Scholarly literature is also critical of ballot notations. See Bruce E. Cain, *Garrett’s Temptation*, 85 Va. L. Rev. 1589, 1589 (1999) (noting that the labels may “allow a majority to characterize a minority’s voting position without any guarantee that it will do so fairly”).

## Legal Analysis

*VanNatta v. Keisling* considered a challenge under the Oregon Constitution to a requirement that statements be placed in voter pamphlets identifying whether candidates had agreed to accept voluntary spending limits. 931 P.2d 770, 787-88 (Or. 1997). The Oregon Supreme Court rejected the claim that such a provision unlawfully coerced candidates into accepting the limits, noting that the publication requirement did not by its terms inflict a punishment and stating:

[W]e have difficulty accepting the proposition, in the context of political campaigns, that the neutral reporting of this kind of objective truth . . . somehow *impermissibly* burdens expression.

Admittedly, a candidate's knowledge that his or her refusal to agree to expenditure limitations will be brought to the attention of the voters might persuade some candidates to agree to expenditure limits when, in the absence of that voter notification, they would not have agreed. Indeed, we assume that such a result was the precise purpose behind [the provision]. But encouraging such an outcome does not amount to impermissible coercion.

*Id.*<sup>8</sup> Such a provision has yet to be reviewed in any other court.

There are only three cases considering whether a state may place limits on what candidates may say in statements submitted for official voter pamphlets. In *Clark v. Burleigh*, 841 P.2d 975 (Cal. 1992), the California Supreme Court rejected First Amendment and equal protection challenges to restrictions that confined judicial candidates to discussions of their own background and qualifications. Such a ruling is not entirely surprising, given the special concerns arising from the election of judges. But courts have since ruled that even non-judicial candidates may be barred from attacking opponents in the statements. See *Hammond v. Agran*, 90 Cal. Rptr. 2d 876, 879 (Cal. Ct. App. 1999); *Dean v. Superior Court*, 73 Cal. Rptr. 2d 70, 72-73 (Cal. Ct. App. 1998).

### 3. Advertising Disclosure Requirements

Another type of informed voter requirement imposes on the candidates themselves the obligation to disclose, in any print or electronic advertising, whether they have accepted voluntary spending limits.

## Tips

**Tip:** No court has upheld a requirement that a candidate's advertising disclose whether the candidate has agreed to limit spending.

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<sup>8</sup> The *VanNatta* court also upheld a requirement that the voter pamphlet disclose when a candidate who agreed to limit spending in a prior election actually failed to abide by the limit, noting a special exception under Oregon's Constitution for laws targeted at fraud. See 931 P.2d at 788.

## Legal Analysis

There have been no published opinions ruling directly on the constitutionality of a requirement that advertising disclose whether or not a candidate has agreed to limit spending. But in an unpublished opinion, the *Colorado Right to Life* court invalidated such a rule. The challenged provision required that candidates who refused spending limits include in all messages they produced a prominent statement that: “(Candidate’s name) HAS NOT AGREED TO THE CAMPAIGN SPENDING LIMITS ADOPTED BY THE VOTERS IN THE FAIR CAMPAIGN PRACTICES ACT.” The court distinguished *VanNatta*, noting that the advertising disclosure provision did not merely impose a requirement on the state but compelled candidates to convey a specific political message. *Colorado Right to Life*, No. 96-S-2844, slip op. at 17. Although the district court’s ruling was vacated as moot after Colorado repealed the law and is not technically binding precedent, the court’s reasoning is consistent with decisions that have invalidated other advertising disclosure provisions that require more than identification of the sponsor. See Chapter Eight, section II (discussing cases).

## II. Mandatory Spending Limits

Many reformers are concerned about the skyrocketing cost of political campaigns. As costs escalate each year, candidates scramble to raise greater and greater sums of money. Candidates become locked in a spiraling fundraising “arms race” that neither side will unilaterally abandon for fear of electoral defeat. The best solution, many reformers believe, is a mandatory limit on the amount of money each candidate in a race may spend. Such limits would free candidates from chasing every possible contribution and make them more likely to decline funds from donors seeking special favors. In addition, candidates could spend less time fundraising and more time campaigning (or governing if they are already officeholders).

However, the Supreme Court has all but ruled out mandatory spending limits as a means of accomplishing these goals. *Buckley* struck down such ceilings in federal law, and in *Randall v. Sorrell*, 548 U.S. 230 (2006), the Supreme Court reaffirmed that holding in striking down Vermont’s campaign expenditure limits.<sup>9</sup> In a plurality decision, the *Randall* Court expressly rejected the argument that expenditure limits were necessary to reduce the amount of time candidates spent raising money, citing *Buckley*. *Id.* at 240-241. More recently, in *Davis v. FEC*, the Supreme Court invalidated a provision because it indirectly burdened the “unfettered right to make unlimited personal expenditures.” 128 S. Ct. 2759, 2772 (2008).

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<sup>9</sup> *Buckley* used strong language in striking down the federal expenditure ceilings, whether they applied to independent expenditures, see 424 U.S. at 48-49 (“[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 . . . .”); the expenditure of the candidate’s personal funds, see *id.* at 54 (“[T]he First Amendment simply cannot tolerate [FECA’s] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy . . . .”); or spending by a candidate’s campaign committee, see *id.* at 57-58 (“The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.”).

## Tips

**Tip:** The Supreme Court has very recently struck down mandatory limits on how much money candidates and their campaigns can spend in an election. It is unlikely that a new test case will be viable for some time.

**Tip:** A jurisdiction interested in defending the constitutionality of mandatory spending limits must build a factual record even stronger than that developed in *Randall*.<sup>10</sup>

**Tip:** Mandatory spending limits may stand a better chance of surviving constitutional scrutiny if a jurisdiction can demonstrate that other types of campaign finance regulation already in place — such as contribution limits and incentives for voluntary spending limits — are insufficient to address the asserted governmental interests.

## Legal Analysis

*Buckley* involved a challenge to mandatory limits on both the amount of money that federal campaigns could spend in an election and on the amount of personal wealth that candidates could spend to advance their own candidacies.<sup>11</sup> The Supreme Court invalidated both sorts of limits under the First Amendment, *Buckley*, 424 U.S. at 39-59, and has never questioned that holding.<sup>12</sup> *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 610 (1996) (plurality opinion) (noting *Buckley*'s invalidation of limits on candidates' spending of their own money and on campaign expenditures).

In *Buckley* the Supreme Court began its constitutional analysis of FECA's mandatory spending limits by examining the burden they imposed on the First Amendment rights of candidates and their supporters. The Court rejected the argument that in enacting spending limits Congress was regulating conduct (the spending of money) rather than speech. *Buckley*, 424 U.S. at 15-17. Newspaper comments, the Court reasoned, are considered a "pure form of expression" involving "free speech alone" even though it requires money to publish and disseminate the comments. *Id.* at 17 (quoting *Cox v. Louisiana*, 379 U.S. 559, 563-64 (1965)). *Buckley* explained that the Supreme Court had "never suggested that the dependence of a communication on

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<sup>10</sup> See *Randall*, 548 U.S. at 239-240 (noting Vermont had "not shown, for example, any dramatic increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem.").

<sup>11</sup> *Buckley* also involved a challenge to a \$1,000 annual ceiling on expenditures made independently by an individual or an organization "relative to a clearly identified candidate." 424 U.S. at 39-51. The Court found that neither the governmental interests in preventing the reality and appearance of corruption nor the interest in equalizing the relative ability of individuals and groups to influence the outcome of elections was sufficient to justify the limit. See *id.* at 46-49. For further discussion of the constitutional issues raised with respect to independent expenditures, see section I(B)(3)(b) of this chapter (addressing the treatment of independent expenditures in the context of voluntary spending limit schemes), Chapter Four, section II (addressing limits on contributions to independent expenditure committees), and Chapter Six (addressing monetary limits on independent expenditures).

<sup>12</sup> The mandatory spending limits considered in *Buckley* were lower than the costs of many federal campaigns at the time. For example, at least 25% of all major-party senatorial candidates in the two political cycles prior to the enactment of the ceilings had spent more than the prescribed spending limits. 424 U.S. at 20 n.21. The Court noted that the percentage of candidates who exceeded the limits in those years was probably even higher, since that figure reflected the aggregate limits allowed for the primary and general elections and the combined amounts spent by candidates in both elections, whereas the provisions at issue in *Buckley* imposed separate caps for each election and did not allow the amounts to be aggregated. *Id.* at 20 n.21. The Court thus concluded that the limits "would have required restrictions in the scope of a number of past . . . campaigns." *Id.* at 20, see *id.* at 55 n.62. More generous limits might not have faced the same problem.

the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment.” 424 U.S. at 16. Instead, the Court insisted:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

*Id.* at 19. The Court concluded that FECA's expenditure limits represented “substantial . . . restraints on the quantity and diversity of political speech.” *Id.*; *see also id.* at 39 (“[FECA's] expenditure ceilings impose direct and substantial restraints on the quantity of political speech.”).

The Court also held that the campaign spending limits burdened the associational rights of a candidate's supporters. First Amendment protection of the freedom of association includes the right of individuals “to pool their resources in furtherance of common political goals.” *Id.* at 22. Accordingly, limits “on the ability of . . . candidate campaign organizations to expend resources on political expression ‘is simultaneously an interference with the freedom of [their] adherents.’” *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion) (alteration in original)).

In sum, the Court held that, although contribution limits and spending limits both implicate First Amendment rights, “expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.” *Buckley*, 424 U.S. at 23. The Court therefore applied strict scrutiny to the mandatory expenditure ceilings. As is explained below, neither the limit on candidate self-financing nor the limit on campaign committee expenditures survived the exacting review.

### **A. Candidate Self-Financing**

The *Buckley* Court swiftly rejected FECA's limits on expenditures by candidates from their personal funds.<sup>13</sup> The Court began by stressing the importance of allowing candidates “the unfettered opportunity to make their views known.” *Id.* at 52-53. It then rejected the two proffered governmental interests—the prevention of

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<sup>13</sup> Some Justices have suggested that limits on self-financing should not be regarded as expenditure limits. *Buckley*, 424 U.S. at 287 (“[FECA] imposes no overall limit on the amount a candidate can spend; it simply limits the ‘contribution’ a candidate may make to his own campaign.”) (Marshall, J., concurring in part and dissenting in part). In *Nixon v. Shrink Missouri Government PAC*, Justice Breyer suggested that “it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience stressed by Justice Kennedy . . . , making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns.” 528 U.S. 377, 405 (2000) (Breyer, J., joined by Ginsburg, J., concurring). The recent decision in *Randall* suggests that such an approach will not be considered favorably by the current Supreme Court.



corruption and the equalizing of candidates' financial resources. The interest in combating corruption, the Court explained, is advanced by *allowing* candidates to spend freely from their own resources, thereby reducing their dependence on outside contributions. *Id.* at 53. The Court then held that the interest in equalizing the relative financial resources of candidates is not a legitimate basis for burdening candidates' speech rights. It explained: "[T]he First Amendment simply cannot tolerate . . . restriction[s] upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

Since *Buckley*, no court has upheld constraints on the self-financing of campaigns.<sup>14</sup> In *Gable v. Patton*, the Sixth Circuit struck down a ban on candidates' contributions to their own campaigns within the last 28 days of an election. 142 F.3d 940, 951-53 (6th Cir. 1998) (holding that the ban—unlike a ban on contributions from others during the same 28-day period—could not be justified as a means of effectuating trigger provisions in Kentucky's public financing system). Recently, in *Anderson v. Spear*, another panel of the same circuit invalidated additional provisions of Kentucky's campaign finance law on the grounds that they functioned to limit candidate self-financing. 356 F.3d 651, 666-67, 672-73 (6th Cir. 2004) (invalidating the definition of "contribution" and a \$50,000 limit on loans).<sup>15</sup>

*Dann v. Blackwell* involved a provision requiring candidates contributing more than \$25,000 to their own campaigns to file a notice with County Board of Elections, upon penalty of forfeiture of the candidates' nomination or election. Opposing candidates then had the option of lifting limits on contributions to their campaigns. 83 F. Supp. 2d 906 (S.D. Ohio 2000). The *Dann* court held that the legislature could not lengthen the notice period, if the timing of the legislative amendment would effectively prevent a candidate from financing his own campaign. *Id.* at 912-13 & n.10 (declining to decide the constitutionality of the scheme as a whole).

## **B. Spending by Campaign Committees**

Without much difficulty, the Court in *Buckley* also invalidated FECA's limits on spending by a candidate's campaign committee. First, the Court held that the interest in combating corruption was not implicated by the spending limits, because "[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations and disclosure provisions." *Buckley*, 424 U.S. at 55. Second, the Court rejected the equality rationale. The Court explained that, under a system of contribution limits, the amount of money a candidate raises "will normally vary with the size and intensity of the candidate's support."<sup>16</sup> *Id.* at 56. Accordingly, the Court found nothing "invidious, improper, or unhealthy" in permitting candidates to

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<sup>14</sup> In 2008, the Supreme Court emphasized *Buckley*'s continuing vitality in this regard. *See Davis*, 128 S. Ct. at 2772 (invalidating provision that indirectly burdened "unfettered right to make unlimited personal expenditures").

<sup>15</sup> The Sixth Circuit also invalidated Kentucky's definition of "contribution" on the grounds that it applied to a self-financed candidate's spending, even though the Kentucky law expressly exempted candidate contributions to their own campaigns from otherwise applicable contribution limits. *See Anderson*, 356 F.3d at 667 ("*Buckley* drew a line in the sand, and prohibited the government from restricting a candidate's ability to make expenditures on his own behalf.").

<sup>16</sup> The Court did not consider that the financial means of a candidate's supporters also affects how much money a candidate can raise.

spend whatever they are able to raise.<sup>17</sup> *Id.* Finally, the Court dismissed as anathema to the First Amendment the notion that the skyrocketing costs of political campaigns could justify limiting campaign spending. Such a justification, according to the Court, was at base paternalistic: “The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.” *Id.* at 57.

Before *Randall*, lower courts consistently struck down mandatory campaign spending limits, although some questioned whether *Buckley* represented a *per se* ban on mandatory spending limits. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *reversed sub nom Randall v. Sorrell*, 548 U.S. 230 (2006); *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 543 U.S. 1002 (2004); *Kruse v. Cincinnati*, 142 F.3d 907 (6th Cir. 1998); *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998). But *Randall* reaffirmed the conclusion of *Buckley* that that campaign expenditure limitations unacceptably burden the First Amendment, because they “necessarily ‘reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.’” 548 U.S. at 242 (quoting *Buckley*, 424 U.S. at 19). The *Randall* plurality also reaffirmed *Buckley*’s holding that corruption and the appearance thereof are adequately addressed through contribution limits and disclosure requirements, holding that Vermont had not demonstrated any interests requiring a different result, such as a dramatic increase in corruption or evidence that expenditure limits were “the only way to attack that problem.” *Id.* at 239. Finally, *Randall* held that *Buckley* had also considered and rejected the burdens of candidate fundraising as a justification for campaign expenditure limits. *Id.* at 240-241. After *Randall*, it will be extremely difficult to enact mandatory campaign expenditure limits that will survive constitutional scrutiny.<sup>18</sup>

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<sup>17</sup> The *Buckley* Court also pointed out that equalizing campaign resources may hurt candidates without name recognition. 424 U.S. at 56-57.

<sup>18</sup> The case law since *Randall* has been similarly unpromising. In *Davis v. FEC*, the Supreme Court approved *Buckley*’s holding that limits on “overall campaign expenditures [are] unconstitutional.” *See* 128 S. Ct. at 2772.