

⑦

ANALYSIS OF SUPREME COURT DECISION IN RANDALL V. SCRRELL

To: Interested Persons
From: Brenda Wright, NVRI
Date: June 29, 2006

On June 26, 2006, the U.S. Supreme Court announced its decision in *Randall v. Sorrell*, a case addressing the constitutionality of Vermont's comprehensive campaign finance law, enacted in 1997. The Court was badly splintered on the reasoning, but the bottom-line vote was to strike Vermont's spending limits as well as its contribution limits. This is not the result that reformers hoped for; neither does the decision realize the worst fears that some had about the outcome. The splintered rationales of the six opinions reflect the continued lack of consensus on the Court on how to address the conflicting constitutional values at stake in the campaign finance debate.

This memo outlines how the Justices lined up on the issues, provides some analysis of the opinions, and touches on the implications for future reform efforts.

How the Justices Lined Up

While there were six different opinions, it's probably easiest to understand the line-up as, roughly, a three-way split (although there are nuances within each group of three). On one end of the spectrum, three justices (Stevens, Souter and Ginsburg) believe that the First Amendment would allow properly tailored limits on campaign spending to be upheld, and also would have ruled that Vermont's contribution limits were constitutional. Justice Stevens was ready to overrule *Buckley* outright on the spending limits question, while Justices Souter and Ginsburg said that the strong justifications for Vermont's spending limits could allow them to be upheld under *Buckley*, and would have allowed the trial court to consider, on remand, whether Vermont's spending limits were sufficiently narrowly tailored to satisfy constitutional scrutiny.

On the other end of the spectrum, Justices Scalia and Thomas reiterated their view that the First Amendment forbids any limits on campaign contributions as well as on spending, and that *Buckley* should be overruled to the extent it allowed limits on contributions. Justice Kennedy, while declining to take a definitive position on whether limits of any kind are categorically unconstitutional, issued a brief concurrence indicating his overall dissatisfaction with the Court's past approach to campaign finance regulation, and appears inclined to strike down most campaign finance limits.

That leaves three Justices in the middle with the controlling opinion in the case. Justice Breyer, joined by Chief Justice Roberts, ruled that principles of *stare decisis* – the general rule that past precedents should be followed regardless of how the court would rule if considering the issue for the first time – required them to strike down Vermont's spending limits. They ruled that the record did not present the "special justification" required to overturn a long-established precedent (p. 9), and that the justifications for

Vermont's spending limits were not sufficiently different from those considered by *Buckley* to warrant a different result. Justice Alito joined this opinion in part; he agreed that *Buckley* required the Court to strike down Vermont's spending limits, but declined to address whether *Buckley* should be overruled, saying the parties had not properly presented that question.

On the contribution limits, Justice Breyer, joined by Chief Justice Roberts and Justice Alito, ruled that while contribution limits generally remain permissible under *Buckley*, Vermont's contribution limits were too restrictive to survive constitutional scrutiny. The Breyer plurality decision reaffirmed *Buckley*'s holding that "we have no scalpel to probe each possible contribution level" and that the Court "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." (p. 14, citation and internal quotation omitted). For that reason, "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.* (citation and internal quotations omitted).

Nevertheless, the plurality justified its closer scrutiny of Vermont's particular limits by employing a two-step analysis, the second part of which has five parts. Given that this is only a plurality opinion, the qualified, multi-level analysis reinforces the impression of a badly fragmented Court.

The first part of the plurality's analysis asks whether, despite the usual rule of deference to the legislature's judgment on where to set contribution limits, 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." (p. 14). Those danger signs, the plurality said, were present with respect to the Vermont limits because (a) Vermont's limits were set on an election-cycle basis, instead of allowing separate contributions in the primary and general election (p. 15); (b) Vermont's limits were, overall, the lowest in the nation (p.16); and (c) "Vermont's limit [sic] is well below the lowest limit this Court has previously upheld." (p. 17).

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. These included (pp. 22-28):

- The contribution limits would significantly restrict the funding available to challengers to run competitive campaigns against incumbents, particularly the funds supplied by political parties (p. 19-20)
- The Vermont law placed the same dollar limit on party contributions to candidates as on individual contributions to candidates

¹Vermont's campaign finance law imposed contribution limits of \$200 per election cycle for candidates for state representative, \$300 for candidates for state senate, and \$400 for gubernatorial candidates and other candidates for statewide office.

- The absence of exceptions for some kinds of volunteer expenses;
- The absence of an automatic adjustment for inflation;
- The absence of a special justification for the lower Vermont contribution limits.

Under the plurality's decision, it was the combined effect of all these factors, taken together, that rendered Vermont's limits unconstitutional (p. 28).

Analysis

1. The Spending Limits Opinions

Without doubt, the Court missed a critical opportunity to make our elections fairer and our democracy stronger when it voted to strike down Vermont's spending limits. With four justices (Breyer, Chief Justice Roberts, Thomas and Scalia) indicating they view spending limits as categorically unconstitutional, and two more (Kennedy and Alito) seemingly inclined the same way, the landscape on that issue is unlikely to change for the foreseeable future.

This result reflects the reality of a Court whose majority has shifted since the time Vermont enacted its campaign reform law in 1997, and is unfortunately oblivious to the harm that unlimited campaign spending has inflicted on the fairness and accountability of the electoral process over the past decades. As one commentator has noted, "It is as though the 6-3 majority missed the last 30 years and the lessons we have learned since the court first held that campaign spending limits were a restriction on free speech."² As the dissents indicate, the case for spending limits was there; the votes, however, were not.

Indeed, because *Buckley* saw only one Justice – Byron White – voting to uphold campaign spending limits in 1976, it is worthwhile to canvass the reasons that the three dissenters gave for saying that it was time to reconsider *Buckley* on that point. And it is also worth some observations on the positions of Justices Breyer and Kennedy – both of whom previously had indicated a willingness to reconsider *Buckley* on the question of spending limits.

Justice Stevens is the only current Justice who was also serving at the time of *Buckley*, although he did not participate in the *Buckley* decision. Thirty years of experience with unlimited spending convinced Justice Stevens that *Buckley* was "quite wrong to equate money and speech" (p. 4). Rejecting *Buckley's* metaphor that caps on campaign spending restrict speech just as limits on gasoline restrict driving, Justice Stevens said, "Just as a driver need not use a Hummer to reach her destination, so a candidate need not flood the airways with ceaseless sound-bites of trivial information in order to provide voters with reasons to support her" (id.)

Justice Stevens highlighted the "significant government interests favoring the imposition of expenditure limits." (p. 6). "Not only do [spending] limits serve as an

Eileen McNamara, "Court misses the mark," Boston Globe, June 28, 2006, B1

important complement to corruption-reducing contribution limits . . . but they also protect equal access to the political arena, [and] free candidates and their staffs from the interminable burden of fundraising” (id.). Unlimited campaign spending, in his view, undermines the goal of an accountable, responsive political process: “When campaign costs are so high that only the rich have the reach to throw their hats into the ring, we fail to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government.” (Id., citations and internal quotations omitted). “Without expenditure limits, fundraising devours the time and attention of political leaders, leaving them too busy to handle their public responsibilities effectively.” (Id.).

Justice Stevens took note of evidence that spending limits promote electoral competition, citing the example of the city of Albuquerque, where challengers had an unbroken record of defeating incumbent mayors while spending limits were in effect (p. 7, n. 4). He also cited the example of other democracies, noting that the common-law democracies that have campaign spending limits – Canada, the U.K., New Zealand, and Malta) have more electoral competition than those, such as the United States, that lack such limits.

He concluded, “I am firmly persuaded that the Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities And they surely would not have expected judges to interfere with the enforcement of expenditure limits that merely require candidates to budget their activities without imposing any restrictions whatsoever on what they may say in their speeches, debates and interviews.” Interestingly, here Justice Stevens invoked Art. I, sec. 4 as a basis of congressional authority to enact federal spending limits.

For his part, Justice Souter, writing for himself and Justice Ginsburg on this issue, said “the *Buckley* Court did not categorically foreclose the possibility that some spending limit might comport with the First Amendment.” (p. 2). In particular, “the Court did not squarely address a time-protection interest as support for the expenditure limits, much less one buttressed by as thorough a record as we have here.” (p. 3 n.*). Based on that record, Justice Souter wrote, “Vermont’s claim is serious. Three decades of experience since *Buckley* have taught us much, and the findings made by the Vermont Legislature on the pernicious effect of the nonstop pursuit of money are significant.” (p. 3). For those reasons, he wrote, it is wrong to “foreclose the ability of a State to remedy the impact of the money chase on the democratic process.” (Id.).

A fair question to pose is why Justice Breyer did not also seize this opportunity to revisit *Buckley* on the spending limits question, given that Justice Breyer, only a short time ago, took pains to indicate his willingness to engage in such reconsideration. See *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 405 (2000) (concurring opinion of Breyer, J., joined by Ginsburg, J.) (calling for approach that balances competing constitutional interests and stating “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. . . . But what if I am wrong about *Buckley*? Suppose *Buckley* denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance. If so, like Justice KENNEDY, I believe the Constitution would require us to reconsider *Buckley*”).

As part of the answer, one cannot help but see *Roe v. Wade* hanging over these opinions. Given the recent changes on the Court, and in particularly Justice O’Connor’s retirement in June 2005, *Roe* is under siege, and the Court already has two abortion cases on its docket for next term. Justice Breyer’s endorsement of *stare decisis* comes against that backdrop, and Justice Alito’s refusal to join the plurality in endorsing *stare decisis* as a basis for rejecting the spending limits could be seen in the same light. Moreover, if this factor did play a role, then it may be equally significant that Chief Justice Roberts, unlike Justice Alito, joined Justice Breyer’s opinion embracing the importance of *stare decisis* as a principle of judicial restraint.

For that matter, Justice Kennedy had also expressed his willingness to reconsider *Buckley*’s holding not only on contribution limits, but on spending limits as well, in *Shrink Mo. PAC*, specifically citing the candidate time-protection interest: “For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising.” *Id.* at 409-410 (Kennedy, J., dissenting). Yet Justice Kennedy’s concurrence does not separately discuss the time-protection interest that he flagged in *Shrink*. A judicial equivalent of Gilda Radnor/Emily Litella saying “Never mind”? One wonders whether Justice Kennedy’s opinion started out as a longer exposition, especially given the somewhat abrupt transitions within his brief opinion.

2. The Contribution Limits Opinions

The outcome on contribution limits is a mixed bag. On the one hand, there were no new converts in this case to the Thomas/Scalia view that all limits on campaign contributions are unconstitutional. On the other hand, as the dissenters point out, Vermont’s contribution limits should have been sustained under the Court’s past precedents granting broad leeway to states in determining the details of their contribution restrictions. Justice Souter’s dissent rightly chided the majority for ignoring “our self-admonition against second-guessing legislative judgments about the risk of corruption.” Even though the plurality ruling was narrow, it will undoubtedly spawn additional challenges to contribution limits that are the lower end of the spectrum nationally, as opponents of campaign finance reform seek to test the outer limits of the Court’s decision.

Under Justice Breyer’s plurality decision, we believe most such limits can be sustained. The fact that a state has limits on the lower end of the spectrum does not, under the plurality’s analysis, mean that the limits will be found unduly restrictive. Instead, because the plurality stressed the *combined* effect of numerous specific features

of Vermont's law as the justification for striking the contribution limits, schemes that differ from Vermont's with respect to one or more of those features are not necessarily unconstitutional in the wake of the decision. For example, if a state has low limits on individual contributions to candidates, but adds an automatic adjustment for inflation, or allows political parties to contribute somewhat larger amounts, or both, the limits seem likely to pass muster under the plurality approach.

As various commentators have noted, the plurality opinion, in striking down Vermont's contribution limits, cites the possibility of structural harm to the functioning of democratic government as the critical basis for its decision. Thus, it is concerned that limits that are too low may "harm the electoral process by preventing challengers from mounting effective campaigns . . . thereby reducing democratic accountability" (p. 14) and that they could impede overall "electoral fairness[.]" (Id.).

We have no quarrel with the principle that elections should be competitive and that officeholders should be accountable to voters; indeed, these were critical interests we advanced in support of both the spending and contribution limits. The plurality's factual assessment of how these principles are affected by contribution limits, however, is deeply flawed. As the dissent points out, the only record evidence of an election conducted under Vermont's contribution limits showed that the election was competitive and the challenger amassed the resources necessary for an effective campaign (Souter opinion, p. 7). In addition, careful social science studies have debunked the notion that contribution limits harm candidates. (Id. at 8). More importantly, the plurality simply assumes that higher contribution limits typically will allow challengers to outspend incumbents. That ignores the greater ability of entrenched incumbents to amass high-dollar donations from interests seeking legislative influence. And if encouraging challengers to take on incumbents is the goal, spending caps would do far more to achieve that end than would raising the limits on contributions.

In the right circumstances, the plurality decision may create an opening for reform advocates by its conclusion that the First Amendment is violated by laws that serve to entrench incumbents and deter electoral competition and accountability – even though we must continue to contest the plurality's factual conclusion that contribution limits have such an effect. Previous decisions striking campaign finance laws have relied on individual rights to freedom of association or speech rather than on a right to competitive elections. The plurality's recognition of such a right could play out in unexpected ways. For example, in the Texas redistricting case which the Court decided just two days after *Randall*, the focus was on the partisan unfairness of the redistricting plan, not on whether it entrenched incumbents generally; but in some states the incumbents of both major parties get together on a redistricting plan that disadvantages challengers across the spectrum. Would voters, or primary challengers, have a cause of action under the plurality decision to say this violates the First Amendment by entrenching incumbents? Just as advocates have used *Bush v. Gore* to challenge inequalities in electoral procedures across the country, not just with respect to recount procedures, so it seems possible that the plurality opinion in *Randall* could give rise to legal challenges to allegedly anti-competitive electoral rules beyond the specific context of contribution limits.

③

Other Implications

With mandatory spending limits off the table for the current Court, the push for voluntary public financing laws is likely to intensify. The *Randall* ruling does not call into question the constitutionality of such laws. Other advocates, such as USPIRG, already are calling for a constitutional amendment to allow mandatory limits on campaign spending. And, as noted, there are likely to be state-to-state legal battles over whether particular contribution limits are permissible under the plurality ruling.

We see also see the decision as prompting a closer look at other reform innovations, such as aggregate contribution limits that place a cap on the total amount of contributions a candidate may accept from a particular source such as PACs. Such aggregate limits have been upheld in Montana, Wisconsin and Minnesota. Small donor incentive programs such as Minnesota's voucher system, whereby the state will provide a refund for a donation of up to \$50 made to any candidate, may be an attractive way to bring more small donors into the system.

The case also illustrates the need for advocates to continue working with academics and social scientists to shed light on the impact of campaign reforms and build the case for the efficacy of reforms in promoting competition as well as greater fairness and integrity in the electoral process.