

and unproductive options of going public or staying silent. Finally, the approach offered recognizes the dilemma faced by an individual who finds that her office operates in a manner that violates either the Constitution or her professional ethical code. When a government entity's actions contravene these canons, the Court would do well to protect, rather than abandon, the public servant torn by dual loyalties yet compelled to speak.

3. *Campaign Finance Regulation*. — More than thirty years ago, in the landmark case of *Buckley v. Valeo*,¹ the Supreme Court considered the constitutionality of legislatively enacted campaign finance regulation. In *Buckley*, the Court split the difference² and created a bipartite classification that exists to this day. Balancing Congress's legitimate regulatory interests³ against the constitutional speech rights of political participants, the Court held that the regulation of campaign contributions was permissible, while the regulation of campaign expenditures was not.⁴ The response to *Buckley* was almost universally negative: the academy despised the decision,⁵ and, for at least the last ten years, a majority of the Justices on the Court have wanted to overturn it.⁶ But *Buckley* has endured.

Last Term, in *Randall v. Sorrell*,⁷ the newly constituted Roberts Court reconsidered this redheaded stepchild of Supreme Court jurisprudence. With six Justices filing opinions in a contentious decision, the Justices could only agree to an affirmation of *Buckley*'s core holding. However, hidden beneath the surface of this seeming non-event was a potentially important development: the Supreme Court's most emphatic embrace yet of its role in protecting the structural integrity of

¹ 424 U.S. 1 (1976) (per curiam).

² Judge J. Harvie Wilkinson III recently described the Rehnquist Court's jurisprudence using this phrase. See J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969 (2006). Although *Buckley* was decided by the Burger Court and thus is not discussed by Judge Wilkinson, the concept of "splitting the difference in result" can also be applied to *Buckley*. See *id.* at 1972–75.

³ The Court recognized as a legitimate regulatory interest the need to prevent corruption and its appearance. *Buckley*, 424 U.S. at 25. Although the definition of corruption has expanded since *Buckley*, see *McConnell v. FEC*, 540 U.S. 93, 152 (2003), the Court has never explicitly recognized another legitimate legislative interest in campaign finance cases.

⁴ *Buckley*, 424 U.S. at 23.

⁵ See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 513 (2d ed. 2002) (detailing the academy's "tremendous criticism" of *Buckley*).

⁶ See *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604 (1996). In *Colorado I*, five Justices believed that *Buckley* should be overturned. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas believed that regulation of neither contributions nor expenditures should be allowed, see *id.* at 635–36 (Thomas, J., concurring in the judgment and dissenting in part), and Justices Stevens and Ginsburg believed that regulation of both contributions and expenditures was constitutional, see *id.* at 648–50 (Stevens, J., dissenting). Since neither side could attract five Justices, the case was narrowly decided, upholding *Buckley*.

⁷ 126 S. Ct. 2479 (2006).

democratic politics. This is a welcome development: the group-based, heavily regulated nature of electoral politics makes a focus on structural integrity more sensible than *Buckley*'s traditional focus on individual rights. Unfortunately, the *Randall* Court did not follow through on its structural rhetoric, instead resorting to a traditional, individual rights approach in reaching its decision.

In 1997, an overwhelming bipartisan majority of the Vermont legislature passed Act 64,⁸ a comprehensive campaign finance reform package.⁹ The Act imposed mandatory expenditure limits on "the total amount a candidate for state office can spend during a 'two-year general election cycle,' i.e., the primary plus the general election."¹⁰ Incumbents were restricted to eighty-five, and in some cases ninety, percent of these expenditure limits.¹¹ Act 64 also contained strict contribution limits¹² — the lowest of any state in the country¹³ — that applied not only to individual donors, but also to political parties.¹⁴

Various Vermont political actors challenged Act 64 on First Amendment grounds,¹⁵ and the district court ruled that while the individual contribution limits were constitutional, the expenditure limits and the contribution limits as applied to political parties were not.¹⁶

A divided Second Circuit panel held all of Act 64's contribution limits to be constitutional.¹⁷ In addition, the court recognized that Vermont had "established two interests in favor of Act 64's expenditure limitations that, taken together, [were] constitutionally compelling: namely, protecting the time of candidates and elected officials, and preventing the reality and appearance of corruption."¹⁸ Unable to tell from the record if the expenditure limits were narrowly tailored, the

⁸ 1997 Vermont Campaign Finance Reform Act, VT. STAT. ANN. tit. 17, §§ 2801–2883 (Supp. 2005); *Landell v. Sorrell*, 382 F.3d 91, 100 (2d Cir. 2004). Various legislative committees ultimately "[held] over 65 hearings with more than 145 witnesses testifying." *Id.*

⁹ *Landell*, 382 F.3d at 99.

¹⁰ *Randall*, 126 S. Ct. at 2486 (plurality opinion) (quoting § 2805a(a)). The expenditure limits were scaled based on the position sought; for example, gubernatorial candidates could spend up to \$300,000, while single-member district state representative candidates could spend up to \$2000. § 2805a.

¹¹ *Randall*, 126 S. Ct. at 2486 (plurality opinion).

¹² *Id.* Contribution limits were also scaled based on the position sought. § 2805(a).

¹³ *Randall*, 126 S. Ct. at 2493 (plurality opinion).

¹⁴ VT. STAT. ANN. tit. 17, § 2811.

¹⁵ *Randall*, 126 S. Ct. at 2487 (plurality opinion) ("The petitioners are individuals who have run for state office in Vermont, citizens who vote in Vermont elections and contribute to Vermont campaigns, and political parties and committees that participate in Vermont politics.").

¹⁶ *Landell v. Sorrell*, 118 F. Supp. 2d 459, 493 (D. Vt. 2000).

¹⁷ Judge Straub wrote the majority opinion and was joined by Judge Pooler. Judge Winter dissented. Interestingly, Judge Winter had argued *Buckley* in the Supreme Court for the petitioners, urging the Court to declare campaign finance regulation unconstitutional. See *Buckley v. Valeo*, 424 U.S. 1, 5 (1976) (per curiam).

¹⁸ *Landell v. Sorrell*, 382 F.3d 91, 148 (2d Cir. 2004).

Second Circuit remanded the issue to the district court for further fact-finding¹⁹ and later rejected a petition to reconsider the decision en banc.²⁰

The Supreme Court reversed and remanded. Justice Breyer wrote the controlling opinion for a divided Court,²¹ relying on *Buckley* to invalidate both the expenditure and contribution limits of Act 64.²² Trumpeting the importance of stare decisis²³ and finding no “special justification that would require [the Court] to overrule *Buckley*,”²⁴ Justice Breyer rejected the respondents’ argument that the Court should overturn *Buckley*’s prohibition of expenditure limits²⁵ and dismissed the argument that *Randall* could be distinguished from *Buckley*.²⁶

Act 64’s contribution limits required “more complex” analysis.²⁷ Justice Breyer did not define a precise standard for measuring the constitutionality of contribution limits, instead noting that when “danger signs” appear, “independent judicial judgment” must be used.²⁸ The fact that Act 64’s contribution limits were both the lowest limits in the country²⁹ and, inflation-adjusted, lower than any limits ever upheld by the Court³⁰ constituted a “danger sign.”³¹ On examination of the record, Justice Breyer found Act 64 to be “too restrictive” because it constrained the ability of “challengers to run competitive campaigns,”³² threatened individual voters’ right to association,³³ and imprecisely de-

¹⁹ *Id.* at 148–49.

²⁰ *Landell v. Sorrell*, 406 F.3d 159 (2d Cir. 2005) (denial of petition for rehearing en banc). The court’s order is perhaps most interesting for Judge Calabresi’s concurrence. Although agreeing with the panel’s decision, Judge Calabresi noted that *Buckley*, by focusing on the value of political expression to the exclusion of more egalitarian concerns, has centered the campaign finance dialogue on a set of values that, while “by no means unimportant,” are “not really at the core of the debate.” *Id.* at 163 (Calabresi, J., concurring in the denial of rehearing en banc).

²¹ Chief Justice Roberts joined Justice Breyer’s opinion in full, and Justice Alito joined the opinion with the exception of Parts II.B.1 and II.B.2, which considered whether to overturn *Buckley*’s holding with respect to expenditure limits.

²² *Randall*, 126 S. Ct. at 2487–89, 2490–2500 (plurality opinion); *id.* at 2489–90 (opinion of Breyer, J.).

²³ *Id.* at 2489–90 (opinion of Breyer, J.).

²⁴ *Id.* at 2489.

²⁵ First, the respondents contended that *Buckley*’s expenditure limitations were ineffective in deterring corruption or its appearance — the one legitimate objective the Court had recognized for campaign finance regulation. *Id.* Second, they contended that the Court should consider that expenditure limits “help to protect candidates from spending too much time raising money rather than devoting time to campaigning among ordinary voters.” *Id.*

²⁶ *Id.* at 2490–91 (plurality opinion).

²⁷ *Id.* at 2491.

²⁸ *Id.* at 2492.

²⁹ *Id.* at 2493.

³⁰ *Id.* at 2494.

³¹ *Id.* at 2492–93.

³² *Id.* at 2495.

³³ *Id.* at 2496.

terminated the impact of volunteer activity.³⁴ While the decision was consistent with *Buckley*, which recognized that there must be “some lower bound” on acceptable contribution regulation,³⁵ the controlling opinion for the first time declined to defer to the legislature’s “empirical judgment[]” in this regard.³⁶

Justice Alito concurred in part and in the judgment, filing a short opinion to distance himself from Justice Breyer’s reliance on *stare decisis* to uphold *Buckley*’s expenditure limits.³⁷ Characterizing the respondents’ challenge to expenditure limits as an “afterthought,” Justice Alito did not find it necessary to reach the issue.³⁸

Justice Kennedy also filed a short opinion concurring in the judgment. Justice Kennedy felt that the result of *Randall* was correct given “the universe of campaign finance regulation” that the Supreme Court had “in part created and in part permitted by its course of decisions.”³⁹ However, he felt it was proper to concur only in the judgment because of his skepticism regarding the system of campaign finance regulation and its operation.⁴⁰

Justice Thomas also concurred in the judgment.⁴¹ Consistent with his views in other campaign finance cases,⁴² Justice Thomas wrote that “*Buckley* provides insufficient protection to political speech,”⁴³ is “insusceptible of principled application,” and, therefore, is “not entitled to *stare decisis* effect.”⁴⁴

³⁴ *Id.* at 2498. Justice Breyer also noted two other factors: the limits were not inflation-indexed, and the record lacked any “special justification that might warrant a contribution limit so low or so restrictive as to bring about . . . serious associational and expressive problems.” *Id.*

³⁵ *Id.* at 2482.

³⁶ *Id.* at 2492. The decision seemed to conflict with *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), in which the Court held contribution limits to be constitutional because they were not “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.* at 397. As Justice Souter noted in his *Randall* dissent, the regulations at issue in *Randall* did not seem to rise to this level. See *Randall*, 126 S. Ct. at 2512–13 (Souter, J., dissenting).

³⁷ *Randall*, 126 S. Ct. at 2500–01 (Alito, J., concurring in part and concurring in the judgment).

³⁸ *Id.*

³⁹ *Id.* at 2501 (Kennedy, J., concurring in the judgment).

⁴⁰ *Id.* Justice Kennedy identified the impact of the Court’s campaign finance jurisprudence on political parties as a concern because party restrictions have channeled political speech through political action committees that “operate in ways obscure to the ordinary citizen.” *Id.*

⁴¹ Justice Scalia joined Justice Thomas’s opinion.

⁴² See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465–66 (2001) (Thomas, J., dissenting).

⁴³ *Randall*, 126 S. Ct. at 2502 (Thomas, J., concurring in the judgment).

⁴⁴ *Id.* at 2502–03 (emphasis omitted). Justice Thomas criticized both parts of Justice Breyer’s two-step evaluation of the constitutionality of contribution limits. He first noted that “it is entirely unclear” how a court is to determine whether “danger signs” are present. *Id.* at 2503. He then criticized Justice Breyer’s use of “independent judicial judgment,” calling it “odd” and con-

Justice Stevens dissented, arguing that the “time has come to overrule” *Buckley*’s prohibition of expenditure limits⁴⁵ because “it is quite wrong to equate money and speech.”⁴⁶ In Justice Stevens’s view, candidates can campaign effectively within the constraints of expenditure limitations,⁴⁷ and, thus, regulations such as Act 64 are “far more akin to time, place, and manner restrictions than to restrictions on the content of speech.”⁴⁸ In addition, Justice Stevens observed that there is no convincing evidence that the interests favoring expenditure limits are fronts for incumbency protection.⁴⁹ He would thus have given the “greatest possible deference” to the legislature in interpreting a “constitutional provision that has, at best, an indirect relationship to activity that affects the quantity — rather than the quality or the content — of repetitive speech in the marketplace of ideas.”⁵⁰

Justice Souter also dissented.⁵¹ While Justice Souter agreed that expenditure limits implicate important speech interests, he felt that it was proper for the court of appeals to remand to the district court to determine if Act 64’s “spending limits [were] the least restrictive means of accomplishing” the legislature’s “worthy objectives.”⁵² Justice Souter also would have deferred to the Second Circuit on contribution limits because he did not think Act 64’s limits were “beyond the constitutional pale” given the Court’s precedents.⁵³

Despite the anticipation created by the changing membership of the Court and the deep divisions reflected in the Court’s six opinions, *Randall*, on its surface, did little more than affirm *Buckley*’s status quo: expenditure limits are essentially prohibited, and contribution limits are allowed as long as they are not too restrictive of speech. This outcome is unsurprising; most commentators did not expect the newly constituted Roberts Court to disturb the *Buckley* framework.⁵⁴

tending that it provided “no insight on how to draw [the] constitutional line” between proper and improper regulation. *Id.*

⁴⁵ *Id.* at 2506 (Stevens, J., dissenting).

⁴⁶ *Id.* at 2508.

⁴⁷ *See id.* (noting that “the examples of effective speech in the political arena that did not depend on any significant expenditure by the campaigner are legion”).

⁴⁸ *Id.*

⁴⁹ *Id.* at 2510.

⁵⁰ *Id.*

⁵¹ Justice Ginsburg joined Justice Souter’s dissent, and Justice Stevens joined with respect to Parts II and III, which would have upheld as constitutional the contribution limits and the presumption that spending by political parties is coordinated.

⁵² *Randall*, 126 S. Ct. at 2512 (Souter, J., dissenting).

⁵³ *Id.* at 2513. In particular, Justice Souter thought *Shrink Missouri* controlled this issue. *See id.* at 2512–15.

⁵⁴ Most commentators did not think the newly constituted Court would make a dramatic move in a highly visible and politically controversial area during its first Term. *See, e.g.*, Richard H. Pildes, *Campaign Finance and Political Competition*, ELECTION LAW @ MORITZ, Feb. 27, 2006, <http://moritzlaw.osu.edu/electionlaw/etable06/060227-pildes.php>.

Once again, *Buckley* remained good law even though a majority of the Justices probably would overturn it if given the chance.⁵⁵

Randall's affirmation of *Buckley*, however, may mask an important shift in the Court's campaign finance jurisprudence. Since *Buckley*, the Court's campaign finance decisions have concentrated almost exclusively on weighing the government's legitimate regulatory interests against the First Amendment harm created by restricting an individual's ability to spend money on or donate money to political campaigns.⁵⁶ Thus, limitations on campaign expenditures were virtually per se unconstitutional because they directly "reduce[] the quantity of expression,"⁵⁷ whereas contribution limits were allowable since their expressive purpose is primarily symbolic and they place only a "marginal restriction upon the contributor's ability to engage in free communication."⁵⁸

Without ignoring the First Amendment implications of campaign finance regulation, *Randall* expanded the Court's analysis by focusing on a set of harms that did not involve "individual First Amendment rights in any conventional sense."⁵⁹ Justice Breyer discussed at length the possibility that Vermont's regulations would cause a "democratic harm"⁶⁰ that "implicate[s] the integrity of our electoral process"⁶¹ by hindering "the ability of a candidate running against an incumbent officeholder to mount an effective challenge."⁶² While the Court had previously discussed the risks of entrenchment inherent in campaign finance regulation, "the Court in [*Randall*] ma[de] as clear as it has in any constitutional decision involving democratic institutions" that it

⁵⁵ Justices Stevens, Scalia, and Thomas all explicitly called for *Buckley* to be overturned. Justice Kennedy came close to doing the same, and Justice Alito seemed to indicate that he would overturn *Buckley* if asked nicely. In addition, Justices Souter and Ginsburg read *Buckley*'s limitations quite liberally. Justice Ginsburg had previously joined an opinion in *Colorado I* that seemingly called for the Court to overturn *Buckley*. See *supra* note 6.

⁵⁶ This individual rights approach has dominated the Court's election law jurisprudence since long before *Buckley*. See Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1457 & n.185 (2002) (listing malapportionment cases in which the Court adopted an individual rights approach). In the campaign finance context, the Court's primary focus has been the determination of "whether and to what extent . . . regulation comports with the First Amendment." Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1706 (1999).

⁵⁷ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

⁵⁸ *Id.* at 20-21.

⁵⁹ Posting of Professor Richard Pildes to SCOTUSblog, <http://www.scotusblog.com> (June 26, 2006, 11:44 EST).

⁶⁰ Justice Breyer used this term in *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004), to describe a category of constitutional harms caused by legislative action that does not fit precisely within the traditional individual rights rubric. See *id.* at 1822 (Breyer, J., dissenting). He identified "unjustified entrenchment" as the paradigmatic example of such harm. *Id.* at 1825.

⁶¹ *Randall*, 126 S. Ct. at 2492 (plurality opinion).

⁶² *Id.* at 2496.

views its role as protecting not only individual rights, but also the “structural integrity of the democratic process.”⁶³

This shift in focus is a positive development. Politics is a heavily regulated, group-based activity.⁶⁴ Because an individual’s rights within a democracy are “inevitably conditioned by the entire institutional structure within which these rights exist,” the individual rights at issue in cases like *Randall* “cannot be understood as general, intrinsic liberties.”⁶⁵ Thus, by focusing too much on atomistic, individual rights “in isolation from the overall organizational and coalitional matrix that determines actual political power,” courts “can undermine the very interests [they] believe themselves to be securing.”⁶⁶

This structural approach⁶⁷ is particularly appropriate when the traditional sources of constitutional interpretation do not provide clear direction. The Court’s *Buckley* framework essentially equates spending money with political speech. But this analogy is neither mandated by the text of the Constitution nor dictated by historical understanding.⁶⁸ Campaign finance regulations do not stop political candidates from speaking and, if they speak well, from persuading the electorate.⁶⁹

In addition, the available historical evidence seems to indicate that “limiting the amount of money that congressional candidates might spend in future elections [is] well within Congress’s authority.”⁷⁰ First, the Constitution provides that “Congress may at any time by Law make or alter” the “Times, Places and Manner of holding Elections for

⁶³ Posting of Professor Richard Pildes to SCOTUSblog, *supra* note 59.

⁶⁴ See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 51–54 (2004).

⁶⁵ *Id.* at 52.

⁶⁶ *Id.* at 54.

⁶⁷ The approach explained in the previous two paragraphs is termed “structural” to differentiate it from the “individual rights” approach described earlier. When employing the structural approach, a court primarily evaluates legislative action to determine if it is self-entrenching, rather than whether it infringes upon individual constitutional rights. There is a voluminous literature on the subject, with John Hart Ely’s foundational work, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980), serving as an excellent starting point. Probably the most influential modern article is Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

⁶⁸ Perhaps the most famous scholarly criticism of the Court’s equation of money with speech was written by Judge J. Skelly Wright in the immediate aftermath of *Buckley*. See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). Similarly, Justices White and Stevens have argued that “it is quite wrong to equate money and speech.” *Randall*, 126 S. Ct. at 2508 (Stevens, J., dissenting); see also *Buckley v. Valeo*, 424 U.S. 1, 259 (1976) (White, J., concurring in part and dissenting in part) (“[N]either the limitations on contributions nor those on expenditures directly or indirectly purport to control the content of political speech . . .”).

⁶⁹ See *Randall*, 126 S. Ct. at 2508–09 (Stevens, J., dissenting).

⁷⁰ *Id.* at 2510.

Senators and Representatives.”⁷¹ Second, Congress had long regulated both campaign expenditures and contributions before the Court’s decision in *Buckley*,⁷² and the Supreme Court had acquiesced in this regulation, considering it permissible regulation of conduct rather than impermissible regulation of speech.⁷³ While historical understanding is not necessarily dispositive,⁷⁴ it does suggest the constitutionality of campaign finance regulation.⁷⁵

Given the lack of constitutional clarity, it is appropriate for the Court to defer to the legislature’s democratic judgment, while ensuring that legislators do not take advantage of this deference to entrench themselves improperly. As Justice Breyer has argued, when the “legislature has significantly greater institutional expertise, as, for example, in the field of election regulation,” the Court should “defer[] to empirical legislative judgments — at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge.”⁷⁶

Unfortunately, the controlling opinion in *Randall* seemed unprepared to accept the full implications of its structural analysis. Justice Breyer showed little willingness to defer to the empirical judgment of the Vermont legislature; indeed, as Justice Souter pointed out in dissent, it is hard to reconcile Justice Breyer’s plurality opinion in *Randall* with his previously stated desire to defer to the legislature in this area.⁷⁷

In *Randall*, Justice Breyer presented data demonstrating that the Vermont campaign finance laws could decrease the money available to challengers in competitive elections as evidence of a structural “democratic harm.”⁷⁸ But Justice Breyer never tied this data to a change in the likelihood of a challenger’s defeating an incumbent or presented evidence of an empirical connection between the two, in Vermont or

⁷¹ U.S. CONST. art. I, § 4, cl. 1.

⁷² See, e.g., Labor Management Relations Act of 1947, ch. 120, § 304, 61 Stat. 136, 159 (prohibiting unions and corporations from making expenditures and contributions in federal elections); Tillman Act of 1907, ch. 420, 34 Stat. 864 (prohibiting corporations and national banks from contributing to federal campaigns).

⁷³ See *Randall*, 126 S. Ct. at 2507 (Stevens, J., dissenting) (citing *Buckley v. Valeo*, 519 F.2d 821, 841 & n.41, 851 & n.68, 859 (D.C. Cir. 1975) (en banc) (per curiam)).

⁷⁴ *Id.* at 2510. Justice Scalia has argued in the First Amendment context that, in circumstances in which “[t]he constitutional text is . . . as susceptible of one meaning as of the other,” “long and unbroken tradition” is an important factor in reaching the appropriate decision. *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 688 (1996) (Scalia, J., dissenting).

⁷⁵ Justice Stevens went so far as to write 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.” *Randall*, 126 S. Ct. at 2510 (Stevens, J., dissenting).

⁷⁶ *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

⁷⁷ See *Randall*, 126 S. Ct. at 2513–14 (Souter, J., dissenting).

⁷⁸ *Id.* at 2495–98 (plurality opinion).

elsewhere.⁷⁹ Justice Breyer’s inability to make this connection is unsurprising given the lack of convincing evidence that campaign finance regulation is generally a “front[] for incumbency protection.”⁸⁰

The limited evidence of entrenchment risk that Justice Breyer was able to marshal stands in sharp contrast to the overwhelming bipartisan support for the Act,⁸¹ the detailed legislative findings in support of it, and its provisions explicitly favoring challengers. This constellation of factors demonstrates that Act 64 was the product of reasoned legislative deliberation and was broadly supported by the electorate; in other words, it presented a perfect opportunity for the Court to “defer to empirical legislative judgment.”⁸² At the very least, if the Court was truly troubled by entrenchment fears, it should have remanded to the district court for further evidentiary hearings on the issue.

Contrast the Court’s willingness to override the legislature’s will in *Randall* with its recent decision in *Vieth v. Jubelirer*.⁸³ In many ways, these two cases present the same analytic challenge: potentially self-entrenching legislative action that defines the structure of democratic politics — how campaigns are financed in *Randall* and how votes are counted in *Vieth* — implicating individual constitutional rights of ambiguous scope — the First Amendment right to free speech in *Randall* and the Fourteenth Amendment right to equal protection in *Vieth*.⁸⁴ But despite this analytic similarity, the results in the two cases could not differ more dramatically. Little beyond the desire to self-entrench dictates most redistricting, yet the Court refused to intervene and overturn the judgment of the legislature in *Vieth*.⁸⁵ Thus, in *Vieth* the Court underenforced voters’ individual right to cast a meaningful ballot, while in *Buckley* the Court overenforced political candidates’ and contributors’ individual speech rights.

⁷⁹ Justice Breyer’s opinion contained one parenthetical noting that, during the 2000 congressional races, “successful challengers spent far more than the average candidate.” *Id.* at 2496. However, this data point does not convincingly support Justice Breyer’s argument because it leaves several questions unanswered, such as how the spending of these successful challengers compared with that of their opponents, rather than to that of candidates at large.

⁸⁰ *Id.* at 2510 (Stevens, J., dissenting). In addition, the empirically uncertain relationship between campaign finance regulation and incumbency protection counsels courts to allow states to experiment with different campaign finance limits. Such experimentation would provide useful information about the relationship between money and incumbency reelection. *See id.*

⁸¹ In and of itself, bipartisan support would be insufficient to remove the presumption that an election-related law is self-entrenching; the political parties could have engaged in a mutually beneficial “sweetheart gerrymander.” However, when combined with the other factors listed, it offers some support for the proposition that the purpose of Act 64 was not entrenchment.

⁸² *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

⁸³ 124 S. Ct. 1769 (2004). The Court reiterated its core holding from *Vieth* last Term in *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006).

⁸⁴ *Id.* at 1773 (plurality opinion). The partisan gerrymander at issue in *Vieth* was also challenged under Article I of the Constitution. *Id.*

⁸⁵ *Id.* at 1798–99.

The Court premised its refusal to intervene in *Vieth* on its stated inability to develop a judicially manageable standard by which to determine when a particular gerrymander has “gone too far.”⁸⁶ Perhaps similar reasoning best explains the Court’s unwillingness to confront the full implications of its structural rhetoric in the campaign finance context. Recognizing the attractiveness of a structural approach but unable to develop a test to evaluate the risk of entrenchment, the Court at least partly fell back on the familiar individual rights model that had been in place since *Buckley*.

Read this way, the Court’s emphasis on structural integrity is largely empty rhetoric — and that is a shame. It is difficult to see the advantage of the *Buckley* approach. How is the *Randall* standard any more manageable than the standards that have been proposed to evaluate whether legislative action in the context of gerrymandering, and democratic politics generally, is unduly self-entrenching?⁸⁷ As Justice Thomas wrote in concurrence, the controlling opinion’s campaign finance standard is incapable of “principled application.”⁸⁸ Is it so much easier to determine when a restriction on self-expression “goes too far” than to determine when legislative action is too likely to shut down the political process?

Of course, this problem could be solved by adopting Justice Thomas’s approach and overenforcing individuals’ First Amendment rights by banning all campaign finance restrictions. But that solution would just exacerbate the problems inherent in the current system, which many view as “vacuous, . . . money driven, [and] more locked up than ever.”⁸⁹ By embracing the individual rights approach to campaign finance regulation and striking down legislatively enacted attempts to reshape the political system, the Court has essentially locked the electorate into the current political structure — a structure with problems created in part by the Court’s past jurisprudence.⁹⁰ The

⁸⁶ *Id.* at 1784.

⁸⁷ An example of such a standard is the test first articulated by Justice Stevens in *Karcher v. Daggett*, 462 U.S. 725 (1983). To declare legislation unconstitutionally discriminatory, Justice Stevens would have required a plaintiff to show, through objective evidence, that the action had a “significant adverse impact on an identifiable political group” and that the action did not “serve[] neutral, legitimate interests of the community as a whole.” *Id.* at 751 (Stevens, J., concurring).

⁸⁸ *Randall*, 126 S. Ct. at 2503 (Thomas, J., concurring in the judgment).

⁸⁹ Issacharoff & Karlan, *supra* note 56, at 1706.

⁹⁰ *Buckley* may be a contributing factor to the perception that the current system is overly money driven. *Buckley*, by limiting contributions but not expenditures, has created a “disturbing trend” of divorcing politics from the “mediating influence of candidates and political parties.” *Id.* at 1714. The ability of legislatures to address these issues is limited by the constitutionalization of *Buckley*’s bipartite framework. As Professor Morton Horowitz notes, the Burger and Rehnquist Courts’ “generalization and universalization of freedom of speech,” in which increasingly abstract speech rights are recognized and protected, has caused a “Lochnerization of the First Amend-

Court would be better off practicing what it preaches and deferring to legislative judgment in this area while policing the boundary of improper self-entrenchment, rather than overenforcing abstract individual rights.

II. FEDERAL JURISDICTION AND PROCEDURE

A. Equitable Remedies

Abortion Rights — Remedy for Unconstitutionality. — Since deciding *Roe v. Wade*,¹ the Supreme Court has sent mixed signals regarding the proper standard to apply in addressing facial challenges to abortion regulations. In several cases, the Court applied the standard set forth in *United States v. Salerno*,² which requires a plaintiff challenging the facial validity of a statute to “establish that no set of circumstances exists under which the [statute] would be valid.”³ In more recent cases, the Court has applied the standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴ under which a statute is invalid if, “in a large fraction of the cases in which [that statute] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”⁵ These mixed signals, in the words of Judge Easterbrook, have “put courts of appeals in a pickle” because they “cannot follow *Salerno* without departing from the approach taken in . . . *Casey*; yet [they] cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books.”⁶ Unsur-

ment.” Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 109–10 (1993).

¹ 410 U.S. 113 (1973).

² 481 U.S. 739 (1987).

³ *Id.* at 745. Cases applying the *Salerno* standard include *Rust v. Sullivan*, 500 U.S. 173 (1991), which addressed a facial challenge to regulations specifying that certain public funds could not be used to encourage, promote, or advocate abortion as a method of family planning, *see id.* at 180, 183; *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), in which the Court stated that “because appellees are making a facial challenge to a statute, they must show that ‘no set of circumstances exists under which [it] would be valid,’” *id.* at 514 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 524 (1989) (O’Connor, J., concurring in part and concurring in the judgment)); and *Webster*, in which Justice O’Connor remarked that “some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees’ assertion that the ban is facially unconstitutional,” 492 U.S. at 524 (O’Connor, J., concurring in part and concurring in the judgment).

⁴ 505 U.S. 833 (1992).

⁵ *Id.* at 895. For example, the Court employed the *Casey* standard in *Stenberg v. Carhart*, 530 U.S. 914, 937–38, 945–46 (2000).

⁶ *A Woman’s Choice—E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002).