

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 04–1528, 04–1530 and 04–1697

04–1528 NEIL RANDALL, ET AL., PETITIONERS
v.
WILLIAM H. SORRELL ET AL.

04–1530 VERMONT REPUBLICAN STATE COMMITTEE, ET AL.,
PETITIONERS
v.
WILLIAM H. SORRELL ET AL.

04–1697 WILLIAM H. SORRELL, ET AL., PETITIONERS
v.
NEIL RANDALL ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 26, 2006]

JUSTICE STEVENS, dissenting.

JUSTICE BREYER and JUSTICE SOUTER debate whether the *per curiam* decision in *Buckley v. Valeo*, 424 U. S. 1 (1976), forecloses any constitutional limitations on candidate expenditures. This is plainly an issue on which reasonable minds can disagree. The *Buckley* Court never explicitly addressed whether the pernicious effects of endless fundraising can serve as a compelling state interest that justifies expenditure limits, *post*, at 2 (SOUTER, J., dissenting), yet its silence, in light of the record before it, suggests that it implicitly treated this proposed interest insufficient, *ante*, at 11 (plurality opinion of BREYER, J.). Assuming this to be true, however, I am convinced that *Buckley*'s holding on expenditure limits is wrong, and that

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the time has come to overrule it.

I have not reached this conclusion lightly. As JUSTICE BREYER correctly observes, *stare decisis* is a principle of “fundamental importance.” *Ante*, at 9. But it is not an inexorable command, and several factors, taken together, provide special justification for revisiting the constitutionality of statutory limits on candidate expenditures.

To begin with, *Buckley*’s holding on expenditure limits itself upset a long-established practice. For the preceding 65 years, congressional races had been subject to statutory limits on both expenditures and contributions. See 37 Stat. 28; Federal Corrupt Practices Act of 1925, 43 Stat. 1073; Federal Election Campaign Finance Act of 1971, 86 Stat. 5; Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263; *United States v. Automobile Workers*, 352 U. S. 567, 575–576 (1957); *McConnell v. Federal Election Comm’n*, 540 U. S. 93, 115–117 (2003). As the Court of Appeals had recognized in *Buckley v. Valeo*, 519 F. 2d 821, 859 (CA DC 1975) (en banc) (*per curiam*), our earlier jurisprudence provided solid support for treating these limits as permissible regulations of conduct rather than speech. *Ibid.* (discussing *Burroughs v. United States*, 290 U. S. 534 (1934), and *United States v. Harriss*, 347 U. S. 612 (1954)); see also 519 F. 2d, at 841, and n. 41, 851, and n. 68. While *Buckley*’s holding on contribution limits was consistent with this backdrop, its holding on expenditure limits “involve[d] collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience,” *Helvering v. Hallock*, 309 U. S. 106, 119 (1940).

There are further reasons for reexamining *Buckley*’s holding on candidate expenditure limits that do not apply to its holding on candidate contribution limits. Although we have subsequently reiterated the line *Buckley* drew between these two types of limits, we have done so primarily in cases affirming the validity of contribution limits or their functional equivalents. See *McConnell*, 540 U. S., at

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134–138; *Federal Election Comm’n v. Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 440–442 (2001); *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377, 386–387 (2000); cf. *California Medical Assn. v. Federal Election Comm’n*, 453 U. S. 182, 194–195 (1981) (plurality opinion). In contrast, these are our first post-*Buckley* cases that raise the constitutionality of expenditure limits on the amounts that candidates for office may spend on their own campaigns.¹

Accordingly, while we have explicitly recognized the importance of *stare decisis* in the context of *Buckley*’s holding on contribution limits, *McConnell*, 540 U. S., at 137–138, we have never before done so with regard to its rejection of expenditure limits. And *McConnell*’s recognition rested largely on an interest specific to *Buckley*’s holding on contribution limits. There, we stated that “[c]onsiderations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.” 540 U. S., at 137–138 (emphasis added). This powerful buttress is absent from *Buckley*’s refusal to defer to the Legislature’s judgment as to the importance of expenditure limits. Relatedly, while Congress and state legislatures have long relied on *Buckley*’s authorization of contribution limits, *Buckley*’s rejection of expenditure limits “has not induced [comparable] detrimental reliance,” *Lawrence v.*

¹We have, of course, invalidated limits on independent expenditures by third persons. *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U. S. 480 (1985); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm’n*, 518 U. S. 604 (1996); cf. *Federal Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986). In these cases the principal parties accepted *Buckley*’s holding on candidate expenditure limits and gave us no cause to consider how much weight to give *stare decisis*.

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Texas, 539 U. S. 558, 577 (2003). See also *Vieth v. Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (noting lessened *stare decisis* concern where “it is hard to imagine how any action taken in reliance upon [the prior case] could conceivably be frustrated”).

Perhaps in partial recognition of these points, Justice White refused to abandon his opposition to *Buckley*’s holding on expenditure limits. See *Federal Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 271 (1986); *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U. S. 480, 507–512 (1985) (dissenting opinion). He believed *Buckley* deeply wrong on this issue because it confused “the identification of speech with its antecedents.” *National Conservative Political Action Comm.*, 470 U. S., at 508. Over the course of his steadfast campaign, he converted at least one other *Buckley* participant to this position, see *National Conservative Political Action Comm.*, 470 U. S., at 518–521 (Marshall, J., dissenting), and his reasoning has since persuaded me—the nonparticipating Member of the *Buckley* Court—as well.

As Justice White recognized, it is quite wrong to equate money and speech. *Buckley*, 424 U. S., at 263 (opinion concurring in part and dissenting in part). To the contrary,

“The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained. Even under the campaign laws as originally enacted, everyone was free to spend as much as they chose to amplify their views on general political issues, just not specific candidates. The restrictions, to the extent they do affect speech, are viewpoint-neutral and indicate no hostility to the speech itself or its effects.” *National Conservative Po-*

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litical Action Comm., 470 U. S., at 508–509 (White, J., dissenting).

Accordingly, these limits on expenditures are far more akin to time, place, and manner restrictions than to restrictions on the content of speech. Like Justice White, I would uphold them “so long as the purposes they serve are legitimate and sufficiently substantial.” *Buckley*, 424 U. S., at 264.

Buckley’s conclusion to the contrary relied on the following oft-quoted metaphor:

“Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” *Id.*, at 19, n. 18.

But, of course, while a car cannot run without fuel, a candidate can speak without spending money. And while a car can only travel so many miles per gallon, there is no limit on the number of speeches or interviews a candidate may give on a limited budget. Moreover, provided that this budget is above a certain threshold, a candidate can exercise due care to ensure that her message reaches all voters. 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.

Indeed, the examples of effective speech in the political arena that did not depend on any significant expenditure by the campaigner are legion. It was the content of William Jennings Bryan’s comments on the “Cross of Gold”—and William McKinley’s responses delivered from his front porch in Canton, Ohio—rather than any expenditure of money that appealed to their cost-free audiences. Neither Abraham Lincoln nor John F. Kennedy paid for the opportunity to engage in the debates with Stephen Douglas and Richard Nixon that may well have determined the out-

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comes of Presidential elections. When the seasoned campaigners who were Members of the Congress that endorsed the expenditure limits in the Federal Election Campaign Act Amendments of 1974 concluded that a modest budget would not preclude them from effectively communicating with the electorate, they necessarily rejected the *Buckley* metaphor.

These campaigners also identified significant government interests favoring the imposition of expenditure limits. Not only do these limits serve as an important complement to corruption-reducing contribution limits, see *id.*, at 264 (opinion of White, J.), but they also “protect equal access to the political arena, [and] free candidates and their staffs from the interminable burden of fundraising.” *Colorado Republican Federal Campaign Comm. v. Federal Election Comm’n*, 518 U. S. 604, 649–650 (1996) (STEVENS, J., dissenting). These last two interests are particularly acute. 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.” *Automobile Workers*, 352 U. S., at 590. States have recognized this problem,² but *Buckley*’s perceived ban on expenditure limits severely limits their options in dealing with it.

The interest in freeing candidates from the fundraising straitjacket is even more compelling. Without expenditure limits, fundraising devours the time and attention of political leaders, leaving them too busy to handle their public responsibilities effectively. That fact was well recognized by backers of the legislation reviewed in *Buckley*, by the Court of Appeals judges who voted to uphold

²See Brief for State of Connecticut et al. as *Amici Curiae* 16–17 (citing Ariz. Rev. Stat. §16–940(B)(7); Colo. Rev. Stat. §1–45–102; Neb. Rev. Stat. §32–1602(1); and R. I. Gen. Laws §17–25–18).

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the expenditure limitations in that statute, and by Justice White—who not incidentally had personal experience as an active participant in a Presidential campaign. Cf. 519 F. 2d, at 838 (and citations to legislative history contained therein); 424 U. S., at 265 (opinion of White, J.). The validity of their judgment has surely been confirmed by the mountains of evidence that has been accumulated in recent years concerning the time that elected officials spend raising money for future campaigns and the adverse effect of fundraising on the performance of their official duties.³

Additionally, there is no convincing evidence that these important interests favoring expenditure limits are fronts for incumbency protection. *Buckley*'s cursory suggestion to the contrary, *id.*, at 56–57, failed to take into account the mixed evidence before it on this issue. See 519 F. 2d, at 861, 862 (detailing how “[t]he material available to the court looks both ways”). And only by “permit[ting] States nationwide to experiment with these critically needed reforms,”—as 18 States urge us to do—will we enable further research on how expenditure limits relate to our incumbent reelection rates. See Brief for State of Connecticut et al. as *Amici Curiae* 3.⁴ In the meantime, a

³See, e.g., Alexander, Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials, 37 Loyola U. Chi. L. J. 669, 673–683 (2006); see also *post*, at 3 (SOUTER, J., dissenting).

⁴Indeed, the example of the city of Albuquerque suggests that concerns about incumbent entrenchment are unfounded. In 1974, the city set expenditure limits on municipal elections. A 2-year interlude aside, these limits applied until 2001, when they were successfully challenged by municipal candidates. *Homans v. Albuquerque*, 217 F. Supp. 2d 1197, 1200 (NM 2002), *aff'd*, 366 F. 3d 900 (CA10), cert. denied, 543 U. S. 1002 (2004). In its findings of fact, the Federal District Court determined that “[n]ationwide, eighty-eight percent (88%) of incumbent Mayors successfully sought reelection in 1999. In contrast, since 1974, the City has had a zero percent (0%) success rate for Mayors seeking

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legislative judgment that “enough is enough” should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects the quantity—rather than the quality or the content—of repetitive speech in the marketplace of ideas.

One final point bears mention. Neither the opinions in *Buckley* nor those that form today’s cacophony pay heed to how the Framers would have viewed candidate expenditure limits. This is not an unprincipled approach, as the historical context is “usually relevant but not necessarily dispositive.” *Georgia v. Randolph*, 547 U.S. ___, ___ (2006) (slip op., at 1) (STEVENS, J., concurring). This is particularly true of contexts that are so different. At the time of the framing the accepted posture of the leading candidates was one of modesty, acknowledging a willingness to serve rather than a desire to compete. Speculation about how the Framers would have legislated if they had foreseen the era of televised sound-bites thus cannot provide us with definitive answers.

Nevertheless, 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. I think they would have viewed federal statutes limiting the amount of money that congressional candidates might spend in future elections

reelection.” 217 F.Supp. 2d, at 1200 (citation omitted). The court further concluded that the “system of unlimited spending has deleterious effects on the competitiveness of elections because it gives incumbent candidates an electoral advantage.” *Ibid.* While far from conclusive, this example cuts against the view that there is a slam-dunk correlation between expenditure limits and incumbent advantage. See also Brief for Center for Democracy and Election Management at American University as *Amicus Curiae* (concluding that Canada, the United Kingdom, New Zealand, and Malta—all of which have campaign expenditure limits—have more electoral competition than the United States, Jamaica, Ireland, and Australia—all of which lack such limits).

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as well within Congress' authority.⁵ 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.

For the foregoing reasons, I agree with JUSTICE SOUTER that it would be entirely appropriate to allow further proceedings on expenditure limits to go forward in these cases. For the reasons given in Parts II and III of his dissent, I also agree that Vermont's contribution limits and presumption of coordinated expenditures by political parties are constitutional, and so join those portions of his opinion.

⁵See Art. I, §4 (providing that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"); see also §5 (providing that "Each House may determine the Rules of its Proceedings").