

June 2014

First Amendment Decisions in the October 2005 Term

Joel Gora

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Gora, Joel (2014) "First Amendment Decisions in the October 2005 Term," *Touro Law Review*. Vol. 22: No. 4, Article 5.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol22/iss4/5>

This Annual Supreme Court Review is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

First Amendment Decisions in the October 2005 Term

Cover Page Footnote

22-4

FIRST AMENDMENT DECISIONS IN THE OCTOBER 2005 TERM

*Joel Gora**

One important theme of the 2005 Term, as Professor Chemerinsky previously mentioned, is the decreasing docket size of the Supreme Court this past Term and in recent years. I think of this theme as it relates to the First Amendment,¹ as a minimalist phenomenon.

First of all, the Court only decided three First Amendment cases, a minimal number as compared to recent years.² Naturally, since the Supreme Court's docket has declined in numbers, of course the number of First Amendment cases has declined as well. While there were a number of cases that involved First Amendment matters tangentially, in terms of core First Amendment concerns or issues, there were only three cases on the docket.

* Professor of Law, Brooklyn Law School; B.A., Pomona College; LL.B, Columbia University School of Law. This Article is based on a transcript of remarks from the Eighteenth Annual Supreme Court Review Program presented at Touro Law Center, Huntington, New York.

¹ U.S. CONST. amend. I provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

² For First Amendment cases decided during the October 2005 Term, see *Rumsfeld v. Forum for Academic and Inst. Rights, Inc. (FAIR)*, 126 S. Ct. 1297 (2006), *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Randall v. Sorrell*, 126 S. Ct. 2479 (2006). Yet, during the October 2003 Term, the Supreme Court decided approximately six First Amendment cases. See *Ashcroft v. ACLU*, 542 U.S. 656 (2003), *Tennessee v. Lane*, 541 U.S. 509 (2004), *McConnell v. FEC*, 540 U.S. 93 (2003), *Hibbs v. Winn*, 542 U.S. 88 (2004), *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *City of Littleton v. Z-J. Gifts D-4 L.L.C.*, 541 U.S. 774 (2004).

Second, another interesting aspect of the October 2005 Term, is that there was a range of interpretations of prior decisions that related to the depth of the First Amendment's coverage. One end of the range gives First Amendment rights a minimal view, while the other gives them a broader view. In two of the three cases decided this past Term, the Court went for the minimal end of that range by rejecting the application of various First Amendment precedents and principles to the case at bar.³ Finally, the one case that the First Amendment prevailed is the campaign finance case.⁴ I have been working with the American Civil Liberties Union ("ACLU") for thirty years challenging limits on campaign financing, and I do not see two sides on the broad issue. In my opinion, there is only one side to this case, the First Amendment side. The Court's decision, even though it is saying it is a First Amendment claim, is a minimalist approach. It is certainly not a swashbuckling opinion, although the First Amendment claim was sustained.

³ See *FAIR*, 126 S. Ct. at 1313 (holding that a finding in *FAIR*'s favor would "exaggera[te] the reach of our First Amendment precedents"); *Garcetti*, 126 S. Ct. at 1962 ("We reject . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.").

⁴ *Randall*, 126 S. Ct. at 2500 ("We conclude that Act 64's expenditure limits violate the First Amendment We also conclude that the specific details of Act 64's contribution limits require us to hold that those limits violate the First Amendment, for they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance.").

**I. INTERPRETING THE FIRST AMENDMENT'S PROTECTIONS
FROM A MINIMALIST STANDPOINT**

A. Rumsfeld v. Forum for Academic and Institutional Rights

Let me first turn to the case that is significant to us law professors. The case is *Rumsfeld v. Forum for Academic and Institutional Rights* (“FAIR”).⁵ It involved a group of law professors’ challenge to the Solomon Amendment.⁶

You are aware that the Solomon Amendment requires that all educational institutions, colleges, and universities that receive the billions and billions of dollars of federal funding distributed to them are required to give military recruiters access to their campuses.⁷ While the Solomon Amendment went through various permutations, it is the final version that essentially caused a number of law professors to join a group called FAIR, the Forum for Academic and Institutional Rights to do battle with that law. FAIR brought suit to challenge the Solomon Amendment as violative of a number of related First Amendment rights. The case involves a version of that old adage, he who pays the piper calls the tune. Here, he is the federal government, it writes checks for trillions every year and billions for educational institutions. The piper is the colleges and universities that receive the checks, and the tune is that you have to let the military come on campus and recruit.

⁵ *FAIR*, 126 S. Ct. 1297.

⁶ Solomon Amendment, 10 U.S.C. § 983 (2000 & Supp. IV 2004).

⁷ *Id.*; see also *FAIR*, 126 S. Ct. at 1302 (explaining that the Solomon Amendment requires “that if any part of an institution of higher education denies military recruiters access equal

The requirement was challenged by law professors who had a particularly close relationship to the issue. The military has the policy of “don’t ask, don’t tell,” which the official organization of law schools viewed as a discriminatory policy against gays and lesbians. The official organization of law schools requires law schools not to facilitate work by any employer who discriminates against gays and lesbians. Law school procedures operate against the Department of Defense’s military services “don’t ask, don’t tell” policy because of the discrimination perpetuated by the policy. Law schools are required not to participate or cooperate with employers of that kind. However, under the Solomon Amendment, these institutions have to cooperate with discriminatory employers or they will lose all federal funding. Further, it is not just the funding that relates to the law school that is at risk, but the whole of the university’s federal funding.

The claim in *FAIR* was basically that the imposition of the requirement of having to permit military recruiting as a condition of getting federal education funding violated the unconstitutional conditions doctrine. The unconstitutional conditions doctrine provides that while an individual may or may not have a right to a certain benefit, a government cannot seek to deny an individual that benefit for reasons that will infringe upon or require the surrender of an individual’s constitutionally protected rights.⁸

to that provided other recruiters, the entire institution would lose certain federal funds.”).

⁸ See, e.g., *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (a person, otherwise qualified, could not be denied a tax exemption for refusing to sign a defective loyalty oath, even though there was no “right” to the tax exemption). See also 16A AM. JUR. 2d *Constitutional Law* § 395 (2006).

The Solomon Amendment's requirement is an example of the unconstitutional conditions doctrine. However, the Court held that the Solomon Amendment was not an unconstitutional condition.⁹ Interestingly, the Court took the case out of the unconstitutional condition funding situation and basically found that the federal government could simply and directly demand that all colleges and universities make themselves available to military recruiters as part of its national responsibility for raising an army, and wholly apart from imposing that requirement as a condition of receiving federal funds.¹⁰ Therefore, universities cannot claim that the government has no right to require that military recruiters be on campus as a prerequisite for receiving funds "[b]ecause the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement"¹¹ Hence, the unconstitutional conditions doctrine, the notion that the government cannot do indirectly what it cannot do directly, did not apply in *FAIR* because the government could take direct action to require military recruiters access.¹² The unconstitutional conditions doctrine really was found to be basically irrelevant in *FAIR*.

Another related First Amendment doctrine that law professors know well has to do with the notion of the compelled speech or association. You may remember from law school that the First Amendment guarantees both the right to speak and associate, and

⁹ *FAIR*, 126 S. Ct. at 1307 ("It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly.").

¹⁰ *Id.* at 1306-07.

¹¹ *Id.* at 1307.

¹² *Id.*

also guarantees the flip side—the right *not* to speak or be compelled to speak, the right *not* to associate in certain circumstances, and the right *not* to have the government require that you associate with persons that you choose not to.¹³ Therefore, the law professors argued that by imposing military recruitment on the campus, the schools would be in effect required to sing the military's tune, to speak the military's words and to support the military's conduct. According to the law professors, this violated their rights to be free from participation in speech or ideas that they found unacceptable.

There were a number of similar cases you may remember from the World War II era that applied this principle, for example, that recognized the right of Jehovah's Witnesses to refuse to stand and salute the flag was especially held as a First Amendment right.¹⁴ More recently, the right of someone not to have the license plate from New Hampshire, which says "Live Free Or Die," was viewed as a First Amendment right, to resist that right to speech.¹⁵

Similarly, the professors in *FAIR* argued that, based on such precedents, they and the schools had the right to resist. But the Supreme Court rejected that right and as a number of conservative

¹³ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (finding the Board of Education's resolution that required participation in a flag salute violated the First Amendment); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (holding that the anti-discrimination statute violated the Boy Scout's First Amendment right to freedom of association); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573-75 (1995) (holding that the State of Massachusetts could not require a private group that conducts the St. Patrick Day parade to include gay, lesbian, and bisexual groups to march under their own banner because the organizers have a First Amendment right to refuse the inclusion of another group's message).

¹⁴ See *Barnette*, 319 U.S. at 642; *Taylor v. Mississippi*, 319 U.S. 583, 589 (1943).

¹⁵ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

pundits pointed out, this was an eight-to-nothing decision.¹⁶ The law professors could not get a single Justice to agree with their position. In rejecting the professors' theory, the Court explained that the government was not compelling law schools to say something or support something they did not agree with; the Solomon Amendment simply requires that the government receive the same incidental administrative assistance that all other employers receive, which does not compromise the right to be free from compelled speech.¹⁷ By the way, the Court observed, do not forget you can turn down the money if you find the government condition offensive. Of course, it turns out that this really would not matter, since the Court said the government can come onto campus anyway, money or not.¹⁸ After all, Congress passed the statute based on that principle. Further, the Court explained that the notion of the right to resist compelled speech, was by no means even incidentally involved in this case, and was rejected on a First Amendment basis.¹⁹

The other right worth mentioning is the right to resist association.²⁰ Ironically, this right had been recognized and extended in two cases where gay rights groups or individuals were seeking

¹⁶ *FAIR*, 126 S. Ct. at 1308 (stating that unlike the *Barnette* and *Wooley* cases, "[t]he Solomon Amendment does not require any similar expression by law schools.").

¹⁷ *Id.* ("The Solomon Amendment . . . does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters.").

¹⁸ *Id.* at 1306 ("[M]ilitary recruiters must be given the same access as recruiters who comply with the policy.").

¹⁹ *Id.* at 1308 ("The compelled speech to which law schools point is plainly incidental to the Solomon Amendment's regulation of conduct . . .").

²⁰ *See, e.g., Dale*, 530 U.S. at 644, 647-48 (recognizing a "right of expressive association" under the First Amendment and stating that "[t]his right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.").

access to various institutions and were denied that access.²¹ In one case, gay rights groups wanted to march in the St. Patrick's Day parade and were precluded.²² In the other case, a state antidiscrimination law was held to prevent the Boy Scouts from excluding gay scout masters.²³ Both of these cases went to the Supreme Court and in both cases the Court held the organizations that sought to exclude, namely, the parade organizers and the Boy Scouts, had a right to freedom of association—to be free from government compelled and forced associations in these settings.²⁴

These precedents were being invoked by gay rights advocates in *FAIR* to say that for similar reasons the government cannot compel association with the military by requiring recruiting functions and associations. The Supreme Court explained that those cases involved association for overtly political or cultural purposes and attempts to compel membership in an organization as a prerequisite to march in the parade.²⁵ The Court distinguished those cases, where the government was seeking to directly impose a position upon private

²¹ See *Hurley*, 515 U.S. at 557; *Dale*, 530 U.S. at 654.

²² *Hurley*, 515 U.S. at 559 (“[Requiring] private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey . . . violates the First Amendment.”).

²³ *Dale*, 530 U.S. at 644.

²⁴ *Id.* at 654; *Hurley*, 515 U.S. at 559. In *Dale*, the Court compared the rights of the parade organizers to the rights of the Boy Scouts in the *Hurley* decision:

As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.

Dale, 530 U.S. at 654.

²⁵ See *FAIR*, 126 S. Ct. at 1309, 1313 (“The expressive nature of a parade was central [to the Court's] holding in *Hurley*,” and that “the law schools’ effort to cast themselves as just like the . . . parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the

2007]

FIRST AMENDMENT DECISIONS

925

organizations, from the instant case, where the government's position incidentally affects expression.²⁶

The interesting matter of fact is that various First Amendment doctrines were advanced as a basis for resisting military recruitment on campus. The Court, nonetheless, chose to interpret those prior decisions that formed the doctrinal basis at the narrower end of the precedence scale, and thus rejected the application of those doctrines to this case and sustained the Solomon Amendment.²⁷ I think it was quite significant that even the more liberal justices of the Court did not give a concurring opinion or dissenting opinion from that decision.

B. *Garcetti v. Ceballos*

The second significant case mentioned previously, *Garcetti v. Ceballos*,²⁸ is the case involving speech in an official public employee capacity. I will not revisit the *Garcetti* decision in its entirety, and only wish to make a few important points.

Garcetti is an important and complex decision. If you have a chance to review the whole opinion, there is a good deal of sniping back and forth in the countering of arguments between the majority and dissent.²⁹ It is a bit surprising that the Court took a categorical

expressive nature of their activity . . .").

²⁶ *Id.* at 1313.

²⁷ *Id.* ("Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association, the Court of Appeals erred in holding that the Solomon Amendment likely violates the First Amendment.").

²⁸ 126 S. Ct. 1951 (2006).

²⁹ *E.g., id.* at 1963 (Stevens, J., dissenting) ("[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly

view that some kind of speech by public employees done in one's official capacity is basically off limits to the First Amendment, *period*.³⁰

In trying to explain the complicated rules framed by the Court in a straightforward way, I have come up with the following assessment. According to the Supreme Court, speech at the public workplace—*at the job*—may still be protected, but speech *on the job* is now virtually immune from any First Amendment inquiry.³¹ The Court said maybe there can be statutory or regulatory whistleblower protection put in place instead.³² Statutory and regulatory whistleblower protection exists in some federal, state and local statutes.³³ Unfortunately, prior to *Garcetti* it seemed like the ultimate whistleblower protection was the First Amendment.

Importantly, the *Pickering v. Board of Education*³⁴ line of cases said that public employees as citizens have a right to speak about matters of public concern and if they do, then you have to

to their superiors"); *id.* at 1967 (Souter, J., dissenting) (asking "why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job?"); *id.* at 1962 (majority opinion) (rejecting Justice Souter's suggestion in the dissent, that *Garcetti* would affect cases involving teaching or scholarship).

³⁰ *Id.* at 1961 ("[T]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.").

³¹ *Id.* at 1957-60 (stating that the First Amendment protects an employee's right, in certain instances, to speak as a citizen about matters of public concern, or in some cases where the employee expresses himself at work, but that the First Amendment does not protect public employees' statements made pursuant to their official duties).

³² *Id.* at 1961-62 (stating that the Court will not intervene in the conduct of governmental operations, and this decision is notably exemplified by such whistleblower protection laws and rules of conduct which are in place to protect employees and provide checks on supervisors).

³³ *See, e.g.*, 5 U.S.C. § 2302(b)(8) (2000); CAL. GOV'T CODE § 8547.8 (West 2006); CAL. PROF. CONDUCT RULE 5-110 (2006).

³⁴ 391 U.S. 563 (1968).

balance their interest in speaking against whatever effect their speech may have in the workplace.³⁵ Certainly misconduct in a prosecutor's office having to do with an allegedly faulty affidavit is a matter of public concern. But after *Garcetti*, if you speak internally about workplace misconduct in an official way, through a memo or a similar form of communication, then you cannot claim that any subsequent action against you as an employee is in retaliation for that protected activity.³⁶ I do think that will have a negative effect on the ability of public employees to speak out on these kinds of important issues.

I can understand that the Supreme Court did not want to become the national public employee personnel board. But surely an approach where the Court would continue to balance the employee's speech interest against the employer's concern with the orderly conduct of public business would have been the best way to reconcile the competing interests on a case-by-case basis, as compared to the one-sided, categorical rule that the Court fashioned.

II. DECISIONS DISCUSSING FIRST AMENDMENT RELATED ISSUES: *HARTMAN V. MOORE* AND *BEARD V. BANKS*

There are two other cases that I will just mention briefly. Although they are not core First Amendment cases, they tangentially

³⁵ *Id.* at 568 (holding that the First Amendment protects a public employee's right, in some instances, to address matters of public concern, and it is necessary to balance the interests of a public employee in speaking about matters of public concern and "the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees.").

³⁶ See *supra* note 31.

involve the issue. *Hartman v. Moore*³⁷ deals with a related matter, a claim of retaliatory action by the government against a speaker. A person indicted for mail fraud claimed that the indictment resulted from his criticism of postal authority activity and policy.³⁸ The criminal defendant brought a *Bivens*³⁹ civil damage action, that is the federal constitutional damage action comparable to a § 1983⁴⁰ suit against state or local officials.⁴¹ There are some key questions on what kind of matters must be proved by a *Bivens* retaliatory claimant. But since the underlying claim was a First Amendment claim, that he spoke out and for that he was prosecuted, I think it is important to note it as a First Amendment issue. Unfortunately, the Court upheld a stiffer pleading requirement on this plaintiff, which resulted in another First Amendment case being lost by a claimed whistleblower.

The other First Amendment case I want to mention briefly is *Beard v. Banks*,⁴² a prison case. There is general agreement that prisoners do not have the same First Amendment rights as the rest of

³⁷ 126 S. Ct. 1695 (2006).

³⁸ *Id.* at 1700 (stating that the prosecutors and inspectors had manufactured a criminal prosecution as revenge for Moore's criticism of the Postal Service).

³⁹ *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁴⁰ 42 U.S.C. § 1983 (2000) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

⁴¹ *Hartman*, 126 S. Ct. at 1700 n.2 (stating that a *Bivens* action is the equivalent of bringing an action against state officials under § 1983). Notably, "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Id.*

⁴² 126 S. Ct. 2572 (2006).

us. As an old New Yorker cartoon indicated, being in prison does carry a general lack of amenities, and the Court, in this case, had to decide whether restrictions on prisoners in possession of newspapers, magazines, and photographs were consistent with the reduced First Amendment protection available to prisoners.

Between the six Justices in the majority, including two concurring opinions, and the two Justices in the dissent, there was no real disagreement about the standards to apply.⁴³ However, there was disagreement about the application in this case, whether the possession of First Amendment materials posed any danger to prisoner security to justify their being suppressed.⁴⁴

Another important aspect I note about *Beard* is that Justice Thomas concurred. In his concurrence, Justice Thomas revisited the basic premise of prisoners' rights and concluded that the only provision of the Constitution that should apply to prisoners is the Eighth Amendment,⁴⁵ the ban on cruel and unusual punishment.⁴⁶

⁴³ Justices Breyer, Kennedy, Souter, and Chief Justice Roberts were in the majority. *Id.* at 2577-78. The Court stated that the proper standard to apply is the one espoused in *Turner v. Safley*, 482 U.S. 78, 87 (1987), which held that restrictive prison regulations are permissible so long as they are reasonably related to legitimate penal interests. *Id.*; see also *id.* at 2588 (Stevens & Ginsburg, JJ., dissenting) (stating that the *Turner* standard applies). Only the two concurring justices seemed to disagree about the applicable standard. See *id.* at 2582-83 (Thomas & Scalia, JJ., concurring) (declining to apply the *Turner* standard because it rests on the presumption that the Constitution contains a definition of incarceration, and since such a definition is absent, states are free to define incarceration as they wish).

⁴⁴ *Id.* at 2586-87 (Stevens & Ginsburg, JJ., dissenting) (stating that the plurality had failed to discuss whether the possession of First Amendment materials posed any danger to prison security to justify being suppressed, and that the Justices believed there was no evidence at trial to support the justification and therefore the security interest does not warrant judgment).

⁴⁵ U.S. CONST. amend. VIII states in pertinent part: "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted."

⁴⁶ *Beard*, 126 S. Ct. at 2582-83 (Thomas & Scalia, JJ., concurring) (explaining that the States have broad power in defining imprisonment, and that the only requirement is that the deprivation the state chooses to implement cannot deprive the prisoner of his Eighth

The First Amendment and other rights, which the Court has applied in the prison setting over a generation, were really not applicable, except to the extent that the deprivation could create an Eighth Amendment violation.⁴⁷ He was joined in that original view by Justice Scalia.

III. UPHOLDING THE FIRST AMENDMENT'S APPLICATION TO CAMPAIGN CONTRIBUTIONS AND EXPENDITURES: *RANDALL V. SORRELL*

The third and final significant First Amendment case after the *FAIR* Solomon Amendment case and the *Garcetti* public employee case is the campaign finance case, *Randall v. Sorrell*.⁴⁸ Notably, there is also another related case *Wisconsin Right to Life, Inc. v. FEC*.⁴⁹

First, I would like to issue an important disclosure. I worked on the *Randall* case for the American Civil Liberties Union ("ACLU"). I helped write the briefs in that case and was present during the oral argument. The case involved the challenge to Vermont's contribution and expenditure limits, which were extremely low. The campaign contribution limits were challenged on the

Amendment rights).

⁴⁷ *Id.*

⁴⁸ *Randall*, 126 S. Ct. 2479.

⁴⁹ 126 S. Ct. 1016 (2006) (involving the "Bipartisan Campaign Reform Act of 2002" which "prohibits corporations from using their general treasury funds to pay for any 'electioneering communications' "). In this case, within barely a week of oral argument, the Court summarily reversed the district court's refusal to entertain an "as applied" challenge to the law by a non-profit advocacy organization engaged in grass roots lobbying which referred to federal officeholders who were also up for election. Since then, that lower court held that the Act was unconstitutional as applied to certain lobbying broadcast advertisements, and the Court has once again agreed to review the case. *See* 75 U.S.L.W. 1389 (Jan. 9, 2007).

grounds that low contribution limits made it very hard for a particular challenger to raise enough funds to get their message out to the public. That was the issue in *Randall*.

One noticeably important aspect of oral argument was that the initial questioning of the lawyers in the case came from Justice Stephen Breyer, who perceived Vermont's restrictions as so low that it could make it hard for a candidate to raise enough funds to get his or her message out.⁵⁰ Justice Breyer, who had expressed his views on the bench in his opinions and off the bench in a long essay on "active liberty," seemed to believe that there were two sides of the First Amendment issue: one to restrict speech, and the other to encourage fair and open balanced debate.⁵¹

Our side, the challenger's side, was concerned about how Justice Breyer would vote in the case. When he started the active questions about the problems with the Vermont law, we believed that we would have a chance to prevail in the case. That is precisely what

⁵⁰ Justice Breyer made the following comments to Mr. Sorrell, the respondent:

It's not going to help to say incumbents had a bigger advantage before. That is . . . what we're interested in is . . . at what point do these [contribution limits] become so low that they really, as a significant matter, shut off the possibility of a challenge. . . . I'm talking about the contribution limits. I and my friends have the following thought. We don't know who the candidates for State rep are, but we want a Republican slate or we want a Democratic slate. So we get all our \$ 5 together, give them to the Democratic Party or the Republican Party in Vermont, and lo and behold, that party cannot give more than \$100 in an election to a State rep, et cetera. Now, to the—to the ear, that sounds as if a challenger or a slate of challengers or a party that wants to challenge is going to have a really tough time. So I want you to explain it.

Transcript of Oral Argument at **31-32, *Randall*, 126 S. Ct. 2479 (Nos. 04-1528, 04-1530, 04-1697), 2006 WL 560656.

⁵¹ *Randall*, 126 S. Ct. at 2491-92, 2499-2500.

happened—the Court held the Vermont law to be unconstitutional.⁵²

Randall essentially revisited and reaffirmed the decision of *Buckley v. Valeo*⁵³ thirty years after it was decided. *Buckley* was the first major case to decide whether the First Amendment would permit the government to impose limits on campaign funding.⁵⁴ In *Buckley*, the Court dealt with a federal statute passed in the wake of Watergate, which had put very significant limits on the ability of candidates, parties, committees, and organizations to raise and spend monies in political campaigns. The limitations were challenged as restrictions of free speech and free association on the ground that the less money you can raise and spend, the less speech you could support and generate. The Supreme Court came down with a Solomon-like, splitting of the baby, decision which did not work out as well as Solomon's decision.

In *Buckley*, the Court said that limits on spending money are at the core of the First Amendment, because spending is speech.⁵⁵ Hence, according to the Court, if you cannot spend, you cannot speak. If the law says nobody can spend more than \$1,000 a year on political speech, this means that an individual cannot run more than one advertisement in the newspaper and you have to be silent. The Court said that while limits on campaign spending are unacceptable, limits on campaign contributions are more tolerable because giving

⁵² *Id.* at 2500.

⁵³ 424 U.S. 1, 51, 54 (1976) (holding that the Federal Election Campaign Act's restrictions on campaign contributions were constitutional while its expenditure limits were unconstitutional under the First Amendment).

⁵⁴ *Id.* at 13-15.

⁵⁵ *Id.* at 16 (explaining that communication which is expressed through spending money can either involve speech, conduct or a combination of the two).

money is one step removed from spending and extensive campaign contributions could result in undue influence.⁵⁶ Thus, while holding that *contribution* limits are acceptable, the Court held that campaign *expenditure* limits placed “substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.”⁵⁷

Well, this so-called split decision has caused many difficulties. Candidates can spend as much as they can raise, yet they can only raise funds in limited amounts. Therefore, they are hoping to raise money outside of those controls. As a result we had soft money, which is money raised and spent by rich individuals, by labor unions, corporations, and the like, all allegedly trying to influence the political process in some fashion, but outside the restrictions and controls of the campaign laws.

A number of states and localities have said that they think *Buckley* is wrong and the Court should have allowed not just limits on contributions but also limits on spending in order to have balanced campaigns.⁵⁸ So a few places, notably Vermont, passed statutes designed to set up a test case to revisit *Buckley* by imposing very low limits on both spending and giving in elections.⁵⁹ The spending limit

⁵⁶ *Id.* at 20-21, 23 (stating that even though spending is speech, limitations on campaign contributions do not limit political speech because the contributor may still discuss political candidates and issues).

⁵⁷ *Id.* at 58-59.

⁵⁸ *Randall*, 126 S. Ct. at 2489. Respondents, state officials, in *Randall*, claimed that limiting campaign contribution without limiting expenditure limits “cannot effectively deter corruption or its appearance . . .” *Id.*

⁵⁹ *Id.* at 2486. Vermont’s statute, Act 64, set mandatory limits on both expenditures and contributions. *Id.*

for state assembly was \$2,000, which would barely buy a person dinner for eight where I come from. And that applied for a two-year election cycle.

Similarly, the contribution limits were down to as low as \$200, which also applied to an entire two-year election cycle. Thus, if your college roommate was running for state assembly, and you wanted to give him a \$250 check fully disclosed, you could not lawfully do it. The political parties were limited to the same \$200 contribution. If a party raised \$10,000, a dollar at a time from its supporters, it could not give more than \$200 to any one candidate. These problems with the statute—in terms of the limits on giving and spending—were not troublesome to the majority of the Second Circuit, which upheld the constitutionality of both the contribution and the spending limits.⁶⁰

A new theory had developed post-*Buckley*, that the Second Circuit thought was relevant in *Randall*. The theory is that raising a lot of money is going to take away an office holder's time and energy. According to this theory, candidates need to be worried about the business of government, not raising money. In *Randall*, we were not convinced that this issue was enough to justify reducing candidates and their campaigns to effective silence.

The Vermont statute posed a head-on challenge to the rules on campaign limits, in terms of contribution limits and spending limits,

⁶⁰ See *Landell v. Sorrell*, 382 F.3d 91, 124-25 (2d Cir. 2004), *rev'd sub nom. Randall*, 126 S. Ct. 2479. The Second Circuit decided that the spending limits were supported by two government interests—preventing corruption and preserving candidates time—and that the two interests, when taken together, were sufficiently compelling that the spending limits might be constitutional, if the statute were sufficiently narrowly tailored to advance those

and went to the Supreme Court with that posture. While the makeup of the Court and what the future may hold has already been discussed. What is interesting in the result is that the Court did two things. First, the Court upheld *Buckley* as far as no spending limits are concerned, and struck down Vermont's spending limits.⁶¹ The Court said that *Buckley* worked pretty well and there is no viable reason to change it. Spending limits are not going to be allowed.⁶²

Second, for contribution limits, which is basically read as a six-three decision, the Court held that the limits were too low.⁶³ On this particular issue there were three Justices who indicated that they were unhappy with as much regulation as we now have, and they might be willing to eliminate limits on giving money, that would be Justices Kennedy, Thomas, and Scalia.⁶⁴ Then there were three Justices who were uncertain, Justices Breyer, Roberts, and Alito.⁶⁵ Finally, there were three Justices who had indicated a willingness to allow greater regulation of political funding, and those were the liberal Justices, Justices Ginsberg, Souter, and Stevens.⁶⁶ The plurality of the Court said that under *Buckley* the limits might be so low that they would make it hard to have a campaign of any

two interests. *Id.*

⁶¹ See *Randall*, 126 S. Ct. at 2500.

⁶² *Id.*

⁶³ Chief Justice Roberts and Justices Alito, Breyer, Kennedy, Thomas, and Scalia made up the plurality. *Id.* at 2494-95 (explaining that Act 64's contribution limits were substantially lower than the limits the Court had previously upheld); *id.* at 2501 (Kennedy, J., concurring); *id.* at 2506 (Thomas & Scalia, JJ., concurring).

⁶⁴ *Randall*, 126 S. Ct. at 2501 (Kennedy, J., concurring). See also *id.* at 2502-06 (Thomas & Scalia, JJ., concurring).

⁶⁵ *Id.* at 2492-93 (plurality opinion) ("As compared with the contribution limits upheld by the Court in the past, and with those in force in other States, Act 64's limits are sufficiently low as to generate suspicion that they are not closely drawn.").

⁶⁶ *Id.* at 2512, 2515 (Souter, Ginsburg, & Stevens, JJ., dissenting).

effectiveness for particularly a challenger, and we think these are too low.⁶⁷ Contribution limits do not permit effective campaigning, nor do they permit effective competition.⁶⁸ Justice Breyer said in his plurality opinion that because he worried about the effect of low contribution limits on political competition, this was a valid reason for striking down the limits.⁶⁹

So three Justices allow greater limits, three Justices would allow less limits, and the three Justices in the middle said our current *Buckley* regime is probably fine. In *Randall*, the plurality held that the contribution limits were too low, so the Court struck them down.⁷⁰ However, *Buckley* said you cannot have spending limits and the Court followed *Buckley* in holding that Vermont's expenditure limits violated the First Amendment.⁷¹

Thus, the case will be remanded to the same world in the area of First Amendment and campaign finance that we had the last thirty years. The only way in which there may be a change in the future, since very low limits are not going to be upheld, is increased interest in public funding of campaigns. That is the one area where the Court said that you can impose limits as a condition of receiving public funding, although that strikes me as problematic as well.⁷²

⁶⁷ *Id.* at 2495 (plurality opinion) (“[T]he record suggests, though it does not conclusively prove, that Act 64’s contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns.”).

⁶⁸ *See id.* The election prior to when Act 64 took effect was analyzed; the statute’s “contribution limits would have reduced the funds available in 1998 to Republican challengers in competitive races in amounts ranging from 18% to 53% of their total campaign income.” *Id.*

⁶⁹ *Randall*, 126 S. Ct. at 2499-2500.

⁷⁰ *Id.* at 2500.

⁷¹ *Id.* at 2499-2500.

⁷² *See id.* at 2490 (explaining that the Court in *Buckley* approved the public funding law in

2007]

FIRST AMENDMENT DECISIONS

937

Some purists like me think that this may be a violation of the unconstitutional conditions doctrine. But the result of the Court's striking down expenditure limits in the Vermont case may be of more interest in public funding when you get a lot of money from the government to run your campaign, but you cannot spend any more than you get. That kind of regime may be an alternative to mandatory limits. Under *Randall*, mandatory limits on spending are *still* not allowed, and very low limits on giving will not be allowed either.⁷³

Only time will tell whether the Court will stay in the middle on campaign funding and the First Amendment—where it has basically dwelled for 30 years—or whether the two newest Justices will tack toward one end of the spectrum or the other.

And those are the First Amendment decisions in the October 2005 Term. Thank you very much.

the statute at issue because it was intended to “relieve Presidential candidates ‘from the rigors of soliciting private contributions’ ” (quoting *Buckley*, 424 U.S. at 91)). In *Randall*, the act created a voluntary public financing system and any requirements of that system were not challenged. *Id.*

⁷³ *Id.* at 2500. The Court concluded that “Act 64’s expenditure limits violate the First Amendment as interpreted in *Buckley v. Valeo*.” *Id.* The Court also concluded that “the specific details of Act 64’s contribution limits . . . burden[ed] First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance.” *Id.*

