

# GEORGE MASON UNIVERSITY SCHOOL OF LAW



**THE PER CURIAM OPINION OF STEEL:  
*BUCKLEY V. VALEO* AS SUPERPRECEDENT?  
CLUES FROM WISCONSIN AND VERMONT**

**Allison R. Hayward**

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Allison R. Hayward

I. Introduction

. . . we are talking about speech, money is speech, and speech is money, whether it be buying television or radio time or newspaper advertising, or even buying pencils and paper and microphones. That's the – that's certainly clear, isn't it?

Comments of Justice Potter Stewart during oral argument in *Buckley v. Valeo*, November 14, 1975, at 67.

I think it was Holmes who said, once you admit the necessity of drawing a line, you can always find something on one side or the other. It's quite different between \$1,000 and \$2,000 or 100 feet and 75 feet and advocacy with respect to an election and advocacy with respect to an issue. It's an entirely different quality of a distinction....

Comments of Chief Justice Roberts during oral argument in *Wisconsin Right to Life v. FEC*, January 17, 2006, at 49.

I thought what [Buckley] said and what many of our other cases say, with regard to expenditures in particular, is that you're not talking about money here. You're talking about speech. So long as all that money is going to campaigning, you're talking about speech. And when you say you don't need any more speech than this, that's a very odd thing for a United States government to say. Enough speech. You don't need any more than this. . . . We, the State, will tell you how much campaigning is enough. That's extraordinary.

Comments of Justice Scalia during oral argument in *Randall v. Sorrell*, February 28, 2006, at 50-52.

The rich tapestry of American campaign finance law continued to accumulate threads with the Court's decisions this Term in *Randall v. Sorrell*<sup>1</sup> and *Wisconsin Right to Life v. FEC*.<sup>2</sup> These two cases brought before the Court a variety of campaign finance regulations, from contribution limits and expenditure limits to restrictions on incorporated entities. Despite expressions of discomfort by many Justices with the way

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<sup>1</sup> 126 S. Ct. 2479 (2006).

<sup>2</sup> 126 S. Ct. 1016 (2006).

modern campaign finance is regulated, the Court declined to rework *Buckley v. Valeo*'s holding to relieve that discomfort. Nor did it sanction a more lenient constitutional test to satisfy those other Justices who would prefer to give legislatures and Congress leeway to regulate politics.

Since some scene-setting background may be useful for many readers, here is a brief, not comprehensive, but accurate description of what political activity can be regulated, and what activity is protected by the Constitution: For most individual donors,<sup>3</sup> contributions to candidates and other political committees may be limited, but not (as we learned this Term in *Randall*, of which more later) if those limits are too extreme. For most individuals, making independent expenditures about candidates, parties and politics may not be limited in amount, but the spender may be required to disclose his or her identity on any communications, and may also be required to file publicly available reports with the government. Groups of individuals may combine to engage in politics, but if they pass certain financial thresholds they too may be required to report. Contributions to groups can be limited, as may the contributions groups make to other recipients like candidates or political parties.

Not all spending activity is sufficiently “political” to be regulated. What any particular spender can do outside the federal restrictions, for example, varies with the status of the spender (Are they a party? A federal officeholder or candidate? The press?), whether the activity is coordinated with a candidate or party, and what they want to say (will they, e.g., expressly advocate the election or defeat of a clearly identified candidate?)

For corporations and labor organizations, the rules are a bit more straightforward, at least at the federal level, because contributions and expenditures are prohibited. And yet this seemingly flat ban on activity is porous for those prohibited sources in a position to take advantage of certain statutory allowances – groups that can establish a political action committee (PAC), have “members” or executives and shareholders to whom they can direct political communications without limit, are exempt nonprofits that take no corporate funding, are a press entity engaged in its “press function,” or find it useful to communicate while avoiding “express advocacy” or “electioneering communications.”<sup>4</sup>

Much of the design of this tapestry of limits, prohibitions and reporting requirements arises from the peculiarities of the Court's *Buckley v. Valeo* decision, which held constitutional certain aspects of the Federal Election Campaign Act<sup>5</sup> and rejected others. The Court in both *Wisconsin Right to Life* and *Randall* kept within the *Buckley*

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<sup>3</sup> Foreign nationals are barred by federal law from making contributions or expenditures at any level. Government contractors are also restricted at the federal level, as are certain governmental employees, and a multifaceted array of state and local laws restrict donors who contract with the government, or are lobbyists, or are licensees of various types.

<sup>4</sup> The open question to be answered in the remand of *Wisconsin Right to Life* is whether the Constitution requires exemption from the “electioneering communications” ban for an incorporated issue group to run grassroots lobbying advertisements that mention, among other officeholders, someone who is a candidate for reelection, during the thirty days before that candidate's primary.

<sup>5</sup> Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, 2 U.S.C. § 431 et seq.

framework, and in *Randall* took great pains to explain why this was necessary. The Court had the opportunity to revisit *Buckley* and did not. Has *Buckley* now become unassailable -- what some might call a superprecedent?

This Essay argues that, even were one to grant the existence of a class of decisions that are “superprecedents,” *Buckley v. Valeo* is a poor candidate for that classification. To set the stage it first reviews the *Randall* and *Wisconsin* decisions from this Term, and how they use the Court’s campaign finance precedents. It then discusses what might be meant by “superprecedent” and how a superprecedent might be identified. Then, looking at *Buckley*’s history, analysis and application, it discusses whether *Buckley* should be classified as a superprecedent, and answers that question “no.” Finally, it revisits what *Buckley*-type thinking has done to campaign finance regulation, and makes some preliminary suggestions for how, if the opportunity presents itself again, the Court might rework its analysis.

## II. The *Wisconsin Right to Life v. FEC* and *Randall v. Sorrell* Decisions

The Court’s consideration of both *Randall v. Sorrell* and *Wisconsin Right to Life v. FEC* in the same Term presented the Justices with a broad array of campaign finance issues, and the opportunity to rethink significant portions of the law. In *Wisconsin Right to Life*, a state nonprofit corporation made an as-applied challenge to those portions of the Bipartisan Campaign Reform Act (BCRA) designed to restrict the ability of corporations to engage in political activity.<sup>6</sup> The regulation of corporations in politics has been a part of federal law since the passage of the Federal Corrupt Practices Act in 1907, and many states enacted similar laws dating to that time.<sup>7</sup> These laws initially prohibited corporations from making contributions, later extending that ban to labor unions, and to expenditures by either form of organization.<sup>8</sup>

In more recent times, corporate (and labor union) funding in federal politics has avoided legal prohibitions by, among other things, focusing upon “issues” advertising rather than contributions or expenditures. Perceived as a loophole in the law, Congress enacted an electioneering communications ban to prohibit corporate and labor funded issue advertising in proximity to an election.<sup>9</sup> Under BCRA, broadcast, cable, or satellite advertising referring to a candidate for federal office, targeted to that candidate’s district and running within 30 days of the candidate’s primary or 60 days of the general election may not be funded using corporate or labor general treasury funds.<sup>10</sup> This statute was designed to survive constitutional scrutiny by presenting the Court with a clear unambiguous rule, backed up with research demonstrating its necessity as well as its

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<sup>6</sup> Bipartisan Campaign Reform Act of 2002 (BCRA) § 203, 116 Stat. 91, codified at 2 U.S.C. § 441b(b)(2).

<sup>7</sup> Robert Mutch, Before and After Bellotti: The Corporate Political Contributions Cases, 5 Election L. J. 293, 294-96 (2006).

<sup>8</sup> See history as set forth in *United States v. Auto Workers*, 352 U.S. 567 (1957), and in *McConnell v. FEC*, 540 U.S. 93, 115-18 (2003).

<sup>9</sup> *McConnell*, 540 U.S. at 127-32.

<sup>10</sup> 2 U.S.C. § 441b(c)(3)(A).

tailoring.<sup>11</sup> The law’s supporters hoped the Supreme Court would conclude the electioneering communications law was constitutional under *Buckley v. Valeo*. It did in 2003, in *McConnell v. FEC*.<sup>12</sup>

In *McConnell*, the Court also noted that Congress has provided a “backup” definition of “electioneering communication” in the event the primary definition was found unconstitutional. The Court then said: “We uphold all applications of the primary definition and accordingly have no occasion to discuss the backup definition.”<sup>13</sup> The Federal Election Commission argued in *Wisconsin Right to Life* that this sentence demonstrated that the Court had foreclosed the possibility of making *any* “as applied” challenge to the electioneering communications ban. In January 2006, the Court rejected this ambitious reading, and sent the case back so the District Court could consider the merits of the Wisconsin group’s claim.

As this Essay is being written, the government has engaged in broad discovery of the group’s activities far beyond its advertisements. If the constitutionality of regulating electioneering communications rests upon the clarity and precision of the statute, then it seems inappropriate, and time consuming, to permit the government to compel the production of extraneous facts useful only in building some broader argument about the “purpose” of the group’s advertising.<sup>14</sup> This would seem especially true where publicity can chill political activity, not to mention inflate the legal bills of the group resisting the encroachment. Nevertheless, this dispute is taking place almost two full years after the group initially asked for a preliminary injunction to insulate their advertisement. Whatever the fate of subsequent litigants, as-applied challenges to the electioneering ban have not yet offered a timely way to delineate the rights of grassroots lobbying groups.

In *Randall v. Sorrell*,<sup>15</sup> the Court reviewed Vermont’s laws setting limits on contributions and expenditures, aspects of the regulatory regime under *Buckley v. Valeo* not considered in (or disrupted by) *McConnell*. The Vermont legislature enacted Act 64 in 1997, containing contribution limits and spending limits as an explicit challenge to the holding in *Buckley v. Valeo* striking down expenditure limits as unconstitutional.<sup>16</sup> Under Act 64, expenditures were capped at \$300,000 in a two-year cycle for candidates for Governor, ranging to \$2,000 for state representatives in single-member district in that period.<sup>17</sup> Incumbents seeking reelection were subjected to even lower limits, and political party expenditures benefiting six or fewer candidates were presumed to be coordinated with those candidates, and counted within these expenditure limits.<sup>18</sup> Act 64 also limited contributions to candidates for Governor to \$400 per two-year cycle, down to \$200 for

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<sup>11</sup> 540 U.S. at 193-95.

<sup>12</sup> *Id.* at 194.

<sup>13</sup> *Id.* at 190 n. 73.

<sup>14</sup> Memorandum in Support of Plaintiff’s Summary Judgment Motion, *Wisconsin Right to Life v. FEC*, No. 04-1260 (June 23, 2006) at 41-47 (on file with author).

<sup>15</sup> 126 S. Ct. 2479 (2006).

<sup>16</sup> Vt. Stat. Ann., Tit. 17, § 2801 et seq. (2002); Andrew B. Kratenstein, Recent Legislation; Campaign Finance Reform, 36 Harv. J. on Legis. 219, 220 (1999).

<sup>17</sup> 126 S. Ct. at 2486.

<sup>18</sup> *Id.*

state representative.<sup>19</sup> Act 64 adjusted expenditures limits, but not contribution limits, for inflation.<sup>20</sup> All affiliated committees of a political party were aggregated and subject to a single contribution limit, and individuals were limited to contributing \$2,000 to a party in a two-year cycle.<sup>21</sup> Here, too, political party expenditures benefiting six or fewer candidates would presumptively count against the contribution limit.<sup>22</sup>

The Court found both Vermont's expenditure limits and its contribution limits unconstitutional. Justice Breyer's plurality opinion, joined in full only by Chief Justice Roberts, contained a ringing endorsement for the continued vitality of the Court's holdings in *Buckley v. Valeo*. It interpreted the *Randall* litigation as a direct challenge to *Buckley*'s conclusion that expenditure limits are unconstitutional, and rejected that challenge. Precedents should be observed, wrote Justice Breyer, especially where "the principle has become settled through iteration and reiteration over a long period of time."<sup>23</sup> The litigants failed to demonstrate that the times had changed sufficiently to undermine the "critical factual assumptions" in *Buckley*.<sup>24</sup>

The opinion drew a contrast between the claimed necessity for expenditure limits argued in *Randall*, and the more extensive record supporting BCRA in *McConnell*.<sup>25</sup> It also rejected Vermont's argument that their statute served a state interest in preserving officeholders' time, an interest they contended was not considered in *Buckley* and formed a basis for distinguishing *Buckley*. Breyer stated that the *Buckley* Court had this interest before it, and in any event "the connection between high campaign expenditures and increased fundraising demands seems perfectly obvious."<sup>26</sup> Justice Alito concurred with the result, but described Vermont's invitation to revisit the *Buckley* precedent as "a backup argument" and "an afterthought" it would be best not to address.<sup>27</sup>

### III. The Notion of Superprecedents

The plurality opinion in *Randall* emphasized respect for precedent and stare decisis. "Stare decisis... avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm."<sup>28</sup> That respect is accorded one decision specifically – *Buckley v. Valeo* and its bifurcated analysis of campaign finance restrictions. That respect, however,

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2486-87. The Act also contained disclosure requirements not at issue in this litigation, and a limit on out-of-state contributions found unconstitutional below and not challenged in this case. *Id.* at 2487.

<sup>23</sup> *Id.* at 2489.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2490.

<sup>26</sup> *Id.*

<sup>27</sup> 126 S. Ct. at 2500 (Alito, J., concurring). Justice Alito did not acknowledge any awareness that the Vermont statute has been designed specifically to challenge *Buckley*. See Editorial; ... And Go To High Court, Boston Herald, Sept. 29, 2005 at 36; Opinion: Vermont the Model?, Burlington Free Press, Aug. 9, 2002 at 10A.

<sup>28</sup> 126 S. Ct. at 2489.

is not shown the more recent analysis in *Nixon v. Shrink Missouri Gov't PAC*.<sup>29</sup> In attempting to explain this fealty to *Buckley*, some have suggested that, like a few other select Court decisions, the Court is looking to *Buckley* as a “superprecedent.”<sup>30</sup>

“Superprecedents” gained recent attention during Justice Roberts’s confirmation debate. Senator Arlen Specter asked Judge Roberts whether he agreed that certain decisions, *Roe v. Wade*, for instance, had become so deeply embedded in constitutional law that they necessarily survive reassessment.<sup>31</sup>

The expression “superprecedent” is not new, but its meaning has changed over the years. The initial use of the term appears to be in a 1976 article in which William Landes and Richard Posner speculate about the existence of such precedents. A superprecedent, as they saw it, was “so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place or, if they do arise, induces them to be settled without litigation.”<sup>32</sup> They do not provide examples, but one might think of *Marbury v. Madison*,<sup>33</sup> the Legal Tender Cases<sup>34</sup> or *Humphrey’s Executor*<sup>35</sup> in this light.

Decisions like *Roe v. Wade* and *Buckley v. Valeo* would be something different, so if these cases are “superprecedents” than that term must mean something else. *Roe* and *Buckley* are cited frequently, and neither prevented legal disputes from arising nor encouraged them to be settled without litigation.<sup>36</sup> Yet they do serve as “foundations for subsequent lines of judicial decisions”<sup>37</sup> however much debate accompanies that application. If *Buckley* is an ordinary case, it is due the respect of an ordinary case. What “superprecedence” seems to connote is that the Court must conform to a precedent it would ordinarily distinguish, whether or not it has otherwise sound reasons for moving away from it.<sup>38</sup>

In particular, the *Buckley* framework forms the basis for a line of campaign finance decisions because nothing like it had been articulated previously. Noted the *Randall* plurality, “Congress and state legislatures have used *Buckley* when drafting campaign

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<sup>29</sup> 528 U.S. 377 (2000).

<sup>30</sup> See, e.g., exchange on the Election Law Listserv, June 26, 2006, archived at [http://majordomo.lls.edu/cgi-bin/lwgate/ELECTION-LAW\\_GL/archives/election-law\\_gl.archive.0606/date/](http://majordomo.lls.edu/cgi-bin/lwgate/ELECTION-LAW_GL/archives/election-law_gl.archive.0606/date/).

<sup>31</sup> See Jeffrey Rosen, So Do You Believe in Superprecedent?, NY Times (Week in Review), Oct. 30, 2005.

<sup>32</sup> William M. Landes & Richard A. Posner, Legal Precedent, A Theoretical and Empirical Analysis, 19 J. L. & Econ. 249, 251 (1976).

<sup>33</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>34</sup> 79 U.S. (12 Wall.) 457 (1870).

<sup>35</sup> 295 U.S. 602 (1935).

<sup>36</sup> Westlaw lists 10,763 “citing references” for *Buckley v. Valeo*, 16,140 for *Roe v. Wade*, but 1425 for *Humphrey’s Executor*.

<sup>37</sup> Michael Gerhardt, Super Precedent (Symposium), 90 Minn. L. Rev. 1204, 1205 (2006). Gerhardt divides superprecedents into three categories – one of decisions articulating “foundational institutional practices,” another setting forth “foundational doctrine” and another containing “foundational decisions.” Id. at 1207-20.

<sup>38</sup> See Randy E. Barnett, It’s a Bird, It’s a Plane, No It’s Super Precedent: A Response to Farber and Gerhardt (Symposium), 90 Minn. L. Rev. 1232, 1240-41 (2006).

finance laws. And, as we have said, this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent.”<sup>39</sup>

Is “reliance” on a novel formulation sufficient to insulate a precedent like *Buckley* from reconsideration? If so, how much reliance? Settled expectations are important, but this cannot provide the final answer. Otherwise, what justification had the Court for reconsidering separate but equal accommodations for people of different races? That holding was articulated in 1896 in *Plessy v. Ferguson*<sup>40</sup> and was a standard upon which governments relied until *Brown v. Board of Education*<sup>41</sup> “disrupted” those expectations in 1954. *Plessy* had provided a rule – invidious and distasteful though it was – for twenty-eight years longer than *Buckley* has.<sup>42</sup>

Perhaps currency is relevant – that is, a watershed decision that makes a break from the past should be honored at least for a decent interval, but as times change its power could diminish. Looked at this way, reliance is not as relevant as timeliness. Even if this approach doesn’t have much to say for it as a matter of principle, one could expect that the Court might act this way, simply because the individual Justices on the Court would want to apply a precedent they had crafted in subsequent cases.

This has not happened with the campaign finance cases, though. Returning to *Randall*, the plurality is devoted to *Buckley* with respect to Vermont’s expenditure limits, but distinguished the more recent *Shrink Missouri* decision readily to conclude that Vermont’s contribution limits were constitutionally deficient. The contribution-limits aspect of the decision expresses loyalty yet again to *Buckley*, repeating the rule provided there that the Court could (hypothetically) find that contribution limits that “prevented candidates from amassing the resources necessary for effective advocacy” would run afoul of the First Amendment.<sup>43</sup> “[W]e see no alternative to the exercise of independent judicial judgment as a statute reaches these outer limits.”<sup>44</sup>

The plurality then musters two reasons why these limits are in danger of reaching those outer limits – they apply per election cycle, not to separate primary and general elections, and they are very low (the lowest in the nation) and less than one-sixth the level of the Missouri Auditor limit upheld in *Shrink Missouri*.<sup>45</sup> Examining the record, the plurality then found five factors indicating that the limits were not closely drawn to meet an anticorruption objective – the record contained evidence that the limits would hurt challengers in competitive races,<sup>46</sup> and were overly burdensome on political parties.<sup>47</sup>

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<sup>39</sup> 126 S. Ct. at 2490.

<sup>40</sup> 163 U.S. 537 (1896).

<sup>41</sup> 347 U.S. 483 (1954).

<sup>42</sup> Barnett, *supra* note 38 at 1243-44.

<sup>43</sup> 126 S. Ct at 2491 (quoting *Buckley*, 424 U.S. at 21).

<sup>44</sup> *Id.* at 2492.

<sup>45</sup> *Id.* at 2493-94 (citing *Shrink Missouri*, 528 U.S. at 377). Justice Souter, in dissent, disputed the plurality’s reading of the record, arguing that once population-adjusted, the limits are not unusually low. *Id.* at 2512-13 (Souter, J., dissenting).

<sup>46</sup> *Id.* at 2495.



The low limit was aggravated by including within it volunteer expenses,<sup>48</sup> were not adjusted for inflation, and lacked any special evidence in their favor to support an extreme state regulation.<sup>49</sup> Throughout the discussion, Justice Breyer expresses dismay at the burdens the limits place upon associational activity, especially among political parties and campaign volunteers.

While it is heartening that the Court took the burdens imposed by contribution limits seriously, this is not the approach taken in recent precedent, particularly the Court's 2000 decision in *Shrink Missouri* – which Breyer joined while providing a concurrence that resembles *Randall* in many respects.<sup>50</sup>

Justice Souter, who wrote the majority's opinion in *Shrink Missouri*, takes issue in his *Randall* dissent with Breyer's willingness to second guess the Vermont Legislature, imploring the Court instead to follow *Shrink Missouri* and defer to legislative judgment. "To place Vermont's contribution limits beyond the constitutional pale, therefore, is to forget not only the facts of *Shrink* but also our self-admonition against second-guessing legislative judgments about the risk of corruption . . ."<sup>51</sup> For Souter in *Randall* – as for the Court's majority in *Shrink* -- the test is whether the limits are "depressed to the level of political inaudibility."<sup>52</sup> That test leaves plenty of space for legislatures to regulate. Souter's dissent in *Randall*, like Breyer's plurality opinion, also clothes itself in a *Buckley* cloak.<sup>53</sup>

If it makes sense to segregate certain decisions as superprecedents, *Buckley* seems to be a poor contender, as least for the conventional reasons. *Buckley* lives on because it provided a new rule in a contentious area, and nobody yet seems to be able to come up with something more agreeable. It also lives on by being sufficiently vague and general to support a range of results. If *Buckley* is to be considered a superprecedent, then perhaps the true test of whether a decision is superprecedent is not whether there has been substantial reliance upon it, or whether it is recent, or whether it settles a question for all time, but whether it can be cited in support of *conflicting conclusions*.<sup>54</sup> That could be a reason – admittedly not a very defensible one -- why *Buckley* is a "superprecedent" but (apparently) *Shrink Missouri* is not.

#### IV. Making Sausage and Superprecedents

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<sup>47</sup> *Id.* at 2496.

<sup>48</sup> *Id.* at 2498.

<sup>49</sup> *Id.* at 2499.

<sup>50</sup> *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 399 – 405 (2000) (Breyer, J., concurring).

<sup>51</sup> 126 S. Ct. at 2513 (Souter, J., dissenting).

<sup>52</sup> *Id.* at 2516. Justice Ginsburg joined Breyer's concurrence in *Shrink*, but joined Souter's dissent in *Randall*.

<sup>53</sup> *Id.* at 2511-12.

<sup>54</sup> See Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. Pa. L. Rev. 31 (2004). Hasen describes two periods of Supreme Court campaign finance jurisprudence since *Buckley*, an earlier period of skepticism, see *id.* at 36-41, and a later period of deference, *id.* at 42-46. Whatever their differences, both sets of decisions *claim* faithfulness to *Buckley v. Valeo*.

*Buckley* is a flexible source of authority partially because *Buckley* is an odd and analytically incomplete opinion. One characteristic we might expect from a superprecedent is a synthesis of authorities into a coherent whole. That is, a superprecedent would bring together strands of legal analysis in a manner that rendered the resulting opinion clear and “obvious” in a way other decisions had been unable to do. *Buckley v. Valeo*’s history and analysis show its deficiencies in this regard.

When one reads the archived materials produced during the drafting of the per curiam *Buckley* decision,<sup>55</sup> one observes a team of Justices struggling with the constitutionality of a complicated piece of legislation, and left seemingly rudderless by precedent. The Justices also assigned the opinion among several chambers, which may have generated some of the per curiam opinion’s incoherence.<sup>56</sup>

Justice Powell’s bench memo for *Buckley* is preserved in his papers, and it is a thoughtful piece focusing on justiciability.<sup>57</sup> On the merits of the claim, this Justice and his clerk struggled with how to evaluate regulations of contributions and expenditures, whether different standards were justified, and whether the law was unconstitutionally vague. But there just wasn’t much law in the discussion. Neither Marshall’s nor Brennan’s papers appear to contain a similar memorandum, perhaps because they were not preserved for the archives, or perhaps because they never had one written.

A week after conference, portions of the opinion were assigned to various Justices.<sup>58</sup> After what must have been a stimulating winter holiday, memoranda circulated among them with edits and concerns about the emerging opinion. Justice Brennan, worried about the vagueness of the definition of “expenditure,” apparently succeeded in persuading Justice Stewart to add a footnote delineating what specific phrases would be “express advocacy” – this is now the somewhat derisively named “magic words” footnote in *Buckley*.<sup>59</sup> By mid-January the draft was essentially complete, and the Court delivered its decision January 30, 1976.<sup>60</sup>

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<sup>55</sup> The papers of Justice Thurgood Marshall are available in the Library of Congress Reading Room. Justice William Brennan’s papers are also housed there, and can be accessed by permission of the estate’s designees. Justice Lewis Powell’s papers are held at Washington and Lee University, and are available to researchers by appointment. Justice Potter Stewart’s papers are held by the Manuscripts and Archives Department at Yale University, and will be open to research on the retirement of Justice Stevens, the last of the Justices to serve with Justice Stewart.

<sup>56</sup> Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 Elec. L. J. 241 (2003). See also Richard L. Hasen, “*Buckley* is Dead,” *supra* note 54, at 36.

<sup>57</sup> Memorandum from Chris Whitman to Justice Powell, September 18, 1975, on file with author.

<sup>58</sup> Hasen, “*Drafting History*,” *supra* note 56, at 245. Chief Justice Burger took the introduction, Justice Powell the disclosure section, Justice Brennan public financing, Justice Stewart the contribution and expenditure limitations, and Justice Rehnquist the portion dealing with the composition of the Federal Election Commission. Justice Stewart circulated his draft permitting contribution limits but not expenditure limits on Christmas Eve, 1975.

<sup>59</sup> Hasen, “*Drafting History*,” *supra* note 56, at 247; see 424 U.S. 1, 44 n. 52. Justice Marshall also apparently succeeded in having Justice Stewart eliminate a passage explaining why the expenditure limits was overbroad. *Id.* at 248. See also undated memorandum “*Disclosure Provisions*” from Justice Marshall’s clerks to the Justice, on file with author. Similar to the Powell bench memorandum in his papers, this Memorandum between the Justice and his clerks shows each grappling with how to treat the new law, but without citation to any precedent. One exception is that the clerks do not “think it fruitful to

*Buckley v. Valeo* was heard, discussed in conference, assigned, written in bits and pieces, revised and delivered in about two and one half months. Was this sufficient? This is similar to the time between argument and decision in *McConnell v. FEC* (three months)<sup>61</sup>, and *Massachusetts Citizens for Life v. FEC* (about two and a half months).<sup>62</sup> But other narrower decisions have taken longer. *FEC v. National Conservative PAC*, which found expenditure limits unconstitutional in the presidential public funding system, took almost four months, as did the second consideration of *FEC v. Colorado Republican*.<sup>63</sup> *Austin v. Michigan Chamber of Commerce* took five months, as did *First National Bank of Boston v. Bellotti*.<sup>64</sup> *McIntyre v. Ohio Elections Commission*, which considered whether a state law could require a pamphleteer to disclose her identity on her handbills, took six months from argument to decision.<sup>65</sup> Incidentally, another case often invoked when discussing “superprecedents,” *Roe v. Wade*, took a little over three months, but was argued twice so newly appointed Justices Powell and Rehnquist could participate.<sup>66</sup>

*Randall v. Sorrell* took four months from argument to decision.<sup>67</sup> While *Wisconsin Right to Life* was vacated and remanded a mere six days after oral argument, the core issue in that case is still being contested by the parties. We should expect that, if the Court agrees to hear the “grassroots lobbying” challenge to the electioneering communications prohibition, either in *Wisconsin Right to Life* or in a similar case, *Christian Civic League of Maine v. FEC*,<sup>68</sup> the final decision will take *more* than six days to draft. Perhaps *Buckley v. Valeo* would have improved from additional time spent on drafting, although it is not clear what clarifying principle the Court might have discovered even with additional time.

Without such a principle, the final opinion itself is inconsistent and analytically weak. *Buckley* comes out initially as very protective of money spent in politics, insisting that contributions and expenditures “operate in an area of the most fundamental First Amendment activities.”<sup>69</sup> It rejects the position taken in the Court of Appeals<sup>70</sup> that campaign finance restrictions could be upheld under *United States v. O’Brien* on the

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discuss whether the expenditure of money involved in this case is akin to the destruction of a draft card in *O’Brien*. We think the speech-conduct distinction is a tenuous one.” Memorandum at 5.

<sup>60</sup> Hasen, “Drafting History” *supra* note 56 at 248.

<sup>61</sup> 540 U.S. 93 (2003), argued September 8, 2003, decided December 10, 2003. One expects that, in time, the jointly authored Stevens/O’Conner opinion in *McConnell* will yield its own intriguing drafting history.

<sup>62</sup> 479 U.S. 238 (1986), argued October 7, 1986, decided December 15, 1986.

<sup>63</sup> NCPAC, 470 U.S. 480 (1985), argued November 28, 1984, decided March 18, 1985; *FEC v. Colorado Rep. Fed. Camp. Comm.*, 533 U.S. 431 (2001), argued February 28, 2001, decided June 25, 2001.

<sup>64</sup> *Austin*, 494 U.S. 652 (1990), argued October 31, 1989, decided March 27, 1990; *Bellotti*, 435 U.S. 765 (1978), argued November 9, 1977, decided April 26, 1978.

<sup>65</sup> 514 U.S. 334 (1995), argued October 12, 1994, decided April 19, 1995.

<sup>66</sup> 410 U.S. 113 (1973), argued December 13, 1971, reargued October 11, 1972, decided January 22, 1973.

<sup>67</sup> 126 S. Ct. 2479, argued February 28, 2006, decided June 26, 2004.

<sup>68</sup> No. 05-1447 (Notice of Appeal filed May 11, 2006).

<sup>69</sup> *Buckley*, 424 U.S. at 14.

<sup>70</sup> *Buckley v. Valeo*, 519 F.2d 821, 840-41 (D.C. Cir. 1975).

theory that the expenditure of money was a non-speech element that could be restricted, like the burning of a draft card was restricted in *O'Brien*.<sup>71</sup>

The Court applied strict scrutiny to the laws limiting expenditures, but some unclear lower level of scrutiny to laws burdening contributions.<sup>72</sup> It failed to explain how it could factor in the elements that apparently make contributions inferior – like the fact they are more attenuated, or symbolic, or contingent -- without calculating into the equation “nonspeech” conduct and implicitly using the reasoning of the rejected *O'Brien* decision. Notably, in the pages of *Buckley* where the standard of review argument is made most explicitly, there are not citations to precedent.<sup>73</sup> In the later discussion of contribution limits, the *one* precedent cited is *CSC v. Letter Carriers*, 413 U.S. 548 (1973), a but-distantly relevant authority in which the Court upheld Hatch Act limits on partisan political activity by federal employees.<sup>74</sup> In subsequent decisions, the Court has been compelled to acknowledge *Buckley's* lack of a clear standard of review for contributions.<sup>75</sup>

*Buckley* upheld the \$1,000 contribution limit to candidates without much discussion about breadth. All the *Buckley* Court offered is that if “some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.” [] Such distinctions in degree become significant only when they can be said to amount to differences in kind.”<sup>76</sup> When might that be? Can limits be too low? How low is too low, and why? The two citations the Court provides, which involve party primaries and whether state laws can restrict participation, are not illuminating.<sup>77</sup>

*Buckley* also had to assess the scope of the campaign finance laws, and address what kinds of groups would be regulated. It articulated a “major purpose” test without much elaboration.<sup>78</sup> The “major purpose” test protected from regulation groups that might make contributions or expenditures in addition to other activities.<sup>79</sup> So long as they did not have the “major purpose” of electing a candidate, they would be free from the reporting requirements and limitations federal political committees faced. This standard has vexed courts, agency enforcement, and regulated entities for thirty years.<sup>80</sup>

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<sup>71</sup> *Buckley*, 424 U.S. at 15-16

<sup>72</sup> *Id.* at 25.

<sup>73</sup> *Id.* at 20-21.

<sup>74</sup> *CSC v. Letter Carriers*, 413 U.S. 548 (1973), cited at 424 U.S. at 29.

<sup>75</sup> *Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377, 386 (2000).

<sup>76</sup> *Buckley*, 424 U.S. at 30.

<sup>77</sup> *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

<sup>78</sup> A federal appeals court had articulated a similar standard to narrow the scope of the 1971 campaign finance law, while explicitly avoiding ruling on that law's constitutionality. *U.S. v. National Committee for Impeachment*, 4690 F.2d 1135, 1140-41 (2d Cir. 1972).

<sup>79</sup> *Buckley*, 424 U.S. at 79 (“To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of “political committees” so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.”)

<sup>80</sup> Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 3 *Election L. J.* 82, 85-86, 99-100 (2005).

*Buckley's* narrowing construction of expenditures to “express advocacy,” and that standard’s scope and legal effect, has been a topic of hot dispute from the outset. For many years it was interpreted by many to be of constitutional dimension, which would have been good news for groups like Wisconsin Right to Life.<sup>81</sup> In *McConnell*, however, the Court concluded that “express advocacy” was a statutory construction, not a constitutional standard, and in the process upheld the electioneering communications portion of BCRA.<sup>82</sup>

How to explain the dearth of authority for *Buckley's* scrutiny of limits, the “major purpose” concept, and the “express advocacy” content test for expenditures? Federal law had, after all, contained expenditure and contribution limits for much of the preceding century. One would think the Court would have synthesized the wisdom of the ages when articulating these rules.

But the lack of foundation wasn’t a symptom of poor research. As historian Robert Mutch has noted in his history of corporate campaign finance regulation, “Congress has sought financial equality among candidates, or at least the lessening of inequality, since 1911, and for sixty years thereafter philosophical objection to this goal was as rare as adherence to the limits intended to achieve it.”<sup>83</sup> So, without enforcement (and injury), it was not necessary to contest the constitutionality of the various types of expenditures and contribution limits enacted over the years. Moreover, when cases prosecuted against unions under the same general ban came before the Court, the Justices avoided deciding the constitutional issues.<sup>84</sup> *Buckley*, while grabbing bits and pieces from other kinds of cases, could not synthesize precedent into an intelligible principled decision, even if a majority could have aligned behind one, because there wasn’t much to use.

*Buckley* also left some of the most intractable questions unanswered, and subsequent decisions have not always been helpful.<sup>85</sup> What is the constitutional standard of review protecting contributions to political committees and associations, as opposed to candidates? What justification could there be for a standard inferior to strict scrutiny, especially where the political committee does not make contributions to candidates or parties, so there is no possible claim of circumvention of those limits? What groups can constitutionally be restricted as political committees? What spending can be treated as a contribution or expenditure, anyway? If an *expenditure* is being regulated because the

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<sup>81</sup> See *Brice v. Clagett & John R. Bolton, Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 20 *Vand. L. Rev.* 1327, 1333 (1976) (concluding that *Buckley* held that only communications containing express advocacy could constitutionally be regulated); Statement of Joel Gora before the Committee on Rules and Administration, United States Senate (Mar. 22, 2000) (“The funding of any speech that falls short of such ‘express advocacy’ is wholly immune from regulation.”); see also *Citizens for Responsible Gov’t State PAC v. Davidson*, 236 F.3d 1174, 1187 (10<sup>th</sup> Cir. 2000) (citing cases).

<sup>82</sup> 540 U.S. at 190-91.

<sup>83</sup> Robert Mutch, *Campaigns Congress and Courts* 54 (1988).

<sup>84</sup> *United States v. CIO*, 335 U.S. 106 (1948); *United States v. United Automobile Workers*, 352 U.S. 567 (1957).

<sup>85</sup> *Clagett & Bolton, supra* note 81, at 1360-65 (discussing outstanding issues).

state has an interest in preventing “circumvention” of a *contribution* limit (or prohibition), should the law be subjected to strict scrutiny or something less?

Instead of deeming *Buckley* a “superprecedent,” we may want to adopt a different category – the “provisional precedent” – for decisions that articulate broad standards based on the judgment and intuition of Justices possessing the same human limitations shared by all of us.<sup>86</sup> Justices will face hard cases where a decision and a reasoned explanation will require saying something new. The Court should exercise restraint and humility in those contexts, to be sure, but it also needs to decide the case. Part of the exercise of restraint should come later by showing a willingness to review critically such decisions as the years unfold. Given its history, scope and analytical gaps, *Buckley* is a good candidate for this classification.

## V. Beyond *Buckley*

As campaign finance caselaw builds over time, the Court has continued to apply the bifurcated *Buckley* analysis to limits and prohibitions at the federal and state levels. With each decision, the Court explains, distinguishes, and balances, adding complexity to the field. Real life continues to confound the *Buckley* standards by presenting situations where Justices need to redefine scope, or complicate the analysis with new exceptions.<sup>87</sup> The quotes from the Justices at the outset of this Essay are true – campaign finance regulation is about “speech,” but it is about a lot of other arcane detail, too.

With every opinion that attempts to square the First Amendment with the regulation of politics, the complexity only increases. To see how this works in practice, look at either the exemption for “qualified nonprofits” or the definition of “member.” Because of Court precedents following *Buckley*, a corporate speaker might be entitled to a narrow Court-crafted exemption for “qualified” nonprofits articulated in *Massachusetts Citizens for Life v. FEC*.<sup>88</sup> That test itself is complicated, and it is not self-evident that the characteristics the Court listed in the decision, such as whether a group took corporate funding, were meant to be illustrative and based on the facts in that case, or were to be a rule applied to all other groups. Corporations with members determine the bona fides of membership under another Court-crafted rule, articulated in *National Right to Work v. FEC*.<sup>89</sup> There, the Court concluded that “member communications” could not be made to just anyone a group claimed as its member. After the Federal Election Commission promulgated a very narrow “member” definition, the issue was relitigated, but has not reached the Supreme Court again.<sup>90</sup>

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<sup>86</sup> Rarely, the Court admits that a decision may only articulate a rule of constitutional law for a limited time. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”)

<sup>87</sup> Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 *Cap. U. L. Rev.* 381 (1992) (describing inflexible campaign finance analysis and problems Court has when new cases don’t fit easily into existing categories).

<sup>88</sup> 479 U.S. 238, 263-64 (1986).

<sup>89</sup> 459 U.S. 197, 205-06 (1982).

<sup>90</sup> *Chamber of Commerce v. FEC*, 76 F.3d 1234 (D.C. Cir. 1996). The FEC did not petition the Court for a writ of certiorari.

At least in these contexts there has been some subsequent clarification (if also complication) of the Court-created standards. Subsequent litigation has done little to clarify how the “major purpose” test might determine political committee status, and the Court has not stepped in to help explain its rule.<sup>91</sup>

The spawn of *Buckley* will continue to multiply. In the corporate and labor context, incorporation or union status practically dictates a result that will be deferential to regulators. The one exception to that general rule is corporate-funded independent advertising about ballot measures.<sup>92</sup> *Wisconsin Right to Life* will test how broad the corporate “issues speech” protection reaches, by offering the Court a sympathetic grassroots lobbying campaign that nevertheless identifies a federal candidate running for election. The Court will have to choose a category: Is the Wisconsin group more like a “corporation” whose candidate-specific electioneering can be barred by federal law? Or, regardless of its status, is the activity the kind of “issues speech” that deserves protection and an audience? *Buckley*, its express advocacy standard stripped of any constitutional dimension by *McConnell*, could probably be cited to support either result.

In the contribution limits context, the Court will be presented with new cases where contribution limits are low, or arguably burden the associational rights of parties or volunteers, but the other facts differ from those present in the unconstitutional Vermont law. If the Court follows *Randall*, it will apply something more deferential than strict scrutiny, and will be obliged to mine the case record for reasons why the restriction is or is not permissible. The canny litigant will play upon the associational burden of the challenged law, since it would appear Justice Breyer is especially concerned about those kinds of restrictions. We will see whether the Court and enforcement agencies treat Breyer’s factors in *Randall* as illustrative, or as a rule to be applied mechanically to other claims, similar to the way the factors articulated in *Massachusetts Citizens for Life* and *National Right to Work* have been used.

If the Court were to reconsider its precedents in the campaign finance cases, it would be useful to politicians, donors and the public for it to articulate a principled rule. One such rule is regularly expressed in dissent by Justices Thomas and Scalia. These Justices would focus on the speech elements in campaign finance activity, and apply strict scrutiny to contributions and expenditures, as well as corporate activity.<sup>93</sup> That would discard the confusing rationales used to differentiate between similar activities, and would make other rules devoted to deciding whether something is a “contribution” or an “expenditure” – like the much contested question of coordination -- less important. It would protect the political activity of incorporated and non-incorporated groups equally.

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<sup>91</sup> Hayward & Smith, *supra* note 80 (citing *Massachusetts Citizens for Life v. FEC*, *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996) and *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1997)).

<sup>92</sup> *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>93</sup> 126 S. Ct. at 2502 (Thomas J., dissenting); *FEC v. Beaumont*, 539 U.S. 146, 164-65 (2003) (Thomas, J., dissenting).

That choice would also unsettle campaign finance laws, to be sure. But as the system adjusted, it would be left with a simpler, clearer and more consistent playbook. Strict scrutiny would also result in less burdensome regulations. It would seem, for instance, that only relatively high contribution limits could be found constitutional. Yet at some high level, a regulator might persuasively argue that a contribution would so likely be corrupting that a general limit could withstand even strict scrutiny. Regulators might also persuasively argue that limits (or prohibitions) in certain more “corrupting” contexts (those involving government contractors and lobbyists spring to mind) are appropriate. It is not the case that strict scrutiny would operate as a *per se* rule abolishing all limits or prohibitions.

Of the six Justices joining the judgment in *Randall*, at least three and possibly five believe the bifurcated *Buckley* legacy is illegitimate.<sup>94</sup> With the right opportunity, the day when the Court applies strict scrutiny to both contributions and expenditures may not be far away. It seems less evident that a Court majority would embrace a rule protecting corporate, labor and potentially other prohibited sources who want to make contributions and expenditures in campaigns. Vestiges of Progressive-era thinking about the pernicious social effects of corporations, and the tit-for-tat logic that treats unions like corporations, will probably live on.

The Court’s legacy with regard to these actors is to defer to legislative restrictions in the context of candidate campaigns and elections, now generously construed in *McConnell* to reach beyond express advocacy. Yet it isn’t always clear whether that deference to regulation is due to the fact the spender is entitled to fewer speech rights, or as a class exhibit a higher propensity for corruption, or has an unfair advantage in a capitalist economy, or something else.<sup>95</sup> If the reason for deference is that the entity itself should be entitled to reduce First Amendment rights, the Court should explain why, and account for how such a categorical approach is appropriate in all instances. The Court would have to explain why independent expenditures by “associations” – corporate, labor, political club, group blog, or knitting circle – could constitutionally be restricted or prohibited - ever.

Another way to resolve the contradictions in the *Buckley* legacy would be for the Court to drift the other direction. It might conclude that campaign finance activity, like ordinary economic activity, can be regulated under a very deferential standard of review. Although he describes it as a rejection of the “money is speech” formulation, Justice Stevens essentially argues this approach in his various dissents in campaign finance cases, and a deferential attitude runs throughout the Stevens/O’Conner-authored opinion in *McConnell*.<sup>96</sup> This would leave to the rough-and-tumble of politics – and the self-

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<sup>94</sup> It is presumptuous to conclude that simply because Roberts and Alito joined the *Randall v. Sorrell* plurality and its embrace of *Buckley* in that situation, they would otherwise defer to limits on contributions. Cf. Campaign Finance Bellwether: The Supreme Court’s Vermont Ruling Seems Like a Defeat for Reformers. In the Long Run It May Not Be (Editorial), Wash. Post (July 3, 2006) at A20.

<sup>95</sup> Mutch, *supra* note 7, at 323 (“More than eighty years after the First Amendment challenge was first raised, we still do not have definitive answers to the central questions: What exactly are corporations, and what is their role, if any, in a democracy?”).

<sup>96</sup> 126 S. Ct. at 2508 (Stevens, J., dissenting); *McConnell*, 540 U.S. at 137-38.



interested calculations of incumbent officeholders -- the question of how strenuously legislation should regulate contributions, expenditures, independent spending, and the like, and what purposes legislatures can pursue when they write these laws. If lawmakers saw fit to pursue egalitarian or “democracy enhancing” goals with limits and prohibitions, they could do so openly. The public, for its part, could pray that those avowed goals weren’t mere pretext.

*Buckley* attempted to find a middle road between two alternatives – that of regulating campaign finance activity like ordinary economic activity and that of protecting it as core First Amendment speech. Unfortunately, there is no coherent middle road. Neither *Buckley* nor the Court’s more recent decisions can reason a path absent some ad hoc balancing based upon the individual experience, biases, and what may appear “perfectly obvious”<sup>97</sup> to the Justices.

The Court’s contemporary debate on these questions hasn’t moved far from the debate the Court had in 1975. Justice Breyer might be Justice Brennan. Justice Thomas might be Chief Justice Burger. *Buckley*, like a bad treaty, settled nothing to anyone’s satisfaction. Perhaps the time will come soon for the Court to revise its effort. Professor Lawrence Tribe, in explaining why a new version of his famous treatise on constitutional law would not be forthcoming, seems to think that we are entering an era of change in many constitutional doctrines.<sup>98</sup> If *Buckley* is truly a “provisional precedent” perhaps its time has come and gone as well.

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<sup>97</sup> *Id.* at 2490.

<sup>98</sup> Lawrence H. Tribe, *The Treatise Power*, 8 *Green Bag* 2d 291, 297 (2005) (“There is an emerging realization that the very working materials of American constitutional law may be in the process of changing.”).