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Under U.S. campaign finance jurisprudence, a government may constitutionally subject electoral candidates to contribution limits—i.e., limits on the dollar amount one may directly contribute to a candidate's campaign. Such limits play a crucial role in our democratic systems, as they help curb corruption, reduce legislative polarization, and equalize political influence between the power elite and marginalized communities.

Since 2005, the Roberts Court has systematically deregulated federal campaign finance laws, including federal contribution limits. Such cases have received considerable attention from scholars and the media. What has received far less attention, however, is the onslaught of legal challenges brought against state and local contribution limits (SLCLs), many of which have been successful.

Within each of these challenges, a critical problem emerges: There is no clear standard of judicial scrutiny for SLCLs. The Court attempted to create one in a 2006 opinion penned by Justice Breyer, dubbed the "danger signs" test. This test, nevertheless, is ripe with ambiguities and has confused judges and scholars since. And when the Court had a chance to provide clarification in 2019, it instead muddled the test further.

This Article marks the first major attempt in the campaign finance literature to resolve this issue. It deconstructs the danger signs test and rebuilds it to reflect both developments in the case law and the modern state of campaign finance. In particular, this Article centers the danger signs test around one key concept: that contribution limits under the Roberts Court have been reduced to price ceilings on quid pro quo exchanges between donors and candidates. In doing this, the Article seeks to develop a robust standard that will protect SLCLs from arbitrary invalidation and ultimately preserve the democratic interests of state and local constituencies.

INTRODUCTION

Since the Supreme Court issued its seminal decision in *Buckley v. Valeo* almost a half century ago, contribution limits have become a mainstay in our election cycles. In *Buckley*, the Court held that legislative and regulatory limits on the dollar amounts that contributors (a.k.a. donors[1]) may give to candidates for federal office were not violative of the First Amendment because Congress had a sufficient anticorruption interest.[2] Twenty-four years later, the Court would extend this reasoning to state and local governments in the case of *Nixon v. Shrink Missouri Government PAC*, finding that they too could institute contribution limits in their elections, even at dollar amounts below the federal

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1. This Article uses the terms "contributor" and "donor" interchangeably.
2. Buckley v. Valeo, 424 U.S. 1, 26–29 (1976).

limits.[3] Since then, all but five states have implemented contribution limits of some kind,[4] nine of which having individual-to-candidate limits even lower than those upheld in *Shrink Missouri*.[5] Likewise, countless cities, counties, and other municipalities (all referred to as "localities" in this Article) have implemented contribution limits that range from a few hundred dollars to tens of thousands.[6]

These state and local contribution limits (SLCLs) play a vital role in preserving healthy democratic systems throughout the United States. For one, they curtail corruption by prophylactically reducing the potential for donors and candidates to engage in transactions in which the donor gives a large monetary contribution in exchange for political favors, i.e., quid pro quo.[7] They also, if low enough,[8] lessen the *appearance* of corruption, which yields more public trust in governing institutions and, in turn, higher voter participation.[9] Beyond corruption, SLCLs can also better align elected officials' policy positions with the will of their constituents by reducing the overall influence of donors, who tend to be, on average, wealthier, whiter, and more ideologically extreme than the total population.[10] Likewise, by lessening the influence of highly partisan individual donors, individual-to-candidate SLCLs in particular can help prevent legislative polarization,[11] which is crucial to maintaining a functioning legislature.

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3. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397–98 (2000).

4. *See* NAT'L CONF. OF STATE LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES: 2021–2022 ELECTION CYCLE (2021) [hereinafter NCSL STATE LIMITS], https://www.ncsl.org/Portals/1/Documents/Elections/Contribution_Limits_to_Candidates_2020_2021.pdf (showing state contribution limits for individual-to-candidate, party-to-candidate, PAC-to-candidate, corporation-to-candidate, and union-to-candidate contributions).

5. *See infra* Table 1.

6. *See, e.g.*, *Campaign Contribution Limits*, ERIE CNTY. BD. OF ELECTIONS, https://www.elections.erie.gov/contributions (last visited Jan. 31, 2022) (ranging from $1,000 to $31,484 depending on the city); *Contribution Limits*, CITY OF SACRAMENTO, http://www.cityofsacramento.org/clerk/elections/5-contribution-limits (last visited Jan. 31, 2022) (ranging from $1,800 to $12,000 depending on contributor and office); *Contribution Limits*, CITY OF MILWAUKEE, https://city.milwaukee.gov/election/HowtoRunforPublicOffice/Contribution-Limits (last visited Aug. 31, 2022) (ranging from $770 to $6,000 depending on candidate and office).

7. Prior to contribution limits being commonplace in the United States, politicians were openly taking obscene amounts of contributions from the wealthy in exchange for influence. *See infra* notes 296–301 and accompanying text.

8. *See* Matthew DeBell & Shanto Iyengar, *Campaign Contributions, Independent Expenditures, and the Appearance of Corruption: Public Opinion vs. the Supreme Court's Assumptions*, 20 ELECTION L.J. 286, 295 (2021).

9. *See* Daniel Stockemer et al., *Bribes and Ballots: The Impact of Corruption on Voter Turnout in Democracies*, 34 INT'L POL. SCI. REV. 74, 82 (2013).

10. *See* PETER L. FRANCIA ET AL., THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES 16 (2003); Richard H. Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341, 364–71 (2020).

11. *See* RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL 106 (2015) (finding that polarization increases in legislatures in states with high or nonexistent contribution limits).

Thus, a lot is at stake when it comes to the ongoing movement to judicially deregulate campaign finance laws under the Roberts Court,[12] which has not spared SLCLs. Indeed, within the Roberts Court's second year, the Court struck down an SLCL for the first time in American judicial history. The case, *Randall v. Sorrell*,[13] involved a constitutional challenge against Vermont's contribution limits, which were among the lowest in the nation.[14] The Court issued a fractured opinion, with Justice Breyer penning a plurality that set out to create a proper standard for judicial review of SLCLs. The *Randall* plurality began by emphasizing the importance of deferring to legislative bodies when it comes to contribution limits, but insisted that such deference diminishes when there are "danger signs" signaling that a limit might be so low that it prevents candidates from amassing enough funds to campaign sufficiently.[15] The plurality recognized five such danger signs in Vermont's limits, though it failed to explain why it chose them in particular and how many were needed to trigger independent judicial judgment.[16] Next, the plurality discussed five "factors" it believed demonstrated that Vermont's limits were not closely drawn enough to pass constitutional muster,[17] though it again neglected to make clear why those specific factors were chosen as well as how they differed from danger signs.[18] In the end, the plurality plus a few concurrences resulted in the invalidation of Vermont's limits.[19] The plurality's approach became known as the "'danger signs' test."[20]

The danger signs test confused scholars and judges alike. Campaign finance experts could only agree on basically one point: that the "test" had two parts, step one being a threshold question and step two involving independent judicial judgment. Beyond that, questions abounded. Why these danger signs? Why these factors? Must all of them be discussed? Can courts include additional ones in future cases? Is there a hierarchy of danger signs? Will courts that reach step two get swept up in a battle of political science papers and expert testimony?[21] Meanwhile, judges ended up applying the danger signs test in all sorts of inconsistent ways. Some followed the *Randall* plurality to a tee, some only

12. *See* Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL'Y REV. 471, 481–96 (2019).

13. Randall v. Sorrell, 548 U.S. 230 (2006).

14. *Id.* at 250–51.

15. *See id.* at 249.

16. *See id.* at 249–51; Elizabeth Garrett, *The Political Process*, 34 PEPP. L. REV. 554, 561 (2007).

17. *See Randall*, 548 U.S. at 253–61.

18. For instance, why is an SLCL being set on a "per election cycle" basis any more of a danger sign that the limit might damage electoral competition than is the limit not being adjusted for inflation, which the plurality identified instead as a "factor"? *See id.* at 249, 261.

19. *See id.* at 262–63.

20. Rachel Gage, Note, Randall v. Sorrell*: Campaign-Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST AMEND. L. REV. 341, 359 (2007).

21. These reactions are discussed in detail in Part I.C.2.

looked into a few danger signs, and some flat out reversed the steps.[22] Others refused to apply the test at all given *Randall*'s lack of a clear majority,[23] resulting in the Court taking up another SLCL case in 2019, *Thompson v. Hebdon*.[24] The *Thompson* Court had a chance to clear up these uncertainties, but instead—despite adopting the danger signs test unanimously—ended up muddling the analysis, treating some of *Randall*'s step-two factors as step-one danger signs.[25] The Court also added an additional danger sign and did not mention a couple from *Randall*.[26] The Court provided no explanation for these changes, again leaving much to question: For instance, was the Court signaling that the danger signs test is actually extremely fluid, or did it simply misapply *Randall*?

Evidently, some clarity is long overdue here, especially given how frequently SLCLs are challenged in court.[27] Astonishingly, though, little has been written about SLCLs and the danger signs test in the campaign finance literature since the years following *Randall*. And within those pieces that do mention it, none have attempted to fully make sense of the danger signs test and extract a workable standard out of all its ambiguities.

This Article seeks to do just that. To begin, it is essential to recognize that the Roberts Court has significantly cabined the government's interest in preventing corruption and its appearance to one type of corruption: quid pro quo corruption.[28] Consequently, contribution limits these days are effectively price ceilings in a market of favors in which contributors are the buyers and candidates are the sellers—this Article calls this the "quid pro quo market."[29] Courts analyzing SLCLs must then concern themselves with two ceiling levels: the level at which the SLCL falls below equilibrium and begins disrupting exchanges in the quid pro quo market (the "efficacy threshold") and the level at which the SLCL damages democratic values such as electoral competition, political party health, and civic participation, and thus becomes unconstitutional (the "lower bound"). An informed legislative body's goal will be to pass contribution limits at some amount between these two levels so that said limits are both constitutional and useful.[30]

Using this framing, this Article delineates clear, separate goals for both steps of the danger signs test. When applying step one, courts should identify

22. *See infra* Part II.A.

23. *See infra* Part II.A.3.

24. Thompson v. Hebdon, 140 S. Ct. 348 (2019).

25. *See id.* at 351 (noting the lack of inflation indexing).

26. *See id.* at 350–51.

27. *See* cases cited *infra* note 244.

28. *See* McCutcheon v. FEC, 572 U.S. 185, 227 (2014) (plurality opinion).

29. *See infra* Part IV.A.

30. Of course, this assumes both that the efficacy threshold will always fall above the lower bound and that incumbent legislators want to institute SLCLs above the lower bound. These assumptions are rationalized in Part IV.B.3.

any apparent factors and indications (i.e., danger signs) that an SLCL might fall below the lower bound. This includes condensing the danger signs and factors brought up in *Randall*, given their arbitrary distinction. Naturally, some danger signs will be more pertinent than others, and this Article provides a non-exhaustive list of signs courts should continue using, new signs that they should consider incorporating, and signs from *Randall* that should receive far less emphasis.[31] If step one is satisfied, courts can apply independent judicial judgment under step two. This does not, however, mean that courts get to roleplay as legislatures and conduct independent research to calculate optimal and suboptimal SLCLs. Courts are not equipped to do this. Instead, courts should look to the legislative record to determine whether the legislature engaged in enough good-faith fact-finding to instill confidence in the court that the legislature generally understood where the efficacy threshold and lower bound lay in the given state or locality. In a sense, step two should resemble administrative law's hard look review.[32]

This Article proceeds as follows: Part I summarizes the jurisprudence of SLCLs, with a particular focus on *Buckley*, *Shrink Missouri*, and *Randall*. Part II then delves into the post-*Randall* treatment of SLCLs by lower courts and eventually the *Thompson* Court. Next, Part III offers a wholehearted defense of the enduring importance of contribution limits in a democracy. The Part provides some much-needed pushback against recent sentiments among campaign finance scholars that contribution limits are virtually meaningless nowadays. It also discusses the extent to which the future of SLCLs is in jeopardy. Finally, Part IV provides the groundwork for tailoring a danger signs test that reflects both the modern state of campaign finance and developments in the Court's precedent. In doing so, the Part explains the concept of the quid pro quo market, lays out what the danger signs test's two-step analysis should look like, and, by using both existing research and original quantitative analysis, explores which danger signs should matter more in step one and which should not be considered danger signs at all.

I. THE JURISPRUDENCE OF STATE & LOCAL CONTRIBUTION LIMITS

Any discussion of U.S. campaign finance law—including SLCLs—must inevitably start with *Buckley v. Valeo*.[33] While campaign finance law existed in

31. *See infra* Part IV.C.

32. *See infra* note 389.

33. Buckley v. Valeo, 424 U.S. 1 (1976).

the United States well before *Buckley*,[34] the 1976 case very much "laid the foundation of modern campaign finance jurisprudence."[35] Accordingly, to tell the whole story of SLCLs, this Part begins by breaking down the framework that the *Buckley* Court created for modern-day campaign finance law. Next, Part I.B discusses *Nixon v. Shrink Missouri Government PAC*,[36] the first case in which the Court confronted the uncertainties of applying *Buckley* to SLCLs. Lastly, Part I.C overviews *Randall v. Sorrell* [37] and the "test" that Justice Breyer laid out for determining the constitutionality of SLCLs and then provides a summary of the array of reactions that immediately followed the decision.

A. The Buckley *Framework*

In 1974, to combat post-Watergate revelations that President Nixon and other politicians had received millions of dollars in pledged campaign contributions from interest groups in exchange for pro-business regulation,[38] Congress passed sweeping amendments to the Federal Election Campaign Act (FECA).[39] While the amendments had many provisions, two of the most important ones were (1) a $1,000 limit on the amount that individuals and organizations could donate (i.e., contribute) to federal candidates and political parties,[40] and (2) a $1,000 limit on expenditures—both independent and coordinated[41]—that individuals and organizations could make in support of a federal candidate.[42] Such restrictive limits naturally led to condemnation, and a

34. *See, e.g.*, Federal Corrupt Practices Act, Pub. L. No. 61-274, §§ 5–6, 36 Stat. 822, 823–24 (1910) (requiring House candidates to disclose information on contributions received); Act of Mar. 6, 1909, § 24, 1909 Idaho Sess. Laws 196, 204 (limiting how candidates could expend campaign contributions received). Indeed, eight states had already instituted their own contribution limits decades before Congress established federal limits. *See* Comment, *Loophole Legislation—State Campaign Finance Laws*, 115 U. PA. L. REV. 983, 991–92, 991 nn.64–65 (1967).

35. Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397, 409 (2015); *see also* George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1607 (2008) ("*Buckley* is the foundation of modern campaign finance doctrine . . . .").

36. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

37. Randall v. Sorrell, 548 U.S. 230 (2006).

38. *See* Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 612–13 ("[T]he 'Milk Producer Association pledged $2,000,000 to President Nixon's campaign for reelection . . . at the same time as the Nixon Administration granted an increase in the support price of milk.'" (second alteration in original)); *see also* S. REP. NO. 93-981, at 581 (1974).

39. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

40. *Id.* sec. 101(a), § 608(b)(1), 88 Stat. at 1263.

41. The difference between "independent" and "coordinated" expenditures is that "coordinated" expenditures are made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." Buckley v. Valeo, 424 U.S. 1, 78 (1976). They are effectively the same thing as contributions, and for the remainder of this Article, "contributions" will mean both contributions and coordinated expenditures.

42. Federal Election Campaign Act Amendments of 1974, sec. 101(a), § 608(e)(1), 88 Stat. at 1265.

"broad coalition of groups" immediately challenged the constitutionality of the 1974 FECA amendments.[43] This challenge eventually worked its way up to the Supreme Court in 1975, in the case of *Buckley v. Valeo*.

Two months after oral arguments, the Court issued the opinion that would come to shape the entire future of campaign finance jurisprudence.[44] The *Buckley* opinion itself covered a wide variety of issues.[45] The most crucial portions of the opinion, however, are the Court's disparate treatments of limits on contributions and independent expenditures. While the Federal Government attempted to justify both limits primarily under a governmental interest in "the prevention of corruption and the appearance of corruption,"[46] the Court ultimately upheld only the limits on contributions, holding FECA's limits on independent expenditures violative of the First Amendment.[47]

What explains this bifurcated approach? In the Court's own words, it found that limits on independent expenditures "impose[d] far greater restraints on the freedom of speech and association than [did] . . . contribution limitations."[48] The Court reasoned that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression."[49] Consequently, the Court reviewed these limits under "exacting scrutiny," comparable to today's strict scrutiny.[50]

Conversely, the Court subjected contribution limits to an intermediate scrutiny. While the Court found that FECA's contribution limits implicated "fundamental First Amendment interests,"[51] it distinguished such limits as less restrictive than independent expenditure limits because contributions will always signal a "general expression of support for [a] candidate" regardless of

43. *See* Pasquale, *supra* note 38, at 614.

44. The Court evidently understood the magnitude of the case, allotting a rare four hours of oral arguments. *See* Andrew Christy, *'Obamacare' Will Rank Among the Longest Supreme Court Arguments Ever*, NPR (Nov. 15, 2011, 5:11 PM), https://www.npr.org/sections/itsallpolitics/2011/11/15/142363047/obamacare-will-rank-among-the-longest-supreme-court-arguments-ever.

45. The case was basically a constitutional challenge against the entirety of FECA. *See Buckley*, 424 U.S. at 7.

46. *Id.* at 25–26. The Government had also argued two "ancillary" interests: equalizing "the relative ability of all citizens to affect the outcome of elections," and equalizing the playing field for all candidates. *See id.* Nevertheless, the Court found neither of these interests to be convincing enough to justify either contribution or expenditure limits. *See id.* at 47–49.

47. *Id.* at 143.

48. *Id.* at 44.

49. *Id.* at 19.

50. *See* John J. Martin, *Self-Funded Campaigns and the Current (Lack of?) Limits on Candidate Contributions to Political Parties*, 120 COLUM. L. REV. F. 178, 181 n.19 (2020). Today's Court treats exacting scrutiny as slightly less burdensome than strict scrutiny. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021).

51. *Buckley*, 424 U.S. at 23.

their quantity.[52] Accordingly, the Court applied to contribution limits what is now known as "*Buckley* scrutiny,"[53] under which contribution limits must be "closely drawn" to a "sufficiently important" governmental interest.[54] Ultimately, in applying this standard, the Court found the Government's anticorruption interest sufficiently important enough to uphold FECA's contribution limits.[55]

Buckley's contribution–expenditure distinction has now haunted campaign finance law for almost five decades, leaving very few contented. Left-wing and right-wing critics alike deem the distinction "artificial," though for different reasons.[56] For instance, Justice Thomas would argue that both contribution limits and independent expenditure limits severely implicate fundamental First Amendment rights.[57] Meanwhile, the late Justice Stevens would adamantly assert that neither burden any First Amendment rights because "money is not speech."[58] Hence, *Buckley* created perhaps one of the most disfavored compromises in American judicial history.

To add to the confusion, *Buckley* left open one very significant question: How does the opinion apply to contribution limits passed on state and local levels? To recall, the *Buckley* Court addressed *federal* campaign finance law and therefore did not reach the subject of campaign finance laws in state and local elections.[59] Could states and localities institute contribution limits below the federal limits? Or were the federal limits the lowest levels permitted? Commentators spent the next twenty-four years debating this question.[60] Finally, in 2000, the Court provided an answer.

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52. *See id.* at 20–21. For example, whether I contribute $1,000 or $10,000 to a candidate's campaign, the ultimate speech value of the contribution is "I support this candidate."

53. *See, e.g.*, FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado II*), 533 U.S. 431, 466 (2001) (Thomas, J., dissenting) ("*Buckley* scrutiny has meant that restrictions on contributions by individuals and political committees do not violate the First Amendment so long as they are 'closely drawn' to match a 'sufficiently important' government interest . . . ." (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–89 (2000))).

54. *Buckley*, 424 U.S. at 25.

55. *See id.* at 26–29.

56. Chad Flanders, *Alaskan Exceptionalism in Campaign Finance*, 37 ALASKA L. REV. 191, 194–95 (2020).

57. *See* Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 640 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

58. Ben Goad, *John Paul Stevens: 'Money Is Not Speech'*, THE HILL (Apr. 30, 2014, 11:33 AM), https://thehill.com/regulation/204800-john-paul-stevens-money-is-not-speech.

59. *See supra* notes 39–43 and accompanying text.

60. *See, e.g.*, William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483, 497–500 (1996).

B. Shrink Missouri*: A Victory for SLCLs?*

The Supreme Court addressed SLCLs for the first time in *Nixon v. Shrink Missouri Government PAC*.[61] Without yet getting too deep into the weeds of the case, the Court ultimately held that Missouri could pass contribution limits lower than the federal ones upheld in *Buckley*.[62] At the time, some experts declared *Shrink Missouri* "a victory" for advocates of campaign finance reform.[63] Were they correct? To answer that, we must go back to the beginning of the journey of Missouri's limits.

In 1994, Missouri enacted, through a popular ballot measure, what became some of the most restrictive contribution limits in the country, with individual-to-candidate and party-to-candidate limits ranging from $100 for legislative candidates to $300 for statewide office candidates,[64] an amount nearly nine times lower than the limits upheld in *Buckley* (when accounting for inflation). Not soon after, Missouri faced a legal challenge from a Missouri lawyer who claimed that the new limits were "in violation of his rights of free speech and association."[65] The United States Court of Appeals for the Eighth Circuit struck down the limits as unconstitutional,[66] applying a standard of scrutiny stricter than *Buckley* scrutiny.[67] Nevertheless, the Supreme Court denied certiorari,[68] refusing to address the issue of SLCLs after two decades of silence.

With the ballot measure-imposed limits gone, much higher, legislature-imposed limits took their place.[69] Once again, not much time passed before these limits too were challenged in court, this time by a political action committee (PAC) called Shrink Missouri Government PAC. At the time of the suit, Missouri's new contribution limits ranged from $1,075 for statewide candidates to $275 for some legislative offices.[70] Yet, despite these limits being multiple times greater than the previous ones, the Eighth Circuit once again invalidated them.[71] This time, the Supreme Court granted certiorari, providing some hope for clarity to those unsure about how *Buckley* interacted with SLCLs.

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61. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

62. *See id.* at 397–98.

63. *See, e.g.*, Trevor Potter & Kirk L. Jowers, *The Frequently Mischaracterized Impact of the Courts on the FEC and Campaign Finance Law*, 51 CATH. U. L. REV. 839, 844 (2002).

64. Proposition A, § 130.100, 1994 Mo. Laws 1249, 1250.

65. Carver v. Nixon, 72 F.3d 633, 635 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

66. *See id.* at 645.

67. *See id.* at 635, 643–44.

68. Nixon v. Carver, 518 U.S. 1033, 1033 (1996).

69. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 382 (2000). The Missouri General Assembly amended these limits once in 1997 before *Shrink Missouri*. *See* Act of July 7, 1997, § 130.032, 1997 Mo. Laws 435, 471.

70. *Shrink Mo.*, 528 U.S. at 382–83.

71. *See* Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 521–22 (8th Cir. 1998), *rev'd sub nom.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

This was, after all, not simply a Missouri problem. By the time of *Shrink Missouri*, about sixteen states had imposed contribution limits below the levels upheld in *Buckley*.[72] An answer was long overdue.

The *Shrink Missouri* Court ended up reversing the Eighth Circuit in a 6 – 3 decision,[73] upholding Missouri's new limits. In an opinion written by Justice Souter, the Court first reaffirmed the *Buckley* standard, emphasizing the contribution–expenditure distinction and finding the Eighth Circuit's standard too strict.[74] In the Court's own words: "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."[75] Thus, the Court stressed that Missouri's contribution limits needed only to be "closely drawn" to a "sufficiently important interest"—i.e., its anticorruption interest.[76]

Next, the Court assessed whether Missouri's contribution limits did indeed pass *Buckley* scrutiny. The Court found "no serious question about the legitimacy of [Missouri's] interests claimed," which was the same standard anticorruption interest endorsed in *Buckley*.[77] Moreover, the Court cited convincing evidence that the Missouri General Assembly had valid concerns about potential corruption in campaign finance.[78] Finally (and most importantly), the Court saw no indication that the contribution limits would prevent candidates or political committees from running successful campaigns.[79] Consequently, the Court found no reason to overturn Missouri's new contribution limits.

In upholding Missouri's limits, the *Shrink Missouri* Court explicitly "rejected the contention that [FECA's limits], or any other amount, was [the] constitutional minimum below which legislatures could not regulate."[80] The

72. Connolly, *supra* note 60, at 498–500, 499 n.81.

73. The three dissenting justices were Justices Kennedy, Thomas, and Scalia. All three expressed dissatisfaction with *Buckley*'s framework, though for different reasons. Justice Kennedy opposed *Buckley* due to his belief that it failed to work in practice. *See Shrink Mo.*, 528 U.S. at 406–07 (Kennedy, J., dissenting). Meanwhile, Justices Thomas and Scalia—joined together under one dissent—simply repeated their long-held beliefs that contribution limits should be subject to the same exacting scrutiny as independent expenditure limits. *See id.* at 412 (Thomas, J., dissenting); *see also supra* note 57 and accompanying text.

74. *Shrink Mo.*, 528 U.S. at 386–95.

75. *Id.* at 387 (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 259–60 (1986)).

76. *Id.* at 387–88 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)) ("[T]he dollar amount of the limit need not be 'fine tun[ed].'" (second alteration in original) (quoting *Buckley*, 424 U.S. at 30)).

77. *Id.* at 390.

78. This evidence included "newspaper accounts of large contributions supporting inferences of impropriety," "report[s] question[ing] the state treasurer's decision to use a certain bank for most of Missouri's banking business after that institution contributed $20,000 to the treasurer's campaign," and evidence of "three scandals, including one in which a state representative was 'accused of sponsoring legislation in exchange for kickbacks.'" *Id.* at 393–94 (quoting Carver v. Nixon, 72 F.3d 633, 642 & n.10 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996)).

79. *See id.* at 395–96.

80. *Id.* at 397.

Court hence answered yes to the question of whether SLCLs could fall below the limits upheld in *Buckley*. What matters, said the Court, is not the number value of the specific limit, but rather whether "the limits [are] so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'"[81] This concept would become crucial six years later in *Randall v. Sorrell*.[82]

So, to return to the question: Is it correct to call *Shrink Missouri* "a victory" for campaign finance reform? It is complicated. To be sure, there were a few wins. For one, the Court reasserted in unambiguous terms "that a lower standard of scrutiny applies to contribution limits than to restrictions on independent expenditure[s]."[83] Furthermore, the Court gave assurance to states and localities that their limits would not be deemed per se unconstitutional simply for falling below the federal limits.[84]

On the other hand, the Court subtly shifted its approach within the *Buckley* framework, moving its concern over contribution limits beyond the associational rights of contributors and focusing more so on how contribution limits might affect the electoral competitiveness of candidates.[85] This shift effectively elevated the weight of concern given by courts to dollar amounts when reviewing contribution limits. To recall, the *Buckley* Court asserted that the First Amendment value derived from a contribution comes from "the act of contributing" itself, as opposed to "the amount of the contribution."[86] Nevertheless, in focusing on the candidates' ability to raise sufficient campaign funds, courts post-*Shrink Missouri* were expected to show much greater concern for "the amount of the contribution." Furthermore, the Court's denial of

81. *Id.* (alteration in original) (quoting *Buckley*, 424 U.S. at 21).

82. *See infra* Part I.C.

83. Potter & Jowers, *supra* note 63 (emphasis omitted). Of course, maintaining this distinction may not be perceived as that much of a victory by the "money is not speech" crowd. *See supra* note 58 and accompanying text.

84. *See Shrink Mo.*, 528 U.S. at 397.

85. *See id.* ("[W]e refer[] instead to the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'" (third alteration in original) (quoting *Buckley*, 424 U.S. at 21)). As Professor Richard Briffault observes, "The *Shrink Missouri* Court implicitly acknowledged the burden contribution limits could potentially place on competitiveness." Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1767 (2001). This shift has not resulted in courts abandoning any attention to the associational rights of contributors. Indeed, concerns about such rights were at the forefront of the Court's decision in *McCutcheon v. FEC*. *See* 572 U.S. 185, 204 (2014) (plurality opinion). Nevertheless, most challenges to contribution limits (and other limits in campaign finance law) nowadays approach the issue from a candidate-oriented approach. *See, e.g.*, Motion to Affirm or Dismiss at 1–3, FEC v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022) (No. 21-12), 2021 WL 3821373, at *1–3 (arguing that the Bipartisan Campaign Reform Act of 2002's (BCRA) limit on the amount of post-election contributions that federal candidates may use to pay off personal loans "deters candidates from loaning money to their campaigns" and thus could prevent them from mounting a successful campaign).

86. J. Robert Abraham, Note, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1082 (2010); *see also Buckley*, 424 U.S. at 21.

certiorari in the first challenge to Missouri's limits suggested that the Court—which had the exact same composition as it did in *Shrink Missouri*—indeed harbored some concerns at the time over the lower bounds of SLCLs.[87]

Overall, *Shrink Missouri* signaled to state and local governments that they were not bound to the contribution limits set forth in the 1974 FECA amendments. At the same time, the case certainly did not provide blanket immunity to SLCLs, and, in some ways, might have made it more difficult to defend some of the really low ones should a similar challenge make its way to the Supreme Court again.[88] As (bad?) luck would have it, it took only six years for this to happen.

C. Randall v. Sorrell*: The "Newer Incoherence"*

In 1997, the Vermont General Assembly passed Act 64, which completely overhauled Vermont's campaign finance system.[89] Among other things, Act 64 instituted very stringent contribution limits, under which individuals and political parties could not contribute more than $200 to state house candidates, $300 to state senate candidates, or $400 to statewide office candidates.[90] Following Act 64's passage, a mixture of candidates, voters, and political parties all mounted a collective legal challenge against the Act, including its low contribution limits.[91] The challenge eventually made its way up to the Supreme Court.[92]

With only half a decade having passed since *Shrink Missouri*, it was difficult to predict with any certainty just how the Court would land on Vermont's contribution limits.[93] Would the *Shrink Missouri* Court's reaffirmation of contribution limits' intermediate scrutiny play in Vermont's favor, or would the Court's shift toward a candidate-oriented framework lead the *Randall* Court to disfavor Vermont's uniquely low contribution limits? In the end, the latter happened,[94] though in a remarkably divided opinion in which only two justices joined the plurality in full (Justices Breyer and Roberts). With division came confusion, as campaign finance experts were left unsure about how exactly to interpret the opinion and the legal standard it put forth—Rick Hasen dubbed

87. *See* Nixon v. Carver, 518 U.S. 1033, 1033 (1996).

88. *See supra* note 86 and accompanying text.

89. *See* Act of June 26, 1997, No. 64, sec. 6, § 2805(a), 1997 Vt. Acts & Resolves 490, 497; *see also* Randall v. Sorrell, 548 U.S. 230, 237–39 (2006).

90. *See* Act of June 26, 1997, sec. 6, § 2805(a), 1997 Vt. Acts & Resolves at 497.

91. *Randall*, 548 U.S. at 239–40.

92. Randall v. Sorrell, 545 U.S. 1165, 1165 (2005).

93. *See, e.g.*, Brian L. Porto*, Less Is More and Small Is Beautiful: How Vermont's Campaign-Finance Law Can Rejuvenate Democracy*, 30 VT. L. REV. 1, 25 (2005) ("Uncertainty about the outcome notwithstanding, it is easy to understand why the Supreme Court chose to review *Landell v. Sorrell*.").

94. *See Randall*, 548 U.S. at 262–63 (plurality opinion).

it "the newer incoherence."[95] This Subpart overviews *Randall*, summarizes the "danger signs" test applied by Justice Breyer in his plurality, and then engages with the contemporary reactions that experts and commentators at the time had to *Randall*.

1. The Opinion

The *Randall* Court produced six separate opinions, none of which attained a majority.[96] The plurality opinion, written by Justice Breyer, was joined only by Chief Justice Roberts in full and Justice Alito in part. Three concurrences were filed: one by Justice Kennedy, one by Justice Thomas (joined by Justice Scalia), and one by Justice Alito. Lastly, Justices Souter and Stevens both wrote separate dissents, though Justice Ginsburg and Justice Stevens also joined Justice Souter's dissent. All in all, not the most cohesive of opinions produced by the Court.

a. The Plurality & the Danger Signs Test

To begin with Justice Breyer's opinion (which has been theoretically adopted by a majority of today's Court[97]), the plurality concluded that Vermont's contribution limits were unconstitutional under *Buckley*'s framework. The plurality started by laying down some ground rules:

> Following *Buckley*, we must determine whether Act 64's contribution limits prevent candidates from "amassing the resources necessary for effective [campaign] advocacy"; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, *whether they are too low and too strict to survive First Amendment scrutiny*.[98]

The plurality thus employed to an extent the same candidate-oriented approach seen in *Shrink Missouri*,[99] i.e., that candidates have a First Amendment interest in being able to raise enough money to mount an effective campaign.

The plurality also recognized that "[the Court] cannot determine with any degree of exactitude the precise restriction necessary to carry out [Act 64's] legitimate objectives."[100] Nevertheless, the plurality stressed the existence of "some lower bound" that must be determined through "the exercise of

95. *See generally* Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After* Randall v. Sorrell, 68 OHIO ST. L.J. 849 (2007).

96. *See Randall*, 548 U.S. at 235.

97. *See infra* Part II.B.

98. *Randall*, 548 U.S. at 248 (alteration in original) (emphasis added) (citation omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

99. *See supra* notes 85–86 and accompanying text. *But see infra* note 116 and accompanying text.

100. *Randall*, 548 U.S. at 248.

independent judicial judgment."[101] In a way, the plurality admitted to placing the Court in a virtually impossible position of determining the undeterminable. How, then, did it proceed?

First, the plurality developed a threshold standard for establishing when a court should review the record independently: whether there are "danger signs" that contribution limits are so low that they threaten the democratic process.[102] Accordingly, if a court were to find danger signs that a state's contribution limits are too low to, say, allow candidates—particularly challengers—to properly campaign, they could then exercise independent judicial judgment. In *Randall*, the plurality explicitly identified the following danger signs in Act 64: (1) the limits were "per election cycle" rather than "per election," meaning that if someone gave $200 to a state house candidate in a primary, they could not donate any further money to said candidate in the general election,[103] (2) the limits were "well below" the limits upheld in *Buckley*,[104] (3) the limits on individual contributions were among "the lowest in the Nation,"[105] (4) the limits on political party contributions were literally the lowest in the United States,[106] and (5) the limits were much lower than those upheld in *Shrink Missouri*.[107] Finding enough danger signs present, the plurality moved onto the next step of its substantive analysis: reviewing the record.

The plurality specifically highlighted five factors that, "taken together," led it to find Vermont's contribution limits not "closely drawn" enough to survive *Buckley* scrutiny.[108] First, the record indicated that many candidates in competitive races would have their available funding severely reduced by the new limits.[109] Second, Act 64's application of the same low limits to both individual-to-candidate contributions and party-to-candidate contributions undermined "the right to associate in a political party."[110] Third, Act 64 counted expenses incurred by campaign volunteers as being part of those volunteers'

101. *Id.* at 248–49.

102. *See id.* at 249.

103. *See id.*

104. *Id.* at 250.

105. *Id.* at 250–51.

106. *Id.* at 251.

107. *Id.*

108. *Id.* at 253.

109. *See id.* at 253–56 ("57% of all 1998 Senate campaigns and 30% of all House campaigns exceeded Act 64's expenditure limits, which were enacted along with the statute's contribution limits. Moreover, 27% of all Senate campaigns and 10% of all House campaigns spent more than double those limits." (citation omitted)).

110. *Id.* at 256–59. The Court has previously upheld limits on contributions from political parties to candidates. *See, e.g.*, *Colorado II*, 533 U.S. 431, 465 (2001). The *Randall* plurality, however, noted that "the contribution limits at issue in *Colorado II* were far less problematic, for they were significantly higher than Act 64's limits." *Randall,* 548 U.S. at 258.

contributions to the campaign.[111] Fourth, the contribution limits in Act 64 were not indexed for inflation, which could result in debilitatingly low limits should the Vermont General Assembly neglect to ever update them.[112] Finally, the record provided no special justification to warrant why Vermont needed such significantly low limits.[113] Consequently, the plurality deemed Vermont's contribution limits disproportionality burdensome on candidates' First Amendment interests and, in turn, invalidated them.[114] This marked the first time the Court had ever "invalidated contribution limitations on the ground that they were too low."[115]

While the *Randall* plurality in some ways represented a continuation of *Shrink Missouri*'s focus on electoral competition, Justice Breyer interestingly seemed to expand this focus by showing concern for the democratic process more broadly. For instance, in critiquing Act 64's burden on campaign volunteering and exceptionally low party-to-candidate limits, the plurality suggested that civic participation and political party health should also be considered when reviewing SLCLs.[116] While this shift arguably complicated the analysis, it also constituted an important recognition (by at least some members of the Court) that democracy is a vibrant, multifaceted system, and, in turn, that contribution limits can affect many components of a democracy beyond candidates. That is not to say that electoral competition did not significantly drive the analysis, but it nevertheless was not the only element influencing the plurality's decision.

b. The Other Opinions

The plurality was followed by three concurrences. Justice Alito's concurrence distanced himself from the plurality's discussion of stare decisis regarding expenditure limits.[117] Justice Kennedy concurred only in the judgment, expressing the same skepticism against the system of campaign

111. *See Randall,* 548 U.S. at 259–60. The plurality noted how easy it would be to reach this limit; for example, sending out 500 letters advocating for a state house candidate would cost over $200 in stamps alone. *See id.* at 260.

112. *Id.* at 261.

113. *Id.* ("The record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere.").

114. *See id.* at 261–63 ("[T]he Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation.").

115. Lillian R. Bevier, *Full of Surprises—And More to Come:* Randall v. Sorrell*, the First Amendment, and Campaign Finance Regulation*, 2006 SUP. CT. REV. 173, 178.

116. *See Randall*, 548 U.S. at 261–62.

117. *See id.* at 263–64 (Alito, J., concurring in part and concurring in the judgment).

finance regulated under *Buckley* that he had expressed in *Shrink Missouri*.[118] Justice Thomas, joined by Justice Scalia, also concurred only in the judgment, writing that "*Buckley* provides insufficient protection to political speech."[119] Overall, the *Randall* concurrences expressed a desire to move away from the *Buckley* framework's less-than-strict treatment of contribution limits.

Conversely, the two dissents criticized *Buckley* from the other end. Justice Stevens plainly asserted that the "time has come to overrule" *Buckley*'s prohibition on expenditure limits because "it is quite wrong to equate money and speech."[120] Thus, Justice Stevens would have upheld both Vermont's expenditure and contribution limits. In a more moderate dissent, Justice Souter wrote that the Court should have deferred to the United States Court of Appeals for the Second Circuit on contribution limits because Act 64's limits were not "beyond the constitutional pale" given the Court's opinion in *Shrink Missouri*.[121]

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In some ways, *Randall* illustrated just how divided the Court was regarding *Buckley*. Despite this, however, some assert that *Randall* actually "did little more than affirm *Buckley*'s status quo," under which independent expenditure limits are generally prohibited and contribution limits are permitted so long as they are "closely drawn" to an anticorruption interest.[122] This could very well be the case. Yet, *Randall*'s biggest move may have been precisely what it *did not* do: create a clear standard for reviewing SLCLs. Instead, campaign finance experts were left with something that resembled a two-part test, endorsed by approximately two and a half Justices, with no well-defined parameters to which lower courts could adhere. As the next Subpart briefly surveys, this led to some confusion amongst those in the field.

2. The Reaction

The *Randall* plurality elicited a mixture of reactions. Some believed the danger signs test would grant judges too much authority to inject their personal values into SLCL cases.[123] Others praised the test for giving due deference to

118. *See id.* at 264–65 (Kennedy, J., concurring in the judgment).
119. *Id.* at 265–66 (Thomas, J., concurring in the judgment).
120. *Id.* at 274–77 (Stevens, J., dissenting).
121. *See id.* at 284–88 (Souter, J., dissenting).
122. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 287 (2006).
123. *See, e.g.*, Hasen, *supra* note 95, at 886.

legislative bodies.[124] Many simply found the plurality's approach confusing and poorly explained.[125] At the very least, most commentators could agree on a few high-level details, such as the plurality's approach being a "two-part test,"[126] step one being whether there are enough "danger signs" to warrant independent judgment and step two being somewhat about whether contribution limits are closely drawn enough to an anticorruption interest.[127] The consensus seemed to end there, though.

Elizabeth Garrett was particularly critical of the plurality opinion, putting forth a list of questions:

> How many of the danger signs are required to trigger independent judicial assessment of the regulation, rather than judicial deference to legislative judgments? What is the hierarchy of the signs? Are they the only danger signs, or are there others that we will learn about in future cases? We do not know. We have no idea. We do not even know why these were picked as danger signs.[128]

While this criticism is rather strong, there is merit to it. Justice Breyer provided little explicit explanation as to why he picked the particular danger signs identified.[129] Moreover, commentators could not even settle on precisely how many danger signs the plurality discussed, some pointing out five and others only listing four.[130] Garrett was not alone in her assessment, either. Lillian Bevier, for instance, pointed out the plurality's failure to provide clarity regarding its step-two analysis.[131] She noted how the plurality did not "specify the relative weight that should be given to the factors; whether any of the five factors might be dispositive; whether all would need to be present in the same degree; [or] whether other factors might also be relevant."[132] Some even

124. *See, e.g.*, Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 750 (2007).

125. *See, e.g.*, Garrett, *supra* note 16, at 569–70; Bevier, *supra* note 115, at 181.

126. *See, e.g.*, Hasen, *supra* note 95, at 864; James Coleman, *The Slow, Just, Unfinished Demise of the* Buckley *Compromise:* Randall v. Sorrell*, 126 S. Ct. 2479 (2006)*, 30 HARV. J.L. & PUB. POL'Y 427, 430 (2006); Karlan, *supra* note 124.

127. Hasen, *supra* note 95, at 864.

128. Garrett, *supra* note 16, at 561.

129. Of course, Breyer's fluid, standard-like analysis may have very well been by design. After all, does the *Randall* plurality really read as a "test" that is expected to be followed note for note? Nevertheless, even if this is the case, the plurality's ambiguity is still enough for judges and scholars to ask, "So what do we do with this?" Moreover, the Court appeared to at least attempt to replicate the *Randall* plurality's analysis in *Thompson v. Hebdon*, which potentially undermines the notion that the danger signs test as conducted in *Randall* is an entirely customizable inquiry. *See infra* notes 179, 182–188 and accompanying text.

130. *Compare* Hasen, *supra* note 95, at 865 (identifying five danger signs), *with* Bevier, *supra* note 115, at 180 (identifying four danger signs), *and* Coleman, *supra* note 126, at 430 (same).

131. Bevier, *supra* note 115, at 181.

132. *Id.*

contended that the danger signs test "is far too vague to be a workable rule of law."[133]

Hasen disapproved of the danger signs test particularly because of its "superficial aura of scientific exactness."[134] Hasen predicted that "[f]ollowing *Randall*, . . . challenges to low contribution limits will turn . . . upon fact-intensive political science expert testimony about the amount of money necessary to run a competitive race in the relevant jurisdiction."[135] In other words, trials would turn into a battle of statistics and regression equations. Wary of this trend, Hasen believed that the *Randall* plurality's test would give judges too much leeway, emboldening them to "hear what they want to hear about how particular campaign contribution limits are likely to affect the competitiveness of close elections."[136] Hasen's criticism, however, had itself received pushback from others who interpreted the test's two-step analysis more optimistically. Christopher Elmendorf, for instance, pointed out that Justice Breyer's approach in *Randall* turned largely on qualitative factors, as opposed to the quantitative impact of contribution limits on political competition.[137] Furthermore, Pamela Karlan emphasized how the test directs judges to afford legislatures deference so long as there are not significant danger signs,[138] which could help quell fears of judges "hear[ing] what they want to hear" since they likely may not even reach step two's independent judicial judgment.[139]

One final, more neutral observation made by academics was how the plurality further shifted the Court's focus from being contributor-oriented to candidate-oriented.[140] Some believed Justice Breyer's approach might have been inspired by Samuel Issacharoff and Richard Pildes's central argument in their

133. Coleman, *supra* note 126, at 432, 436. *But see* Cole Schlabach, Comment, *Money Talks: Creating a "Workable Inquiry" from the Supreme Court's 1st Amendment Restrictions on Political Contribution Limitations in* Randall v. Sorrell, 40 ARIZ. ST. L.J. 351, 352 (2008) ("[T]he analysis is simpler than it may appear . . . .").

134. Hasen, *supra* note 95, at 879.

135. *Id.* at 853.

136. *Id.* at 886.

137. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 361 n.209 (2007). Elmendorf appears to get the better of the argument here, being that four out of the five factors on which Justice Breyer relied in step two are qualitative. *See supra* notes 109–113 and accompanying text.

138. *See* Karlan, *supra* note 124; *see also* Randall v. Sorrell, 548 U.S. 230, 248 (2006) (plurality opinion) ("Thus ordinarily we have deferred to the legislature's determination of such matters.").

139. Hasen, *supra* note 95, at 886; *see also* Deborah Goldberg & Brenda Wright, *Defending Campaign Contribution Limits After* Randall v. Sorrell, 63 N.Y.U. ANN. SURV. AM. L. 661, 675 (2007) (arguing that states likely will not be subject to independent examination "unless [their] limits, on a per-election basis, are both lower than those in the rest of the nation and lower than those previously upheld").

140. *See, e.g.*, Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 391 (2011) ("To speak broadly, and at the risk of oversimplification, the debate shifted from *liberty-versus-anti-corruption* to *equality-versus-competitiveness*—even though the Court did not expressly acknowledge this shift.").

article, *Politics as Markets*. In short, Issacharoff and Pildes argue that in cases involving the regulation of politics, "courts should shift from the conventional first-order focus on rights and equality to a second-order focus on the background markets in partisan control."[141] Compare this with the *Randall* plurality opinion, in which Justice Breyer stated that the Court "must determine whether Act 64's contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'"[142] Based on this language, Justice Breyer certainly may have premised his approach off the same concerns for partisan competition that Issacharoff and Pildes believe should be driving courts' decisions on election law matters.[143] At the same time, much of what he said came directly from *Buckley*.[144]

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Sixteen years have passed since *Randall v. Sorrell*. And while there was an abundance of criticisms immediately following the decision, little follow-up analysis has been written on how lower courts ended up interpreting it. Has there actually been confusion and disagreement over how to apply the danger signs test? Do judges inject too much of their own personal thoughts into cases when determining whether an SLCL is too low? Furthermore, how have other changes in campaign finance jurisprudence affected how courts approach SLCLs? Part II delves into these questions.

II. THE POST-*RANDALL* WORLD

Since *Randall v. Sorrell*, there have been a few developments in the jurisprudence of contribution limits that could affect how courts treat challenges against SLCLs going forward. This Part addresses such developments. First, we begin with how lower courts have applied *Randall* over the last decade and a half. The short answer is "not uniformly." Next, Part II.B discusses the Supreme Court's latest case on contribution limits, *Thompson v. Hebdon*,[145] in which the majority of the Court endorsed the *Randall* plurality's danger signs test while simultaneously failing to consistently apply it. Finally,

141. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998). Issacharoff and Pildes further suggest "courts would do better to examine the background structure of partisan competition. Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention." *Id.*

142. *Randall*, 548 U.S. at 248 (plurality opinion) (alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

143. *See* Issacharoff & Pildes, *supra* note 141.

144. *See Buckley*, 424 U.S. at 21.

145. Thompson v. Hebdon, 140 S. Ct. 348 (2019).

Part II.C briefly touches upon other post-*Randall* developments in the Court's campaign finance jurisprudence, including its increasingly skeptical standard of review and its cabining of the government's anticorruption interest in setting contribution limits to cover only one type of corruption—quid pro quo corruption.

A. The Nonuniform Application of the Danger Signs Test

Based on how lower courts have applied *Randall* to challenges against SLCLs, those who were concerned about the *Randall* plurality not providing a clear framework have been vindicated.[146] Indeed, courts deciding these cases have managed to employ a diverse range of approaches. Some follow to a tee the five danger signs and five factors that the plurality discussed. Other courts confuse the order of the test's two-step process. Lastly, some courts refuse altogether to apply *Randall*, given that it had no majority opinion. This section overviews one case from each of these three groups.

1. The Stickler: Lair v. Bullock

In 2012, the United States District Court for the District of Montana was in the midst of handling a lengthy legal challenge against Montana's contribution limits.[147] At the time of the original challenge, the limits were quite low: $630 for gubernatorial candidates, $310 for other statewide candidates, and $160 for candidates to all other public offices.[148] The district court eventually struck down the limits as unconstitutional in the case of *Lair v. Murry*,[149] and the challenge made its way to the United States Court of Appeals for the Ninth Circuit.[150]

In reviewing the district court's decision, the Ninth Circuit applied the *Randall* plurality's danger signs test word for word, treating Justice Breyer's every consideration as binding and relevant. First, the court formulaically went through each danger sign identified in the *Randall* plurality.[151] Having identified the existence of these danger signs, the court in turn applied each of the five factors listed in step two of the *Randall* plurality.[152] The court found these

146. *See supra* notes 128–133 and accompanying text.

147. *See* Lair v. Murry, 903 F. Supp. 2d 1077, 1078 (D. Mont. 2012), *rev'd sub nom.* Lair v. Bullock, 798 F.3d 736 (9th Cir. 2015).

148. *See id.* at 1086.

149. *See id.* at 1093–94.

150. Lair v. Bullock (*Lair I*), 697 F.3d 1200 (9th Cir. 2012).

151. *See id.* at 1208–10.

152. *See id.* at 1210–14.

factors to work in favor of the State and therefore stayed the district court's injunction.[153]

Such a clean, strict application of the two-step test would seem to support the claim that "the analysis [in *Randall*] is simpler than it may appear."[154] Nevertheless, cases like *Lair* seem to be the exception to the norm;[155] in fact, the Ninth Circuit itself has not been consistent in its application of *Randall*,[156] even flip-flopping later on in the *Lair* case. After its initial review of the district court's decision, the Ninth Circuit held in 2015 that the district court erred in applying *Randall* over the Ninth Circuit's own standard for reviewing SLCLs, noting that "there simply was no binding *Randall* decision on that point."[157] The Ninth Circuit, nevertheless, reversed again the district court's decision to strike down Montana's limits in 2017, this time applying both the Ninth Circuit's test and *Randall* plurality together.[158] Finally, following the Supreme Court's decision in *Thompson v. Hebdon*, the Ninth Circuit reaffirmed its 2017 decision, asserting that Montana's limits were constitutional under either test.[159] The *Lair* case truly exemplifies the "newer incoherence" of *Randall*.[160]

2. The Mixed-Up: Riddle v. Hickenlooper

In 2002, Coloradan voters passed Amendment 27, a state constitutional amendment that instated individual- and PAC-to-candidate contribution limits ranging from $500 for statewide offices to $200 for other state offices (e.g., state representative).[161] The Colorado General Assembly subsequently passed a bill to enact Amendment 27 into law.[162] Under the new law, the contribution limits operated on a "per election" basis, meaning a state house candidate could receive $200 from a contributor in a primary election and then another $200 from the same contributor in the general election.[163] Nevertheless, because minor party candidates did not have primary elections, they were only eligible to receive contributions in the general election, and thus could only raise half

153. *Id.* at 1215–16.

154. Schlabach, *supra* note 133, at 352.

155. For another example of a court faithfully applying the *Randall* plurality, see Thalheimer v. City of San Diego, No. 09-CV-2862, 2012 WL 177414, at *6–10, *13–19 (S.D. Cal. Jan. 20, 2012) (upholding San Diego's $500 per election individual contribution limit and striking down the city's $1,000 party contribution limit).

156. *See infra* Part II.A.3.

157. Lair v. Bullock (*Lair II*), 798 F.3d 736, 747–48 (9th Cir. 2015).

158. Lair v. Motl (*Lair III*), 873 F.3d 1170, 1186–87 (9th Cir. 2017).

159. *See* Lair v. Mangan (*Lair IV*), 822 F. App'x 635, 635–36 (9th Cir. 2020).

160. Hasen, *supra* note 95.

161. *See* Riddle v. Hickenlooper, 927 F. Supp. 2d 1092, 1093–94 (D. Colo. 2013), *rev'd on other grounds*, 742 F.3d 922 (10th Cir. 2014).

162. *Id.* at 1094.

163. *See id.*

as much money as majority party candidates. In response to this discrepancy, some voters challenged Colorado's contribution limits.[164]

The United States District Court for the District of Colorado upheld the limits, applying the *Randall* plurality's test. The court began with step one, ultimately finding that there were no danger signs, and thus refrained from moving onto step two, instead granting deference to the legislature.[165] The court, however, made a rather large mistake in its application of *Randall*: the danger signs into which it had looked were actually the five factors from step two of the danger signs test.[166] In the court's own words:

> *Randall*'s danger signs were whether the contribution limits: (1) significantly restrict the amount of funding available to run a political campaign; (2) apply equally to political parties; (3) restrict the use of volunteering or other services provided for no compensation; (4) were not adjusted for inflation; and (5) had a special justification.[167]

While this may have been a harmless error,[168] it is indicative of the *Randall* plurality's failure to present an easy-to-follow test. Indeed, the District of Colorado is not alone in its mixing up of the *Randall* plurality's step-one danger signs and step-two factors, with other courts having done so to varying degrees.[169] The Supreme Court itself is guilty of having done this in *Thompson v. Hebdon*, a potentially important move discussed later.[170]

3. The Defiant: Thompson v. Hebdon

Most recently, Alaska faced a challenge against—among other things—its $500 limit on individual contributions to candidates.[171] The Alaska Legislature had passed this limit in 1996 in an effort to combat ongoing corruption.[172] The district court hence found that the state had "presented adequate evidence that the $500 base limits . . . further[ed] the sufficiently important state interest of

164. *See id.* at 1095–96.

165. *See id.* at 1104.

166. *See id.* at 1104 n.16.

167. *Id.*; *see also* Randall v. Sorrell, 548 U.S. 230, 253–61 (2006) (plurality opinion) (identifying these five factors in step two of its analysis).

168. It seems very likely that the court would have upheld the limits regardless, even if it took them until properly reaching step two of the analysis.

169. *See, e.g.*, Zimmerman v. City of Austin, 881 F.3d 378, 387 (5th Cir. 2018) (only mentioning three danger signs and listing a lack of indexing for inflation as a danger sign when it was actually one of the step-two factors in the *Randall* plurality).

170. *See infra* Part II.B.

171. *See* Thompson v. Dauphinais, 217 F. Supp. 3d 1023, 1026–27 (D. Alaska 2016), *aff'd in part*, *rev'd in part sub nom.* Thompson v. Hebdon, 909 F.3d 1027 (9th Cir. 2018), *vacated*, 140 S. Ct. 348 (2019).

172. *Id.*

preventing quid pro quo corruption or its appearance."[173] Furthermore, the court found the $500 limit to be "closely drawn" to this anticorruption interest, and thus upheld it.[174]

Upon appeal, the United States Court of Appeals for the Ninth Circuit also found that the limits were constitutional.[175] What it did not do, however, was apply the danger signs test. In a footnote, the court dismissively stated that "*Randall* is not binding authority because no opinion commanded a majority of the Court."[176] Consequently, the court applied its own test, which somewhat reflected the original *Buckley* scrutiny.[177]

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Overall, the lower courts' inconsistent treatment of the danger signs test reflects the *Randall* plurality's inability to command a clear, consistent standard for assessing the constitutionality of SLCLs. One can almost hear the aforementioned courts collectively repeating, "We do not know. We have no idea."[178] Some may argue that this is by design. That *Randall*, being standard-like in its approach,[179] was never meant to be religiously followed. And if so, it is quite understandable that courts have been somewhat fast and loose in their application of the danger signs test. That is precisely the point though: Judges and scholars have no sense of whether the *Randall* plurality consists of a fluid, indistinct set of criteria that may or may not be applied in other SLCL cases (and if so, to what degree), or if the two steps must be adhered to perfectly.

The Court had the opportunity to provide some clarity after it took notice of *Thompson* and granted certiorari. Suffice to say, the Court did not take kindly to the Ninth Circuit's treatment of *Randall* as non-precedential. Nevertheless, despite giving itself the chance to comment on SLCLs once again thirteen years after having issued its fractured *Randall* opinion, the Court did not provide the most elucidating of opinions. In some ways, it seemed intent on running through the exact same danger signs discussed in *Randall*, similar to the *Lair* court. Yet, the Court made some subtle changes in its approach that signaled support for a looser interpretation of the danger signs test. The next Subpart overviews the decision in detail.

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173. *Id.* at 1040.

174. *See id.*

175. *See* Thompson v. Hebdon, 909 F.3d 1027, 1039 (9th Cir. 2018), *vacated*, 140 S. Ct. 348 (2019).

176. *Id.* at 1037 n.5. The Ninth Circuit had also made this same point three years earlier in *Lair II*. *See Lair II*, 798 F.3d 736, 747–48 (9th Cir. 2015).

177. *See Thompson*, 909 F.3d at 1032–33 (citing Mont. Right to Life Ass'n v. Eddleman, 343 F.3d 1085 (9th Cir. 2003)).

178. Garrett, *supra* note 16, at 561.

179. *See supra* note 129.

B. Thompson v. Hebdon*: Turning* Randall *into Precedent?*

On its surface, the *Thompson* Court's per curiam opinion reaffirmed the *Randall* plurality's two-step danger signs test, officially transforming it into binding precedent.[180] The Court began the opinion by recapping the Ninth Circuit's decision to not apply the danger signs test when it upheld Alaska's $500 contribution limit.[181] The Court then overviewed its own approach to Vermont's contribution limits in *Randall*, emphasizing that "[a] contribution limit that is too low can . . . 'prove an obstacle to the very electoral fairness it seeks to promote.'"[182] Next, the Court brought up danger signs, noting in particular three (debatably four) signs that Alaska's limit shared with Vermont's overturned limits:

- First, "Alaska's $500 individual-to-candidate contribution limit [was] 'substantially lower than . . . the limits [the Court has] previously upheld.'"[183] The Court observed that Alaska's limit was less than two-thirds of the statewide limit upheld in *Shrink Missouri* (accounting for inflation).[184]
- Second, "Alaska's individual-to-candidate contribution limit [was] 'substantially lower than . . . comparable limits in other States.'"[185] The Court remarked that only five other states had an individual-to-candidate contribution limit below the $500 mark.[186] Moreover, the Court highlighted how Alaska was the only state out of these six to apply its low contribution limit uniformly to all offices, even statewide ones.[187] (While the Court treated comparability to other states and uniform application as one danger sign, they would appear to be two distinct signs.)
- Third, "Alaska's contribution limit [was] not adjusted for inflation."[188] Instead, the $500 limit had remained the same since 1996.[189]

Based on these danger signs, the Court remanded the case to the Ninth Circuit to revisit whether Alaska's limits were consistent with the First Amendment precedent set in *Randall*.[190]

180. *See* Thompson v. Hebdon, 140 S. Ct. 348, 349–50 (2019).
181. *Id.* at 350.
182. *Id.* (quoting Randall v. Sorrell, 548 U.S. 230, 249 (2006) (plurality opinion)).
183. *Id.* at 350 (second alteration in original) (quoting *Randall*, 548 U.S. at 253).
184. *See id.* at 350–51.
185. *Id.* at 351 (second alteration in original) (quoting *Randall*, 548 U.S. at 253).
186. These states were Colorado, Connecticut, Kansas, Maine, and Montana. *Id.*
187. *See id.*
188. *Id.*
189. *Id.*
190. *See id.*

In the aftermath of the opinion, campaign finance reform advocates declared Alaska's "loss" as a win.[191] Hasen called it "the least bad way [Alaska] could lose,"[192] given the Court's hostility toward campaign finance regulation over the last sixteen years. What was especially remarkable is that the opinion was 9 – 0, which suggested "hesitation on the part of at least some justices to take on contribution limits as a whole."[193] Perhaps then the days of Justice Thomas consistently demanding the Court to overturn *Buckley* are behind us.[194] At the very least, the opinion could be a sign that Justices Gorsuch and Kavanaugh are willing to respect the stare decisis of *Buckley*'s contribution–expenditure distinction.

The most extraordinary aspect of *Thompson*, though, is how little has been written about it afterwards by campaign finance scholars.[195] For sure, a five-page opinion reaffirming another opinion from sixteen years ago might not be the most exciting of subjects. Nevertheless, the Court made a couple notable, if not odd, moves in *Thompson* that are worth giving some attention, as they could prove quite significant in future legal challenges against SLCLs.

For one, the opinion implies that not every danger sign discussed in the *Randall* plurality must be identified in order for a court to exercise step-two independent judgment. Indeed, the *Thompson* Court only mentioned three of the *Randall* danger signs, viewing them as enough to remand the case for further consideration.[196] Additionally, the Court included in its danger signs analysis the fact that Alaska's limits applied uniformly among all office types, something that was not even mentioned in *Randall* but is evidently a danger sign in the modern Court's eyes.[197] Among the danger signs *not* identified by the Court were (1) the limits being "per election cycle" rather than "per election," and (2) the limits on party-to-candidate contributions being low.[198] Thus, the Court's opinion suggests that step one of the danger signs test might actually be fairly flexible, allowing courts to discuss danger signs not brought up in *Randall* and forego certain danger signs identified in *Randall*, depending on what is relevant to the given SLCL being reviewed.

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191. *See* Bernie Pazanowski & Kimberly Strawbridge Robinson, *Alaska's Campaign Finance Loss a 'Win' for Reformers (Corrected)*, BLOOMBERG L. (Nov. 26, 2019, 8:26 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-remands-alaska-campaign-finance-limit-to-9th-cir.

192. *Id.*

193. *Id.*

194. *See supra* notes 57, 119 and accompanying text.

195. Only one other academic piece has discussed the opinion in detail since the Court issued it. *See generally* Flanders, *supra* note 56 (discussing "Alaskan exceptionalism" in campaign finance law).

196. Thompson v. Hebdon, 140 S. Ct. 348, 350–51.

197. To be fair to the Court, Vermont's contribution limits differed based on office type, so it would have been pointless to mention this as a sign in *Randall*.

198. *See* Randall v. Sorrell, 548 U.S. 230, 249–51 (2006) (plurality opinion).

Additionally, and more curiously, the Court conflated *Randall*'s step-one danger signs and step-two factors. To recall, the *Thompson* Court's third enumerated danger sign was that "Alaska's contribution limit is not adjusted for inflation."[199] Yet, in *Randall*, Justice Breyer listed "[a] failure to index" for inflation as the fourth *factor* in his step-two analysis.[200] The *Thompson* Court offered no explanation for this move. While possibly an error, that seems unlikely since Justice Breyer was a member of the Court in 2019. Alternatively, the Court may have been signaling a shift away from its initial approach to the two-step analysis and toward one that condenses the danger signs and five factors into step one. This could be a rational move. After all, why should a contribution limit being ran on a per-election-cycle basis be any more of a danger sign of "constitutional risks to the democratic electoral process" than said limit not being indexed for inflation?[201] In this way, the distinction between *Randall*'s danger signs and five factors seems a bit arbitrary, and it may be best to simply remove it. The question becomes, then, what a modified danger signs test would—and should—look like.

For now, it is enough to say that *Thompson*, despite being a short, relatively undiscussed opinion, could have big implications for how courts analyze the constitutionality of SLCLs going forward. Indeed, the opinion was enough to convince the Ninth Circuit to go against its previous judgment and strike down Alaska's contribution limits on remand despite acknowledging that Alaska's oil-based economy created "risk factors" for corruption.[202] Much of that decision could be attributed simply to lower courts following the Supreme Court's newly enhanced skepticism against campaign finance regulation;[203] still, using a poorly defined test that neglects to properly defer to local legislative expertise surely did not help. The Ninth Circuit almost seemed to treat the three danger signs identified by the Court as a de facto death sentence against Alaska's contribution limits, and only ceremoniously went through each of *Randall*'s five factors, even redundantly including the lack of inflation indexing that was treated as a danger sign, not a factor, by the *Thompson* Court.[204] Whether this was the correct approach is addressed in Part IV.

199. *Thompson*, 140 S. Ct. at 351.

200. *See Randall*, 548 U.S. at 261.

201. *See id.* at 248.

202. *See* Thompson v. Hebdon, 7 F.4th 811, 822–23 (9th Cir. 2021) ("[O]ur consideration of the five factors leads us to hold that Alaska has failed to meet its burden of showing that its individual contribution limit is 'closely drawn to meet its objectives.'" (quoting *Randall*, 548 U.S. at 253)).

203. *See infra* Part II.C.

204. *See Thompson*, 7 F.4th at 819–22.

C. Tightening Standards, Tightening Interests

There are two final changes in campaign finance jurisprudence that are important to note, for they too affect how courts now think about contribution limits. For one, the Court's new 6 – 3 conservative majority has displayed much more skepticism in its scrutiny of campaign finance laws than it did even during the years surrounding *Citizens United*. In 2021, for instance, the Court heightened the level of scrutiny used when reviewing disclosure requirements, demanding for the first time that such requirements be "narrowly tailored."[205] And just this year, the Court refused to explicitly reject the application of strict scrutiny to personal loan repayment limits.[206] While the Court has not openly denounced the intermediate "closely drawn" scrutiny with regard to contribution limits, its increasing suspicions of and harshening inquiries into campaign finance laws will likely impact how lower courts review SLCLs. Just like the Ninth Circuit on remand in *Thompson*, many other courts may feel more compelled to strike down SLCLs than they would have even a few years ago when the Court's skepticism was mainly directed toward independent expenditure limits.

Second, while the *Buckley* Court had found a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption,"[207] the modern-day Court has significantly cabined this interest to the prevention of the actuality or appearance of one type of corruption: quid pro quo corruption.[208] Therefore, for a government to justify a contribution limit, it has to demonstrate that said limit is meant to prevent the exchange of money for favors between contributors and candidates. What does this mean for SLCLs? In some ways, not much, since contribution limits are typically instituted to prevent such quid pro quo relationships. Nonetheless, the change is still valuable to keep in mind when framing how courts should approach the danger signs test post-*Thompson*.[209]

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The post-*Randall* world of campaign finance has brought noteworthy changes to the jurisprudence of SLCLs. And yet, *Thompson* has left states and localities without a better understanding of exactly how courts should and will

205. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021).

206. FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1652 (2022).

207. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

208. *See* McCutcheon v. FEC, 572 U.S. 185, 227 (2014) (plurality opinion); Martin, *supra* note 50, at 182.

209. *See infra* Part IV.A.

review their contribution limits. The next question is, does this really even matter? Part III answers with yes.

III. WHY STATE & LOCAL CONTRIBUTION LIMITS STILL MATTER

An ambiguous test would be of little actual consequence if SLCLs did not play a vital role in our democratic system. Indeed, many experts have argued—with varying reasons—that contribution limits are effectively useless.[210] Accordingly, to justify the need to establish a clear-cut danger signs test, this Part endeavors to explain why SLCLs still matter and are crucial for a healthy democracy. This Part's first Subpart explains how contribution limits remain relevant to candidates and donors, even in a post-*Citizens United* world. The next Subpart then overviews how many SLCLs could be subject to constitutional challenges in the near future. Finally, the last Subpart outlines some of the potential negative repercussions of having zero or ineffectively high contribution limits. Overall, this Part demonstrates that the stakes are high when it comes to challenges against SLCLs, meaning that we cannot leave the fate of such challenges in the hands of a confusing, ill-defined standard.

A. Why Contribution Limits Remain Relevant

Following *Citizens United v. FEC*,[211] the infamous case in which the Court held that corporations and labor organizations have a First Amendment right to engage in unlimited amounts of political spending,[212] some campaign finance experts have adopted the belief that contribution limits are no longer an effective means of combatting money in politics. The reasoning is simple: because a donor can legally donate an infinite amount of money to an independent-expenditure group (i.e., "super PACs"),[213] and because said independent-expenditure group can spend an infinite amount of money in advocacy for a candidate,[214] contribution limits cannot prevent a donor from contributing as much money as they want in favor of their preferred

210. *See, e.g.*, Ann Southworth, *The Consequences of* Citizens United*: What Do the Lawyers Say?*, 93 CHI.-KENT L. REV. 525, 538–39 (2018) (quoting a campaign finance attorney).

211. Citizens United v. FEC, 558 U.S. 310 (2010).

212. The Court essentially expanded *Buckley*'s contributions–expenditures distinction to apply to corporations and labor organizations. *See supra* notes 48–50 and accompanying text.

213. In the same year that the Court decided *Citizens United*, the D.C. Circuit declared that individuals cannot be limited on the amount they contribute to super PACs. *See* SpeechNow.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010).

214. In fact, within a few years following *Citizens United*, outside spending more than doubled in federal elections. *See* IAN VANDEWALKER, BRENNAN CTR. FOR JUST., ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 1 (2015), https://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf.

candidates.[215] As one campaign finance attorney states, while "[t]here are still contribution limits on the books," "as a practical matter in the real world . . . what you see is a world in which there are no contribution limits."[216] For instance, one person contributed $15.5 million during the 2016 election to a super PAC that supported Senator Ted Cruz and former President Donald Trump,[217] approximately $15.5 million more than he could have directly contributed to said candidates under the federal contribution limits.[218] Thus, from some commentators' points of view, super PACs allow donors to "bypass . . . contribution limits," rendering such limits as useless.[219]

These concerns are not without merit. In an ideal world, super PACs, being independent-expenditure groups, would not coordinate with electoral candidates, meaning that a donation to a super PAC supporting a particular candidate and a direct contribution to said candidate would not yield similar opportunities for quid pro quo between the donor and the candidate.[220] This is not, nevertheless, how things play out in reality. Instead, there is an exceptional amount of coordination between candidates, super PACs, and super PAC donors. Candidates will, for example, engage in a practice called "redboxing" in which they use "magic signals" to tip off to friendly super PACs what information the candidate wants the super PACs to include in their advertisements.[221] Super PACs have also been caught collecting information on their supporters and sharing it with candidates.[222] Furthermore (and perhaps

215. *See* Albert W. Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 FORDHAM L. REV. 2299, 2301–02 (2018) ("In the 2016 presidential campaign . . . federal law barred hedge fund manager Donald Sussman from contributing as much as $5500 to Hillary Clinton's campaign. . . . But federal law did not prohibit Donald Sussman from contributing $21 million to Priorities USA Action, a super PAC whose principal mission was to place advertisements on behalf of Clinton.").

216. Southworth, *supra* note 210, at 538–39.

217. *See* Alschuler et al., *supra* note 215, at 2301.

218. The federal individual-to-candidate contribution limit in the 2015–2016 election cycle was $2,700 per election. *See* Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

219. *Help Stop Big Money*, LEAGUE OF WOMEN VOTERS, https://www.lwv.org/blog/help-stop-big-money (May 28, 2015); *see also* Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755, 791–804 (2012) (arguing that contribution limits have failed to achieve their intended results).

220. This is why coordinated expenditures are treated the same as contributions under U.S. campaign finance law, whereas independent expenditures are not. *See* Buckley v. Valeo, 424 U.S. 1, 78 (1976).

221. *See* Kaveri Sharma, Note, *Voters Need to Know: Assessing the Legality of Redboxing in Federal Elections*, 130 YALE L.J. 1898, 1908–16 (2021). The term "redboxing" derives from a common practice by candidates in which they include red-shaded boxes on their websites containing messages intended for super PACs to use in their own campaigns. *See id.* at 1910.

222. *See* Samir Sheth, Note, *Super PACs, Personal Data, and Campaign Finance Loopholes*, 105 VA. L. REV. 655, 696 (2019) (discussing how Ready PAC, a super PAC that supported Hillary Clinton, gave information on 4 million supporters to the official Clinton campaign committee).

most egregiously), candidates may speak directly with super PAC donors,[223] even on corrupt matters such as how large a super PAC donation would need to be to guarantee the donor an appointment to office or certain policies desired by the donor.[224]

With all this in mind, it is easy to understand how one may view contribution limits as irrelevant: If an individual can simply donate massive amounts of money to a given super PAC at a candidate's request, and if the candidate can then exert great influence over the decisions of said super PAC despite its independent status, what purposes do contribution limits serve? Accordingly, considering the powerful role that super PAC money plays in state and local elections,[225] the future of SLCLs might not seem like the most urgent of issues to some in the campaign finance field.[226] This pessimism is, however, unfounded in many ways.

For one, as Raymond La Raja notes, "independent campaigns are a second-best strategy for candidates."[227] While super PACs can be an asset to candidates, they cannot wholly replace the benefits reaped by direct contributions. For instance, "[s]uper PACs do not always respond quickly and appropriately to changing dynamics of a campaign."[228] Moreover, super PACs can also face higher advertisement costs than candidates.[229] Consequently, direct contributions are fundamentally more valuable to candidates than indirect donations via super PACs because they afford candidates the greatest level of

223. Provided that the donor does not have any sway over determining how the super PAC's funds are spent. *See* 11 C.F.R. §§ 109.20(a), 109.21(a) (2021).

224. *See* Albert W. Alschuler, *Limiting Political Contributions After* McCutcheon*,* Citizens United*, and* SpeechNow, 67 FLA. L. REV. 389, 475 (2015).

225. *See, e.g.*, David Cruz, *Super PACs Poured Millions into the NYC Primary. Whose PAC Got the Best Results?*, GOTHAMIST (July 16, 2021), https://gothamist.com/news/super-pacs-poured-millions-nyc-primary-whose-pac-showed-best-rate-return; Gintautas Dumcius, *Boston Mayoral Candidate Essaibi George Asks Super PACs to Stay Out of the Race*, WBUR (Sept. 21, 2021), https://www.wbur.org/news/2021/09/21/annissa-essaibi-george-super-pacs-boston-mayoral-race; Brent Johnson, *Murphy, Ciattarelli, Outside Groups Spent a Near-Record Amount of Money on N.J. Governor Race*, NJ.COM, https://www.nj.com/politics/2021/11/murphy-ciattarelli-spent-a-near-record-amount-of-money-on-nj-governors-race.html (Nov. 29, 2021, 7:52 AM); J.T. Stepleton, *When State Laws Are Away, Federal PACs Will Play*, FOLLOW THE MONEY (Jan. 8, 2018), https://www.followthemoney.org/research/blog/when-state-laws-are-away-federal-pacs-will-play.

226. *See, e.g.*, Alschuler, *supra* note 224, at 399–400 (overviewing how some Justices in *McCutcheon* asked "whether super PAC contributions and expenditures hadn't made BCRA's contribution limits pointless or worse"); Joshua Rosenthal, *Accountability Vouchers: A Proposal to Disrupt the Undue Influence of Wealthy Interests on State Politics*, 45 U. TOL. L. REV. 211, 211 (2014) ("With *Citizens United*, the Court rendered contribution limits ineffective by throwing open the floodgates to unlimited independent expenditures.").

227. *See* Raymond J. La Raja, *Why Super PACs: How the American Party System Outgrew the Campaign Finance System*, 10 FORUM 91, 101 (2012).

228. *Id.*

229. *Id.*

control over campaign resources and advocacy.[230] In turn, wealthy individuals are in a better position to control the decisions of candidates if they can directly contribute unlimited amounts of money to them rather than to a super PAC—being able to say "here's my money, now do X for me" will always be more compelling than saying "I gave my money to this group that might help you, now do X for me." Thus, the *Buckley* Court was not fully incorrect to treat contributions as more conducive to corruption than independent expenditures.[231] As such, super PAC donations are far from a perfect replacement for contributions to candidates.

This becomes quite evident when looking at wealthy individuals' donation patterns. Billionaires, despite having the ability to donate obscene amounts of money to super PACs post-*Citizens United*, still continue to give direct contributions to candidates at the maximum allowable limits. Out of the ten wealthiest Americans in 2021,[232] for instance, nine contributed the maximum allowable amount to various federal candidates over the past six federal elections.[233] Many also contribute to state and local candidates' campaigns at their respective maximum allowable limits. To name a couple examples, Steve Ballmer contributed $1,000 to Gina Raimondo's Rhode Island gubernatorial

230. *See id.* (stating that candidates "would much prefer to have control of resources and campaign messages"). As Senator Ted Cruz similarly put it in a recent hearing, "I think the current system of super PACs is idiotic . . . . [E]very candidate would rather control their own message rather than some other group." *S. 443, The DISCLOSE Act: Hearing on S. 443 Before the S. Comm. on Rules and Admin.*, 117th Cong. 27 (2022) (statement of Sen. Ted Cruz).

231. *See* Buckley v. Valeo, 424 U.S. 1, 45–47 (1976). What the *Buckley* Court got wrong, and what today's Roberts Court gets wrong, is the notion that independent expenditures present no threats of corruption. *See id.* Rather, they simply present a level of threat less than that of contributions, the degree of which this Article does not attempt to quantify.

232. *See* Matt Durot, *Forbes 400 2021: The Top 20 Richest People in America*, FORBES (Oct. 5, 2021, 6:00 AM), https://www.forbes.com/sites/mattdurot/2021/10/05/forbes-400-2021-the-top-20-richest-people-in-america/?sh=69ca5cf8270f.

233. *See Donor Lookup: Jeff Bezos*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=jeff+bezos&order=desc&sort=D (last visited Dec. 2, 2021); *Donor Lookup: Elon Musk*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=elon+musk&order=desc&sort=D (last visited Dec. 2, 2021); *Donor Lookup: Mark Zuckerberg*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=mark+zuckerberg&order=desc&sort=D (last visited Dec. 2, 2021); *Donor Lookup: William Gates*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=william+gates&order=desc&sort=D (last visited Dec. 2, 2021); *Donor Lookup: Sergey Brin*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=sergey+brin&order=desc&sort=D (last visited Dec. 2, 2021); *Donor Lookup: Lawrence Ellison*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=Lawrence+Ellison&order=desc&sort=D (last visited Nov. 16, 2022); *Donor Lookup: Warren Buffett*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=warren+buffett&order=desc&sort=D (last visited Dec. 2, 2021); *Donor Lookup: Steve Ballmer*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=steve+ballmer&order=desc&sort=D (last visited Dec. 2, 2021); *Donor Lookup: Michael Bloomberg*, OPEN SECRETS, https://www.opensecrets.org/donor-lookup/results?name=michael+bloomberg&order=desc&page=2&sort=D (last visited Dec. 2, 2021).

campaign in 2018, which is the individual-to-candidate limit for statewide elections.[234] And Michael Bloomberg contributed $1,000 to Molly Kelly in her 2018 New Hampshire senate race, the maximum possible amount under the state's contribution limits at the time.[235] If direct campaign contributions were no different than donations to super PACs, affluent Americans would not be providing the maximum possible contributions to candidates nationwide.[236] Nevertheless, they are, because they understand that relying on the aid of super PACs is only the "second-best strategy" for candidates,[237] unable to match the power of having cash directly in a campaign account. Contribution limits thus remain necessary and operative in state and local elections despite the fallout of *Citizens United*, lest we end up with the Michael Bloombergs of the world casually contributing hundreds of thousands, if not millions, to state and local candidates,[238] in effect able to directly buy influence over them.[239]

Beyond the relationship between contributors and candidates, contribution limits also affect elections and governance in a myriad of other ways. For example, contribution limits have been shown to decrease incumbents' fiscal advantages in elections.[240] Contribution limits can also affect polarization in legislatures, with higher limits on individual contributions leading to more ideological polarization and higher limits on PAC contributions leading to

234. *See Donor Lookup: Steven Ballmer*, *supra* note 233; 17 R.I. GEN. LAWS § 17-25-10.1(a)(1) (2018).

235. *See Donor Lookup: Michael Bloomberg*, *supra* note 233; N.H. REV. STAT. ANN. § 664:4 (2018). New Hampshire repealed this limit in 2021. *See* H.B. 263, 2021 Gen. Ct., Reg. Sess. (N.H. 2021).

236. One potential counterargument against this point is that such contributions are purely symbolic gestures of support toward the receiving candidate. And, in many instances, this is likely the case. Nevertheless, this raises another question: Who's the target audience of that gesture? Truly, while disclosure requirements are extraordinarily beneficial to democracy, very few voters are sifting through candidates' disclosure reports to see who contributed to which candidate's campaign. Indeed, the gesture is meant for the candidates themselves to know that Billionaire X supports them. If anything, this underscores the importance of the contribution limit—we do not want candidates to be *too* moved by the gesture.

237. *See* La Raja, *supra* note 227.

238. For instance, Michael Bloomberg contributed $250,000 to Fred Hubbell's 2018 gubernatorial campaign in Iowa, a state without any contribution limits—an example of the uncomfortable exchanges that can and will happen between candidates and the power elite when there are no limits in place. *See* Laura Belin, *Fred Hubbell Caucused for Mike Bloomberg*, BLEEDING HEARTLAND (Feb. 9, 2020), https://www.bleedingheartland.com/2020/02/09/fred-hubbell-caucused-for-mike-bloomberg; *Candidates*, IOWA ETHICS & CAMPAIGN DISCLOSURE BD., https://ethics.iowa.gov/campaigns/candidates (last visited Oct. 14, 2022).

239. Some recent research suggests that the proportion of a contribution relative to total contributions is more important with regards to influencing a candidate than is the amount of a contribution. *See* Nathan Leys, Note, *"Masters of War"? The Defense Industry, the Appearance of Corruption, and the Future of Campaign Finance*, 39 YALE L. & POL'Y REV. 655, 675 (2021). While this research is illuminating, it seems wrong to totally dismiss the importance of "static" contribution limits when such contribution limits are what prevent certain contributors—be they individual, party, or PAC—from providing contributions that make up a high proportion of a candidate's total funds.

240. *See* Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 163; Thomas Stratmann & Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 PUB. CHOICE 177, 198 (2006); *see also infra* Part IV.B.3.

less.[241] While these factors are not ones that courts consider when reviewing contribution limits,[242] they do provide further evidence that contribution limits remain relevant and impactful in the United States, including on state and local levels.

Of course, perhaps the greatest indication of the continuing relevance of SLCLs is the fact that so many have been subject to constitutional challenges in recent years, with many more facing threats of such challenges in the future. The next Subpart discusses this in detail.

B. Why SLCLs Are in Jeopardy

Following *Randall*, campaign finance experts described the future of SLCLs as "uncertain."[243] What became quite certain, however, is that the targeting of contribution limits would not end with Vermont. Rather, between *Randall* and *Thompson*, dozens of SLCLs faced constitutional challenges, with varying degrees of success.[244] Emboldened by the Roberts Court's persistent hostility

241. Michael J. Barber, *Ideological Donors, Contribution Limits, and the Polarization of American Legislatures*, 78 J. POL. 296, 308–09 (2016). To read more on the importance of this relationship between contribution limits and polarization, see *infra* Part III.C.3.

242. *See supra* Part II.C.

243. *See* James Bopp, Jr. & Susan Lee, *So There Are Campaign Contribution Limits That Are Too Low*, 18 STAN. L. & POL'Y REV. 266, 295 (2007); Richard Briffault, WRTL *and* Randall*: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 838 (2007); *see also* Goldberg & Wright, *supra* note 139, at 666–74. To read about the general scholarly confusion that followed *Randall*, see *supra* Part I.C.2.

244. *See, e.g.*, Deon v. Barasch, 341 F. Supp. 3d 438, 454 (M.D. Pa. 2018) (striking down Pennsylvania statute prohibiting individuals with interests in gambling businesses from making any political contributions), *aff'd*, 960 F.3d 152 (3d Cir. 2020); Zimmerman v. City of Austin, 881 F.3d 378, 382 (5th Cir. 2018) (upholding Austin's base contribution limits and aggregate limit on contributions from nonresidents, but striking down a temporal prohibition on contributions); Ill. Liberty PAC v. Madigan, 212 F. Supp. 3d 753, 770 (N.D. Ill. 2016) (upholding various contribution limits, including a $5,000 individual contribution limit), *aff'd*, 904 F.3d 463 (7th Cir. 2018); O'Toole v. O'Connor, No. 15-cv-1446, 2016 WL 4394135, at *20 (S.D. Ohio Aug. 18, 2016) (upholding the Ohio Code of Judicial Conduct's ban on the personal solicitation of campaign contributions by judicial candidates), *aff'd*, 733 F. App'x 828 (6th Cir. 2018); Riddle v. Hickenlooper, 927 F. Supp. 2d 1092, 1109 (D. Colo. 2013) (upholding various Colorado contribution limits passed by referendum), *rev'd on other grounds*, 742 F.3d 922 (10th Cir. 2014); McNeilly v. Land, 684 F.3d 611, 622 (6th Cir. 2012) (denying plaintiff's motion for preliminary injunction to enjoin the enforcement of Michigan's individual contribution limits); Lair v. Murry, 903 F. Supp. 2d 1077, 1093–94 (D. Mont. 2012) (striking down Montana's contribution limits), *rev'd sub nom.* Lair v. Bullock, 798 F.3d 736 (9th Cir. 2015); Thalheimer v. City of San Diego, No. 09-CV-2862, 2012 WL 177414, at *22 (S.D. Cal. Jan. 20, 2012) (upholding and striking down various San Diego contribution limits); Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304, 319 (8th Cir. 2011) (declining to invalidate Minnesota's ban on direct corporate contributions to candidates), *aff'd in part*, *rev'd in part en banc*, 692 F.3d 864 (8th Cir. 2012); Preston v. Leake, 743 F. Supp. 2d 501, 511 (E.D.N.C. 2010) (upholding North Carolina's ban on contributions by registered lobbyists), *aff'd* 660 F.3d 726 (4th Cir. 2011); Iowa Right to Life Comm., Inc. v. Smithson, 750 F. Supp. 2d 1020, 1044–46 (S.D. Iowa 2010) (upholding Iowa limits on corporate contributions); Ognibene v. Parkes, 599 F. Supp. 2d 434, 455 (S.D.N.Y. 2009) (upholding contribution limits for individuals and entities that have business dealings with New York City), *aff'd*, 671 F.3d 174 (2d Cir. 2011); Kermani v. N.Y. State Bd. of Elections, 487 F. Supp. 2d 101, 113–14 (N.D.N.Y. 2006) (staying injunction for one year on a New York State statute that "provide[d]

toward campaign finance reform,[245] those looking to dismantle campaign finance regulations have gone on the offensive. And with the Court's *Thompson* decision having led to the Ninth Circuit striking down Alaska's contribution limits,[246] more plaintiffs may feel encouraged in the coming years to take on contribution limits in other states and localities.

Thus, many existing limits could be in serious jeopardy. For example, as Table 1 highlights, nine states—Colorado, Connecticut, Delaware, Maine, Massachusetts, Minnesota, Montana, Rhode Island, and South Dakota—currently have individual-to-candidates contribution limits (simply referred to as "individual contribution limits" for the remainder of the Article) in place that fall below the limits upheld in *Shrink Missouri* (when accounting for inflation and the fact that limits are essentially halved when applied per year or election cycle rather than per election).[247] In addition, as inflation continues, many other states run the risk of falling below the *Shrink Missouri* limits by the end of the 2020s, including Florida, Idaho, Kansas, and South Carolina.[248] These limits are at significant risk of being struck down given that falling below the *Shrink Missouri* limits is a danger sign mentioned in both *Thompson* and *Randall*.[249]

that no money may be contributed or expended in aid of the designation or nomination of a party candidate at the primary election").

245. *See* CIARA TORRES-SPELLISCY, POLITICAL BRANDS 47–58 (2019).

246. *See* Thompson v. Hebdon, 7 F.4th 811, 822–23 (9th Cir. 2021).

247. The limits upheld in 2000 by the *Shrink Missouri* Court were $1,075 for statewide candidates, $525 for state senate candidates, and $275 for state house candidates. Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 520 (8th Cir. 1998), *rev'd sub nom.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000). In 2022 dollars, that equals approximately $1,860, $909, and $476, respectively. *See* Inflation Calculator, U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com (last visited Nov. 16, 2022). Dollar amounts that fall under these adjusted limits are highlighted in grey.

248. *See* FLA STAT. § 106.08(3) (2022) (setting a $1,000 per election limit on contributions to senate candidates); IDAHO CODE § 67-6610A(1)(a) (2022) (same); KAN. STAT. ANN. § 25-4153(a) (2022) (setting a $2,000 per election limit on contributions to statewide candidates, $1,000 per election limit on contributions to senate candidates, and $500 per election limit on contributions to house candidates); S.C. CODE ANN. §§ 8-13-1300(10), 8-13-1314(A)(1)(c) (2022) (setting a $1,000 per election limit on contributions to senate candidates).

249. *See* Thompson v. Hebdon, 140 S. Ct. 348, 350–51 (2019); Randall v. Sorrell, 548 U.S. 230, 251 (2006) (plurality opinion).

Table 1 – State Individual Contribution Limits that Fall Below *Shrink Missouri* Limits in 2022 (Accounting for Inflation[250])

State	Statewide	State Senate (or equivalent)	State House (or equivalent)
Colorado[251]	$625	$200	$200
Connecticut[252]	$2,000–$3,500	$1,000	$250
Delaware[253]	$1,200†	$600†	$600*
Maine[254]	$1,725	$425	$425
Massachusetts[255]	$1,000†	$1,000*	$1,000††
Minnesota[256]	$2,000*–$4,000††	$1,000*	$1,000††
Montana[257]	$700–$1,000	$400	$400
Rhode Island[258]	$1,000†	$1,000*	$1,000††
South Dakota[259]	$4,000††	$1,000*	$1,000††

* Limits that effectively fall below the *Shrink Missouri* limits because they apply per year (Massachusetts, Rhode Island, South Dakota) or per election cycle (Delaware, Minnesota) rather than per each election.

† Limits that apply per year or per election cycle but would fall below the *Shrink Missouri* limits even if applied per each election.

†† Limits that apply per year or per election cycle and do not fall below the *Shrink Missouri* limits.

This risk applies not only to existing limits, either, but also extends to future limits. For instance, other states routinely consider legislation or ballot initiatives that would lower their contribution limits below the *Shrink Missouri*

250. *See supra* note 247.

251. COLO. CONST. art. XXVIII, § 3(1); 8 COLO. CODE REGS. § 1505-6:10.17.1(h) (2021).

252. CONN. GEN. STAT. § 9-611(a) (2021).

253. DEL. CODE ANN. tit. 15, § 8010 (2022). Delaware's contribution limits apply per "election period," not per election, meaning that if an individual were to contribute $300 to a Delaware house candidate's primary election campaign, said individual could only contribute an additional $300 to the candidate's general election campaign. *See id.* This effectively places the limits below the *Shrink Missouri* limits from a house candidate's perspective. This same phenomenon applies to various individual contribution limits in Massachusetts, Minnesota, Rhode Island, and South Dakota. *See infra* notes 255–256, 258–259.

254. ME. REV. STAT. ANN. tit. 21-A, § 1015(1) (West 2021); *Contributing Information and Rules*, ME. COMM'N ON GOVERNMENTAL ETHICS & ELECTION PRACS., https://www.maine.gov/ethics/political-activity/contributing-information (last visited Nov. 16, 2022).

255. MASS. GEN. LAWS ANN. ch. 55, § 7A (West 2021). Massachusetts' individual contribution limits apply per year. *Id.* Thus, the limits are effectively below the *Shrink Missouri* limits for senate candidates.

256. MINN. STAT. § 10A.27, subdiv. 1 (2022) (applying only to candidates who have not signed a public subsidy agreement). Minnesota's individual contribution limits apply per election segment of an election cycle, meaning per two-year period. *Id.* § 10A.01, subdiv. 16. Thus, Minnesota's contribution limits are effectively below the *Shrink Missouri* limits for senate candidates and all statewide candidates other than candidates for governor and lieutenant governor—whose limits are $4,000 per election segment of an election cycle—as primary and general election contributions are not treated separately.

257. MONT. CODE ANN. § 13-37-216(1)(a) (West 2021).

258. 17 R.I. GEN. LAWS § 17-25-10.1(a)(1) (2021). Rhode Island's individual contribution limits apply per year. *Id.* Thus, the limits are effectively below the *Shrink Missouri* limits for senate candidates.

259. S.D. CODIFIED LAWS §§ 12-27-7, 12-27-8 (2022). South Dakota's individual contribution limits apply per year. *Id.* Thus, the limits are effectively below the *Shrink Missouri* limits for senate candidates.

limits.[260] Furthermore, this risk is not state-specific, as many cities across the United States have recently enacted, or plan to enact, contribution limits for their municipal elections,[261] some of which will almost assuredly be disputed in court.[262]

Constitutional challenges against SLCLs affect not only the limits in dispute either, but also influence limits in other states or localities. For example, lawmakers may feel pressured to raise existing contribution limits if they feel that they could be targeted next. The Arizona State Legislature did just that in the wake of *Randall*, raising its individual contribution limits significantly in 2007 out of fear that Arizona's previous limits would be overturned by the Court.[263] Montana and South Dakota similarly amended their respective contribution limits within a couple years of *Randall*.[264] To this day, states continue to raise their contribution limits significantly beyond their pre-*Randall* levels, with two states having done so this past year.[265] Furthermore, in addition to lawmakers raising contribution limits, lawmakers in states and localities that currently have *zero* contribution limits may be wary of passing such limits in the future out of fear of a constitutional challenge.[266] Last year, for instance, Oregon legislators had to scrap plans to pass contribution limits following a state ballot measure that granted them the power to do so because they were unable to agree upon

260. For example, Arizonans nearly considered in November 2022 a ballot initiative that would have reduced contribution limits from $6,250 to $1,000 per election for local and legislative candidates and $2,500 per election for statewide office candidates. *See* Joe Pitts, *Arizona Republicans Pitch Voters on Election Security Plan*, W. TRIB. (Aug. 30, 2022), https://westerntrib.com/arizona-republicans-pitch-voters-on-election-security-plan.

261. *See, e.g.*, Sarah Girma & Jennifer L. Powley, *City Council Debates Contentious Measure to Limit Campaign Donations by Developers*, HARV. CRIMSON, https://www.thecrimson.com/article/2021/11/11/city-council-campaign-finances (Nov. 11, 2021, 3:35 PM) (Cambridge, MA); Greg Scruggs, *Seattle Passes Campaign Finance Curbs on 'Foreign-Influenced' Firms*, REUTERS (Jan. 13, 2020, 7:48 PM), https://www.reuters.com/article/us-usa-politics-seattle-idUSKBN1ZD04T (Seattle, WA); Gustavo Solis, *National City Passes Campaign Contribution Limits*, SAN DIEGO UNION-TRIB. (Apr. 27, 2020, 12:50 PM), https://www.sandiegouniontribune.com/communities/south-county/national-city/story/2020-04-27/national-city-campaign-limits (National City, CA); Amelia Templeton, *Portland Voters Pass Campaign Finance Limits*, OPB (Nov. 6, 2018, 10:45 PM), https://www.opb.org/news/article/portland-oregon-election-campaign-finance-result (Portland, OR).

262. *See, e.g.*, Ryan Autullo, *Lawsuit Challenges Austin's Fundraising Rules for Political Candidates*, AUSTIN AM.-STATESMAN, https://www.statesman.com/story/news/2021/03/26/lawsuit-challenges-austins-fundraising-rules-political-candidates/7004402002 (Mar. 28, 2021, 4:10 PM).

263. *See* H.B. 2690, 48th Leg., 1st Sess. (Ariz. 2007); Schlabach, *supra* note 133, at 367.

264. *See* Schlabach, *supra* note 133, at 367 n.126.

265. *See* H.B. 263, 2021 Leg., Reg. Sess. (N.H. 2021); S.B. 224, 67th Leg., Reg. Sess. (Mont. 2021).

266. Currently, eighteen states lack contribution limits in at least one of these five categories of contributions: individual-to-candidate, party-to-candidate, PAC-to-candidate, corporation-to-candidate, and union-to-candidate. *See* NCSL STATE LIMITS, *supra* note 4 (Alabama, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming).

limit amounts.[267] Alaska's legislature has also faced issues instating new contribution limits following *Thompson*.[268] Other states have openly adopted very high contribution limits (and therefore not as effective as perhaps desired) specifically to "withstand a constitutional challenge."[269] Such is the state of affairs for lawmakers under the Roberts Court's anti-campaign finance jurisprudence.

All in all, contribution limits are far from safe in many states and localities. The obvious question then is: Does it matter if a contribution limit is struck down or significantly increased? Some would argue no.[270] This Part's final Subpart, nevertheless, contends that not only would it matter, but that such a situation has the potential to drastically undermine the democratic process within the affected state or locality.

C. Why SLCLs Are Important for Democracy

While contribution limits remain relevant in elections, and while SLCLs may be subject to numerous constitutional challenges in the coming years, some might doubt whether we should anguish over courts potentially striking down more limits in the future. Some may even believe that the destruction of contribution limits would be a net positive for democratic systems in the United States.[271] This Subpart maintains the contrary, that contribution limits are a necessary component of a healthy democracy and that their nonexistence would be a detriment to democratic processes and representation within states and localities. In particular, this Subpart analyzes how the weakening of such limits would increase corruption and its appearance in state and local governments. This Subpart also analyzes how weak contribution limits could decrease lawmakers' responsiveness to the will of voters and exacerbate ideological polarization within legislative bodies, both of which, while not sufficiently

267. *See* Hillary Borrud, *Oregon Lawmakers Appear Unlikely to Limit Campaign Contributions, as Key Proponent Moves to Drop Effort*, OR. LIVE (June 2, 2021, 10:33 AM), https://www.oregonlive.com/politics/2021/06/oregon-lawmakers-appear-unlikely-to-limit-campaign-contributions-as-key-proponent-moves-to-drop-effort.html. In 1997, the Oregon Supreme Court had ruled that contribution limits violated the state's constitution, a ruling that the court later overturned in 2020. *See* Vannatta v. Keisling, 931 P.2d 770, 773 (Or. 1997), *overruled by* 462 P.3d 706 (Or. 2020); *In re Matter of Validation Proc. to Determine the Regularity & Legality of Multnomah Cnty. Home Rule Charter Section 11.60 & Implementing Ordinance No. 1243 Regulating Campaign Fin. & Disclosure*, 462 P.3d 706, 722 (Or. 2020).

268. Rick Hasen, *Following Supreme Court Decision in* Thompson v. Hebdon*, Alaska Has Gone from the State with One of the Lowest Campaign Contribution Limits to Unlimited Donations—And So Far the Legislature Won't Fix It*, ELECTION L. BLOG (May 22, 2022, 3:59 PM), https://electionlawblog.org/?p=129448.

269. *See, e.g.*, Jeffrey Brindle, *NJ Contribution Limits Safe Despite Circuit Court Ruling in Alaskan Case*, INSIDER NJ (Aug. 9, 2021, 12:56 PM), https://www.insidernj.com/nj-contribution-limits-safe-despite-circuit-court-ruling-alaskan-case.

270. *See* Gaughan, *supra* note 219, at 791–804.

271. *See, e.g.*, Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1071–84 (1996).

important state interests from the Court's perspective, pose significant issues in an allegedly democratic system.

1. Increase in Corruption and the Appearance of Corruption

One of the most highly contested assertions in campaign finance literature is that contribution limits truly serve as an effective anticorruption measure.[272] There are many factors contributing to these differences of opinion, such as difficulties in quantifying corruption, differences in definitions of corruption, and conflicting social science research. Despite this, when simply looking at how the real political world operates, it seems quite clear that contributions can and do, to some degree, combat corruption and its appearance.

a. Actuality of Corruption

To begin with the actuality of corruption, social science is essentially a wash. Some research concludes that contribution limits have no effect on corruption. For example, one recent study found "no correlation between state-level campaign contribution limits and corruption" aside from individual-to-party limits.[273] Yet, a 2021 paper observed that "mayors' donors are [more] favored in municipalities with looser [contribution] limits."[274] These discrepancies in campaign finance literature can be attributed to a couple of factors. First, as Tom Ginsburg and Nicholas Stephanopoulos note, "social scientists have rarely been able to quantify corruption itself."[275] Rather, some measure corruption through bribery convictions of public officials, which can be a questionable method given bribery's under-prosecution.[276] Meanwhile,

272. *Compare* Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1307 (2012) ("Contribution limits of $2,500, for example, not only prevent corruption but also limit inequality by preventing higher-income individuals from contributing more money."), *and* Richard L. Hasen, Opinion, *Limiting Contributions to Candidates Deters Corruption*, N.Y. TIMES (Oct. 10, 2014, 12:12 PM), https://www.nytimes.com/roomfordebate/2013/10/06/why-limit-political-donations/limiting-contributions-to-candidates-deters-corruption, *with* Gaughan, *supra* note 219, at 802–04 (arguing that states without contribution limits are no more corrupt than states with contribution limits).

273. Mark Hand, Campaign Contribution Limits and Corruption: Evidence from the 50 States 8 (May 23, 2018) (unpublished manuscript) (on file with author).

274. Saad Gulzar et al., *Do Campaign Contribution Limits Curb the Influence of Money in Politics?*, 66 AM. J. POL. SCI. 932, 933 (2022); *see also* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 814 (1990) ("[M]oneyed interests *do* affect the decision-making processes of Congress, an implication that one does not easily derive from the existing political science literature on contributions.").

275. Tom Ginsburg & Nicholas Stephanopoulos, *The Concepts of Law*, 84 U. CHI. L. REV. 147, 161 (2017).

276. *See* Hand, *supra* note 273, at 14–15.

others use people's trust in government as a rough proxy for corruption,[277] though who can say whether public perception truly correlates with actual corruption.[278] Second (and relatedly), social scientists differ in how they define corruption. Some focus purely on quid pro quo corruption,[279] which, while being the sole form of corruption on which the Court focuses,[280] is certainly not the only type out there. Indeed, other social scientists have focused on corruption more broadly at the institutional level,[281] which can paint a more holistic picture of how campaign finance laws can help curb corruption. Given these variations in methodologies, and therefore results, social science does not provide robust consensual support for the notion that a relationship exists between campaign finance regulation and corruption.[282]

Moving onto the legal academic literature, there are a variety of arguments made to further the notion that contribution limits do not curtail corruption (and perhaps even worsen it). Anthony Gaughan raises many of these arguments in an article that concludes that contribution limits are futile in the age of super PACs.[283] These arguments, nevertheless, are far from indomitable.

Take, for instance, Gaughan's claim that "states with minimal contribution limits fare no worse in government corruption surveys than do states with strict limits."[284] In reaching this conclusion, Gaughan cites a couple surveys that rank a few states that have zero contribution limits—e.g., Oregon and Utah—as being among the least corrupt states.[285] There are two issues with this claim, however. For one, as discussed above, measuring corruption is a fickle endeavor[286]: In another survey conducted by Best Life ranking state corruption, five out of the top ten "most corrupt" states in the United States were states that allow unlimited contributions to candidates in some form, including the supposedly least corrupt states of Oregon and Utah.[287] That is some heavy

277. *See, e.g.*, Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 145–48 (2004).

278. There is, after all, a reason why federal campaign finance jurisprudence treats the actuality of corruption and the appearance of corruption as two distinct concepts. *See* Buckley v. Valeo, 424 U.S. 1, 26 (1976).

279. *See, e.g.*, Gulzar et al., *supra* note 274; Hand, *supra* note 273, at 5.

280. *See supra* Part II.C.

281. *See, e.g.*, Clint Lopaty, Campaign Finance and Corruption 16–17 (May 2021) (unpublished manuscript), https://scholarworks.csun.edu/bitstream/handle/10211.3/219960/Lopaty-Clint-thesis-2021.pdf?sequence=1.

282. *See* Ginsburg & Stephanopoulos, *supra* note 275, at 161–62.

283. *See generally* Gaughan, *supra* note 219.

284. *Id.* at 803.

285. *See id.* at 802–03.

286. *See supra* notes 273–281 and accompanying text.

287. *See Most Corrupt States 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/most-corrupt-states (last visited Oct. 31, 2022) (Vermont, Utah, Oregon, Iowa, and Nebraska); *see also supra* note 266 (listing the states that currently lack state contribution limits in one of the contribution categories).

representation considering that only about one-third of U.S. states permit unlimited contributions of some kind.[288] Thus, these corruption rankings do not appear to be a reliable means of comparing corruption amongst the states (or localities, if such rankings exist).

Furthermore, and more importantly, even if we were to accept the claim that states with strict contribution limits still have a high level of corruption, to act as though this is indicative of a lack of efficacy of contribution limits is to ignore a pretty clear endogeneity issue. Indeed, it could very well be the case that states suffering from widespread corruption are the most likely to adopt contribution limits in order to address such corruption.[289] Accordingly, if states with strict contribution limits genuinely end up faring no worse corruption-wise than states with minimal contribution limits,[290] perhaps this actually suggests that state contribution limits have been effective in combatting corruption; the very corrupt states that felt compelled to pass strict contribution limits might have successfully reduced their corruption levels to those of the less corrupt states that saw no reason to enact strict contribution limits in the first place. This is, of course, all just speculation, but that is precisely the point.

Gaughan also emphasizes that contribution limits encourage the rise of "bundlers"—people (typically rich or famous) who help round up individual contributions for a candidate they support—which he asserts "undermines the whole point of contribution limits."[291] The numbers, however, call into doubt this conclusion. Out of Hillary Clinton's 1,129 bundlers in the 2016 election, only 31 raised over $5 million throughout all federal elections between 1990 and 2016.[292] And out of President Joseph Biden's 816 bundlers in 2020, only 19 raised over $5 million throughout all federal elections between 1990 and 2020.[293] While those numbers may seem daunting at first glance, consider that $5 million stretched over decades for various federal candidates means that many of these bundlers may not actually be raising substantial amounts for individual candidates. Moreover, campaign contributions raised through bundlers often constitute only a small minority of total funds raised for a candidate.[294] This is not to say that bundling is not an issue—to be sure, having

288. *See supra* note 266 (eighteen states).

289. *Cf.* Thomas Stratmann, *Do Strict Electoral Campaign Finance Rules Limit Corruption?*, 1 CESIFO DICE REP. 24, 27 (2003) ("[C]ountries that have an inherently more corrupt culture will introduce contribution limits . . . .").

290. *See* Gaughan, *supra* note 219, at 803–04.

291. *Id.* at 797–98.

292. *See Hillary Clinton's Bundlers*, OPEN SECRETS, https://www.opensecrets.org/pres16/bundlers (last visited Dec. 16, 2021).

293. *See Biden Administration Bundlers*, OPEN SECRETS, https://www.opensecrets.org/biden/bundlers (last visited Dec. 16, 2021).

294. *See* Christopher Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 384–85 (2016).

lobbyist-bundlers play a role in raising money for candidates will inevitably lead to some nefarious activity, even instances of quid pro quo.[295] To say that bundlers outright undermine the goal of contribution limits is, nonetheless, an overstatement.

It does not take long after delving into this literature to begin realizing that academic debates over whether contribution limits quell corruption are confusing and, in some ways, fruitless. One furthermore begins to question the necessity of these inquiries. After all, do we really need a regression equation or an index to tell us the obvious? That reducing direct contributions to a candidate will at least prevent *some* instances of corruption? Maybe, instead, it is time to accept that history and some basic math offer enough proof that contribution limits are doing *something*.

To elaborate, there is ample documentation that quid pro quo exchanges between politicians and donors have been occurring in the United States since its founding.[296] One of the earliest examples of elite interests attempting to buy off American politicians occurred in the 1830s, when the president of the Bank of the United States spent $42,000 to support opponents of Andrew Jackson, an avowed enemy of the Bank.[297] In 1868, wealthy entrepreneurs such as Cornelius Vanderbilt and John Astor contributed obscene amounts of money to Ulysses S. Grant's presidential campaign, leading one commentator to write, "Never before was a candidate placed under such great obligation to men of wealth as was Grant."[298] At the turn of the 20th century, political strategist Mark Hanna raised money from banks and corporations to directly support William McKinley and the Republican Party, which inevitably led to great influence over them.[299] And of course, Richard Nixon infamously took millions of dollars in pledged campaign contributions from various interest groups in exchange for pro-business regulation, leading to FECA's passage.[300] These practices continue in modern times, one notable example being Alaska's "Corrupt Bastards Club," where state legislators were bribed through large contributions to pass laws friendly to Alaska's oil and gas industries.[301] Even more recently, New York Lieutenant Governor Brian Benjamin was charged just this year for giving grant money to a real estate developer in exchange for a $25,000 campaign

295. *See, e.g.*, Bryan Metzger, *President Biden Nominates 2 Top Campaign Bundlers for Ambassadorships to Sweden and Belgium*, INSIDER (Sept. 23, 2021, 8:25 AM), https://www.businessinsider.com/biden-taps-2-top-campaign-bundlers-donors-ambassador-sweden-belgium-2021-9.

296. *See* MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 5–11 (2005).

297. *See id.* at 7.

298. 1 GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH 289 (Michael Nelson ed., 5th ed. 2013) (quoting JASPER B. SHANNON, MONEY AND POLITICS 25 (New York: Random House ed. 1959)).

299. *See id.*

300. *See* Pasquale, *supra* note 38.

301. *See* Flanders, *supra* note 56, at 191–92.

contribution (evidently a legal amount under New York's massively high limits).[302]

What these examples demonstrate is perhaps almost too evident: Wealthy individuals will contribute colossal amounts of money directly to electoral candidates if no laws are in place to prevent them from doing so, which in turn presents a very real threat of corrupt quid pro quo exchanges. Thus, what do contribution limits do to prevent corruption? Well, instead of being able to contribute millions to a presidential candidate's campaign, a corporate CEO can only contribute $2,900.[303] Instead of being able to donate tens of thousands to an Alaskan legislator or an Alaskan state party, a big oil executive could, up until recently,[304] only donate $500 and $5,000 per year, respectively.[305] Naturally, such individuals will try their darndest to circumvent these limits and gain influence over candidates through their wealth, as they already do through methods such as bundling contributions and donating money to super PACs.[306] These methods will never, however, provide a perfect replacement for the ability to directly pay off candidates.[307] Big donors are instead forced to jump over additional hurdles in an attempt to achieve a comparable level of influence, and some of that influence must be lost along the way. Maybe a donor is not able to bundle together nearly as much money as they would have contributed themselves if it were possible. Maybe someone who donates tens of thousands to a super PAC does not get as noticed by a candidate as they would have if they have been able to contribute that money directly to the candidate's campaign.

In the end, it should not be a controversial statement to say that contribution limits are doing *something* to mitigate the possibility of corrupt dealings between contributors and candidates. And consequently, the erosion of such limits would result in more actual corruption in any affected state or locality.

b. Appearance of Corruption

Contribution limits may also help contribute to a reduction in the appearance of corruption. Predictably, scholars disagree on contribution limits'

302. *See* Ayana Archie, *New York's Lieutenant Governor Resigns After Being Charged with Bribery and Fraud*, NPR (Apr. 13, 2022, 3:38 AM), https://www.npr.org/2022/04/13/1091973669/new-york-lieutenant-governor-brian-benjamin-resigns-bribery-fraud-campaign; NCLS STATE LIMITS, *supra* note 4, at 11.

303. *See Contribution Limits for 2021–2022 Federal Elections*, FEC, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits (last visited Dec. 17, 2021).

304. *See* Thompson v. Hebdon, 7 F.4th 811, 822–23 (9th Cir. 2021).

305. *See* ALASKA PUB. OFFS. COMM'N, ALASKA CAMPAIGN ANNUAL CONTRIBUTION LIMITS—AS 15.13 https://doa.alaska.gov/apoc////pdf/ContributionLimits-2020.pdf (2020).

306. *See supra* notes 211–224, 291–295 and accompanying text.

307. *See* La Raja, *supra* note 227.

precise impact on how voters perceive corruption amongst their government leaders. A recent study by David Primo and Jeffrey Milyo, for example, suggests that campaign finance laws (including contribution limits) do not improve trust in state government.[308] Looking at nearly 60,000 individual-level observations, they instead find that such laws have a negligible effect on this trust.[309]

This does not, however, necessarily mean that contribution limits lack any potential to do so. Rather, a more recent survey by Matthew DeBell and Shanto Iyengar reveals that present contribution limits are simply too high to convince most Americans that contributions do not lead to corruption.[310] To illustrate, DeBell and Iyengar highlight how 60% of Americans view a contribution of $1,000 as corrupt, with this number increasing by only two points to 62% when considering a $5,000 contribution.[311] In other words, the number of Americans who view contributions as corrupt turns inelastic past a certain, relatively small amount of money; in fact, DeBell and Iyengar pinpoint $274 as the contribution amount at which less than half of Americans view a contribution as corrupt.[312] It is accordingly no wonder that state contribution limits are not reducing the appearance of corruption when only two states—Colorado and Connecticut—have any individual contribution limits below $274.[313]

The upshot here is mixed. On the one hand, because current campaign finance laws in the United States are not strict enough to convince most Americans that their elected officials behave ethically, a court tearing down an SLCL likely would not move the needle much regarding the appearance of corruption. On the other hand, the Court's hostility to campaign finance regulation is precisely why many state and local governments have actively avoided the adoption or maintenance of bolder contribution limits.[314] Consequently, how courts review SLCLs can have a profound effect on the wellbeing of democracy in the United States. If courts employ a standard of scrutiny that is unnecessarily antagonistic toward SLCLs, state and local governments may continue to be unable to adequately assuage public concerns about corruption. And when voters believe they live in a corrupt democracy, they are less likely to take part in it.[315] The future of SLCLs could therefore potentially impact voter participation in state and local elections, for better or worse.

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308. *See* DAVID M. PRIMO & JEFFREY D. MILYO, CAMPAIGN FINANCE AND AMERICAN DEMOCRACY: WHAT THE PUBLIC REALLY THINKS AND WHY IT MATTERS 143–47 (2020).

309. *See id.* at 145.

310. *See* DeBell & Iyengar, *supra* note 8, at 287.

311. *See id.* at 295.

312. *See id.*

313. *See supra* notes 251–252 and Table 1.

314. *See supra* notes 263–265 and accompanying text.

315. *See* Stockemer et al., *supra* note 9.

2. Misalignment Between Elected Officials and Voters

In addition to corruption, weak or nonexistent contribution limits can lead to lawmakers catering to the ideologies of their donors at the expense of the desires of the vast majority of their electorate.[316] Stephanopoulos refers to this phenomenon as "misalignment," under which a "government's policy outputs" do not line up with "voters' policy preferences."[317] How this misalignment occurs is fairly straightforward: Ignoring self-funding and loans, the vast majority of campaign funding for the average candidate comes from individual contributions, as opposed to contributions from parties or PACs.[318] These individual contributors only constitute a small minority of all voters[319] and tend to be wealthier, older, whiter, more male, and far more left-leaning or right-leaning than the average voter.[320] Thus, candidates are incentivized to appeal to a small, unrepresentative portion of voters to gain their campaign contributions, resulting in those candidates who become officeholders being ideologically divergent from their overall constituency.[321]

Misalignment illustrates how campaign contributions can engender antidemocratic ends. If elected officials are too focused on implementing policies or making decisions that gain the support of individual contributors, more privileged communities and more politically extreme groups will be favored while more marginalized communities and less politically extreme groups will end up ignored. Take, for instance, how many candidates (including incumbents) are now signaling support for the far-right "Stop the Steal" movement.[322] While some may genuinely believe that Donald Trump had the 2020 election stolen from him, most have likely hopped on the movement

316. *See* Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1427 (2015).

317. *See id.* at 1428.

318. *See id.* at 1426; Michael S. Kang, *Hyperpartisan Campaign Finance*, 70 EMORY L.J. 1171, 1192 (2021) ("Since 1980, the average share of a congressional candidate's total fundraising that comes from individual donors has grown from less than half to nearly three-quarters of total fundraising.").

319. *See* Stephanopoulos, *supra* note 316, at 1474 (noting how only 0.4% of the population supplied 64% of funds received by candidates from individuals in 2012).

320. *See* FRANCIA ET AL., *supra* note 10, at 16 ("[C]ontributors are indeed overwhelmingly wealthy, highly educated, male, and white. The pool of congressional contributors does not remotely look like America . . . ."); Pildes, *supra* note 10, at 364–71 ("[M]ost donors fall[] on either the very liberal or very conservative side of the ideological spectrum.").

321. *See* Stephanopoulos, *supra* note 316, at 1474–81.

322. *See, e.g.*, Zach Montellaro, *Democrats Locked in Close Contests with Election Deniers for Key Secretary of State Posts*, POLITICO (Oct. 24, 2022, 4:30 AM), https://www.politico.com/news/2022/10/24/election-deniers-secretary-of-state-00062383; Michael Kunzelman, *Candidates Who Attended 'Stop the Steal' Rally Before Deadly Insurrection Win Races*, WHYY (Nov. 4, 2021), https://whyy.org/articles/candidates-who-attended-stop-the-steal-rally-before-deadly-insurrection-win-races.

because there is a ton of fundraising potential in doing so.[323] And more generally, it should come as no surprise that policies passed on the state and local levels all too often favor the white and the wealthy.[324]

The negative repercussions of misalignment can, however, be mitigated through strict contribution limits. For one, women and people of color represent a greater share of small-donor contributions (less than $200) than they do large-donor contributions (equal or greater than $200).[325] Specifically, when looking at FEC data,[326] women only account for 37.7% of large-donor contributions but 52.5% of small-donor contributions.[327] Similarly, Black and Hispanic individuals only account for 3.3% and 3.8% of large-donor contributions, respectively, and yet these percentages nearly double when looking at small-donor contributions.[328] Accordingly, stricter contribution limits can lead to a donor population whose demographics are more closely aligned with that of the general population. Moreover, lower limits will naturally reduce affluent contributors' total share of dollars raised through campaign contributions. Finally, because individual contributors tend to harbor political beliefs on the outskirts of the ideological spectrum, limits on individual contributions in particular could lead to more alignment between voters' preferences and government policy- and decision-making by reducing the sway that some of the most extreme voters have on candidates.[329] All in all, strict contribution limits can help uplift underheard voices currently drowned out by the small percentage of the population who monetarily influence campaigns.

There are a couple caveats that should be mentioned here. First, some scholars maintain that strict limits on contributions by political parties, PACs, and corporations to candidates would not improve misalignment, mainly because these groups tend to support more "moderate" positions that are

323. *See* Soo Rin Kim & Will Steakin, *How Trump, RNC Raised Hundreds of Millions Pushing Baseless Election Fraud Claims*, ABC NEWS (Feb. 2, 2021, 6:30 PM), https://abcnews.go.com/US/trump-rnc-raised-hundreds-millions-pushing-baseless-election/story?id=75633798.

324. *See, e.g.*, CHUCK COLLINS ET AL., INST. FOR POL'Y STUD., DREAMS DEFERRED: HOW ENRICHING THE 1% WIDENS THE RACIAL WEALTH DIVIDE 7–14 (2019), https://ips-dc.org/wp-content/uploads/2019/01/IPS_RWD-Report_FINAL-1.15.19.pdf; Heather Stephenson, *Local Governments Favor the White and Wealthy*, TUFTSNOW (Oct. 16, 2020), https://now.tufts.edu/articles/local-governments-favor-white-and-wealthy.

325. Laurent Bouton et al., Small Campaign Donors 14 (May 9, 2022) (unpublished manuscript), https://ssrn.com/abstract=3978318.

326. While this only covers federal elections, the sample size is so massive—reflecting tens of millions of contributions nationwide over a fifteen-year period, *id.* at 1—that there is little reason to believe that contributor demographics would not be similar on a state or local level.

327. *Id.* at 14.

328. *See id.*

329. *See* Stephanopoulos, *supra* note 316, at 1487–88.

deemed to better reflect what the public supports.[330] Perhaps this is correct, though it begs the question of what "moderate" is. This Article does not attempt to provide an answer, though it largely does not matter either. For one, individual contributions constitute the vast majority of contributions to candidates.[331] Moreover, the federal government and most states already have much higher party-to-candidate and PAC-to-candidate contribution limits relative to individual contribution limits.[332] The second caveat is that small-donor contributions are still largely made by individuals who identify as far-left or far-right, as Richard Pildes notes,[333] a fact which may suggest that strict individual contribution limits might not actually quell misalignment. Nevertheless, while a contribution limit of, say, $200 on individual contributions might not lower the number of ideologically extreme people contributing to candidates, it *would* lower the total amount of dollars given by such people to candidates, which itself could dampen these contributors' influence over elected officials.

3. Legislative Polarization

In addition to misalignment, another ramification of candidates relying heavily on individual contributions from ideologically extreme voters is that legislative bodies can become polarized and unable to pass policies altogether. As noted by Michael Kang, "[I]ndividual donors who give exclusively to one party dominate campaign finance and contributed roughly 85% of federal campaign finance money for the 2016 and 2020 election cycles."[334] The consequence of this trend is that more extreme Republican and Democratic candidates tend to draw more money than less extreme ones, meaning that highly partisan candidates have an easier time raising the funds necessary to get into office.[335] Hence, the greater the amount of campaign money flowing from individual contributions, the more polarized elected officials become. Indeed, studies indicate that ideological polarization increases in legislatures in states with higher or nonexistent individual contribution limits.[336] And the Court's

330. *See id.* at 1488–89; RAYMOND J. LA RAJA, SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM 156 (2008); *see also* Pildes, *supra* note 10, at 358–59 ("Business PACs tend to give more to moderates, with an edge to conservative moderates, but not extreme conservatives.").

331. *See supra* note 318 and accompanying text.

332. *See Contribution Limits for 2021–2022 Federal Elections*, *supra* note 303; NCSL STATE LIMITS, *supra* note 4.

333. *See* Pildes, *supra* note 10, at 372 ("[S]mall donors are no less ideologically extreme than large donors.").

334. Kang, *supra* note 318, at 1191.

335. *See id.*; Michael J. Ensley, *Individual Campaign Contributions and Candidate Ideology*, 138 PUB. CHOICE 221, 229 (2009).

336. *See* LA RAJA & SCHAFFNER, *supra* note 11.

deregulation of campaign finance more broadly has coincided with a surge in hyperpolarization among our elected officials.[337]

The effects of polarization on legislative bodies are troubling. Polarized state legislatures, for instance, are less able to pass redistributive policies that help poorer citizens, such as social welfare programs, income taxes, and minimum wage increases.[338] More generally, polarized state legislatures experience more gridlock, which reduces their ability to transform agenda into law.[339] This can admittedly go both ways: While gridlock can prevent a legislature from passing much-needed legislation, it can also prevent one from dismantling crucial social welfare programs and policies. Regardless, polarized legislatures leave much to be desired for their constituents. They have a slower legislative process,[340] produce less policies,[341] and ultimately fail to fully fulfill their purpose of meeting the needs of their electorates.[342] And if you are suffering from crippling poverty, poor healthcare, climate change, a broken criminal justice system, or any other issue faced by Americans today, the unfortunate fact is that your state and local representatives may be unable or unwilling to address such issues in part because they are more concerned about catering to the hyper-partisan preferences of those who supply them with individual contributions.

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Overall, SLCLs matter. They help curb corruption, promote democratic representation, and foster a more efficient legislative process. Yet, many remain at risk of being struck down by courts attempting to apply the crude danger signs test laid out by the *Randall* and *Thompson* Courts. Especially in this era of extreme judicial skepticism against campaign finance regulation,[343] many SLCLs going forward may not survive scrutiny if courts do not incorporate proper consideration of local issues, legislative expertise, and the overall state of

337. *See* Kang, *supra* note 318, at 1198–99.

338. Elizabeth Rigby & Gerald C. Wright, *The Policy Consequences of Party Polarization: Evidence from the American States*, *in* AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 236, 239–40, 245–47 (James A. Thurber & Antoine Yoshinaka eds., 2015).

339. *See id.* at 240–41.

340. Tyler Hughes & Deven Carlson, *How Party Polarization Makes the Legislative Process Even Slower When Government Is Divided*, LONDON SCH. OF ECON. & POL. SCI. (May 19, 2015), https://blogs.lse.ac.uk/usappblog/2015/05/19/how-party-polarization-makes-the-legislative-process-even-slower-when-government-is-divided (finding "that divided government slows down the legislative process by 60 days, on average").

341. *See* Rigby & Wright, *supra* note 338, at 245–47.

342. *But see* Sean Farhang, *Legislative Capacity & Administrative Power Under Divided Polarization*, DAEDALUS, Summer 2021, at 49, 63 (noting that while Congress now passes fewer laws, within these laws exists significantly more regulatory policy than in the past).

343. *See supra* Part II.C.

modern campaign finance into their analyses. Under an ambiguous danger signs test, such considerations will likely go ignored by many courts.

Thus, if we are to treat SLCLs seriously, we must critically assess the application of the danger signs test today. What do courts get right? What do they get wrong? What is a danger sign? What is not? What should step one and step two be? How much deference should be afforded to legislative bodies?

This Article does not assert that no SLCL should ever be struck down by a court. In the words of Justice Breyer, there must be "some lower bound."[344] If an individual contribution limit for a particular office were $1, for instance, this would almost assuredly make it impossible for anybody to mount a successful campaign unless one had sufficient means of self-funding or access to a generous and robust public financing system.[345] Courts are more than justified in removing such extreme limits, and if the Court insists on invoking the First Amendment to arrive at such a judgment, so be it.

What this Article *does* argue is if a court is to strike down an SLCL, it should do so using neither a test premised on faulty and outdated assumptions about campaign finance nor one that fails to properly define the scope of its steps. Fortunately, the *Thompson* opinion—in all its perplexity—has provided a ripe opportunity to reevaluate how to mold and apply the danger signs test to SLCLs in modern times. Part IV elaborates.

IV. TAILORING A DANGER SIGNS TEST IN A MODERN QUID PRO QUO MARKET

As Part II covers, the danger signs test adopted by the *Randall* and *Thompson* Courts is brimming with ambiguities that have stumped courts, scholars, and attorneys alike.[346] There are, nevertheless, some certainties about the test that one can extract from the two opinions. And before delving too deeply into a critical assessment, these certainties should be laid out.

First, the danger signs test is a two-step process, the first step being a threshold question of whether there exist danger signs of an SLCL being too low, which, if satisfied, leads to a second step inquiry into other relevant factors, including any "special justifications" for the SLCL.[347] Second, based on both how the *Thompson* Court ran through the test and how many of the five factors discussed in *Randall* were unique to Vermont, it does not appear as though courts must go through every single danger sign and factor enumerated in

344. Randall v. Sorrell, 548 U.S. 230, 248 (2006) (plurality opinion).

345. *See infra* Part IV.C.1.d.

346. *See supra* Parts II.A and II.B.

347. *See* Thompson v. Hebdon, 140 S. Ct. 348, 350–51 (2019).

Randall when reviewing an SLCL.[348] Moreover, courts appear free to consider additional relevant danger signs beyond those in *Randall*, considering that the *Thompson* Court included the uniformity of Alaska's individual contribution limit as a danger sign.[349] Third, the primary constitutional concern when reviewing an SLCL is the First Amendment right of a candidate—especially a challenger—to "amas[s] the resources necessary for effective [campaign] advocacy,"[350] though concerns about other democratic issues like civic engagement and political party participation can be relevant.[351] Fourth, and perhaps not acknowledged enough, courts should generally defer to legislative bodies for determinations of SLCLs given that they are "better equipped to make such empirical judgments"[352]—only in extreme circumstances should this deference subside. Finally, the line between the original danger signs and factors mentioned in *Randall* is blurred following *Thompson*; at the very least, *Randall*'s step-two factors can also be considered step-one danger signs.[353]

This Part does not attempt to disturb these certainties, as this Article is not a call to completely overhaul Supreme Court precedent. Rather, it navigates through them while realigning the danger signs test to be more suitable for the modern campaign finance era. This Part thus proceeds as follows. Part IV.A briefly overviews the sole contemporary purpose of SLCLs following *McCutcheon v. FEC*: to institute a price ceiling on potential quid pro quo exchanges between donors and elected officials. The next Subpart then assesses the danger signs test through this framework and reworks its two-step process to better incorporate legislative deference and delineate what a "danger sign" is. Lastly, the third Subpart uses a mixture of existing literature and original quantitative analysis to evaluate which danger signs matter more than others, and which should play little if any role in reviewing SLCLs.

A. The Quid Pro Quo Market of Campaign Finance

Under modern campaign finance jurisprudence, contribution limits are little more than price ceilings on quid pro quo exchanges.[354] Why is this? To

348. *See id.*; *Randall*, 548 U.S. at 253–61.

349. *See Thompson*, 140 S. Ct. at 351.

350. *Randall*, 548 U.S. at 256 (first alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

351. *See id.* at 261.

352. *Id.* at 248; *see also* McConnell v. FEC, 540 U.S. 93, 137 (2003), *overruled in part by* Citizen United v. FEC, 588 U.S. 310 (2010).

353. *See supra* notes 199–201 and accompanying text.

354. A "price ceiling" is "a type of price control, usually government-mandated, that sets the maximum amount a seller can charge for a good or service." Troy Segal, *Price Ceiling Types, Effects, and Implementation in Economics*, INVESTOPEDIA, https://www.investopedia.com/terms/p/price-ceiling.asp (last visited Nov. 17, 2022).

recall, the Supreme Court has spent the past couple decades constraining which governmental interests may qualify as sufficiently important enough to justify contribution limits.[355] Now, the only acceptable government interest is, in the Court's eyes, the prevention of quid pro quo corruption, i.e., a donor giving money to a person or entity in exchange for something in return.[356] And while there have been arguments made in support of additional interests,[357] it is highly unlikely that a 6 – 3 conservative Court will take to such arguments any time soon.

Consider next that corrupt quid pro quo exchanges between donors and candidates aggregate to form a marketplace—what this Article refers to as the "quid pro quo market." In this marketplace (visualized in Figure 1's abstract supply-and-demand graph[358]), political candidates are the suppliers and contributors are the consumers. The supply curve, labeled *S*, represents the willingness of candidates to sell their "product"—a political favor[359]—at any given "price"—a campaign contribution. The demand curve, labeled *D*, represents the quantity of favors that contributors are willing to buy at any given contribution amount. At any given point on the curve, the corresponding coordinates (x, y) mean that contributors in the aggregate are willing to buy x level of political favors if the necessary contribution amount to do so is $\$y$. Contribution amounts and favors will tend toward an equilibrium point (P, Q), where the supply and demand curves intersect.[360] At this point, the amount of favors that contributors want to buy is equal to the amount of favors that candidates wish to sell. Without any regulatory intervention, a quid pro quo market will operate at equilibrium, with contributors donating $\$P$ worth of contributions to candidates in exchange for Q level of favors from them.[361]

355. *See supra* Part II.C.

356. *See* McCutcheon v. FEC, 572 U.S. 185, 207–08 (2014) (plurality opinion).

357. *See, e.g.*, Stephanopoulos, *supra* note 316, at 1499–500 (arguing that alignment is a government interest that should justify campaign finance regulations).

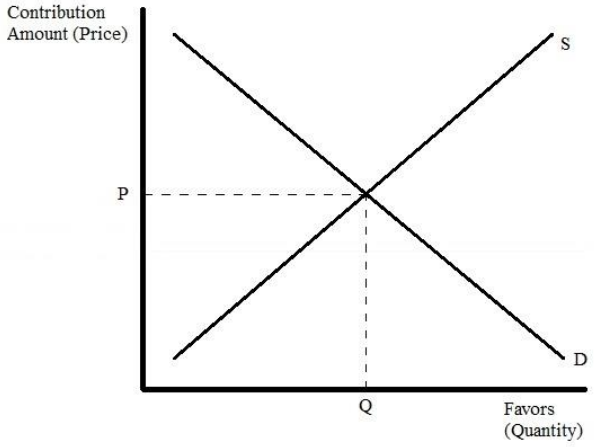
358. Economists often use such graphs to help analyze how markets work and react to various changes. For a more detailed introduction to supply and demand analysis, see DAVID A. BESANKO & RONALD R. BRAEUTIGAM, MICROECONOMICS: AN INTEGRATED APPROACH 25–73 (2002). For the purposes of this Article, these graphs have been reduced to their most abstract form; there is no concern for details such as elasticity.

359. What precisely constitutes one unit of a political favor is not a concern for this Article, though obviously not all favors are valued equally. Let us say hypothetically that one piece of legislation equals one favor, meaning a contributor looking for a candidate to support three particular pieces of legislation would need to donate three times the amount of money to said candidate as would a contributor looking for support for only one piece of legislation. And if, say, an appointment to an ambassadorship is worth half a piece of legislation, the contributor would only need to donate half the amount of money to receive such a favor.

360. *See supra* note 358.

361. It should be noted that not every contributor or candidate participates in the quid pro quo market. Surely, many (if not most) individuals who contribute money to a campaign do not do so with any intent of receiving favors in return. Likewise, there are plenty of candidates who are not giving out favors to contributors for a variety of reasons (e.g., morality). These people are not included in the quid pro quo market.

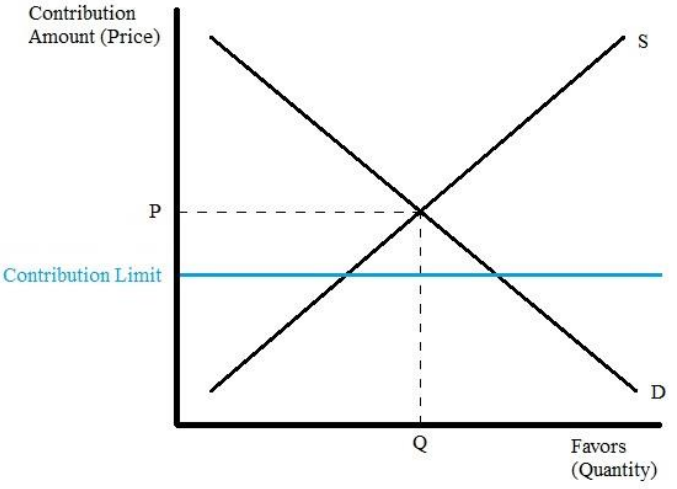
Figure 1 – The Quid Pro Quo Market



A legislative body's goal when passing a contribution limit, then, is to ensure that the limit amount falls below the equilibrium point. Otherwise, if a contribution limit rests above the equilibrium point, contributors and candidates in the quid pro quo market will go about business as usual at equilibrium, rendering the limit functionally useless. Accordingly, as Figure 2 illustrates, an effective contribution limit operates as a price ceiling in the quid pro quo market, under which candidates cannot sell favors to contributors at a dollar amount above the limit, including the equilibrium amount. For example, say the *P*-level equilibrium price for receiving a political appointment by the governor in State X were a $10,000 contribution. In response to blatant corruption, State X passes a $2,000 limit on individual contributions to candidates for statewide offices. What would be the effect? As Figure 2 shows, the supply of such political favors (appointments) would drop below the demand for them. Less gubernatorial candidates in State X would be willing to enter such a quid pro quo exchange for only a $2,000 contribution, thus creating a scarcity of favors for contributors.[362] This scarcity is the means by which contribution limits are able to prophylactically prevent the occurrence of corruption within a given democratic system.

362. The contribution limit itself would not affect supply and demand in this market. *See* John Lynham, *Price Ceilings and Price Floors*, PRINCIPLES OF MICROECONOMICS—HAWAII EDITION, https://pressbooks.oer.hawaii.edu/principlesofmicroeconomics/chapter/3-4-price-ceilings-and-price-floors (last visited Oct. 16, 2022) ("Neither price ceilings nor price floors cause demand or supply to change."). Thus, once a contribution limit is set, it would only move above the quid pro quo market equilibrium if supply increased—perhaps caused by an increase in legislative seats or power—or demand decreased, i.e., less individuals sought after political favors.

Figure 2 – The Quid Pro Quo Market with Contribution Ceiling



With this in mind, we can now analyze how the danger signs test should operate in the quid pro quo market.

B. Realigning a Two-Step Process

The dangers sign test as currently applied by courts presents some big questions for those in the campaign finance field. This section attempts to answers these questions and come out with a better sense of what a more coherent, robust two-step test would look like. First, what is a danger sign? Second, when and to what extent does deference to legislative bodies stop? The first two subsections tackle these uncertainties. The final subsection then addresses and rationalizes two assumptions necessary for this Article's explanation of the danger signs test to work. Perhaps boldly, it asserts both that the dollar amount at which a contribution limit becomes effective will always be above the amount at which it disrupts the democratic process (such as preventing candidates from amassing enough funds to successfully campaign) and that a legislative body that knows the latter level generally will not pass limits that fall below it. Thus, so long as a court finds that a legislative body did its due diligence and provided proper justifications for the limits it passed, the court can presume that said limits are constitutional.

1. Step One—What Is a Danger Sign?

The *Randall* Court failed to adequately explain what a "danger sign" is. To be sure, Justice Breyer gave us a general idea, describing them as "strong indication[s] in a particular case" that "contribution limits . . . are too

low . . . [and] prevent[] challengers from mounting effective campaigns against incumbent officeholders."[363] Still, this description did not paint a full picture, especially considering that factors such as an SLCL being on a "per election cycle" basis were in step one yet others such as a lack of inflation indexing were in step two.[364] Despite such factors both being "strong indications" that contribution limits may be too low,[365] the *Randall* Court only considered the former a danger sign. This distinction between *Randall*'s step-one danger signs and step-two factors thus comes across as arbitrary, begging the question: Why were the danger signs in *Randall* chosen as danger signs? What qualifies a danger sign to be a danger sign?

As alluded to earlier in this Article, the *Thompson* Court offered an answer to this question. Instead of following the *Randall* plurality exactly, the Court added a couple additional danger signs: lack of inflation indexing, which was a step-two factor in *Randall*, and uniformity, which was not mentioned in *Randall* at all.[366] Danger signs are therefore not simply the five signs originally enumerated by Justice Breyer. Rather, the *Thompson* opinion demonstrates that the Court will consider as danger signs any strong indicators that an SLCL is so low that it disrupts democratic values like electoral competition, civic engagement, and party participation—what Justice Breyer and this Article calls the "lower bound."[367] This move, even if inadvertent, is important for the longevity of the danger signs test because flexibility is essential in a world in which campaign finance is constantly evolving and contribution limits are each implemented in their own unique contexts. While the danger signs discussed in *Randall* may have made sense for Vermont's specific contribution limits in the 2006 world, other danger signs may be more applicable to different SLCLs in the modern day. Moreover, if the *Randall* plurality's concern was about the impact of contribution limits on contributions more broadly,[368] it makes sense to view many of the step-two factors, like limits on campaign volunteering and party-to-candidate limits, as danger signs rather than reserving them until the latter part of the test.

Step one of the danger signs test is therefore a seemingly open-ended threshold question of whether there are enough indicators signaling that an

363. Randall v. Sorrell, 548 U.S. 230, 248–49 (2006) (plurality opinion).

364. *See id.* at 249, 261.

365. *See* Thompson v. Hebdon, 140 S. Ct. 348, 351 (2019); *see also supra* notes 199–201 and accompanying text.

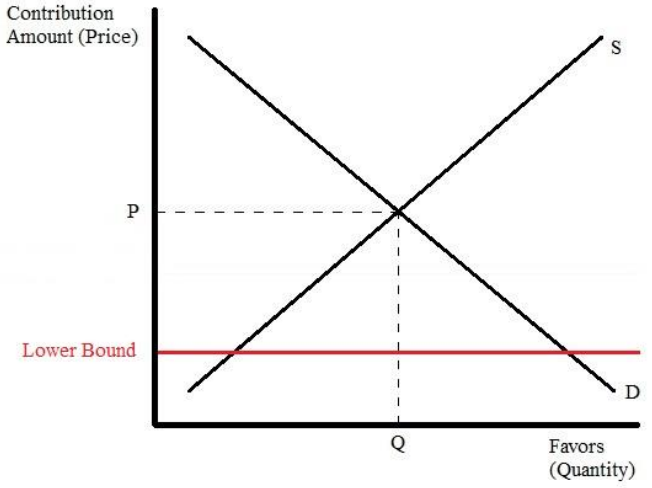
366. *See Thompson*, 140 S. Ct. at 350–51.

367. *See Randall*, 548 U.S. at 248. Justice Breyer specifically framed this concern as challenger versus incumbent. *See id.* at 248–49 ("[C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders . . . ."). There is, however, little reason to believe that too low of a contribution limit would not also present issues for incumbent candidates as well. *See infra* notes 397–398 and accompanying text.

368. *See Randall*, 548 U.S. at 262; *see also supra* note 116 and accompanying text.

SLCL is so low that it may fall below lower bound, i.e., upset democratic values. Of course, the question cannot be too open-ended; courts can only consider so many danger signs until the analysis becomes unmanageable. Part IV.C identifies which indicators may generally be the most useful danger signs to consider (as well as which ones are not so useful). Furthermore, it is not a court's job to fulfill the impossible task of precisely calculating which dollar amount constitutes the lower-bound SLCL.[369] Its job is simply to ascertain whether enough danger signs exist to imply that an SLCL might exist below the lower-bound line, as shown in Figure 3.[370]

Figure 3 – The Quid Pro Quo Market and the Lower Bound



If the danger signs are few or nonexistent, a court must then defer to a legislative body's determination of an SLCL. If, however, enough danger signs are exposed, deference diminishes, and the court will move onto step two: Did the legislative body do its due diligence?

369. *See Randall*, 548 U.S. at 248 ("[T]he legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." (quoting McConnell v. FEC, 540 U.S. 93, 137 (2003), *overruled in part by* Citizen United v. FEC, 588 U.S. 310 (2010))).

370. There are then the questions of how many danger signs must be met in step one and whether such danger signs are weighted differently depending on the sign. *See* Garrett, *supra* note 16. Unfortunately, there are no good answers to these questions. This is simply the trade-off of adopting a standard-like process, which works better than a rule-like approach when, "in a particular area of law, facts vary considerably from case to case." Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101, 112–13 (1997). Such is the state of campaign finance law, in which each state and local government has their own peculiarities and different needs when it comes to elections.

2. Step Two—A Hard Look?

So a court discovers enough danger signs when reviewing an SLCL to raise suspicion that the limit may fall below the lower bound, and can in turn exercise some independent judgment. What should the court do now? As discussed earlier,[371] courts have not settled on how to approach step two. Some will run through all five of the factors discussed in *Randall*'s step-two analysis.[372] Others focus almost exclusively on the fifth factor: "special justifications" for the limit level chosen.[373] When contemplating both the uniqueness of the facts in *Randall* and the roles of each step in the danger signs test, the latter approach is more sensible.

First consider how flummoxing *Randall*'s step-two approach would be in the context of basically any other SLCL case. Two of the factors applied by Justice Breyer were very specific to the limits imposed by Vermont's Act 64[374]—most states and localities are not passing campaign finance laws that subject individuals and political parties to the same contribution limits or define campaign volunteering as a contribution.[375] Hence, it would be utterly pointless for courts to always consider these factors when reviewing SLCLs. The Ninth Circuit, for instance, discussed these two factors in *Thompson* on remand despite them being irrelevant to Alaska's contribution limits, and the section ended up reading as awkwardly formalistic and unneeded.[376] Of course, these factors (or similar variations) may not always be inapt, in which case they would be better suited as danger signs in step one given their impact on a candidate's ability to raise sufficient funding.[377] Likewise, two of the other factors—the amount of funds reduced by the SLCL and lack of inflation indexing[378]—while far more applicable to the average SLCL case, should also be considered danger signs and analyzed in step one rather than step two. After all, why should step two include the examination of factors that implicate the First Amendment rights of candidates, parties, and citizens more broadly when that is literally the exact purpose of step one?

371. *See supra* Part II.A.

372. *See, e.g.*, Thompson v. Hebdon, 7 F.4th 811, 819–23 (9th Cir. 2021).

373. *See, e.g.*, Ognibene v. Parkes, 599 F. Supp. 2d 434, 448–50 (S.D.N.Y. 2009), *aff'd*, 671 F.3d 174 (2d Cir. 2011).

374. *See Randall*, 548 U.S. at 256–60 (listing as factors "Act 64's insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors" and "the Act's treatment of volunteer services").

375. *See* NCSL STATE LIMITS, *supra* note 4.

376. *See Thompson*, 7 F.4th at 821.

377. *See supra* Part IV.B.1; *see also infra* Part IV.C.1.e.

378. *See Randall*, 548 U.S. at 253–56, 261.

One factor thus remains: whether there are any "special justification[s] that might warrant a contribution limit so low."[379] And when it comes down to what step two's goal should be, this is really the only factor that is needed. Whereas step one's analysis is focused on the *interests of democratic participants* (e.g., candidates),[380] step two's analysis should then be focused on the *government's interest*, namely whether it can justify the contribution limits it passed. The Supreme Court in fact hinted at this idea at the end of its *Thompson* opinion, in which it neglected to mention any of the *Randall* step-two factors other than special justifications.[381] While the Court possibly meant nothing by this, it does raise the question of whether the Court views the "special justifications" factor as the most important of those listed in *Randall*.

There is also the question of deference here. If deference to the legislature subsides in step two and courts get to exercise independent judgment, what then does looking into special justifications entail? Certainly, it does not mean that courts should attempt to calculate what the optimal contribution limits would be in a given state or locality. Just because a court no longer plans to afford deference to a legislative body does not mean that it gets to roleplay as the legislature itself. Not only would this arguably offend separation of powers principles, but it would also ignore the enormous advantages that legislative bodies have over courts in this area. For one, legislative bodies "have substantial staff, funds, time and procedures to devote to effective information gathering and sorting,"[382] placing them in a much better position to determine which levels of contribution limits would effectively combat quid pro quo corruption while still keeping races competitive. Moreover, each state and locality has its unique reasons for crafting its campaign finance laws the way it did, responding to the specific needs and features of its democracy.[383] And legislative bodies—including referenda[384]—consist of individuals who are much more in tune with said needs and features than judges. Overall, courts should refrain from assuming the role of a fact-finding legislature when applying step two.

379. *Id.* at 261.

380. Namely, how an SLCL affects their interest. *See supra* Part IV.B.1.

381. *See* Thompson v. Hebdon, 140 S. Ct. 348, 351 (2019).

382. Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578 (1994).

383. *See, e.g.*, Flanders, *supra* note 56, at 197–98 ("Because Alaska is viewed as being different, its campaign finance rules are thought to necessarily be different (and more restrictive) as well."). For another example, New Jersey allows corporate contributions to candidates *except* from banks because New Jersey has a particular history with banking and corruption. *See* N.J. Bankers Ass'n v. Grewal, No. 18-cv-15725, 2021 WL 2525762, at *7–9 (D.N.J. June 21, 2021), *rev'd sub nom. on other grounds*, N.J. Bankers Ass'n v. Att'y Gen. N.J., 49 F.4th 849 (3d Cir. 2022).

384. *Cf.* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808–09 (2015) ("'[T]he Legislature' comprises the referendum and the Governor's veto in the context of regulating congressional elections.") (citing Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 567 (1916); Smiley v. Holm, 285 U.S. 355, 372–73 (1932)).

This does not mean, however, that courts cannot scrutinize the *process* undertaken by a legislative body in its determination of contribution limit levels. Indeed, courts are well-equipped to decide whether a legislature used the resources at their disposal to make a good-faith factual inquiry into both the lower bounds of a constitutional contribution limit and the level at which a limit begins to disrupt the quid pro quo market (referred to for the remainder of this Article as the "efficacy threshold"), or at least to address the appearance of corruption. Eric Berger refers to this approach to deference as the institutional-analysis approach.[385] As Berger notes, "[i]t may well be true that [legislatures] in theory [are] better equipped than courts to amass facts, but that does not mean that [legislatures] always utilize[] [their] institutional advantages when doing so."[386] For a variety of reasons—politics, incompetence, laziness—legislative bodies may neglect to properly explore pertinent facts and considerations necessary to provide compelling reasons (i.e., "special justifications"[387]) as to why contribution limits should be set at their given level. Therefore, courts "should examine [legislatures'] fact-finding procedures for rigor and good faith."[388] Through this approach, courts reviewing SLCLs under the danger signs test can exercise independent judgment in step two without assuming the role of legislators.

Bearing all this in mind, step two should resemble something comparable to hard look review under administrative law.[389] Courts should avoid reviewing facts de novo when deciding whether special justifications for an SLCL exist,[390] and should instead examine the steps the legislative body took to arrive at the limits it did. This will involve scrupulous inspection of the legislative record.[391] Did the legislative body carefully investigate the issue? Did it compile copious amounts of data? Did it genuinely consider multiple perspectives before settling on the dollar amounts it chose? Do these actions reflect that the legislative body

385. Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 498 (2013).

386. *Id.* at 501.

387. Randall v. Sorrell, 548 U.S. 230, 261 (2006) (plurality opinion).

388. Berger, *supra* note 385, at 502.

389. Under hard look review, courts reviewing an agency's actions make sure that said agency considered all relevant facts as part of its decision-making process. Agencies must provide detailed explanations of their behavior and make policy choices that are reasonable on the merits. Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1912–14 (2009). If the agency cannot satisfy this review, the court will deem the decision (e.g., regulation) "arbitrary and capricious" and invalidate it. *See id.* (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

390. For an example of a court doing this, see Thompson v. Hebdon, 7 F.4th 811, 822 (9th Cir. 2021).

391. For an example of a court doing this in another context, see Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1012–14 (N.D. Cal. 2004) ("Congress has not drawn reasonable inferences based on substantial evidence, and its findings are therefore not entitled to substantial deference."), *aff'd sub nom.* Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007).

made itself aware of the levels at which the contribution limits may hit their lower bound? Has the body done enough to instill confidence in the court that the legislators crafting the law generally understood where the efficacy threshold lies? Or understood how low the limits would need to be to reduce the appearance of corruption?[392]

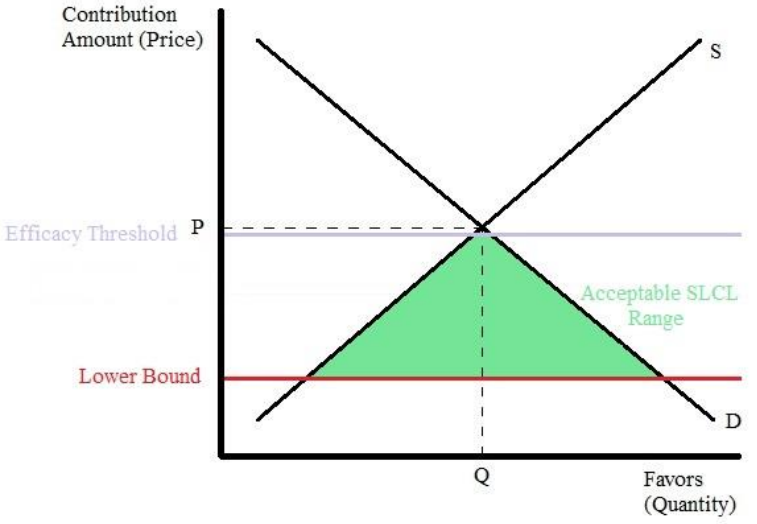
If a court can answer yes to these questions, it can safely assume that the SLCL being reviewed falls somewhere below the efficacy threshold and above the lower bound, therefore residing within the range of constitutional yet useful contribution limits in the state or locality (as shown in Figure 4 below). That is, because the legislative body did enough of its homework to discern both the point at which an SLCL would become effective and the point at which it would harm democratic values, the court can assume that the SLCL exists between these two points.[393] Thus, in such a case, the court should restore deference to the legislative body and uphold the SLCL. If, however, the court finds that the legislative body did not engage in a good-faith factual inquiry, but instead selected the limits it did for seemingly arbitrary or illegitimate reasons (e.g., partisan reasons), the SLCL should be found unconstitutional. Naturally, though, the thoroughness of legislative fact-finding will exist on a spectrum rather than as a dichotomy, meaning greater thoroughness should beget greater deference, and vice versa.[394]

392. It should be noted, though, that courts these days seem to be increasingly wary of "the appearance of corruption" itself being used to justify campaign finance laws. *See, e.g.*, Ted Cruz for Senate v. FEC, 542 F. Supp. 3d 1, 15 (D.D.C. 2021) (dismissing a comprehensive poll conducted on Americans' perceptions of campaign contributions and corruption), *aff'd*, 142 S. Ct. 1638 (2022). However, the Supreme Court's recent campaign finance decisions suggest that while the bar is high to prove the appearance of corruption, it is still a valid state interest. *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1654 (2022).

393. The reason why the appearance of corruption is not part of this analysis is because the limit level that effectively counters the appearance of corruption will almost always be lower than the level that begins disrupting the quid pro quo market. *See supra* notes 311–313 and accompanying text (noting that contribution limits must be set exceptionally low for the majority of Americans to not perceive corruption).

394. *See* Berger, *supra* note 385, at 502–03.

Figure 4 – The Quid Pro Quo Market and the Efficacy Threshold



This entire approach to step two admittedly rests on two glaring assumptions: first, that knowledgeable legislators will not institute contribution limits below the lower bound, and second, that the efficacy threshold will always rest above the lower bound. The final Subpart tackles and rationalizes these assumptions.

3. Two Assumptions

The above model approach begs two questions. First, even if legislators did their due diligence and likely identified the lower bound of the SLCLs they considered, why should the court assume that said legislators would not still institute SLCLs below that lower bound? This is, in fact, an oft-cited concern of many who scrutinize campaign finance laws: that low contribution limits can actually become a form of incumbency protection.[395] The theory is that because

395. *See* Citizens United v. FEC, 558 U.S. 310, 460–61 (2010) (Stevens, J., concurring in part and dissenting in part) (pointing out instances of incumbency protection being used by Justices as a reason to strike down campaign finance laws); Randall v. Sorrell, 548 U.S. 230, 248–49 (2006) (plurality opinion); Scott P. Bloomberg, *Democracy, Deference, and Compromise: Understanding and Reforming Campaign Finance Jurisprudence*, 53 LOY. L.A. L. REV. 895, 934 (2020) ("A loose nexus between a campaign finance law and the anticorruption interest may signal an ulterior legislative motive, such as incumbency protection."); Torres-Spelliscy, *supra* note 12, at 482 (stating that "[t]he Roberts Court sees campaign finance reform as negatively impacting American democracy" because it can "act[] as incumbency protection plans"); Richard L. Hasen, *Judging the Political and Political Judging: Justice Scalia as Case Study*, 93 CHI.-KENT L. REV. 325, 329–31 (2018).

incumbents have advantages not enjoyed by most challengers, such as institutional support and name recognition, super low contribution limits would not bar them from running an effective campaign in the same way that it would to challengers.[396] Thus, state and local legislators surely would have all the incentive in the world to pass SLCLs under the lower bound, right?

Wrong. Low contribution limits do not disproportionately burden challengers in elections. As a matter of fact, campaign finance data suggests that, at least on the state level, low contribution limits *increase* competition in elections, giving challengers a stronger chance of ousting incumbent opponents.[397] This indicates that legislators actually have an impetus to either pass high contribution limits or zero limits at all.[398] This makes sense, too. If incumbents and challengers are given equal opportunity to raise unfettered amounts of money from others, the incumbent can be expected to raise more funds simply due to having more connections with the party establishment and elite donors, as well as benefiting from better name recognition. This is perhaps why legislators often cite fears of having to face wealthy, self-funded candidates in elections as justification for campaign finance laws; they are who incumbents truly worry about.[399]

One could, of course, posit extraordinarily improbable scenarios: What if a state legislature, despite doing its due diligence, passes an individual contribution limit of $10? Should a court still defer to the legislature under step two because it engaged in thorough fact-finding? The answer is obviously no, because elections would clearly lose their competitiveness at that level and only those with enough preexisting connections, money, and popularity would stand a chance. Such an unlikely situation would simply be governed by common sense, though.[400]

Regarding the second question: Why should courts accept an assumption that the efficacy threshold of contribution limits will always fall above their lower bound? To answer this, consider the ramifications of the alternative. What would a court be saying if it left open the possibility that the lowest possible contribution limit at which elections can remain democratic may

396. Hasen, *supra* note 395.

397. *See* CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUST., ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS 7 (2009), https://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf ("[I]ndividual contribution limit[s] set at $500 or lower reduce[] an incumbent's margin of victory by 14.5 percentage points."); Stratmann & Aparicio-Castillo, *supra* note 240.

398. This makes it all the more commendable when a legislative body chooses to pass lower contribution limits.

399. *See, e.g.*, 147 CONG. REC. 3852, 3884–85 (2001) (statement of Sen. Sessions) (citing self-funded candidates as reason for support of BCRA's Millionaire's Amendment).

400. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it.").

potentially be higher than the level at which a contribution limit can become effective by disrupting quid quo pro exchanges between candidates and their contributors? In effect, it would be saying that some states and localities might need to choose between having its leaders remain corruptible or having a society devoid of necessary components of a true democracy like electoral competition.[401] In other words, that the state or local government can never be truly democratic, but is instead destined to resemble something more oligarchic.[402] This surely cannot ever be the case; at least, we should not want judges to be the ones making such a dangerous calculation. That would fall into a realm of "democratic backsliding" so severe that it could undermine the legitimacy of both our courts and elected institutions.[403]

Moving beyond abstractions, Justices of the Supreme Court have routinely cited to democratic principles as justifications for decisions made in a variety of cases.[404] The *Randall* plurality itself was driven heavily by explicit concerns over "democratic accountability."[405] There is hence a wealth of jurisprudential foundation supporting the notion that courts should engage in what some call "democratic protectionism" when reviewing SLCLs[406]: They should assume that SLCLs' efficacy thresholds will always be higher than their lower bounds.[407] Otherwise, courts would be essentially saying that some state or local legislatures are literally unable to institute contribution limits that are both useful and constitutional.

Some may regard this assumption as a legal fiction. Even if this is so, it is a necessary one.

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401. Which is not really a choice given that the Court finds that the latter implicates First Amendment rights. *See supra* Part I.C.

402. "Oligarchy" means "government by the few." *Oligarchy*, BRITANNICA, https://www.britannica.com/topic/oligarchy (last visited Oct. 4, 2022).

403. *See generally* Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U. L. REV. 351 (2018) (overviewing how courts have been used to erode democracy "in a series of small individual steps that, each on their own, may not appear alarming").

404. *See, e.g.*, Berisha v. Lawson, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from the denial of certiorari) ("When the Court originally adopted the actual malice standard, it took the view that tolerating the publication of *some* false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed."); Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1859 (2018) (Breyer, J., dissenting) ("[O]ur precedent strongly suggests that, given the importance of voting in a democracy, a State's effort (because of failure to vote) to remove from a federal election roll those it considers otherwise qualified is unreasonable."); Williams-Yulee v. Fla. Bar, 575 U.S. 433, 443 (2015) ("Applying a lesser standard of scrutiny to such speech would threaten 'the exercise of rights so vital to the maintenance of democratic institutions.'" (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939))). One of the first federal campaign finance laws was upheld under the principle that Congress possesses the power "essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." Burroughs v. United States, 290 U.S. 534, 545 (1934).

405. Randall v. Sorrell, 548 U.S. 230, 249 (2006) (plurality opinion).

406. *See* Amal Sethi, *Towards a Pluralistic Conception of Judicial Role*, 90 UMKC L. REV. 69, 87–91 (2021).

407. *See supra* Figure 4.

C. Evaluating Danger Signs

Returning to step one, a final question remains about what sorts of factors and indications a court should regard as a "danger sign" that an SLCL may fall below the lower bound. While this Subpart attempts to neither establish a hierarchy of danger signs nor create an exhaustive list of them, it will evaluate which danger signs identified by the Supreme Court are actually relevant in the modern-day world of campaign finance, and which are less so. Moreover, it will suggest a couple additional danger signs that have not been extensively considered by courts—methods of campaigning and the existence of matching funds programs. In doing so, this Subpart will hopefully provide a roadmap for constructing a sounder step-one formula.

1. What Matters

What should courts consider danger signs? This Article identifies five potential signs that should matter when reviewing the constitutionality of SLCLs: lack of inflation indexing, corresponding contribution limits, methods of campaigning, existence of a matching funds program, and any other state- or local-specific idiosyncrasies.

a. Lack of Inflation Indexing

As the Supreme Court has identified,[408] contribution limits that are not adjusted for inflation run a severe risk of either being too low or becoming too low in the future. The danger is evident: If a contribution limit remains the same amount over the course of decades, the depreciating value of the dollar will over time make it increasingly implausible for campaigns to raise sufficient funds. Such a risk has become especially pertinent over the past year, during which the United States experienced its worst inflation since 1982.[409] Because of this, a contribution of $1,000 in the 2022 election had approximately the same value as a contribution of $870 in the 2020 election. Thus, in states or localities without indexed contribution limits, candidates' only hope of avoiding the detrimental impact of inflation on their campaigns is for legislative bodies to routinely pass bills to increase the limits. And having the functionality of competitive elections fall on the mercy of legislators and their ability to legislate is far from an ideal situation.

408. *See* Thompson v. Hebdon, 140 S. Ct. 348, 351 (2019); *Randall*, 548 U.S. at 261.

409. *See* Christopher Rugaber, *US Inflation at New 40-Year High as Price Increases Spread*, AP NEWS (June 10, 2022), https://apnews.com/article/key-inflation-report-highest-level-in-four-decades-c0248c5b5705cd1523d3dab3771983b4.ca

With all that said, a lack of indexing should not be seen as a total death sentence for SLCLs. If a contribution limit is high enough that the chances of it obstructing candidates from amassing necessary campaign funds over the next few decades are slim, then not being indexed to inflation might not be a substantial danger sign.[410] Furthermore, state and local legislative bodies may actually be more reliable and willing to regularly raise contribution limits than one would think. While there is some understandable reason for cynicism on this front, state legislatures and city councils are actually much more productive than Congress, which is attributable to factors such as less polarization[411] and no supermajority requirements (like that of the U.S. Senate).[412] In fact, in the case of states, the average state legislature introduces twenty-three times more bills than Congress does[413] and passes bills at a rate six times higher than Congress.[414] It is therefore not surprising that many state legislatures have demonstrated a willingness to manually raise unindexed contribution limits,[415] though often this only occurs after a legal challenge against them.[416] Nevertheless, these facts do not undermine the notion that a lack of inflation indexing generally presents a major danger sign that an SLCL could be too low. It is, after all, not a coincidence that six out of the nine lowest state individual contribution limits in the nation are not indexed to inflation.[417]

b. Corresponding Contribution Limits

Another danger sign that courts should continue to consider is how corresponding contribution limits in a given state or locality interplay with the limit being challenged. For instance, the *Randall* plurality took issue with the fact that Vermont's party-to-candidate contribution limits were the same as its

410. The United States Court of Appeals for the Sixth Circuit felt this way in a challenge to Michigan's contribution limits, which the court upheld despite not being indexed to inflation because the limits were not "suspiciously low." McNeilly v. Land, 684 F.3d 611, 619 (6th Cir. 2012).

411. *See* NAT'L CONF. OF STATE LEGISLATURES, STATE LEGISLATIVE POLICYMAKING IN AN AGE OF POLITICAL POLARIZATION 26 (2018), https://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Partisanship_030818.pdf.

412. *See* Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1266 (2014) ("[C]ity councils generally do not require supermajorities to pass legislation.").

413. *State Legislatures vs. Congress: Which Is More Productive?*, QUORUM, https://www.quorum.us/data-driven-insights/state-legislatures-versus-congress-which-is-more-productive (last visited Jan. 25, 2022).

414. *See* Glen Justice, *States Six Times More Productive than Congress*, CQ (Jan. 27, 2015), https://web.archive.org/web/20200915021202/https://info.cq.com/resources/states-six-times-more-productive-than-congress.

415. *See, e.g.*, S.B. 661, 97th Leg., Reg. Sess. (Mich. 2013) (raising contribution limits for statewide, senate, and house candidates).

416. For instance, Michigan raised its limits almost immediately following a challenge against them in federal court. *See* McNeilly v. Land, 684 F.3d 611 (6th Cir. 2012) (upholding Michigan's contribution limits).

417. *See* CONN. GEN. STAT. § 9-611(a) (2021); DEL. CODE ANN. tit. 15, § 8010 (2021); MASS. GEN. LAWS ANN. ch. 55, § 7A (West 2021); MINN. STAT. § 10A.27, subdiv. 1 (2022); 17 R.I. GEN. LAWS § 17-25-10.1(a)(1) (2021); S.D. CODIFIED LAWS §§ 12-27-7, 12-27-8 (2022); *see also supra* Table 1.

individual contribution limits.[418] This makes sense given the great extent to which candidates—particularly those in close races—now rely on party support for their campaigns.[419] A seemingly reasonable individual contribution limit can in reality be highly constraining for candidates if their political parties are only able to throw a few hundred bucks toward their campaigns. Moreover, low individual-to-party and party-to-candidate limits may threaten political parties' vital democratic role in aggregating interests, guiding voter choices, and supporting candidates that further their platform.[420] This is why most states that regulate contributions end up passing individual-to-party and party-to-candidate limits much higher (sometimes over 100 times higher) than their individual contribution limits.[421] This concept can also work in reverse: An extraordinarily high party-to-candidate contribution limit may very well be too low if the corresponding individual contribution limit prevents candidates from raising enough funds. This rings especially true considering how so many candidates these days rely mainly on individual contributions.[422] Lastly, this concept explains why so many states and localities are able to outright prohibit corporation-to-candidate and union-to-candidate contributions[423]—contributions from individuals and parties under their limits provide candidates with more than enough potential to raise funds needed to successfully campaign.

c. Methods (and Costs) of Campaigning

The primary methods of campaigning in a given state or locality, as well as how those methods impact campaign costs, should be very relevant when assessing SLCLs. The *Randall* plurality somewhat hinted at this by analyzing how Vermont's contribution limits would affect the contemporary campaign

418. The plurality in *Randall* somewhat bifurcated this point between step one and step two. *See* Randall v. Sorrell, 548 U.S. 230, 251, 256–57 (2006) (plurality opinion). It also focused on the associational rights of parties, but that is less of an issue in challenges to contribution limits. *See id.*; *supra* note 85.

419. *See* Kang, *supra* note 318, at 1188–89; Anthony Gierzynski & David Breaux, *The Role of Parties in Legislative Campaign Financing*, 15 AM. REV. POL. 171, 178 (1994).

420. *See* LA RAJA & SCHAFFNER, *supra* note 11, at xiv.

421. For instance, Ohio permits parties to contribute over $770,000 to statewide candidates per election while individuals can only contribute about $13,700. OHIO SEC'Y OF STATE, OHIO CAMPAIGN CONTRIBUTION LIMITS 1 (2021), https://www.ohiosos.gov/globalassets/candidates/limitchart2021.pdf. Eleven states even allow parties to give unlimited amounts of money to candidates while simultaneously imposing contribution limits onto individuals. *See* NCSL STATE LIMITS, *supra* note 4 (Illinois, Kentucky, Louisiana, Mississippi, New Jersey, New York, North Carolina, South Dakota, Vermont, Wisconsin, and Wyoming).

422. *See* Kang, *supra* note 318.

423. *See, e.g.*, NCSL STATE LIMITS, *supra* note 4; L.A. CITY ETHICS COMM'N, CONTRIBUTOR GUIDE: 2022 ELECTION 6–8 (2022), https://ethics.lacity.org/wp-content/uploads/Contributor-Guide-2022.pdf (prohibiting, among other entities, national banks, federal corporations, and developers from contributing to candidates in city elections).

spending habits of its politicians, though it did not explicitly refer to this as a danger sign.[424] Nevertheless, if candidates in a certain area typically engage in costlier methods of campaigning, a low contribution limit could present more of a danger to them than if they were instead employing cheaper methods.

This should be a decidedly important consideration for courts reviewing SLCLs given how much campaigning has changed over the past sixteen years. When the Supreme Court decided *Randall*, online advertising was hardly a thought for campaigns; nowadays, it is often the go-to means of reaching out to voters.[425] And with online ads and other similar content—e.g., social media posts—dominating modern campaigning, there is less of a need to purchase TV or radio ads, rent offices, or travel extensively across a constituency. In turn, campaigning has become more affordable for many candidates and will likely drop further in costs in the future as this trend continues.[426]

Despite these developments, some courts have insisted that more traditional methods of campaigning still drive campaign costs. As one judge recently stated, "[T]he costs of hiring staff and renting space is ever increasing. As the cost of living rises so does the cost of campaigning."[427] Perhaps this may be true in some areas or for some specific candidates, but the data indicates that this is not the case for the average candidate. While no formal studies appear to have looked into U.S. candidates, a recent study on U.K. candidates paints a compelling picture.[428] Looking at campaigns from the 1860s to today, its authors found that average campaign spending decreased steadily from 2005 to 2017 in part due to the growing ubiquity of the Internet and a shift away from paid staff.[429] Of course, U.S. campaigning is not perfectly comparable to U.K. campaigning (for instance, the United States has a much longer election

424. *See* Randall v. Sorrell, 548 U.S. 230, 253 (2006) (plurality opinion) ("Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns.").

425. *See* Lata Nott, *Political Advertising on Social Media Platforms*, AM. BAR ASS'N (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/political-advertising-on-social-media-platforms (describing how online political ad spending increased from $22.25 million in 2008 to $1.4 billion in 2016).

426. *See* Barbara Ortutay & Amanda Seitz, *Online Political Ads: Cheap, Efficient and Ripe for Misuse*, AP NEWS (Jan. 31, 2020), https://apnews.com/article/ar-state-wire-tx-state-wire-election-2020-dc-wire-elections-eef44be313efdefa959ec7d7200474cc. Take, for instance, John Fetterman's 2022 U.S. Senate campaign, which once spent less than $400 on a Cameo recording that ultimately received hundreds of thousands of views, in which *Jersey Shore* star Snooki criticized Fetterman's opponent, Dr. Mehmet Oz. *See* Olivia Truffaut-Wong, *What Is Snooki Doing in the Pennsylvania Senate Race?*, THE CUT (July 17, 2022), https://www.thecut.com/2022/07/john-fetterman-gets-snooki-involved-in-his-race-for-senate.html.

427. Thompson v. Hebdon, 7 F.4th 811, 822 (9th Cir. 2021).

428. *See* Julia Cagé & Edgard Dewitte, It Takes Money to Make MPs: New Evidence from 150 Years of British Campaign Spending (Mar. 10, 2022) (unpublished manuscript), https://ssrn.com/abstract=3929857.

429. *See id.* at 1, 14, 46. The authors took into account the impact of changes in contribution limits when arriving at this conclusion. *See id.* at 1.

cycle[430]), but similar changes in the United States are noticeable. One prominent example that comes to mind is the fact that President Biden won the presidency despite not opening campaign offices in many crucial states and counties,[431] a feat that may not have been possible decades ago. Moreover, with the COVID-19 pandemic having demonstrated that workplace productivity can survive without everybody convening in rented office spaces,[432] campaigns could very well permanently rid themselves of that cost.

Likewise, this shift in campaign strategies also impacts how campaign volunteering is done. Instead of having volunteers pay to print out campaign materials and travel out into public areas to bolster support for a candidate or ballot initiative, much of volunteering is now done through textbanking and engaging with potential voters over social media,[433] much of which is extraordinarily low-cost, if not free. Accordingly, a contribution limit that includes volunteering expenses within the definition of a "contribution" may not impede civic participation in the same way it would have back when the Court decided *Randall*.[434]

This is not to say that the cost of an effective campaign has changed uniformly everywhere, but that is precisely why methods of campaigning should be a consideration in step one. Maybe a city's demographics skew older and therefore TV and radio ads are more necessary for campaigns. Maybe a state has geographically large legislative districts, requiring more travel for candidates, staff, and volunteers. Maybe a state's gubernatorial elections are routinely covered by national press, leading to candidates having to spend a great deal of money to keep up with their opponents.[435] SLCLs are far more likely to signal danger signs in states or localities with such characteristics.

430. *See* Danielle Kurtzleben, *Why Are U.S. Elections So Much Longer Than Other Countries'?*, NPR (Oct. 21, 2015, 10:16 AM), https://www.npr.org/sections/itsallpolitics/2015/10/21/450238156/canadas-11-week-campaign-reminds-us-that-american-elections-are-much-longer.

431. *See, e.g.*, Charlotte Alter, *Joe Biden Is Running an Invisible Digital Campaign in All-Important Michigan. That's Making Some Democrats Nervous*, TIME (Sept. 15, 2020, 5:28 PM), https://time.com/5889093/joe-biden-michigan-campaign.

432. *See It's Time to Reimagine Where and How Work Will Get Done*, PWC (Jan. 12, 2021), https://www.pwc.com/us/en/services/consulting/business-transformation/library/covid-19-us-remote-work-survey.html.

433. *See Words We're Watching: 'Textbanking,'* MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/textbanking-phonebanking-words-were-watching (last visited July 16, 2022).

434. *See* Randall v. Sorrell, 548 U.S. 230, 259 (2006) (plurality opinion).

435. *See, e.g.*, Lindsey Kennett, *Campaign Funds Top $115 Million Becoming Most Expensive Governor's Race in Virginia*, WSLS (Oct. 29, 2021, 5:42 PM), https://www.wsls.com/news/local/2021/10/29/campaign-funds-top-115-million-becoming-most-expensive-governors-race-in-virginia.

d. Matching Funds Programs

Another increasingly prevalent factor to mull over when reviewing SLCLs is the presence of (or lack thereof) a matching funds program in a state or locality's campaign finance system. Under a matching funds program, candidates receive a certain amount of public funding proportionate to their privately raised funds, usually with a cap.[436] For instance, participating candidates in New York City mayoral elections will receive eight dollars per every one dollar they receive in contributions (up to $250 per contributor), so a contribution of $100 to a candidate in reality gives them $900.[437] As of 2022, at least seven states have implemented matching funds programs,[438] as well as many localities.[439]

Given the multiplying effect that such programs have on contributions, candidates do not need to receive nearly as many private contributions to fund a successful campaign as they otherwise would without the program. Consequently, states or localities with these programs could theoretically implement very low SLCLs without implicating candidates' First Amendment rights. An individual contribution limit of $100 in a state that matches contributions 9-to-1 could be equivalent to an individual contribution limit of $1,000 in a state with no matching funds program. Of course, other factors such as caps may change this calculus a bit, but the general idea stands that candidates receiving matching funds can raise less money privately and still amass enough funds to be viable.

Including matching funds in the danger signs equation may be somewhat confusing because it is more of an anti-danger sign: If a state or locality has a matching funds program, seemingly low limits may not actually pose any threat to electoral competition. Thus, in a sense, *not* having a matching funds program is the true danger sign, though likely only in states or localities that have very low SLCLs.

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436. This is different from clean elections programs, which give qualifying candidates a fixed amount of public money. *See Public Financing of Campaigns: Overview*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 8, 2019), https://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx.

437. *See* N.Y.C. CAMPAIGN FIN. BD., CAMPAIGN FINANCE HANDBOOK: 2021 ELECTION CYCLE, vi (2021), http://www.nyccfb.info/PDF/candidate_services/Handbook_2021.pdf.

438. BRENNAN CTR. FOR JUST., GUIDE: NEW YORK STATE'S NEW SMALL DONOR PUBLIC FINANCING PROGRAM 1 (2020), https://www.brennancenter.org/sites/default/files/2020-12/12.18.20%20NYPF%20explainer%20FINAL_0.pdf; *Public Financing of Campaigns: Overview*, *supra* note 436.

439. *See, e.g.*, N.Y.C. CAMPAIGN FIN. BD., *supra* note 437; D.C. OFF. OF CAMPAIGN FIN., PUBLIC FINANCING PROGRAM (n.d.), https://ocf.dc.gov/sites/default/files/dc/sites/ocf/page_content/attachments/Public%20Finance%20%20Program_Training_.pdf; *Public Campaign Financing*, MONTGOMERY CNTY. COUNCIL, https://www.montgomerycountymd.gov/COUNCIL/public_campaign_finance.html (last visited Jan. 27, 2022).

e. Other Idiosyncrasies

Finally, the last danger sign to discuss is not really a danger sign, but rather an acknowledgement that courts may wish to consider any other relevant factors or indications in step one. SLCLs each have their own peculiarities, so it makes little sense for courts to ruminate over a fixed set of danger signs when some may not be applicable to the given case and others not included may be crucial to the analysis. In *Randall*, Justice Breyer simply focused on what was pertinent in the case before him—lower courts should do the same.[440] While such an open-ended approach may feel unsatisfying, that is the trade-off of having a danger signs test that can withstand both the everchanging nature of campaign finance and the diverse campaign finance regimes of each state and locality.[441]

2. What Does Not Matter

Next, which danger signs identified by courts should *not* be considered danger signs (or, at the very least, should be considered minor)? This subsection identifies three: (1) uniformity among candidates for all offices; (2) SLCLs being lower than most other contribution limits in the nation; and (3) SLCLs being lower than the contribution limits upheld in *Shrink Missouri*. These traits say little about an SLCL's impact on candidates or democratic values more broadly and therefore should not play a major role in a court's step-one analysis.

a. Uniformity

The *Thompson* Court identified uniformity among Alaska's contribution limits—i.e., the fact that its $500 individual contribution limit applied to all offices, from statewide to representative—as a danger sign.[442] The idea here is that because candidates for larger offices (e.g., governor or other statewide positions) have more voters and ground to cover than candidates for smaller offices (e.g., state house of representatives), their campaigns will be more costly and therefore need higher contribution limits. Some academics have shared similar beliefs. For example, Gaughan has criticized FECA's limits because "the same [$2,900] limit applies to presidential candidates running in a nation of 320 million people, to Senate candidates running in states with populations that range from a low of 585,000 . . . to a high of thirty-nine million . . . , and to

440. Indeed, the *Thompson* Court highlighted the danger signs it did because "Alaska's limit on campaign contributions share[d] some of" the same "characteristics" as Vermont's, not simply because it felt it *had* to look into the same danger signs. Thompson v. Hebdon, 140 S. Ct. 348, 350 (2019).

441. *See* Posner, *supra* note 370.

442. *Thompson*, 140 S. Ct. at 351.

House candidates running in districts ranging from 525,000 . . . to one million."[443] These criticisms are important to contemplate given that thirteen states apply their individual contribution limits uniformly among all candidates.[444] The problem with these criticisms, however, is that they ignore the fact that candidates for offices with a greater number of constituents will generally receive a greater number of contributions.

Take, for instance, a hypothetical scenario in which Candidate A is running in a house district of 10,000 constituents in State X, and Candidate B is running for governor of State X, which in total has 100,000 constituents. In State X, there is a uniform individual contribution limit of $1,000 per election. In Candidate A's district, a candidate must generally spend $500,000 to be competitive, and in State X, statewide candidates such as Candidate B must spend $5,000,000. Is Candidate B disadvantaged by the uniform limit because his costs are ten times greater than Candidate A's? No, because Candidate B has ten times the amount of constituents. If he were to raise the maximum allowable amount from 10% of constituents, he would amass $10 million. Meanwhile, if Candidate A did the same, she would only amass $1 million. The house candidate is therefore no better off than the statewide candidate, despite being subject to the same contribution limits. If anything, given that statewide offices are more prone to gain national attention, and are thus more likely to draw in contributions from non-constituents, contribution limits for these offices could debatably be lower than those for smaller offices. This Article does not attempt to dive into such a complicated argument, though.

Real-world data supports this notion. If candidates for offices with more constituents truly need higher contribution limits than those with less constituents, we should expect them to spend a greater amount of dollars per constituent.[445] Yet, FEC data indicates that this does not happen. As Graph 1 and Graph 2 show, recent candidates in competitive U.S. House and Senate races did not need to spend more dollars per constituent to win elections when they had a greater number of constituents.[446] Quite the opposite, both graphs

443. Anthony J. Gaughan, Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law, 27 S. CAL. INTERDISC. L.J. 79, 121 (2017).

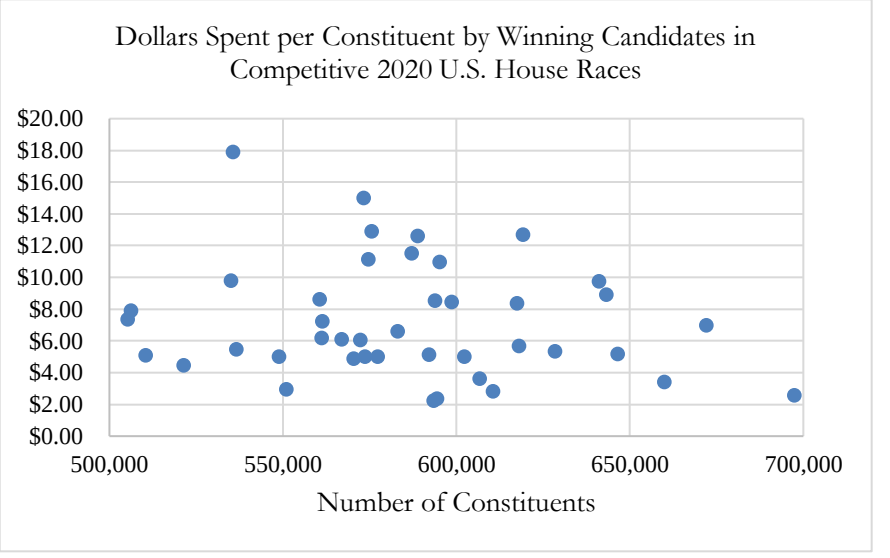
444. *See* NCSL STATE LIMITS, *supra* note 4 (Arkansas, Illinois, Kentucky, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Rhode Island, and West Virginia).

445. This Article treats "constituent" to mean somebody of voting age and therefore old enough to contribute money to campaigns.

446. The reason this Article uses FEC data rather than state- or local-level data is because data on election spending is very difficult to find on such levels. While the spending habits of federal candidates may not be perfectly comparable to state or local candidates, this FEC data suffices to get the general point across that uniformity among contribution limits is not a danger sign. Data on the total amount spent by candidates were gathered on Open Secrets. *See Congressional Races*, OPEN SECRETS, https://www.opensecrets.org/races (last visited Jan. 26, 2022). Data on constituency populations were gathered from both the U.S. Census Bureau and the Federal Register. *See State-by-State Visualizations of Key Demographic Trends from the 2020 Census*, U.S.

show a downward trend, suggesting that the more constituents one has, the less they need to spend per constituent to fight a winning campaign. These findings generally hold up even when incumbents are ignored.[447] One could come up with a myriad of reasons why this is so—maybe there is only so much a candidate can spend, regardless of constituency size, until the marginal return of a campaign dollar spent is reduced to zero. This Article does not claim to know why this trend is so, but only that it is so. Further research could be done into the question.

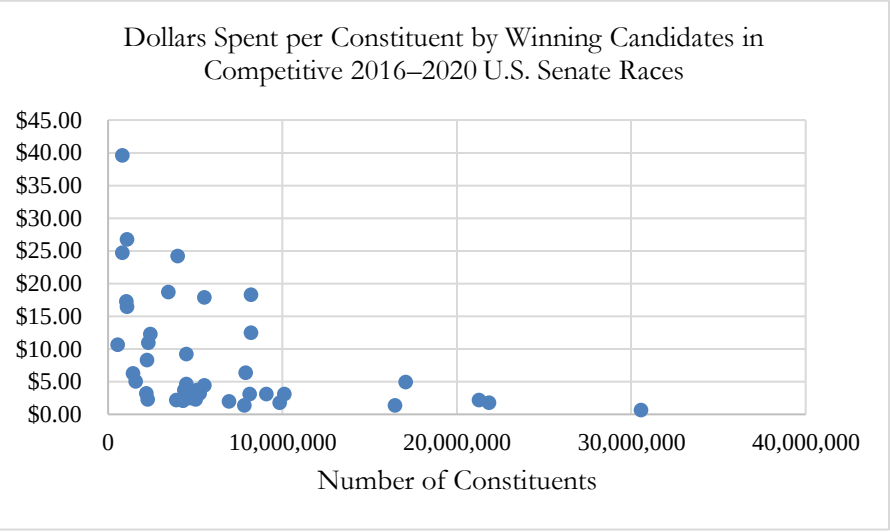
Graph 1



CENSUS BUREAU, https://www.census.gov/library/stories/state-by-state.html (last visited Aug. 16, 2022); *My Congressional District*, U.S. CENSUS BUREAU, https://www.census.gov/mycd (last visited Jan. 26, 2022); Estimates of the Population of Voting Age for Each State and the District of Columbia: July 1, 2018, 84 Fed. Reg. 53,103, 53,103 (Oct. 4, 2019); Estimates of the Population of Voting Age for Each State and the District of Columbia: July 1, 2016, 82 Fed. Reg. 8720, 8720 (Jan. 30, 2017). "Competitive" districts were picked through Ballotpedia's battleground reports. *See U.S. House Battlegrounds, 2020*, BALLOTPEDIA, https://ballotpedia.org/U.S._House_battlegrounds,_2020 (Jan. 26, 2021); *U.S. Senate Battlegrounds, 2020*, BALLOTPEDIA, https://ballotpedia.org/U.S._Senate_battlegrounds,_2020 (Jan. 26, 2021); *U.S. Senate Battlegrounds, 2018*, BALLOTPEDIA, https://ballotpedia.org/U.S._Senate_battlegrounds,_2018 (last visited Oct. 17, 2022); *U.S. Senate Battlegrounds, 2016*, BALLOTPEDIA, https://ballotpedia.org/U.S._Senate_battlegrounds,_2016 (last visited Jan. 26, 2022).

447. *See infra* Appendix.

Graph 2



An additional finding worth pointing out is that House and Senate candidates generally seem to spend similar dollars per constituent, despite most Senate candidates having many times more constituents than House candidates. For example, all winning 2020 House candidates in competitive races spent between zero and twenty dollars per constituent, and all but four Senate candidates spent in the same range. If candidates with more constituents needed to spend more dollars per constituent to win, these ranges would not overlap so heavily between House and Senate candidates.

With all this in mind, courts should not regard uniformity among contribution limits as a danger sign that the limits are too low.

b. Relativity to Other SLCLs

One frequently observed danger sign is whether an SLCL is among "the lowest in the [n]ation."[448] In doing this, courts will compare the challenged SLCL to those in other states or localities and make a judgment as to whether the SLCL is concerningly lower than them.[449] There are two problems with this, though. First, what does this information really tell us? Let us say that State X implements a $500 individual contribution limit for statewide offices, making

448. Randall v. Sorrell, 548 U.S. 230, 250 (2006) (plurality opinion).

449. *See, e.g.*, Zimmerman v. City of Austin, 881 F.3d 378, 387 (5th Cir. 2018) ("[T]he $350 limit is on par with limits imposed in other states and localities and upheld by other courts.").

the limit the lowest of its kind in the nation.[450] This alone gives little "indication" that the contribution limit is "too low . . . [and] prevent[s] [candidates] from mounting effective campaigns."[451] For one, when it comes to state contribution limits, most states have set theirs relatively high, with the majority having at least some of theirs falling above the federal limits.[452] Accordingly, being among the lowest of them is not some exceptional feat. Furthermore, it is an unavoidable fact that some SLCLs will always be among the lowest in the nation. If a court strikes down the lowest state individual contribution limit, does the second lowest suddenly become more suspect because it is now the lowest? If that is the case, we will end up witnessing a slow creep toward every SLCL being above the *Shrink Missouri* limits.[453]

Relatedly, if a court relinquishes its deference to a state or local legislature when reviewing an SLCL merely because the SLCL is not comparable to those of other states, the court is in a sense undermining the federalist principles on which this nation was founded. Indeed, one of the great advantages of federalism is that it allows states and localities to "serve as laboratories for experiments in . . . policy."[454] Thus, when crafting SLCLs, state and local governments should feel safe to draw from their unique histories and experiences and arrive at contribution limit levels that suit their needs. This is why SLCLs vary so much between states and localities. Yet, when a court automatically views as a danger sign any instance of an SLCL skewing toward the lower end on the national spectrum, the court is effectively penalizing states and localities for taking bold measures to combat corruption and disincentivizing their legislatures from taking such action in the future. In turn, states and localities end up implementing SLCLs more in tune with the status quo,[455] and the boundaries of campaign finance reform remain un-pushed.

This is not to say that an SLCL being extraordinarily low is not a danger sign. Such a judgment, however, does not require comparisons to other SLCLs. Instead, courts can use their analyses of other danger signs, such as the methods of campaigning, to figure out whether the seemingly low value of an SLCL is cause for concern. A $200 and a $500 individual contribution limit for statewide offices, for example, would both be the lowest in the nation. But unless we explore additional factors, that fact itself means nothing. How much does the average competitive campaign cost in the state? Does the state provide

450. *See supra* Table 1.

451. *Randall*, 548 U.S. at 248–49.

452. *See* NCSL STATE LIMITS, *supra* note 4; *Contribution Limits for 2021–2022 Federal Elections*, *supra* note 303.

453. This is, evidently, already happening. *See supra* notes 263–269 and accompanying text.

454. Lino A. Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165, 173 (2000); *see also* Doni Gewirtzman, *Complex Experimental Federalism*, 63 BUFF. L. REV. 241, 243 n.10 (2015).

455. *See, e.g.*, Brindle, *supra* note 269.

matching funds? How much can parties contribute to statewide campaigns? The answers to these questions would be much more informative as to whether an SLCL's low level is a danger sign than would be a comparison to the SLCLs of other states.

c. Relativity to Shrink Missouri *Limits*

Lastly, the *Randall* plurality identified as a danger sign an SLCL falling below the contribution limits upheld in *Shrink Missouri*.[456] Recall that as of 2022, nine states' individual contribution limits are lower than the *Shrink Missouri* limits;[457] many localities are similarly situated.[458] To instinctively perceive such limits as exhibiting danger signs is, nevertheless, erroneous. For one, as discussed above, to simply remark that an SLCL falls below the *Shrink Missouri* limits says nothing about how said SLCL might actually impact electoral competition. Additionally, the *Shrink Missouri* decision is over two decades old at this point. Campaign finance has evolved in ways likely unimagined by the Court back then, and the costs and methods of campaigning have changed dramatically between 2000 and today.[459] It therefore seems a tad illogical to hold the limits upheld in *Shrink Missouri* as the go-to comparison in SLCL cases.

Some may defend this danger sign under stare decisis. After all, *Shrink Missouri* is good law. Why should courts not consider it when reviewing other SLCLs? The precedential value of *Shrink Missouri*, however, is not very strong if we are focusing purely on the limits it maintained, as the sets of facts in *Shrink Missouri* and a modern SLCL case are going to noticeably differ. Not only has the world of campaign finance transformed, but also Missouri's electoral system and political environment will inevitably vary from those of other states and localities. With such new facts present in any given challenge against SLCLs, courts should afford the *Shrink Missouri* limits far less significance in a step-one analysis than they currently do.[460]

CONCLUSION

With the ongoing movement to judicially deregulate campaign finance in this country showing no signs of slowing down, it is imperative that we have in place robust standards of judicial review to ensure no law is struck down

456. *Randall*, 548 U.S at 251.

457. *See supra* Table 1.

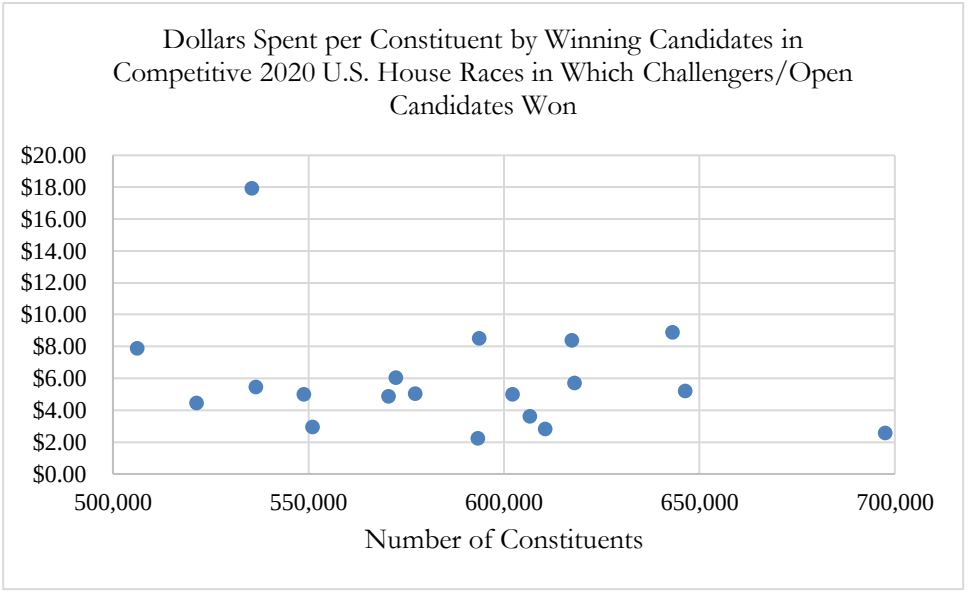
458. *See, e.g.*, Solis, *supra* note 261 (covering how National City, CA passed $1,000 contribution limits for all candidates).

459. *See supra* Part IV.C.1.c.

460. *See* Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62, 91–92 (2018) (identifying this approach to *stare decisis* as the "balance-of-factors view").

without merit. This Article has laid out the groundwork for developing such a standard for state and local contribution limits. By delineating clear purposes and justifications for each step of the danger signs test, and by tailoring the test to the modern state of campaign finance and its jurisprudence, courts will be able to provide proper deference to state and local legislative bodies on this issue and strike down only those limits that would truly damage the democratic process. Candidates may have a First Amendment right to amass sufficient campaign funds, but constituents are also entitled to a democratic government free from corruption, polarization, and misaligned interests. Precarious attempts to preserve the former should not come at the expense of the latter.

APPENDIX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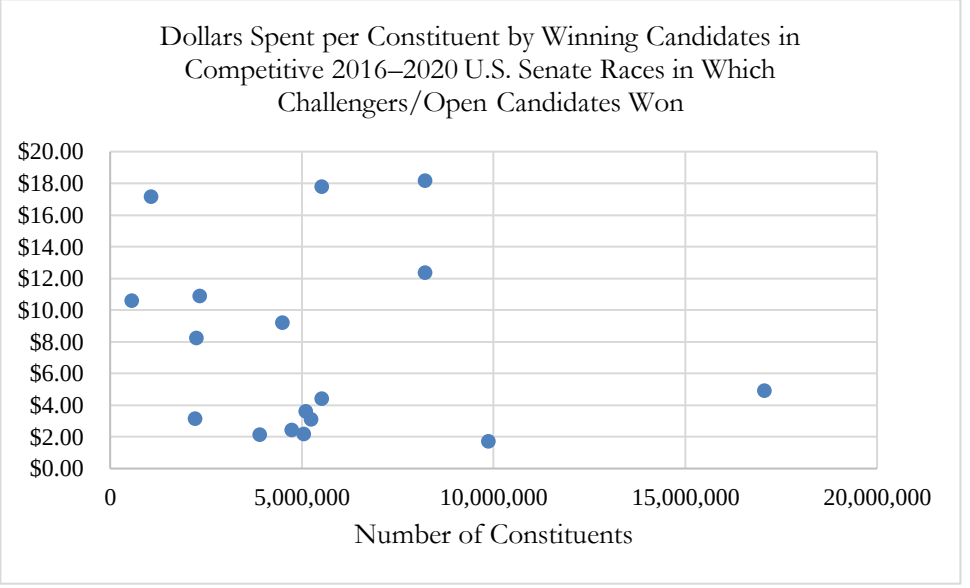
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