

LESS IS MORE AND SMALL IS BEAUTIFUL: HOW VERMONT'S CAMPAIGN-FINANCE LAW CAN REJUVENATE DEMOCRACY

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INTRODUCTION: VERMONT AS A LABORATORY FOR DEMOCRACY

“Bigger is better” seems to be the ethos that guides campaign finance in American politics. The best evidence of this is the extraordinary growth of campaign spending in the United States in recent decades. In 1968, spending on all political campaigns totaled approximately \$300 million.¹ By 1996, however, presidential and congressional campaign spending alone exceeded \$2 billion.² In 2000, then-Governor George W. Bush of Texas conducted the most expensive presidential campaign in American history raising more than \$191 million and spending more than \$183 million during the two-year period prior to the 2000 presidential election.³

A growing public perception that politicians favor their campaign contributors over their constituents has accompanied the growth in campaign spending that has occurred since the 1960s. A University of Michigan survey asking Americans whether they thought that government was run for the benefit of the public at-large or for the benefit of “special interests” found that in 1964 64% of the respondents said that the chief beneficiary of government was the public.⁴ In 1974, however, only 25% of the respondents believed that government chiefly benefited the public, and by 1994 that figure had declined to 19%.⁵ The flip side of this coin is that the percentage of respondents who said that government was run for the benefit of “a few special interests” increased from 29% in 1964 to 66% in

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1. Kristen Kay Sheils, Note, *Landell Bodes Well for Campaign Finance Reform: A Compelling Case for Limiting Campaign Expenditures*, 26 VT. L. REV. 471, 471 (2002).

2. *Id.* at 471–72.

3. *Id.* at 472.

4. David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 96 (1998).

5. *Id.*

1974 and to 76% in 1994.⁶

Today, even some politicians argue that organizations representing corporations, labor unions, and professions exert undue influence over public policy decisions. They argue that this influence flows from the large aggregate financial contributions that these organizations make to the policymakers' reelection bids. Indeed, Senator John McCain (R-AZ) built his campaign for the Republican Party's nomination for President in 2000 largely on this issue. He said, "Anybody who glances at the so-called 1996 Telecommunications Reform Act and then looks at the results, which are increases in cable rates, phone rates, mergers and lack of competition, clearly knows that the special interests are protected in Washington and the public interest is submerged."⁷ The campaign donors who benefit from such results are a narrow slice of American society, as is evidenced by data from 1994 showing that residents of one zip code on the Upper East Side of Manhattan contributed more money to congressional candidates than did all of the residents of twenty-one states.⁸

The donors' beneficence rewards mostly incumbent officeholders whose superior access to campaign contributions, by virtue of their voting records on certain issues, insures that the overwhelming majority of them will win reelection by defeating cash-starved challengers. In 1996, for example, 17 incumbent members of the U.S. House of Representatives ran unopposed, and 111 ran "financially unopposed," as they faced challengers who had less than \$25,000 in their campaign treasuries.⁹ All 128 incumbents won reelection that year.¹⁰ An additional 182 incumbents ran in races that were not financially competitive because the incumbent had more than twice as much money to spend on the campaign than the challenger.¹¹ Of this group, 178, or 98%, won reelection in 1996.¹²

The combination of financially powerful donors and entrenched incumbent officeholders tends to produce public policy outcomes that, as Senator McCain's comment suggested, neither serve nor reflect the wishes of most Americans. One indication of this phenomenon is poll data that show a growing disparity between the bills enacted by the Congress and what Americans say they want government to do. A leading political

6. *Id.*

7. George F. Will, *Soft Thinking on Soft Money*, WASH. POST, Oct. 7, 1999, at A35.

8. E. JOSHUA ROSENKRANZ, TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FIN. LITIG., *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM* 16 (1998).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

scientist has observed that during the 1970s the public's wishes and Congress's actions were aligned about 60% of the time, but that by the 1990s that figure had declined to approximately 40%.¹³

Both the "bigger is better" ethos of campaign finance and the severed connection between the public's wishes and Congress's actions are byproducts of the United States Supreme Court's decision in *Buckley v. Valeo*, which held, *inter alia*, that limiting campaign expenditures violates the First Amendment's guarantee of freedom of speech.¹⁴ Despite the current environment, though, some voters and politicians are advocating and practicing a "less-is-more-and-small-is-beautiful" philosophy of campaign finance. For example, the Saint Patrick's Day breakfasts that Representative Martin Meehan (D-MA), a leading congressional advocate for campaign-finance reform, hosts in Lowell and Haverhill, Massachusetts, might seem to be quaint relics of a bygone era. On a recent Saint Patrick's Day, 600 people in Lowell and 500 in Haverhill contributed \$25 each to Representative Meehan.¹⁵ What may look quaint to a Washington lobbyist, though, looks like a model for the future to those who would rejuvenate democratic participation by reducing the role that large contributions play in electoral politics. Representative Meehan agrees. "I'm politically stronger," he has noted, "because more than a thousand people in the core of my district participated in a fundraising activity."¹⁶ He added, "I think the [Democratic] party in the long term will be helped by returning to grassroots activism, voter turnout, and leafleting."¹⁷

Nowhere is the "less-is-more-and-small-is-beautiful" philosophy of campaign finance held more strongly than in Vermont, Massachusetts's rural neighbor to the north. True to this philosophy, in 1997, the Vermont legislature sought to rein in the rising cost of running for office by enacting "An Act Relating to Public Financing of Election Campaigns, Disclosure Requirements and Limits on Campaign Contributions and Expenditures," better known as Act 64.¹⁸ As befits its title, Act 64 is a comprehensive campaign-finance law. It is also bold. It limits the amount of money that individuals, political parties, and political committees can contribute to

13. THOMAS E. PATTERSON, *THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY* 37 (2003) (footnote omitted).

14. *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976).

15. Seth Gitell, "The Democratic Party Suicide Bill," *ATLANTIC MONTHLY*, July–Aug. 2003, at 106, 113.

16. *Id.*

17. *Id.*

18. Act 64, 1997 Vt. Acts & Resolves 490 (codified as amended at VT. STAT. ANN. tit. 17, §§ 2801–2883 (2002 & Supp. 2005)).

candidates for statewide or legislative office¹⁹ and the amount of money that candidates can spend in their campaigns.²⁰ Moreover, the contribution and expenditure limits apply to candidates whether or not they choose to participate in the public-financing system that Act 64 has created.²¹ In contrast, federal law limits contributions but not expenditures in congressional campaigns.²² It also permits candidates to opt out of the public-financing system for presidential primaries, thereby freeing them to raise as much money as they can during the primaries.²³

The boldness of Act 64 is reflected in the comments that Senator William Doyle (R-Washington County) made on the floor of the Vermont Senate in support of the Act's final passage in late May 1997. Senator Doyle noted that both Republicans and Democrats who had served on the conference committee that reconciled the differences between House and Senate versions of the campaign-finance bill "knew that the U.S. Supreme Court decision in *Buckley v. Valleo* [sic] must be challenged if real reforms were to be implemented."²⁴ "It was only in the 1980's [sic], after *Buckley*," he added, "that campaigns for statewide office became dominated by media costs and significant out-of-state spending."²⁵ Finally, Senator Doyle observed that "[t]he bill before us today puts Vermont in the lead in campaign finance reform, [something that] the U.S. Congress is unwilling to do for federal elections."²⁶ Thus, when Act 64, which then-Governor Howard Dean signed into law on June 26, 1997, took effect on November 4, 1998, it promised to change the relationship between money and politics in Vermont dramatically. The Act severely limited campaign contributions and expenditures in state elections, notwithstanding a well-established federal prohibition against limits on expenditures in political campaigns.

19. VT. STAT. ANN. tit. 17, § 2805 (2002 & Supp. 2005).

20. *Id.* § 2805a.

21. *Id.* § 2805a(a).

22. 2 U.S.C. § 441a(a) (2000); *see also* *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (upholding provisions of the Federal Election Campaign Act of 1971 limiting individual contributions to campaigns, while striking down limits on campaign expenditures).

23. § 441a(b). In the 2004 Democratic presidential primaries, both former Vermont governor Howard Dean and Senator John Kerry of Massachusetts opted out of the public financing system in order to be free of its fundraising cap. Ken Auletta, *Kerry's Brain*, NEW YORKER, Sept. 20, 2004, at 64, 67. Dean and Kerry are the first Democratic presidential candidates to opt out of the public financing system since it began operating during the 1976 presidential campaign. Sara Schweitzer, *In a First, Dean Says He'll Reject US Funds*, BOSTON SUNDAY GLOBE, Nov. 9, 2003, at A1. Republican George W. Bush opted out during both the 2000 and the 2004 campaigns. *Id.*; Auletta, *supra*, at 67.

24. 2 JOURNAL OF THE SENATE OF THE STATE OF VERMONT 1338 (1997).

25. *Id.* at 1339.

26. *Id.* at 1340.

Act 64 aimed to fulfill this promise by establishing what one might call a “town meeting” model of campaign finance. “Town meeting” usually refers to the annual exercise in direct democracy that occurs in Vermont’s 236 towns, wherein the executive is a three- or five-member board of selectmen and the legislature is the town meeting, in which all adult residents of each town are entitled to participate.²⁷ This institution enthralled the great poet and social thinker Ralph Waldo Emerson. “Emerson seems almost driven in his praise [of town meeting]. Town meeting reveals ‘the great secret of political science’ and solves the ‘problem’ it entails: how to ‘give each individual his fair weight in the government.’”²⁸

By giving each person his or her “fair weight in the government,” town meeting also provides a much-needed model for modern campaign finance. The “town meeting” model of campaign finance, by limiting contributions and expenditures to the lowest sums necessary to conduct viable campaigns, would give each voter an opportunity to exert his or her “fair weight” at low cost just as town meeting offers each resident a chance to be a town legislator at low cost. The “price of admission” to town meeting, like the chance to speak there, is the same for the farmer or the logger as it is for the physician or the attorney, namely, a few hours of his or her time.²⁹ Similarly, the price of admission to a political campaign ought to be low enough that the farmer or the logger can pay. It should not be so high that only the physician and the attorney can afford to pay and only persons of their social class gain access to candidates.

Among the campaign-finance laws in place today, Vermont’s Act 64 best exemplifies the “town meeting” model, which is why this article will argue that the Second Circuit Court of Appeals was correct to uphold the

27. FRANK M. BRYAN & JOHN MCCLAUGHRY, *THE VERMONT PAPERS: RECREATING DEMOCRACY ON A HUMAN SCALE* 73–74 (1989). Vermont also has nine “cities,” which are governed by mayors, and boards of aldermen or city councils, instead of by selectmen and town meetings.

28. FRANK M. BRYAN, *REAL DEMOCRACY: THE NEW ENGLAND TOWN MEETING AND HOW IT WORKS* 26 (2004) (quoting Ralph Waldo Emerson, Address at Concord, Mass. (Sept. 12, 1835), available at <http://digbig.com/4fpke>).

29. Financial barriers to attending town meeting are greatest for low and moderate income hourly wage earners, especially if their towns meet during the daytime. *Id.* at 90. But the financial barriers to attending town meeting are not nearly as high as the financial barriers to making campaign contributions. This is so because: (1) towns increasingly meet in the evening or on Saturday; and (2) many self-employed professionals are as unlikely as hourly employees (or self-employed nonprofessionals) to attend town meetings held during working hours, even though these professionals may enjoy considerably higher incomes than hourly employees or self-employed nonprofessionals. This observation coincides with the finding by town-meeting scholar Frank Bryan, that the percentage of residents who attend town meeting is more likely affected by the town’s size than the time of the meeting. *Id.* at 90–91.

Vermont law's limits on campaign contributions and expenditures,³⁰ and that the United States Supreme Court should do the same. Part I of this article will discuss the key provisions of Act 64 and their relationship to the *Buckley* decision. Part II will review *Landell v. Sorrell* in which the plaintiffs challenged the contribution and expenditure limits in Act 64 on First Amendment grounds.³¹ Part III will present an argument in favor of the contribution and expenditure limits in Act 64. Part IV will link that argument to the "town meeting" model of campaign finance. Finally, the article will conclude that this model is just the tonic that America's ailing democracy needs to rejuvenate itself.

I. ACT 64: A CLOSER LOOK

A. A Challenge to Buckley

As enacted, Act 64 stood in stark contrast to the federal campaign-finance rules that were articulated in *Buckley v. Valeo*.³² The principal difference between the two was that Act 64 limited both the amount of money that an individual, political party, or political committee could contribute to a campaign for state office in Vermont *and* the amount of money that a candidate could spend to win a state office in Vermont.³³ In contrast, the Supreme Court held in *Buckley* that limits on contributions are constitutional, but that limits on expenditures violate the First Amendment's guarantees of freedom of speech and association.³⁴ According to the *Buckley* Court, limits on contributions are constitutional because: (1) contributors do not communicate messages when they contribute funds to political campaigns, even when those funds enable the recipient candidate to communicate a message;³⁵ and (2) the government's interest in preventing "the actuality and appearance of corruption"³⁶ is sufficient to justify limits on contributions, for contributions can be "given to secure a political *quid pro quo* from current and potential office

30. *Landell v. Sorrell*, 382 F.3d 91, 148–49 (2d Cir. 2004), *cert. granted*, 126 S. Ct. 35 (2005).

31. *Id.* at 96.

32. See VT. STAT. ANN. tit. 17, §§ 2805–2805a (2002 & Supp. 2005) (mandating both contribution and expenditure limits for Vermont political campaigns). See generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (addressing First Amendment challenges to the Federal Election Campaign Act of 1971).

33. §§ 2805–2805a.

34. *Buckley*, 424 U.S. at 58–59.

35. *Buckley*, 424 U.S. at 21.

36. *Id.* at 26.

holders.”³⁷ Limits on expenditures, however, are unconstitutional because: (1) independent expenditures made on behalf of candidates communicate a message indicating why the spender supports a particular candidate; and (2) it is not necessary to limit either independent or candidates’ expenditures in order to prevent corruption or the appearance of corruption in political campaigns.³⁸ Thus, the Vermont Legislature threw down the gauntlet in a direct challenge to the *Buckley* rule when it included in Act 64 limits on both contributions to and expenditures by candidates for state offices in Vermont.

B. The Buckley Decision and its Implications for Act 64

In light of this challenge, it is worthwhile to focus briefly on the U.S. Supreme Court’s decision in *Buckley v. Valeo*. At issue was the constitutionality of the Federal Election Campaign Act (FECA) Amendments of 1974 and related revisions to the Internal Revenue Code (IRC).³⁹ Congress enacted the FECA Amendments and the IRC revisions after discovering numerous campaign-finance abuses by President Nixon’s reelection committee during the 1972 presidential campaign.⁴⁰

In *Buckley*, the Court upheld limits on contributions made by individuals and Political Action Committees (PACs), reasoning that “a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.”⁴¹ This was because, in the Court’s view, “[a] contribution serve[d] as a general expression of support for the candidate and his views, but d[id] not communicate the underlying basis for the support.”⁴² In contrast, the per curiam opinion noted:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduce[d] the quantity of expression by restricting the number of

37. *Id.* (italics in original).

38. *Id.* at 22, 39, 48, 55.

39. *Id.* at 6.

40. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. § 431 (2000)); *see also* Frank J. Sorauf, *Introduction* to ch. 5 of CAMPAIGN FINANCE REFORM: A SOURCEBOOK 123, 123 (Anthony Corrado et al. eds., 1997) [hereinafter SOURCEBOOK] (noting that one impetus behind the post-Watergate reforms was a desire to curb contributions by “fat cats,” wealthy individuals who personally contributed millions to the Nixon campaign).

41. *Buckley*, 424 U.S. at 20–21.

42. *Id.* at 21.

issues discussed, the depth of their exploration, and the size of the audience reached. This [wa]s because virtually every means of communicating ideas in today's mass society require[d] the expenditure of money.⁴³

Moreover, the Court reasoned, “[t]he major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions.”⁴⁴ The best means of preventing such quid pro quo corruption, the Court observed, were contribution limits and disclosure requirements, not limits on expenditures.⁴⁵

Thus, the *Buckley* Court concluded that “although the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests,” the former should be upheld and the latter should be struck down on the ground that expenditure limits “impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions.”⁴⁶ Specifically, the Court upheld limits on contributions by individuals (\$1,000 per candidate for federal office per election and \$25,000 in total contributions in a calendar year) and PACs (\$5,000 per candidate for federal office per election), but struck down limits on independent expenditures made on behalf of candidates (\$1,000 per candidate per calendar year), expenditures made by candidates from personal or family resources (\$50,000 for presidential and vice-presidential candidates, \$35,000 for candidates for the United States Senate, and \$25,000 for candidates for the House of Representatives), and total expenditures.⁴⁷

Since its enactment, then, Vermont’s Act 64 has been on a collision course with *Buckley v. Valeo*. *Buckley* invalidated limits on campaign expenditures, but Act 64 imposed limits on campaign expenditures. This important disparity reflects the Vermont Legislature’s intent to challenge

43. *Id.* at 19 (footnote omitted).

44. *Id.* at 55.

45. *Id.*

46. *Id.* at 23.

47. *Id.* at 51, 58–59; 2 U.S.C. § 441a(a) (2000).. Despite invalidating the \$50,000 limit on contributions by presidential and vice-presidential candidates (and their immediate family members) to their own campaigns, as provided for in the FECA Amendments, the Court upheld that limit as included in Subtitle H of the Internal Revenue Code, which contains the public-financing system for presidential elections. *Buckley*, 424 U.S. at 108; *see also* I.R.C. § 9035(a) (2000) (“[N]o candidate shall knowingly make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaign for nomination for election to the office of President in excess of, in the aggregate, \$50,000.”). The \$50,000 limit, therefore, applies only to presidential and vice-presidential candidates who accept public funds. §§ 9033(b), 9035(a); *see also* ANTHONY CORRADO, CAMPAIGN FINANCE REFORM: BEYOND THE BASICS 54–55 (2000) (discussing the spending limits and \$50,000 personal contribution cap that bind publicly funded presidential candidates).

Buckley when it enacted Act 64.

C. *The Key Provisions of Act 64*

Act 64 limits contributions to candidates for state representative and for local offices to \$200 per individual, partnership, corporation, labor union, or other organization that is not a political party or a political committee in any “two-year general election cycle,”⁴⁸ which is the “24-month period that begins the day after a general election.”⁴⁹ It also limits contributions, within the same two-year period, to candidates for state senator and county offices (\$300), and to candidates for governor, lieutenant governor, secretary of state, treasurer, auditor of accounts, and attorney general (\$400).⁵⁰ No more than 25% of the contributions received by a candidate within a general election cycle could come “from contributors who [were] not residents of . . . Vermont or from political committees or parties not organized in . . . Vermont.”⁵¹

These limits do not apply to contributions that the candidate or members of the candidate’s “immediate family” (including parents, children, grandparents, grandchildren, brothers, sisters, uncles, aunts, nephews, nieces, and great-grandparents) make to the candidate’s campaign.⁵² That does not mean, though, that candidates and their family members can make unlimited contributions to their own campaigns or to relatives’ campaigns. Act 64 limits campaign expenditures,⁵³ thereby imposing de facto contribution limits on candidates and members of their families, which could reduce the influence of candidates’ personal wealth on their electoral prospects. Federal campaign-finance law also prohibits

48. VT. STAT. ANN. tit. 17, §§ 2801(6), 2805(a) (2002 & Supp. 2005).

49. *Id.* § 2801(9).

50. *Id.* § 2805(a).

51. Act 64, 1997 Vt. Acts & Resolves 490, 497, *invalidated by* Landell v. Sorrell, 118 F. Supp. 2d 459 (D. Vt. 2000), *aff’d in part, vacated in part*, 382 F.3d 91 (2d Cir. 2004), *cert. granted*, 126 S. Ct. 35 (2005). This provision is no longer part of Act 64. Both the United States District Court for the District of Vermont and the Court of Appeals for the Second Circuit struck it down as a violation of the First Amendment guarantees of freedom of speech and association, and the plaintiffs will not challenge these decisions in the Supreme Court because they opposed the limit on contributions from nonresidents in the lower courts. *Sorrell*, 118 F. Supp. 2d at 483.

52. *See* tit. 17, § 2805(f) (2002 & Supp. 2005) (defining “immediate family” to mean “individuals related to the candidate in the first, second or third degree of consanguinity”); DEBORAH L. MARKOWITZ, SEC’Y OF STATE, GUIDE TO VERMONT’S CAMPAIGN FINANCE LAW 11 (2004), *available at* <http://vermont-elections.org/elections1/2001cfguide.pdf> (explaining that while Vermont law nowhere defines the degrees of consanguinity, it is widely accepted that the first degree of consanguinity includes parents and children; the second includes grandparents, grandchildren, brothers, and sisters; and the third includes uncles, aunts, nephews, nieces, and great-grandparents).

53. Tit. 17, § 2805a.

limits on contributions by candidates and by members of their immediate families, but, unlike Act 64, federal law permits unlimited expenditures in congressional campaigns,⁵⁴ so personal wealth can surely influence a candidate's prospects for winning election to Congress.

Under Act 64, a "political committee" (PAC), other than a candidate's campaign committee or a political party, cannot accept a contribution totaling more than \$200 from an individual, partnership, corporation, labor union, another political committee, or a political party within any two-year election cycle.⁵⁵ Contributors are required to make all contributions exceeding \$50 by check,⁵⁶ and contributors must give their contributions to campaign treasurers directly, not via an intermediary.⁵⁷ The latter provision seeks to prevent "bundling," a common practice in congressional and presidential campaigns in which a PAC or party committee collects contributions of up to \$2000 (the federal individual contribution limit) from its supporters, and a representative of the PAC or committee then gives the "bundle" of individual checks to the candidate's campaign treasurer.⁵⁸ Bundling enables PACs to evade the \$5000 limit on PAC contributions to federal candidates because federal law considers the bundled checks to be contributions from individuals rather than from a PAC.⁵⁹ Similarly, absent the prohibition in Act 64 against contributions via intermediaries, PACs that contributed to candidates for state offices in Vermont could potentially evade Act 64's contribution limit by bundling numerous \$200 individual

54. See *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (holding that candidates' personal expenditures on their own campaigns are protected First Amendment expressions). The federal arrangement is a direct result of *Buckley*, wherein the Supreme Court invalidated the limits on campaign contributions by candidates and members of their immediate families and on campaign expenditures that were included in section 101 of the FECA Amendments of 1974. *Id.* No such limits apply to congressional elections or to the party-nominating contests that choose the Democratic and Republican nominees for president. See I.R.C. §§ 9002(2) (2000) (defining a candidate as only a person who has been "nominated" for the offices of President and Vice President); *Buckley*, 424 U.S. at 104 n.141 (noting that contributions to a party for general purposes, like convention funding, are not subject to a ceiling). The *Buckley* decision upheld a public-financing system for the general election campaign for President that placed limits on contributions by the candidates and their families (\$50,000 total) and on expenditures by the candidates' campaign organizations during the general election campaign for candidates that accept matching funds. *Id.* at 51, 108; see also CORRADO, *supra* note 47, at 54–55 (discussing the rules governing publicly financed Presidential campaigns).

55. Title 17, section 2805(a) of the Vermont Statutes Annotated actually refers to "a single source," which is defined in section 2801 as "an individual, partnership, corporation, association, labor organization or any other organization or group of persons which is not a political committee or political party." *Id.* §§ 2801(6), 2805(a).

56. *Id.* § 2805(d).

57. *Id.* § 2805(e).

58. HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 56–57 (4th ed. 1992).

59. Schultz, *supra* note 4, at 93.

contributions.

A more significant reform in Act 64, though, was its restriction of campaign expenditures by candidates, individuals who were not candidates, PACs, and political parties. These limits flew in the face of the Supreme Court's conclusion in *Buckley* that the similar limits in the FECA violated the First Amendment freedoms of speech and association.⁶⁰ Moreover, the expenditure limits in Act 64 applied not only to candidates who agree to participate in the public-financing mechanism that the statute established, but also to those who finance their campaigns from private contributions, and even those who rely exclusively on personal or family funds.⁶¹ This arrangement was starkly different from federal campaign-finance law. The federal system, of course, lacks expenditure limits for congressional elections. It also permits candidates for President who opt out of the public financing system to raise and spend unlimited sums to win the nominations of their respective parties. Then-Governor George W. Bush of Texas declined public funds for the 2000 primary season and instead raised approximately \$100 million in private contributions, twice the sum that was available to Democratic nominee Al Gore, who accepted public funds.⁶² In 2004, after Congress increased the maximum amount of money that an individual can give to a candidate per election from \$1000 to \$2000,⁶³ President Bush's reelection campaign set its sights on raising \$170 million in private funds during the primary season.⁶⁴

60. *Buckley v. Valeo*, 424 U.S. 1, 23, 58–59 (1976).

61. Tit. 17, § 2805a(a).

62. Michael Kranish & Anne E. Kornblut, *GOP Surges in Campaign Money Race*, BOSTON SUNDAY GLOBE, Aug. 31, 2003, at A1.

63. Section 307 of the Bipartisan Campaign Reform Act of 2002 (BCRA) increased the individual-contribution limit from \$1,000 to \$2,000. Bipartisan Campaign Reform Act § 307, Pub. L. No. 107-155, 116 Stat. 81 (2002) (to be codified as amended at 2 U.S.C. § 441a). BCRA is better known as the McCain-Feingold law, in honor of its two Senate sponsors, John McCain (R-Ariz.) and Russell Feingold (D-Wis.). The Act aims to increase the role played by relatively small individual contributions in federal election campaigns, while reducing the role played by large contributions from corporations, labor unions, and wealthy individuals. It seeks to achieve the latter goal by prohibiting the national committees of political parties from accepting the unlimited, unregulated contributions known as “soft money” that both the Democratic and Republican National Committees received in enormous amounts during the 1996 and 2000 election cycles. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 124, 154–56 (2003). The U.S. Supreme Court, in *McConnell*, upheld most of the provisions of this law, including the \$2,000 individual-contribution limit and the ban on soft-money donations to the political parties' national organizations. *Id.* at 156.

64. Schweitzer, *supra* note 23.

Act 64 limits expenditures by candidates for governor to \$300,000⁶⁵ and expenditures by candidates for lieutenant governor to \$100,000 during a two-year election cycle.⁶⁶ It limits expenditures by candidates for secretary of state, state treasurer, auditor of accounts, and attorney general to \$45,000 during the same time period.⁶⁷ Candidates for state senator can spend up to \$4000 plus \$2500 for each additional seat in their respective districts, and candidates for county office can spend up to \$4000 during a two-year election cycle.⁶⁸ In the same time frame, candidates for state representative can spend up to \$3000 in a two-member House district and up to \$2000 in a single-member House district.⁶⁹ Incumbents are subject to lower expenditure ceilings than challengers in order to offset incumbents' greater name recognition and access to contributions; incumbent candidates for statewide office can spend up to 85% of the expenditure limits for their respective offices,⁷⁰ and incumbent legislative candidates can spend up to 90% of the expenditure limits for their respective offices.⁷¹ There is no limit in federal election law on expenditures by candidates for Congress or the Presidency, which has undoubtedly contributed to the average 92% reelection rate for members of the House of Representatives and 78% reelection rate for Senators since World War II.⁷² In turn, these high reelection rates have prompted recent demands for term limits for Representatives and Senators.⁷³

Act 64 not only limits expenditures by candidates, it also limits expenditures by individuals and organizations that spend money on behalf of candidates. Act 64 treats as a campaign expenditure by the candidate on whose behalf it was made "any expenditure [of more than \$50] intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee."⁷⁴ In other words, these "related campaign expenditure[s]" count toward the limits on the contributions that a candidate can collect and the expenditures that a candidate can make under Act 64.⁷⁵

65. Tit. 17, § 2805a(a)(1).

66. *Id.* § 2805a(a)(2).

67. *Id.* § 2805a(a)(3).

68. *Id.* § 2805a(a)(4).

69. *Id.* § 2805a(a)(5).

70. *Id.* § 2805a(c).

71. *Id.*

72. LARRY BERMAN & BRUCE ALLEN MURPHY, *APPROACHING DEMOCRACY* 139 (3d ed. 2001).

73. *Id.* at 141–42.

74. Tit. 17, § 2809(c) (2002).

75. *Id.* § 2809(a)–(d).

There are two exceptions to this rule: one for expenditures of less than \$50, and the other for expenditures by political parties or PACs that benefit more than six candidates and that “facilitate[] party or political committee functions, voter turnout, platform promotion or organizational capacity.”⁷⁶ The purpose of this rule is to limit the power of wealthy organizations to influence elections in Vermont by spending large sums of money on media campaigns on behalf of candidates whom they support.⁷⁷ Act 64 restricts the clout of these organizations by counting their expenditures toward the contribution limits and the expenditure limits that bind their preferred candidates. The intended result is electoral contests between candidates, not between checkbooks or the advertisements they can buy.

The most ambitious provision of Act 64 establishes a public-financing mechanism for elections for Governor and Lieutenant Governor. Like the public-financing mechanism for presidential elections, Act 64 provides public funds only to candidates who demonstrate that they enjoy at least a modicum of public support by raising a threshold amount of private contributions.⁷⁸ A gubernatorial candidate in Vermont qualifies for public funds by raising, during the “qualification period,” which runs from February 15th of the election year until the deadline for filing primary petitions,⁷⁹ at least \$35,000 from at least 1500 individuals who each contribute \$50 or less.⁸⁰ A candidate for Lieutenant Governor qualifies for public funds by raising, during the same time period, at least \$17,500 from at least 750 individuals who each contribute \$50 or less.⁸¹ The qualification period effectively shortens the campaign season by prohibiting candidates seeking public funds from accepting contributions or from making expenditures of more than \$500 before February 15th of a general election

76. *Id.* §§ 2809(b), 2809(d).

77. Act 64, 1997 Vt. Acts & Resolves 490, 490.

78. Under federal law, every candidate for the presidential nomination of a political party who seeks to qualify for federal funds must raise at least \$5000 in individual contributions of \$250 or less in each of at least twenty states. I.R.C. § 9033(b)(3) (2000). When a candidate reaches this threshold, every additional \$250 that he or she receives in private funds triggers a matching \$250 subsidy from the federal treasury up to an established ceiling. *Id.* § 9034. The eligibility requirements for the matching-funds mechanism are codified at I.R.C. § 9033(a) (2000). See also BERMAN & MURPHY, *supra* note 72, at 390–91 (summarizing eligibility requirements). The expenditure ceiling, which increases as the Consumer Price Index rises, is codified at 2 U.S.C. § 441a(b)–(c) (2000).

79. VT. STAT. ANN. tit. 17, § 2851(4) (2002). The deadline for filing primary petitions is usually 5:00 p.m. on the third Monday of July preceding the primary. *Id.* § 2356 (2002 & Supp. 2005). In the case of a special primary election, the deadline is 5:00 p.m. on the 42nd day before the special primary. *Id.* Regularly scheduled primary elections occur in Vermont on the second Tuesday of September in each even-numbered year. *Id.* § 2351 (2002).

80. *Id.* § 2854(a)(1).

81. *Id.* § 2854(a)(2).

year.⁸² Therefore, the public-funding mechanism in Act 64 addresses two common complaints about American election campaigns: they last too long and cost too much money.⁸³

Finally, Act 64 imposes both civil and criminal penalties on violators. A person who “knowingly and intentionally” violates reporting requirements is subject to a fine of up to \$1000, imprisonment for up to 6 months, or both.⁸⁴ A person who violates any provision of Act 64 is subject to a civil penalty of up to \$10,000 per violation and is required to refund the unspent balance of any public funds received as of the date of the violation.⁸⁵ Besides these penalties, “a state’s attorney or the attorney general may institute any appropriate action, injunction, or other proceeding to prevent, restrain, correct or abate any violation of” Act 64.⁸⁶

Thus, Act 64 established in Vermont a comprehensive and comparatively restrictive scheme of campaign-finance regulation that generally reflects a less-is-more-and-small-is-beautiful perspective regarding contributions to and expenditures by and on behalf of political campaigns. Neither its comprehensiveness nor its restrictive nature has been universally popular; evidently, some Vermonters believe that when it comes to financing politics, bigger is better. This view spawned a constitutional challenge to Act 64 in *Landell v. Sorrell*.⁸⁷

II. *LANDELL V. SORRELL*: A CONSTITUTIONAL CHALLENGE TO ACT 64

A. *The District Court’s Decision*

In August 2000, the U.S. District Court for the District of Vermont considered a constitutional challenge to Act 64, *Landell v. Sorrell*, wherein the plaintiffs alleged, *inter alia*, that the limits imposed by Act 64 on contributions to, and expenditures by, political campaigns in Vermont violated the First Amendment.⁸⁸ The plaintiffs, who were Vermont voters,

82. *Id.* § 2853(a) (2002 & Supp. 2005).

83. Both complaints are reflected in the “Legislative Findings and Intent” on which Act 64 is based. The findings state that “[e]lection campaigns for statewide and state legislative offices are becoming too expensive,” and that “[c]itizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns.” Act 64, 1997 Vt. Acts & Resolves 490, 490.

84. Tit. 17, § 2806(a) (2002).

85. *Id.* § 2806(b).

86. *Id.* § 2806(c).

87. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 483 (D. Vt. 2000), *aff’d in part, vacated in part*, 382 F.3d 91 (2d Cir. 2004), *cert. granted*, 126 S. Ct. 35 (2005).

88. *Id.* at 462. *Landell* is the result of the consolidation of three lawsuits. The case’s early

candidates, and political organizations, sought declaratory and injunctive relief under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution.⁸⁹ They alleged that the limits on contributions and expenditures, and several other restrictions imposed by Act 64, violated their First Amendment freedoms of speech and association without serving a compelling state interest.⁹⁰ These allegations were aired at a ten-day bench trial,⁹¹ during which much of the testimony concerned whether candidates would be able to run effective campaigns in Vermont if subject to the contribution limits imposed by Act 64.⁹²

It was not surprising, then, that the first provision of Act 64 the district court addressed was section 2805, which limited the amount of money that individuals, political parties, and political committees could donate to campaigns.⁹³ Neither was it surprising, in light of the Supreme Court's approval in *Buckley* of limits on campaign contributions, that the district court upheld the contribution limits mandated by Act 64. The district court agreed with the Supreme Court that contribution limits were an effective antidote to quid pro quo corruption.⁹⁴ The threat of such corruption, it concluded from reviewing polling data and the trial testimony of public officials, was "far from illusory" in Vermont.⁹⁵ Moreover, the court added, "it is beyond argument that the public perceives corruption in the political electoral system. Typical barometers of citizen concern such as polls and media coverage point to the fact that Vermonters are troubled by how money influences campaigns."⁹⁶ Thus, the district court determined that the State had demonstrated a sufficiently compelling governmental interest to justify its inclusion of contribution limits in Act 64.⁹⁷

procedural history is aptly summarized as follows:

On May 18, 1999, Marcella Landell, Donald Brunelle, and the Vermont Right to Life Committee, Inc. sued Vermont Attorney General William Sorrell and Vermont's fourteen State Attorneys. . . . On August 13, 1999, Neil Randall, George Kuusela, Steve Howard, Jeffrey Nelson, John Patch, and the Vermont Libertarian Party brought a similar suit, and on October 21, 1999, the two actions were consolidated. On February 15, 2000, the Vermont Republican State Committee also raised a challenge to the Act, and on March 21, 2000, this case was consolidated with the other two actions.

Sheils, *supra* note 1, at 481 (footnotes omitted).

89. *Landell*, 118 F. Supp. 2d at 462.

90. *Id.*

91. *Id.* at 468.

92. *Id.* at 470.

93. VT. STAT. ANN. tit. 17, § 2805 (2002 & Supp. 2005).

94. *Landell*, 118 F. Supp. 2d at 465, 478.

95. *Id.* at 478.

96. *Id.*

97. *Id.*

The district court also determined that the contribution limits were narrowly tailored.⁹⁸ It pointed to statistics presented at trial showing that more than 90% of the campaign contributions made during the previous three election cycles in Vermont were at or below the maximum levels set by Act 64.⁹⁹ It noted that when examined proportionally to population, Vermont's contribution limits were more generous than those in Missouri,¹⁰⁰ which the United States Court of Appeals for the Eighth Circuit had upheld in *Shrink Missouri Government PAC v. Adams*.¹⁰¹ Indeed, the court observed, Vermont's limits permit more than 50% more money to be contributed per constituent than Missouri's limits, which are \$525 for any office for which the population of the electoral district is 100,000 or more and \$275 for any office for which the population of the electoral district is less than 100,000.¹⁰² Finally, the court offered the 1999 mayoral election in Burlington, which compares favorably with a countywide state senate race, as evidence that candidates can run effective campaigns within the contribution limits of Act 64.¹⁰³ The candidates were limited to \$200 contributions, yet they raised between \$19,000 and \$39,000.¹⁰⁴ Therefore, the court concluded, state senate candidates, who could receive contributions of up to \$300 under Act 64, would be able to raise enough money to run effective campaigns even in Chittenden County, Vermont's most populous county, where the average state senate campaign in the recent past cost \$10,000 and the most expensive campaign cost \$30,000.¹⁰⁵

Thus, the district court held that the contribution limits of Act 64 were constitutional as they served a compelling state interest in combating quid pro quo corruption and they were narrowly tailored to accomplish that end without preventing Vermont candidates from raising sufficient funds to run effective campaigns.¹⁰⁶ The court acknowledged that the contribution limits could force many candidates to seek smaller donations from a larger pool of potential donors, but it hastened to add that "credible testimony

98. *Id.* at 480.

99. *Id.* at 478.

100. *Id.* at 479.

101. *Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838, 842 (8th Cir. 2000). The Eighth Circuit had previously struck down the Missouri contribution limits, *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 523 (8th Cir. 1998), but upheld the limits after the Supreme Court reversed the Eighth Circuit's 1998 decision and remanded for proceedings consistent with *Buckley*. *Shrink*, 204 F.3d 838; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000).

102. *Landell*, 118 F. Supp. 2d at 479 (citing *Shrink*, 204 F.3d at 842-43).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 478-81.

from citizens, politicians and experts suggested that compelling candidates to increase constituent contact would improve the health of the democratic system.”¹⁰⁷

The court was notably less sanguine about the other major provision of Act 64 that it considered, namely the expenditure limits in section 2805a.¹⁰⁸ It recalled the *Buckley* Court’s observation that “‘expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions.’”¹⁰⁹ It also recalled the *Buckley* Court’s conclusion that the threat of quid pro quo corruption that justified contribution limits did not justify expenditure limits.¹¹⁰ This was because such corruption could not arise from candidates’ spending money to disseminate their own messages or even from individuals and organizations spending their own money to disseminate messages that supported a particular candidate or issue-positions associated with that candidate.¹¹¹

That does not mean that the district court was enthusiastic about the *Buckley* Court’s reasoning or its conclusion with respect to spending limits. Indeed, the district court wrote that:

[g]iven the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, [indicating that spending limits were necessary in order to enable officeholders to concentrate on their official duties instead of fundraising, preserve the public’s faith in democracy, and provide access to the political system for ordinary Americans,] this Court understands why it included spending limits as part of its comprehensive campaign finance bill.¹¹²

“Nevertheless,” the district court continued, it was “bound by the doctrine of *stare decisis* to adhere to Supreme Court precedent.”¹¹³ Thus, it concluded that the expenditure limits in Act 64 were unconstitutional.¹¹⁴ The court observed, at the end of its opinion, that it had upheld Act 64 “to the furthest extent that the First Amendment [would] allow.”¹¹⁵

107. *Id.* at 479.

108. *Id.* at 481–83.

109. *Id.* at 481 (quoting *Buckley v. Valeo*, 424 U.S. 1, 23 (1976)).

110. *Id.* at 477, 481 (citing *Buckley*, 424 U.S. at 25–26, 46, 55, 96).

111. *Id.* at 481 (citing *Buckley*, 424 U.S. at 46–47).

112. *Id.* at 468, 483.

113. *Id.* at 483 (italics in original).

114. *Id.*

115. *Id.* at 493.

B. The Second Circuit's Decision

On August 7, 2002, almost two years after the district court's decision, the United States Court of Appeals for the Second Circuit announced its decision in *Landell v. Sorrell*, which affirmed the district court's ruling in part, and vacated and remanded it in part.¹¹⁶ The most noteworthy aspect of the appellate court's ruling was its reversal of the district court's determination that the expenditure limits in Act 64 were unconstitutional. In a 2-1 decision, the appellate majority stated that "Act 64's expenditure limitations serve to safeguard Vermont's democratic process from the corrupting influence of excessive and unbridled fundraising."¹¹⁷ The corruption of which the second circuit spoke was not the quid pro quo variety that the Supreme Court feared in *Buckley*, but instead, the undue influence exerted by large contributors over elected officials as a result of their campaign contributions. According to the second circuit, "absent expenditure limitations, the fundraising practices in Vermont will continue to impair the accessibility which is essential to any democratic political system. The race for campaign funds has compelled public officials to give preferred access to contributors, selling their time in order to raise campaign funds."¹¹⁸

For a short time after the second circuit panel announced its decision, Vermont was poised to pioneer stringent campaign reform. That prospect changed on October 3, 2002, when, in an unusual move, the second circuit panel withdrew the decision that it had announced the previous August "pending further proceedings" and possible amendment by the panel—a decision that put on hold the plaintiffs' request that the second circuit hear the case *en banc*.¹¹⁹ From October 3, 2002, until August 18, 2004, *Landell v. Sorrell* remained pending in that court. On the latter date, the same three-judge panel that had issued the now-withdrawn opinion issued an "amended opinion" that was strikingly similar to its predecessor, again affirming the district court's opinion in part, reversing it in part, and remanding.¹²⁰ The

116. *Landell v. Sorrell*, No. 00-9159, (2d Cir. Aug. 7, 2002), *withdrawn*, 2002 WL 31268493 (2d Cir. Oct. 3, 2002).

117. *Id.*, slip. op. at 5.

118. *Id.*

119. *Landell v. Sorrell*, No. 009159, 2002 WL 31268493 (2d Cir. Oct. 3, 2002); *see also* John T. Cooke, Comment, *Making the Case for Campaign Finance: One Theory Explaining the Withdrawal of Landell v. Sorrell*, 27 VT. L. REV. 685, 685 (2003) (discussing the Second Circuit's decision to withdraw the *Landell* decision).

120. *Landell v. Sorrell*, 382 F.3d 91, 149 (2d Cir. 2004). Interestingly, the Second Circuit repeatedly reconsidered the denial of rehearing in *Landell*, most recently in *Landell v. Sorrell*, 406 F.3d 159 (2d Cir. 2005) (*en banc*) (reconsidering and, over a strenuous four-judge dissent, affirming its earlier denial of rehearing).

amended opinion also featured the identical 2-1 outcome that had occurred nearly two years earlier.¹²¹ “Having reconsidered our holding and taking serious note of the views presented during the rehearing process,” the majority opinion began, “we now issue this amended opinion, modifying our holding only with regard to Act 64’s expenditure limits.”¹²²

Once again, the majority vacated the district court’s ruling that the expenditure limits in Act 64 were unconstitutional.¹²³ Still, the second circuit did not view its support for expenditure limits as a cold slap in the face to the Supreme Court’s *Buckley* rationale. “As we did in our original opinion,” the majority wrote, “we hold today that the Supreme Court, in *Buckley v. Valeo*, did not rule campaign expenditure limits to be *per se* unconstitutional, but left the door ajar for narrowly tailored spending limits that secure clearly identified and appropriately documented compelling governmental interests.”¹²⁴ The court also held that “the State has established that the challenged expenditure limits are supported by its compelling interests in safeguarding Vermont’s democratic process from (1) the corruptive influence of excessive and unbridled fundraising and (2) the effect that perpetual fundraising has on the time of candidates and elected officials.”¹²⁵ The court reasoned that *Buckley* had not held that the Constitution would always prohibit expenditure limits regardless of the reasons and the evidence that supported them.¹²⁶ Indeed, the appellate majority observed, even after *Buckley*, it was still possible that “a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.”¹²⁷

The second circuit then concluded that the limits imposed by Act 64 survived constitutional review because Vermont had shown two sufficiently strong governmental interests to justify the expenditure limits under the *Buckley* standard.¹²⁸ One such interest was in making sure that it was not necessary for Vermonters to pay, via large campaign contributions, in order to have access to their elected officials.¹²⁹ In the court’s view:

121. *Landell*, 382 F.3d at 96, 149.

122. *Id.* at 96–97.

123. *Id.* at 149.

124. *Id.* at 97 (citation omitted).

125. *Id.* (footnote omitted).

126. *Id.* at 107.

127. *Id.* at 108.

128. *Id.* at 125.

129. *Id.* at 118.

The evidence at trial demonstrated that money—and the special interests that wield it—has a great influence on candidate behavior in Vermont, at the expense of the electorate as a whole, since candidates depend on it in order to run for office. Where access and influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power.¹³⁰

The other governmental interest that the appellate court thought justified the expenditure limits imposed by Act 64, was “‘assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties.’”¹³¹ “[T]here is strong evidence,” the majority wrote, “that unlimited expenditures have compelled candidates to engage in lengthy fundraising in order to preempt the possibility that their political opponents may develop substantially larger campaign war chests.”¹³² This pressure to raise large sums of money, the opinion continued, “affects the way candidates and elected officials spend their time.”¹³³ According to the majority:

Special interests, well placed to take advantage of candidates’ fear of losing this fundraising war, dominate candidates’ time and thereby have been able to exercise substantial control over the information that passes to candidates. They do this by increasingly consuming the opportunities candidates have for meeting with constituent groups and forcing candidates to choose contributors over private citizens who make small or no contributions.¹³⁴

Having identified two compelling interests that warranted expenditure limits, the second circuit opted not to consider whether the other three interests that Vermont claimed, namely: (1) promoting electoral competition and protecting equal access to political participation; (2) “bolstering voter interest and engagement in elective politics”; and (3) enhancing the quality of political debate and voters’ understanding of the issues, also justified those limits.¹³⁵ Instead, the judges turned their

130. *Id.* at 118–19.

131. *Id.* at 119 (alteration in original).

132. *Id.* at 121–22.

133. *Id.* at 122.

134. *Id.*

135. *Id.* at 125.

attention to the question of whether the expenditure limits in Act 64 were “narrowly tailored,” that is, would the limits “significantly advance the State’s time-protection and anti-corruption interests, without severely burdening the First Amendment rights of the plaintiffs.”¹³⁶

In order to answer this question, the majority considered whether: (1) the expenditure limits advanced Vermont’s interests; (2) candidates could conduct “effective advocacy” despite the expenditure limits; and (3) “the government has proven the absence of less restrictive alternatives that are as effective in advancing its compelling interests, while impinging less on First Amendment rights.”¹³⁷ The majority opinion concluded that the expenditure limits advanced Vermont’s interests in preventing both the appearance and the reality of corruption and in freeing candidates and officeholders from endless fundraising.¹³⁸ This conclusion derived from the court’s reasoning that “[t]he significance of the spending cap lies not in reducing the amount of money spent on campaigns, but rather in eliminating th[e] potential of being vastly outspent that leads to the ‘arms race’ mentality among candidates and elected officials,”¹³⁹ which in turn “affects what issues are put on the agenda, what issues are taken off, and how certain issues are addressed.”¹⁴⁰ The court reasoned further that contrary to the plaintiffs’ claims, the expenditure limits do not discriminate against challengers because “Act 64 permits challengers to outspend incumbents, partially neutralizing the advantages that incumbents often enjoy from free media exposure.”¹⁴¹ Based on this reasoning, the majority concluded that Vermont had demonstrated that the expenditure limits in Act 64 advanced its anti-corruption and time-protection interests; that the plaintiffs had failed to show that those limits resulted from impermissible legislative motives; and, most importantly, that Vermont had “met its burden on [the] aspect of narrow tailoring [because] the spending limits

136. *Id.* Judge Ralph Winter, in a lengthy dissent, rejected the majority’s conclusion that Vermont had identified compelling interests that justify expenditure limits in political campaigns. He chastised his colleagues for having “accept[ed] the theory and factual assumptions proffered by [Act 64’s] supporters at face value” in “a show of deference exceeding even that accorded . . . an administrative body.” *Id.* at 159 (Winter, J., dissenting). This misplaced deference, Judge Winter concluded, caused the majority to uphold extremely low expenditure limits that would prevent candidates from communicating their campaign messages effectively in order to achieve the constitutionally impermissible purpose of “[f]oiling ‘special interests’ while empowering ‘ordinary citizens.’” *Id.* at 153.

137. *Id.* at 126 (majority opinion).

138. *Id.*

139. *Id.* at 127.

140. *Id.*

141. *Id.* at 128.

actually advance [the] asserted interests.”¹⁴²

The majority also concluded that despite the expenditure limits, candidates can conduct effective political campaigns in Vermont.¹⁴³ It noted that expert testimony in the district court had shown that “the average spending in Vermont House district races during the three election cycles preceding the District Court’s opinion was almost uniformly below the limits set pursuant to Act 64.”¹⁴⁴ It also noted that “multi-member Senate districts all involved average spending below that permitted pursuant to Act 64, with average spending exceeding the Act’s expenditure limits only in single-member Senate districts.”¹⁴⁵ Even in Chittenden County, which includes the city of Burlington, and for which the plaintiffs claimed that the expenditure limits were unduly restrictive, the evidence, according to the appellate court majority, supported the district court’s conclusion that average spending “was consistently far less than the \$16,500 allowed under Act 64.”¹⁴⁶ Indeed, the majority noted, the evidence presented at trial had shown that in both 1994 and 1996 all six of the victorious state senate candidates in Chittenden County had spent at or near the Act 64 limits and that three of the six winners in 1998 had spent less than the limits allowed by Act 64.¹⁴⁷ Thus, the appellate court held that the expenditure limits in Act 64 “are not ‘so radical in effect’ as to ‘drive the sound of a candidate’s voice below the level of notice,’¹⁴⁸ and therefore the limits do not prevent candidates from ‘amassing the resources necessary for effective advocacy.’”¹⁴⁹

The final issue that the second circuit considered in order to determine whether the Act 64 expenditure limits were narrowly tailored was whether they were the “least restrictive means” of preventing corruption and reducing the time spent on fundraising.¹⁵⁰ In the court’s view, a two-part inquiry is necessary.¹⁵¹ The first part requires the State to show that the type of regulation it chose “was the least restrictive—that is, that no other type of regulation could have advanced the interests asserted while impinging less on First Amendment rights.”¹⁵² The second part requires

142. *Id.*

143. *Id.* at 131.

144. *Id.* at 130 (citing *Landell v. Sorrell*, 118 F. Supp. 2d 459, 471 (D. Vt. 2000), *aff’d in part, vacated in part*, 382 F.3d 91 (2d Cir. 2004), *cert. granted*, 126 S. Ct. 35 (2005)).

145. *Id.* (citing *Landell*, 118 F. Supp. 2d at 471–72).

146. *Id.* at 130–31.

147. *Id.* at 131.

148. *Id.* (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397 (2000) (citation omitted)).

149. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

150. *Id.*

151. *Id.*

152. *Id.* at 131–32.

“scrutiny of the basis for the particular spending limits chosen—an inquiry not undertaken with respect to contribution limits.”¹⁵³

The appellate court concluded that this inquiry should be conducted in the district court, to which it then remanded *Landell* for fact-finding, stating as follows:

On remand, the District Court should make findings as to whether there were less restrictive alternatives available [e.g., higher and/or voluntary spending limits] that could have been as effective in advancing the asserted interests. Should there be proven another type of regulation that would have similarly advanced the interests asserted, while impinging less on First Amendment rights, the District Court will have a basis to find that the provision [of Act 64 limiting expenditures] is not narrowly tailored.

....

If the District Court finds, however, that mandatory spending limits were the only type of regulation that could sufficiently advance Vermont’s time-protection and anti-corruption interests, then the court must also inquire into the basis for the particular amount of the spending limits chosen.¹⁵⁴

In the latter inquiry, according to the appellate court, if the district court finds that “the lower spending limit—for example, \$4,000 for a Senate race as opposed to \$6,000—is significantly more restrictive, while no more effective in advancing the interest asserted, then the lower spending limit is not consistent with the First Amendment.”¹⁵⁵

The appellate court then turned its attention to the contribution limits in Act 64, all of which it found to be constitutional.¹⁵⁶ In so doing, it affirmed the district court’s decision regarding contribution limits, save the limit on contributions *from* parties to candidates, which the district court had invalidated but the appellate court upheld.¹⁵⁷ The appellate court reasoned that Vermont’s interest in eliminating both actual and apparent corruption was sufficient to support the contribution limits imposed by Act 64.¹⁵⁸ The majority noted that “the District Court relied on trial testimony, citizen polls, comments by public officials and media coverage to demonstrate the

153. *Id.* at 132.

154. *Id.* at 133 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

155. *Id.* at 134 (internal quotation marks omitted).

156. *Id.* at 139.

157. *Id.*

158. *Id.* at 138.

real and perceived threat of corruption in Vermont,”¹⁵⁹ and it echoed the district court’s conclusion that “[t]he threat of corruption in Vermont is far from illusory.”¹⁶⁰

Moreover, the majority concluded, the contribution limits in Act 64 were “‘closely drawn’” to serve Vermont’s anti-corruption purpose.¹⁶¹ The majority noted that “[t]he District Court relied in part on expert testimony indicating that over the last three election cycles, less than 10[%] of contributions [made to candidates for public office in Vermont] exceeded the limits set by [Act 64].”¹⁶² It added that as a result of the testimony of both plaintiffs’ and defendants’ witnesses, the district court had concluded that the contribution limits Act 64 had imposed “‘approximated amounts ‘considered suspiciously large by the Vermont public.’”¹⁶³

The appellate court then observed that the contribution limits in Act 64 were “‘sufficiently high to permit effective campaigning.’”¹⁶⁴ It buttressed this conclusion by pointing out that the 1999 Burlington mayoral election, held after the enactment of Act 64, “involved effective campaigns despite the contribution limitations. Subject to the applicable limits imposed by the statute,” the majority wrote, “the mayoral candidates raised funds comparable to the amounts spent in State Senate races in the past.”¹⁶⁵

Thus, the second circuit upheld the contribution limits in Act 64 but vacated the district court’s judgment and remanded for further proceedings on limiting candidate expenditures.¹⁶⁶ In light of the remand, the appellate court affirmed the district court’s injunction against enforcement of expenditure limits pending the outcome of further proceedings.¹⁶⁷ Last but not least, it remanded to the district court “the issue of when the various limitations revived by this opinion should be given effect”¹⁶⁸ and authorized that court “to designate an appropriate effective date for these limitations that [would] cause[] the least disruption to the current election cycle.”¹⁶⁹

159. *Id.* (citing *Landell v. Sorrell*, 118 F. Supp. 2d 459, 478 (D. Vt. 2000) *aff’d in part, vacated in part*, 382 F.3d 91 (2d Cir. 2004), *cert. granted*, 126 S. Ct. 35 (2005)).

160. *Id.* (alteration in original) (quoting *Landell*, 118 F. Supp. 2d at 478).

161. *Id.*

162. *Id.* (citing *Landell*, 118 F. Supp. 2d at 478).

163. *Id.* (quoting *Landell*, 118 F. Supp. 2d at 479–80).

164. *Id.*

165. *Id.* at 139 (citing *Landell*, 118 F. Supp. 2d at 471, 479).

166. *Id.* at 149.

167. *Id.*

168. *Id.*

169. *Id.*

C. Implications

The Supreme Court granted certiorari to both groups of plaintiffs on September 27, 2005.¹⁷⁰ On the same day, the Court accepted a separate appeal, *Vermont Public Interest Research Group v. Randall*, wherein the plaintiff, unlike the plaintiffs in the other two appeals comprising this litigation, supports the spending limits in Act 64.¹⁷¹ The three cases have been consolidated for appeal.¹⁷² Thus, it is clear now that the Supreme Court will review *Landell v. Sorrell*, although the case's outcome is impossible to predict. Prediction has been complicated by a recent personnel change and by a prospective personnel change at the Court.

Uncertainty about the outcome notwithstanding, it is easy to understand why the Supreme Court chose to review *Landell v. Sorrell*. The second circuit's ruling on expenditure limits has created a difference of opinion among the circuits concerning that issue, which often triggers a decision to grant certiorari.¹⁷³ Moreover, the detailed factual record developed in the district court will, in the words of one commentator, "present a golden opportunity for the [Supreme] Court to review its holding in *Buckley v. Valeo*."¹⁷⁴ Part III will argue that the Supreme Court should seize this opportunity and use *Landell* to reverse the longstanding prohibition on expenditure limits that began with *Buckley*.

III. ACT 64 AS AN ENGINE OF REFORM: AN ARGUMENT FOR SPENDING LIMITS IN POLITICAL CAMPAIGNS

When the *Buckley* Court ruled that limiting campaign expenditures violates the freedom of speech, it disregarded the numerous limits and regulations that apply to political speech in institutional settings. Political speech is the lifeblood of the Congress, but it is hardly unregulated. For example, the presiding officer of the House or the Senate or the chair of a congressional committee may rule a statement out of order if it violates an

170. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *cert. granted sub nom.* Vermont Republican State Comm. v. Sorrell, 126 S. Ct. 35 (2005); *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *cert. granted sub nom.* Randall v. Sorrell, 126 S. Ct. 35 (2005).

171. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *cert. granted sub nom.* Sorrell v. Randall, 126 S. Ct. 36 (2005).

172. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *cert. granted sub nom.* Vermont Republican State Comm. v. Sorrell, 126 S. Ct. 35 (2005); *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *cert. granted sub nom.* Randall v. Sorrell, 126 S. Ct. 35 (2005); *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *cert. granted sub nom.* Sorrell v. Randall, 126 S. Ct. 36 (2005).

173. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 227–28 (3d ed. 1993).

174. Cooke, *supra* note 119, at 685.

institutional rule.¹⁷⁵ Similarly, these legislative bodies both have rules that, under certain circumstances, permit them to end debate in order to vote on legislation.¹⁷⁶ Legislative committees typically divide the allotted time for witness testimony between opposing sides, which effectively limits speech in the interest of efficiency and fairness.¹⁷⁷ Trial courts limit speech during trials on grounds of relevancy, redundancy, likely prejudicial effect, and the lack of a foundation; and appellate courts impose strict time limits on oral arguments so that they can hear several cases in a morning or an afternoon.¹⁷⁸ Even the moderator at a Vermont town meeting attempts to regulate speech by urging attendees to use the microphone when speaking and to keep their comments brief so that everyone who wishes to speak about a particular matter can do so.¹⁷⁹

These limits are accepted because speech in a legislative body, a courtroom, or at a town meeting is not merely political speech but, more importantly, “institutionally bound” political speech.¹⁸⁰ Speech is institutionally bound, according to one commentator, when it occurs in situations in which “resources and activities are authoritatively organized to further or accomplish particular objectives within a limited realm of social life.”¹⁸¹ Schools, military bases, prisons, and all institutions involved in government are among the contexts in which speech is institutionally bound.¹⁸²

Electoral speech should be deemed institutionally bound speech, too. Therefore, it should be regulated to ensure the fairness of elections, just as witness testimony is regulated in legislative hearings and courtrooms to ensure the fairness of those proceedings.¹⁸³ In other words, electoral speech ought to be viewed “as an integral part of the institutionally bound electoral process [instead of, as the *Buckley* Court viewed it,] part of the broader, generally unregulatable” public debate that occurs outside the institutional context.¹⁸⁴ After all, elections, like courts and legislatures, are legally structured institutions that are designed to promote democratic

175. C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 21 (1998).

176. *Id.*

177. *Id.* at 22.

178. *Id.* at 22–23.

179. See BRYAN, *supra* note 28, at 152–54, 158 n.37 (noting the increasing prevalence of microphones at town meetings and the average length of presentations at those meetings).

180. Baker, *supra* note 175, at 19.

181. *Id.*

182. *Id.*

183. *Id.* at 3, 19.

184. *Id.* at 3, 21–23.

governance.¹⁸⁵ Accordingly, if it is necessary to regulate speech in courts and legislatures in order to ensure a fair opportunity for competing views to be heard, it is also necessary to regulate electoral speech for that purpose.¹⁸⁶

“Regulation” in this context does not mean restrictions on the content of electoral speech or the viewpoints expressed therein. Those types of restrictions would plainly violate the First Amendment.¹⁸⁷ Instead, the regulation contemplated would restrict the amount of speech in which any one speaker could engage so as to ensure that everyone who wishes to speak has the same opportunity to do so. The Congress that passed the FECA, which the Supreme Court reviewed in *Buckley*, employed such regulation when it allocated time between the opposing sides for debate on the bill, thereby preventing either side from monopolizing the debate.¹⁸⁸ When the Supreme Court heard oral arguments in *Buckley*, it allocated equal amounts of time to the petitioners who challenged the FECA and to the federal government that defended it, also to prevent either side from monopolizing the proceedings.¹⁸⁹

These limits on speech flow from a societal determination that they are necessary to ensure rational, balanced discourse in important institutional settings. Such settings require deliberation, which may necessitate limiting some speakers’ access to the microphone so that others can be heard.¹⁹⁰ Limits are not imposed in order to ensure that each speaker will be equally influential, which would undoubtedly be impossible even if desired, as each speaker is unlikely to be equally persuasive.¹⁹¹ Rather, the limits on one’s time at the microphone aim to give each speaker an equal opportunity to persuade.¹⁹² These limits are compatible with the First Amendment as long as they foster openness and fairness in the electoral process by providing

185. *Id.* at 25.

186. *See id.* at 25 (noting that the rules governing the electoral process are designed to further various institutional goals, including “creat[ing] and justify[ing] the belief that the process is fair”).

187. For example, the Supreme Court has struck down both state and federal laws prohibiting flag desecration because those laws were “content specific,” that is, they prohibited expressive acts of flag desecration out of hostility to the message that such acts convey. *United States v. Eichman*, 496 U.S. 310, 319 (1990) (striking down federal anti-flag-desecration law); *Texas v. Johnson*, 491 U.S. 397, 414, 420 (1989) (striking down state anti-flag-desecration law). The Supreme Court articulated the principle that “content-neutral” regulations (e.g., time, place, and manner restrictions) are permissible, but “content-specific” regulations are not in *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92 (1972), in which the Court struck down an ordinance because it “slip[ped] from the neutrality of time, place, and circumstance into a concern about content.” *Id.* at 99 (footnote omitted).

188. ROSENKRANZ, *supra* note 8, at 67.

189. *Id.*

190. *Id.* at 68.

191. *Id.* at 69.

192. *Id.*

that opportunity to speakers who would otherwise not be heard.¹⁹³

To be sure, a major reason for limiting speech in a legislative chamber or a courtroom is the need for orderly procedures. No such need exists in election campaigns except in formal debates and at the polls on Election Day. Still, order is not the only end served by institutionally bound speech. Institutional limits also ensure fairness to the participants in a debate or a court hearing by allocating time among the speakers equitably. Similarly, limits on campaign expenditures would ensure fairness to the participants in a political campaign by reducing the cost of running for office and of gaining access to officeholders and by preventing candidates who are wealthy or whose supporters are wealthy from drowning out candidates who have neither personal wealth nor wealthy supporters.¹⁹⁴ After all, the moderator of the town meeting does not preside just to maintain order. The moderator also presides in order to make sure that everyone who wishes to speak has a fair chance to do so.

In this respect, limits on electoral speech would be no different than the “one person, one vote” principle that underlies the periodic reapportionment of seats in both the Congress and state legislatures. In the 1960s, when state legislatures reapportioned based on this principle in the wake of Supreme Court decisions requiring them to do so, the major effect was to quiet the previously dominant voices of rural residents while raising those of urbanites who had long been underrepresented in state legislatures.¹⁹⁵ In other words, as one commentator has observed, reapportionment “reduce[ed] the speech of some to enhance the relative speech of others.”¹⁹⁶ It is ironic, then, that in *Buckley* the Supreme Court rejected equal opportunity as a compelling interest that justifies expenditure limits, reasoning that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others

193. See Baker, *supra* note 175, at 46 (asserting that the determinative issue in a First Amendment challenge to a campaign-speech restriction should be its effect on “openness and fairness”).

194. See *supra* text accompanying notes 53–54, 83.

195. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that the Equal Protection Clause mandates that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is . . . diluted”); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (stating that the “Constitution’s plain objective” was to make “equal representation . . . the fundamental goal for the House of Representatives”); *Gray v. Sanders*, 372 U.S. 368, 380–81 (1963) (stating that the Constitution requires that each person’s vote should be of equal weight); *Baker v. Carr*, 369 U.S. 186, 207–08 (1962) (finding that appellants have a justiciable claim under the Equal Protection Clause based on alleged disproportionate representation). The import of these cases is that the Equal Protection Clause of the Fourteenth Amendment requires that state legislative districts and districts for the federal House of Representatives be as nearly equal in population as possible so that each person’s vote will count equally.

196. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994).

is wholly foreign to the First Amendment.”¹⁹⁷ If the law protects equal opportunity to participate in politics by voting, the law should also protect equal opportunity to participate in politics by contributing to political campaigns and by running for office.¹⁹⁸ The best way to achieve the latter goal is to impose expenditure limits that, while high enough to ensure viable campaigns, are low enough to reduce the primacy of fundraising and the influence of large contributions (and large contributors) while increasing opportunities for ordinary people to obtain access to, and even to become, public officials. Otherwise, wealthy individuals can use their personal resources to exert extraordinary influence on, and to dominate the ranks of, candidates and officeholders, which surely violates the spirit of the “one person, one vote” ideal.¹⁹⁹

The reapportionment cases are not the only context in which the Supreme Court has held that it is permissible to balance First Amendment rights with community interests in structuring the electoral process. The Court has struck a similar balance in regulating access to the election ballot for third party and independent political candidates.²⁰⁰ In 1974, the same year that it decided *Buckley*, the Court decided *Storer v. Brown* wherein two independent congressional candidates challenged a statute denying general election ballot positions to independent candidates who were registered with a ballot-qualified political party within one year prior to the preceding primary election.²⁰¹ The Court held that the one-year disaffiliation requirement satisfied the First Amendment by furthering California’s compelling interest in preserving the stability of its political system, which outweighed a candidate’s interest in making a late decision to seek ballot access as an independent.²⁰²

In another 1974 decision, *American Party of Texas v. White*, the Supreme Court considered a First Amendment challenge to a Texas law that required parties whose candidates had polled less than 2% of the vote in the last gubernatorial election and parties that had not nominated a candidate in that election to demonstrate, either at a precinct nominating convention or

197. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

198. See Strauss, *supra* note 196, at 1388 (suggesting that, to enhance equality, the government should use public money to fund private political campaigns and not allow large private donations to such campaigns).

199. *Id.* (internal quotation marks omitted).

200. Richard Briffault, *Drawing the Line Between Elections and Politics*, in *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 121, 166–67 (E. Joshua Rosenkranz, ed., 1999).

201. *Storer v. Brown*, 415 U.S. 724, 727–28 (1974); see also Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 *BYU J. PUB. L.* 281, 293 (1993).

202. *Storer*, 415 U.S. at 736.

by gathering the requisite number of signatures, that at least 1% of voters supported them.²⁰³ The plaintiffs challenged the 1% support requirement and its attendant conventions and petitions, along with four other provisions of the Texas law, including a ban on circulating petitions prior to the primary elections, the disqualification of voters who had voted in a party primary from signing a ballot-access petition, limitation of the signature-gathering period to 55 days, and a requirement that all signatures be notarized.²⁰⁴

The Court upheld the 1% support requirement on equal protection grounds, then upheld, on First Amendment grounds, the disqualification of primary voters from signing ballot petitions, reasoning that a state “may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the . . . nominating process.”²⁰⁵ The Court also upheld the 55-day petitioning period, concluding that it was not unduly short, and the notarization requirement, holding that it was the only means available of enforcing Texas’s important interest in ensuring fair elections by preventing voters from voting twice.²⁰⁶

More recently, in *Burdick v. Takushi*, the Supreme Court considered a First Amendment challenge to Hawaii’s prohibition on write-in voting.²⁰⁷ The Court concluded that Hawaii could ban write-in voting, partly because the ban imposed only a “very limited” burden on constitutional rights as candidates could achieve ballot access by three mechanisms, including a nonpartisan primary for candidates unaffiliated with a political party.²⁰⁸ Besides, the Justices reasoned, Hawaii’s interests in restricting the size of the general election ballot, avoiding divisive, “sore-loser candidacies” by unsuccessful primary contestants, and preventing “party raiding” (the organized switching of blocs of voters from Party A to Party B in order to manipulate the results of Party B’s primary) outweighed the limited burden imposed on voters by the ban on write-in voting.²⁰⁹

203. *Am. Party of Tex. v. White*, 415 U.S. 767, 774, 777–79 (1974); Porto, *supra* note 201, at 295.

204. *Am. Party of Tex.*, 415 U.S. at 779.

205. *Id.* at 786–89.

206. *Id.* at 786–87.

207. *Burdick v. Takushi*, 504 U.S. 428, 430 (1992).

208. *Id.* at 430, 435–37.

209. *Id.* at 439. Even more recently, in *Timmons v. Twin Cities Area New Party*, the Supreme Court upheld Minnesota laws prohibiting a candidate from appearing on the ballot as the nominee of more than one political party (i.e., a “fusion” candidate). *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369–70 (1997). The majority reasoned that the burden imposed by these laws on associational rights was not severe because the “New Party” remained free to endorse any candidates it favored, ally itself with other parties, nominate candidates, and spread its message. *Id.* at 361, 369–70. Under these

The Supreme Court has also upheld restrictions on electioneering practices in the face of First Amendment challenges. In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, the Court held that Los Angeles could prohibit the placement of political signs on public property, even if the prohibition reduced the quantity of speech in the election, in order to reduce the “visual assault” that resulted from the proliferation of signs in the city.²¹⁰ Similarly, in *Burson v. Freeman*, the Court upheld a state law that prohibited the posting of campaign materials within 100 feet of entrances to polling places.²¹¹

The Supreme Court has even approved of restrictions on campaign expenditures under certain circumstances. In *Austin v. Michigan Chamber of Commerce*, the Court upheld a Michigan law prohibiting corporations from making independent expenditures from their treasuries in support of candidates for state offices.²¹² The Justices expanded the limited, quid pro quo view of corruption articulated in *Buckley* to one encompassing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”²¹³ This broad interpretation of corruption, according to one commentary, “effectively rehabilitates the equalization [of political opportunity and participation] rationale rejected in *Buckley* as ‘wholly foreign to the First Amendment.’”²¹⁴ If the Court extended its *Austin* rationale beyond the realm of corporations, it would presumably uphold restrictions on independent spending by PACs, ideological groups, and wealthy individuals, which spending may also reflect accumulated wealth but not necessarily public support for the ideas of the sponsor.²¹⁵ Moreover, *Austin* recognizes, albeit implicitly, that electoral speech is institutionally bound and therefore subject to regulation, including a prohibition on independent expenditures by corporations, in order to enhance “the democratic character of elections.”²¹⁶

circumstances Minnesota’s stated interests in avoiding voter confusion, promoting competition between candidates, preventing electoral distortions and ballot manipulations, and discouraging party factionalism justified its ban on fusion candidacies. *Id.* at 364, 369–70.

210. *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 807, 817 (1984); Schultz, *supra* note 4, at 83.

211. *Burson v. Freeman*, 504 U.S. 191, 193, 211 (1992).

212. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 654–55 (1990).

213. *Id.* at 659–60.

214. Daniel R. Ortiz, *Introduction* to ch. 3 of SOURCEBOOK, *supra* note 40, at 63, 65 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

215. *Id.*

216. Baker, *supra* note 175, at 33.

Austin shows that fairness is just as compelling an interest in financing political campaigns as it is in apportioning legislative seats, providing ballot access for third party and independent candidates, and regulating electioneering. Therefore, the individualistic approach to campaign finance that the Supreme Court articulated in *Buckley*, which equated campaign expenditures with speech, stands in stark contrast to its communitarian approach in *Austin* and in the reapportionment and ballot-access cases, which held that society's interest in a fair and equitable political process can trump an individual's (or a corporation's) interest in free expression. The latter approach squares with what Ronald Dworkin has termed the "partnership" conception of democracy, which views democratic government as a collective enterprise in which everyone ought to be able to participate.²¹⁷ According to this view, individuals cannot participate in the democratic partnership when they are effectively barred from political debate because they cannot afford either to run for office or to contribute enough money to those who do to ensure that their voices will be heard.²¹⁸

To be sure, Dworkin recognizes that "[n]o citizen is entitled to demand that others find his opinions persuasive or even worthy of attention."²¹⁹ Still, he argues, "each citizen is entitled to compete for that attention, and to have a chance at persuasion, on fair terms, a chance that is now denied [to] almost everyone without great wealth or access to it."²²⁰ Viewed in this light, Cass Sunstein has noted, unlimited campaign expenditures are not admirable exemplars of free expression, but instead unfortunate consequences of a regulatory choice to turn disparities in wealth into disparities in political influence.²²¹

Recent Supreme Court decisions indicate potential support from several Justices for an argument favoring campaign spending limits as necessary to ensure that ordinary Americans have a fair chance to participate in politics as candidates and/or contributors. In upholding Missouri's contribution limits in campaigns for state offices in *Nixon v. Shrink Missouri Government PAC*, Justice Souter noted that large contributions raised the specter not only of quid pro quo corruption but also of public disaffection from politics because of "the perception of

217. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 364 (2000).

218. *Id.*

219. Ronald Dworkin, *The Curse of American Politics*, in SOURCEBOOK, *supra* note 40, at 98, 102.

220. *Id.*

221. Cass R. Sunstein, *Political Equality and Unintended Consequences*, in SOURCEBOOK, *supra* note 40, at 113, 117.

corruption” that such contributions engender.²²² Justice Souter observed:

Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works “only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.”²²³

The perception of impropriety is potentially a crucial concept in campaign-finance jurisprudence. It reflects a broader definition of political corruption than *Buckley* recognized, as was clear in Justice Souter’s majority opinion the following year in *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado II)*, which defined corruption to include “not only . . . *quid pro quo* agreements, but also . . . undue influence on an officeholder’s judgment, and the appearance of such influence.”²²⁴ Even more recently, a joint opinion by Justices Stevens and O’Connor in *McConnell v. Federal Election Commission* reflected the Court’s increased attention to the appearance of impropriety instead of just *quid pro quo* corruption.²²⁵ In *McConnell*, the majority upheld the Bipartisan Campaign Reform (McCain-Feingold) Act’s prohibition on the solicitation, receipt, direction, transferring or spending of unregulated “soft money,” namely, unlimited contributions from corporations, labor unions, and wealthy individuals.²²⁶ The Stevens-O’Connor opinion, which Justices Souter, Breyer, and Ginsburg joined, stated that the Court had come to recognize ““a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.””²²⁷ The opinion went on to note that “[o]f ‘almost equal’ importance has been the Government’s interest in combating the appearance or perception of

222. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390, 397–98 (2000).

223. *Id.* at 390 (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

224. *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 441 (2001) (italics in original) (citing *Shrink*, 528 U.S. at 388–89).

225. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 114, 143–44 (2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)). Of course, Justice O’Connor’s views on these matters may have no bearing on the outcome of *Landell v. Sorrell*, as she is likely to have retired from the Court by the time that *Landell* is decided.

226. *Id.* at 183–84.

227. *Id.* at 143 (quoting *Shrink*, 528 U.S. at 389).

corruption engendered by large campaign contributions.”²²⁸

The perception of impropriety is the possible foundation for a conclusion by the Court that spending limits are necessary to restore Americans’ faith in democratic politics and their willingness to participate as voters, supporters, and candidates. Moreover, it coincides with the notion that electoral speech is institutionally bound and therefore should be regulated to ensure a fair and equitable electoral process. The perception of impropriety, after all, includes a sense that the political deck is stacked in favor of the wealthy and the well connected, and that persons who are neither go unheard.

Justice Breyer’s concurrence in *Shrink* represents an especially clear recognition of electoral speech as institutionally bound. Justice Breyer wrote:

The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many—in Congress, for example, where constitutionally protected debate, Art. I, §6 [sic], is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate.²²⁹

Moreover, Justices Breyer, Ginsburg, and Stevens, all of whom concurred in the judgment in *Shrink*, concluded in their respective concurrences that money is not equivalent to speech.²³⁰ Justice Stevens argued that “[m]oney is property,” while Justices Breyer and Ginsburg argued that money is not speech, but that it enables speech.²³¹ The implication of these Justices’ conclusions is that the First Amendment does not afford to political money the great protection that it affords to political ideas. A Court majority holding this view could decline to review expenditure limits with strict scrutiny, thereby improving the chances that such limits would pass constitutional muster.

Justices Stevens and Ginsburg sounded this same theme in dissent four years before *Shrink* in *Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I)*.²³² The majority held therein

228. *Id.* at 114, 143.

229. *Shrink*, 528 U.S. at 402 (Breyer, J., concurring).

230. *Id.* at 398 (Stevens, J., concurring); *id.* at 400 (Breyer, J., concurring).

231. *Id.* at 398 (Stevens, J., concurring); *id.* at 400 (Breyer, J., concurring).

232. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n (Colorado I)*, 518 U.S. 604, 648–50 (1996) (Stevens, J., dissenting).

that FECA's "party expenditure provision," which limits expenditures made by political parties "in connection with a 'general election campaign'" for Congress, was unconstitutional as applied to independent expenditures that a party made absent coordination with the candidate who was the intended beneficiary of the expenditures.²³³ The Stevens-Ginsburg dissent stated:

It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fundraising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment.²³⁴

The comments of Justices Souter, Breyer, Ginsburg, Stevens, and O'Connor in *Shrink*, *Colorado I*, *Colorado II*, and *McConnell*, respectively, recognize that *Buckley* adopted what Professor David Schultz has called "an excessively narrow definition of corruption," using the 1972 and 1974 congressional campaigns as its frame of reference.²³⁵ Those campaigns, Professor Schultz notes, are not valid reference points for assessing independent expenditures today.²³⁶ For example, he points out, 21 individuals made \$98,060 in personal independent expenditures during the 1972 presidential campaign.²³⁷ By 1980, however, "'105 PACs and 33 individuals reported to the FEC independent expenditures totaling \$16.1 million.' This [is] . . . an 800% increase . . . since 1976."²³⁸ This figure grew to \$23.4 million in 1984 and then declined in 1988 to \$20.8 million, still a significant increase from 1972.²³⁹ During the 1996 election cycle, PACs alone made \$10,552,367 worth of independent expenditures.²⁴⁰

Thus, the evidence suggests—and five members of the Supreme Court have apparently recognized—that, in Professor Schultz's words, "the nature and scope of independent expenditures have changed since the Court decided *Buckley*, and that its assumptions about this type of political

233. *Id.* at 608 (majority opinion). The party expenditure provision is codified at 2 U.S.C. § 441a(d)(3) (2000).

234. *Colorado I*, 518 U.S. at 649–50 (Stevens, J., dissenting).

235. Schultz, *supra* note 4, at 87–88.

236. *See id.* at 88–90 (noting the substantial growth in independent campaign expenditures since the mid-1970s, and arguing that the *Buckley* Court "could not have imagined" the heightened significance such expenditures would later have).

237. *Id.* at 88.

238. *Id.* (quoting HERBERT E. ALEXANDER, FINANCING THE 1980 ELECTION 387 (1983)).

239. *Id.* at 89 (citations omitted).

240. *Id.* (citation omitted).

spending may therefore no longer hold.”²⁴¹ Indeed, according to Professor Schultz, *Buckley* helped to trigger the explosion in independent expenditures in the 1976 elections by striking down limits on individual, independent expenditures, hence “creat[ing] an easy route for avoiding the contribution limits it upheld.”²⁴²

Happily, *Buckley* did not foreclose a future conclusion that expenditure limits are necessary to a democratic revival in America. It did not state that combating quid pro quo corruption is the only governmental interest that can survive strict scrutiny in a campaign-finance case.²⁴³ Instead, it left open the possibility that a case with a rich factual record demonstrating public cynicism about cozy relationships between politicians and campaign contributors could spur the Court to hold that expenditure limits survive strict scrutiny when they are narrowly tailored to offer all members of a political entity a fair chance to participate in the electoral process.²⁴⁴ *Landell v. Sorrell* presents just such a rich factual record, so Act 64 may well be the vehicle for overturning *Buckley* that its drafters intended it to be.²⁴⁵

Act 64 can do more than overturn *Buckley*. If its limits on contributions and expenditures prevail in the Supreme Court, it could rejuvenate American democracy by lowering the price of admission to the political arena for candidates and contributors. In other words, it could extend the equality of a Vermont town meeting, where financial barriers to participation are minimal, to political contests nationwide.²⁴⁶ The “town meeting” model of campaign finance is the subject of Part IV.

IV. THE “TOWN MEETING” MODEL OF CAMPAIGN FINANCE

Act 64, with its contribution and expenditure limits intact, illustrates how to democratize American politics in general and campaign finance in particular. This is because the two sets of limits, taken together, mirror the New England town meeting in making political participation accessible to people of ordinary means. The town meeting “predates representative government” in America and is unsurpassed among forms of government in its accessibility to every citizen.²⁴⁷ In a town meeting, Emerson observed

241. *Id.* at 90. This total includes Justice O’Connor, who as noted earlier, may not be a member of the Court when *Landell* is decided. *See supra* note 225.

242. *Id.* at 91.

243. Sheils, *supra* note 1, at 484.

244. *Id.* at 483.

245. 2 JOURNAL OF THE SENATE OF THE STATE OF VERMONT 1338 (1997).

246. *See supra* note 29.

247. BRYAN, *supra* note 28, at 3.

during the nineteenth century, “the rich gave council, but the poor also; and, moreover, the just and the unjust . . . every opinion had its utterance, every fact, every acre of land, every bushel of rye, its entire weight.”²⁴⁸

This is still true, as University of Vermont political scientist Frank Bryan recognized in his recent book on town meetings. “[S]tep into the average town meeting in Vermont;” Bryan wrote, “and you will see before you an approximation of the ranges of status groups in the community that is remarkably accurate.”²⁴⁹

Admittedly, town meetings rarely realize their potential as engines of democracy because relatively few residents take part in them. For example, Bryan’s sample of 1435 town meetings held in Vermont between 1970 and 1998 showed that town meetings attracted an average of 20.5% of registered voters.²⁵⁰ Therefore, it is fair to ask whether town meeting, with its low rate of participation, is a desirable model for a revamped system of campaign finance.

The answer is that town meeting is indeed a good model for restructuring campaign finance, and the reason for that lies in the relationship between the size of a town and the degree of attendance at (and participation in) its town meeting. Professor Bryan has gathered voluminous data on town meetings in Vermont since 1970. He notes that “the association between [town] size and attendance remains remarkably consistent over time.”²⁵¹ “Size matters,” says Bryan, “and it matters plenty.”²⁵² He explains that “smaller towns will have higher [rates of] attendance at their meetings because the people who live in these places know they are more powerful decision makers than people in larger towns.”²⁵³ “Irrespective of the time [of day] the meeting [wa]s held,” he has found, “as the size of the town increased the attendance at town meeting dropped like a rock.”²⁵⁴

An example will illustrate this point. Professor Bryan’s data show that in 1992, the Town of Newark, which is located in the Northeast Kingdom, Vermont’s most rural and least prosperous region, had a population of 354.²⁵⁵ The data also show that the Town of Shelburne, an affluent “bedroom community” near Burlington, had a population of 6604 in

248. *Id.* at 26–27.

249. *Id.* at 284.

250. *Id.* at 57.

251. *Id.* at 74.

252. *Id.*

253. *Id.* at 78.

254. *Id.* at 91.

255. *Id.* at 73.

1992.²⁵⁶ Bryan found that 39.5% of Newark's registered voters attended its town meeting that year, more than twelve times the rate of attendance in Shelburne, where only 3.2% of the population attended town meeting.²⁵⁷

Moreover, smaller towns not only have higher rates of attendance at town meeting, but they have higher rates of participation, too; that is, in smaller towns, attendees are more likely to speak during the town meeting than are attendees in larger towns. "In general," Professor Bryan writes, "town meetings with the smallest number of people in attendance have the largest percentage of participators and the best distribution of participation among those present."²⁵⁸ He concludes, therefore, that increased town size hurts town meeting democracy in two ways: first, by "dramatically reduc[ing] the percentage of citizens who attend town meeting"; and, second, by "increas[ing] the number of citizens who attend, which dramatically decreases the percentage of these attenders who participate."²⁵⁹

An important analogy can be made between Professor Bryan's findings about the relationship between town size and town meeting attendance and the world of campaign finance. Act 64 reflects a "town meeting" model of campaign finance because its contribution limits and expenditure ceiling, taken together, can spur ordinary people to participate in politics by convincing them that they will be more influential than they are in the current atmosphere of large contributions and unlimited expenditures. Just as smaller towns enjoy greater attendance at and participation in town meetings, political campaigns could enjoy greater grassroots participation (i.e., making donations and performing campaign tasks) by ordinary people if strict limits governed both contributions and expenditures.

Contribution limits will force candidates to raise money in smaller amounts from a larger pool of donors. The result will be what a commentator has called a merger of "the cash constituency and voting constituency."²⁶⁰ Individuals who until now have only expressed their support for candidates by voting for them will be encouraged to donate because the price of admission to the "donors' club" will decline making a donation of \$50 or \$100 more significant than it was in the past. Expenditure limits will make potential candidates who are neither wealthy nor eager to solicit large donations from wealthy persons more likely to run for office because they will not have to fear unlimited spending by their

256. *Id.*

257. *Id.* at 80.

258. *Id.* at 157.

259. *Id.* at 163.

260. ROSENKRANZ, *supra* note 8, at 65.

opponents.²⁶¹

Contrary to popular belief, the expenditure limits of Act 64 would not harm challengers as most challengers are outspent absent expenditure limits and many challenges are never launched because potential candidates fear having to compete against incumbents who are permitted to spend unlimited amounts of money.²⁶² Besides, Act 64 aids challengers by limiting incumbents seeking reelection to statewide offices to spending only 85% of the amounts that their challengers can spend and by limiting incumbents seeking reelection to the legislature to spending only 90% of what their challengers can spend.²⁶³ Expenditure limits will also not deprive the public of any political argument or public policy information that it needs as current political advertising is at least repetitive, if not also superficial, and fewer repetitions will not change or quash the intended message.²⁶⁴ Indeed, Vermonters may well be exposed to more and better information than they receive now if and when both contribution and expenditure limits are in place. This is because candidates will interact with their potential constituents more frequently in order to attract financial support from a large pool of contributors, and they will have more time for interaction because their fundraising task will be less onerous than it is now.²⁶⁵

Still, contribution and expenditure limits are not perfect, so campaign-finance reformers ought not to expect them to perform miracles. Even when, as under Act 64, contribution limits are strict, most individuals cannot afford to contribute the maximum amount; therefore, those who can do so may well enjoy more and better access to elected officeholders than their less affluent neighbors.²⁶⁶ It would be a mistake then, to imagine that contribution and expenditure limits will eliminate political inequality.²⁶⁷ A more realistic hope is that they will diminish political inequality by making

261. See Sheils, *supra* note 1, at 493 (asserting that unlimited spending discourages potential candidates who are neither wealthy nor able to raise large sums).

262. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1294 (1994).

263. VT. STAT. ANN. tit. 17, § 2805a(c) (2002 & Supp. 2005).

264. Sheils, *supra* note 1, at 502 (citing Dworkin, *supra* note 219, at 102).

265. The district court endorsed this view in *Landell v. Sorrell* with respect to contribution limits. It observed that “credible testimony from citizens, politicians and experts suggested that compelling candidates to increase constituent contact [by imposing contribution limits that require candidates to solicit smaller sums from a larger pool of potential donors] would improve the health of the democratic system.” *Landell v. Sorrell*, 118 F. Supp. 2d 459, 479 (D. Vt. 2000), *aff’d in part, vacated in part*, 382 F.3d 91 (2d Cir. 2004), *cert. granted*, 126 S. Ct. 35 (2005).

266. John C. Bonifaz, Gregory G. Luke & Brenda Wright, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 60 (1999).

267. *Id.*

political participation, as candidates or contributors, more accessible to ordinary middle-class people than it is today.

Thus, Vermont's Act 64 can reinvigorate democracy by lowering the financial and related psychological barriers that discourage ordinary middle-class voters from donating to political campaigns and from seeking elective office. The means to this end are stringent but realistic limits on campaign contributions and expenditures, vigorous enforcement of the limits, and, most importantly, a public commitment to a style of politics that, in the best tradition of a town meeting, is low in cost but high in opportunities to participate. Vermont, because of its small size and its town meeting tradition, is an ideal laboratory in which to test the new model and the theory of institutionally bound electoral speech on which it is based. If the model works in Vermont, by lowering the cost of campaigns and/or encouraging more people to participate in politics, it can then be applied in other states with appropriate adjustments in contribution and expenditure limits to reflect variations in population size. Perhaps the states will then influence the Congress to adopt similar reforms, thereby bringing the flavor of town meeting to Capitol Hill.

CONCLUSION

A "bigger is better" ethos seems to govern campaign finance in the United States resulting in steady increases in campaign costs with each election cycle. These conditions have created a public perception that politicians favor their contributors over their constituents when making public policy. In this instance, perception mirrors reality as the interaction between financially powerful donors and the entrenched incumbents whom they support frequently produces policy decisions that neither serve nor reflect the wishes of most Americans.

Against this backdrop, Vermont has championed a less-is-more-and-small-is-beautiful philosophy of campaign finance, as reflected in Act 64, the landmark law enacted in 1997. Act 64 challenges the prevailing legal standard in campaign-finance regulation by limiting the amounts of money that candidates can spend in their campaigns. It also embodies the "town meeting" model of campaign finance, which features stringent but realistic limits on campaign contributions and expenditures and offers a unique opportunity to reconnect politicians and voters by lowering the price of admission to the political process.

This opportunity will go unrealized unless the Vermont law's limits on both contributions and expenditures survive appellate review in the federal courts. The expenditure limits deserve to be upheld as legitimate

regulations on institutionally bound electoral speech much like the one-person, one-vote principle and ballot-access laws. If both its contribution and its expenditure limits survive appellate review, Act 64 will revitalize democracy in Vermont by encouraging ordinary people to contribute to political campaigns and to run for office. If applied beyond Vermont, Act 64 could revitalize democracy nationwide by showing the rest of America that the guiding principle of campaign finance ought not to be “bigger is better,” but rather, “less is more and small is beautiful.”