LANDELL BODES WELL FOR CAMPAIGN FINANCE REFORM: A COMPELLING CASE FOR LIMITING CAMPAIGN EXPENDITURES

There are two things that are important in politics. The first is money and I can't remember what the second is.

Senator Mark Hanna[1]

INTRODUCTION

If money is the first important aspect of politics, the second undoubtedly is speech. The reality in American politics, however, is that political speech costs money.[2] While "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution,"[3] it does not follow that unrestricted expenditures of campaign funds enhance the quality of communication between candidates and voters.[4] In fact, experience has proven the opposite.[5]

The role of money in politics has increased in staggering measure. Campaign spending on all campaigns for public office in 1968 reached an estimated $300 million.[6] By 1996, in the most expensive election in United States history to that date, congressional and presidential candidates alone

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1. Helen Dewar, *For Campaign Finance Reform, A Historically Uphill Fight*, WASH. POST, Oct. 7, 1997, at A5 (quoting nineteenth-century U.S. Senator Mark Hanna (R-Ohio)), *cited in* Representative Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307, 307 (2000).

2. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event.").

3. *Id.* at 14.

4. *See* John C. Bonifaz et al., *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 39 (1999). Authors and attorneys for the National Voting Rights Institute suggest that unlimited campaign spending undermines public confidence in the political process, presents an increased danger of actual corruption, places enormous time pressures on office holders to raise inordinate amounts of campaign funds, enables the wealthy to drown out the voices of lesser-funded candidates and their supporters, and violates protection of equality in American politics. *Id.*

5. *Id.* (citing, inter alia, CHARLES LEWIS & THE CENTER FOR PUBLIC INTEGRITY, THE BUYING OF THE CONGRESS (1998); 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, 1281 (1994); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 293-97, 326-28 (1993); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1126-31 (1994).

6. FRED WERTHEIMER, THE COMMON CAUSE MANUAL ON MONEY AND POLITICS 3 (Common Cause 1972).

spent a total of more than $2 billion.[7] In 2000, President George W. Bush ran the longest, closest, and most expensive American presidential race ever, raising more than $191 million and spending more than $183 million of that total during the 2000 election cycle.[8] These kinds of unlimited campaign expenditures have had a disastrous effect on the political process.[9] Unlimited campaign spending forces candidates to rely primarily upon large fiscal contributions from outside sources to subsidize their campaigns.[10] The appearance and reality of corruption is the cost of this campaign finance system:

> What a contributor may receive from his government takes many forms. The quid pro quo may be an appointment to high office or the granting of a lucrative government contract. It may mean a specific legislative benefit, or the reversal of a bureaucratic decision. We know that major campaign contributors most often give today in the expectation of some "return" on their "investment." The individual who wants nothing but honest government for his money is rare.[11]

An example on the national level of the corrupt possibilities inherent in unlimited campaign spending occurred in connection with Richard Nixon's 1972 presidential campaign.[12] Representatives of the nation's dairy industry

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7. Bonifaz et al., *supra* note 4, at 39.

8. The Center for Responsive Politics, President-Elect George W. Bush, *Introduction*, *at* http://www.opensecrets.org/2000elect/other/bush/introduction.asp (Nov. 9, 2001); The Center for Responsive Politics, *2000 Presidential Race, Total Raised and Spent*, *at* http://www.opensecrets.org/2000elect/index/AllCands.htm (Nov. 9, 2001). The Center for Responsive Politics obtained this information from the Federal Election Commission data released on January 3, 2001. *Id.* "The Center for Responsive Politics is a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics, and its effect on elections and public policy." The Center for Responsive Politics, *at* http://www.opensecrets.org/about/index.asp (Nov. 9, 2001).

9. WERTHEIMER, *supra* note 6, at 3. "The passage of campaign spending reform legislation by the Congress arose from recognition that the whole procedure of fund raising by candidates has gotten out of hand; that campaigns cost too much money and that the one-man, one-vote principle is being flouted by men and organizations of substantial means." *Id.*

10. *Id.* "Most candidates cannot personally finance even a small fraction of [campaign] costs. The money must come from outside sources. As a result of this system, our government has been up for sale—campaign contributions are used by special interests and wealthy individuals to purchase political power and influence." *Id.*

11. *Id.*

12. BURT NEUBORNE & ARTHUR EISENBERG, THE RIGHTS OF CANDIDATES AND VOTERS: THE BASIC ACLU GUIDE FOR VOTERS AND CANDIDATES 96-97 (American Civil Liberties Union Handbook No. 28159, 1976).

pledged $2 million to President Nixon's campaign.[13] Nixon met with dairy representatives and, on March 23, 1971, promised an increase in milk price supports.[14] Before the president announced his decision, he required the dairymen to reaffirm their $2 million pledge.[15]

A well-known instance of money and corruption in Congress is the savings and loan scandal of the 1980s:

> During the 1980s, when savings and loan institutions were engaged in the activities that ultimately led to the biggest American financial scandal since Teapot Dome, S&L interests poured at least $11,699,499 in campaign contributions to congressional candidates and political party committees, including $6.3 million through PACs [political action committees]. Despite mounting evidence that the S&L industry was risking billions of dollars in federally insured deposits through questionable business practices, Congress during this period helped to protect the S&L industry from the kind of regulatory control that was needed to safeguard the interests of the American taxpayer. In the end, the American taxpayer had to bail out the S&L industry to the tune of $150 billion to $200 billion.[16]

Few events in American history rival the appearance of corruption of the savings and loan scandal.

Regardless of the existence of actual corruption in the preceding examples, the appearance of corruption is sufficient to demonstrate the need for a comprehensive system of campaign finance reform. Contribution limits alone are insufficient because they do not eliminate candidates' perceived need to amass war chests of campaign funds.[17] Expenditure limits are necessary to

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13. *Id.* Although federal law prohibited contributions of this size, the dairy industry donated the money in $2500 payments to hundreds of individual political committees willing to hold the money for President Nixon until the 1972 presidential campaign. *Id.*

14. *Id.*

15. *Id.*

16. Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1139 (1994) (citing 1990 Cong. Q. Almanac 78, 97 (1990); Helen Dewar, *Stalemate of Survival*, WASH. POST, Aug. 6, 1992, at A1; *It's a Wonderful Life*, COMMON CAUSE NEWS (Common Cause, Washington, D.C.), June 29, 1990, at 1 (on file with Columbia Law Review); Jerry Knight, *$45 Billion Sought for Thrift Cleanup*, WASH. POST, Mar. 17, 1993, at C1; *Last Installment for the S&Ls*, WASH. POST, June 28, 1993, at A18).

17. Wertheimer & Manes, *supra* note 16, at 1132-33.

> Under the current system of unlimited spending, there are no constraints on how much money candidates raise. An arms race mentality takes over and candidates raise and spend escalating amounts, in order to stay one step ahead of any possible

return integrity and equal representation to the political system. The question remains, however, to what extent expenditure limits are constitutional under *Buckley v. Valeo*, the Supreme Court's quarter century-old landmark case on political speech.[18]

Various states have enacted campaign finance reform measures, including limits on campaign spending.[19] In 1997, the Vermont Legislature enacted the Vermont Campaign Finance Reform Act, a comprehensive system of campaign finance reform known as Act 64, which included both contribution and expenditure limits.[20] While the Vermont Legislature acted in what it perceived to be the electorate's best interest, the constitutionality of these efforts is at issue in the case *Landell v. Sorrell*.[21] This case, which addresses the legality of campaign finance laws that restrict aspects of political speech, provides an ideal opportunity for the Supreme Court to revisit its ruling in *Buckley*.

This Note analyzes the role of *Landell* in redefining what constitutes a compelling state interest in support of campaign expenditure limits. Part I of

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> opponent and to deal with any possible contingency. Incumbents also stockpile large campaign war chests to discourage serious challengers from entering the race.

Id.

18. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

19. Ross Sneyd, *Court Says Yes and No to Vermont Funding Law*, CHI. TRIB., Aug. 11, 2000, at N3 ("Limits have been set on candidates' expenditures or fundraising in at least 24 states."). Efforts in Vermont, Maine, and Arizona have received considerable attention. *See, e.g.*, Editorial, *Testing Competition*, BOSTON GLOBE, Dec. 6, 2000, at A18.

Since this note was written, Congress passed the long-awaited Bipartisan Campaign Reform Act of 2002 (BCRA). Pub. L. No. 107-155, § 116 Stat. 81 (2002). The President signed the bill into law on March 27, 2002, *id.*, and Senator Mitch McConnell (R-KY) and the National Rifle Association immediately challenged the law that morning, with numerous other groups following suit. Complaint, NRA v. FEC, No. CIV ___ (D.D.C. Mar. 27, 2002), http://news.findlaw.com/hdocs/docs/fec/nravfeccmplnt032702.pdf; United Press International (UPI), *Bush Signs Campaign Finance Bill; NRA Sues*, NewsMax.com Wires, *at* http://www.newsmax.com/archives/articles/2002/3/27/135423.shtml (last visited Apr. 11, 2002); *NRA First to File Constitutional Challenge to Campaign Finance Law*, Joint Statement by Wayne Lapierre, Executive Vice President, The National Rifle Association of America, and James Jay Baker, Executive Director, NRA's Institute for Legislative Action, http://www.nraila.org/NewsCenter.asp?FormMode=Detail&ID=1495 (Apr. 9, 2002). The NRA case will focus primarily on the new advertising restrictions. Complaint, NRA v. FEC, *supra*, ¶¶ 2-3. The NRA case could also demonstrate the extent to which the courts, and specifically the Supreme Court, are willing to accept legislation that attempts to lessen the influence of special interests in federal elections.

Importantly, BCRA does not include overall candidate expenditure limits. BCRA, Pub. L. No. 107-155, § 116 Stat. 81 (2002). While BCRA limits the amount of money candidates may accept and spend from certain sources and in certain circumstances, a candidate may still spend as much of his own money as he wants. *Id.* In this respect, BCRA fails to eliminate the "wealth primary" that will continue to exist without candidate expenditure limits. National Voting Rights Institute, What is the Wealth Primary?, http://www.nvri.org/about/wealth.shtml (Apr. 9, 2002). *Landell* and *Homans v. City of Albuquerque*, 264 F.3d 1240 (10th Cir. 2001), remain the leading cases regarding candidate campaign expenditure limits.

20. 1997 Vt. Acts & Resolves 64 (codified at VT. STAT. ANN. tit. 17, §§ 2801-2881 (Supp. 2000)).

21. Landell v. Sorrell, 118 F. Supp. 2d 459 (D. Vt. 2000).

this Note provides a brief background of First Amendment free speech jurisprudence, with specific attention to *Buckley* and *Landell*. Part II examines the constitutionality of Vermont's expenditure limits under *Buckley*. Part III considers *Landell* as a vehicle to overrule *Buckley*. This Note concludes by suggesting that in order for laws such as Act 64 to survive, the Supreme Court must clarify, redefine, or overturn its holding in *Buckley* regarding exactly what constitutes a compelling state interest in the arena of campaign expenditure limits.

I. BACKGROUND

A. Overview of First Amendment Jurisprudence

The United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[22] While some commentators have stressed that "no law" means absolutely *no law*, laws restricting free speech are commonplace.[23] Laws against perjury, blackmail, and fraud restrict speech.[24] Advocacy of illegal action, libel, obscenity, fighting words, and commercial speech are five general categories of unprotected speech.[25] Moreover, "in the real world, communicative and non-communicative aspects of conduct are constantly intertwined."[26] Because speech interacts with many non-speech elements, the task of formulating principles distinguishing the degree of protection appropriate to one form of speech over another is far more complex than defining simple categories of protected and unprotected speech.[27]

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22. U.S. CONST. amend. I.

23. Even Justice Black, whose dissenting opinion in *Tinker v. Des Moines Independent Community School District* spawned this strict interpretation of the First Amendment, contemplates a speech-conduct distinction that gives rise to some restrictions on speech-related activities:

> While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleased or when he pleases.

Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting).

24. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 614 (1996).

25. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770-72 (1976) (prohibiting false or misleading advertising); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (prohibiting speech "directed to inciting or producing imminent lawless action"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (restricting categories of speech including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"). "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky*, 315 U.S. at 571-72.

26. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2.06[2][b] (1994).

27. LOCKHART, *supra* note 24, at 614.

The Supreme Court has approached questions of free speech primarily on an ad hoc basis, "without much attention to the language or history of the [F]irst [A]mendment and without a commitment to any general theory. Rather it has sought to develop principles on a case-by-case basis and has produced a complex and conflicting body of constitutional precedent."[28] This approach gives rise to "the problem of applying broad principles of the First Amendment to unique forums of expression."[29] "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[30] Thus, "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[31] These distinctions assume great significance in the context of campaign expenditures, which involve both speech and non-speech elements.

Despite the complexity of the First Amendment landscape, the Supreme Court tends to apply certain doctrinal principles with reasonable consistency regardless of the area of speech in which regulation occurs.[32] The common starting point in most cases of First Amendment analysis is to distinguish content-neutral from content-based restrictions of speech.[33] This distinction determines the applicable level of judicial scrutiny. Content-based restrictions generally trigger heightened scrutiny, while content-neutral laws (such as time, place, and manner restrictions) receive some variation of intermediate scrutiny.[34]

Time, place, and manner restrictions are the most common examples of content-neutral regulation.[35] These restrictions do not regulate what is said, but when, where, and how communication occurs.[36] The government may impose such restrictions in public fora provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly

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28. *Id.* at 614-15.

29. Metromedia, Inc. v. San Diego, 453 U.S. 490, 500 (1981).

30. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

31. *Metromedia, Inc.*, 453 U.S. at 501 (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

32. SMOLLA, *supra* note 26, § 3.01[2][a].

33. *Id.* § 3.01[2][b][i]. "The principle inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 295 (1984)). A regulation is content-neutral if it is "*justified* without reference to the content of the regulated speech." *Id.* The government's purpose for the regulation is the controlling consideration. *Id.*

34. SMOLLA, *supra* note 26, §§ 3.01[2][b][i], 3.02[1][b].

35. *Id.* § 3.02[3][a].

36. *Id.*

tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[37]

Distinct analytical considerations arise regarding laws that aim at the regulation of conduct but that have an incidental impact on speech.[38] *United States v. O'Brien* provides that laws passed for reasons unrelated to the content of expression are valid if the regulation is within the constitutional power of the body passing the regulation, if the regulation furthers an important or substantial government interest, if the interest is unrelated to the suppression of free expression, and if the restriction is no greater than necessary to further the interest.[39] Thus, content-neutral laws that have an incidental impact on expression qualify for a lower level of scrutiny.[40]

B. Political Speech

Political speech is a primary concern of First Amendment protection. *Eu v. San Francisco Democratic Committee* provides that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[41] Protection of speech regarding governmental affairs was among the Framers' primary motivations.[42] Free speech is an integral component of the American system of government, "[f]or speech

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37. *Rock Against Racism*, 491 U.S. at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

38. DANIEL A. FARBER, THE FIRST AMENDMENT 40-41 (1998). First Amendment protection extends beyond verbal communications. *Id.* at 40. Non-verbal, communicative activities often receive First Amendment protection under the umbrella of "symbolic speech." *Id.* The Court, however, may uphold restrictions on symbolic speech if a reasonable, content-neutral justification supports the government action. *Id.* (relying in part on Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984)).

39. United States v. O'Brien, 391 U.S. 367, 377 (1968) (considering the constitutionality of burning draft cards in public). Modern commentary on *O'Brien* suggests:

> [I]t makes very little difference in most cases whether conduct is classified as speech or not, so long as the government's regulation is content neutral. Thus, the government is generally uninhibited in enforcing a general regulation unrelated to the [actor's] intended message, even if we do classify the conduct as speech. In contrast, if the government regulation relates to the [actor's] message, the government cannot very well deny that the [actor] is engaged in an act of communication. Either way, the crucial question is no longer, "Does the [actor's] conduct constitute speech?", but rather, "Is the government's regulation based on content?".

FARBER, *supra* note 38, at 41.

40. SMOLLA, *supra* note 26, § 3.01[2][b][i].

41. Eu v. San Francisco Democratic Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

42. Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

concerning public affairs is more than self-expression; it is the essence of self-government."[43]

> The First Amendment bars the state from imposing upon its citizens an authoritative vision of truth. It prohibits the state from interfering with the communicative processes through which its citizens exercise and prepare to exercise their rights of self-government. And the Amendment shields those who would censure the state or expose its abuses.[44]

For these reasons, First Amendment analysis regarding political speech delves far beyond expression itself; this analysis implicates numerous questions of access to and representation by the American system of government.[45]

C. Buckley v. Valeo

The Supreme Court decided its landmark case regarding campaign finance in 1976.[46] In *Buckley v. Valeo* the Court considered the constitutionality of the Federal Election Campaign Act (FECA) of 1971, as amended in 1974.[47] The Court examined FECA's disclosure requirements, limits on campaign contributions and expenditures, and public financing of elections.[48] FECA pertained only to presidential, senatorial, and congressional elections, and not to elections for state office.[49] It limited contributions from individuals and groups to candidates for federal elective office to $1,000 per election, and by a political committee to $5,000 to any single candidate per election, with an overall annual contribution limitation of $25,000 for any individual contributor.[50] FECA further limited related expenditures to $1,000 per candidate per election,[51] and limited expenditures by a candidate from his personal or family funds to specified amounts depending on the federal office

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43. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

44. Herbert v. Lando, 441 U.S. 153, 184-85 (1979) (Brennan, J., dissenting in part).

45. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) ("[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of government."). The First Amendment affords broad protection to political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

46. *Buckley*, 424 U.S. 1.

47. *Id.* at 6.

48. *Id.* at 6-7.

49. Federal Election Campaign Act of 1971, 18 U.S.C. § 608 (Supp. IV 1970) (repealed 1976).

50. *Id.* § 608(b)(1)-(3).

51. *Id.* § 608(e)(1).

sought.[52] The Court upheld limits on contributions, but found the expenditure limits unconstitutional,[53] partially reversing the court of appeals.[54]

The government had contended that FECA regulated conduct, and that restrictions exerted nothing more than an incidental effect on speech.[55] The court of appeals agreed and applied the *O'Brien* test accordingly.[56] The *Buckley* Court refused to characterize spending money as conduct, stating, "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."[57] The Court further stated that if the *O'Brien* test did apply, FECA would fail the third prong of the test because "the governmental interests advanced in support of the Act involve 'suppressing communication.'"[58]

Second, the Court rejected the notion that FECA constituted a reasonable exercise of time, place, and manner restrictions because the Act's contribution and expenditure limits imposed direct quantity restrictions on political communication and association in addition to the restrictions on time, place, and manner.[59] The Court's rejection of these two arguments foreclosed the application of a lower standard of review. In accordance with its conclusion that "the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests,"[60] the Court applied "the exacting scrutiny required by the First Amendment."[61]

The government presented three state interests in support of FECA: prevention of the appearance and reality of corruption, leveling the playing field between candidates, and limiting the skyrocketing costs of political campaigns.[62] The *Buckley* Court accepted the anti-corruption rationale as compelling regarding contribution limits, and thus found it unnecessary to discuss the other two interests.[63] The Court rejected all three interests with respect to expenditure limits.[64]

Since *Buckley*, the Court has provided little guidance regarding the constitutionality of campaign finance reform. Until the Court overturns or

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52. *Id.* § 608(c)(1)(A)-(C).
53. *Buckley*, 424 U.S. at 23-59.
54. *Id.* at 14-18.
55. *Id.* at 15.
56. Buckley v. Valeo, 519 F.2d 821, 840 (D.C. Cir. 1975); *Buckley*, 424 U.S. at 15-16.
57. *Buckley*, 424 U.S. at 16.
58. *Id.* at 17.
59. *Id.* at 18-19.
60. *Id.* at 23.
61. *Id.* at 16.
62. *Id.* at 25-26 (discussing contribution limits); 55-57 (discussing expenditure limits).
63. *Id.* at 26.
64. *Id.* at 55-57.

redefines *Buckley*, this case remains the rule by which all restrictions on campaign finance must abide. Therefore, the validity of campaign spending limits in Vermont's Act 64 depends entirely upon the Act's ability to exist within the confines of *Buckley*, or upon the willingness of the Court to reconsider its stance on campaign expenditure limits.

D. Vermont's Act 64

In 1997, the Vermont Legislature enacted a comprehensive system of campaign finance reform.[65] The Vermont Campaign Finance Reform Act (Act 64) restricted contribution and expenditures in Vermont elections.[66] Act 64 limited contributions to candidates to $200 for state representative; $300 for state senator; and $400 for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and state attorney general.[67] The Act limited contributions to a political committee or political party to $2,000.[68] A candidate, political party, or political committee could not accept a contribution transferred to the contributor by another person for the purpose of circumventing the contribution limits of the Act.[69] Act 64 did not limit the amount a candidate or the candidate's immediate family could contribute to the candidate's campaign.[70]

Act 64 limited expenditures by candidates to $2,000 for a state representative in a single-member district, and $3,000 in a two-member district; $4,000 for state senator, plus an additional $2,500 for each additional seat in the senate district; $45,000 for secretary of state, state treasurer, auditor of accounts, and attorney general; $100,000 for lieutenant governor; and $300,000 for governor.[71] The Act deemed any related expenditure on a candidate's behalf a contribution to the candidate on whose behalf it was made.[72]

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65. 1997 Vt. Acts & Resolves 64 (codified at VT. STAT. ANN. tit. 17, §§ 2801-2881 (2000)).

66. VT. STAT. ANN. tit. 17, §§ 2801-81 (2000). Although this Note primarily discusses the constitutionality of campaign expenditure limits, this section provides a brief description of the contribution limits in Act 64 to illustrate how contribution and expenditure limits in the Act operated as an integrated whole.

67. *Id.* § 2805(a).

68. *Id.*

69. *Id.* § 2805(e).

70. *Id.* § 2805(f).

71. *Id.* § 2805a(a)(1)-(5).

72. *Id.* § 2809(a).

E. Landell v. Sorrell

Act 64 promptly encountered constitutional challenge under the First Amendment in the case *Landell v. Sorrell*.[73] 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.[74] Plaintiffs alleged primarily that Act 64 violated their First Amendment freedoms of free speech and association.[75] On August 13, 1999, Neil Randall, George Kuusela, Steve Howard, Jeffrey Nelson, John Patch, and the Vermont Libertarian Party brought a similar suit,[76] and on October 21, 1999, the two actions were consolidated.[77] On February 15, 2000, the Vermont Republican State Committee also raised a challenge to the Act,[78] and on March 21, 2000, this case was consolidated with the other two actions.[79] The Vermont Public Interest Research Group, the League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorello, Marion Gray, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson intervened in all three of the above cases. The parties to these actions were Vermont voters, contributors to political campaigns, candidates for political office, political action committees, and/or registered political parties in Vermont.[80]

Applying *Buckley*, the United States District Court for the District of Vermont held that Act 64's contribution limits, as they applied to contributions from individuals, were constitutional.[81] The court held Act's 64's expenditure limits unconstitutional.[82] The court found "numerous important government interests such as minimizing the reality and appearance of corruption, stemming the manipulative practice of bundling, increasing candidate-voter contact, and inspiring participation in the electoral process" supported the

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73. Landell v. Sorrell, 118 F. Supp. 2d 459 (D. Vt. 2000). This challenge was not unexpected. "From the moment Vermont's legislature enacted campaign finance reform in 1997, it was certain that the law's pathbreaking limits on campaign spending would be challenged in court." Bonnie Tenneriello, *Vermont: The State to Watch*, TomPaine.common sense, A Journal of Opinion, *at* http://www.tompaine.com/features/2000/01/31/index.html (Nov. 11, 2000).

74. Landell v. Sorrell, No. 99-cv-146 (D. Vt. May 18, 1999) (original complaint).

75. *Id.*

76. Randall v. Sorrell, No. 99-cv-234 (D. Vt. Aug. 13, 1999) (original complaint).

77. Randall v. Sorrell, No. 99-cv-234 (D. Vt. Oct. 25, 1999) (order granting consolidation).

78. Vt. Republican State Comm. v. Sorrell, No. 00-cv-57 (D. Vt. Feb. 15, 2000) (original complaint).

79. Vt. Republican State Comm. v. Sorrell, No. 00-cv-57 (D. Vt. Mar. 21, 2000) (order granting consolidation).

80. *Landell*, 118 F. Supp. 2d at 475-76.

81. *Id.* at 463.

82. *Id.* at 463-64.

expenditure limits.[83] However, Judge Sessions held that these interests were "unprecedented" and therefore an "impermissible extension of *Buckley*."[84] The court also found numerous "compelling" interests in support of the Act's expenditure limits including freeing office holders of the time constraints of fundraising; preserving faith in democracy; protecting access to the political arena; and diminishing the importance of repetitive, thirty-second commercials.[85] Once again, however, the court read *Buckley* as precluding the constitutionality of expenditure limits.[86] Plaintiffs, Defendants, and Defendant-Intervenors have appealed this ruling to the Second Circuit Court of Appeals.[87]

II. THE *BUCKLEY* ANALYSIS APPLIED TO ACT 64

Although the *Landell* trial court held Act 64's expenditure limits unconstitutional, *Buckley* does allow alternative interpretation. Defendants and Defendant-Intervenors in the *Landell* case advance several well-constructed arguments urging that changing facts and circumstances now satisfy the stringent *Buckley* standards and perhaps present new compelling interests the *Buckley* Court did not consider.[88] These arguments suggest that the

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83. *Landell*, 118 F. Supp. 2d at 463. Wertheimer and Manes offer the following definition of the bundling loophole in campaign finance laws:

> The loophole, called bundling, works in the following way: a PAC, for example, solicits contributions from its members made out to a particular candidate and then turns over these contributions or otherwise arranges for them to be channeled to that candidate. Because the contributions technically originate with the person who signs the contribution check, the contributions involved do not count toward the $5,000 limit on the amount the PAC can contribute to a candidate. The PAC, however, gets the credit—and the influence that flows from it—for giving the total amount of bundled contributions to the candidate. Bundling thereby effectively allows the PAC to evade its contribution limits.

Wertheimer & Manes, *supra* note 16, at 1140-41.

84. *Id.* at 463-64.

85. *Id.* at 482-83.

86. *Id.* at 483.

> [T]his Court is bound by the doctrine of *stare decisis* to adhere to Supreme Court precedent. In view of the absence of case law on this matter in this circuit, and the Supreme Court's directives in *Buckley*, this Court cannot take the unprecedented step of finding expenditure limits constitutional.

Id.

87. National Voting Rights Institute, *Vermont: Leading the Way on Limiting Campaign Spending*, *at* http://www.nvri.org/about/buckleyvvaleo2.shtml (Nov. 9, 2001). Parties argued the appeal in this case to the United States Court of Appeals for the Second Circuit. The case remains under advisement in the Court of Appeals as of October 2001. *Id.*

88. Portions of the following sections contain similar structure, research, and analysis as that contained in Trial Brief of Defendants and Defendant-Intervenors, Landell v. Sorrell, 118 F. Supp. 2d 459

Supreme Court need not overrule *Buckley* in order to sustain campaign expenditure limits.

A. Buckley *Does Not Impose a Per Se Ban on Expenditure Limits*

The *Buckley* Court stated that restrictions on campaign contributions and expenditures "operate in an area of the most fundamental First Amendment activities."[89] Therefore, any limits on campaign expenditures are subject to "exacting scrutiny"[90] under which the restrictions must be "narrowly tailored to serve a compelling state interest" to survive constitutional challenge.[91] However, exacting scrutiny is not the same as a per se ban.[92] Although exacting scrutiny imposes a rigorous standard, a law may be constitutional if the government interest is strong enough (i.e. compelling).[93] Thus, *Buckley* leaves the door open to the possibility that a factual record different from that in *Buckley* or new compelling state interests that the *Buckley* Court did not address could justify limits on campaign expenditures.[94]

Buckley's acceptance of the anti-corruption rationale with respect to contribution limits highlights the Court's intention to sidestep a per se ban.

(D. Vt. 2000) (No. 2:99-cv-146), http://nvri.org/library/cases/LandellBrief.shtml (last visited Feb. 12, 2002) [hereinafter Defendants' Brief].

89. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam).

90. *Id.* at 16.

91. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990). *Buckley* only vaguely articulates the standard of review it apples to campaign expenditure limits. In *Nixon v. Shrink*, the Court stated, "Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000). The *Buckley* Court's distinctions in analysis between contributions and expenditures further obscures the standard of review. *See Shrink*, 528 U.S. at 386-89. However, courts have interpreted *Buckley* to require the traditional strict scrutiny analysis of narrow tailoring to a compelling state interest. *E.g.*, *Austin*, 494 U.S. at 657.

92. *See* Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"). "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests *thus far* identified for restricting campaign finances." FEC v. Nat'l Conservative PAC, 470 U.S. 480, 496-97 (1985) (emphasis added). "In recent years, the Supreme Court has upheld a number of electoral regulations against First Amendment challenge even while applying strict scrutiny." Defendants' Brief, *supra* note 88, at 31 (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (applying strict scrutiny to Michigan statute restricting independent expenditures by corporations in political campaigns, but upholding restriction); Burson v. Freeman, 504 U.S. 191 (1992) (applying strict scrutiny to state ban on electioneering activity near polling places, but upholding ban)).

93. *See generally, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990); Burson v. Freeman, 504 U.S. 191 (1992) (both cases upholding campaign restrictions under strict scrutiny).

94. *See* Defendant's Brief, *supra* note 88, at 31-33. "While the record before the *Buckley* Court in 1976 may have suggested that contribution limits alone were sufficient to limit the improper influence of money and restore citizens' faith in the integrity of government, the record before this Court 24 years later demonstrates the opposite." *Id.* at 33.

Notably, the *Buckley* Court never stated that anti-corruption was the only acceptable compelling state interest, or that equalizing the financial resources of candidates and restraining the rising costs of elections could not be compelling under a different factual showing.[95] Rather, regarding contribution limits, the Court stated that it was "unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification."[96] Similarly, *Buckley* confined its consideration of compelling state interests regarding expenditure limits to those presented on the facts of that case.[97]

In recent cases, a total of four Supreme Court Justices have supported the idea that *Buckley* does not completely bar restrictions on campaign finance. The Court in *Nixon v. Shrink Missouri Government PAC* upheld campaign finance measures in Missouri.[98] Justice Breyer, in a concurrence joined by Justice Ginsburg, called for an approach that balances competing constitutional interests and stated that "it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience stressed by Justice Kennedy [in his *Shrink* dissent], making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns."[99]

Justice Kennedy's dissent noted the difficulty of constitutional issues surrounding campaign finance regulation, but stated: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising."[100] Justice Stevens concurred in the judgment, stating: "Money is property; it is not speech .... The right to use one's own money to hire gladiators, or to fund 'speech by proxy,' certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases."[101]

Federal Election Commission v. Colorado Republican Federal Campaign Committee (*Colorado II*) is the Court's most recent ruling on campaign finance regulation. Justice Souter, writing for the plurality, quoted Justice

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95. *See Buckley*, 424 U.S. at 23-29.

96. *Id.* at 26.

97. *Id.* at 55 (stating that "[n]o governmental interest *that has been suggested* is sufficient to justify [FECA's] campaign expenditure limitations") (emphasis added).

98. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397-98 (2000) (Stevens, J. concurring).

99. *Id.* at 405 (Breyer & Ginsburg, JJ., concurring).

100. *Id.* at 409 (Kennedy, J., dissenting).

101. *Id.* at 398-99 (Stevens, J., concurring).

Kennedy's dissent and Justice Stevens' concurrence in *Shrink*, noting that the *Buckley* approach to expenditure limits may need to be revisited "in light of post-*Buckley* developments in campaign finance."[102] *Colorado II* was the sequel to a 1996 decision, *Colorado Republican Federal Campaign Committee v. Federal Election Commission* (*Colorado I*), which considered the constitutionality of government restrictions on spending by political parties.[103] In *Colorado I* Justice Stevens, joined by Justice Ginsburg, stated in his dissent:

> 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 fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment.[104]

Specifically, Justice Stevens stated, "I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns."[105] These statements by Justices Breyer, Ginsburg, Stevens, and Kennedy provide valuable insight to the potential support on the current Court for the notion that *Buckley* does not impose a per se ban on campaign expenditure limits.

Judges in lower courts have similarly expressed support for these views. The Sixth Circuit is the only circuit that has considered the constitutionality of locally enacted spending limits.[106] Although two members of the panel

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102. FEC v. Colo. Republican FCC, 533 U.S. 431, 443 n.8 (2001). The Court in *Colorado II* upheld the Federal Election Commission's presumption that when political party expenditures are coordinated with particular candidates, the expenditures should be treated as contributions to the candidates under *Buckley*, and should be limited accordingly. *Id.* at 437-38.

103. Colo. Republican FCC v. FEC, 518 U.S. 604 (1996). Prior to *Colorado I*, Federal Election Commission rules reflected a "conclusive presumption" that all political party expenditures in an election campaign were coordinated with party candidates. Party expenditures were therefore treated as contributions to those candidates, and limited accordingly. *Id.* at 619-21 (Breyer, O'Connor, & Souter, JJ., plurality opinion). The expenditures in *Colorado I* had been made before the Republican Party had chosen its candidate in the race at issue, and the Court held that the Commission rules were unconstitutional as applied to these independent expenditures. *Id.* at 619-21. The Court remanded for considerationof whether "in-fact coordinated expenditures by political parties are protected from congressional regulation by the First Amendment." *Id.* at 624.

104. *Colorado I*, 518 U.S. at 649-50 (1996) (Stevens & Ginsburg, JJ., dissenting).

105. *Id.* at 649.

106. *See* Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998). Since this Note was written, the Tenth Circuit has given preliminary consideration to the issue and granted an injunction against enforcement of local expenditure limits in Albequerque, New Mexico. Homans v. City of Albequerque, 264 F.3d 1240 (10th Cir. 2001). *Homans* is a particularly good companion case to *Landell* because it presents an equally rich factual basis arising from Albuquerque's twenty-seven years of experience with expenditure limits. *Id. See also* National Voting Rights Institutes, Albuquerque: spending limits still on the books, http://www.nvri.org/about/buckleyvvaleo5.shtml (Apr. 9, 2002).

applied *Buckley* as an absolute ban on spending limits regardless of surrounding facts and circumstances, District Judge Avern Cohn stated that *Buckley* does not render spending limits unconstitutional as a matter of law:

> The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.[107]

In *Landell*, Judge Sessions also described the factually contingent nature of determining whether an interest is compelling:

> [T]he constitutionality of some provisions of Act 64 depends heavily on facts, while the constitutionality of others does not. The constitutionality of those sections that do hinge on facts depends in large part on whether the legislature was correct in perceiving that there was public concern about corruption in campaign financing, and whether the legislature's responses—i.e., the provisions of the Act—were properly tailored to address that perceived concern. As to the former criterion, the quality of and quantity of evidence considered by the legislature, as well as the atmosphere of public concern leading to the Act's creation, are of central importance to this Court's rulings.[108]

The clear suggestion in each of these excerpts is that *Buckley* does not impose a complete ban on campaign expenditure limits. If Act 64's expenditure limits are narrowly tailored to a compelling state interest, *Buckley* does not stand in the way.

B. Act 64's Expenditure Limits Serve Compelling State Interests

Under the *Buckley* analysis, limits on political expression must serve compelling state interests to survive constitutional challenge.[109] Defendants and Defendant-Intervenors in the *Landell* case asserted four state interests in support of Act 64's expenditure limits. First, Vermont's spending limits curb the reality and appearance of corruption and enhance citizen confidence in

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107. *Id.* at 920 (Cohn, J., concurring, sitting by designation).
108. Landell v. Sorrell, 118 F. Supp. 2d 459, 464 (D. Vt. 2000).
109. *See supra* notes 89-94 and accompanying text.

government.[110] Second, Vermont's expenditure limits are necessary to assure that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing their official duties.[111] Third, Vermont's expenditure limits encourage electoral competition and protect the fundamental right to equal political participation.[112] Fourth, Vermont's expenditure limits promote robust debate of ideas and an informed citizenry.[113]

The *Landell* court found that Vermont's expenditure limits address certain governmental interests that *Buckley* did not consider.[114] The *Landell* court stated that spending limits free office holders to concentrate their resources on official duties rather than fundraising, preserve faith in democracy, protect access to the public arena, and diminish the importance of repetitive thirty-second commercials.[115] The court acknowledged that the state successfully proved that each of these "compelling governmental interests" exists in Vermont, and that Act 64's expenditure limits address them.[116] Yet, the court rejected these interests because, although compelling, they are unprecedented justifications of expenditure limits in campaign finance reform.[117] The following discussion suggests that while the Supreme Court has not accepted these interests as compelling in the past, the *Buckley* analysis does not render these interests unconstitutional as a matter of law. These interests may be compelling and constitutional under the new facts and circumstances of *Landell.*

1. Vermont's Interest in Avoiding the Reality and Appearance of Corruption and Assuring Citizen Confidence in Government

Buckley recognized that avoiding both the reality and appearance of corruption are governmental interests of the highest order.[118] *Buckley* accepted this rationale for upholding FECA's contribution limits but failed to do so for

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110. Defendants' Brief, *supra* note 88, at 32.

111. *Id.* at 34-35.

112. *Id.* at 35.

113. *Id.* at 38.

114. *Landell*, 118 F. Supp. 2d at 482-83.

115. *Id.*

116. *Id.* at 483.

117. *Id.* ("In view of the absence of case law on this matter in this circuit, and the Supreme Court's directives in *Buckley*, this Court cannot take the unprecedented step of finding expenditure limits constitutional.").

118. *See Buckley*, 424 U.S. at 27 (stating that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent'") (citing CSC v. Letter Carriers, 413 U.S. 548, 565 (1973)).

expenditure limits.[119] The Court reasoned that an individual cannot create a quid pro quo arrangement with himself, and the threat of corruption that arises from large donations therefore does not exist with regard to expenditures.[120] Critics have challenged this distinction between contribution and expenditure limits.[121]

Expenditure limits address the reality and appearance of corruption in ways that contribution limits alone cannot.[122] The testimonies of Vermont legislators, state citizens, and expert witnesses before the Vermont Legislature and at trial confirmed that a system of unlimited campaign spending undermines public confidence in government.[123] Unlimited spending creates an arms race mentality in which candidates amass staggering war chests of campaign funds based not on need, but purely on the fear of opponents' spending capabilities.[124] Unlimited spending also fails to eradicate the practice of bundling through which parties multiply their contributions through various vehicles.[125]

The public was well aware of the threat of corruption resulting from unlimited expenditures.[126] In 1997, Governor Howard Dean stated that "money does buy access, and we're kidding ourselves and Vermonters if we deny it."[127] This statement was highly publicized in Vermont media, and the issue of access and influence in Vermont politics became a recurring theme. Vermont Senator Jeb Spaulding stated that "[t]he evidence is all around us that money is a negative influence on the impartial ordering of priorities and

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119. *See id.* at 26-30, 53, 55-59.

120. *Id.* at 53, 55-59.

121. *See, e.g.*, Jeffrey Glekel, Book Note, *Money in the Public Realm*, 94 YALE L. J. 957, 966 (1985) (reviewing AMITAI ETZIONI, CAPITAL CORRUPTION: THE NEW ATTACK ON AMERICAN DEMOCRACY (1984), and stating "[t]he distinction between the contribution limitations that *Buckley* upheld and the expenditure limitations that *Buckley* invalidated is an amorphous one"); Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 356-75 (1977).

122. *See Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part) ("It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf.") (discussing limits on related expenditures).

123. 1997 Vt. Acts & Resolves 64 § 1(a)(9)-(10); *Landell*, 118 F. Supp. 2d at 466-69; Defendants' Brief, *supra* note 88, at 33.

124. Wertheimer & Manes, *supra* note 16, at 1132-33.

125. *Id.* at 1140-41.

126. *See, e.g., Campaign Spending Fuels Voter Cynicism*, BURLINGTON FREE PRESS, Dec. 29, 1996, at 6E (reporting that "as elections get more expensive . . . the potential for special interests to abuse the system increases"), *cited in* Defendants' Brief, *supra* note 88, at 33; Bryan Pfeiffer, *He's a Lock, But Funds Still Roll Right In*, RUTLAND HERALD, Oct. 2, 1996, at 11.

127. Bonnie Tenneriello, *Vermont: The State to Watch*, TomPaine.common sense, A Journal of Opinion, *at* http://www.tompaine.com/features/2000/01/31/index.html (Nov. 11, 2000) (referring to Howard Dean's 1997 inaugural address to the Vermont General Assembly).

passage or failure of bills around here."[128] Vermont Senate President Pro Tem Peter Shumlin said, "There's no question [money] buys access to the system. . . . In my view, it adversely influences a citizen Legislature and elections for that matter."[129] Regardless of whether these reports from within the political system indicate actual corruption, they are likely to add to the perception of corruption and to a lack of citizen confidence in government.

Special interest funds and contributions from large corporations are particularly disturbing in the context of the Vermont political process. For example, newspapers reported that Republican lawmakers weakened an anti-smoking bill in the final hours of the 1997 session after receiving $25,450 in donations from tobacco giant Philip Morris.[130] Other reports described allegations that Governor Dean vetoed a pharmacy bill after collecting $6,000 in campaign contributions from pharmaceutical companies.[131] In addition, the media criticized Treasurer Paul W. Ruse for "financing his campaign with contributions from Wall Street firms with which the state does business,"[132] and for appearing in a magazine advertisement for an investment firm.[133] These types of contributors and big-money associations pose a stark contrast to the average Vermonter. As one editorial observed regarding large amounts of special interest money in the 1996 elections, "No doubt the phones are ringing for these PACs and political committees as they buy access, but what

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128. Christopher Graff, *Money Changes Opinions*, BURLINGTON FREE PRESS, Apr. 27, 1997, at 6E, *quoted in Landell*, 118 F. Supp. 2d at 465. One scathing report criticizing the *Landell* opinion specifically addressed Sen. Spaulding's remark, stating, "[I]n politics, a 'negative' influence is nothing more than an opponent, idea or law that a politician dislikes." Bruce Fein, *Price Tag on Free Speech*, WASH. TIMES, Aug. 15, 2000, at A16. However, the negative influence on impartial ordering in politics presents questions of constitutional magnitude:

> No doubt when candidates spend so much of their time fund-raising they encounter grievances, information, and ideas of potential donors that an enlightened representative would want to consider. If the candidate is not substantially free, however, to spend her time considering as well the grievances, information, and ideas of non-donors—in particular her geographic constituents—the process falls short, not just of the ideal but of the constitutional norm.

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, 1283 (1994).

129. Ross Sneyd, *Politicians Line Up Behind Campaign Finance Reform*, RUTLAND HERALD, Apr. 8, 1997, at 7, *quoted in Landell*, 118 F. Supp. 2d at 465.

130. Editorial, *Democratic Process Relies on Reform*, BURLINGTON FREE PRESS, Oct. 6, 1997, at 6A, *quoted in Landell*, 118 F. Supp. 2d at 466.

131. Bryan Pfeiffer, *Dean Angry About Pharmacy Veto Criticism, News Story*, RUTLAND HERALD, June 16, 1994, at 11, *quoted in Landell*, 118 F. Supp. 2d at 466.

132. Chris Graff, *Treasurer Won't Run: Surprise Intended to Thwart Auditor*, BURLINGTON FREE PRESS, July 20, 1994, at 1B, *quoted in Landell*, 118 F. Supp. 2d at 466.

133. Editorial, *With Ruse Stepping Out, Amestoy Must Step In*, BURLINGTON FREE PRESS, July 20, 1994, at 6A, *quoted in Landell*, 118 F. Supp. 2d at 466.

about the Fairfield dairy farmer . . . who can't write the big checks?"[134] These media excerpts illustrate the environment of concern present regarding money in Vermont politics leading up to the passage of Act 64.

Contribution limits greatly reduce the threat of actual and apparent corruption from big money in Vermont politics. However, contribution limits alone do not adequately address the arms race mentality or the practice of bundling which together undermine the state's interest in preventing corruption and appearance thereof.[135] In the context of perpetual fundraising that arises under the current system of campaign finance, well-heeled interest groups wield enormous influence.[136] While contribution limits do not prohibit bundling, they cap in terms of dollar amounts the extent to which special interest funds conjunctively influence or appear to influence candidate behavior. Discussing the consequences of losing an entire industry as a source of donations, Defendants and Defendant-Intervenors refer to the testimony of Senator Cheryl Rivers, who testified that

> she was unable to attract co-sponsorship from the Senate leadership for a bill on labeling of genetically engineered food. The explanation she was given was that the Democrats could not afford to lose the food industry as a source of donations, having already alienated the pharmaceutical industry because of a prescription drug bill.[137]

Expenditure limits allow candidates to look elsewhere for contributions in a situation such as this because each dollar becomes replaceable rather than a rivaled acquisition in the never-ending arms race for campaign funding.[138] Under Act 64's comprehensive system of contribution and expenditure limits, tobacco giants, pharmaceutical companies, food industries, and upscale investment firms no longer represent the only viable sources of campaign

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134. Editorial, *Paying for Power*, BURLINGTON FREE PRESS, Oct. 17, 1996, at 12A, *quoted in Landell*, 118 F. Supp. 2d at 466.

135. Wertheimer & Manes, *supra* note 16, at 1132-33, 1141-42 ("The bundling loophole poses a serious threat to the integrity of existing federal contribution limits and the ability of these limits to protect the political system from potential corruption as a result of large political contributions."). For further in-depth discussion and research, see Brief for the Intervenors-Defendants-Appellants-Cross-Appellees at 18-25, Landell v. Sorrell, ___ F.3d ___ (2d Cir. 2001) (No. 00-9158(L)) [hereinafter Appellate Brief].

136. Wertheimer & Manes, *supra* note 16, at 1140-41. *See also* Appellate Brief, *supra* note 135, at 19.

137. Appellate Brief, *supra* note 135, at 23.

138. *See id.* at 23 ("[W]hen a candidate needs every possible dollar to avoid being bested in the financial arms race, limits on contributions alone simply cannot solve the problem of improper influence by wealthy interests."); 25 ("While limits on campaign spending, of course, do not directly prohibit bundling and related practices, they lessen the clout of those who would engage in such practices, because the funds will no longer be irreplaceable as they are when potential spending is unlimited.").

funding. Expenditure limits in Vermont enable candidates to rely solely on private, un-bundled contributions to wage a competitive campaign.[139]

2. Vermont's Interest in Candidate Time Protection

The political culture in Vermont is intimate, informal, and very much a reflection of all Vermonters.[140] For this reason, campaigns in Vermont are less expensive than in many other jurisdictions.[141] Nevertheless, campaign spending is on the rise,[142] and this results in politicians spending more time on fund raising than on their official duties.[143] The Vermont Legislature found that candidates for statewide office were spending inordinate amounts of time raising campaign funds.[144] Although *Buckley* did not directly consider

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139. For example, a candidate for state representative in a single-member district could raise the maximum expenditure limits under Act 64 by receiving a mere $5 contribution from each of 400 individual contributors.

140. *See* Tenneriello, *supra* note 127.

> Vermont's political culture is unusually intimate. The legislature is part-time and low paid. Dairy farmers, retirees, a janitor and even a pizza deliverer have won recent elections. The informality of the State House is striking to an outsider—legislative leaders are easily cornered in the hall, and first names seem to be the rule. Many campaign door-to-door, and it is possible to visit every home in many districts.

Id.

141. Defendants' Brief, *supra* note 88, at 36 ("In Vermont, spending on election campaigns has remained much lower; the state's small population and tradition of retail politics has kept spending far below the levels seen in most other states.").

142. Journal of the Vermont Senate, June 12, 1997, at 1338 (statement of Republican Senator William Doyle in debate on Act 64), *quoted in* Defendants' Brief, *supra* note 88, at 36.

> In the 1970s, the limit on campaign spending for a statewide race for the general election was $40,000. In 1972, Representative Tom Salmon of Rockingham, who announced for governor in August, spent $29,000. His opponent, Fred Hackett, of South Burlington spent $39,000. . . . A few years after *Buckley*, aggregate spending for governor on several occasions totaled over $1 million—a more then ten-fold increase. . . .

Id.

These dollar amounts suggest that a campaign finance scheme that does not include both contribution and expenditure limits facilitates rather than deters increased campaign spending.

143. David Wilson, *Vermont Legislature Needs Campaign Finance Reform*, BURLINGTON FREE PRESS, Jan. 30, 1997, at 7E ("Politicians are forced to spend as much time begging as they do campaigning."), *quoted in* Defendants' Brief, *supra* note 88, at 35; Editorial, *Democratic Process Relies On Reform*, BURLINGTON FREE PRESS, Oct. 6, 1997, at 6A ("Money not only threatens to corrupt the [political] process, it sabotages the political dialogue as well. Candidates spend too much time begging for dollars and too little time talking issues."), *quoted in* Defendants' Brief, *supra* note 88, at 35.

144. 1997 Vt. Acts & Resolves 64 § 1(a)(1).

candidate time protection in its analysis,[145] *Buckley* leaves the door open for precisely this type of compelling state interest.[146]

Expenditure limits directly influence how a candidate may choose to spend her time. "If candidates are permitted to spend vast amounts of money in pursuit of votes, they will inevitably spend vast amounts of time in pursuit of money."[147] Limiting the amount a candidate may spend most effectively eliminates this war chest mentality. "No package of campaign finance reforms will change substantially how representatives spend their time unless war chests are made unimportant. The best way to make a war chest unimportant is to prohibit the money in it from being spent in the cause of re-election."[148] In this manner spending limits accomplish what contribution limits alone cannot.[149]

The time-protection rationale is unique in contrast to most justifications for campaign expenditure limits. "The candidate-time-protection rationale is notable not only because it does not depend on the communicative impact of

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145. The absence in *Buckley* of a discussion regarding candidate time protection does not indicate that this interest is not compelling; it merely indicates that the interest was not compelling at that time:

> The centrality of candidate spending limits was not so apparent when Congress passed its major campaign finance reforms in 1971 and 1974, nor when the Supreme Court in 1976 held several provisions of that legislation unconstitutional, including the mandatory ceilings on overall campaign spending by congressional candidates. At that time, what has come to be known as the war chest mentality had not yet seized the Congress .... One indication of how dramatically the war chest mentality has altered the regulatory landscape is the fact, startling in retrospect, that the Supreme Court in Buckley never considered how spending limits might be justified as a means of preventing candidates from spending excessive amounts of time on fundraising. In 1976, candidate time protection was not seen as a major objective of campaign finance reform. Corruption, disproportionate influence, the fencing out of impecunious candidates, and the alienation of the electorate were the dominant concerns.

Blasi, *supra* note 128, at 1284-85.

146. Kruse v. City of Cincinnati, 142 F.3d 907, 919 (6th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998) (Cohn, J., concurring) ("There is an independent interest in freeing officeholders from the pressures of fundraising so they can perform their duties."); Rosenstiel v. Rodriquez, 101 F.3d 1544, 1553 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) (noting that with regard to a system of public campaign financing, "the State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning. It is well settled that [this] governmental interest[is] compelling."); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993) (stating that when "the legislature has adopted a public funding alternative, the state possesses a valid interest in having candidates accept public financing because such programs . . . free candidates from the pressures of fundraising"). *Rosensteil* and *DiStefano* refer to restrictions within the context of public campaign financing, however the same interest may be sufficiently compelling to justify spending limits in general. The Supreme Court has yet to address this issue. *Kruse*, 142 F.3d at 919 ("A determination of whether this interest is sufficiently compelling to justify campaign expenditure limits should be left for another day.").

147. Blasi, *supra* note 128, at 1284.

148. *Id.* at 1285.

149. *Id.* at 1284 ("Spending limits are the sine qua non of candidate time protection.").

speech, but also because it involves an interest that is itself of constitutional dimension: the quality of representation."[150] This interest in improving representation through monitoring the quality of time allocation does not rely on the government monitoring the quality of political communication, a practice that the *Buckley* Court found constitutionally suspect.[151] Rather, this interest presents a regulatory means to ensure quality representation.[152]

> Whatever it is that representatives are supposed to represent, whether parochial interests, the public good of the nation as a whole, or something in between, they cannot discharge that representational function well if their schedules are consumed by the need to spend endless hours raising money and attending to time demands of those who give it.[153]

Expenditure limits are therefore necessary to assure that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing their official duties.

3. Vermont's Interest in Electoral Competition and in Protecting the Fundamental Right to Equal Political Participation

Unlimited campaign spending discourages potential candidates who lack large campaign funds from running for office. Unlimited campaign spending "erects a wealth barrier to electoral participation, making candidates' ability to seek office depend upon their personal wealth or access to wealth rather than the power of their ideas."[154] Such a barrier directly conflicts with Supreme Court holdings regarding equal political participation:[155] "[P]otential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support."[156] The Vermont Legislature found that many

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150. *Id.* at 1302.

151. *Buckley*, 424 U.S. at 57 ("In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.").

152. Blasi, *supra* note 128, at 1302.

153. *Id.* at 1304.

154. Defendants' Brief, *supra* note 88, at 36.

155. *E.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) (holding Mississippi statute requiring advanced payment of record preparation fees in court appeal record violates equal protection and Fourteenth Amendment due process); Bullock v. Carter, 405 U.S. 134, 143 (1972) (holding that Texas' primary election filing system violates equal protection).

156. *Bullock*, 405 U.S. at 143.

Vermonters are financially unable to seek election to public office as a result of the rising cost of elections.[157] Additionally, the Vermont Legislature found Act 64 necessary to implement more fully the provisions of Article 8, Chapter I of the Vermont Constitution, which ensures candidates and voters equal participation in the political process.[158]

Expenditure limits restrict an individual's ability to use his property as he chooses. "It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results."[159] In other words, money is not speech. Despite *Buckley*'s equivocation of the two, money is not speech and is not entitled to the same degree of constitutional protection. Even if the Court chooses to cling to an erroneous grant of First Amendment protection for spending privileges, expenditure limits may be constitutional when necessary to protect the speech of others. Justice Breyer supported this notion in rejecting *Buckley*'s declaration that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[160] Rather, Breyer stated, "The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ."[161] This approach affords First Amendment protection to a broader array of speakers.

The *Buckley* Court rejected the state's interest in leveling the playing field because it abridged the "speech" of big spenders.[162] This reasoning does not account for the equally compelling state interest in protecting the First Amendment rights of those with lesser means.[163] While recognizing the

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157. 1997 Vt. Acts & Resolves 64 § 1(a)(1).

158. 1997 Vt. Acts & Resolves 64 § 1(15)(c). The Vermont Constitution provides: "That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution." VT. CONST. ch. I, art. 8.

159. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

160. *Buckley*, 424 U.S. at 48-49.

161. *Shrink*, 528 U.S. at 402 (Breyer & Ginsburg, JJ., concurring) (citing limitations in Congress on constitutionally protected debate to provide every member an equal opportunity to express his or her views, and constitutional restrictions on ballot access limiting the political rights of some in order to effectuate the political rights of the entire electorate).

162. *Buckley*, 424 U.S. at 48-49.

163. *Washington Week in Review* (PBS television broadcast, Nov. 7, 1997) (statement of Linda Greenhouse of *The New York Times*) ("[U]nder *Buckley*, you cannot limit somebody's expenditures. That means that it's the wealthy people who have money to spend, and . . . there's no level playing field. And so somebody without those kind [sic] of resources is basically shut out at the very beginning of the political process.") *available at* http://www.pbs.org/weta/wwir/transcripts/transcript971107.html (Nov. 11, 2000).

> It seems perverse to suffer the clear unfairness of allowing rich candidates to drown out poor ones, or powerful corporations to buy special access to politicians by making enormous gifts, in order to prevent speculative and unnamed dangers to

inherent sacrifice of freedoms that results from campaign expenditure limits, the *Landell* court observed:

> The exercise of those freedoms by some through large money contributions in our political system threatens to drown out the freedoms of speech and association of so many others—those who cannot make such large contributions. The integrity of our democracy is inextricably bound to the voices of those with lesser means. Thus, the categorical preservation of free speech . . . cannot lay waste to our other core democratic values such as effective representation, equal access to the political system, and honest, responsive government.[164]

It is thus necessary, in the fervor to protect First Amendment rights, to protect the speech of those individuals whose messages are not padded by healthy pocketbooks.

4. Vermont's Interest in Promoting Robust Debate of Ideas and an Informed Citizenry

The Vermont Legislature found that "[r]obust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased."[165] It is impossible to remedy this situation in Vermont if unbridled campaign spending excludes vast numbers of voices from the political process altogether. As Defendants and Defendant-Intervenors stated in their trial brief, "[m]eaningful electoral debate cannot take place in the absence of meaningful electoral competition. . . . [A] regime of unlimited spending undermines the very conditions needed for a robust debate of the issues by deterring electoral competition."[166] Elizabeth Ready, then Vermont State Senator and currently Vermont Auditor of Accounts, testified that "low-income families 'have a vote, but little voice.'"[167] Without a voice, these low-income families are unable to participate in robust debate and in the effective exchange of ideas.

The Vermont Legislature found that excessively long and expensive campaigns lessen citizen interest, participation, and confidence in the electoral

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democracy that have not actually occurred and that no one has shown are likely to occur.

Ronald Dworkin, *The Curse of American Politics*, New York Review of Books, Oct. 17, 1996, at 19-24.

164. *Landell*, 118 F. Supp. 2d at 493.

165. 1997 Vt. Acts & Resolves 64 § 1(a)(4).

166. Defendants' Brief, *supra* note 88, at 38.

167. Tenneriello, *supra* note 127 (describing Ready's testimony in a *Landell* deposition).

process.[168] Limiting large contributions and campaign expenditures will encourage direct and small-group contact between candidates and the electorate and will encourage the personal involvement of a large number of citizens in campaigns, both of which are crucial to public confidence and the robust debate of issues.[169] Social science research on campaign expenditure limits suggests that direct forms of voter mobilization are more effective in promoting individual citizen participation than indirect forms measured by overall campaign spending.[170] Increased campaign spending reduces voter participation because it encourages candidates to rely on negative advertisement and indirect forms of voter mobilization.[171]

Conversely, spending limits increase voter interest in and connection to the election process.[172] Increased campaign spending has no effect or lessens citizens' political interest, concerns about election outcomes, and attentiveness to campaign news reports.[173] Increased campaign spending does not improve citizen awareness of the ideological platforms of the candidates.[174] Once again, Defendants and Defendant-Intervenors stress the importance of direct voter contact: "Just as direct personal contact with citizens seems to be the key to stimulating voter participation, it also seems to be the key to enhancing voter information and citizens' connection to the electoral process."[175] Such methods are likely to further rather than infringe First Amendment values by "promoting more informed voter choices by an engaged and active citizenry."[176] Vermont's expenditure limits thus serve a compelling state interest of promoting robust debate of ideas and an informed citizenry.

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168. 1997 Vt. Acts & Resolves 64 § 1(a)(10).

169. 1997 Vt. Acts & Resolves 64 § 1(a)(8).

170. Professor Donald Gross of the University of Kentucky explains that, "based on studies of congressional elections, direct forms of voter mobilization efforts (such as personal contact from a party or a candidate) have a much more profound and positive effect on individual citizen participation than indirect forms measured by overall campaign spending." Defendants' Brief, *supra* note 88, at 34 (citing Defendants' and Defendant-Intervenors' Exhibit X, Report of Donald Gross).

171. *Id.* (relying on research of Professor Gross).

172. *Id.* (citing excerpts from Goidel, et al., Money Matters, Tab 13 (attached to Defendants' Brief, *supra* note 88) (on file with attorneys)).

173. *Id.* (citing research of Professor Gross).

174. Dworkin, *supra* note 163, at 19-24 (stating that spending limits do not "seriously risk keeping from the public any argument or information it would otherwise have").

175. Defendants' Brief, *supra* note 88, at 38-39.

176. *Id.* at 39 (citing Anderson v. Celebrezze, 460 U.S. 780, 796 (1983) ("There can be no question about the legitimacy of the state's interest in fostering informed and educated expressions of the popular will in a general election.")).

III. *LANDELL* AS A VEHICLE TO OVERTURN *BUCKLEY*

Landell presents an ideal case for consideration by the United States Supreme Court. The timing, facts, and circumstances of *Landell* are ripe within the landscape of campaign finance reform:

> This case emerges at a critical point in the movement to challenge *Buckley*. With the Supreme Court's January 24, 2000 decision in *Nixon v. Shrink Missouri Gov't PAC*, four Justices are now on record suggesting that *Buckley* may need to be revisited on the question of campaign spending limits, if the right case presents itself for such review. *Landell v. Sorrell* presents the newest opportunity for that revisitation.[177]

Players on both sides of the push for campaign finance reform anticipate, and seemingly urge, Supreme Court review. Brenda Wright, lead counsel for the National Voting Rights Institute, stated of the *Landell* trial court opinion, "This is the clearest language yet from a federal court that it is time to revisit the Supreme Court's ruling in Buckley v. Valeo."[178] Peter Langrock, a lawyer for the American Civil Liberties Union, opined that the *Landell* decision "seemed to be inviting an appeal."[179] In response to the *Landell* ruling, the Vermont media reported, "There is a growing belief that the current Supreme Court would be willing to review that 24-year-old decision [*Buckley v. Valeo*]."[180] Further, regarding the decision in *Landell*, reports indicated that "the Vermont Legislature had developed compelling arguments for limiting the amounts that may be spent on campaigns, and the state may well have a solid case to appeal to the U.S. Supreme Court."[181] The public eagerly awaits the Supreme Court's consideration of the issue of campaign finance reform. *Landell* offers the ideal opportunity.

Landell presents an extremely well developed factual record. *Landell* is the first case to test the constitutionality of expenditure limits at a full trial, and as a result the factual record is far more extensive than that in *Buckley*.[182] As

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177. National Voting Rights Institute, Litigation Program, Landell v. Sorrell, *at* http://nvri.org/page3.html (Dec. 21, 2000).

178. Ross Sneyd, *Ruling Rejects Part of Campaign Finance Law*, RUTLAND HERALD, Aug. 11, 2000, at A1.

179. *Id.*

180. *Id.*

181. *Id.*

182. National Voting Rights Institute, Litigation Program, Landell v. Sorrell, *at* http://nvri.org/page3.html (Dec. 21, 2000). "In accordance with the special provision to the Federal Election Campaign Act, the courts examined the claims in *Buckley* on an expedited basis without any trial or even a discovery process." *Id.* In *Landell*, a "ten day bench trial took place between May 8, 2000 and June 2, 2000 to gather facts in this matter." Landell v. Sorrell, 118 F. Supp. 2d 459, 468 (D. Vt. 2000).

the *Landell* court articulated, "The state's factual presentation at trial decidedly sets this case apart from both *Buckley* and *Kruse*. . . . Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill."[183] The Supreme Court decided *Buckley* on an extremely limited set of facts. As Justice Cohn stated in *Kruse*, "It should be recognized that *Buckley v. Valeo* was decided on a slender factual record. Similarly, although the City here attempted to develop a compelling factual record, it failed to do so."[184] Judge Sessions found in *Landell* that "[t]he same simply cannot be said of this case."[185] Unlike the facts of *Buckley* and *Kruse*, the facts of *Landell* provide the basis for a clear ruling grounded in unambiguous facts.

This distinction from *Buckley* and its progeny is of the utmost importance because it relates to the aspects of *Buckley* that are particularly susceptible to criticism—its statement of the appropriate standard of review and its discussion of what constitutes a compelling state interest. Although traditional strict scrutiny analysis does not overtly contemplate a factually contingent balancing process, traditional analysis must give way to some form of balancing when, as in *Landell*, "there are important interests to be considered on *both* sides of the constitutional calculus."[186] Justices Breyer and O'Connor

> would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding . . . speech-related benefits, . . . as well as the need for the restrictions in order to secure those benefits? What this Court has called "strict scrutiny"—with its strong presumption against constitutionality—is normally out of place where, as here, important competing constitutional interests are implicated.[187]

Based on this approach, "the key question becomes one of proper fit"[188] involving determinations regarding the consequences and benefits of restrictions within a particular factual setting. A compelling interest that

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183. *Landell*, 118 F. Supp. 2d at 483.

184. Kruse v. City of Cincinnati, 142 F.3d 907, 919 (6th Cir. 1998) (Cohn, J., concurring), *cert. denied*, 525 U.S. 1001 (1998) (citation omitted).

185. *Landell*, 118 F. Supp. 2d at 483.

186. Bartnicki v. Vopper, 532 U.S. 514, 533 (2001) (emphasis in original) (weighing fundamental interests in privacy and free speech); *Id.* at 536-37 (Breyer and O'Connor, JJ., concurring).

187. *Id.* at 536 (Breyer & O'Connor, JJ., concurring).

188. Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part), *quoted in Bartnicki*, 532 U.S. at 536 (Breyer and O'Connor, JJ., concurring).

would justify restriction in one factual circumstance might not do so in another, particularly in light of competing constitutional interests. Therefore, application of the harsh guidelines set forth in *Buckley* might not be appropriate in a different factual setting such as that in *Landell*. *Landell* provides the ideal opportunity for the Court to clarify these issues while avoiding the confusion *Buckley* and *Kruse* have generated over the years. The following sections highlight aspects of *Buckley* that are particularly susceptible to criticism and consider the likelihood that the Court will overrule or significantly redefine the *Buckley* holding.

A. Criticism of Buckley

The *Buckley* opinion is susceptible to criticism on many levels—particularly regarding its statement of the appropriate standard of review and its discussion of what constitutes a compelling state interest. The following discussion returns to those doctrinal principles of First Amendment analysis that the Supreme Court tends to apply with reasonable consistency regardless of the area of speech in which regulation occurs.[189] The Court perhaps failed in its consistency when it applied these principles to the facts of *Buckley*.

1. Content-neutrality

FECA imposed contribution and expenditure limits without regard to the content of the messages that individuals might have conveyed with restricted funds. "Campaign spending limits are, in these terms, content neutral: all expenditures above a limit are forbidden without regard to the content of the communications they might purchase."[190] This analysis of content-neutrality seems to qualify expenditure limits for a lower lever of scrutiny as opposed to the exacting scrutiny that *Buckley* applied.[191] *Buckley* arguably erred in concluding that contribution and expenditure limits are content-based and therefore subject to exacting scrutiny rather than an intermediate standard of review.

2. Time, Place, and Manner Restrictions

Ward v. Rock Against Racism presents a three-part test to determine the reasonableness of time, place, and manner restrictions.[192] This test requires

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189. *See supra* Part I.A.

190. Blasi, *supra* note 128, at 1292.

191. *See supra* notes 31-39 and accompanying text.

192. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). *Ward* came down after *Buckley* and therefore was not binding on the *Buckley* Court. However, *Ward* presents the most widely known

that restrictions be "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[193] First, as Part III.A.1 suggests, FECA's restrictions on campaign expenditure limits are content-neutral. "Genuine time, place, or manner regulations are *by definition* content-neutral."[194] This does not suggest that courts may be lax in discerning whether content-based regulations have mistakenly assumed the guise of neutrality; however, this determination generally does not entail more than consideration of the statute on its face.[195] Second, the requirement that a statute be narrowly tailored to serve a significant governmental interest indicates the intermediate standard of review is applicable to time, place, and manner restrictions.[196] This standard is considerably less onerous than *Buckley*'s exacting scrutiny.[197] Third, adequate alternative channels must be available.[198] Thus, while restrictions may limit various forms of communication, they may not effect a total ban.

The *Buckley* Court rejected appellees' arguments that FECA presented a reasonable exercise of time, place, and manner restrictions primarily on the

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articulation of the standard of time, place, and manner restrictions and does not represent a strict departure from previous holdings. *Ward* draws on a body of caselaw and prevailing notions regarding time, place, and manner restrictions ranging back to the time of *Buckley*. *See, e.g., Ward*, 491 U.S. at 791 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 452 U.S. 748, 771 (1976))).

193. *Ward*, 491 U.S. at 791.

194. SMOLLA, *supra* note 26, § 3.02[3][b][i].

195. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). The Court struck down a statute prohibiting cross-burning motivated by racial hatred:

> We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

Id. at 385 (citing Texas v. Johnson, 491 U.S. 397, 406-07 (1989)). The Court overturned Chicago's ordinance that prohibited picketing within 150 feet of a school within thirty minutes before or after school was in session, but that provided an exemption for peaceful labor picketing: "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter." Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972). Unlike expenditure limits, the content-based characteristic of these regulations was facially unmistakable.

196. SMOLLA, *supra* note 26, § 3.02[3][b][ii][A]. "The term 'significant' (or 'substantial' or 'important') interest is a term of art in constitutional law, used when the court is applying a 'middle tier' or 'intermediate level' of constitutional scrutiny—a level of scrutiny that largely began with gender discrimination cases under the equal protection clause." *Id.*

197. *See* FARBER, *supra* note 38, at 176-77. *Ward* and related illustrate that "the Court's review of time, place, and manner restrictions normally is not particularly vigorous." *Id.*

198. *See generally* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); SMOLLA, *supra* note 26, § 3.02[3][b][iii].

basis that the Act's contribution and expenditure limits imposed quantity restrictions on political speech.[199] *Buckley*'s holding in regard to time, place, and manner restrictions arises in part from the theory of a free marketplace of ideas. This theory presents free speech "in terms of an open market in which ideas are allowed to compete against one another in an ongoing process of human enlightenment."[200] The theoretical marketplace operates without the intrusion of government regulation. In the real world, however, restrictions in the marketplace of ideas are necessary just as they are in the commercial marketplace.[201] "The marketplace of ideas, no less than the marketplace of commerce, will inevitably be biased in favor of those with the resources to ply their wares. The ideas of the wealthy and powerful will have greater access to the market than the ideas of the poor and disenfranchised."[202] In the realm of campaign finance, regulation is therefore necessary to ensure equal access to the political process.[203]

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199. Buckley v. Valeo, 424 U.S. 1, 17-18 (1976) (per curiam). Appellees in *Buckley* analogized contribution and spending limits to restricting the decibels a sound truck may emit. *Id.* at 18, n.17. Regulating the level of sound from a truck does not violate the First Amendment. *Id.* (citing Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (citation omitted)). Appellees argued that "the Act may restrict the volume of dollars in political campaigns without impermissibly restricting freedom of speech." *Id.* The Court distinguished contribution and expenditure limits from sound regulation by stating such cases only barred "broadcasting 'in a loud and raucous manner on the streets' and imposed 'no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers,' or by soundtrucks operating at a reasonable volume." *Id.* (citation omitted). Arguably, FECA's restrictions are less severe because they do not prohibit any form of communication, merely the volume at which the speech may be broadcast. The Court did not discuss the possibility that the expenditure of money above the Act's proscribed limits produces political speech "in a loud and raucous manner," the regulation of which might be well within the confines of the First Amendment. *See id.*

200. SMOLLA, *supra* note 26, § 2.01[2][a].

201. *Id.* § 2.02[2][a] ("Economists widely concede the necessity of using governmental regulation to trim the freedom of markets at the edges, correcting for their deficiencies in the real world of commerce."); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 130-31 (1999) ("We tend to think that people with economic power are likely to have an advantage in politics. They may have an advantage in the marketplace of ideas as well.").

202. SMOLLA, *supra* note 26, § 2.02[2][a].

203. *Buckley* criticized the incidental effects of spending limits in stating that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Buckley*, 424 U.S. at 19 n.18. *Buckley* fails to extend this analogy to address the need for regulation to protect those individuals who do not have access to the metaphorical car or single tank of gasoline. Consider also the following criticism of the Court's approach to regulations in the marketplace of ideas:

> The thrust of the Court's opinions (speaking at a very high level of generality) is to unshackle the marketplace of ideas. Critics argue that this approach raises the same issues as the deregulation of any other market. Like other markets, the marketplace of ideas reflects the current distribution of wealth and power. Those who lack access to these resources have little impact on what is said in the major media. Also, what the market produces is based on the tastes that people already have. Those who are deeply critical of the present distribution of wealth and power, and of the current

Restrictions that limit the quantity of speech are not uncommon. In *Buckley*, Justice White highlighted labor and price control laws that impose costs on news organizations.[204] Although these costs resulted in less news consumption,[205] they were justified under the First Amendment.[206] Additionally, quantity restrictions do not prevent candidates from effectively communicating with the public. Expenditure limits do not "seriously risk keeping from the public any argument or information it would otherwise have: media advertising of rich candidates and campaigns is now extremely repetitive; and the message would not change if the repetitions were fewer."[207] Quantity restrictions alone are thus insufficient to invalidate spending limits:

> Spending limits reduce the amount of campaign speech, but that fact in itself cannot be dispositive of the First Amendment issue. . . . So long as reduction in the quantity of speech is not the purpose of a regulation but only its unavoidable byproduct, this phenomenon of adverse impact is not by itself sufficient to invalidate the law.[208]

If expenditure limits impose an incidental impact on speech, this perhaps merits further examination under the *O'Brien* test. However, incidental impact alone should not have provided a sufficient basis for the Court to overturn the law at issue in *Buckley*.

3. The *O'Brien* Test

In *Buckley*, "[a]ppellees contend that what the Act regulates is conduct, and that its effect on speech and association is incidental at most."[209] This contention returns to the basic tenet that money is not speech. "Money is not

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culture of our society, fear that unrestricted free speech will merely reproduce the existing inequalities.

FARBER, *supra* note 38, at 16-17.

204. *Buckley*, 424 U.S. at 262-64 (White, J., concurring in part and dissenting in part).

205. Blasi, *supra* note 128, at 1290-91. "Compliance with those laws diverts funds that otherwise could be used to pay for more and better reporting, or greater reader access due to lower prices and wider distribution." *Id.* at 1290.

206. *Id.*

207. Dworkin, *supra* note 163, at 19-24.

> Nothing in the history of the many democracies that do restrict electoral expenses suggests that they have sacrificed wisdom by doing so. In any case, the argument that curtailing political expenditure would hinder the search for truth and justice seems so speculative—and the potential cost in those values so meager even if the argument is right—that it hardly provides a reason for forgoing the conceded gains in fairness that restricting electoral expenses would bring.

Id.

208. Blasi, *supra* note 128, at 1290-91.

209. *Buckley*, 424 U.S. at 15.

speech literally . . . . Restrictions on spending by candidates thus are not regulations of speech as such, but they are laws the incidence of which falls predictably and heavily on speech." [210] The Court of Appeals accepted this argument and applied the *O'Brien* test accordingly.[211] The *Buckley* Court disagreed, thereby giving birth to the notion that money is speech and thus deserving of First Amendment protection:

> Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.[212]

The *Buckley* Court arguably erred in its determination that FECA aimed at the suppression of speech and therefore failed the third prong of *O'Brien*.

The third prong of the *O'Brien* test is of the utmost importance because it is the "gatekeeper" governing entrance to the lower level of scrutiny in *O'Brien*.[213] This prong requires that the governmental interest be unrelated to the suppression of free speech.[214] The proper interpretation of prong three "requires that the reasons advanced by the government to justify the law be grounded solely in the *non*-communicative aspects of the conduct being regulated."[215] The *Buckley* Court concluded that FECA suppressed communication in violation of the third prong of *O'Brien* because "[t]he interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns."[216] However, appellees never advanced these interests as justifications for the Act.[217] Rather than consider the actual asserted govern-

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210. Blasi, *supra* note 128, at 1289. This incidental impact is precisely the scenario that should have triggered the *O'Brien* test.

211. Buckley v. Valeo, 519 F.2d 821, 840-41 (D.C. Cir. 1975).

212. *Buckley*, 424 U.S. at 16.

213. SMOLLA, *supra* note 26, § 3.02[4][c][iii].

214. United States v. O'Brien, 391 U.S. 367, 377 (1968).

215. SMOLLA, *supra* note 26, § 3.02[4][c][iii][B]. This requirement does not refer to the ultimate goal of the law:

> Since legislatures that pass laws restricting speech always have, as their *ultimate* goal, some perceived social interest other than suppression of speech, there is no law that could not qualify for the lenient treatment of the *O'Brien* test if the phrase "an interest unrelated to free expression" refers merely to that ultimate goal.

Id. § 3.02[4][c][iii][A].

216. *Buckley*, 424 U.S. at 17.

217. *Id.*

mental interests under the *O'Brien* test, the Court summarily concluded the test did not apply. In so doing, the Court forfeited the opportunity to engage in a legitimate analysis of *Buckley* under the *O'Brien* test.

Little speculation is necessary to conclude that proper application of the *O'Brien* test in *Buckley* could have led to a drastically different result. While the Court found the asserted governmental interests in favor of expenditure limits were not compelling, the possibility that those interests were important or substantial is an entirely different question. A lower standard of review would have increased significantly the likelihood of the Court upholding expenditure limits.[218]

4. Compelling Governmental Interests

Appellees in *Buckley* presented three compelling state interests in support of the Act. These included preventing the appearance and reality of corruption, leveling the playing field between candidates, and limiting the skyrocketing costs of political campaigns.[219] Regarding contribution limits, the *Buckley* Court accepted the anti-corruption rationale, but did not discuss the other two interests.[220] The Court rejected all three interests with respect to expenditure limits.[221] Critics have denounced this distinction in reasoning between contribution and expenditure limits, suggesting that the expenditure limits are constitutional for precisely the same reasons the Court accepted in support of limits on contributions.[222]

Additionally, the Supreme Court perhaps erred in its determination that the rejected interests in *Buckley* were not compelling. Congress passed FECA in response to a drastic increase in campaign spending.[223] This reform legislation arose from congressional recognition that increased spending in elections led to corruption in the political process and violation of the one-man, one-vote principle.[224] Although the magnitude of these interests has become more apparent overtime, the interests arguably were compelling at the time of *Buckley*, thus meriting a different ruling from the Court.

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218. SMOLLA, *supra* note 26, § 3.02[1][a] ("[W]hen heightened scrutiny is applied, the odds are quite high that the law will be struck down. Content-neutral laws, on the other hand, qualify for significantly less rigorous levels of review, often resulting in judicial decisions upholding the regulations at issue."); *see also, e.g., supra* notes 39-40 and accompanying text.

219. *Buckley*, 424 U.S. at 24-29, 39-59.

220. *Id.* at 24-29.

221. *Id.* at 39-59.

222. *See supra* note 121 and accompanying text.

223. WERTHEIMER, *supra* note 6, at 3.

224. *Id.*

B. The Likelihood that the Court Will Overturn Buckley

While the case for overruling *Buckley* is strong, the prospects for its success are uncertain:

> Reforming campaign financing and restricting the influence of special interests require difficult estimates of the political feasibility as well as, ultimately, the social and economic consequences of possible changes. This is an area where individual measures often have unintended, indeed, unimagined systematic consequences. Moreover, efforts to curtail the power of money and punish corrupt conduct impinge upon the values that many—including the Supreme Court—have elevated to constitutional sanctity.[225]

The difficulties increase in acknowledging that "[t]he Supreme Court's recent decisions are more libertarian than liberal. A fair number of justices appear to like unregulated markets. They oppose government regulation of economic markets, and they oppose government regulation of the marketplace of ideas."[226] Conversely, a factor in the Court's decision to reconsider this issue might be the American public's concern regarding the role of money in politics.[227] Although the Court is not an instrument of the popular vote, if public "dissatisfaction continues to grow, and the public understands that the *Buckley* decision prevents the most direct attack on the problem, the pressure for overruling it would intensify."[228]

Finally, one cannot underestimate the power of ideas that have emerged in the concurrences and dissents of Supreme Court opinions in response to *Buckley*. The dissent is a powerful element in the development of new law.

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225. Glekel, *supra* note 121, at 969.

226. TUSHNET, *supra* note 201, at 130. "At the moment, progressives and liberals are losing more from judicial review than they are getting." *Id.* at 172.

227. Dworkin, *supra* note 163, at 19-24 (citing a poll of registered voters to suggest that "the American public is becoming increasingly angered by the political role in money").

228. *Id.* Regarding public response to Supreme Court opinions, Professor Louis L. Jaffe writes:

> There is no area in which criticism at its most intense is more appropriate or more to be anticipated than the area of constitutional adjudication. There will be and there should be popular response to the Supreme Court's decision; not just the "informed" criticism of law professors but the deep-felt, emotion-laden, unsophisticated reaction of the laity. This is so because more than any court in the modern world the Supreme Court "makes policy," and is at the same time so little subject to formal democratic control.

Louis L. Jaffe, *Impromptu Remarks*, 76 HARV. L. REV. 1111, 1111 (1963). The legal community has also exerted tremendous pressure to overrule *Buckley*. *See* Press Release, State of Iowa Department of Justice, 24 Attorneys General Issue Call for the Reversal of *Buckley v. Valeo* (Jan. 28, 1997), *available at* http://nvri.org/attygen.html (Nov. 11, 2000), in which twenty four state attorneys general, including Attorney General Wallace Malley (R) of Vermont, call for the reversal of *Buckley*.

> One of the oddities of First Amendment law is that often the dissenting opinions have proved more important than the majority. The eloquent early dissents of Justices Holmes and Brandeis are still read for their articulation of First Amendment values, long after the majority opinions have been forgotten. Similarly, in the 1950s, the dissents of Justices Black and Douglas were a bright spot in a period of repression, and set the stage for the revival of speech rights in the following era.[229]

As Chief Justice Hughes eloquently stated: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[230] Therefore, the possibility exists, particularly in light of four current justices' misgivings regarding *Buckley*, that *Landell* poses a significant threat.

First Amendment doctrines "have evolved through fits and starts over time through decisions of the Supreme Court" and "are expressions of social policy and philosophy. They will come and go with changes in the personnel of the Supreme Court, and with the long march of cultural and intellectual history—of which the First Amendment is only one small part."[231] Regardless of whether *Buckley* was the appropriate decision at the time, social policy now begs for change. The Court once deemed restrictions on campaign finance reform necessary to preserve free speech. Twenty-five years of experience demonstrates that these measures impede rather than serve that goal.[232]

CONCLUSION

During the summer of 2000 I worked as an extern to Judge Sessions while the *Landell* case was before the United States District Court for the District of Vermont. I was fortunate to observe the *Landell* trial and its

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229. FARBER, *supra* note 38, at 12-13.

230. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928).

231. SMOLLA, *supra* note 26, § 2.01[4].

232. Glekel, *supra* note 121, at 968-69.

> There is a further irony in the increasing use of the First Amendment to prohibit restrictions on the right of money to speak. This development may not only threaten other vital social interests but may also undermine the very values it is designed to preserve, by cheapening the First Amendment in the eyes of the public. A public that has repeatedly seen the First Amendment invoked to reinforce the position of those most powerful in society may doubt that it is essential to the functioning of the good society, and may become increasingly reluctant to support First Amendment protections when they are sought in the name of those interests traditionally protected by the First Amendment.

Id.

aftermath firsthand. Although I had resided in Vermont for almost a year prior to that point, I had never understood Vermonters and Vermont politics as I did subsequent to this experience.

Living in Vermont, I have read press releases of Republican Karen Kitzmiller's annual collection of winter coats as a means of aiding and interacting with the community. I have seen Democrat Elizabeth Ready wave campaign signs at intersections in Burlington, Vermont. I learned about Democrat Ann Siebert's political ideology as a result of her door-to-door visits in my community of South Royalton, Vermont. Furthermore, these candidates earned my support in the process. Campaign methods such as these are effective in Vermont. Limiting campaign expenditures will not violate this process but will preserve the aspects of this political culture that Vermonters hold most dear.

The interests that gave rise to Act 64 are compelling in Vermont, and the actions of the legislature represented the best interests of all Vermonters. This is why the Act received such widespread bipartisan support from the public and in the legislature. However, in order for laws such as Act 64 to survive, the United States Supreme Court must clarify, redefine, or overturn its holding in *Buckley* concerning exactly what constitutes a compelling state interest in the arena of campaign finance reform. Regardless of the how compelling Vermont's interest in maintaining Act 64 may be, no lower court can confidently uphold these measures until the Supreme Court provides further instruction for interpreting *Buckley v. Valeo*.

The Vermont Legislature always has aimed to protect the interests of its constituents as its first and foremost responsibility. Perhaps by coincidence, Vermont has served as a testing ground for new policy and bold legislation in such arenas as campaign finance, educational funding, and domestic partnership, among others. Clearly, as Vermonters like to say, a small state can lead the nation. The question is: Will the nation follow?

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