

ISSUES IN VERMONT LAW: CAMPAIGN FINANCE REFORM

INTRODUCTION FROM THE EDITORS: FEDERAL CAMPAIGN FINANCE REFORM, *BUCKLEY*, AND A MINI- SYMPOSIUM ON VERMONT'S ACT 64

Campaign finance reform was the hot topic of John McCain's strong, early run at the presidency in 2000. While Senator McCain and his supporters did not succeed in their bid to the White House, their efforts translated into legislative momentum, and in 2002 President George W. Bush signed into law a campaign finance reform bill that had strong bipartisan as well as popular support. Opponents of the McCain-Feingold Campaign Finance law were quick to respond. The ink had barely dried when the Act faced its first challenge in federal court. As this book goes to press, the Supreme Court has agreed to start its fall session three weeks early in order hear four hours of arguments for and against this Act.

To characterize campaign finance reform as a populist movement to reclaim government from corporations is at once true and at once misleading. Campaign finance, despite the words of Justice John Paul Stevens and Judge Skelly Wright, is about speech because just like abortion, the larger debate about campaign finance extends beyond personal motives into how we conceive ourselves, our representatives, and our government. Reformers and dissenters will argue that with or without campaign finance reform, democracy and free expression is doomed. In the waning days of the twentieth century, campaign finance reformers presented us with an intoxicating argument. As candidates spend more and more on campaigns, they will have to raise more funds from larger and more exclusive sources. As if prove the reformers prognosticators, George W. Bush's current re-election campaign has vowed to raise 200 million dollars. Guess how much of that will come in the form of pennies from school children? The reformers have a strong point. Campaigns are about money, and the contributors are individuals and corporations that have a big stake in the laws and affairs of government. Whether it is the wealthy investor who wants a tax break or the business interested in the new FCC regulations that may allow them to own more companies, the people who give to political campaigns have a stake in what the office holders will decide during their term.

But, the chasm between noticing a problem and solving it is wide and deep. The dissenters to campaign finance reform do not question the facts or motives of the reformers. Indeed, the campaign landscape is as bad as it looks. To the dissenters, however, the problem is only aggravated by the

solution. Instead of creating tethers to hold down the cost of campaign spending and corporate contributions, campaign finance reform only worsens a bad situation by creating barriers and restrictions on ordinary and smaller contributors who are held to the same regulations, limits, and penalties as their larger, wealthier counterparts. To the dissenters, campaign gift restrictions will not stop a corporation with legions of resources and legal counsel who can research and craft a new loophole for giving. It will be individuals, those who speak out for a candidate or contribute tangible items like computers or office chairs, that push the artificial gift limit. As the dissenters point out, previous limits on giving have not checked or limited campaign spending. Why should the current program be any different?

All discussions about campaign finance eventually return to the seminal Supreme Court decision of *Buckley v. Valeo*, 424 U.S. 1 (1976). The *Buckley* decision, which struck down parts of a federal election law, divided campaign finance into two realms: campaign contributions, which can be regulated if there is a compelling governmental purpose, and campaign expenditures, which cannot. This court-ordered Cartesian split has resulted in a labyrinth of funding schemes, Political Action Committees (PACs), centralized fundraising, and wink-wink, nudge-nudge solicitation from candidates. On the other side, expenditures have continued to rise as campaigns grow more sophisticated, prolonged, and dependent on expensive media. It is difficult to overstate the impact *Buckley* had, and continues to have, on every campaign since 1976. Whether *Buckley* stands for an absolute bar on regulating candidate spending or simply a high bar that allows regulation only in the most dire of circumstances, it is clear that the result has been one-sided away from regulating campaigns. Yet, *Buckley's* other half has been growing more dense as fund raising becomes less of an art and more of an avocation.

Once again debate on the national stage has been prefigured by action in the states. In 1997, the Vermont General Assembly passed Act 64, a comprehensive campaign expenditure and public financing program. As William Russell's article, *A Brief History of Campaign Finance Legislation in Vermont*, argues, Act 64 was not the General Assembly's first attempt to regulate campaigns or even to limit campaign expenditures. Act 64 represents the fruition of several decades of legislative debate and growing concern over the rising cost and impersonal nature of campaigning in Vermont. Mr. Russell points to legislative efforts dating back to the early 1900s, which demonstrate a consistent concern for how individuals raised and spent money to get elected. As he demonstrates, Act 64 arose out of a process of hearings, debate, and compromise. The end result was a system

that regulated the funding and spending for most state-wide offices and legislative seats. In return, Act 64 created a public financing component that allows candidates to tap into state money to pay for their campaigns. In its original form the law was a strong return to pre-*Buckley* standards of regulation. In essence, Act 64 argues that campaign finance cannot be segregated into regulated contributions and unregulated spending. The two areas are too close and for citizens to have faith in the democratic process, both must be regulated.

Like the McCain-Feingold law, Act 64 was immediately challenged in federal district court. The resulting decision upheld the majority of Act 64 but struck down its spending limits.¹ The resulting appeal to the Second Circuit Court of Appeals brought strong arguments from both sides as the State argued to reverse the lower court's rejection of spending limits and the challengers fought to have the rest of the statute invalidated. In Mitchell Pearl and Mark Lopez's brief for the appellants, *Against Act 64: Brief for the Appellants in Landell v. Sorrell*, the arguments against campaign finance are made in two ways. In the statement of facts, Mr. Pearl and Mr. Lopez use the factual record to demonstrate widespread problems with implementing uniform reform on an individualized process. Across the political spectrum, they line-up the testimony of participants in the process who point out that Act 64 is not based on, nor does it distinguish between, the reasons behind the vast disparity in campaign spending. As the patchwork of testimony shows, unopposed candidates can spend little or no money to win, but "hot" contests require candidates to spend much more in order to reach more voters and get their message across. In such competitive races, spending limits act like choke collars, cutting off a candidate's critical ability to communicate with the voters. In Mr. Pearl and Mr. Lopez's argument section, they make the persuasive point that such limits and restrictions violate a candidate's right to free speech and more importantly, violate the fundamental nature of the democratic process. Instead of a utopian return to door-to-door visits and "front porch campaigns," Act 64 will create a snare for the unsuspecting and create another diversion that will further force the citizen-candidate out of the process in favor of the well-versed professional.

In August 2002, a three Judge panel of the Second Circuit issued findings and conclusions in *Landell*. The result was a strong affirmation of the legislature as the court upheld even more of Act 64. In an equally strong dissent, Judge Winter spoke to the concerns of the dissenters and

1. For more on the District Court's decision and its analysis of Act 64, see Kristen K. Sheils, *Landell Bodes Well for Campaign Finance Reform: A Compelling Case for Limiting Campaign Expenditures*, 26 VT. L. REV. 471 (2002).

questioned the validity of the majority in light of *Buckley* and similar cases. The result was a victory for Act 64 supporters and a clear ticket to the Supreme Court for the dissenters. That is until October of 2002, when the Second Circuit took the very unusual step of withdrawing the decision but retaining jurisdiction over the case.² This has left the case in limbo for nearly a year. John Cooke's case comment, *Making the Case for Campaign Finance: One Theory Explaining the Withdrawal of Landell v. Sorrell*, illustrates the move is highly unusual and may reflect dissension within the Circuit over the meaning of *Buckley* and its relevancy in the modern era of big money campaigns.

Beyond the resulting confusion in Vermont politics over whether Act 64 should apply or not, the withdrawal of the Second Circuit's opinion has stalemated campaign finance reform in Vermont. Whether one supports or fears reform, suspending the law will not solve the fundamental problems. Unlike many political debates, campaign finance reformers and dissenters share a great deal in common. Both sides see a need for some type of change to make elections more democratic and candidates more accessible. In the end, the real bone of contention is how to reform campaign financing while preserving the fundamental interests at stake and not creating a system that will only further the divide in wealth and privilege. On both sides in Act 64, the call is out to heal *Buckley's* "false" split between contribution and expenditure.

Vermont is often referred to as a laboratory for social change. With a population of approximately 600,000, Vermont is roughly the size of a medium city. The past decade has brought an amazing series of initiatives and programs from the Vermont stage into the national consciousness. Campaign finance and Act 64 promise to be another area. As editors, we hope that you will take away from these articles a stronger sense of the vital issues at stake within campaign finance and understand some of the greater legal implications of Act 64 or any attempt to reform the election system.

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2. The withdrawal of the Second Circuit's decision can be found at 300 F.3d 129 (2d Cir. 2002). The Second Circuit's majority opinion and dissent were initially published as a slip opinion. Following withdrawal, the opinion has been removed from all print and electronic sources. For the following articles the slip opinion cited is from a copy posted on the Vermont Secretary of State's web site, at <http://www.vermont-elections.org/elections1/campaignfinance.html> (last visited June 1, 2003). This version is not the official version and may lack consistency with the prior, official version. Moreover, the dissenting opinion of Judge Winter has been separately paginated. We have tried to clearly distinguish between the majority and dissenting opinions in our citation form.