MAKING THE CASE FOR CAMPAIGN FINANCE: ONE THEORY EXPLAINING THE WITHDRAWAL OF *LANDELL V. SORRELL**

INTRODUCTION

On October 3, 2002, the Second Circuit Court of Appeals withdrew its landmark decision *Landell v. Sorrell* (*Landell II*).[1] The decision, as initially written, presented a direct challenge to the United States Supreme Court's ruling in *Buckley v. Valeo* which held, *inter alia*, that campaign spending limits are unconstitutional.[2] The unexpected withdrawal, "pending further proceedings and possible amendment by the panel," put on hold a pending request to rehear the case en banc.[3] It is not clear when the amended ruling will be issued and outside opinions regarding the extent of the amendment range from a "major rewrite" to only "minor changes."[4] But, no matter how the Second Circuit decides, the result would be prime for appeal to the United States Supreme Court and the detailed factual record in *Landell II* would present a golden opportunity for the Court to review its holding in *Buckley v. Valeo*.

Since the Supreme Court's decision in *Buckley*, states have been reluctant to enact comprehensive campaign finance laws that place caps on the amount of money a candidate may spend while campaigning.[5] This reluctance is likely due to the conflicting interpretations of what *Buckley* stands for when campaign expenditure limits are at issue.[6] However, in

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* [Editor's note] To clarify this case's naming convention, it is important to note that as this case has progressed through the court system the Vermont Pubic Interest Research Group intervened and thus their name has displaced Sorrell's name in the Second Circuit's original decision and subsequent withdrawal notice. For consistency with the lower court's opinion and the general public's familiarity with the Sorell appellation, *Landell v. Sorell* will be used to refer to all versions of the case throughout this Case Comment and subsequent articles in this issue.

1. Landell v. Sorrell, No. 00-9159 (2d. Cir. Aug. 7, 2002), *withdrawn* 300 F.3d 129 (2d Cir. 2002) [hereinafter *Landell II*], *at* http://vermont-elections.org/elections1/campaignfinance.html (last visited March 31, 2003).

2. Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (per curiam).

3. *Editor's Note*, 300 F.3d 129 (2d Cir. 2002) (noting that the opinion of the Second Circuit in *Landell* was withdrawn from the bound volume prior to publication "at the request of the court, pending further proceedings and possible amendment by the panel"); Kenneth P. Doyle, *Campaign Finance: Federal Appeals Court Withdraws Ruling that Upheld Limits on Campaign Spending*, Daily Rep. For Exec. (BNA), No. 195, at A-11 (Oct. 8, 2002).

4. Doyle, *supra* note 3, at A-11 (noting that James Bopp, attorney for the challengers said it would be a "major rewrite and that Brenda Wright for the National Voting Rights Institute said that only "minor changes" are expected).

5. *See* Laurence M. Bogert, Buckley v. Valeo *and Campaign Finance Reform After California's Proposition 73: Why Don't You Love Me Like You Use to Do?*, 29 IDAHO L. REV. 235, 236 (1993) (stating that "[a]fter *Buckley*, reform of state and federal campaign contribution systems has had to be performed on an often treacherous constitutional high wire").

6. *Compare* Homans v. City of Albuquerque, 264 F.3d 1240, 1243 (10th Cir. 2001) (stating

1997 the Vermont State Legislature, concerned with rising campaign costs, enacted the Vermont Campaign Finance Reform Act (Act 64), which contained both contribution and expenditure limits for candidates running for state office.[7] Vermont's statutory framework is significant because it has "placed its weight behind the necessity of spending limits to curb the corrupting influence of money and to assure that elected officials will devote their time to governing rather than fundraising."[8] Thus, if upheld, Vermont's factual basis for creating Act 64 could serve as a constitutional template for other states wishing to enact stricter campaign finance laws.

Part I of this Case Comment examines the legal blueprint created by *Buckley* and cases that followed in its footsteps. Part II sets forth a brief discussion of the initial and appellate *Landell* decisions. And lastly, Part III examines the Second Circuit's opinion as it was decided before being withdrawn to determine if it fits within the legal blueprint created by the *Buckley* line of cases. This Case Comment concludes by proposing that the facts underlying *Landell II* fit within a reasonable interpretation of *Buckley* and further speculates about why the Second Circuit withdrew its opinion and what it should address when rewriting the opinion.

I. BUCKLEY AND SUBSEQUENT CASES

In 1976, the United States Supreme Court decided *Buckley v. Valeo*, which sealed the fate of the Federal Election Campaign Act of 1971 as amended in 1974.[9] The Court generally concluded that all of the provisions

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that campaign expenditure limitations are subject to "exacting scrutiny"), *with* Kruse v. City of Cincinnati, 142 F.3d 907, 915–18 (6th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998) (rejecting the City of Cincinnati's campaign expenditure limits as unconstitutional under *Buckley* without reviewing the City's justification for limits and implying that all campaign spending limits are per se unconstitutional). *See also* John C. Bonifaz et al., *Challenging* Buckley v. Valeo*: A Legal Strategy*, 33 ACKRON L. REV. 39, 44, 54 (1999) (interpreting *Kruse* to stand for the proposition that all campaign spending limits are per se unconstitutional under *Buckley*).

7. An Act Relating to the Public Financing of Election Campaigns, Disclosure Requirements and Limits on Campaign Contributions and Expenditures, No. 64, §§ 6–7, 1997 Vt. Acts & Resolves 490, 497–98 (codified at VT. STAT. ANN. tit. 17, §§ 2805–2805a (2002)). Act 64 limited contributions to candidates to $200 for a state representative; $300 for state senator and $400 for all other elected positions. Act 64 limits 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; $45,000 for secretary of state and state treasurer; $100,000 for lieutenant governor and $300,000 for governor. *Id.*; *see also id.* at 490–91 (explaining the legislative findings and intent in enacting Act 64).

8. Bonifaz et al., *supra* note 6, at 56. Bonifaz bases his belief as to the significance of this statute on his interpretation of *Buckley*, which leaves room for expenditure limits when there is a detailed factual record that supports the need for such limits. *Id.* at 55–56.

9. *Buckley*, 424 U.S. at 1; *see also* Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–56 (2000)); 18 U.S.C. § 608 (Supp. IV 1970) (repealed 1976).

of the Act, which limited the contributions to a candidate for federal office, were constitutional, while all those that limited the expenditures of a candidate were in violation of the First Amendment.[10] The Court based these opposing rulings on the characteristics of contribution limits versus those of expenditure limits.[11] The Court justified its decision on the view that expenditure limits impose "significantly more severe restrictions" on First Amendment rights than do limits on the amount one may contribute to a candidate.[12] Thus, the Court determined that although strict scrutiny was triggered for both, the limits on expenditures should be more closely scrutinized than limits on contributions.[13]

As for contribution limits, the Court stated that the right of political association may be interfered with if the State "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement" of those guaranteed rights.[14] The State advanced three interests: (1) to "prevent[] corruption and the appearance of corruption;" (2) to limit the voices of the affluent in order to "equalize the relative ability of all citizens to affect the outcome of elections;" and (3) to reign in "the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money."[15] The Court found the first stated interest, the prevention of the appearance of corruption, compelling enough to warrant the use of contribution limits and therefore failed to discuss the validity of the other two asserted interests.[16] Notably, the third interest, which the Court failed to discuss in *Buckley*, was asserted as a compelling governmental interest in *Landell*.[17] The Court further concluded in *Buckley* that the contribution limits were closely drawn to meet the asserted interest despite the presence of bribery and disclosure laws.[18] This basic rationale was used to uphold all four of the contribution limits set forth in the 1974 amendments to the Federal Election Campaign Act of 1971.[19]

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10. *Buckley*, 424 U.S. at 58–59.

11. *Id.*

12. *Id.* at 23.

13. *Id.* at 44–45; *see also* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001).

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

15. *Id.* at 25–26.

16. *Id.* at 26.

17. *Landell II*, No. 00-9159, slip op. at 5; *Landell v. Sorrell*, 118 F. Supp. 2d 459, 481 (D. Vt. 2000) [hereinafter *Landell I*] (identifying Vermont's asserted interest that elections have become too expensive thus prohibiting many Vermonters from seeking office).

18. *Buckley*, 424 U.S. at 27–28.

19. The Court upheld: (1) "the $1,000 limitation on contributions by individuals and groups to candidates and authorized campaign committees"; (2) "the $5,000 limitation on contributions by

On the other hand, expenditure limits posed a different problem to the majority in *Buckley* due to their "direct and substantial restraints on the quantity of political speech."[20] Although the Court held that all of the expenditure provisions were unconstitutional,[21] the Court stated that *independent* expenditure provisions were more "drastic" than the expenditure limits placed on spending directly tied to the candidate.[22] This statement indicates that the Court may have viewed general expenditure limits placed on individuals differently from those specific limits aimed at spending by a candidate, a campaign, or a political party.[23] It appears by this statement that the Court was concerned with limiting the First Amendment rights of "all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations,"[24] more than it was with limits on expenditures that were connected directly to an election campaign.

Despite this apparent distinction between certain types of expenditure limits, the Court felt that the lack of any sufficient compelling governmental interest to sustain even the less drastic means of imposing expenditure limits precluded a closer discussion of this possible issue.[25] However, the Court appears to suggest that there may be a compelling governmental interest that would meet the strict standard of review.[26] Such a conclusion is justified not only by the language in *Buckley* itself, but also in language arising from cases following *Buckley*.[27] Whether a different

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political committees;" (3) the limits placed upon a volunteer's incidental expenses; and (4) "the $25,000 limitation on total contributions during any calendar year." *Id.* at 23–38.

20. *Id.* at 39.

21. The Court held that: (1) the $1,000 contribution limitation on expenditure to a clearly identified candidate was unconstitutional; (2) the limitation on the candidates spending his own money was unconstitutional; and (3) the overall limit on campaign expenditures was unconstitutional. *Id.* at 39–58.

22. *Id.* at 39 ("The most *drastic* of the limitations restricts individuals and groups, including political parties that fail to place a candidate on the ballot, to an expenditure of $1,000 'relative to a clearly identified candidate during a calendar year.'") (emphasis added).

23. *See id.*

24. *Id.* at 40.

25. *See id.* at 48, 53, 55 (noting that the governmental interest of preventing actual corruption or the appearance of corruption of the political process does not support any of the limits on expenditures).

26. *See id.* at 55 (noting that "[n]o governmental interest *that has been suggested* is sufficient to justify the restriction on the quantity of political expression imposed by . . . campaign expenditure limitations") (emphasis added). Furthermore, the Court in *Buckley* based its ruling as to expenditure limits, to some extent, on the assumption that contribution limits were sufficient in and of themselves to quell the governmental interest of preventing corruption or the appearance of it. *See id.* at 46, 53, 55. *But see Kruse*, 142 F.3d at 915–18 (suggesting that all campaign expenditure limits are per se unconstitutional under *Buckley*).

27. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000) (citation omitted); *see also*

level of review for those less drastic expenditure limits will be used remains to be seen.

The Court did not revisit campaign finance until January 2000 when it decided *Nixon v. Shrink Missouri Government PAC.*[28] The Court upheld Missouri's limits on contributions and in so doing reaffirmed the line they drew between expenditure and contribution limits. Again, the Court did not state that expenditure limits were per se unconstitutional while contribution limits were subject to strict scrutiny; it stated instead that "[w]e have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."[29] While this further supports the conclusion that the Court in *Buckley* did not suggest a per se ban on expenditure limits, the concurring opinions go even further suggesting that "it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience . . . making less absolute the contribution/expenditure line."[30]

The Supreme Court's most recent proclamation on this issue arises out of *FEC v. Colorado Republican Federal Campaign Committee.*[31] The Court again noted the line between expenditure and contribution limits, but made clear its willingness to go beyond the conventional definitions of such classifications.[32] The court stated that:

> The First Amendment line between spending and donating is easy to draw when it falls between independent expenditures by individuals or political action committees (PACs) without any candidate's approval (or wink or nod), and contributions in the form of cash gifts to candidates. But facts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify.[33]

Kristen Sheils, Landell *Bodes Well for Campaign Finance Reform: A Compelling Case for Limiting Campaign Expenditures*, 26 VT. L. REV. 471, 507 (2002) (arguing that "the United States Supreme Court must clarify, redefine, or overturn its holding in *Buckley* concerning exactly what constitutes a compelling state interest . . . no lower court can confidently uphold these measures until the Supreme Court provides further instruction for interpreting *Buckley v. Valeo*").

28. *Shrink*, 528 U.S. at 377.

29. *Id.* at 387 (citation omitted).

30. *Id.* at 405 (Breyer, J., concurring, joined by Ginsberg, J.); *see also id.* at 406 (Kennedy, J., dissenting) (stating that the contribution/expenditure dichotomy alluded to in *Buckley* set the stage for a new kind of "covert speech").

31. *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 431.

32. *Id.* at 437, 442–43.

33. *Id.* at 442–43 (citations omitted).

The Court upheld the limits placed on coordinated expenditures not solely because they were akin to contribution limits, but because "unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits."[34] Thus, it seems that not only can there be other compelling governmental interests to justify expenditure limits, but there can also be expenditure limits justified on the basis that the contribution limits are not adequate in and of themselves to reduce the risk, or appearance of, corruption.

II. LANDELL V. SORRELL

A. The District Court: Landell I

After Act 64 was enacted in 1997, it was promptly challenged under the First Amendment.[35] The District Court noted that the constitutionality of Act 64 would depend heavily on the factual background of the legislation.[36] Therefore, the court included much of the legislative debate in its opinion and even conducted a ten-day bench trial in order to gather more facts.[37] These facts reviewed by the court supported "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."[38] The district court noted that "[g]iven the wealth of evidence gathered by the Vermont legislature . . . this court understands why it included spending limits as part of its comprehensive campaign finance bill."[39] Furthermore, the court acknowledges that both *Kruse* and *Buckley* were decided on slim factual records and *Buckley* could be read to allow for these concerns to be corrected by the creation of expenditure limits.[40] Despite this endorsing acknowledgement, however, the court felt that, given

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34. *Id.* at 456.

35. Sheils, *supra* note 27, at 481. Act 64 was enacted in 1997. An Act Relating to the Public Financing of Election Campaigns, Disclosure Requirements and Limits on Campaign Contributions and Expenditures, No. 64, 1997 Vt. Acts & Resolves 490–506 (codified at VT. STAT. ANN. tit. 17, §§ 2801–2883 (2002)); *see also* William Russell, *A Brief History of Campaign Finance Legislation in Vermont*, 27 VT. L. REV. (2003).

36. *Landell I*, 118 F. Supp. 2d at 464.

37. *Id.* at 468.

38. Sheils, *supra* note 27, at 481 (quoting *Landell I*, 118 F. Supp. 2d at 463). Bundling is the practice of soliciting contributions from individuals and then channeling them to a candidate. The loophole is that the bundled amounts do not count towards limits on the political organizations. Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140–41 (1994).

39. *Landell I*, 118 F. Supp. 2d at 483.

40. *Id.*

both the absence of case law in the Second Circuit and the Supreme Court's directive in *Buckley*, it "[could] not take the unprecedented step of finding expenditure limits constitutional."[41]

B. The Second Circuit Court of Appeals: Landell II

The district court's decision was appealed to the Second Circuit Court of Appeals and arguments were heard on May 7, 2001.[42] In a 2-1 decision, that has since been withdrawn, the Second Circuit Court of Appeals upheld the expenditure limitations.[43] Writing for the two-judge majority, Judge Straub felt that Vermont had established that its expenditure limits "serve a sufficiently strong government interest and are narrowly tailored to permit effective campaigns."[44] Criticizing the decision in a lengthy dissent, Judge Winter maintained that the majority had not followed the proper standard of review as announced by *Buckley*.[45]

1. The Majority

The two-judge majority clearly rejected the assertion that *Buckley* established a per se rule against the constitutionality of expenditure limitations.[46] Instead the majority noted that under increased judicial scrutiny, expenditure limits have "typically" failed to pass constitutional muster.[47] Furthermore, the Second Circuit felt that the Supreme Court's decision in *Buckley* was due to Congress's failure to demonstrate the need for expenditure limitations, especially in light of the asserted governmental interest to eliminate quid pro quo corruption.[48] This factually dependent analysis opened the door for the Second Circuit to consider Vermont's governmental interests based on the facts presented in the court below.[49]

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41. *Id.*
42. *Landell II*, No. 00-9159 at 1.
43. *Id.* at 65.
44. *Id.* at 5.
45. Landell v. Sorrell, No. 00-9159dis., slip op. at 8–9 (2d. Cir. Aug. 7, 2002) (Winter, J., dissenting), *withdrawn* 300 F.3d 129 (2d Cir. 2002) [hereinafter *Landell II Dissent*], *at* http://vermont-elections.org/elections1/campaignfinance.html (last visited March 31, 2003). Responding to the dissent, the majority states that Winter's dissent does not go as far as to say the expenditure limits are "per se unconstitutional." *Landell II*, No. 00-9159, slip op. at 64 n.6. "*Buckley* . . . held that government may not limit campaign expenditures by candidates for electoral office." *Landell II Dissent*, No. 00-9159dis., slip op. at 3. However absolute this may or may not sound, Winter does not rest on this conclusion, but rather he reviews the provisions under "exacting scrutiny." *Id.* at 12.
46. *Landell II*, No. 00-9159, slip op. at 64 n.6.
47. *Id.* at 19.
48. *Id.* at 20 (citing *Buckley*, 424 U.S. at 55–58).
49. *See* Bonifaz et al., *supra* note 6, at 46 (arguing that "*Buckley* leaves the door open for a different factual record which would justify the need for campaign spending limits").

The Second Circuit agreed with Vermont's asserted need to limit expenditures due to the increasing burden on politicians to raise a significant amount of money.[50] This burden, in turn, led to politicians devoting more time to raising money than representing the public and limited access to those politicians on the basis of who could contribute to their campaigns.[51] The Second Circuit reasoned that the "basic democratic requirements of accessibility, and thus accountability, are imperiled when the time of public officials is dominated by those who pay for such access with campaign contributions."[52] The court reviewed the evidence presented by Vermont that supported the need for such limits, as well as the rationale for the claimed interest.[53] It concluded that the evidence supported the compelling interest to ensure that politicians spend more time representing their constituents and that access should be available to constituents whether or not they can contribute to candidates's "war chests."[54]

The Second Circuit then evaluated whether the limits in place were narrowly tailored to serve the compelling governmental interest.[55] The main concern in this inquiry, according to the court, is to "ensure . . . that the expenditure limits are not so low that they also sacrifice [a] candidate['s] ability to communicate with the electorate and campaign effectively."[56] Such a determination, according to the analysis of the Second Circuit, should be made on a state-specific basis.[57] In other words, when determining whether or not a limit is narrowly tailored, a court must take into consideration the previous patterns of campaign spending in that state, or district, as well as "the size of election districts, the cost of mass media, and the feasibility of alternative communication techniques."[58] The court found that expenditure limits patterned upon existing practices are "presumptively narrowly tailored" due to their basis in a candidate's beliefs about what financial resources he or she needs to run for office, and because existing practices demonstrate the level of funding available from contributors.[59] Furthermore, the court left room for further change by

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50. *Landell II*, No. 00-9159, slip op. at 25.
51. *Id.* at 29–30.
52. *Id.* at 25.
53. *Id.* at 29.
54. *Id.*
55. *Id.* at 40–44.
56. *Id.* at 41.
57. *See id.* (stating that the inquiry is "fact-intensive" and then assessing the facts as they apply in Vermont specifically).
58. *Id.*
59. *Id.*

noting that Vermont could set even lower limits if the legislature could find sufficient evidence to demonstrate the inadequacy of the current limits.[60]

The Second Circuit reasoned that the limits set in place by Vermont fit well within these confines. They noted that candidates would still be able to run effective campaigns and that such limits would not drastically alter the campaigning landscape.[61] Furthermore, the expenditure limits are aimed at controlling the costs of campaigning in Vermont with the hope that these limits will slow the rise of campaign costs in the future.[62] Thus, the court found that Vermont's limits on campaign expenditures were narrowly tailored to meet its compelling governmental interest.[63]

2. The Dissent

Judge Winter took a more practical approach to Act 64 in his constitutional analysis and took particular issue with how expenditure limits will function as applied.[64] His argument attacks the two-judge majority for succumbing to ideological notions of democracy at the cost of constitutional analysis through the lens of *Buckley*.[65] Judge Winter warns the majority that "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[66] This statement may be aimed at the Vermont legislature, or the majority, or possibly both.

Judge Winter challenges the statute on its face and criticizes the majority for not looking carefully at the statute itself.[67] He indicates particular concern with what he considers the latent ambiguities throughout the provisions of the statute and demonstrates that, if interpreted strictly, otherwise harmless everyday functions would have to be accounted for under the contribution limits.[68] Therefore he concludes that these provi-

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60. *Id.* at 44.

61. *Id.* at 43–44.

62. *Id.* at 44.

63. *Id.*

64. *See Landell II Dissent*, No. 00-9159dis., slip op. at 16–32 (assessing how expenditure limits are applied under Act 64).

65. *Id.* at 3–4 ("[Act 64] may be a popular law but only because its proponents systematically divert attention from the law's actual provisions to the nobility of their goal—here the transfer of political power from 'special interests' to 'regular citizens.'"); *see generally id.* (attempting to negate the underlying ideological principles by proving that these provisions will work against that which the majority is trying to enhance).

66. *Id.* at 4 (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

67. *Id.* at 15.

68. *See id.* at 24–25 (noting that under a strict application of the statute's language even services by volunteers might have to be counted as expenditures and could be put towards the limit).

sions, although grand in idea and novelty, will have a disastrous affect on the very people they are intended to benefit.[69] "If one looks at what Act 64 says instead of what its proponents say about it, it is quite apparent that Act 64 substantially disables citizens from meaningful participation . . . in grassroots activities on behalf of candidates."[70]

III. ANALYZING WHETHER LANDELL II FITS WITHIN THE LEGAL BLUEPRINT OF BUCKLEY

The decision reached by the majority in *Landell II* creates tension between circuits as to what *Buckley* says about expenditure limits.[71] Despite the intrusion upon First Amendment grounds, the Second Circuit's approach, as a whole, is more sound due to its flexibility both to account for multiple factors and to stay open to possible situations where restrictions could be constitutionally justified.[72] Furthermore, an interpretation that *Buckley* imposes a per se ban on expenditure limits, is at odds with the language in that opinion and subsequent interpretations.[73] However, according to the majority's own declaration in *Landell II*, in order for these provisions to be within the constitutional parameters set forth by precedent they had to be reviewed by the court in a manner that would ensure that "each of the provisions survives the 'exacting scrutiny' standard."[74] By

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69. *Id.* at 79–80.

70. *Id.*

71. *Compare Landell II*, No. 00-9159, *with Homans*, 264 F.3d at 1243–44 (stating that limitations "do not survive even under the rationale of . . . deterring corruption and preventing evasion of contribution limits . . . equalizing the financial resources of the candidates, and . . . restraining the cost of election campaigns") (citations omitted), *and Kruse*, 142 F.3d at 915 (suggesting that all expenditure limits are per se unconstitutional under *Buckley*).

72. *See Landell II*, No. 00-9159, slip op. at 41 (noting factors to take into consideration when determining if the provision is narrowly tailored and weight given to legislative findings).

73. *See Buckley*, 424 U.S. at 55 ("No governmental interest *that has been suggested* is sufficient to justify the restriction on the quantity of political expression imposed by . . . campaign expenditure limitations.") (emphasis added); *Shrink*, 528 U.S. at 405 (Breyer, J., concurring, joined by Ginsberg, J.) ("[I]t might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience . . . making less absolute the contribution/expenditure line, particularly in respect to wealthy candidates, whose expenditures might be considered contributions to their own campaigns."); *see also Kruse*, 142 F.3d at 920 (Cohen, J., concurring).

> The Supreme Court's decision in *Buckley*, however, 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.

Id.

74. *Landell II*, No. 00-9159, slip op. at 19 (citing *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 472).

ignoring the practical application of provisions in Act 64, the Second Circuit failed to meet its responsibility to "make an independent examination of the whole record."[75] This probably accounts for the withdrawal of the opinion, especially in light of its probable appeal to the United States Supreme Court. In order to have its ruling sustained, the Second Circuit will need to take an in-depth review of what the provisions will really do to First Amendment rights.

A. Judge Winter's Dissent Exposes a Constitutional Flaw with the Majority's Analysis

Judge Winter's dissent raises reasonable questions regarding the thoroughness of the majority's First Amendment analysis in *Landell II*. Although *Buckley* should not be read to create a per se ban on expenditure limits, it also should not be read as requiring anything less than the most exacting scrutiny.[76] Judge Winter's fear is correct in that the majority opinion did not give the "legislation careful, much less exacting, scrutiny."[77] As he notes, "[t]heir opinion describes the provisions of Act 64 in only cursory fashion . . . [and] accepts the theory and factual assumptions proffered . . . at face value."[78] Such a review does not meet the exacting scrutiny required under *Buckley*.

Portions of *Buckley* indicate that the expenditure/contribution line is not absolute.[79] Instead, the Supreme Court seems to be more concerned with the degree of impact of a particular provision on the protected freedoms of political expression and association.[80] In order to make such a determination, a reviewing court must take into consideration the actual language of the statute. As the Court in *Buckley* made abundantly clear "[t]he test is whether the language of [the statute] affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'"[81] The *Landell II* majority's statement in a footnote that "any such ambiguities, omissions or statutory quirks will, in

75. *Id.* at 17 (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)).

76. *Buckley*, 424 U.S. at 44–45.

77. *Id.*

78. *Landell II Dissent*, No. 00-9159dis., slip op. at 15.

79. *See Buckley*, 424 U.S. at 38 (noting a difference in degree among contribution limits); *see also Nixon*, 528 U.S. at 405 (Breyer, J., concurring, joined by Ginsberg, J.) (interpreting Justice Kennedy's dissent as advocating for a standard "making less absolute the contribution/expenditure line").

80. *See Buckley*, 424 U.S. at 39 (contending that as a group, expenditure limits by their own terms "impose direct and substantial restraints on the quantity of political speech").

81. *Buckley*, 424 U.S. at 41 (quoting NAACP v. Button, 371 U.S. 413, 438 (1963)) (first and second alteration added).

the normal course of litigation, legislative amendment and administrative interpretation, be resolved" does not meet this standard.[82]

B. Upon Review for Amendment the Second Circuit Should Focus Upon the Statutory Language

In First Amendment cases, the Supreme Court seems more concerned with the actual impact of limitations on First Amendment rights, than with the classification of those limitations as expenditures or contributions.[83] Given this focus, a reviewing court must evaluate the impact of the statute as applied. Such an approach in the case of Act 64 raises some serious constitutional questions that must be dealt with in the amended opinion.

It is not clear, for example, whether an ordinary citizen, with no political affiliations, who speaks out in the media, through an editorial or similar forum in favor of a candidate, should be considered to have made a campaign expenditure. Such an action clearly fits within Act 64's definition of expenditure.[84] Furthermore, it could also fit under the provision allowing for related expenditures, although it could also be argued that it does not.[85] Supposing it did, and this editorial put the candidate over the defined expenditure limit. Then, the candidate could be fined up to $10,000.[86] Such results would have a "chilling effect" on how candidates run their campaigns and may severely limit what they want to get across to the voting public.

CONCLUSION

The decision reached by the Second Circuit Court of Appeals in their pre-withdrawal opinion is the correct one. *Buckley* and following cases support the assertion that expenditure limits are not per se invalid under the First Amendment. Furthermore, the State of Vermont has clearly presented a compelling governmental interest that demonstrates the need for expenditure limits. The Second Circuit would be doing democracy a disservice by not allowing a more flexible approach when the factual record clearly

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82. *Landell II*, No. 00-9159, slip op. at 64 n.6.

83. *See supra* Part III.A.

84. VT. STAT ANN. tit. 17, § 2801(3) (2002). "'Expenditure' means a payment, disbursement, distribution, advance, deposit, loan or gift of money *or anything of value*, paid . . . for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates." *Id.* (emphasis added).

85. VT. STAT ANN. tit. 17, § 2809(c)(2002). "[A] 'related campaign expenditure made on the candidate's behalf' means any expenditure intended to . . . defeat . . . an opposing candidate." *Id.*

86. VT. STAT ANN. tit. 17, § 2806(b) (2002). "A person who violates any provision of this chapter shall be subject to a civil penalty of up to $10,000.00." *Id.*

supports this need. However, this flexible approach should not provide a means for the reviewing court to circumvent its responsibility to ensure that the statute does not unnecessarily impede the broader right to political speech.

Upon review for amendment, the Second Circuit should address the practical implications of Act 64. Such an analysis would make their decision more persuasive and frame the issues more narrowly thus creating a stronger opinion for a rehearing en banc and for a possible appeal to the U.S. Supreme Court.

In the event the ruling stands and *Landell II* is not appealed to the Supreme Court, other states should carefully consider the factual basis on which it was decided. By holding that expenditure limits are constitutional, a reissued *Landell II* decision could help states create more comprehensive campaign finance laws; the compelling interest asserted in *Landell II* does not, however, provide the sole or instant basis on which to hang one's hat. Any state wishing to enact campaign finance laws must make their own legislative determinations and support their reasoning with sufficient information to survive a constitutional attack. Among other things, states must show that there is a clear need for expenditure limits, that other methods have not worked in the past, and that there is no other reasonable way to meet the need. *Landell II* is a landmark decision but not because it gives states the power to enact expenditure limits. Instead, *Landell II* should be a landmark decision because it establishes the factual foundation that is constitutionally required of states to justify expenditure limits in their campaign finance laws.

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