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LANDELL V. SORRELL: LESSONS LEARNED FROM VERMONT'S PENDING CHALLENGE TO BUCKLEY V. VALEO

Nathan Huff

I. INTRODUCTION

The cost of running for political office in America is rising. In 1992, total election spending for the presidential and congressional elections was 1.8 billion dollars. In subsequent years, election spending rose to $2.2 billion (1996) and then to almost $3 billion (2000). This continual increase in election spending spans both federal and state elections and has given rise to widespread public support for government regulation of campaign spending.

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3. Id. Current evidence indicates that this trend will continue through the 2004 elections where the expenditures will exceed those of the 2000 elections. Id. In the 1999-2000 election cycle, the Democratic and Republican parties collectively raised $1.2 billion. Id. This was a thirty-six percent increase from the 1995-1996 election cycle. Id.

4. Anthony Gierzynski, Financing Gubernatorial and State Legislative Elections, in FINANCING THE 2000 ELECTION 188-89 (David B. Magleby ed., 2002) (noting that “Political money flows to the places of power within a political system, and as states become more powerful, more political money flows into state elections”). As a result of the rising costs of state elections, thirty-five states have implemented some form of contribution limits. Id. at 189. Since 1979, two-thirds of all states have implemented major campaign finance reforms. Id.

5. Richard E. Levy, The Constitutional Parameters of Campaign Finance Reform, 8 KAN. J.L. & PUB. POL’Y 43, 43 (1999) (describing the widespread belief that the influence of money has corrupted the political process). The author also describes the public’s perception that wealthy individuals can exert undue influence over that process. Id. See also Center for Responsive Politics, supra note 2 (explaining that the trend has given rise to several campaign finance reforms). The most popular among these reforms is the McCain-Feingold Bill (S.27). Id. This bill was sponsored by Senator John McCain (R-AZ) and Senator Russell Feingold (D-WI). Id. The defining characteristic of this bill was its ban on soft money. Id. On September 8, 2003, the Supreme Court heard oral arguments in McConnell v. Federal Election Commission, a case challenging the
Too often, public support for such regulation is based upon the good intentions of its proponents, rather than the effects of its provisions. This focus on the nobility of the intent behind particular legislation, rather than the actual effects of its provisions, is dangerous. Justice Brandeis expressed this idea in his dissent in Olmstead v. United States when he said, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." The support of the "well-meaning" public for campaign finance reforms has caused federal and state governments to enact various reform packages.

Each of these regulations represents an effort to reconcile regulatory interests in campaign finance reform with the limits imposed by the First Amendment. In Buckley v. Valeo, the seminal case on campaign


7. Olmstead, 277 U.S. at 479 (Brandeis, J., dissenting); Landell, dissent at 3-4 (Winter J., dissenting).

8. Olmstead, 277 U.S. at 479 (Brandeis, J., dissenting). Justice Brandeis argued that the proponents were diverting attention away from the actual provisions and to the nobility of their goal, protecting the power of the people. Id. at 478; see also Beauharnais v. Illinois, 343 U.S. 250, 274 (1952) (noting that "[h]istory indicates that urges to do good have led to the burning of books and even to the burning of 'witches'"); see also Landell, dissent at 3-4 (Winter J., dissenting). An alternate explanation for the public support of government regulation in the area of campaign finance is the media's portrayal of opponents to reform as being self-interested. POLITICAL MONEY: DEREGULATING AMERICAN POLITICS xiv (Annelise Anderson ed., 2000). Annelise Anderson explained this phenomenon saying, "Public opinion polls reflect support for added government control, possibly because both the print and the television media have beaten their drums for so-called reform and claimed that its failure to pass is merely the result of craven self-interest." Id. She also noted that the media stands to benefit if campaign finance reforms are passed. Id. Limiting the amount that candidates are able to spend on their campaigns increases the power of the media in expressing its political opinions. Id.

9. Levy, supra note 5, at 43. Some scholars have proposed that reform efforts actually harm the democratic process. Id. For example, Bradley A. Smith, author of Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, has noted that during the same thirty-year period public confidence in government decreased while campaign finance reforms increased. Smith, supra note 1, at 1057-58.

10. Levy, supra note 5, at 43 (discussing how "government regulation of political campaigns raises concerns that lie at the core of the First Amendment's protection of freedom of speech"). In 1985, the Supreme Court examined the constitutionality of the Presidential Election Campaign Fund Act, which provided candidates the option to receive public financing for presidential elections conditioned on their acceptance of expenditure limitations. Fed. Election Comm'n v. Nat'l Conservative PAC, 470 U.S. 480 (1985); see also Buckley v. Valeo, 424 U.S. 1 (1976) (examining the constitutionality of the
finance reform, the United States Supreme Court required these regulations to be narrowly tailored to serve compelling government interests. Under this standard of review, the Supreme Court has permitted regulations limiting campaign contributions, but consistently has invalidated those limiting campaign expenditures. This result troubles advocates of campaign finance reform because it stifles their ability to advance the regulatory interest in decreasing the cost of elections. Despite their best efforts, advocates have been unable to mount a sufficient challenge to the decision in Buckley.

The passage of the 1997 Vermont State Election Campaign Act (Act 64) and the ensuing case challenging its constitutionality represent advocates’ most successful challenge to date. Vermont’s defense of the regulation’s constitutionality has advanced to the United States Court of Appeals for the Second Circuit and positioned Vermont on the cutting edge of the campaign finance reform debate.

Vermont’s challenge originated in 1997 with the passage of Act 64. The Act was passed in response to public outcry over the rising cost of

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11. Buckley, 424 U.S. at 44-45. Buckley is the seminal case in the area of campaign finance reform because it sets out the applicable standard of review for evaluating the constitutionality of campaign finance regulations. Id. at 15; Levy, supra note 5.

12. Buckley, 424 U.S. at 143. The Court held that limitations on campaign expenditures, independent expenditures, and personal expenditures by candidates were unconstitutional because they limited the quantity of expression candidates were permitted to make. Id.; NC-PAC, 470 U.S. at 497.


14. See e.g., Homans v. City of Albuquerque, 264 F.3d 1240, 1243-44 (10th Cir. 2001) (per curiam); Kruse v. City of Cincinnati, 142 F.3d 907, 919 (6th Cir. 1998). Kruse and Homans both held that limits on campaign expenditures were unconstitutional. Kruse, 142 F.3d at 919; Homans, 264 F.3d at 1245.


campaigns for state office in Vermont. It was intended to control campaign costs and to provide the United States Supreme Court with an opportunity to reexamine its decision in *Buckley v. Valeo.* Secretary of State Deborah L. Markowitz, in a memorandum to the Vermont State Legislature, stated that “[s]ome of the law’s provisions were adopted with the express intent of challenging restrictive readings of [the] United States Supreme Court precedent *Buckley v. Valeo* . . .” The provision that presents the most direct challenge to *Buckley* imposes mandatory limits on campaign expenditures.

Act 64 applied these expenditure limits to candidates running in primary, general, and local elections, and placed ceilings on the amount each candidate could spend based on the office being sought. For example, although candidates for governor were permitted to spend $300,000 in a two-year election cycle, candidates for state representative were permitted to spend only $2,000.

18. *Sorrell,* 118 F. Supp. 2d at 464; *Landell,* slip op. at 4.


20. Memorandum from Deborah L. Markowitz, Vermont Secretary of State to Senate, *supra* note 19. In the section of the memorandum entitled “Critical Review of the Law,” the Secretary of State requested “that the legislature consult with the Attorney General’s office before making any changes to the law.” *Id.* This request was intended to preserve the court case. *Id.* For example, the secretary advised that, “certain changes to the law, including repeal, could render the court case moot, frustrating the express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in *Buckley v. Valeo.*” *Id.*

21. 1997 Vermont State Election Campaign Act, VT. STAT. ANN. tit. 17, §§ 2805(a) (1997). Section 2805a limited the expenditures that candidates for Vermont state offices could make during a single, two-year election cycle. *Id.* This section also limited the contribution amounts that candidates could receive. *Id.* For example, candidates for state representative were prohibited from accepting contributions in excess of $200 from a single source. *Id.*


23. *Id.* §§ 2805a(a)(1)-(5) (Supp. 1998).

24. *Id.* §§ 2805a(a)(1) (Supp. 1998). Candidates for lieutenant governor were limited to $100,000 and candidates for secretary of state, state treasurer, auditor of accounts or attorney general were limited to $45,000. *Id.* §§ 2805a(a)(2), (3). Candidates for state senator were limited to $4,000 with an additional $2,500 allowed per additional seat in their district. *Id.* § 2805a(a)(4). Candidates for state representative were permitted to spend $3,000 if they were campaigning in a two-member district. *Id.* § 2805a(a)(5). Under the Act, incumbents were only permitted to spend a percentage of the above figures. *Id.* § 2805a(c).
In 1999, a group of plaintiffs consisting of politicians, political action committees, and private individuals filed suit against the Vermont Attorney General and fourteen other states’ attorneys, attacking the constitutionality of Act 64’s expenditure and contribution limits. At trial, the district court examined the findings asserted by the Vermont General Assembly in support of the Act’s limits on campaign expenditures. Notwithstanding these findings, the court still found Act 64’s expenditure limits unconstitutional under Buckley v. Valeo. All of the parties involved appealed the district court’s decision.

On appeal, the United States Court of Appeals for the Second Circuit reversed the district court’s ruling on Act 64’s expenditure limits. The court of appeals disagreed with the district court’s statement that Buckley created a per se rule against the constitutionality of expenditure limits. The court held that Act 64’s expenditure limits satisfied the First Amendment test set out in Buckley.

This decision was the first of its kind and was praised by advocates of campaign finance reform. To the dismay of those advocates, the panel


26. Sorrell, 118 F. Supp. 2d at 459. The Vermont General Assembly presented fifteen specific findings in support of Act 64. Landell, slip op. at 10-12. The Vermont legislature explained that four factors generally created a situation in which “public officials are functionally compelled to sell privileged access through the fundraising system.” Id. at 25-26. The General Assembly’s first finding was that campaigns in Vermont were becoming too expensive. Id. Second, the legislature found that this placed an increased burden on candidates to raise funds. Id. Third, as a result of this burden, candidates were forced to award privileged access to large contributors. Id. Finally, it found that the first three factors hindered political debate, candidate interaction, and public confidence and participation in the electoral process. Id.

27. Sorrell, 118 F. Supp. 2d at 483. The court interpreted Buckley v. Valeo as having created a per se rule that limitations on campaign expenditures are unconstitutional. Id.

28. Landell, slip op. at 5.


30. Expenditure Limits in Vermont Elections Upheld Against First Amendment Challenge, supra note 29; Landell, slip op. at 20 (emphasizing that the Court never explicitly created a per se rule but instead invalidated the expenditure limitations in FECA because of the government’s failure to establish a sufficiently compelling interest).

31. Landell, slip op. at 25.

32. Editorial, Campaign Finance Nirvana, supra note 16, at 4. The author noted that, “[s]upporters of strict limits on campaign finance must think they’ve died and gone to
withdrew its decision by order on October 3, 2002\textsuperscript{33} in response to the plaintiffs' petition for a rehearing en banc.\textsuperscript{34} The panel neglected to state a reason for the withdrawal.\textsuperscript{35} However, Brenda Wright, a representative of the National Voting Rights Institute and the lead attorney representing the Vermont Public Interest Research Group, speculated that the panel withdrew its opinion in order to address concerns held by other judges on the Second Circuit.\textsuperscript{36} If the panel issues another decision upholding Vermont's expenditure limits, it will provide the Supreme Court with an opportunity to reconsider its holding in Buckley.\textsuperscript{37}

This Comment shows that Act 64 and the facts of Landell v. Sorrell are an inadequate vehicle for challenging Buckley's rejection of campaign expenditure limits. First, this Comment provides an overview of prior law pertaining to the constitutionality of limits on campaign expenditures, emphasizing interpretations of the standard of review in Buckley v. Valeo and subsequent cases. Second, this Comment shows that Act 64's expenditure limits do not serve a compelling government interest. It explains that, thus far, courts have identified only one government interest that is sufficiently compelling to justify regulations of campaign finance, and that expenditure limits fail to serve that interest. Third, this Comment shows that even if the interest asserted by Vermont in preventing privileged access is compelling, there are insufficient facts to establish expenditure limits as a valid means of preventing privileged access. This Comment concludes with suggestions

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34. E-mail from Brenda Wright, National Voting Rights Institute, Boston, MA to Nathan Huff (Nov. 22, 2002 18:08 EST) (on file with author). Cases before the United States Courts of Appeals are generally heard by a three-member panel of judges. 28 U.S.C.S. 46(c) (2000). However, a majority of the active judges on the circuit can order a hearing or rehearing en banc. Id. A court sitting en banc consists of all of the circuit judges in active service and those senior judges who were members of the panel that made the initial decision. Id. See also CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 11 (6th ed. 2002); Everything You Ever Wanted to Know About the Second Circuit, at http://www.ca2.uscourts.gov/COAInfo.htm (last visited Sept. 6, 2003).

35. E-mail from Brenda Wright, supra note 34.

36. Id. Ms. Wright also expressed her surprise at the fact that the panel had not yet asked the parties to respond to the petition. Id. She indicated that such requests are general practice when the Courts are seriously considering granting a rehearing. Id.

37. See supra note 14; Campaign Finance Nirvana, supra note 16.
II. A BRIEF HISTORY OF CAMPAIGN FINANCE LAW

A. Constitutional Provisions

The Due Process Clause of the Fourteenth Amendment is the starting point for any examination of constitutional provisions relevant to state campaign finance reforms. According to the theory of selective incorporation, this clause applies the first ten amendments to the states. Therefore, states can only violate those amendments through their incorporation into the Fourteenth Amendment. In the context of campaign finance reforms, the First Amendment, through its incorporation into the Fourteenth Amendment, limits the power of the states to regulate campaign finance. In Vermont, this power is granted to its General Assembly by Chapter Two, Sections 6 and 45 of the Vermont State Constitution.

The First Amendment protects the basic freedom of expression, which encompasses both speech and association. One of the major purposes of this Amendment is to protect political discussion.

39. Id.
40. Id. (explaining the doctrine of "selective incorporation," and noting as an example, "if a state were to abridge the freedom of speech, it would be abridging the First Amendment as applied to it through the Fourteenth Amendment").
41. See U.S. CONST. art. I, § 4. This Article grants Congress the power to regulate federal elections. This power exists in tension with, and is subject to, the limitations created by the First Amendment. See Buckley v. Valeo, 424 U.S. 1, 13-14 (1976). The Buckley Court noted that, "the critical constitutional questions presented here go not to the basic power of Congress to legislate in this area, but to whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent [sic] candidates and minor parties in contravention of the Fifth Amendment." Buckley, 424 U.S. at 13-14. See also Erznoznik v. Jacksonville 422 U.S. 205, 209 (1975) (explaining that the government can regulate the time, place, and manner of speech in order to further an important government interest that is unrelated to the restriction of communication).
42. VT. CONST. Ch. II, §§ 6, 45.
43. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id.
44. Buckley, 424 U.S. at 14. The Buckley Court focused on the importance of the public's ability to make informed decisions regarding candidates for office because elected officials "shape the course that we follow as a nation." Id. at 15; see also Mills v. Alabama, 384 U.S. 214, 218 (1966). In Roth v. United States, the Supreme Court noted that "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for states on how to succeed where Vermont has failed in asserting its challenge to Buckley v. Valeo."
Company v. Roy, the Supreme Court stated, "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."\(^45\) This statement suggests that the protection of the First Amendment extends beyond the realm of pure speech to conduct such as campaign spending.\(^46\)

In the context of political campaigns, this conduct includes spending money to communicate ideas to the electorate.\(^47\) Some argue that the spending of political money is more like a disposition of property than an exercise of free speech.\(^48\) However, the Supreme Court has made it abundantly clear that a particular communication's dependence on the spending of money does not diminish its First Amendment protection.\(^49\) Therefore, campaign expenditures possess the same degree of First Amendment protection as other forms of expression.\(^50\)

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45. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). In Monitor Patriot, the Court held that publications that referenced candidates for political office received the same amount of First Amendment protection as speech made by the actual office holders. Id. at 271. See also Eu v. San Francisco Democratic Comm., 489 U.S. 214, 223 (1989); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). In Garrison, the Court discussed the essential role of free speech in a democratic society. Id.

46. See N.Y. Times Co., 376 U.S. at 266, 269. In New York Times Co., the Court awarded First Amendment protection to published statements even though they constituted paid commercial advertisements. Id.; see also Bigelow v. Virginia, 421 U.S. 809, 820 (1975). In New York Times Co. and Bigelow, commercial advertising received the same degree of protection as pure speech.

47. See Buckley, 424 U.S. at 19 (noting that restricting expenditures for political communication "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached"). See also Fein, supra note 15 (emphasizing the necessity of political spending to increase "candidate speech and corresponding voter education").

48. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398-99 (2000) (Stevens, J., concurring). Justice Stevens argued that money is not speech, but rather property. Id. He concluded that because limitations on political spending were not limitations on speech, but rather on property, they did not warrant the same level of constitutional protection. Id. Justice Stevens noted that "[t]he 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." Id. See also Robert F. Bauer, The Demise of Reform: Buckley v. Valeo, the Courts, and the "Corruption Rationale", 10 Stan. L. & Pol'y Rev. 11, 11-12 (1998). The characterization of political spending as speech has been widely criticized. Id. The primary alternative would be to characterize political spending as conduct. Id. Were it such, the government would possess extensive authority to regulate it. Id.

49. N.Y. Times Co., 376 U.S. at 266.

50. See Monitor Patriot Co., 401 U.S. at 272; see also N.Y. Times Co., 376 U.S. at 266.
B. The Federal Election Campaign Act

The Federal Election Campaign Act was the first modern attempt at comprehensive campaign finance reform. Prior to its passage, there were several regulations of campaign finance of less historical significance. In 1910, Congress passed the Publicity Act, which required campaign committees for the House of Representatives operating in two or more states to disclose contributions exceeding $100. In 1925, the

51. Buckley v. Valeo, 171 U.S. App. D.C. 172, 182 (1975) (referring to the Federal Election Campaign Act as "the latest, and by far the most comprehensive, reform legislation passed by Congress concerning the election of the President, Vice-President and members of Congress"); Molly Peterson, Note, Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?, 25 HASTINGS CONST. L.Q. 421, 428 (1998); Sheils, supra note 1, at 478 (noting that the Federal Election Campaign Act applied only to elections for the offices of President, Senator, and Representative). The Federal Election Campaign Act has served as the model for recent campaign finance regulations. Smith, supra note 1, at 1055. The three basic elements of this model are limits on expenditures, limits on contributions, and public funding. Id.

52. DIANA DWYRE & VICTORIA A. FARRAR-MYERS, LEGISLATIVE LABYRINTH: CONGRESS AND CAMPAIGN FINANCE REFORM 4-5 (2001). The authors list several early campaign finance regulations. Id. In 1907, pursuant to President Theodore Roosevelt's concern over the role of corporations in elections, Congress passed the Tillman Act. Id. at 4. The Act banned corporations and national banks from contributing to federal candidates' campaigns. Id. In 1939, Congress passed the Hatch Act, which prohibited federal employees from "active participation in national politics." Id. at 5. In 1940, that act was revised, limiting the fundraising and spending abilities of party committees operating in more than one state. Id. Expenditures were limited to three million dollars per year; individual contributions were limited to five thousand dollars per year. Id. Finally, in 1947, Congress passed the Taft-Hartley Act, which was aimed in part at eliminating contributions by labor unions. Id. In his article discussing the importance of examining the entire history of campaign finance, Bradley Smith points out that most examinations of campaign finance start with the amendment of the Federal Election Campaign Act in 1974. Smith, supra note 1, at 1051. This, he argues, creates an inaccurate perception that the influence of money in politics is a modern phenomenon. Id. at 1051-52.

An examination of the entire history of campaign finance yields a different conclusion. Id. As Mr. Smith notes, even in the earliest U.S. elections, when candidates paid for their own campaigns, the same aristocratic white males exerted influence over the political process. Id. at 1053. The 1828 presidential campaign of Andrew Jackson is seen as the beginning of expensive, mass campaigns. Id. It was the first campaign that spent large sums of money on newspaper advertisements, pamphleteering, and rallies. Id. The passage of the Pendleton Act in 1883, which created the federal civil service, dried up money from political officeholders, thereby increasing the influence of corporations and wealthy individuals. Id. Corporations were aware of this new influence. Id. at 1054. "With the growth of state and federal government powers, including the increased regulation and subsidization of industry, corporate America recognized the need for increased political participation. The stated goal was not to buy legislative votes, but to elect candidates supportive of corporate interests." Id. (footnote omitted).

53. DWYRE & FARRAR-MYERS, supra note 52, at 4.
Federal Corrupt Practices Act closed the loophole that allowed non-election-year contributions to escape disclosure.54

Following its passage in 1971, the Federal Election Campaign Act was amended several times, the most significant of which was in 1974.55 The amendments established limits on expenditures by political party organizations as well as candidates for President, Senator, and Representative.56 As amended, the Federal Election Campaign Act distinguished the two main types of political spending: campaign contributions and campaign expenditures, and it placed different limitations on both types.57 For example, section 608(b)(1) limited contributions that individuals could make to $25,000 per year, with no more than $1000 contributed to a single candidate.58 Section 608(c) limited the expenditures of candidates for election to the office of President to $20 million.59 In passing the Federal Election Campaign Act, Congress was aware of the impact of these provisions on First Amendment freedoms.60 It even included an expedited consideration

54. Id. at 5.
55. Id. The amendments followed the highly publicized Watergate scandal in 1972. Id. The ensuing investigation and hearing uncovered several abuses of the campaign finance system, which sparked an increased call for campaign finance reform. Id.
56. Id. at 5-6. Other provisions include: limits on contributions from individuals, political action committees, and party committees, limits on independent contributions, disclosure requirements and reporting rules, and an amendment allowing presidential candidate nominees from major parties to receive public funding. Id. It also established the Federal Election Commission. Id. The Federal Election Campaign Act was amended again in 1976 and 1979. Id. at 5. The intent of the disclosure requirements set out in the Act was to give voters information on the financing of specific campaigns and also to aid in the enforcement of the other provisions of the Act. Levy, supra note 5, at 45. The disclosure requirements required political committees (groups that received political contributions or made political expenditures in excess of $1000 per year) to report the names of those who contributed in excess of $10 per year, and the names and occupations of those who contributed $100 or more per year. Id. In Buckley, the Supreme Court applied intermediate scrutiny to these provisions because they did not restrict free speech. Id. Sliding scale provisions for public funding of elections apply to presidential candidates. Id. at 46. Major party candidates receive the most funding, and those representing smaller parties receive less or none at all. Id. To be eligible for funding, candidates must pledge to abide by campaign spending limits. Id. The Supreme Court upheld the constitutionality of these particular expenditure limits because they were voluntary. Id. at 46, 49. The Court also upheld funding of campaigns because it facilitated speech rather than inhibiting it. Id. at 46.
58. Id. § 608(b)(1), (3).
59. Id. § 608(c)(1)(B). This provision also limited the expenditures of candidates for nomination to the office of President to ten million dollars. Id. § 608(c)(1)(A). Candidates for election to the office of Senator were limited to the greater of twelve cents multiplied by the total voting age population of the state or $150,000. Id. § 608(c)(1)(A).
60. Peterson, supra note 51, at 428.
provision, which allowed an almost immediate consolidated challenge to the Act.\(^{61}\)

**C. Buckley v. Valeo: Four Lasting Effects**

The challenge to the Federal Election Campaign Act came in the 1976 Supreme Court case, *Buckley v. Valeo*.\(^{62}\) The case arose during a period when the rising cost of election campaigns caused most Americans to question the integrity of their democratic system.\(^{63}\) The Supreme Court examined the constitutionality of the Federal Election Campaign Act of 1971 as amended by the Federal Election Campaign Act Amendments of 1974.\(^{64}\) The decision affected the law surrounding campaign finance reform in four significant ways. First, the Court drew a distinction between the treatment of contribution and expenditure limits.\(^{65}\) Second, it declared the applicable standard of review for government regulations of campaign finance.\(^{66}\) Third, it rejected three broad government interests in limiting campaign expenditures.\(^{67}\) And finally, the Court identified the “prevention of corruption or the appearance of corruption” as the only sufficiently compelling government interest in campaign finance regulation.\(^{68}\) The *Buckley* Court’s analysis has shaped

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61. *Id.*

62. *Id.*; see also Bauer, *supra* note 48, at 11 (noting that since its decision, *Buckley v. Valeo* has been highly controversial).

63. *Buckley v. Valeo*, 519 F.2d 821, 838-39 (D.C. Cir. 1975). The Center for Political Studies conducted a survey asking Americans: “Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?” *Id.* at 839. In 1970, 49.6 percent responded a “few big interests.” *Id.* In 1974, the percentage answering the same way jumped to 69.9 percent. *Id.* *Buckley v. Valeo*, 424 U.S. 1, 20 (1976). In 1974, seventeen of the sixty-five major senatorial candidates spent more than the combined fundraising amounts allowed by the Federal Election Campaign Act for the primary and general elections. *Id.* at 20 n.21.

64. *Buckley*, 424 U.S. at 6.

65. *Id.* at 20-21 (noting that “[b]y contrast with a limitation upon expenditures for political expression, a limit upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication”); Bauer, *supra* note 48, at 12.

66. *See Buckley*, 424 U.S. at 44-45 (holding that “exacting scrutiny” was applicable to regulations that limit the right of political expression); Levy, *supra* note 5, at 44. *See also* Suster v. Marshall, 149 F.3d 523, 532 (6th Cir. 1998) (applying the *Buckley* standard to state election laws).

67. *Buckley*, 424 U.S. at 53, 54, 57. The governmental interests rejected by the Court were the prevention of corruption, equalizing the resources available to candidates, and reducing the cost of political campaigns. *Id.*

68. Fed. Election Comm’n v. Nat’l Conservative PAC, 470 U.S. 480, 496-97 (1985) (explaining its holding in *Buckley* with regard to corruption). The Court stated that it “held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.” *Id.* at 497. *See
campaign finance law over the last twenty-six years, and is still followed in cases involving campaign finance reform.\textsuperscript{69}

1. Expenditures Distinguished from Contributions

In analyzing the constitutionality of the Federal Election Campaign Act, the \textit{Buckley} Court made a deliberate distinction between those provisions limiting expenditures and those limiting contributions.\textsuperscript{70} The Court determined that limitations on expenditures required a higher level of judicial scrutiny because they decreased the quantity of permissible political communication.\textsuperscript{71} It noted that nearly every means of communicating through mass media required the spending of money.\textsuperscript{72} It also noted that the electorate largely depended on the media as a source of information about candidates.\textsuperscript{73} Therefore, limitations on expenditures were equivalent to limitations on the quantity of speech permitted.\textsuperscript{74} The Court did not apply this heightened level of scrutiny to limits on contributions, because contributions had less communicative

\textsuperscript{69} See Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); Kruse v. City of Cincinnati, 142 F.3d 907, 909 (6th Cir. 1998); \textit{see also} Landell v. Vt. Pub. Interest Research Group, No. 00-9159, slip op. at 19 (2d Cir. Aug. 7, 2002), \textit{available at} http://www.nvri.org/library/cases/vermont/Landell_v_Sorrell/Landell_second_circuit_opinion.pdf, \textit{withdrawn} 300 F.3d 129 (2d Cir. 2002) (noting that "\textit{Buckley v. Valeo remains the seminal case governing the constitutional review of campaign finance reform efforts, including expenditure limitations}").

\textsuperscript{70} \textit{NC-PAC}, 470 U.S. at 491; \textit{Buckley}, 424 U.S. at 20-21. \textit{See also} Kruse, 142 F.3d at 911-12.

\textsuperscript{71} \textit{Buckley}, 424 U.S. at 19-20. For example, on January 1, 1975, a full page advertisement in the daily edition of most major metropolitan newspapers cost $6971, seven times the amount allowed under § 608(e)(1). \textit{Id.} at 20 n.20. \textit{See also} \textit{Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.}, 533 U.S. 431, 440 (2001).

\textsuperscript{72} \textit{Buckley}, 424 U.S. at 19 (explaining that "[t]he distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs").

\textsuperscript{73} \textit{Id.} (referring to television, radio, and other mass media as "indispensable instruments of effective political speech"). Furthermore, the Court noted the importance of a well-informed electorate to ensuring the proper function of a democracy. \textit{Id.} at 52-53. \textit{See also} Fein, \textit{supra} note 15 (commenting that "[t]he political illiteracy of the average citizen is appalling. What is desperately needed to revitalize our democracy and system of representative government is more, not less, candidate speech and corresponding voter education."). In \textit{Whitney v. California}, the Supreme Court stated that "Public discussion is a political duty." Whitney v. California, 274 U.S. 357, 375 (1927), \textit{overruled by} Brandenburg v. Ohio, 395 U.S. 444 (1969). The Court in \textit{Buckley} commented that this holding "applies with special force to candidates for public office." \textit{Buckley}, 424 U.S. at 53. \textit{See also} Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (discussing the importance of the public's right to speak freely about government affairs).

\textsuperscript{74} \textit{Buckley}, 424 U.S. at 19. The Court analogized being free to engage in unlimited political speech under spending limitations to "being free to drive an automobile as far and as often as one desires on a single tank of gasoline." \textit{Id.} at 17-18.
value than expenditures. It also stated that contributions expressed general support for a candidate through a "symbolic act," without communicating the underlying reasons for that support.

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, the Supreme Court added: "[T]he symbolic communicative value of a contribution bears little relation to its size." This statement corresponds with the majority in *Buckley*, which also recognized that, at most, contributions indicated the strength of an individual's support for a candidate. Because the size of contributions is of little significance, placing limits on them has a minimal impact on the right to free speech. Therefore, limitations on contributions receive something less than strict judicial scrutiny.

2. Standard of Review

In *Buckley v. Valeo*, the Supreme Court applied a First Amendment analysis to the Federal Election Campaign Act. The Court utilized a basic means-ends test, requiring a factual showing that regulations of campaign finance (the means) be narrowly tailored to serve a compelling government interest (the ends). Applying this heightened standard to

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75. *Id.* at 20-21 (explaining that unlike limitations on expenditures, limitations on contributions "entail[] only a marginal restriction upon the contributor's ability to engage in free communication").

76. *Id.* at 21. The Court explained that an increase in the size of a contribution does not alter the general communication of support, because the communication rests solely on the symbolic act of making the contribution. *Id.* The Court noted that "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

77. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 615 (1996). The Court also noted that despite contribution limits, a contributor is still free to engage in other types of political expression, such as volunteering. *Id.*

78. *Buckley*, 424 U.S. at 21 (noting that, "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate"). The Court explained that contribution limits forced candidates to raise funds from an increased number of individuals and forced contributors to spend more of their money on direct political expression. *Id.* at 21-22.

79. *Id.* at 21.


82. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). Chief Justice Marshall stated, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*

83. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (interpreting *Buckley* as requiring government regulations of political speech to be narrowly tailored to
the Federal Election Campaign Act, the *Buckley* Court held that the Act's limitations on contributions were constitutional but its limitations on expenditures were not.\textsuperscript{84} The Court determined that the limits on contributions served the compelling government interest in eliminating actual or apparent corruption.\textsuperscript{85} The Court found no indication that the expenditure limits achieved this interest.\textsuperscript{86}

The standard of review set out in *Buckley v. Valeo* continues to be the prevailing rule in testing the constitutionality of campaign finance reforms.\textsuperscript{87} For example, in the recent case of *Nixon v. Shrink Missouri Government PAC*, the Supreme Court articulated the *Buckley* standard of review in terms of a three-part test.\textsuperscript{88} First, the Court asked whether the provision in question was entitled to full First Amendment protection.\textsuperscript{89} Second, it inquired whether the provision served a sufficiently compelling government interest.\textsuperscript{90} Third, the Court examined whether the provision was narrowly tailored to serve that interest.\textsuperscript{91}

3. Three Government Interests Explicitly Rejected by *Buckley v. Valeo*

The *Buckley* Court was the first to discuss what constitutes a sufficiently compelling government interest in limiting campaign expenditures.\textsuperscript{92} In its analysis of the Federal Election Campaign Act, the Court deemed three general government interests insufficient to justify limitations on expenditures.\textsuperscript{93} First, the interest in "the prevention of actual and apparent corruption of the political process" and "alleviating serve a compelling government interest). See also *Buckley*, 424 U.S. at 44-45; Levy, *supra* note 5, at 44. The Supreme Court in *Buckley v. Valeo* classified campaign finance reforms as content-based restrictions on speech. 424 U.S. at 44-45. As such, the Court required that they be narrowly tailored to serve a sufficiently compelling government interest. *Id.*

84. *Buckley*, 424 U.S. at 44-45 (explaining that "the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations").

85. *Id.* at 26.

86. *Id.* at 45. The Court found no evidence that the expenditures prohibited by the Act resulted in corruption. *Id.* at 45-46.


89. *Id.*

90. *Id.*

91. *Id.* The Court articulated the requirement that a provision be narrowly tailored by mandating that the provision be "closely drawn" to serve the government interest. *Id.*

92. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *NC-PAC*, 470 U.S. at 496-97; *Suster*, 149 F.3d at 532; *Kruse*, 142 F.3d at 911.

the corrupting influence of large contributions" were invalidated because
the Act's contribution limits already served those interests. 94 The Court
rejected the second interest, leveling the election playing field by
equalizing the financial resources available to candidates, for two reasons. 95 First, the Court explained that the level of financial resources
available to candidates will often vary depending on the candidate's level
of support. 96 Second, any effort to equalize campaign expenditures might
actually handicap an unknown candidate who needs to bolster his or her
name recognition. 97

Finally, the Buckley Court invalidated the interest in reducing the cost
of elections. 98 This interest was rejected because the government lacked
the power under the First Amendment to deem spending to promote
one's political views wasteful. 99 The Court also noted: "In the free
society ordained by our Constitution it is not the government, but the
people . . . who must retain control over the quantity and range of debate
on public issues in a political campaign."100 This language confirms the
Court's deference to the people in matters involving political speech.

4. The Government Interest in Preventing Corruption

The Supreme Court has repeatedly interpreted Buckley v. Valeo as
identifying the only government interest sufficient to justify campaign
finance reforms: the prevention of actual or apparent corruption of the
political process. 101 For example, in Federal Election Commission v.
National Conservative Political Action Committee, a majority of the Supreme Court struck down provisions of the Federal Election Campaign Act limiting expenditures because they failed to prevent corruption.\(^{102}\)

Several courts have interpreted Buckley's identification of this single interest as having implicitly created a per se rule that any limit on campaign expenditures is unconstitutional.\(^{103}\) This interpretation is also derived from Buckley's holding that no correlation exists between expenditures and corruption, and, therefore, expenditure limits cannot serve the interest in preventing corruption.\(^{104}\) Since Buckley, courts have been unable to find a factual showing sufficient to establish this correlation.\(^{105}\)

III. LANDELL V. SORRELL: VERMONT'S CHALLENGE TO BUCKLEY V. VALEO

Landell v. Sorrell arose in response to the passage of the 1997 Vermont Campaign Finance Reform Act (Act 64).\(^{106}\) The Act was passed following the governor's inaugural address, which focused on problems resulting from the increasing cost of elections for political office in Vermont.\(^{107}\) Act 64 included limitations on political expenditures similar unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.” 528 U.S. at 390.

102. NC-PAC, 470 U.S. at 496-97; see also Buckley, 424 U.S. at 53 (holding that the government interest in preventing actual or apparent corruption was insufficient to justify limitations on candidates' expenditure of their personal funds). In Citizens Against Rent Control, the Supreme Court articulated an even broader interpretation when it stated: “Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate.” 454 U.S. at 296-97.

103. See Kruse v. City of Cincinnati, 142 F.3d 907, 911 (6th Cir. 1998). See also Homans v. City of Albuquerque, 264 F.3d 1240, 1243-44 (10th Cir. 2001). The United States Court of Appeals for the Tenth Circuit rejected the district court's holding that Buckley did not create such a rule. Id. The court held unconstitutional provisions contained in the Albuquerque, New Mexico City Charter that limited expenditures by candidates. Id. at 1244-45. In doing so, it cited the Buckley Court's rejection of three proposed government interests in limiting expenditures: deterring corruption, equalizing the financial resources of candidates, and restraining the cost of campaigns. Id. at 1243-44. See also Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 627 (1996) (Kennedy, J., joined by Rehnquist, C.J. and Scalia J., concurring in part and dissenting in part) (stating that “[t]he central holding in Buckley v. Valeo is that spending money on one's own speech must be permitted”).


105. Id.; Homans, 264 F.3d at 1244.


to those held unconstitutional in *Buckley v. Valeo*. One such provision, section 2805a, limited candidates' total campaign expenditures during a two-year election cycle according to the office being sought. This provision constituted a direct assault on *Buckley*'s treatment of expenditure limits.

*Landell v. Sorell* consolidated three separate challenges to the constitutionality of several provisions of Act 64. The plaintiffs sought declaratory and injunctive relief under the First and Fourteenth Amendments and section 1 of the Civil Rights Act of 1871. During a ten-day bench trial, the district court examined the evidence presented by the General Assembly in support of Act 64. This evidence consisted of fifteen specific findings of fact, including: candidates give preferred access to wealthy contributors; the increasing cost of elections forces candidates to depend on large contributions; and large campaign contributions and expenditures decrease public confidence.

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Landell, slip op. at 6-7; Fein, supra note 15 (stating that “[i]n 1997, Vermont declared war against representative and responsive government under the banner of campaign finance reform . . . . Urgently needed and constitutionally coveted political speech was the law’s first casualty.”).


110. See Memorandum from Deborah L. Markowitz, supra note 19 and accompanying text.

111. *Sorrell*, 118 F. Supp. 2d at 463; *Landell*, slip op. at 4-5.

112. *Sorrell*, 118 F. Supp. 2d at 459, 462. The plaintiffs argued that certain provisions of Act 64 violated their rights of free speech and association. *Id.*

113. *Landell*, slip op. at 9; See generally *Sorrell*, 118 F. Supp. 2d at 459.

114. *Landell*, slip op. at 10-12. Other relevant findings included: (1) Due to the rising cost of elections in Vermont, many Vermonter’s are prohibited from running for office. *Id.* at 10. (2) The increase in campaign costs has caused a decrease in the “[r]obust debate of issues, candidate interaction . . . and public involvement and confidence in the electoral process.” *Id.* at 11. (3) The contribution limits contained in Act 64 allow candidates to raise sufficient funds to campaign. *Id.* (4) “Citizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns.” *Id.* (5) Incumbents have a significant advantage over challengers in the electoral process and should therefore be limited in the amount of expenditures they may make. *Id.* at 12. Another justification Vermont used to support expenditure limits was the fact that campaigns were becoming too expensive. Fein, supra note 15. Editorialist Bruce Fein responded by stating, “[A] campaign is ‘too expensive’ only in the eye of the beholder. No number can be plucked from the heavens as the benchmark for determining ‘too much’ candidate speech.” *Id.*
After examining these findings, the district court found that Vermont had demonstrated several compelling justifications for Act 64's expenditure limitations. These justifications included freeing incumbents from the burden of excessive fundraising, preserving faith in the democratic process, protecting the access of those who cannot afford to provide large donations, and decreasing the importance of thirty-second television ads. Despite finding these interests compelling, the district court held the expenditure limits to be unconstitutional. The court interpreted Buckley as having created a per se rule that expenditure limits were unconstitutional. As a result, the court enjoined Vermont from enforcing the campaign expenditure limits.

The parties appealed to the United States Court of Appeals for the Second Circuit to determine whether Act 64's challenged provisions violated the First Amendment. In an opinion that was later withdrawn, the court held that Act 64's expenditure limits were constitutional. First, it rejected the district court's finding that Buckley v. Valeo created a per se rule that expenditure limitations were unconstitutional. It pointed out that Buckley was decided on a narrow factual basis and that the Court never specifically stated that all expenditure limits were unconstitutional. Further, the Second Circuit stated that the expenditure limits in Buckley were invalid because the government failed to assert a compelling government interest. The court stated that "[a]fter Buckley, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record,

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115. Sorrell, 118 F. Supp. 2d at 478.
116. Landell, slip op. at 12.
117. Id.
118. Id. Having found that Buckley v. Valeo created a per se rule against campaign expenditure limitations, the court refused to violate the doctrine of stare decisis. Id. See also Sorrell, 118 F. Supp. 2d at 483.
119. Landell, slip op. at 4.
120. Id. at 5. In its discussion, the court noted that in First Amendment cases, the breadth of review is expanded so that the appellate court must independently examine the entire record. Id. at 17 (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)); supra note 29 and accompanying text.
121. Landell, slip op. at 5-6.
122. Landell, slip op. at 18; Expenditure Limits in Vermont Elections Upheld Against First Amendment Challenge, supra note 29.
123. Landell, slip op. at 19-20, 21-22.
124. Id. at 19-20.
such that some expenditure limits could survive constitutional review." The court found that Vermont had identified such an interest.

The Second Circuit held the government interest in preventing privileged access by wealthy contributors at the expense of those who could not afford to make large campaign contributions to be sufficiently compelling. More specifically, it held that Vermont’s General Assembly demonstrated that unlimited campaign expenditures in Vermont led to a situation where “elected officials [are] forced to provide privileged access to contributors in exchange for campaign money.” The court found that preventing this favoritism was a compelling interest because it protected the accessibility and accountability essential to the democratic process.

IV. FATAL FLAWS IN VERMONT’S CHALLENGE TO BUCKLEY V. VALEO

In Turner Broadcasting System v. Federal Communications Commission, Justice Kennedy stated: “When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’” In the case of campaign finance reform, the government must show that the regulations in question are “narrowly tailored to serve a compelling state interest.”

In Landell v. Sorrell, Vermont failed to make this showing.

125. Id. at 21-22. The court focused on language from Buckley stating that none of the governmental interests proposed were sufficient to justify the expenditure limits. Id. at 19-22.

126. Id. at 25.

127. Id.

128. Id. This exchange of money for access fits the definition of a financial quid pro quo. Id. at 27.

129. Id. at 25-26. Neither individuals nor organizations should have greater access and, therefore, greater influence over government officials simply because they can afford to make large contributions. Id. at 27. The court noted several factors underlying this compelling interest. Id. at 25-26. First, campaigns were becoming too expensive, thereby forcing candidates to spend too much time fundraising. Id. at 25. Candidates therefore needed to attract and favor larger contributors over lesser contributors, resulting in drastic increases in the overall campaign expenditures. Id. The court also noted that the limited number of contributions in Vermont compounded the effects of these factors. Id. at 25-26. Thus, the court found that the expenditure limitations reduced corruption of the process by relieving the “financial pressures [of] spiraling campaign costs . . . .” Id. at 26.


A. Campaign Expenditure Limits Still Do Not Serve a Compelling Government Interest

*Buckley* and its progeny make clear that the only compelling interest sufficient to justify campaign finance regulations is the prevention of actual or apparent corruption. Expenditure ceilings, such as those contained in Act 64, fail to serve this interest. The primary reason for this failure is the lack of a correlation between expenditures and corruption. Even if such a correlation were shown to exist, Act 64's expenditure limits are not narrowly tailored to serve this interest.

1. Campaign Expenditures Do Not Lead to Corruption

In *Federal Election Commission v. National Conservative Political Action Committee*, the Supreme Court defined corruption as a "subversion of the political process." The Court explained that the ultimate example of corruption in the political context is payment of money for political favors. This financial *quid pro quo* results from contributions to candidates, not expenditures by candidates. As a result, the Court found no factual indications that campaign expenditures

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132. *Landell*, dissent at 60 (Winter J., dissenting) (asserting that "[t]he record in justifying Act 64's massive regulation of political speech is not strong; in fact, it is pitifully weak"). The Vermont General Assembly considered campaign finance summaries for statewide races during the period from 1978-1996. *Landell*, slip op. at 9. The dissent pointed out that the average candidate for office in Vermont historically spent less than the ceilings enacted in Act 64. *Landell*, dissent at 60. These findings were insufficient to establish the compelling nature of the interest in preventing privileged access. *Id.*


134. *See NC-PAC*, 470 U.S. at 496-97; *Buckley*, 424 U.S. at 55 (holding that the Federal Election Campaign Act's limitations on campaign expenditures did not serve the government interest in alleviating actual or apparent corruption).


137. *NC-PAC*, 470 U.S. at 497.

138. *Id.*

139. *See id.; see also Colo. Republican*, 518 U.S. at 615-19.
lead to corruption, and therefore invalidated the campaign expenditure limits at issue for failure to serve a compelling government interest.footnote140

Similar to Federal Election Commission, the record in Landell v. Sorrell did not demonstrate the connection between expenditures and corruption.footnote141 In his dissenting opinion from Landell v. Vermont Public Interest Research Group, Judge Winter referred to the factual record established in Landell v. Sorrell as "pitifully weak."footnote142 The district court cited facts from the General Assembly's consideration of Act 64, which involved over sixty-five hearings and 145 witnesses.footnote143 However, most of this testimony consisted of one-sided personal opinions that failed to create a sufficient basis for establishing a connection between campaign expenditures and corruption.footnote144 The court also considered allegations of specific instances of corrupt campaign fundraising practices.footnote145 Although very serious, Judge Winter stated that the allegations "added[] nothing to what was considered and rejected in Buckley."footnote146

footnote140. NC-PAC, 470 U.S. at 496-97. The Court of Appeals for the Sixth Circuit followed this view in Kruse v. City of Cincinnati when it said, "[T]he spending of money legally raised by candidates themselves poses no risk of quid pro quo corruption and campaign spending limits cannot be justified by the anti-corruption rationale." Kruse v. City of Cincinnati, 142 F.3d 907, 913, 915 (6th Cir. 1998). This decision provides support for the view that campaign spending limits are not narrowly tailored to serve the interest in alleviating actual or apparent corruption because expenditures do not pose the same threat of corruption as contributions. Id. The Kruse court used this rationale to invalidate limits on campaign expenditures contained in a Cincinnati city ordinance. Id. at 909. It found the interest in preventing corruption and the appearance of corruption insufficient to justify limitations on campaign expenditures. Id. at 915. It interpreted Buckley v. Valeo to stand for the proposition that contribution limits and disclosure requirements were the only constitutional means of serving the interest in preventing corruption. Id.

footnote141. See NC-PAC, 470 U.S. at 496-97. The Court found that expenditures, especially those uncoordinated with a candidate's campaign, had no tendency to produce corruption or the appearance of corruption. Id.


footnote143. Sorrell, 118 F. Supp. 2d at 466.

footnote144. Id. at 466-67. "Much of the testimony heard was anecdote and personal opinion." Id. "[F]ew witnesses, if any, testified against the bill." Id. Senator Peter Shumlin's statements to the Senate Committee on Government Operations provide an example of the type of testimony elicited during the hearings. Id. at 467. He testified that, "the time he spent raising funds prior to the 1996 elections 'was one of the most distasteful things that I've had to do in public service.'" Id.

footnote145. Id. at 465-66 (citing instances when government decisions favored large contributors).

footnote146. Landell, dissent at 59 (Winter J., dissenting). In the two decades leading up to Buckley, there was a three hundred percent increase in campaign expenditures and a
2. Act 64's Ceilings on Campaign Expenditures Are Not Narrowly Tailored to Serve the Anti-Corruption Interest

To survive the *Buckley* analysis, a regulation of campaign finance must accomplish more than serving the interest in preventing actual or apparent corruption. A regulation must also be narrowly tailored to serve that interest. To satisfy this requirement, a regulation on speech must use the least restrictive means possible to serve the government interest asserted.

*Buckley* held that limits on campaign contributions and disclosure requirements operated as the least restrictive means of serving the government's interest in preventing actual or apparent corruption. The Court explained that the presence of these provisions made limits on campaign expenditures unnecessary. It found no indication that the Federal Election Campaign Act's contribution limits and disclosure requirements were insufficient to serve the interest in preventing actual or apparent corruption.


149. *See NOWAK*, supra note 38, at 1072. "Even if the legislative purpose is legitimate, and one of substantial governmental interest, the government cannot pursue it by means that broadly stifle personal liberties if the end can be more narrowly achieved." *Id.* See also *Shelton* v. Tucker, 364 U.S. 479, 488 (1960) (invalidating a statute requiring teachers to file affidavits listing organizations they belonged to during the previous five years because it was not narrowly tailored, but rather "completely unlimited").

150. *Buckley*, 424 U.S. at 55-56. The Court was not persuaded by the argument that expenditure limitations were necessary to prevent circumvention of the contribution limits. *Id.* The Court said that it lacked any indication that the criminal penalties for violating the contribution ceilings were insufficient to adequately serve this interest. *Id.* at 56.

151. *Id.* at 55. Section 608(b) of the Federal Election Campaign Act prohibited individuals from contributing more than $25,000 per year or $1,000 to any single candidate. *Id.* at 58; *Kruse*, 142 F.3d at 915. "However, NC-PAC and *Colorado Republican* make eminently clear that spending limits on PACs and political parties are unconstitutional not simply because of the presence of contribution limits but because they are not narrowly tailored to serve this interest." *Id.*

152. *Buckley*, 424 U.S. at 55-56; see also *Kruse*, 142 F.3d at 915-16. Since *Buckley v. Valeo*, courts have been faced with the argument that rapid growth of election spending has rendered contribution limits and disclosure requirements insufficient to support the interest in preventing corruption. *Kruse*, 142 F.3d at 915. "As recent events in this nation have shown, contribution limits, alone, will not protect the integrity of the electoral process." *Id.* (citing *Dawn to Dark/Chasing the Dollars: One Day on the [Federal] Fundraising Trail*, BOSTON GLOBE, May 16, 1997, at A1). In *Kruse* v. *City of Cincinnati*, the United States Court of Appeals for the Sixth Circuit examined this argument in light...
In *Kruse v. City of Cincinnati*, the Sixth Circuit rejected the expenditure limits at issue because they were not narrowly tailored to prevent apparent or actual corruption. The court stated that campaign expenditures did not pose the same threat of corruption as campaign contributions, and that limits on expenditures more directly impacted the freedom of speech than limits on contributions. Therefore, not only were expenditure limits less effective than contribution limits as a means of preventing corruption, they also placed a greater burden on the freedom of speech. As a result, the court held that expenditure limits were not the least restrictive means available to eliminate actual and apparent corruption.

When accompanied by contribution limits, expenditure limits are not narrowly tailored because they fail the least restrictive means test. However, the facts surrounding *Landell v. Sorell* indicate that even absent contribution limits, Act 64's expenditure limits would fail to satisfy the narrowly tailored requirement. For example, candidates for state office in Vermont have historically spent less than the mandatory ceilings imposed by Act 64. In fact, during the three election cycles preceding *Landell v. Sorell*, the average House and Senate candidates spent less than their respective maximum amounts. As a result, Act

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153. See *Kruse*, 142 F.3d at 916.
154. Id. at 913 (citing *Buckley*, 424 U.S. at 96-97).
155. Id. at 915-16 (citing *Buckley*, 424 U.S. at 44).
156. Id. (citing *Buckley*, 424 U.S. at 44, 55).
157. Id. at 915.
158. Id. at 913 (citing *Buckley*, 424 U.S. at 55-59).
159. *Landell v. Sorell*, 118 F. Supp. 2d 459, 471-72 (D. Vt. 2000). Recent data indicate that during the period from 1997-2000 Vermont had one of the four lowest levels of spending for its Gubernatorial elections. Id.; Gierzynski, *supra* note 4, at 193. It also had one of the nation's lowest levels of spending in the 1999-2000 state legislative races. Id. at 200.
160. See *Sorrell*, 118 F. Supp. 2d at 471-72.
161. Id. The only exception to these findings occurred in 1994, when the average spending for single member districts was $10 over the $2000 ceiling established in Act 64. Id. at 471. See also *Landell v. Vt. Pub. Interest Research Group*, No. 00-9159, dissent at 60 (2d Cir. Aug. 7, 2002) (Winter J., dissenting), available at http://www.nvri.org/library/cases/vermont/Landell_v_Sorrell/LandellSecondCircuitDissent
64's expenditure limits will have little to no impact on the amount of campaign expenditures in Vermont. Therefore, these limits are ineffective as a means of reducing Vermont's level of actual or apparent corruption.\textsuperscript{162}

\section*{B. Vermont's Interest in Preventing Privileged Access}

The preceding sections of this Comment show that the expenditure limits contained in Act 64 fail to serve what, to date, has been identified as the only compelling government interest sufficient to justify campaign finance regulations.\textsuperscript{163} In light of this failure, the State of Vermont has rejected the argument that \textit{Buckley v. Valeo} foreclosed the possibility of identifying a new compelling interest sufficient to justify limiting expenditures. Instead, Vermont asserted the interest in preventing privileged access of wealthy contributors to candidates at the expense of those who cannot afford to make large contributions.\textsuperscript{164}

Vermont's assertion of this interest suffers two fatal flaws, and as a result, it fails to justify Act 64's expenditure limits. First, the interest in preventing privileged access was implicitly rejected by the Supreme Court in \textit{Buckley v. Valeo}, and therefore is not a compelling state interest.\textsuperscript{165} \textit{Buckley} invalidated the interest in eliminating the corrupting influence of money.\textsuperscript{166} By invalidating this broad interest, the Court implicitly rejected several sub-interests, including the interest in preventing privileged access.\textsuperscript{167}

Both privileged access and the corrupting influence of money arise from the same source. In \textit{Buckley v. Valeo}, the Court stated that the corrupting influence of money arose from candidates' dependence on large contributions.\textsuperscript{168} The Court in \textit{Landell v. Vermont Public Interest Research Group} found that this same dependence caused candidates to provide privileged access to wealthy contributors.\textsuperscript{169} Because both

\textsuperscript{162} Sorrell, 118 F. Supp. 2d at 471, 481.
\textsuperscript{163} Id.; Landell, dissent at 7 (Winter, J., dissenting).
\textsuperscript{164} Sorrell, 118 F. Supp. 2d at 463; Landell, slip op. at 5.
\textsuperscript{165} Buckley v. Valeo, 424 U.S. 1, 54, 55, 57 (1976). The court focused on the statement in \textit{Buckley} that "no governmental interest that has been suggested is sufficient to justify" the expenditure limits. Landell, slip op. at 21.
\textsuperscript{166} Buckley, 424 U.S. at 54, 55, 57.
\textsuperscript{167} Id. at 55. The \textit{Buckley} Court stated: "No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations." Id.
\textsuperscript{168} Id.
\textsuperscript{169} Landell, slip op. at 25-26. The court listed four factors that contributed to privileged access. Id. Among them were the fact "that candidates were forced to spend
privileged access and the corrupting influence of money arise from the same source, the interests in eliminating them can be served by the same means: contribution limits. The presence of these strong similarities indicates that preventing privileged access to candidates is not a separate and distinct interest, but instead constitutes a specific sub-interest under the broad interest in eliminating the corrupting influence of money.

The second flaw in Vermont's assertion of the interest in preventing privileged access is that even if accepted as compelling, expenditure limits are not a valid means of serving that interest. Expenditure limits fail as a means of preventing privileged access for many of the same reasons that they failed to prevent actual and apparent corruption. First, there is no correlation between expenditures and privileged access. Privileged access results when candidates provide access in exchange for campaign contributions. Inherent in this statement is the fact that privileged access results from contributions, not expenditures. For example, the court cited allegations that Governor Dean vetoed a pharmaceutical bill after receiving $6,000 in campaign contributions from large drug companies. This privileged access was not the result of an expenditure by Governor Dean, but rather was caused by the drug companies' contributions to his campaign.

The lack of a correlation between expenditures and privileged access demonstrates that expenditure limits do not directly serve the government interest in preventing privileged access. Yet, expenditure limits can indirectly serve the interest in preventing privileged access by reducing the incentive of candidates to seek contributions. As a result, candidates receive fewer contributions, and there are fewer instances of privileged access. However, this indirect connection is insufficient to too much time fundraising” and that “fundraising requires candidates to give preferred access to contributors over non-contributors . . . .” Id. at 25.

171. Landell, slip op. at 21-22.
172. See supra notes 146-48 and accompanying text.
173. See Buckley, 424 U.S. at 47; see also Landell, dissent at 8 (Winter, J., dissenting).
175. Id.
176. See id.
177. See discussion infra Part IV.A.I.
178. Interview with Robert Destro, Professor of Law, Catholic University of America, Columbus School of Law (Nov. 26, 2002).
179. Id. Limiting the amount candidates are permitted to spend creates a point at which it is no longer beneficial for them to seek further contributions because they would be unable to spend such contributions. Id. Therefore, candidates receive fewer contributions, producing the indirect result of reducing instances of privileged access. Id.
uphold Act 64's expenditure limits because it is more narrowly achieved by the Act's contribution limits.\textsuperscript{180}

\section*{V. SUCCEEDING WHERE VERMONT FAILED}

Challenges to \textit{Buckley}'s treatment of expenditure limits must operate within the framework of the standard of review established by the Supreme Court.\textsuperscript{181} Therefore, states like Vermont must establish campaign expenditure limits that are narrowly tailored to serve a compelling state interest.\textsuperscript{182} Within this framework, a state has two main options: it can argue either that its expenditure limits serve the interest in preventing corruption, or that a new compelling state interest will be served.\textsuperscript{183} Whichever option the state selects, it will be required to make a fact-based showing that expenditure limits are a valid means of serving that interest.\textsuperscript{184}

States that assert the interest in preventing corruption are faced with the seemingly insurmountable challenge of establishing a direct connection between that interest and campaign expenditures.\textsuperscript{185} It is clear from \textit{Landell v. Sorrell} that not enough has changed in the last twenty-five years to make it easy to establish this connection.\textsuperscript{186} The evidence required to make such a showing must include strong empirical data showing that, even when paired with contribution limits, unlimited campaign expenditures threaten the integrity of the electoral process.\textsuperscript{187} An analysis of the records in \textit{Buckley} and \textit{Kruse} provides a useful benchmark and illustrates that more than testimonial evidence and reported incidents of corrupt campaign fundraising practices are

\begin{itemize}
\item \textsuperscript{180} See 1997 Vermont State Election Campaign Act, VT. STAT. ANN. tit. 17, §§ 2801-2883.
\item \textsuperscript{181} See discussion supra Part II.C.2.
\item \textsuperscript{182} See discussion supra Part II.C.2.
\item \textsuperscript{183} See discussion supra Part II.C.2.
\item \textsuperscript{184} See discussion supra Part II.C.2.
\item \textsuperscript{185} See supra note 141 and accompanying text.
\item \textsuperscript{186} See discussion infra Part IV.A.1.
\item \textsuperscript{187} Kruse v. City of Cincinnati, 142 F.3d 907, 911 (6th Cir. 1998). In support of its limitations on expenditures, the City presented a study conducted by the Center of Responsive Politics. \textit{Id.} The study showed that "the rise in the overall cost of city council races has caused a corresponding rise in the influence of wealthy donors in the City's elections, with such donors increasingly dominating the campaign financing process . . . and small donors . . . becoming marginal players in that process." \textit{Id.} The City also attached a copy of a public opinion survey that indicated that a large majority of the citizens believed that wealthy contributors "wield undue influence on the political system as a whole" and "that ordinary voters are unable to participate on equal footing in the process." \textit{Id.} The City also attached affidavits from former Cincinnati politicians regarding the corrupting influence of money in politics. \textit{Id.}
\end{itemize}
necessary to establish the requisite connection. 188 In both of these cases, the Court found data illustrating the skyrocketing cost of campaigns and growing public concern over the role of money in politics to be insufficient to establish the connection between expenditure limits and the interest in preventing corruption. 189

A state asserting a new compelling interest must make a threshold showing that its interest is separate and distinct from those interests previously rejected by the Supreme Court in Buckley v. Valeo. 190 In doing so, a state must address the three general interests explicitly rejected as well as the corresponding sub-interests, which were implicitly rejected. 191 After making this showing, a state must then establish that expenditure limits serve its asserted interest. 192 Buckley and Kruse require a strong factual record to support this showing.

VI. CONCLUSION

As the most recent challenge to Buckley v. Valeo, Landell v. Sorell illustrates three basic principles that, despite the events of the last twenty-five years, still have not changed. First, Buckley requires government regulations of campaign finance to serve a compelling government interest. Second, these regulations must be a valid means of serving the interest asserted. And finally, the validity of such means is established not through a showing of good intentions, but instead through the assertion of a strong factual record.

188. See supra notes 62-80 and accompanying text.
189. See discussion supra Part IV.A.
191. See discussion supra Part II.C.3.
192. See supra Part II.C.2.