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## The Return of Spending Limits: Campaign Finance after *Landell v. Sorrell*

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**THE RETURN OF SPENDING LIMITS:  
CAMPAIGN FINANCE AFTER *LANDELL V.  
SORRELL***

*Richard Briffault\**

**INTRODUCTION**

On August 18, 2004, the United States Court of Appeals for the Second Circuit held that the First Amendment, as interpreted by the Supreme Court in *Buckley v. Valeo*,<sup>1</sup> does not preclude mandatory limitations on campaign expenditures.<sup>2</sup> In *Landell v. Sorrell*,<sup>3</sup> the court concluded that limitations imposed by the state of Vermont on candidate spending in state election campaigns are “supported by [the state’s] compelling interests in safeguarding Vermont’s democratic process from 1) the corruptive influence of excessive and unbridled fundraising and 2) the effect that perpetual fundraising has on the time of candidates and elected officials.”<sup>4</sup> To be sure, the court declined to uphold the Vermont limits and, instead, remanded the case to the district court for a determination of whether the challenged spending limits are the “least restrictive means” of “furthering the State’s compelling anti-corruption and time-protection interests.”<sup>5</sup> Nevertheless, *Landell* is potentially one of the most important decisions in the evolution of modern campaign finance law as it marks the first time since *Buckley* that a court has held that a candidate expenditure limitation can be constitutional.

Although path-breaking, *Landell* is not entirely unprecedented. In recent years, several communities have sought to challenge *Buckley* by adopting

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1. 424 U.S. 1 (1976).

2. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *petition for reh’g en banc denied*, No. 00-915(L), 2005 WL 826151 (2d Cir. Feb. 11, 2005). The order denying the rehearing en banc was filed on February 5, 2005, and amended on April 11, 2005, April 20, 2005, and May 11, 2005 to reflect dissenting and concurring opinions. *Id.*

3. *Id.*

4. *Id.* at 97 (internal citation omitted).

5. *Id.*

spending limits for local<sup>6</sup> or state judicial candidates.<sup>7</sup> These restrictions were invalidated on the authority of *Buckley*, but a number of the judges who heard the challenges to these laws displayed some restiveness with *Buckley*'s rejection of spending limitations.<sup>8</sup> So too, although the Supreme Court has for nearly three decades continued to adhere to *Buckley*, aspects of the Court's recent campaign finance decisions suggest the Court might be open to rethinking *Buckley*'s premises.<sup>9</sup> *Landell* could very well provide the Court with the opportunity to reconsider *Buckley*.<sup>10</sup>

The *Landell* opinion, while very significant, is also limited in several respects. The Second Circuit's suggestion that voluntary public funding with spending limits may be a less restrictive means of attaining the goals of spending limits is troubling, and threatens to pit these two complementary tenets of campaign finance reform against each other. Moreover, although *Landell* challenges *Buckley*'s conclusion concerning spending limits, it still works largely within *Buckley*'s basic conceptual framework. As a result, the Second Circuit's analysis does not reflect the full range of possible justifications for spending limitations.

Part I of this Article will analyze the *Landell* decision and situate it in the evolving judicial debate over campaign finance regulation. Part II will discuss the question, raised by the Second Circuit for the *Landell* district court on remand, whether spending limits are the least restrictive means of attaining the compelling interests relied on by the court. Part III will then examine those interests as well as other justifications for spending limits. As I will suggest, the constitutionality of spending limits in principle<sup>11</sup> would rest on a stronger foundation if other important interests directly

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6. See *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998) (spending limitations on candidates for Cincinnati City Council); *Homans v. City of Albuquerque*, 160 F. Supp. 2d 1266 (D.N.M. 2001) (spending limitations on candidates for Albuquerque city office).

7. See *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (spending limits adopted by the Ohio Supreme Court, as amendments to the Ohio Code of Judicial Conduct, for judicial elections).

8. See *infra* Part I.B (discussing the *Homans* and *Kruse* decisions).

9. See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003).

10. Indeed, there is evidence that the Vermont law at issue in *Landell* was adopted for that very purpose. See *Landell*, 2005 WL 826151, at \*12 (Jacobs, J., dissenting) ("Obviously, the Act was engineered to provide an opportunity for the Supreme Court to revisit existing law in this area.") (citing a statement by Vermont Secretary of State Deborah L. Markowitz).

11. I emphasize that my argument supports spending limits in principle, not the specific spending limits adopted by Vermont. As discussed *infra* at note 114, those limits are both quite low and apply to a broad range of expenditures. Low limits can be in tension not only with the free speech values usually asserted in opposition to spending limits but also with the electoral competitiveness argument that supports spending limits. See *infra* notes 201-02 and accompanying text.

relevant to the financing of democratic elections, particularly electoral competitiveness and voter equality, were taken into account.

**I. LANDELL AND THE EVOLVING JUDICIAL CONSIDERATION OF  
CANDIDATE EXPENDITURE LIMITATIONS**

**A. *Buckley v. Valeo***

Modern campaign finance doctrine begins with the Supreme Court's holding in *Buckley v. Valeo* that campaign finance regulation directly implicates fundamental First Amendment freedoms of speech and association.<sup>12</sup> In so doing, *Buckley* sharply distinguished between limits on contributions and limits on expenditures.<sup>13</sup> The Court held that expenditures involve direct communications with the voters, and thus, expenditure ceilings "impose direct and substantial restraints on the quantity of political speech."<sup>14</sup> As a result, any restriction on expenditures must be subject to strict judicial scrutiny and narrowly tailored to promote a compelling state interest.<sup>15</sup> By contrast, the Court found that a contribution does not entail an expression of political views; rather, it "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."<sup>16</sup> Although contributions fund the communications of candidates, "the transformation of contributions into political debate involves speech by someone other than the contributor."<sup>17</sup> Thus, contribution restrictions do not trigger the same exacting judicial review as spending limits. Moreover, the Court found that contribution restrictions advance the compelling government interests of preventing corruption and the appearance of corruption.<sup>18</sup> As the Court noted, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."<sup>19</sup> Based on the lower speech value of campaign contributions and the compelling interest of preventing corruption and the

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12. 424 U.S. 1, 23 (1976).

13. *Id.* at 20-21.

14. *Id.* at 39.

15. *Id.* at 14-20 (holding that restrictions on campaign expenditures are to be treated as restrictions on "the quantity and diversity of political speech" and, thus, subject to the "exacting scrutiny required by the First Amendment").

16. *Id.* at 21.

17. *Id.*

18. *Id.* at 26-29.

19. *Id.* at 26.

appearance of corruption, *Buckley* sustained the Federal Election Campaign Act (“FECA”) limits on donations by individuals and political committees to federal candidates and on aggregate annual donations by individuals for federal election purposes.<sup>20</sup>

In *Buckley*, however, the Court found that “[n]o governmental interest that has been suggested is sufficient to justify” FECA’s limitations on expenditures by federal candidates.<sup>21</sup> The Court considered three arguments for spending limits: 1) preventing corruption and the appearance of corruption; 2) promoting candidate equality; and 3) holding down the high and rising costs of campaigns.<sup>22</sup> Although the Court found that the prevention of corruption and the appearance of corruption were important government interests, it determined that FECA’s contribution limits and disclosure requirements already took care of the corruption problem. The Court thus concluded that the goals of preventing corruption and the appearance of corruption could not justify the heavy burden on First Amendment rights posed by FECA’s expenditure limits.<sup>23</sup> The Court also specifically rejected the argument that expenditure restrictions are necessary to reduce the incentive to circumvent contribution limits, finding instead that “[t]here is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussions of such violations will be insufficient to police the contribution provisions.”<sup>24</sup>

With respect to candidate equality, the Court found it was not clear that spending limitations would promote equality. Rather, such limits could operate “to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.”<sup>25</sup> More generally, the Court found that, with contribution limitations, different levels of spending by candidates posed little concern: “[T]he financial resources available to a candidate’s campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate’s support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate’s message to the

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20. *Id.* at 23-38. Later cases sustained lower limitations on donations to candidates in state elections, *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000), limitations on donations to political action committees, *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981), a ban on donations by corporations, *FEC v. Beaumont*, 539 U.S. 146 (2003), and limitations on donations to and by political parties, *McConnell v. FEC*, 540 U.S. 93 (2003).

21. 424 U.S. at 55.

22. *Id.* at 45, 53-57.

23. *Id.* at 55.

24. *Id.* at 56.

25. *Id.* at 57.

electorate.”<sup>26</sup>

As for the third argument for spending limits—holding down campaign spending levels—the Court held that there was simply no governmental interest in limiting the amount of money spent on election campaigns.<sup>27</sup>

*Buckley* invalidated not only limitations on candidate spending but also FECA’s limits on so-called independent spending, that is, expenditures by individuals and groups, acting independently of any candidate, to support or oppose a candidate.<sup>28</sup> The Court held that the anti-corruption rationale could not justify these restrictions because “[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>29</sup> Nor could these limits be justified by the “governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections” since the First Amendment precludes restricting the speech of some “to enhance the relative voice of others.”<sup>30</sup>

### B. Recent Judicial Stirrings

Although the contribution/expenditure dichotomy and strict judicial review of spending limits remain fundamental to the Supreme Court’s campaign finance jurisprudence,<sup>31</sup> in recent years some lower federal courts have expressed discontent with *Buckley*’s apparent constitutional preclusion of spending limits. These stirrings reflect grass-roots political resistance to *Buckley* and foreshadowed the Second Circuit’s ruling in *Landell*. The beginnings of a new judicial debate over spending limits can be seen in *Kruse v. City of Cincinnati*<sup>32</sup> and *Homans v. City of Albuquerque*.<sup>33</sup>

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26. *Id.* at 56.

27. *See id.* at 57.

28. *See id.* at 51-54.

29. *Id.* at 47.

30. *Id.* at 48-49. Subsequently, the Court invalidated independent expenditure restrictions in the context of a publicly funded presidential election, *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480 (1985), and restrictions on the independent expenditures of political parties, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

31. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 134-35 (2003); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387-88 (2000).

32. 142 F.3d 907 (6th Cir. 1998).

33. 217 F. Supp. 2d 1197 (D.N.M. 2002), *aff’d*, 366 F.3d 900 (10th Cir. 2004), *cert. denied.*, 125 S. Ct. 625 (2004) [hereinafter *Homans II*]; 160 F. Supp. 2d 1266 (D.N.M. 2001), *rev’d*, 264 F.3d 1240 (10th Cir. 2001) [hereinafter *Homans I*].

*(1) Kruse v. City of Cincinnati*

In 1995, the Cincinnati City Council adopted an ordinance imposing campaign expenditure limitations on candidates for the council.<sup>34</sup> The action appears to have been motivated in part by a desire to challenge *Buckley*.<sup>35</sup> The city contended that the spending limit was justified by *Buckley*'s concern with preventing corruption and the appearance of corruption. It presented evidence that wealthy donors dominated the financing of city elections, and that the overwhelming majority of local residents believed that large contributors wielded undue influence over the local political system.<sup>36</sup> The Sixth Circuit, however, held that *Buckley* "foreclose[d] . . . as a matter of law" the use of the anti-corruption argument to justify a spending limit.<sup>37</sup> The court went on to find that, as a matter of fact, the city had failed to prove spending limits were strictly necessary to prevent corruption since the city had not imposed contribution limits prior to its adoption of spending limits.<sup>38</sup> Thus, the Sixth Circuit held that the city had "no evidence that contribution limits are inadequate to prevent actual and perceived quid pro quo corruption."<sup>39</sup>

The court also dismissed a new justification for spending limits—reducing the time burden that fundraising poses for officeholders and candidates. *Kruse* found this was no more than a restatement of the argument, rejected in *Buckley*, that there is a compelling public interest in reducing campaign costs.<sup>40</sup> Finally, the court determined that arguments raised by the city that spending limits are necessary to enable candidates without access to wealth to participate in the electoral process, and to enable the voters to consider those candidates, were barred by *Buckley*'s rejection of equality rationales for expenditure limitations.<sup>41</sup>

One member of the *Kruse* panel, however, took issue with the dismissal of the time-protection argument, and also raised the possibility that

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34. *Kruse v. City of Cincinnati*, 142 F.3d 907, 909 (6th Cir. 1998).

35. *See id.* at 910 (noting that proponents of the spending limits believed the city should challenge *Buckley*).

36. *Id.* at 911.

37. *Id.* at 915. The court specifically concluded that *Buckley* barred the argument that spending limits were necessary to eliminate the incentive to circumvent contribution limits. *Id.*

38. *Id.* at 916.

39. *Id.* The court concluded that the city could not rely on the federal experience with contribution limits in national elections to "support its contention that they will inevitably prove inadequate at the local level." *Id.* The court ascribed federal election problems to the "'soft-money' loophole" in federal restrictions on contributions. *Id.*

40. *See id.* at 916-17 (citing *Buckley v. Valeo*, 424 U.S. 1, 57 (1976)).

41. *Id.* at 917-18.

spending limitations could be justified by “the interest in preserving faith in democracy.”<sup>42</sup> In his concurrence, Judge Cohn found that officeholder and candidate time-protection and the prevention of “public cynicism” about democracy attributable to unlimited spending are important interests that are conceptually distinct from the concern about campaign costs dismissed in *Buckley*.<sup>43</sup> Although Judge Cohn agreed with the majority that the city had “failed to develop a compelling factual record” and thus concurred in the result, he sought to leave an opening for future efforts to limit campaign spending by concluding that “*Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional.”<sup>44</sup> Rather, he suggested that

[i]t 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.<sup>45</sup>

#### (2) *Homans v. City of Albuquerque*

Three years later, Judge Cohn’s suggestion was embraced by Judge Vazquez of the federal district court in New Mexico in a challenge to Albuquerque’s spending limits for municipal elections.<sup>46</sup> Albuquerque had adopted spending limits in 1974 and, amazingly enough, despite *Buckley* those limits remained on the books and were apparently enforced through 1995.<sup>47</sup> The limits were temporarily enjoined in 1997, but restored and amended in 1999.<sup>48</sup> When a mayoral candidate sought to enjoin their enforcement in the 2001 race, Judge Vazquez denied the plaintiff’s request for a preliminary injunction, concluding that the plaintiff had shown neither a likelihood of success on the merits nor that the public interest would benefit from an injunction.<sup>49</sup>

Rather, the court found on the record that for more than two decades the Albuquerque spending limits had promoted competitive elections,

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42. *Id.* at 919 (Cohn, D.J., concurring).

43. *Id.* at 919-20.

44. *Id.* at 920.

45. *Id.*

46. *Homans I*, 160 F. Supp. 2d 1266 (D.N.M. 2001), *rev’d*, 264 F.3d 1240 (10th Cir. 2001).

47. *See Homans II*, 217 F. Supp. 2d 1197, 1200 (D.N.M. 2002), *aff’d*, 366 F.3d 900 (10th Cir. 2004), *cert. denied.*, 125 S. Ct. 625 (2004).

48. *Id.*

49. *Homans I*, 160 F. Supp. 2d at 1273-74.



increased citizen confidence in government, led to increased voter turnout, reduced the role of large donors, created opportunities for lower-income and lower-middle-income candidates, and generally improved the quality of electoral campaigns without limiting the ability of candidates to campaign effectively.<sup>50</sup> Based on that record, the court found the city had demonstrated its spending limits were necessary to promote the compelling governmental interest in “preserving the public faith in democracy, and reducing the appearance of corruption.”<sup>51</sup> The district court also concluded, based on the voter turnout data, that circumstances had changed in the quarter-century since *Buckley* so that “it is clear today that the public perception of Albuquerque citizens is that unlimited spending infects the political process.”<sup>52</sup> The court echoed Judge Cohn’s opinion in *Kruse* in citing the effect of the fundraising “arms race” in forcing candidates to “spend innumerable hours eliciting contributions rather than performing public duties or ascertaining the interests of those citizens unable to make large financial contributions.”<sup>53</sup> The financial arms race, in turn, reinforced the public perception of special interest domination of elections.<sup>54</sup> By ending the arms race and reducing the role of money in elections, the Albuquerque spending limit was narrowly tailored to advance a compelling government interest.<sup>55</sup>

Less than a week later, the Tenth Circuit reversed and held that the interests identified by the district court were “really no different than the interests deemed insufficient to justify expenditure limitations in *Buckley*” and granted a preliminary injunction against enforcement of the Albuquerque limits.<sup>56</sup>

Subsequently, the district court conducted a full trial on the merits. The court again found that unlimited campaign spending interfered with competitive elections by giving incumbents an advantage. The court noted that all the mayors seeking reelection in Albuquerque since the adoption of spending limits had been defeated, compared with the eighty-eight percent reelection rate of incumbent mayors in other cities.<sup>57</sup> The court again found that turnout in municipal elections had been higher in Albuquerque under spending limits than in other cities without spending limits, and that

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50. *See id.* at 1268-70.

51. *Id.* at 1272.

52. *See id.*

53. *Id.* at 1273.

54. *See id.*

55. *Id.*

56. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244-45 (10th Cir. 2001).

57. *Homans II*, 217 F. Supp. 2d 1197, 1200 (D.N.M. 2002), *aff’d*, 366 F.3d 900 (10th Cir. 2004), *cert. denied.*, 125 S. Ct. 625 (2004).

Albuquerque voters considered their spending-limited elections to be less influenced by special interest money than federal elections, in which spending is not subject to limitation.<sup>58</sup> Looking at federal election practices, the court found that it is easy for large donors to circumvent contribution limitations by bundling.<sup>59</sup> Moreover, with unlimited spending, candidates are “under a great deal of pressure to engage in fundraising activities and to depend on the goodwill of their donors.”<sup>60</sup> The court again concluded that the local spending limit did not interfere with effective campaigning; indeed, five of the eight candidates, including the winner and the second- and third-place finishers in the non-limited 2001 elections, spent less than the enjoined spending limit would have allowed.<sup>61</sup> Ultimately, the district court determined, based on the Tenth Circuit’s interpretation of *Buckley*, that it was “constrained to find” that the city’s expenditure limits were unconstitutional.<sup>62</sup> If the court had been free to apply the analysis it had used in initially denying the preliminary injunction, however, the limits would have been upheld as:

narrowly tailored to serve the compelling interests of deterring corruption and the appearance of corruption, promoting public confidence in government, permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters, increasing voter interest in and connection to the electoral system, and promoting an open and robust public debate by encouraging electoral competition.<sup>63</sup>

In the final decision in the *Homans* saga,<sup>64</sup> a Tenth Circuit panel affirmed the district court, but split over whether *Buckley* was an insurmountable barrier to all spending limits, and whether time-protection and electoral competition are compelling justifications for such limits. Writing the “principal opinion”<sup>65</sup> for the panel, Judge Lucero determined

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58. *Id.* at 1201.

59. *See id.* at 1202, 1205 n.2. Bundling is a “manipulative contribution device[] . . . which enable[s] special interests to direct large quantities of money by way of individual contributions to particular candidates.” *Landell v. Sorrell*, 382 F.3d 91, 100 (2d Cir. 2004).

60. *Homans II*, 217 F. Supp. 2d at 1201.

61. *Id.* at 1203-04.

62. *Id.* at 1206.

63. *Id.*

64. *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 625 (2004) [hereinafter *Homans III*].

65. *Id.* at 902; *see id.* at 914 n.1 (Tymkovich, J., concurring). In the concurring opinion, joined by Judge O’Brien, Judge Tymkovich refers to the opinion of Judge Lucero as the “principal opinion” even though two of the three members of the panel did not join its interpretation of *Buckley*. *Id.*

that *Buckley* was not a per se prohibition on spending limits.<sup>66</sup> Rather, he concluded, *Buckley* resolved only the sufficiency of the arguments specifically addressed by the Supreme Court—anti-corruption, equalization of candidate resources, and limiting campaign costs—“leav[ing] open the possibility that at least in some circumstances expenditure limits may withstand constitutional scrutiny.”<sup>67</sup> He determined that time-protection was conceptually distinct from the cost-limitation argument rejected in *Buckley* and could be a compelling interest justifying spending limits.<sup>68</sup> Similarly, the state interest in promoting electoral competition was an “interest distinct from” the candidate resources equalization argument rejected in *Buckley*.<sup>69</sup> Indeed, Judge Lucero determined that *Buckley*’s rejection of the anti-corruption and perception of corruption justifications for spending limits turned on the particular circumstances of that case.<sup>70</sup> Thus, it would be possible for a government to produce evidence that expenditure limits are necessary to prevent corruption.

Ultimately, however, Judge Lucero, applying the strict scrutiny analysis he agreed *Buckley* requires for judicial review of campaign expenditure limitations, held that Albuquerque could not demonstrate that spending limits were necessary to meet the compelling government interests asserted.<sup>71</sup> The city had failed to present evidence that bundling practices in Albuquerque actually circumvented contribution restrictions, that there was undue special interest influence on government, or that spending limits actually promoted public confidence in government.<sup>72</sup> The city had also failed to produce sufficient evidence to demonstrate that the time burden of fundraising was a “problem of constitutional proportions” in Albuquerque<sup>73</sup> or that spending limits actually improved electoral

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66. *Id.* at 902.

67. *Id.* at 906, 906 n.7.

68. *Id.* at 911-13.

69. *Id.* at 913.

70. *See id.* at 907-08.

71. *Id.* at 913.

72. *Id.* at 908-11. Judge Lucero specifically rejected the evidence that Albuquerque’s spending limits had increased turnout. *Id.* at 909-10. Albuquerque’s higher voting rate, compared with those of other cities, was apparently due to differences in the denominator: the Albuquerque figures were based on registered voters while the turnout rate for other cities was based on voting age population. Albuquerque turnout based on voting age population was comparable to that in other cities. *Id.* at 910. Similarly, the court discounted the significance of public opinion surveys that found Albuquerque residents had more confidence in the integrity of spending-limited local elections compared with un-limited federal elections. The difference was ascribed to the generally higher level of trust voters have in local government, regardless of spending limits. *Id.*

73. *Id.* at 912.

competition.<sup>74</sup>

In his concurring opinion, Judge Tymkovich, joined by Judge O'Brien, agreed with Judge Lucero that *Buckley* "did not adopt a per se rule against campaign spending limits,"<sup>75</sup> thereby making the Tenth Circuit the first appellate court since *Buckley* was decided to hold that campaign spending limits could be constitutional. But Judge Tymkovich emphatically rejected the arguments for spending limits considered by Judge Lucero. Instead, his concurrence found that *Buckley* flatly precluded any justification of spending restrictions in terms of the government interest in reducing corruption. In accord with the Sixth Circuit in *Kruse*, the concurrence further found the candidate time-protection argument to be subsumed in *Buckley*'s rejection of a government interest in controlling election costs.<sup>76</sup> Moreover, in an analysis foreshadowing the remand order in *Landell*, the concurrence suggested that, even if time-protection could be considered a distinct governmental interest, spending limits are not narrowly tailored to further that interest since the provision of public funding for candidates—or the imposition of higher contribution restrictions—would reduce the time necessary for fundraising with less burden on First Amendment rights.<sup>77</sup> Finally, the concurrence again disagreed with the principal opinion, finding that *Buckley*'s rejection of equalization of candidate resources as a compelling argument took care of the asserted interest in electoral competition.<sup>78</sup>

Together, the Cincinnati and Albuquerque cases indicate some discontent in the lower federal courts with the foundations of *Buckley*. The Tenth Circuit concluded that *Buckley* does not adopt a per se rule against spending limits, and judges on the Sixth Circuit and Tenth Circuit panels found that such concerns as protecting officeholder time, promoting electoral competition, vindicating popular faith in democracy, and even preventing corruption may be compelling interests that justify spending limits. In addition, the New Mexico federal district court found that, at the very least, spending limits are consistent with effective challenges to incumbents, high voter turnout, and effective campaigning. Of course, in both cases, the appellate courts invalidated the spending limitations. But *Kruse* and *Homans* may be said to have set the stage for the Second Circuit's determination in *Landell* that candidate spending limits can be

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74. *Id.* at 913.

75. *Id.* at 915 (Tymkovich, J., concurring).

76. *Id.* at 917-18; accord *Kruse v. City of Cincinnati*, 142 F.3d 907, 916-17 (6th Cir. 1998).

77. *Homans III*, 366 F.3d at 919 (Tymkovich, J., concurring).

78. *Id.* at 919-20.

constitutional.

*C. Landell v. Sorrell*

The Vermont Campaign Finance Act of 1997 (“Act”) consists of an extensive package of campaign finance regulations, including restrictions on contributions to candidates for state office, partial public funding for candidates for governor, and mandatory expenditure restrictions on all candidates for state office.<sup>79</sup> In the inevitable constitutional challenge that followed enactment, the federal district court found the Act was the end-product of a process that included extensive legislative deliberation which resulted in legislative findings that rising spending levels denied some Vermonters the opportunity to run for office, required candidates to devote “inordinate amounts of time raising campaign funds,” and reduced “public involvement and confidence in the electoral process.”<sup>80</sup> After a ten-day bench trial, the district court agreed with the state that the evidence “overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics”<sup>81</sup> and that unlimited campaign spending erodes public confidence in government and results in both actual and perceived influence by large contributors on legislators.<sup>82</sup> The court further found that “the need to solicit money from large donors at times turns legislators away from their official duties”<sup>83</sup> The court determined that the specific limits adopted by Vermont would not interfere with effective campaigning.<sup>84</sup> In addition, relying in part on the reasoning in the separate opinion of Judge Cohn in *Kruse*, the court found that spending limits are an “effective response to certain compelling

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79. VT. STAT. ANN. tit. 17, §§ 2801-2883 (2004).

80. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000).

81. *Id.* at 468.

82. *Id.* at 469-70.

83. *Id.* at 468.

84. *Id.* at 472. Under the Act, candidates for state representative or local offices may not accept more than \$200 from any single source; state senate or county office candidates are limited to single contributions of \$300 each; governor, lieutenant governor, secretary of state, state treasurer, auditor of accounts, or attorney general candidates may not accept single contributions over \$400; and political committees are limited to single source contributions of \$2000 or less. VT. STAT. ANN. tit. 17 § 2805. Campaign expenditures are also limited. For example, candidates for governor cannot spend more than \$300,000 in any two-year general election cycle, and lieutenant governor candidate expenditures are limited to \$100,000. *Id.* at § 2805(a). In finding that these limits did not hinder effective campaigning in Vermont, the District Court noted that “[i]n Vermont legislative races, low-cost [campaigning] methods . . . are standard and even expected by the voters” and that “Vermont ranks 49th out of the 50 states in campaign spending.” *Landell*, 118 F. Supp. 2d at 472.

governmental interests not addressed in *Buckley*,” including protecting officeholders’ abilities to attend to their official duties, preserving faith in democracy, and protecting access to the political arena.<sup>85</sup> The court found “the state proved that each of these concerns exist, and that Vermont’s expenditures limits address them.”<sup>86</sup> The district court ultimately concluded, however, that *Buckley v. Valeo* required that the spending limits be declared unconstitutional.<sup>87</sup>

On appeal, the Second Circuit determined it was not so constrained by *Buckley*. In both an initial opinion which was issued in August 2002<sup>88</sup> and withdrawn just two months later<sup>89</sup> while a petition for rehearing en banc was pending, and the amended opinion finally issued in August 2004,<sup>90</sup> the Second Circuit panel determined that *Buckley* “did not rule campaign expenditure limits to be *per se* unconstitutional, but left the door ajar for narrowly tailored spending limits that secure clearly identified and appropriately documented compelling governmental interests.”<sup>91</sup> Like Judge Lucero in *Homans*, the court found that both the “corruptive influence” of unlimited spending and “the effect the perpetual fundraising has on the time of candidates and elected officials” were compelling interests that could justify expenditure limitations.<sup>92</sup> Unlike the Tenth Circuit, however, the *Landell* panel, in an opinion by Judge Straub joined by Judge Pooler, found that unlimited spending posed dangers of corruption and the appearance of corruption that were not adequately addressed by contribution limits.<sup>93</sup>

Acknowledging that *Buckley* had concluded that the corruption danger could be effectively met by contribution limits, so that the burden on

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85. *Landell*, 118 F. Supp. 2d at 482-83 (citing *Kruse v. City of Cincinnati*, 142 F.3d 907, 920 (6th Cir. 1998) (Cohn, J., concurring); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649-50 (1996) (Stevens, J., dissenting)).

86. *Id.* at 483.

87. *Id.*

88. *Landell v. Vt. Pub. Interest Research Group*, 300 F.3d 129 (2d Cir. 2002), *withdrawn*, *Landell v. Sorrell*, No. 00-9159(L), 2002 WL 31268493, at \*1 (2d Cir. Oct. 3, 2002).

89. *Landell*, 2002 WL 31268493, at \*1.

90. *See Landell v. Sorrell*, 382 F.3d 91, 96 (2d Cir. 2004). The initial Second Circuit opinion in *Landell* was assessed in Nathan Huff, Note, *Landell v. Sorrell: Lessons Learned from Vermont’s Pending Challenge to Buckley v. Valeo*, 53 CATH. U. L. REV. 239 (2003). *See also* John T. Cooke, *Making the Case for Campaign Finance: One Theory Explaining the Withdrawal of Landell v. Sorrell*, 27 VT. L. REV. 685, 685, 691-94 (2003) (noting that the original decision directly challenged *Buckley v. Valeo* and discussing the majority and dissenting opinions).

91. *Landell*, 382 F.3d at 97.

92. *Id.*

93. *See id.* at 108, 115-19.

speech resulting from spending limits was not strictly necessary for preventing corruption, *Landell* found “the reality of campaign financing in Vermont” demonstrated that contribution limits alone were inadequate to deal with the danger that state officials would be too compliant with the wishes of large contributors.<sup>94</sup> In particular, the court noted that due to the practice of “bundling” small contributions together, interest groups could make their influence felt despite the limits on individual donations.<sup>95</sup> With unlimited spending, the resulting “arms race mentality has made candidates beholden to financial constituencies that contribute to them.”<sup>96</sup> Due to *Buckley*’s holding concerning the insufficiency of the anti-corruption justification, the Second Circuit panel also relied on a second basis for spending limits—protecting the time of candidates and officeholders from the burdens of fundraising. The court determined that this was a matter of compelling government concern, which *Buckley* had not considered in its analysis of expenditure limitations.<sup>97</sup> The court found that the state of Vermont had proven that “the pressure to raise large sums of money” forces candidates to devote extra time to contributors, thus, “drastically reduc[ing] opportunities that candidates have to meet with non-contributing citizens.”<sup>98</sup> Drawing the anti-corruption and time protection arguments together into a general concern for the “integrity of the electoral process,”<sup>99</sup> the court concluded that the “basic democratic requirements” of officeholder “accessibility” and “accountability” to constituents are “imperiled when the time of public officials is dominated by those who pay for such access with campaign contributions.”<sup>100</sup>

*Landell*’s reliance on the anti-corruption justification is certainly in tension with *Buckley*’s determination that spending limits are not necessary to prevent corruption because contribution limits can vindicate anti-corruption values while placing less of a burden on campaign speech. As *Landell* found, however, as long as there is no limit on the potential costs of a campaign, candidates (other than those who are personally wealthy) will still need to collect massive amounts of contributions.<sup>101</sup> Although individual contributions are limited, intermediary organizations can effectively “bundle” together the donations of individuals or associations

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94. *Id.* at 118-19.

95. *Id.* at 118.

96. *Id.* at 119.

97. *Id.* at 120-21, 124.

98. *Id.* at 122.

99. *Id.* at 124 n.18 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

100. *Id.* at 125.

101. *Id.* at 121-22.

with shared economic or ideological interests so that these groups continue to play a key role in financing campaigns. Indeed, the combined effect of limited contributions and unlimited spending is a powerful stimulus to the activities of such campaign intermediaries, as their work benefits both donors and candidates alike.<sup>102</sup> As a result, even with low contribution limits, people affiliated with a particular group, interest, or sector can together make large contributions to a candidate, with the candidate aware of, and likely grateful for, their efforts.<sup>103</sup>

*Landell's* time-protection argument was not directly addressed by the Supreme Court in its analysis of spending limits so the Second Circuit's analysis on this point is less of a direct challenge to *Buckley* than its analysis of the anti-corruption justification.<sup>104</sup> As with the court's reliance on the danger of corruption, the argument is based on the structural tension that arises when contribution limitations are limited but expenditures are not. To raise the large and growing sums needed to finance campaigns when contributions per donor are limited, candidates must devote ever-increasing time and effort to pursuing potential contributors. With time a scarce resource, these fundraising efforts necessarily cut into the time available for candidates to meet with ordinary voters and for officeholders to attend to "information gathering, political and policy analysis, debating and compromising with fellow representatives, and the public dissemination of views."<sup>105</sup> As already noted, this argument was also raised by one member of the Sixth Circuit panel in *Kruse*<sup>106</sup> and by a member of the Tenth Circuit panel in *Homans*.<sup>107</sup> Moreover, *Buckley* relied upon the public interest in reducing the time burdens of fundraising when it upheld the optional public funding of presidential candidates.<sup>108</sup>

In considering whether the spending limits were narrowly tailored to promote the state's compelling goals, the *Landell* majority found the Vermont limits advance the state's anti-corruption and time protection

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102. *Id.* at 118-19.

103. *Id.*

104. For the intellectual foundation of the time-protection argument, see generally Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

105. *Id.* at 1282-83.

106. See *supra* text accompanying notes 42-43 (discussing Judge Cohn's treatment of the time-protection argument).

107. See *supra* note 68 and accompanying text (discussing Judge Lucero's finding that the time-protection argument was conceptually different from the cost-limitation argument rejected in *Buckley*). Justice Kennedy also raised this concern in *Shrink Missouri*. 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting); see *infra* notes 141-46 and accompanying text.

108. 424 U.S. 1, 96 (1976).



goals, and that the specific spending caps adopted are high enough to permit “effective advocacy.”<sup>109</sup> But the Second Circuit determined that the district court had not considered whether spending limits are the “least restrictive means” for attaining these goals.<sup>110</sup> Specifically, the panel noted that the district court had not considered whether a program of voluntary spending limits, coupled with incentives to accept such limits—such as higher contribution limits or the provision of public funding to participating candidates—would be “as effective in advancing the asserted interests” justifying spending limits.<sup>111</sup> The Second Circuit remanded to the district court the question of whether these alternative means would be as effective in vindicating the state’s goals while imposing less of a burden on First Amendment rights.<sup>112</sup>

Judge Winter dissented.<sup>113</sup> Although much of his dissent focused on the specific terms of the Vermont limits—including the application of a single limit to both primary and general elections in the same election cycle, the Act’s broad definition of expenditure, and the low level of the limits<sup>114</sup>—he

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109. *Landell v. Sorrell*, 382 F.3d 91, 125-31 (2d Cir. 2004).

110. *Id.* at 97, 131.

111. *Id.* at 133.

112. *Id.* at 135-36, 136 n.25. The court also asked the district court on remand to reexamine whether the specific spending limits in the law were constitutionally sound in light of certain arguments raised by Judge Winter’s dissent. The district court had found, and the panel had agreed, that the statutory spending limits were consistent with actual levels of campaign spending in Vermont and thus would not impede effective advocacy. Judge Winter, however, argued that data on past spending levels did not take into account the costs of compliance with the new law, nor did they consider “related expenditures” on behalf of a candidate by individuals or organizations other than the candidate, which the Vermont law treats as both contributions by the entity making the expenditure and expenditures of the candidate benefited. *See id.* at 166-68. The majority asked the district court to take these factors into account in its reconsideration of the spending limits. *Id.* at 134 n.23.

113. *Id.* at 149 (Winter, J., dissenting). Judge Winter’s dissent was endorsed by four of the dissenters from the denial of the petition for rehearing en banc in the most laudatory terms. Chief Judge Walker described Judge Winter’s dissent as “impassioned, insightful, and carefully reasoned,” *Landell v. Sorrell*, No. 00-9159(L), 2005 WL 826151, at \*2 (2d Cir. Feb. 11, 2005), *amended* Apr. 11, 2005, Apr. 20, 2005, and May 11, 2005; Judge Jacobs praised the Winter opinion as “scintillating . . . learned and witty,” *id.* at \*9; Judge Cabranes agreed that the Winter dissent was “comprehensive and fully persuasive . . . a *tour de force*.” *Id.* at \*13. Judge Wesley joined all three dissents without writing one of his own. Even four of the judges who concurred in the denial of the petition for rehearing en banc agreed that Judge Winter’s opinion was “thorough and forceful.” *Id.* at \*1 (Sack, J., and Katzmann, J., concurring).

114. *Landell*, 382 F.3d at 150-83. Four of the dissenters from the denial of the petition for rehearing en banc also specifically adverted to the very low level of the spending limit imposed by the Vermont law. *See Landell*, 2005 WL 826151, at \*8 (“These limits are drastically below realistic spending levels for competitive races.”) (Walker, C.J., dissenting); *id.* at \*14 (“The particular expenditure limits imposed by Act 64 are so

also determined that the majority's justifications for spending limits were precluded by *Buckley*.<sup>115</sup> Moreover, he criticized the majority's decision to remand the "least restrictive means" question to the district court, finding it "self-evident" that "a combination of public and private financing with low contribution limits is infinitely less restrictive—is actually speech supportive—and accomplishes all the ostensible purposes" of the Vermont spending limits.<sup>116</sup>

In February 2005, the full Second Circuit rejected a petition to rehear *Landell* en banc.<sup>117</sup> Subsequently, five members of the court dissented from the denial of the rehearing en banc, with four of the dissenters emphatically rejecting the panel opinion and strongly asserting that *Buckley* precluded any finding that Vermont's spending limits could be constitutional.<sup>118</sup> The dissenters reiterated the traditional view that *Buckley* bars the use of anti-corruption arguments to sustain spending limits,<sup>119</sup> rejected out of hand the argument that officeholder time protection could be a compelling government interest,<sup>120</sup> and, in impassioned terms, denounced the very idea of expenditure limitations.<sup>121</sup>

Seven members of the Second Circuit joined in opinions concurring in the denial of the rehearing en banc. This group included Judges Straub and Pooler, who had been on the *Landell* panel, and Judges Sack, Katzmann, Sotomayor, and B.D. Parker, who joined in an opinion written by Judges Sack and Katzmann that emphasized that the denial of rehearing en banc was based on the Second Circuit's longstanding tradition of rejecting en banc review and was not a consideration of the merits.<sup>122</sup> Only Judge Calabresi's

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laughably low . . .") (Cabranes, J., dissenting).

115. 382 F.3d at 184.

116. *Landell*, 382 F.3d at 207.

117. *Landell*, 2005 WL 826151.

118. Chief Judge Walker and Judges Jacobs, Cabranes, Raggi, and Wesley dissented. Judge Raggi's brief dissent declined "to express an opinion on the merits," and simply concluded that "this case presents serious questions that warrant further consideration by the whole court." *Id.* at \*14. Chief Judge Walker and Judges Jacobs, Cabranes, and Wesley also disagreed with the panel's resolution of the merits. Chief Judge Walker and Judges Jacobs and Cabranes each wrote an opinion which was joined by the other judges who dissented on the merits.

119. *See id.* at \*5 (Walker, C.J., dissenting); *id.* at \*10 (Jacobs, J., dissenting).

120. *See id.* at \*6 (Walker, C.J., dissenting); *id.* at \*10 (Jacobs, J., dissenting).

121. *See id.* at \*2 (panel opinion sets a "dangerous precedent") (Walker, C.J., dissenting); *id.* at \*13 ("The Act at issue in this case is as unconstitutional as if Vermont were to create a dukedom, apply a thumbscrew, or tax Wisconsin cheese.") (Jacobs, J., dissenting); *id.* at \*14 (stating they were "bald-faced political protectionism") (Cabranes, J., dissenting).

122. *See id.* at \*1 (Sack, J., and Katzmann, J., concurring); *see also id.* (citing Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L.

separate concurrence addressed the First Amendment issues presented by Vermont's expenditure limitation. More radically than the panel majority, Judge Calabresi directly challenged *Buckley's* framing of the constitutionality of campaign finance regulation solely in terms of the prevention of corruption and the appearance of corruption. Instead, he made inequality the centerpiece of his analysis. As he put it, the impact of wealth inequalities on elections is "the huge elephant—and donkey—in the living room in all discussions of campaign finance reform."<sup>123</sup> Indeed, he suggested, "it is not entirely out of the question" that equality as well as anti-corruption and time-protection concerns were behind Vermont's decision to adopt candidate spending limits.<sup>124</sup> "[T]he sort of conversation taking place in Vermont (and elsewhere) would be a far more fruitful one—from the standpoints both of campaign finance policy and constitutional jurisprudence—were it able to be brought out from under *Buckley's* corruption mantle and into a framework that more honestly reflects the issues at play."<sup>125</sup> Judge Calabresi concluded that the Supreme Court's reconsideration of *Buckley* to permit consideration of equality arguments is "essential" to a "free and open discussion" of campaign finance regulation, and that the best way to speed that reconsideration was to deny rehearing en banc and move *Landell* closer to Supreme Court review.<sup>126</sup>

The sharpness of the division within the Second Circuit, both within the *Landell* panel and over the decision whether to hear the

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REV. 365, 371 (1984) (noting that the Second Circuit voted to hear only six cases en banc, while denying petitions for rehearing in nineteen cases between 1979 and 1983)). These four concurring judges avoided any comment on the First Amendment merits of the case, except to say "we doubt it," *id.* at \*1, n.3, in response to the contention of Judge Jacobs that the *Landell* panel's decision was attributable to the "many constitutional-law professors and news media [that] lend their prestige and voice to such measures." *Id.* at \*12.

123. *Id.* at \*1.

124. *Id.* at \*1. Judge Calabresi saw campaign spending limitations as implicitly raising two types of inequality concerns. "The first is the generalized egalitarian desire not to advantage one group in society over another." *Id.* In the campaign finance setting, that means "the deeply felt desire not to have the wealthy be able to influence elections more than the poor." *Id.* Second, he suggested that unlimited campaign spending privileges the ability of the wealthy, relative to the poor, to "express the intensity of their political feelings. . . . In other words, and crucially, a large contribution by a person of great means may influence an election enormously, and yet may represent a far less intensity of desire than a pittance given by a poor person." *Id.* Judge Calabresi indicated that this differential wealth-bounded ability to express intensities of political feelings is a First Amendment concern—"the First Amendment right to have one's intensity of desire, as expressed in monetary terms, be measured equally." *Id.*

125. *Id.*

126. *Id.*

case en banc, coming shortly after the Tenth Circuit's *Homans* decision that *Buckley* is not an absolute bar to spending limits, clearly demonstrates the increasingly intense conflict within the lower courts concerning the meaning of *Buckley* and the future of campaign finance jurisprudence.

#### D. *Landell* and the Supreme Court's Evolving Campaign Finance Jurisprudence

*Landell* is a sharp break from *Buckley*'s rejection of candidate spending limits, but it is in some respects foreshadowed by other developments in the Supreme Court's campaign finance jurisprudence, particularly the Court's recent decision in *McConnell v. FEC*.<sup>127</sup> Indeed, the Second Circuit panel repeatedly invoked *McConnell* in its *Landell* decision.<sup>128</sup> *Landell*'s reliance on *McConnell* is, in some sense, curious since *McConnell* upheld the "soft money" restrictions of the federal Bipartisan Campaign Reform Act of 2002 ("BCRA"), and "soft money" consists of *contributions* to parties, rather than *expenditures* by candidates.<sup>129</sup> Indeed, *McConnell* restated *Buckley*'s contribution/expenditure distinction,<sup>130</sup> and relied on it in justifying the application of the lower standard of review used for contribution limits to BCRA's soft money restrictions.<sup>131</sup> Yet, the Second Circuit's use of *McConnell* does accurately capture the Supreme Court's increasingly deferential approach to campaign finance regulation, *McConnell*'s recognition that campaign finance restrictions advance as well as burden constitutional values, and the relevance of the justifications for soft money regulation to spending limitation. In addition to *McConnell*, although the Supreme Court has never directly challenged *Buckley*'s

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127. 540 U.S. 93 (2003).

128. See, e.g., *Landell v. Sorrell*, 382 F.3d 91, 97 nn.1-2, 108, 108 n.6, 11-15, 116 n.11, 117 n.12, 118 n.13, 124, 124 n.17 (2d Cir. 2004). Judge Calabresi's concurrence in the denial of rehearing en banc also saw in *McConnell* a "broader understanding of the 'corruption' rationale than what *Buckley* enunciated—an understanding that could perhaps be read as gesturing toward some of the 'equality' considerations that *Buckley* purportedly purged from the debate." See *Landell*, 2005 WL 826151 at \*1 n.6.

129. See 540 U.S. at 224. According to Federal Election Commission member Bradley A. Smith "[a]ny money that is not contributed directly to a candidate's campaign or used expressly to advocate the election or defeat of a candidate constitutes a form of soft money, although the term is used most often when discussing such donations made to political parties." BRADLEY A. SMITH, UNFREE SPEECH 185 (2001).

130. 540 U.S. at 120-21.

131. *Id.* at 134-37. The dissenters from the denial of the rehearing en banc in *Landell* emphasized *McConnell*'s limitation to contribution restrictions, and its implicit preservation of the contribution/expenditure distinction. See *Landell*, 2005 WL 826151 at \*3 (Walker, C.J., dissenting).

treatment of spending limitations, other decisions by the Court are in tension with *Buckley*'s holding.

First, the Supreme Court has actually upheld expenditure limits. In *McConnell*, the Court upheld bans on both corporate and labor union election spending.<sup>132</sup> Prior to *McConnell*, *Austin v. Michigan Chamber of Commerce*<sup>133</sup> sustained a state law banning corporate election expenditures, finding the prohibition justified by a compelling interest in controlling “the corrosive and distorting effects of immense aggregations of wealth” which could “unfairly influence elections when . . . deployed in the form of independent expenditures.”<sup>134</sup> *Austin* suggests a concern about the inequality of political influence, notwithstanding *Buckley*'s rejection of inequality as a justification for spending limits.

To be sure, *Austin* found that corporate spending poses a unique danger of corruption because corporations enjoy a “unique state-conferred corporate structure” that enables them to accumulate large sums of money.<sup>135</sup> A corporation's financial resources reflect the success of the corporation's commercial activities and not the extent of support for its political ideas. Limits on corporations have, thus, been held to be justified “to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization . . . [are] not . . . converted into political ‘war’ chests.”<sup>136</sup> Yet, *Austin*'s attempt to limit its concern with large campaign war chests to corporations is unpersuasive. It is hard to see why a corporation's state-granted advantages make its speech any more corrupting than the speech of wealthy individuals or noncorporate groups. Moreover, as Justice Scalia pointed out in his *Austin* dissent, corporations are not alone in receiving special advantages from the state.<sup>137</sup> Other business associations—as well as billionaire individuals who benefit from inheritance laws or obtain their wealth from investments in corporations—may build up campaign war chests “that have little or no correlation to the public's support”<sup>138</sup> for their political ideas.<sup>139</sup> Nor is it clear how *Austin*'s reasons for limiting corporate spending justify the limits on *union* spending upheld in

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132. 540 U.S. at 201-02. *McConnell* is the first decision in the post-*Buckley* era that expressly treats the prohibition on both corporations and unions against using their treasury funds in election campaigns as constitutional.

133. 494 U.S. 652 (1990).

134. *Id.* at 660.

135. *Id.*

136. *FEC v. Nat. Right to Work Comm.*, 459 U.S. 197, 207 (1982) (citations omitted).

137. 494 U.S. at 680 (Scalia, J., dissenting).

138. *Id.* at 660.

139. *See id.* at 680 (Scalia, J., dissenting).

*McConnell*. Although the Court has doctrinally bracketed corporations and unions as special cases, the only justification for the corporate and union spending limits that the Court has articulated sounds a lot more like the equality rationale rejected in *Buckley* than the corruption concern that has been the only formally recognized basis for limiting campaign finance activities.

Second, the Court in *McConnell* significantly reframed the way it addresses the constitutionality of campaign finance regulation. Tracking the formulation articulated by Justice Breyer, joined by Justice Ginsburg, concurring in *Nixon v. Shrink Missouri Government PAC*,<sup>140</sup> *McConnell* treated campaign finance laws not simply as burdens on speech and association, but as positive “measures aimed at promoting the integrity of the [political] process.”<sup>141</sup> Justice Breyer’s concurring opinion in *Shrink Missouri* suggested that campaign finance law involves not one set of constitutional principles—freedom of speech and association—but the reconciliation of “competing constitutional interests,” including the promotion of democracy.<sup>142</sup> Moreover, *McConnell* followed the *Shrink Missouri* Breyer concurrence in giving a striking degree of judicial deference to legislative judgments on campaign finance regulation. *McConnell* repeatedly recognized Congress’s “particular expertise”<sup>143</sup> concerning the impact of specific campaign finance practices and their effects on both elections and government decision-making.<sup>144</sup> Indeed, the Court deferred to Congress not just with respect to political facts and electoral predictions, but also concerning the weight to be given to those facts and predictions in balancing democracy-promoting regulation against the speech and associational rights of parties and interest groups.<sup>145</sup>

Finally, both Justice Kennedy’s dissent and Justice Breyer’s concurrence in *Shrink Missouri*, as well as the opinion for the Court in *McConnell*, focused attention on the “post-*Buckley* experience”<sup>146</sup> in considering the constitutional questions posed by campaign finance regulation. Justice Kennedy lamented that “*Buckley* has not worked,”<sup>147</sup> explaining that “by accepting half of what Congress did (limiting contributions) but rejecting

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140. See 528 U.S. 377, 401 (2000) (Breyer, J., concurring).

141. 540 U.S. 93, 137 (2003).

142. 528 U.S. at 402 (Breyer, J., concurring).

143. 540 U.S. at 137.

144. See *id.* at 153, 156, 157, 165, 167, 185, 207.

145. *Id.* at 137.

146. 528 U.S. at 405 (Breyer, J., concurring) (citing *id.* at 406-09 (Kennedy, J., dissenting)).

147. *Id.* at 408 (Kennedy, J., dissenting).

the other (limiting expenditures)”<sup>148</sup> *Buckley* “created a misshapen system” marked by massive avoidance of contribution limits.<sup>149</sup> Although Justice Kennedy indicated he preferred to invalidate both contribution and expenditure limits, he was willing to “leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions.”<sup>150</sup> He specifically noted that a benefit of such a system is that it would “permit[] officeholders to concentrate their time and efforts on official duties rather than on fundraising.”<sup>151</sup> Justice Breyer suggested that a review of the post-*Buckley* experience might lead the Court to “mak[e] less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates.”<sup>152</sup> Without directly challenging the contribution/expenditure line, *McConnell* relied heavily on the post-*Buckley* experience in concluding that the distinction *Buckley* had drawn between “express advocacy” and “issue advocacy” was “functionally meaningless,” thereby upholding BCRA’s restrictions and requirements with respect to electioneering communication.<sup>153</sup> So, too, the *McConnell* Court agreed that the extensive post-*Buckley* efforts by candidates, contributors, and interest groups alike to avoid *Buckley*’s limits justified BCRA’s aggressive anti-circumvention provisions.<sup>154</sup>

Thus, although *McConnell* does not directly challenge *Buckley*’s approach to expenditure limitations and, indeed, relies on it in validating BCRA’s limits on soft money contributions, *McConnell*’s concern for democratic values, its deference to Congressional fact-finding, and its willingness to reconsider aspects of the campaign finance doctrine articulated in *Buckley* in light of the post-*Buckley* experience all indicate that the *Landell* majority’s repeated invocation of *McConnell* is entirely appropriate. *McConnell*, the separate opinions in *Shrink Missouri*, and the Court’s partial reliance on inequality concerns in *Austin*, together suggest that, while *Landell* surely represents a sharp break from *Buckley*, it is not entirely out of step with the Supreme Court’s evolving campaign finance jurisprudence.

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148. *Id.* at 407.

149. *Id.*

150. *Id.* at 409.

151. *Id.*

152. *Id.* at 405 (Breyer, J., concurring).

153. *McConnell v. FEC*, 540 U.S. 93, 193 (2003).

154. *Id.* at 185.

## II. THE *LANDELL* REMAND: IS PUBLIC FUNDING A LESS RESTRICTIVE ALTERNATIVE TO SPENDING LIMITS?

In ordering a remand, the *Landell* panel raised the surprising possibility that two longstanding and traditionally complementary tenets of campaign finance reform— public funding and spending limits— may, ironically, be in conflict with each other. Although the Second Circuit found that both the prevention of corruption and the appearance of corruption and the protection of candidate time from the burdens of fund-raising are compelling constitutional concerns that could justify candidate spending limits, the court asked the district court to consider on remand whether there are less constitutionally burdensome means of achieving those goals.<sup>155</sup> Specifically, the appeals court directed the district court to assess whether the possibility that the Vermont legislature could adopt a program of voluntary public funding, with spending limits accepted by candidates as a condition for receiving public funds, is such a less restrictive means.<sup>156</sup> If so, then spending limits would be unconstitutional.

Judge Winter, in his dissent, found it “self-evident” that public funding would be a less restrictive way of “freeing candidates of improper influence from particular donors and relieving candidates of the need for extensive fundraising.”<sup>157</sup> He concluded that a remand was unnecessary to address the less restrictive means question since the possibility of public funding was certainly a less constitutionally burdensome way of achieving the state’s goals than mandatory spending limits.<sup>158</sup>

Judge Winter is correct in noting that public funding can reduce both the time burdens of fundraising and the ability of private interest groups to reap the quid pro quo benefits of providing candidates with financial support since public funding by definition provides candidates with an alternative to private fundraising. But, although public funding is an alternative to spending limits, it should not be treated as a less restrictive means than spending limits of promoting these goals.

First, all existing public funding systems include spending limits. Thus, they burden campaign speech as much as spending limits without public funding. To be sure, the Supreme Court has upheld the constitutionality of

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155. *Landell v. Sorrell*, 382 F.3d 91, 148 (2d Cir. 2004).

156. *Id.* at 131-33.

157. *Id.* at 207 (Winter, J., dissenting); see also *Homans III*, 366 F.3d 900, 914 (10th Cir. 2004) (mentioning public funding as an alternative version of campaign finance reform).

158. *Landell*, 382 F.3d at 207.



these limits on the theory that they are voluntarily agreed to by the candidate who has chosen to accept public funding.<sup>159</sup> But that assumes candidates have the right to decline public funding (and the concomitant limits). If that is the case, then optional public funding, even with limits, will not be an effective way of achieving the anti-corruption and time-protection interests approved by the *Landell* court.

Of course, a public funding system without spending limits is theoretically possible. In such a program of floors without ceilings, candidates could be given a basic amount of public funds to assure all candidates the ability to compete at some appropriate level, but then candidates would be free to raise whatever they can and to spend whatever they can raise. This would not burden speech, but candidates would remain free to amass and use unlimited private donations. Such a system would be largely ineffective in attaining the anti-corruption and time-protection goals relied on by the *Landell* court.

Second, even assuming a voluntarily-accepted spending limit as a condition for public funding is somehow both less of a burden on speech and equally effective in achieving the anti-corruption and time-protection goals, it should not be treated as a less restrictive alternative in the constitutional sense. A program should be considered a less restrictive alternative to an enacted program only if it is similar in kind to the enacted program and comparably available politically.<sup>160</sup> Thus, a higher spending limit would be a less restrictive alternative to a lower spending limit, although it might be less effective at reaching the spending limit's goals. So, too, a higher contribution limit would be a less restrictive and potentially effective alternative for attaining the time-protection goals of a spending limit, although it could undermine the anti-corruption goal. Both a higher contribution limit and a higher spending limit are similar in kind to a lower spending limit, as they both involve restrictions on the raising and spending of private campaign funds. These alternatives are both presumably politically available to the legislature that adopted a lower spending limit.

Public funding, however, is a totally different type of government intervention into the financing of a political campaign. By providing candidates with taxpayer dollars, rather than by limiting private funds, public funding changes the structure of the campaign finance system. It is, thus, a significant departure from both traditional forms of campaign

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159. See *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (treating a candidate acceptance of spending limits as a condition for public funding as voluntary).

160. See *Blasi*, *supra* note 104, at 1318 (noting that an optional system might increase time spent fundraising).

finance and traditional forms of campaign finance regulation. Moreover, as Federal Election Commission Chairman Bradley Smith has noted, there is an “almost endless array” of public funding systems.<sup>161</sup> Adopting a public funding system involves complex choices concerning which candidates are to get funds, how much funding any candidate is to get, what is the basis for deciding how much a candidate gets, and what conditions apply to publicly funded candidates.<sup>162</sup> Some public funding systems, like that used in the presidential general election, provide qualifying candidates with a flat grant.<sup>163</sup> Others match some fraction of private contributions, although at varying ratios of public dollars to private dollars.<sup>164</sup> In short, public funding presents many complex questions that are totally different from those raised by contribution and spending limits.

Not only is public funding categorically distinct from contribution and expenditure limitations, but public funding is also quite controversial. Although, as I have argued elsewhere, public funding would be an extremely positive campaign finance reform,<sup>165</sup> public funding has drawn considerable political and ideological opposition. Whereas most jurisdictions impose some limitations on contributions, only a relatively small number provide public funding.<sup>166</sup> Public funding is often derided as “welfare for politicians.” Certainly, as Chairman Smith has noted, “[t]here are many who have a blanket objection to any government financing of campaigns as inherently beyond the scope of . . . good government.”<sup>167</sup> Indeed, in Congress the Republican Party has opposed public funding as “an issue of principle”<sup>168</sup> as well as on political grounds. It is doubtful that a measure that is both so different from spending and has drawn such consistent political and philosophical opposition should be considered an available alternative to spending limits.

Third, public funding may not be as effective at advancing the anti-corruption and time-protection goals cited by the Second Circuit unless

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161. SMITH, *supra* note 129, at 89.

162. *See id.* at 88-105.

163. *Id.* at 96. “Matching” funds of up to \$250 per contribution are provided to all candidates seeking his or her party nomination who raises at least \$5000 in each of twenty states in amounts of \$250 or less. *Id.*

164. *Id.* at 97.

165. *See generally* Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563 (1999) [hereinafter Briffault, *Public Funding*].

166. *See id.* at 566-67 (noting that public funding is used in presidential elections as well as in statewide elections in Minnesota and Wisconsin, and in local elections in New York City and Los Angeles).

167. SMITH, *supra* note 129, at 89.

168. *See* Blasi, *supra* note 104, at 1318.

mandatory spending caps are imposed even on candidates who do not accept public funds. As long as candidates are free to opt out of public funding (and the spending limits that are a part of all public funding programs), some candidates will do so. There will be candidates who will want to spend well above the public funding limit and who believe they will be able to raise the funds that will enable them to do so. These will often be candidates who are either backed by extensive fundraising networks, or are personally wealthy. George W. Bush, who opted out of the presidential pre-nomination public funding limits in 2000 and 2004, exemplifies the first category, as does John Kerry, who also opted out of the presidential primary public funding system in 2004.<sup>169</sup> Michael Bloomberg, who drew on his enormous personal wealth to opt out of New York City's mayoral public funding system in 2001, exemplifies the second category.<sup>170</sup>

Not only do the candidates in the first category create corruption, appearance of corruption, and time-burden problems for themselves, but both types of opt-out candidates re-create the corruption, appearance of corruption, and time burden problems for their opponents and the electoral system as a whole. So long as some candidates are able to spend without limit, there will be pressure on their opponents to raise and spend amounts that will match the high-spenders. This will tend to force some candidates who might have preferred to take public funding with spending limits to opt for private funding without limits. This is particularly likely to occur when the public funding level is not high enough to support effective campaigning. Due to the political resistance to public funding previously mentioned, even when public funding systems are adopted, they are often underfunded and so do not provide adequate resources to participating candidates.<sup>171</sup> But in any event, due to opt-outs, so long as public funding is voluntary, it will not be as effective in attaining the anti-corruption and time-protection goals as mandatory spending limits.

Public funding should be seen not as an alternative to spending limits, but as a complement to it, and vice versa. Spending limits with public funding will do a better job of reducing the potentially corruptive effects of campaign contributions and reducing the time burdens of fundraising than

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169. See Campaign Legal Ctr., *Presidential Public Funding System: Problems of the Public Funding System*, at <http://www.campaignfinanceguide.org/guide-53.html> (last visited May 6, 2005).

170. See PAUL RYAN, CTR. FOR GOV'T STUDIES, *A STATUTE OF LIBERTY: HOW NEW YORK CITY'S CAMPAIGN FINANCE LAW IS CHANGING THE FACE OF LOCAL ELECTIONS 2*, available at <http://www.cgs.org/publications/docs/nycreport.pdf>.

171. See Briffault, *Public Funding*, *supra* note 165, at 586, 568 n.73.

spending limits without public funding. After all, without public funding, even candidates subject to spending limits must still spend time and effort in raising funds and they will still be dependent on the financial support of their contributors. Personally wealthy candidates, of course, are not subject to the potentially corruptive effects of private contributions and are not burdened by the requirements of fundraising. Most candidates, however, are not wealthy enough to fund their own campaigns, nor would it be desirable to solve the corruption and time-protection problems by restricting elective office to the rich. Public funding, as Judge Winter noted, theoretically solves the corruption and time-burden problems while actually providing new resources for electoral communication which can be particularly beneficial to political newcomers and challengers.<sup>172</sup> But, in practice, the effectiveness of public funding would be greatly strengthened if all candidates were subject to spending limits.

### III. MAKING THE CASE FOR SPENDING LIMITS

Although *Landell* did not uphold Vermont's spending limits, the Second Circuit did find that spending limits could be constitutional. The court read *Buckley*'s invalidation of FECA's spending limits as just a rejection of the specific justifications put forward and considered by the Supreme Court.<sup>173</sup> *Buckley* found only that "[n]o governmental interest that has been suggested is sufficient to justify" the First Amendment burden created by FECA's spending limits;<sup>174</sup> but, *Landell* found, *Buckley* did not hold that there is no governmental interest that could justify limits.

More controversially, the *Landell* court determined that, in light of the changed campaign finance circumstances since *Buckley*, one of the arguments for spending limits that was rejected by *Buckley*—the prevention of corruption and the appearance of corruption—can now provide a constitutionally sufficient justification for limits.<sup>175</sup> Unlike *Buckley*, the Second Circuit found that, in the absence of spending limits, contribution limits have failed to stem the corruption danger because the need for unlimited funds compels candidates to turn to intermediaries and bundlers in their quest for campaign money.<sup>176</sup> Despite this departure from *Buckley*, *Landell* still hews to *Buckley*'s basic approach of focusing on the impact of the process of raising the funds necessary to pay for unlimited spending on

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172. See *supra* note 115 and accompanying text.

173. *Landell v. Sorrell*, 382 F.3d 91, 106-10 (2d Cir. 2004).

174. *Buckley v. Veleo*, 424 U.S. 1, 55 (1976).

175. See *Landell*, 382 F.3d at 115-19.

176. See *id.* at 118.

the behavior of officeholders and the consequences for governance. Like *Buckley*, *Landell* focused on the potentially corrupting effects of the pursuit of contributions on the integrity of officerholder decisions, and on the potential effects of the appearance of such corruption on public confidence in government.<sup>177</sup> *Landell* added to *Buckley*'s corruption concern consideration of the distracting effect unlimited fundraising has on officerholder time and governance.<sup>178</sup> But in looking at the impact on a campaign spending practice on governance rather than on the election itself, *Landell* is still on the same wavelength as *Buckley*.

As I will suggest in the next two sections of this Part, although *Landell*'s governance concerns are important, it is uncertain whether, by themselves, they provide a constitutionally sufficient basis to justify spending limits. The constitutional case for spending limits becomes clearer when the impact of unlimited spending—which, of course, means unequal spending—on fundamental features of democratic elections, particularly electoral competitiveness and voter equality are taken into account. Electoral competition, voter equality, and concerns about governance together form an overarching interest in democratic self-government which may provide a constitutionally compelling case for spending limits.

#### A. The Prevention of Corruption and the Appearance of Corruption

The heart of *Landell*'s corruption justification is that *Buckley* failed to anticipate how the rise of bundling—due in part to the negative synergy of limited contributions and unlimited spending—re-introduced the potential for corruption and the appearance of corruption inherent in large contributions back into the campaign finance system.<sup>179</sup> In revisiting this aspect of *Buckley*, *Landell* drew comfort from language in *McConnell* in which the Court indicated it was willing to reconsider some of its earlier campaign finance judgments in light of the post-*Buckley* experience.<sup>180</sup> *McConnell* gave great weight to the rise of campaign finance practices that enable candidates and donors to effectively circumvent FECA's limits on large contributions while abiding by the letter of the law. The "soft money" which was the major target of BCRA allowed donors and candidates to evade contribution restrictions by channeling large contributions to political parties which could not have been given directly

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177. *See id.* at 116-17.

178. *See id.* at 119-24.

179. *Id.* at 118 (explaining that bundling could lead to contributor dominance in political campaigns, which could corrupt the process).

180. *See id.* at 118 n.13 (emphasizing that bundling can lead to the appearance of corruption).

to the candidates.<sup>181</sup> *McConnell* not only upheld tight restrictions on the soft money practices that had provoked Congress into enacting BCRA, but also sustained limits on other practices which had not yet proven problematic, but which Congress feared might become future conduits for campaign finance law evasion.<sup>182</sup> The post-*Buckley* experience with evasion thus led the Court both to sustain restrictions on campaign finance practices that did not involve the direct transmission of funds from donors to candidates and to defer to Congress's judgment concerning what campaign practices are likely to cause the same dangers of corruption and the appearance of corruption as direct contributions to candidates.

*Landell* is no doubt right that *McConnell* would support regulation aimed at preventing the corruption and appearance of corruption dangers posed by bundling. *Landell* is also no doubt correct in finding that the absence of spending limits poses a major incentive to bundling. But it is not clear that a spending limit is the least constitutionally restrictive means of addressing the bundling problem. One arguably less restrictive way of dealing with the potentially corruptive consequences of bundling is direct regulation of bundling itself. In the past, Congress considered legislation that would treat contributions collected or arranged by an intermediary as contributions of that intermediary, subject to contribution limits.<sup>183</sup> While no such rule was adopted, the anti-bundling proposals suggest an alternative means of addressing the potentially corruptive nature of the bundled contributions that is less restrictive of candidate speech than spending limits.

*Buckley* may have overstated the ability of contribution limits to address the corruption danger by failing to consider how the interplay of contribution limits and unlimited spending provides intermediaries and bundlers with an opportunity to play a pivotal role in campaign finance, thereby bolstering their influence on government. But it is not clear that even this more sophisticated understanding of the corruption problem, taken by itself, is sufficient to justify spending limits given the possibility of attacking the bundling problem without directly capping spending. So long as the only constitutionally cognizable justification for limiting campaign finance practices is the corruptive effect of donations on

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181. See *McConnell v. FEC*, 540 U.S. 93, 145-48 (2003).

182. See *id.* at 178-81 (upholding BCRA § 323(d), 2 U.S.C. § 441i(d) (2005)), 184-89 (upholding BCRA § 323(f), 2 U.S.C. § 441i(f)); see also Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 149, 167 (2004).

183. See, e.g., DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 193-94* (1990); FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 207-08* (1992).

officeholders (and the demoralizing “appearance of corruption” on a broader public aware of these contributions), spending limits will always be subject to the argument than restrictions on contributions, including bundling, are a less constitutionally burdensome means of achieving the anti-corruption goal. Indeed, even the Second Circuit appeared to recognize that the corruption and appearance of corruption concerns alone did not provide the necessary constitutional predicate for spending limits when it turned to a second justification—officeholder and candidate time protection.

### B. Time Protection

The time-protection argument is a very appealing justification for campaign spending limitation because it gets at some of the most disturbing consequences of our campaign finance system—the distraction of officeholders from the public business they are elected to address, and the increasing tendency of the fundraising system to discourage potential candidates from running for office.<sup>184</sup> Moreover, although the time-protection concern was arguably before the *Buckley* Court,<sup>185</sup> the Court did not discuss it in the context of spending limits so it cannot be said that *Buckley* ruled out this justification for spending limits. *Landell* also correctly concluded that the time-justification argument should not be considered precluded by *Buckley*’s rejection of high and rising campaign costs as a justification for spending limits since time protection addresses a different concern. As a result, there is less of a precedential barrier to the time-protection argument than to the anti-corruption argument. Indeed, an important aspect of the time-protection argument is that begins to push the campaign finance debate beyond the corruption/appearance of corruption framework to consider the broader impact of our campaign finance system on our political process. Yet the time-protection argument, like the anti-bundling concern, is still primarily focused on the impact of unlimited and unequal spending on government decision-making, rather than on the fairness of elections themselves.

Preliminarily, like the anti-bundling argument, the time-protection justification may be open to the response that there is a less restrictive fund-raising law change that would also protect candidate and officeholder time—an increase in the contribution limits. A key reason why candidates

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184. See *id.* at 189 n.24 (quoting *Buckley v. Valeo*, 519 F.2d 821, 838 (D.C. Cir. 1975)).

185. See *Landell*, 382 F.3d at 188-89 (Winter, J., dissenting) (noting that the time-protection argument was relied on by the Court of Appeals in *Buckley*, was discussed in the brief filed on behalf of the Attorney General and Solicitor General, and was mentioned by the Supreme Court) (citing *Buckley v. Valeo*, 424 U.S. 1, 91 (1976)).

have to spend so much time raising money is because they are allowed to accept only a limited amount per donor. If donors could make larger donations, more money could be raised with less effort and less use of candidate time. Of course, this would exacerbate the potentially corrupting consequences of large donations, so that raising contribution limits, while less restrictive, will also be less effective in improving the quality of government. So, a spending limit may be the least restrictive means of advancing the time-protection goal consistent with also pursuing the anti-corruption goals vindicated by contribution limits.<sup>186</sup>

Thus, the more important question is whether reducing the time-burdens of fundraising is a compelling government purpose. The time-protection argument combines two distinct elements—the impact of fundraising burdens on candidates, and the separate impact on officeholders. For candidates, the argument is that fundraising needs distort campaigning by forcing candidates to spend time with potential donors rather than with other voters.<sup>187</sup> According to this view, spending limits—provided the limits are high enough to allow for effective campaigning—would free candidates to spend more time with ordinary, non-wealthy voters. This is an attractive goal, but it is not clear that the government has a compelling interest in determining how candidates campaign or which groups they target with their appeals. Moreover, it is unlikely that the candidates will actually ignore non-donor voters. Fundraising may require candidates to give greater attention to donors and potential donors than their votes alone would warrant, but all candidates will eventually have to aim their campaigns at the voters, and not just at donors, since, ultimately, candidates need votes in order to win. So the candidate portion of the time-protection argument reduces to a government interest in the relative shares of candidate time devoted to donors versus nondonor voters.

The crux of the time-protection argument, thus, must be the protection of officeholder time. The original and most effective development of the time-protection argument focused on the need to protect officeholder time, freeing elected officials to devote more of their energies to the

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186. Public funding would also arguably be a less restrictive means of protecting candidate time than spending limits. Unlike spending limits, public funding actually gives candidates funds, thus more directly protecting candidate time than simply capping the total a candidate can spend. The reasons previously given in Part II as to why public funding may not be appropriately treated as a less restrictive alternative are also applicable here. As with the anti-corruption concern, spending limits and public funding could work well together to protect officeholder time; they should not be seen as mutually exclusive.

187. See *Landell*, 382 F.3d at 119-24; Blasi, *supra* note 104, at 1282-83. I say “other” voters since many—albeit not all—potential donors are likely to be voters in the candidate’s jurisdiction.



policymaking activities that are at the heart of their public responsibilities.<sup>188</sup> Yet, this argument, too, is vulnerable to the rebuttal that the real time diversion for officeholders is not fundraising but the campaigning of which fundraising is just a part. In other words, it is the electoral process itself, or, more accurately, the need to run for reelection in order to continue to hold office that diverts an elected official's time from the substantive responsibilities of office. It is unclear whether fundraising takes up more of officials' time than conferring with influential local party and civic leaders, attending the events of economic, social, ideological and media organizations, or meeting and greeting constituents throughout their terms of office as part of the permanent reelection campaign. Yet, surely the democratic accountability provided by the need to seek reelection is a fundamental value of our system, not a problem.<sup>189</sup> To the extent that the time devoted to campaigning does interfere with good government, there may be less restrictive solutions than an expenditure cap, such as limiting campaigning while the legislature is in session or limiting the number of terms an official may serve, thus eliminating the distraction of a reelection campaign from the final term.<sup>190</sup> More troubling, to the extent that it is difficult to distinguish the time burdens of fundraising from the time burdens of campaigning, the time-protection argument may be seen as implicitly suggesting a skeptical view of the value of elections themselves.

Of course, it could be argued that seeking media, interest group, or opinion leader endorsements, meeting with economic and social constituencies, and frequent interchanges with the voters is a more desirable form of campaigning than fundraising since fundraising focuses public officials' time on large donors while other forms of campaigning address the mass of constituents or the groups that represent their interests. But that counterargument is really a return to the candidate time-protection argument which, as I have suggested, seems less than compelling.

To be sure, the time-protection argument has emerged as a powerful one for scholars and judges alike. It has drawn the respectful attention of Justice Kennedy, who has otherwise been generally hostile to campaign

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188. See Blasi, *supra* note 104, at 1282-83 (explaining that fundraising efforts detract from both the quantity and the quality of time a candidate can spend on "information gathering, political and policy analysis, and debating and compromising with fellow representatives").

189. See *id.* at 1283 n.7 (explaining that constituents are "most actively engaged in expressing their complaints and preferences" during elections).

190. I do not advocate either of these measures, or address the constitutional issues raised by the first,, but merely use them to indicate that there may be other effective means of addressing the time burden problem without limiting campaign speech.

finance regulation,<sup>191</sup> and individual members of the Sixth and Tenth Circuit panels,<sup>192</sup> as well as the *Landell* majority.<sup>193</sup> It accurately captures the sense that the need to raise funds to match an opponent up to an unlimited maximum can take an enormous amount of elected officials' time and distract them from the business of government. Yet it is not clear whether candidate and officeholder time-protection constitutes a compelling justification for limiting candidate spending.

One aspect of the time-protection concern, however, may point the way to a more powerful justification for spending limits. There is considerable anecdotal evidence that the rigors of fund-raising have contributed to the decisions of some elected officials to decline to seek reelection, and, more importantly, have discouraged some potential candidates from even participating in the electoral process.<sup>194</sup> The burdensome fund-raising process, thus, can operate to deny voters the opportunity to consider potentially attractive candidates, while reducing the scope and intensity of electoral competition. The costs of the current fund-raising system, which is driven by unlimited spending, thus, point to a significant justification for spending limits—the compelling governmental interest in promoting competitive elections.

### C. Competitive Elections

As the Association of the Bar of the City of New York has explained, “[e]lections are about giving voters choices.”<sup>195</sup> A fair election allows voters to choose among a number of contenders for the same position, and also allows the candidates to compete for votes.<sup>196</sup> It is particularly important that voters, when faced with an incumbent seeking reelection, be able to consider challengers. The opportunity to deny reelection to incumbents, and the possibility that in any given election the people may exercise their authority to vote out current officeholders, is the ultimate security of popular control over government. As Joseph Schumpeter once observed, “electorates normally do not control their political leaders in any

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191. *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting).

192. *See supra* Part I.B.

193. *See Landell*, 382 F.3d at 119-24.

194. *See* Blasi, *supra* note 104, at 1293.

195. ASS'N OF THE BAR OF THE CITY OF N.Y., *DOLLARS AND DEMOCRACY: A BLUEPRINT FOR CAMPAIGN FINANCE REFORM* 91 (2000) [hereinafter *DOLLARS AND DEMOCRACY*].

196. *See id.*

way except by refusing to reelect them.”<sup>197</sup>

Incumbents typically start out in an election with many built-in advantages ranging from the free media attention they have received while in office to the opportunity to use their offices to provide constituency service and bring pork barrel expenditures back to their districts. These advantages contribute to, and are typically reinforced by, an incumbent’s superior fundraising prowess.<sup>198</sup> Interest groups and individuals interested in having access to officeholders are more likely to give to incumbents because incumbents are more likely to win, thus making their prediction of incumbent reelection more likely to come true.<sup>199</sup> Incumbents tend to heavily outspend challengers, much as winners generally outspend losers by substantial margins.<sup>200</sup> Moreover, an incumbent’s substantial financial superiority may discourage potential challengers from entering a race altogether.<sup>201</sup> In effect, the incumbent’s financial edge constitutes a form of barrier to entry that reduces the competitiveness of our electoral system.

Potentially unlimited campaign spending aggravates this burden on competitiveness. By enabling incumbents—and personally wealthy political newcomers—to spend all the money they can raise, the lack of a spending limit increases the ability of an incumbent or wealthy candidate to financially outdistance opponents and also increases the amount of money necessary to fund a competitive race. *Landell’s* repeated references to candidates’ “pervasive war chests” and the “arms race” mentality<sup>202</sup> underscore this point, even if the Second Circuit’s focus was on the amount of time it takes a candidate to build a war chest rather than the impact of a large war chest and the prospect of an unending arms race in scaring off challengers and narrowing voters’ options.<sup>203</sup> Unlimited spending can reduce electoral competitiveness, particularly the likelihood voters will

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197. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 272 (3d ed. 1950).

198. DOLLARS AND DEMOCRACY, *supra* note 195, at 91-92 (noting that “the statistical likelihood that the incumbent will be reelected increases his or her ability to collect funds from donors who want access to the winner.”).

199. *See id.* at 92.

200. *See generally id.* at 65 (citing Research and Policy Committee of the Committee for Economic Development, *Investing in the People’s Business: A Business Proposal for Campaign Finance Reform*, at 17, 67 (1999)).

201. *See Blasi, supra* note 104, at 1293 (noting that challengers are deterred by the “formidable war chests” incumbents can acquire by accumulating PAC contributions).

202. *See, e.g., Landell v. Sorrell*, 382 F.3d, 91, 121 (2d Cir. 2004) (quoting Blasi, *supra* note 104, at 1287), 122 (quoting Vermont Lieutenant Governor Smith), 123 (describing the testimony of public officials about an “arms race” mentality), 127 (referring to evidence at trial and legislative hearings indicating a “widespread” arms race mentality).

203. *See, e.g., DOLLARS AND DEMOCRACY, supra* note 195, at 60, 74.

hear from, and be able to choose among, candidates who are neither personally wealthy nor favored by wealthy backers. By discouraging such candidates from running, unlimited spending, rather than protecting speech, may actually reduce both the amount and the diversity of electoral speech that voters hear.

To be sure, a low spending limit can be anti-competitive. Indeed, there is evidence that being able to achieve a critical level of spending is essential for a challenger to be effective.<sup>204</sup> An unreasonably low spending limit can make it impossible for a challenger to get her name and message out to the voters. But reasonable spending limits would have little effect on most challengers' spending and would primarily serve to limit the ability of incumbents to wildly outdistance their challengers.<sup>205</sup> Reasonable spending limits could reassure challengers that the funds they are able to raise will enable them to finance a race that is competitive with that of the incumbent. So, too, such limits could cap the built-in advantages of personally wealthy, self-funding candidates. With the knowledge that they would not be dramatically outspent by incumbents or personally wealthy candidates and that even limited fundraising success might be enough to make them competitive, more candidates could be encouraged to enter races. Thus, reasonable spending limits would advance the interest in competitive elections—an interest that is constitutionally compelling because electoral competitiveness is essential to the public accountability that elections are intended to promote.<sup>206</sup>

Nor is there a less restrictive means of addressing the anti-competitive effects of incumbent war chests and the daunting advantages of well-funded candidates than restricting the level of spending that candidates can undertake. Public funding can enable a less well-funded candidate to get to a basic state-determined financial floor, and so promote competitiveness. But public funding can do nothing to limit well-funded candidates who do not take public funding from amassing war chests that give them a huge financial advantage and may even drive their opponents from the field.

*Buckley* did not directly consider the competitiveness argument for spending limits, and neither did *Landell*.<sup>207</sup> Should the case come before

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204. See generally GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980).

205. See ROBERT K. GOIDEL ET AL., MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN U.S. HOUSE ELECTIONS 72 (1995).

206. As with the prevention of corruption and the protection of officeholder time, competitive elections could also be effectively promoted with public funding. As with the other two goals, however, spending limits and public funding should be seen not as mutually exclusive, but as mutually reinforcing.

207. Lucero, writing for the Tenth Circuit panel in *Homans III*, noted that the state interested in promoting electoral competition is an "interest distinct from" the justifications

the Supreme Court—or first return to the Second Circuit after a decision by the district court on remand—the ability of spending limits to promote competitive elections ought to be considered in determining whether spending limits pass constitutional muster.

#### D. Voter Equality

The final interest worth considering in the debate over spending limits is equality. Equality is a central premise of our democratic system. Over the course of our history, the electorate has been expanded to include nearly all adult citizens. The one person, one vote doctrine<sup>208</sup> has sought to ensure not simply that each adult citizen has a right to vote but that each voter has an equally weighted vote, and thus an equal opportunity to affect the outcome of the election. Moreover, our laws most emphatically deny a special place for wealth in voting or running for office.<sup>209</sup> Most states long ago scrapped wealth or tax-payment requirements for voting, and the Supreme Court has mandated the elimination of wealth-based requirements for voting or running for office.<sup>210</sup> The role of voter equality in our electoral system has implications beyond the actual casting and counting of ballots. For an election to serve as a mechanism of democratic decision-making there must be a considerable amount of election-related activity before balloting can occur. Candidates, parties, interest groups, and interested individuals need to be able to attempt to persuade voters how to cast their ballots. The election campaign is an integral part of the process of structured choice and democratic deliberation that constitutes an election.

The interest in voter equality is not directly implicated by unlimited *candidate* spending. As *Buckley* explained, with limits on the size of campaign contributions, differences in resources will simply reflect differences in the size and intensity of support for candidates “and there is nothing invidious, improper, or unhealthy” in that.<sup>211</sup> In other words, equalizing the financial participation of voters in the election could very well lead to differences in candidate spending if more voters give their

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considered in *Buckley* and might be constitutionally compelling. 366 F.3d at 913; *see supra* note 69.

208. *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964).

209. *See Hill v. Stone*, 421 U.S. 289 (1975); *Bullock v. Carter*, 405 U.S. 134 (1972); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

210. *See, e.g., Hill*, 421 U.S. at 300-01 (invalidating requirement of separate approvals of voters and taxpayers as precondition for bond issue); *Bullock*, 405 U.S. at 149 (invalidating filing fee); *Harper*, 383 U.S. at 666 (holding poll tax unconstitutional).

211. *Buckley v. Valeo*, 424 U.S. 1, 56 (1976).

contributions to one candidate than another. Nevertheless, the voter equality concern can support one aspect of candidate spending limits that would not be effectively supported by the anti-corruption and time-protection concerns—the ability of personally wealthy candidates to use their own funds.

In a footnote, *Buckley* acknowledged that its assumption that candidate resources would reflect the size and intensity of a candidate's support—and, thus, not threaten voter equality—“may not apply where the candidate devotes a large amount of his personal resources to his campaign.”<sup>212</sup> But wealthy, self-funded candidates are significant players in our politics, and their large and growing role is due in significant part to *Buckley*'s combination of contribution limits and unlimited spending.<sup>213</sup> These candidates are uniquely well-positioned to spend money unconstrained by the effects of contribution limits, and their resources have nothing to do with the amount of public support for their campaigns. Democratic equality is sorely challenged when a candidate can use her personal wealth, which reflects neither the size nor the intensity of her popular support, to become a major contender. Neither the anti-corruption nor time-preservation concerns supports the imposition of limits on self-funded candidates since these candidates are not dependent on donors and need not waste their time gathering funds. It is not clear whether the spending of wealthy candidates can be limited solely in order to eliminate the corruption and time-burden problems faced by their opponents. Nor is it clear if the electoral competitiveness concern supports limits on the spending of wealthy self-funded candidates since often, due to the interaction of contribution limits and unlimited spending, wealthy self-funded candidates are the individuals in the best position to challenge incumbents.<sup>214</sup> Only the interest in voter equality provides a sufficient basis for limiting spending by self-funded candidates.

In addition, only the interest in voter equality could support limits on the spending of noncandidates, such as independent committees, that may undertake expenditures in support of or opposition to candidates. To be sure, the Vermont spending limits apply only to candidates and related expenditures undertaken by committees, interest groups, or individuals in support of a candidate,<sup>215</sup> so there was no need in *Landell* to develop a spending limit justification that extends to independent committees. Yet, ultimately, the success of candidate spending limits may turn on a state's

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212. *Id.* at 56 n.63.

213. DOLLARS AND DEMOCRACY, *supra* note 195, at 73-74.

214. *Id.* at 74.

215. Vermont Campaign Finance Act of 1997, VT. STAT. ANN. tit. 17, § 2805.

ability to impose reasonable limits on spending by outside groups. If spending by candidates is limited, interest groups and politically engaged individuals may shift their campaign funds from donations to candidates to independent spending. Although independent groups have an important role to play in presenting facts, ideas, and arguments to the voters, they do not speak for candidates, they do not stand for election, and they are not accountable to the electorate. The threat of unlimited one-sided spending can create the same disincentive to candidate entry as one-sided candidate spending. So, too, independent spending by wealthy individuals or well-funded committees could win the gratitude of, and access to, the elected officials who benefit from such spending, even if that spending is not technically coordinated with the candidate. *Buckley* rejected this proposition, but it is uncertain whether the Court's quasi-empirical hunch about the limited gratitude likely to result from uncoordinated independent spending is right. More pragmatically, some jurisdictions will be reluctant to enact candidate spending limits so long as unlimited spending by wealthy individuals and interest groups is possible. And only the interest in democratic equality can provide a compelling justification for independent spending limits.

*Buckley* emphatically and famously rejected the idea that equality can justify limitations on campaign communications.<sup>216</sup> But in *Austin* the Court engaged in reasoning that closely tracked the voter equality argument when it upheld the prohibition on corporate campaign expenditures. As *Austin* explained, corporate campaign spending can “unfairly influence elections” because a corporation’s campaign funds have “little or no correlation to the public’s support for [its] ideas.”<sup>217</sup> In other words, spending that reflects the corporate spender’s wealth rather than the extent of popular support for its message gives the corporate spending an undue influence over the electoral outcome. That is the voter equality argument exactly. More recently, Justice Breyer, concurring with Justice Ginsburg in *Shrink Missouri*, pointed out that “the Constitution tolerates . . . limiting the political rights of some so as to make effective the political rights of the entire electorate.”<sup>218</sup> Thus, *Buckley*’s rejection of equality concerns is itself in deep tension with equality concerns voiced elsewhere both by individual members of the Court and by the Court as a whole.<sup>219</sup>

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216. 424 U.S. at 48-49.

217. 494 U.S. 652, 660 (1990).

218. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

219. Although *Buckley* ruled out limits on independent spending, the Supreme Court of Canada recently upheld the limits imposed by the Canada Elections Act of 2000 on independent spending by individuals and groups in Canadian elections. See *Harper v.*

As Judge Calabresi nicely put it, inequality is surely the unspoken but “huge elephant—and donkey—in the living room in all discussions of campaign finance reform.”<sup>220</sup> The amelioration of the political consequences of wealth inequalities is surely one of the driving forces behind campaign finance reform. That concern should be taken directly into account in judicial consideration of spending limits.

### E. Democratic Elections

It is not clear whether any one of the arguments presented in this Part by itself would be sufficient to sustain candidate spending limits from constitutional challenge. The anti-corruption argument may be of compelling importance but there are arguably less restrictive means of addressing that concern, and the significance of elected official time-protection in a political environment in which elections take a considerable amount of time is debatable. To the extent that time-protection is fundamentally a concern about the consequences of the extensive fundraising that the current regime of limited contributions and unlimited spending requires, the ability of spending limits to alleviate the rigors of fundraising may advance the interest in electoral competition. Indeed, spending limits directly promote electoral competitiveness by limiting the ability of one candidate to financially overwhelm his or her opponents, but no court has yet determined that promoting competitiveness is a compelling concern.<sup>221</sup> Although protecting voter equality ought to be a basic principle of campaign finance regulation, the relevance of voter equality to *candidate* spending limits, other than limits on self-funded candidates, is uncertain, and *Buckley* sharply rejected the idea that equality concerns could be used to limit campaign speech. Ultimately the case for candidate spending limits may require putting all these arguments together.

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Canada (Att’y Gen.), [2004] S.C.R. 827. Judge Calabresi made equality concerns central to his concurrence in the denial of the petition for rehearing en banc in *Landell*. As he explained, equality is one of the “two principal values at play in the campaign finance debate”—the other value, of course, being freedom of political expression. *Landell v. Sorrell*, 2005 WL 826151, at \*1. Indeed, Judge Calabresi found equality concerns embedded in the First Amendment. As he explained, *Buckley*’s invalidation of spending limits enabled individuals to “express the intensity of their political feelings . . . through money.” *Id.* But, due to the “unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor.” *Id.* In his view, the Vermont spending limits may have been intended to create “something of an ‘equal’ opportunity to express intensity of political desire” and to use limits “to make sure that that intensity is not measured differently for rich and for poor.” *See id.*

220. *Landell*, 2005 WL 826151, at \*1.

221. *But cf.*, *Homans III*, 366 F.3d at 913 (suggesting that electoral competitiveness could be a compelling interest justifying spending limits).



*Landell* suggests a framework for aggregating arguments that might be inadequate when considered separately but powerful when taken together. As the Second Circuit explained, the anti-corruption and time-protection interests “overlap and might be better described as one interest—‘to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action.’”<sup>222</sup> That, indeed, should be the test. Does unlimited spending undermine democratic elections, and are spending limits narrowly tailored to advance the compelling interest in democratic elections?

The fundamental components of democratic elections are not limited to the prevention of corruption and the protection of officeholder time. Rather, they include the democratic values of electoral competition and the recognition of voter equality. To be sure, democratic values can also be threatened by spending limits. Limits can curtail the communications of the spenders. By limiting such communication, they can limit the information received by the voters. So, too, limits on candidate spending can make it harder for candidates to engage voters in the electoral process and mobilize them to come to the polls. In short, from a democratic perspective, spending limits have costs as well as benefits. The assessment of spending limits in light of the elements of democratic elections is, thus, a complex one, and certainly more complex than the exclusive focus on the potential for corruption and the appearance of corruption taken by *Buckley*. But surely the rules governing campaign finance should be informed by an awareness of the complex needs of electoral democracy.

### CONCLUSION

The ultimate fate of the Vermont spending limits upheld by *Landell* is uncertain. The Supreme Court could agree to take the case prior to action by the district court on remand.<sup>223</sup> The district court on remand, or the Second Circuit on appeal from the district court’s remand decision, could conclude that, given the possibility of public funding for candidates, spending limits are not the least restrictive means of advancing the compelling interests the court found. The district court or the Second Circuit could agree with Judge Winter that the specific spending limits adopted in 1997—which do not include a cost-of-living adjustment, make

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222. *Landell v. Sorrell*, 382 F.3d 91, 124 n.18 (2d Cir. 2004) (quoting *Nixon*, 528 U.S. at 401 (Breyer, J., concurring)).

223. A petition for certiorari was filed on May 12, 2005 on behalf of the Vermont Republican State Committee, the Vermont Right to Life Committee, Inc., and other petitioners. See *Vt. Republican State Comm. v. Sorrell*, No. 04-1530, available at <http://www.supremecourtus.gov/docket/04-1530.htm>.

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no provision for the costs of compliance with the campaign spending law, and count related expenditures of third parties not simply as contributions to candidates but as candidate expenditures, thereby eating into the expenditures allowed by candidates—have become too low to permit effective advocacy and are thus unconstitutional even if spending limits are theoretically permissible. Or, of course, the district court and the Second Circuit could find that the limits are constitutional. At that point the case would almost certainly go to the Supreme Court.

Whatever the next step, *Landell* will have played an important role in reopening the spending limits question. The three decades of *Buckley* have created a campaign finance regime that, in its combination of limited contributions and unlimited campaign expenditures, is inherently unstable. Candidates and donors alike are driven to create and exploit whatever loopholes they can find. Moreover, *Buckley*'s exclusive focus on corruption misses many of the larger issues at stake in the financing of election campaigns. *Landell* itself expands the range of judicial concern somewhat by adding the impact of bundling and the value of time protection, even if it failed to address such other critical factors as the implications for competitive elections and the value of voter equality. But in challenging even a piece of *Buckley*, *Landell* may have set in motion a process of judicial reconsideration not only of *Buckley*'s specific holding concerning spending limits but of *Buckley*'s broader framework for thinking about the constitutionality of campaign finance law.