CAMPAIGN EXPENDITURE LIMITS: A RIGHT TURN AT ALBUQUERQUE

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I. Introduction

From the first modernly financed national campaign by William McKinley in his successful bid for the office of President

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of the United States, the regulation of campaign finance has been an issue of utmost importance.[1] Campaign finance laws govern how individuals can raise and spend money in political campaigns, and as such, they are the rules of the nation's most important game. The rules of any contest can determine the outcome, and elections are no different than any other competition in this way. If one candidate cannot master the art of campaign fundraising, another candidate certainly will and there is no characteristic more strongly correlated with winning elections than having a larger campaign "war chest" than one's opponent.[2]

There have been many changes to the campaign finance landscape over time, most notably the United States Supreme Court's landmark rulings in *Buckley v. Valeo*,[3] and more recently in *McConnell v. Federal Election Commission*,[4] which interpreted the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"),[5] the most recent amendment to the Federal Election Campaign Act of 1971 ("FECA").[6] In *Buckley*, the Court upheld limits on campaign contributions by individuals[7] and political action committees,[8] but held unconstitutional a provision of FECA that placed a limit on campaign expenditures.[9]

Despite the skyrocketing costs of political campaigns since

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[1] BILL BRADLEY, TIME PRESENT, TIME PAST: A MEMOIR 162-63 (Vintage 1997) (1996).

[2] U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 14 (2003). These ever-expanding "war chests" are significant to the democratic process because the candidate who raises the most money is victorious in 94% of races. *Id.*

[3] Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

[4] McConnell v. FEC, 540 U.S. 93 (2003).

[5] Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. §§ 431-455 (2004)) [BCRA]. This Act is commonly known as the "McCain–Feingold Act," named after its two chief sponsors, Sen. John McCain (R-Ariz.) and Sen. Russell Feingold (D-Wis.).

[6] Federal Elections Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (2002) (codified as amended at 2 U.S.C. §§ 431-441, 451-454; 18 U.S.C. §§ 591, 600, 608, 610, 611; 47 U.S.C. §§ 312, 315, 802-805 (1972)) [FECA]. Congress has also amended FECA by passing the Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 563 (codified at 26 U.S.C. §§ 9001-9013 (1971)), and the Presidential Primary Matching Payment Account Act, Pub. L. No. 93-443, Title VI, 88 Stat. 1297 (codified at 26 U.S.C. §§ 9031–9042 (1974)).

[7] *Buckley*, 424 U.S. at 58.

[8] *Id.*

[9] *Id.* at 58-59.

Buckley, Congress has not revisited the idea of limiting campaign spending on a national level.[10] In response to the exploding cost of competitive campaigns – the so-called "arms race" – several states and localities have enacted voluntary campaign expenditure limits,[11] and, in the two cases addressed in this note, mandatory campaign expenditure limits.[12]

This note will analyze the current circuit split between the Second and Tenth Circuit Courts of Appeal on the question of whether *Buckley* acts as an absolute bar on mandatory campaign expenditure limits, and whether campaign expenditure limits are a viable solution to the campaign finance arms race.[13] I will begin by discussing *Landell v. Sorrell* and *Homans v. City of Albuquerque*, the conflicting cases constituting the circuit split in question.[14] Next, I will examine various compelling reasons for limiting campaign expenditures, such as: time protection,[15] increasing voter turnout,[16] combating the outrageous costs of campaigning,[17]

[10] NAT'L VOTING RIGHTS INST., REVISITING THE CONSTITUTIONALITY OF CAMPAIGN SPENDING LIMITS: VERMONT AND ALBUQUERQUE LEAD THE WAY TO THE SUPREME COURT (June 2004), *available at* http://www.buckbuckley.com/pdfs/spending_limits_legal_background.pdf (last visited Oct. 23, 2005) (overview of Albuquerque and Vermont cases). Prior to *Buckley* in 1976, the average cost of winning a race for a U.S. House seat was approximately $100,000; in the 2000 election cycle, the average cost was $840,000. *Id.*

[11] *See, e.g.*, MINN. STAT. § 10A.25 (2003). Other jurisdictions with voluntary campaign expenditure limits include: Arizona, ARIZ. REV. STAT. § 16-941 (LexisNexis 2004); Arkansas, ARK. CODE ANN. § 7-6-224 (2005); Hawaii, HAW. REV. STAT. § 11-208 (2003); Maine, ME. REV. STAT. ANN. tit. 21-A, § 1015 (2003); Montana, MONT. CODE ANN. § 13-37-250 (2004); New Hampshire, N.H. REV. STAT. ANN. § 664:5-a (2003); and West Virginia, W. VA. CODE § 3-B-5 (2004).

[12] *See* ALBUQUERQUE CITY CHARTER, art. XIII, § 4(d) (2004); 17 VT. STAT. ANN. tit. 17, §§ 2801-2883 (2003).

[13] Landell v. Sorrell (*Landell II*), 382 F.3d 91 (2d Cir. 2002) (opinion withdrawn Oct. 3, 2002; as amended Sept. 21, 2004), *cert. granted*, 74 U.S.L.W. 3199 (U.S. Sept. 27, 2005) (No. 04-1528) (holding that *Buckley* does not operate as a *per se* bar on campaign expenditure limits); Homans v. City of Albuquerque (*Homans III*), 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 625 (2004) (holding that *Buckley* operates as an absolute bar on campaign expenditure limits). The opinion of Judge Lucero, nominally the opinion of the Tenth Circuit Court of Appeals in *Homans*, is only the opinion of the court as to Parts I, II, and III, addressing procedural issues. *Id.* at 902-14. The opinion authored by Judge Tymkovich and joined by Judge O'Brien operates as the opinion of the court as to the merits of the constitutional issue before the court, despite being nominally a concurrence. *Id.* at 914-21.

[14] *See* cases cited *supra* note 13.

[15] *See* discussion *infra* Part IV.A.

[16] *See* discussion *infra* Part IV.B.

improving political representation,[18] and protecting states' rights.[19] Finally, I will reach the conclusion that the campaign finance arms race poses an imminent threat to the integrity of American democracy, and the current state and federal approach to campaign finance regulation under *Buckley* is fundamentally flawed, putting our core democratic values at risk. I will conclude that carefully crafted, reasonably applied, mandatory campaign expenditure limits are the most effective constitutional means of preserving the integrity of the American democratic process.

II. Background on National Campaign Expenditure Limits

A. Buckley v. Valeo

The United States Supreme Court in *Buckley* examined a constitutional challenge to a number of provisions of the 1974 FECA amendments.[20] Most important to the issue at hand is the Court's treatment of the campaign contribution limits and expenditure limits included in FECA.[21]

The Court in *Buckley* based its holding on the principle that money is the equivalent of speech for the purposes of a constitutional analysis.[22] Based on this principle, any limitations on campaign contributions or expenditures implicate the First Amendment's provisions of freedom of speech and association.[23] Any time Congress or any state or local legislative body passes a law that limits free speech in a content-based manner, that law is subject to strict judicial scrutiny.[24] To overcome the strict scrutiny standard, the legislature must present a compelling governmental

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17 *See* discussion *infra* Part IV.C.

18 *See* discussion *infra* Part IV.D.

19 *See* discussion *infra* Part IV.E.

20 *See* Buckley v. Valeo, 424 U.S. 1, 6 (1976).

21 *Id.*

22 *Id.* at 19-23.

23 *Id.* at 15.

24 Turner Broad. Sys. v. FCC, 512 U.S. 622, 641-42 (1994) (Content-based restrictions on speech are subject to the strictest level of scrutiny, while content-neutral restrictions are subject to intermediate scrutiny.). The *Buckley* Court applied strict scrutiny to the contribution and expenditure limits contained in FECA without discussing whether the restrictions were content-based or content-neutral. *See Buckley*, 424 U.S. at 29, 44-45.

interest that the law advances, and show that the law represents the least restrictive means of furthering that interest.[25]

In *Buckley*, the United States Supreme Court found that FECA's limits on campaign contributions met the compelling governmental interest of deterring corruption.[26] However, the Court did not agree with Congress that limiting expenditures sufficiently addressed the state's interest in preventing corruption.[27] According to the Court, campaign expenditures by a candidate do not threaten to create real or apparent quid pro quo arrangements in the same way as large contributions.[28] When the Court considered the corruption-prevention interest, it limited its analysis to the prevention of quid pro quo arrangements and did not address the broader corruption-related interest of preserving the integrity of the democratic system.[29] Because the Court only considered the government's interest in preventing corruption, the expenditure limits contained in FECA did not meet strict scrutiny and were held unconstitutional.[30]

B. *Post* Buckley

The current campaign finance system developed out of the remains of FECA after the *Buckley* Court struck down FECA's limits on campaign expenditures. Since *Buckley*, the Supreme Court has consistently upheld the validity of narrowly tailored contribution

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[25] *See* Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (citing Loving v. Virginia, 388 U.S. 1, 11 (1967)).

[26] *Buckley*, 424 U.S. at 29. FECA imposed a $1,000.00 contribution limit on individual contributors. *Id.* (citing 18 U.S.C. § 608(b)(5) (1976)). The Court found that the primary purpose of the contribution limit was to eliminate the existence and appearance of corruption or quid pro quo relationships between large contributors and candidates, and this purpose was sufficient to justify such a limit. *Id.* at 27-29. The Court found that this restriction was constitutional because it was sufficiently narrowly tailored to address the compelling governmental interest of fighting corruption in politics. *Id.* at 29.

[27] *Id.* at 45. The Court very specifically rejected § 608(e)(1) of FECA, which created expenditure limits, as unconstitutional because "the governmental interests advanced in its support [failed to] satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45.

[28] *Id.* In other words, the Court reasoned that a wealthy candidate runs no risk of being corrupted by spending large amounts of his own money. *See id.*

[29] *Id.*

[30] *Id.*

limits in both state and federal elections.[31] Lower courts, following *Buckley*, have also found corruption prevention alone to be an insufficient justification for imposing mandatory campaign-spending limits.[32] Thus, *Buckley* led directly to the development of a system that only regulates one side of the campaign finance equation based on the Court's simple holding that one provision of one statute was unconstitutional on a limited factual basis.[33] The Court could not have intended its holding to result in the creation of a new campaign finance system.[34]

After *Buckley* upheld limits on direct campaign contributions, the number and importance of political action committees ("PACs") exploded.[35] PACs and political parties became hugely valuable as conduits for infusing huge sums of money into the political system.[36] Senators John McCain (R–Ariz.) and Russell Feingold (D–Wis.), hoping to close loopholes left open by FECA, sponsored and advocated passage of campaign finance reform legislation for several years[37] before Congress finally passed BCRA.[38]

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[31] *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003) (upholding "soft-money" regulations in BCRA on corruption-prevention grounds, as well as limitations on non-FECA compliant contributions to certain tax-exempt organizations); FEC v. Beaumont, 539 U.S. 146 (2003) (upholding application of 2 U.S.C. § 441(b) ban on direct corporate campaign contributions to nonprofit advocacy corporations); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (upholding restrictions on coordinated expenditures by parties on corruption-prevention grounds); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (upholding a Missouri state law that limited contributions to state political candidates).

[32] *See* Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998) (striking down Cincinnati ordinance limiting campaign expenditures on grounds that the corruption-prevention justification alone was insufficient); Suster v. Marshall, 149 F.3d 523 (6th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (affirming a preliminary injunction granted by the district court blocking enforcement of Ohio Code of Judicial Conduct Canon VII(C)(6), which limited campaign expenditures in state judicial races, due to the insufficiency of the state's corruption-prevention justification).

[33] *See* Buckley v. Valeo, 424 U.S. 1, 44-45 (1976).

[34] *See id.*

[35] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1036-37 (2d ed. 2002).

[36] *See* FED. ELECTION COMM'N, PAC COUNT 1977-PRESENT (1998), *available at* http://www.fec.gov/press/paccnt_grph.html (last visited Oct. 23, 2005). PACs became particularly useful for corporations that wished to make huge soft money contributions under FECA, and between 1977 and 1998 the number of corporate PACs increased by roughly 1,000, from under 600 to just shy of 1,600. *Id.*

[37] *See* Editorial, *An Extraordinary Victory*, N.Y. TIMES, Mar. 21, 2002, at A36.

BCRA, the most sweeping change to campaign finance laws since the enactment of FECA, sought to reform the campaign finance system by closing soft-money loopholes that allowed unlimited and unregulated contributions to political parties.[39] In *McConnell v. Federal Election Commission*, the Court upheld the constitutionality of BCRA.[40] However, BCRA, as interpreted by *McConnell*, is still far from a solution to the problems of excessive money in politics.[41]

The enactment of BCRA and the ruling in *McConnell* have reduced the role of the "soft money" as intended,[42] but have led to an increase in so-called "527" groups that can still accept unlimited unrestricted contributions so long as they do not coordinate with a candidate's campaign.[43] When PACs and political parties waned somewhat in significance, 527's emerged to

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[38] *See supra* note 5; *see also* Bipartisan Campaign Reform Act of 2002, 107 CIS Legis. Hist. P.L. 155 (2002). BCRA, *inter alia*, "establishes restrictions on the use of so-called soft money contributions which are not required to be reported under Federal law." *Id.*

[39] *See id.*

[40] McConnell v. FEC, 540 U.S. 93, 114 (2003).

[41] *See id.* at 223-24. Evidence of this can be seen in the two cases to come from the U.S. District Court for the District of the District of Columbia in September 2004, challenging the law a mere forty-six and fifty-four days before the 2004 general election, respectively. *See* Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004) (challenging the FEC's regulation of coordinated expenditures as allowing circumvention of the express intent of BCRA); Sykes v. FEC, 335 F. Supp. 2d 84 (D.D.C. 2004) (rejecting U.S. Senate candidate's challenge of the validity of BCRA as enforced by the FEC prior to the 2004 general election in Alaska to the extent that it allowed out-of-state contributions to his opponent's campaign).

[42] *See* 147 CONG. REC. S2444-46 (daily ed. Mar. 19, 2001) (statement of Sen. Feingold). Sen. Feingold stated:

> Our parties raise unlimited money with one hand, and we cast our votes with the other. . . . Either we finally ban soft money in the next few weeks, or we let [the people] conclude that we are so addicted to the system, so tainted by corruption or at least the appearance of corruption that, once again, we cannot change.

Id.

[43] Glen Justice, *The 2004 Campaign: Campaign Finance*, N.Y. TIMES, May 14, 2004, at A18. 527 committees are political organizations named for the section of the tax code that provides for their tax-exempt status, 26 U.S.C. § 527 (2005). Under the Supreme Court's decision in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 438 (2001), any expenditure by a person or group that is "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" constitutes a coordinated expenditure, and thus a political contribution. *Id.*

fill their role as conduits for unregulated contributions.[44] This is representative of an old problem in campaign finance reform described best by the *McConnell* Court: "[w]e are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet."[45]

Limiting contributions has been historically ineffective at stemming the campaign finance arms race,[46] and it was no coincidence that Congress intended FECA to include both contribution and expenditure limits.[47] Since *Buckley* struck down FECA's regulations on expenditures, it is not surprising that reformers have been trying mostly in vain to enact meaningful campaign finance reform without restricting expenditures.[48] Contribution limits without expenditure limits are doomed to be ineffective in meeting the goal of campaign finance regulation: to "promote fair practices in the conduct of election campaigns."[49]

BCRA therefore cannot be a solution to the problems of the current campaign finance system because that statute only deals with one side of the problem.[50] So long as a candidate has a use for an extra dollar, a donor with a stake in the race will find a way to provide it.[51] Recognizing this fact, the City of Albuquerque in 1974, and the State of Vermont in 1998, reached the same logical solution: campaign expenditure limits.[52] If the *McConnell* Court is right that money is like water, then campaign expenditure limits can act as a dam holding back the flood.

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[44] Glen Justice, *McCain Calls for New Limits on Money to Political Groups*, N.Y. TIMES, Feb. 2, 2005, at A14. 527 committees spent over $400 million dollars in the 2004 election cycle. *Id.*

[45] *McConnell*, 540 U.S. at 224.

[46] *See supra* text accompanying note 10.

[47] *See* Federal Election Campaign Act of 1971, 92 CIS Legis. Hist. P.L. 225 (1972) [hereinafter FECA Legis. Hist.].

[48] *See* 143 CONG. REC. S8290 (daily ed. July 30, 1997) (statement of Sen. McCain). Speaking about the need for campaign finance reform during the 105th Congress, Sen. McCain said, "[m]embers [of Congress] have recognized [the public's demand for campaign finance reform], and as proof of that recognition, have introduced over seventy campaign finance bills." *Id.*

[49] *See* FECA Legis. Hist., *supra* note 47. Congress passed FECA to "promote fair practices in the conduct of election campaigns for Federal political offices, and for other purposes." *Id.*

[50] *See supra* text accompanying note 39.

[51] *See* McConnell v. FEC, 540 U.S. 93, 224 (2003).

[52] *See supra* note 12.

C. *Changing Judicial Attitudes Toward Money and Speech*

The days of treating *Buckley* as a *per se* constitutional bar on expenditure limits may be numbered.[53] Several Supreme Court Justices since *Buckley* have indicated a desire to revisit the opinion's holding and make clear that expenditure limits are not *per se* unconstitutional.[54] In *Nixon v. Shrink Missouri Government PAC,* where the Supreme Court formally extended *Buckley* to uphold state laws limiting campaign contributions,[55] Justice Stevens wrote a brief concurrence where he attempted to make clear the interests involved in campaign finance cases. Justice Stevens succinctly stated, "[m]oney is property; it is not speech."[56] Justice Breyer, in a concurring opinion joined by Justice Ginsburg, also called for a reexamination of the constitutional issues in *Buckley*,[57] declaring that while money may enable speech, it is not speech for purposes of a First Amendment analysis.[58] Justice Breyer's concurrence in *Nixon* also based the need to reexamine *Buckley* on the experience gained since *Buckley* and the legislature's "political judgment that unlimited spending threatens the integrity of the electoral process."[59] Justice Kennedy, in dissent, joined the chorus of justices calling for a reexamination of *Buckley*, and expressed his desire to "overrule *Buckley* and . . . free Congress or state legislatures to attempt some new reform."[60]

III. The Circuit Split

A. *The Vermont Answer: Act 64*

Speaking at his inauguration in 1997, Vermont Governor Howard Dean spurred his state's campaign finance reform

[53] *See* Landell v. Sorrell (Landell II), 382 F.3d 91, 108-09 (2d Cir. 2002).

[54] *See id.*

[55] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 381-82 (2000).

[56] *Id.* at 398 (Stevens, J., concurring).

[57] *Id.* at 400 (Breyer, J., concurring).

[58] *Id.*

[59] *Id.* at 403-04.

[60] *Id.* at 409 (Kennedy, J., dissenting). Justice Thomas has also called for a re-examination of *Buckley*, but his ultimate desire is to eliminate any regulation of campaign funds. *See* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465-67 (2001) (Thomas, J., dissenting).

movement by telling the General Assembly, "money does buy access and we're kidding ourselves and Vermonters if we deny it. Let us do away with the current system."[61] The Vermont General Assembly responded by passing Act 64.[62] With Act 64, the General Assembly acted on a desire to avoid corruption and the appearance thereof, and sought to protect the time and access that are essentially for sale to key contributors.[63] The Vermont Legislature enacted an expenditure limit applicable to candidates for governor of $300,000 per two-year election cycle and limits of lesser amounts applicable to candidates for other offices.[64] Furthermore, candidates for governor and lieutenant governor may be eligible for public campaign financing if they receive a certain quantity of contributions from a certain number of contributors.[65] Act 64 also limits the spending of an incumbent governor, lieutenant governor, secretary of state, state treasurers, auditors of accounts, and attorney general to 85% of the amount described elsewhere in the statute.[66]

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[61] Landell II, 382 F.3d 91, 96 (2d Cir. 2002).

[62] VT. STAT. ANN. tit. 17, §§ 2801-2883 (2004) [Act 64].

[63] *Landell II*, 382 F.3d at 96.

[64] VT. STAT. ANN. tit. 17, § 2805a(a)(1). An expenditure limit of $100,000 applies to candidates for lieutenant governor. *Id.* § 2805a(a)(2). A limit of $45,000 applies to candidates for secretary of state, state treasurer, auditor of accounts, and attorney general. *Id.* § 2805a(a)(3). Candidates for the State Senate and county offices are limited to $4,000 with an additional $2,500 for each seat in any multi-seat district. *Id.* Candidates for state representative are limited to $2,000 for single and $3,000 for dual-member districts. *Id.* § 2805a(a)(4). All limits are effective for a two-year election cycle. *See id.* The statute also recommends a limit for U.S. Representatives and Senators equal to the limit set for candidates for governor. *Id.* § 2805a(b). The Vermont Legislature recognizes the jurisdiction of the federal government over elections for federal offices and in deference has made the limits for such races mere recommendations. *Id.*

[65] *Id.* §§ 2851-56. In addition to other requirements found in §§ 2851-56, candidates for governor who wish to receive public campaign financing must collect no less than $35,000 from no fewer than 1,500 qualified individual contributors, each contributing no more than $50.00. *Id.* § 2854(a)(1). Subject to similar limitations as candidates for governor, candidates for lieutenant governor must also raise $17,500 from no fewer than 750 qualified contributors, each contributing no more than $50.00. *Id.* § 2854(a)(2).

[66] *Id.* § 2805a(c). Similarly, candidates for the General Assembly who are incumbents of the seat they are running for are limited to 90% of the amount described in § 2805a. *Id.* Act 64 contains a number of other provisions challenged in *Landell*, but they are unrelated to this note. *See generally Landell II*, 382 F.3d at 105. Act 64 limits contributions from individuals residing out-of-state and out-of state

Following extensive deliberations,[67] the Vermont Legislature identified three main problems that justified the passage of Act 64.[68] First, the General Assembly found that candidates had to spend too much of their time fundraising to the exclusion of their other duties.[69] Next, the General Assembly found that fundraising under the old system provided donors with greater access than non-contributors.[70] Finally, the General Assembly recognized that as expenditures increased, the quality of debate diminished. The General Assembly attributed this to the necessary decrease in interaction with voters in favor of donors.[71] The public in turn became less involved and less confident in the electoral process.[72]

The litany of formal findings by the Vermont General Assembly used to promulgate Act 64 is a key distinguishing feature from Article XIII of the Albuquerque City Charter, the subject of the Tenth Circuit's decision in *Homans*.[73] The Vermont Legislature passed Act 64 with an explicit intent to further a specific list of compelling government interests.[74] To justify Act 64's expenditure limits, the state narrowed its interests to five:

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political organizations to 25% of total contributions. VT. STAT. ANN. tit. 17, § 2805(c). Act 64 also treats third-party coordinated expenditures as contributions to the candidate, thus subject to contribution limits, and as expenditures by the candidate to be counted against the expenditure limit. *Id.* § 2809(a)-(b). There is a rebuttable presumption that expenditures by a party or PAC count against the candidate's expenditure limits if the expenditure primarily benefits six or fewer candidates. *Id.* § 2809(d).

[67] *Landell II*, 382 F.3d at 100. The General Assembly took testimony from over 145 witnesses and conducted over sixty-five hearings in considering Act 64. *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See id.* The Legislature found that the exorbitant cost of campaigns for state office had limited the ability of many Vermonters to run for office. *Id.* at 101-02.

[73] *See Landell II*, 382 F.3d at 101-02. The Albuquerque City Charter is discussed *infra* at Part III.C.

[74] *See Landell II*, 382 F.3d at 100-02. Because of the necessary enormity of campaign war chests, candidates tended to seek a small number of large contributors to help fund their campaigns, and these large donors were often from out of state. *Id.* at 101. The Legislature determined that the expenditure limits, which had been scaled to the size of the candidate's potential constituency, would allow more people to "express their opinions, level of support and their affiliations." *Id.* Further, the Legislature was confident that the amounts specified in Act 64 would be sufficient to run an effective campaign in the State of Vermont. *Id.*

> (1) "avoiding the reality and appearance of corruption in elective politics and government"; (2) "assuring that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties"; (3) promoting "electoral competition and . . . protecting equal access to political participation"; (4) "bolstering voter interest and engagement in elective politics"; and (5) "enhancing the quality of political debate and voters' understanding of the issues."[75]

Based on the formal findings of the General Assembly that the elimination of large contributions, especially from out-of-state corporations and PACs, would lead to more direct voter involvement and candidate-voter interaction, the Vermont Legislature implemented campaign expenditure limits.[76] The General Assembly found that funding of campaigns by out-of-state interests undermined the public's faith in their elected officials, because out-of-state contributors ostensibly have distinct interests from the constituencies of the candidates they are financing.[77] The Legislature also reasoned that public financing for campaigns would free candidates from looking out of state for contributions and allow them to dedicate more time and energy to deal with pressing issues, respond to constituent needs, and perform the duties they were elected to perform.[78] The Legislature also found that expenditure limits would allow new candidates, perspectives, and ideas that otherwise might not be heard to enter the public debate regardless of their proponents' abilities to amass a huge war chest.[79]

B. *The Second Circuit's Decision*

In *Landell v. Sorrell*, the United States District Court for the District of Vermont and the United States Court of Appeals for the Second Circuit considered the constitutionality of various provisions of Act 64, including the expenditure limit provisions.[80]

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[75] *Id.* at 115 (citation omitted).

[76] *Id.* at 101 (quoting 1997 Vt. Acts & Resolves 64 (H. 28)).

[77] *Id.*

[78] *Id.* at 101-02.

[79] *Id.*

[80] *Landell II*, 382 F.3d at 102-03 (citing Landell v. Sorrell (*Landell I*), 118 F. Supp. 2d 459 (D. Vt. 2000)). The district court consolidated *Landell v. Sorrell* from three

When the district court heard *Landell*, the only prior court to interpret *Buckley*'s ruling on expenditure limits was the U.S. Court of Appeals for the Sixth Circuit in *Kruse v. City of Cincinnati*.[81] In *Kruse*, a divided court found that *Buckley* operated as a *per se* bar on campaign expenditure limits.[82] The *Kruse* Court, in finding that Cincinnati had not presented a compelling governmental interest, had no need to address the narrow tailoring portion of the strict scrutiny inquiry.[83] *Landell* marked the first time that a federal court addressed expenditure limits that were supported by justifications other than simple quid pro quo corruption

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separate civil suits. *Id.* at 102. The plaintiffs from the three suits were: Marcella Landell, Donald R. Brunelle, and the Vermont Right-to-Life Committee in the first case; Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, and the Vermont Libertarian Party in the second case; and the Vermont Republican State Committee in the final case. *Id.* The consolidated list of defendants included the Attorney General and Secretary of State of Vermont, fourteen state attorneys, and a number of intervenors, including the Vermont Public Interest Research Group, the League of Women Voters of Vermont, and many members of Vermont's General Assembly. *Id.* A separate case, Vt. Right to Life Comm. v. Sorrell, 221 F.3d 376 (2d Cir. 2000), challenged other sections of Act 64, including the provisions requiring:

> [D]isclosure of who pays for "political advertisements" and the candidate, party or political committee "on whose behalf" the advertisement is published or broadcast; and . . . [those sections requiring disclosure] of expenditures of "mass media activities . . . which included the name or likeness of a candidate for office" occurring within 30 days of a primary or general election.

Landell II, 382 F.3d at 102 n.4 (citing VT. STAT. ANN. tit. 17, §§ 2881-2883; *Vt. Right to Life Comm.*, 221 F.3d at 376).

[81] Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998). The Cincinnati City Council passed City Ordinance 240-1995, which capped expenditures for candidates for the City Council at three times the annual salary of a city council member. *Id.* at 909. In defense of the expenditure limit, the city only presented a simple anti-corruption justification for the ordinance, which the Sixth Circuit found insufficient. *Id.* at 915. The Sixth Circuit found that the Supreme Court's rulings in *Buckley v. Valeo*, 424 U.S. 1 (1976), *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), and *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), "clearly foreclose [the anti-corruption justification] as a matter of law." *Kruse*, 142 F.3d at 915.

[82] *Kruse*, 142 F.3d at 909. Judge Cohn, concurring in the Sixth Circuit's opinion in *Kruse*, disagreed, and said, "[t]he Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional." *Id.* at 920 (Cohn, D.J., sitting by designation, concurring).

[83] *See id.* at 918-19; *see also Landell II*, 382 F.3d at 125 (stating that no other court had reached the narrow tailoring question in considering mandatory campaign expenditures).

prevention.[84]

The U.S. District Court for the District of Vermont interpreted *Buckley* as setting "an extremely high constitutional threshold for expenditure limits."[85] The district court recognized that there was significant dispute over whether *Buckley* operated as a *per se* bar on campaign expenditure limits, but the court also recognized that *Buckley* was decided on very narrow facts.[86] The district court's decision in *Landell* suggests the court's conviction that Act 64 succeeded in passing the extremely high *Buckley* scrutiny for expenditure limits, but the district court was hesitant to be the first court in the country to find campaign expenditure limits constitutional.[87] Because of a lack of case law on valid expenditure limits in the Second Circuit, and the lack of any precedent upholding expenditure limits anywhere in the nation, the court found that the doctrine of stare decisis required a holding that the limits were unconstitutional.[88]

The Second Circuit did not consider itself bound by stare decisis to hold that *Buckley* operated as a *per se* bar on campaign

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[84] *Landell I*, 118 F. Supp. 2d at 459.

[85] *Id.* at 481.

[86] *Id.* at 482.

[87] *See id.* at 483. "This court would be remiss not to acknowledge that the state provided that each of these concerns exist, and that Vermont's expenditure limits address them. The state's factual presentation at trial decidedly sets this case apart from both *Buckley* and *Kruse.*" *Id.* The *Kruse* Court found that while *Buckley* was "decided on a slender factual record," Cincinnati's attempt to create a factual record sufficient to uphold the limits failed. *Kruse*, 142 F.3d at 919. In contrast, the district court in *Landell* found that the "wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64," did not fail to create a compelling factual record to support expenditure limits. *Landell I*, 118 F. Supp. 2d at 483. The "concerns" mentioned by the district court in *Landell* referred to four compelling governmental interests not addressed in *Buckley*, but since addressed in a number of other opinions. *Id.* They include: "[p]ermitting officeholders to concentrate their time and efforts on official duties rather than fundraising," *id.* (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting)); "[f]reeing office holders so they can perform their duties," *id.* (quoting Kruse v. City of Cincinnati, 142 F.3d 907, 920 (6th Cir. 1998) (Cohn, D.J., concurring)); "[p]reserving faith in our democracy," *id.* (quoting *Kruse*, 142 F.3d at 920 (Cohn, D.J., concurring)); "[p]rotecting access to the political arena," *id.* (quoting Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 649-50 (1996) (Stevens, J., dissenting)); and "[d]iminishing the importance of repetitive 30-second commercials," *id.* (quoting *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 649-50 (Stevens, J., dissenting)).

[88] *Landell I*, 118 F. Supp. 2d at 483.

expenditure limits because the court distinguished *Landell* from *Buckley*.[89] The Second Circuit expressly disagreed with the Tenth[90] and Sixth[91] Circuits, which categorically prohibited expenditure limits based on those courts' interpretations of *Buckley*.[92] The Second Circuit's majority opinion held that finding *Buckley* to be a *per se* constitutional bar on campaign expenditure limits would be contrary to "not only *Buckley's* own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy."[93]

Because the Second Circuit determined that *Buckley* did not operate as an absolute bar on expenditure limits, the court proceeded to address the appropriate standard of review.[94] Act 64 limits the amount of money that can be spent "for the purpose of influencing an election,"[95] and the court held that a law limiting the amount of money a party may spend for a political purpose is content-based[96] and subject to strict scrutiny.[97] While strict scrutiny

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[89] Landell II, 382 F.3d 91, 103 (2d Cir. 2002). Judge Straub wrote the majority opinion and the opinion of the court, which was joined by Judge Pooler. *Id.* Judge Winter entered a dissenting opinion. *Id.* It is worth noting that in 1975, six years before being appointed to the federal judiciary, then-Professor Ralph K. Winter argued before the United States Supreme Court on behalf of the appellant in *Buckley*, Sen. James Buckley, opposing both contribution and expenditure limits. *See* Buckley v. Valeo, 424 U.S. 1 (1976); FED. JUDICIAL CTR., JUDGES OF THE UNITED STATES COURTS, RALPH K. WINTER, JR., *available at* http://www.fjc.gov/servlet/tGetInfo?jid=2621 (last visited Oct. 23, 2005).

[90] Homans v. City of Albuquerque (*Homans III*), 366 F.3d 900 (10th Cir. 2004).

[91] *Kruse*, 142 F.3d at 907.

[92] *Landell II*, 382 F.3d at 107.

[93] *Id.* at 110.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 110 n.8. The court recognized that some academics find campaign expenditure limits to be content-neutral because expenditures are limited regardless of which candidate is being aided. *Id.* (citing Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 517 n.151 (1996)). But commentators have also described campaign expenditure as "subject-matter limitation[s]" because of their applicability to political campaigns and nothing else. *Id.* (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-27, at 1132-36 (2d ed. 1988)).

[97] *See id.* "To uphold a content-based restriction on speech, the government must prove the existence of a compelling state interest to support the restriction, and that the restriction is narrowly tailored to advance that interest." *Id.* "The level of scrutiny applied is akin to the 'strict scrutiny' standard frequently employed in the equal protection context, in terms of required degree of 'fit' between means and

is a "serious barrier" to upholding Act 64's expenditure limits, the court intimated that it could be overcome so long as the court determines that the "[l]egislature was serving the people's interest and not its own."[98] Citing Justice Stevens' concurrence in *Nixon* and his proposed reformulation of the "money-as-speech" paradigm, the court applied strict scrutiny as required by *Buckley* but also "define[d] the protected interest as precisely as possible."[99]

When defining the interest asserted by the challengers to the expenditure limits in *Landell*, the Second Circuit paid close attention to the principles underlying the First Amendment.[100] For the sake of specificity, the court distinguished the interest at hand from classic political speech, and instead described the interest as "the ability to spend money on political speech."[101]

The Second Circuit's most challenging task was determining whether the state had a compelling interest that warranted expenditure limits.[102] The Second Circuit, like the district court below, granted substantial deference to the findings of the legislature as to the necessity of the expenditure limits in Act 64.[103] The court's analysis focused on two critical interests served by Act

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ends." *Id.*

[98] *Landell II*, 382 F.3d at 114.

[99] *Id.* at 111 (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring)).

[100] *See id.* at 110-11.

[101] *Id.* at 111 (citing *Nixon*, 528 U.S. at 400 (Breyer, J., concurring)) ("money is not speech; it enables speech"). The Second Circuit also recognized the voters' interest in receiving political speech as distinct from a candidate or party's interest in speaking. *Id.* One of the plaintiffs, Marcella Landell, was a voter seeking to enforce her right to receive political speech. *Id.* The Supreme Court in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989), held that any restriction on political speech that serves as an impediment to a voter's effort to learn about issues or candidates is constitutionally suspect. *Id.* However, the court in *Landell* "disagree[d] that the high level of protection accorded political speech or the money enabling it dictates that the provision must automatically be struck down." *Landell II*, 382 F.3d at 112.

[102] *See id.* at 111. "[I]t is improper to secondguess [sic] a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* (citing FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982)) (internal quotation marks omitted).

[103] *Id.* at 113. However, the court could not defer to the legislature on the issue of whether the Act was sufficiently narrowly tailored. *Id.* (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (political judgments as to necessity may be balanced, but the justification must be evaluated independently)).

64: the deterrence of corruption (or the appearance thereof)[104] and time protection.[105] In the years since *Buckley*, the Supreme Court has recognized that the anti-corruption interest can be broader than the *Buckley* Court considered it to be.[106] The Court has stated that the anti-corruption interest is not limited to the deterrence of bribery, but also incorporates a broader concern for politicians who are "too compliant with the wishes of large contributors."[107] But because of *Buckley*'s holding that corruption deterrence was an insufficient basis for limiting campaign expenditures, the Second Circuit in *Landell* noted that a court should require "considerable evidence" that any corruption problem is attributable to unlimited campaign spending.[108] The Second Circuit also examined Vermont's time protection argument as an issue of first impression, because the Supreme Court had yet to thoroughly analyze time protection as a justification for limiting campaign expenditures.[109]

The Second Circuit held that Vermont's interests in deterring corruption and ensuring time protection were sufficient to support the imposition of campaign expenditure limits.[110] The court then "ventured into uncharted waters" by discussing the narrow tailoring requirement of a limit on campaign expenditures.[111] After extensive discussion of the narrow tailoring requirement, the Second Circuit remanded the issue of whether or not Act 64's expenditure limiting provisions were sufficiently narrowly tailored to the district court.[112]

Prior to remanding, the Second Circuit explained the steps of the narrow tailoring requirement with an unparalleled degree of

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[104] *See id.* at 115; *see also* discussion *infra* Part IV.F.

[105] *See Landell II*, 382 F.3d at 119; *see also* discussion *infra* Part IV.A.

[106] *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000); *see also* McConnell v. FEC, 540 U.S. 93, 143 (2003).

[107] *Nixon*, 528 U.S. at 389.

[108] *Landell II*, 382 F.3d at 115.

[109] *See id.* at 119-124; *see also* discussion *infra* Part IV.A.

[110] *Landell II*, 382 F.3d at 124.

[111] *Id.* at 125. Due to the rarity of statutes limiting campaign expenditures, neither the Supreme Court not any circuit court has ever reached the narrow tailoring inquiry with regard to such limits. *Id.*

[112] *See id.* at 125-35. The district court had not previously addressed this prong of the inquiry because it was unnecessary in light of the finding that campaign expenditure limits were *per se* unconstitutional under *Buckley*. *Id.* at 135.

detail and comprehensiveness.[113] The first step of the court's proposed analysis requires the court to evaluate the "fit" between the interest and remedy, or, in other words, whether the expenditure limits actually further the professed interests.[114] A subset of this step requires a determination of whether or not the legislature acted with improper motives in passing the bill.[115] The second step in the analysis is to inquire whether the levels of the limits would allow for "effective advocacy."[116] The final step of the narrow tailoring analysis asks whether the law is the "least restrictive means" of furthering the compelling interests.[117] This is a two-part inquiry: first, the type of regulation must be the least restrictive; and second, there must be a sound basis for choosing the particular expenditure limits in the statute.[118] While the record on appeal supported a finding that Act 64 allowed for effective advocacy, the district court had not inquired whether another type of regulation, or a higher limit, would still be able to further the state's compelling interests.[119] To answer these questions, the Second Circuit remanded the matter to the district court.[120]

Landell is significant because it marks the first time a federal

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[113] *See id.* at 125-31.

[114] *Id.* at 128.

[115] *Id.*

[116] *Landell II*, 382 F.3d at 129 n.20 (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)). In *Austin*, the Supreme Court upheld a Michigan law limiting independent political expenditures from a corporation's general fund because that law was sufficiently narrowly tailored to allow for effective advocacy. *Austin*, 494 U.S. at 654, 660. The Court held that the law was "precisely targeted to eliminate the distortion caused by corporate spending *while also allowing corporations to express their political views.*" *Id.* at 660 (emphasis added).

[117] *Landell II*, 382 F.3d at 131-32.

[118] *Id.* at 132. The *Buckley* Court held that "if [a court] is satisfied that some limit . . . is necessary [it] has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000 . . . such distinctions in degree become significant only when they can be said to amount to differences in kind." Buckley v. Valeo, 424 U.S. 1, 30 (1976). The *Landell* Court reserved judgment as to whether Act 64 falls into this category, saying, "there may well be 'differences in kind' as to the choice of specific spending limits that demand scrutiny." *Landell II*, 382 F.3d at 132.

[119] *Id.* at 135.

[120] *Id.* at 136. Specifically, the Second Circuit ordered the district court to inquire: (1) what other alternatives the legislature considered; (2) why the legislature rejected these alternatives; (3) whether one of the alternative regulations would have been less restrictive of First Amendment rights; and (4) whether the interests in time protection and corruption prevention would be as effectively advanced by one of the alternatives. *Id.*

appellate court found a sufficiently compelling interest to justify expenditure limits. Because of the explicit circuit split on this issue between the Tenth and Second Circuit Courts of Appeal and the general displeasure of several justices with *Buckley*, the Supreme Court has granted certiorari in the Vermont case.[121] *Randall v. Sorrell* has the potential to be a watershed moment in the history of campaign finance reform and American democracy.[122]

C. *Albuquerque's Expenditure Limits*

In 1974, two years before *Buckley*, the City of Albuquerque restructured its city government and drafted a new city charter.[123] The new charter included, *inter alia*, a provision limiting campaign expenditures in races for city council and mayor.[124] This provision of the charter limited candidates for the office of councillor to campaign expenditures not exceeding twice the annual salary of a councillor as of the date of the candidate's declaration of candidacy.[125] Similarly, expenditures by candidates for mayor could not exceed twice the annual salary of the mayor as of the date of the candidate's declaration of candidacy.[126] These provisions were wildly popular with the general public, as over 90% of voters approved these limits when they appeared as a ballot question.[127]

Mandatory campaign expenditure limits existed in a quiet,

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[121] *See supra* note 13.

[122] *See* Linda Greenhouse, *Supreme Court Takes on Spending Limits for Candidates*, N.Y. TIMES, Sept. 28, 2005, at A1.

[123] ALBUQUERQUE CITY CHARTER, Historical Postscript (2004).

[124] *Id.* art. XIII, § 4(d). In addition to a provision limiting campaign contributions from any individual donor to no more than 5% of the annual salary of the office sought, there are two other novel provisions in art. XIII, § 4: one for the disposition of excess campaign funds, and one for disposition of "anonymous contributions." *Id.* art. XIII, § (4)(f). The provision for disposition of excess funds limits a candidate to four choices in disposing of excess funds, such as keeping the funds for a possible run-off, returning the money to the donor, giving the money to the city's General Fund, or donating the excess funds to the charity of the candidate's choice. *Id.* Any anonymous contribution must be placed in the city's General Fund, or given to a charity. *Id.* art. XIII, § (4)(g).

[125] *Id.* art. XIII, § (4)(d)(1).

[126] *Id.* art. XIII, § (4)(d)(2).

[127] Homans v. City of Albuquerque (*Homans III*), 366 F.3d 900, 902 (10th Cir. 2004).

effective, self-contained environment in Albuquerque for twenty-five years. The quarter-century period during which the city enforced expenditure limits[128] has produced a substantial data set from which to analyze the actual effects of spending limits.[129] The experiment came to an impasse, however, when Rick Homans, a mayoral candidate in 2001, and Sander Rue, a candidate for the City Council, challenged the limits.[130]

In August 2001, the U.S. District Court for the District of New Mexico denied Homans' request for a preliminary injunction against the enforcement of the expenditure limits.[131] In September 2001, the Tenth Circuit reversed, granting Homans' request for injunctive relief in an emergency interlocutory appeal.[132] After the interlocutory appeal, the district court found that "the circuit court's interpretation of law and application of law to facts" obligated the district court to issue a declaratory judgment in Homans' favor as well as a permanent injunction against enforcement of the expenditure limits on the grounds that the limits violated the First and Fourteenth Amendments to the U.S. Constitution.[133]

The City of Albuquerque appealed the district court's decision, and presented three justifications that it considered sufficiently compelling to sustain the limits on campaign

[128] In 1997, a state court temporarily enjoined enforcement of the expenditure limits. *Id.* at 903.

[129] *See* discussion *infra* Part IV.B.

[130] Homans v. City of Albuquerque (*Homans II*), 217 F. Supp. 2d 1197, 1198-99 (D.N.M. 2002).

[131] *Id.*

[132] Homans v. City of Albuquerque (*Homans I*), 264 F.3d 1240, 1245 (10th Cir. 2001) (per curiam) (emergency injunction pending appeal granted). After the Tenth Circuit granted the preliminary injunction Homans promptly exceeded the expenditure limit of $174,720.00 for the October 2, 2001 mayoral election. *Homans II*, 217 F. Supp. 2d at 1197. In 2001, the Mayor's salary was $87,360.00; candidates for mayor were subject to expenditure limitations of twice this amount pursuant to ALBUQUERQUE CITY CHARTER, art. XIII, § 4(d)(2). When the race was over, Homans spent $552,188 on his unsuccessful campaign. Kate Nash, *Mayoral Candidates Spent More Than $1.69 Million*, ALBUQUERQUE TRIB., Nov. 17, 2001, at A4. Under the relevant ordinances, Homans would have been subject to a fine for each violation of the spending limit, and possible public reprimand and removal from office by the city council if he were to win office. *Homans II*, 217 F. Supp. 2d at 1198.

[133] *Id.* at 1206-07.

expenditures.[134] First, the city argued that the expenditure limits furthered the city's interest in enhancing public confidence in the democratic process and deterring corruption.[135] Second, the city argued that the limits furthered a compelling governmental interest by protecting the time of office holders so they could spend more time governing and less time fundraising.[136] Finally, the city claimed the provisions furthered a compelling interest by making elections in the city more competitive.[137]

D. *The Tenth Circuit's Decision*

When the Tenth Circuit heard the case on final appeal, the court affirmed the holding of the district court that the city had not put forth a sufficiently compelling governmental interest for limiting campaign expenditures. Because the city had not convinced the court that there was a sufficiently compelling interest, the court did not reach the question of whether the charter provision was sufficiently narrowly tailored.[138]

Judge Lucero wrote the majority opinion of the three-judge panel of the Tenth Circuit as to all issues before the court except the constitutional issue.[139] Judge Lucero recognized that *Buckley* did not operate as a *per se* bar on expenditure limits in law or fact, but was unconvinced that the city's professed interests were sufficiently compelling.[140]

Judge Tymkovich, joined by Judge O'Brien, concurred in part, concurred in the result, and wrote for the majority as to the constitutional issue before the court.[141] Judge Tymkovich took a harder line on the standard of review required to find a compelling governmental interest justifying expenditure limits.[142]

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[134] *Homans III*, 366 F.3d at 907. In *Buckley*, the appellee argued that limiting campaign expenditures would: avoid corruption and the appearance thereof, equalize candidate resources, and limit the arms-race mentality by containing the ever-increasing cost of campaigns. *Id.* at n.7.

[135] *Id.* at 907.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 912-15.

[139] *Id.* at 902, 914.

[140] *Homans III*, 366 F.3d at 913-14 (Lucero, J., concurring).

[141] *Id.* at 915-16 (Tymkovich, J., concurring).

[142] *Id.*

After writing that *Buckley* did not act as a *per se* bar on expenditure limits, Judge Tymkovich wrote:

> One can safely conclude that *Buckley* forecloses a finding that spending limitations can be narrowly tailored to further governmental justifications other than the anti-corruption interest sustained by the Supreme Court, no matter what evidence may be presented. In short, the City must do more than offer academic distinctions of the rationales rejected in *Buckley*. Albuquerque failed to do so here.[143]

While Judge Tymkovich may have stated that *Buckley* imposes no *per se* bar on expenditure limits, the court seems to be enacting just such a bar.[144] By stating that the possibility of a "finding that spending limits can be narrowly tailored to further governmental justifications," is "foreclose[d] . . . no matter what evidence may be presented," the court effectively created a *per se* bar on expenditure limits contrary to its previous statement and the holding of *Buckley*.[145]

IV. Why Are Expenditure Limits the Answer?

In *Buckley*, the Supreme Court only considered a narrow version of the corruption-prevention argument in deciding that expenditure limits did not meet strict scrutiny.[146] However, the twenty-five years of experience with expenditure limits in Albuquerque,[147] and the in-depth findings of the Vermont General Assembly,[148] now provide empirical evidence indicating that expenditure limits serve important governmental interests other than the interest in preventing corruption.

A. *Time Protection*

Time protection is the new, highly compelling justification

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[143] *Id.*

[144] *See id.*

[145] *See id.*

[146] Buckley v. Valeo, 424 U.S. 1, 45 (1976).

[147] *See* discussion *infra* Part IV.B. The City of Albuquerque implemented Amendment XIII in 1974 and it remained unchallenged until 1995. *Homans III*, 366 F.3d at 902. It was briefly enjoined in 1997, and remained in effect until being permanently enjoined in 2001. *Id.*

[148] *See* discussion *supra* Part III.A.

for campaign expenditure limits that came out of *Landell*.[149] *Landell* marks the first time that a court addressed the time-protection argument as a justification for mandatory campaign expenditure limits.[150] Vermont described time protection as an interest in "assuring that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties."[151]

Considering a rationale for governmental action, Justice Souter, writing for the Court in *Nixon*, said, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[152] Applying this principle to the time-protection interest, the district court in *Landell* found that there was adequate evidence that the need to raise money "turns legislators away from their official duties."[153] The Second Circuit agreed that there was sufficient evidence that a time-protection interest existed and that the expenditure limits addressed this interest.[154] Therefore, both courts found that the state had advanced sufficient empirical evidence of a novel and plausible government interest to withstand exacting judicial scrutiny.[155]

The time required for candidates and office holders to raise money to bolster their campaign war chests is significant and often prevents elected officials from fully dedicating themselves to the job to which they have been elected.[156] When the Court issued the *Buckley* opinion in 1976, the time-protection argument had yet to be developed because the campaign fundraising arms race had not yet taken off to the degree it has today.[157] Over time, the cost

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[149] Landell II, 382 F.3d 91, 119 (2d Cir. 2002).

[150] *Id.* The *Buckley* Court only made passing mention of the "rigors" of fundraising. *Buckley*, 424 U.S. at 91.

[151] *Landell II*, 382 F.3d at 119.

[152] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000).

[153] Landell I, 118 F. Supp. 2d 459, 468 (D. Vt. 2000).

[154] *Landell II*, 382 F.3d at 124.

[155] *Id.*

[156] *See generally* Brief of Amici Curiae Former Senators Bill Bradley & Alan Simpson, City of Albuquerque v. Homans, *cert. denied*, 125 S. Ct. 625 (2004) (No. 04-413) [hereinafter Bradley-Simpson Brief].

[157] *See* 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.

of running a successful campaign for federal office has exploded.[158] Between 1976 and 2000, the cost of a winning congressional campaign increased 425%; during the same period the rate of inflation was 170%.[159]

After the City of Albuquerque filed a petition for certiorari from the Tenth Circuit Court of Appeals, several current[160] and former[161] federal office holders submitted *amicus* briefs to the

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REV. 1281, 1287 (1994).

[158] Bradley-Simpson Brief, *supra* note 156, at 11.

[159] U.S. PUBLIC INTEREST RESEARCH GROUP, LOOK WHO'S NOT COMING TO WASHINGTON 3 (2001).

[160] Brief of Amici Curiae Sen. Ernest F. Hollings et al., City of Albuquerque v. Homans, *cert. denied*, 125 S. Ct. 625 (2004) (No. 04-413) [hereinafter Hollings Brief]. Senators Fritz Hollings (D-S.C.), Ted Stevens (R-Alaska), Jack Reed (D-R.I.), Dianne Feinstein (D-Cal.), Chuck Schumer (D-N.Y.), Christopher Dodd (D-Conn.), and Arlen Specter (R-Pa.) filed a brief that addressed time protection as a compelling governmental interest. *Id.* at 19. As sitting public officials it would have been imprudent for them to focus too strongly on the time-protection argument because that would imply that they were not doing their jobs as well as possible; but the fact that their brief addressed the subject of time protection as a valid concern demonstrates the importance of the issue.

[161] Bradley-Simpson Brief, *supra* note 156. Former Senators Bill Bradley (D-N.J.) and Alan Simpson (R-Wyo.), who filed a brief as *amici curiae* in support of the petition for certiorari in the *Homans* case, are useful subjects for examining trends in the costs of campaigning for the U.S. Senate. *Id.* Senators Bradley and Simpson represented the most densely populated and least populous states in the Union, respectively, and both Senators served three full terms in the United States Senate. *Id.* In 2000, Sen. Bradley made a competitive but ultimately unsuccessful bid for the Democratic Party's nomination for the Presidency. *Id.* Sen. Bradley's first campaign for the open Senate seat in New Jersey in 1978 cost $1,688,499, and in 1984 that number skyrocketed to $4,566,758. CTR. FOR RESPONSIVE POLITICS, BILL BRADLEY, *available at* http://www.opensecrets.org/1994os/osdata/bradlbil.pdf (last visited Feb. 25, 2005). By the time Sen. Bradley ran for reelection in 1990, the cost of his successful campaign had increased more than seven-fold from 1978 to a mammoth $12,475,527. *Id.* Sen. Simpson of Wyoming provides a less stark but no less striking example of the fundraising arms race. In 1978, Sen. Simpson spent $439,805 to win a U.S. Senate seat in Wyoming, but by 1990 the Senator's campaign had more than tripled in cost to $1,443,298. CTR. FOR RESPONSIVE POLITICS, ALAN SIMPSON, *available at* http://www.opensecrets.org/1994os/osdata/simpsala.pdf (last visited Oct. 23, 2005). Sen. Simpson's spending in 1990 in Wyoming amounted to $3.18 per Wyoming resident. *See* U.S. CENSUS BUREAU, COUNTY AND CITY DATA BOOK: 2000, AREA AND POPULATION TABLE, *available at* http://www.census.gov/prod/2002pubs/00ccdb/cc00_tabA1.pdf (last visited Oct. 23, 2005) (based on the 1990 U.S. Census, the State of Wyoming had a population of 453,589). By comparison, had Sen. Bradley spent $3.18 per person in New Jersey in 1990 (which had a population of 7,747,750), his campaign would have cost $24,637,845. *See id.* Based on his actual spending in his 1990 race, Sen. Bradley spent $1.61 per person in New Jersey. *See id.*

United States Supreme Court on the issue of time protection. As experienced and successful campaigners and legislators, these groups of *amici curiae* have expertise in the field of campaign finance, and extensive firsthand knowledge of the time and effort that federal office holders must dedicate to fundraising. Their insights are particularly useful because in their political careers they have worked under the current system and dealt with proposed remedies to the system in their roles as legislators.

As expensive as congressional races are, the costs of presidential campaigns are even more astronomical. In the course of the 2004 election cycle, President George W. Bush and Sen. John F. Kerry combined to raise $693,465,089.[162] To raise this amount of money in one year, President Bush, while serving as President of the United States with all the responsibilities of that office, would have needed to raise over one million dollars per day.[163] Similarly, Sen. Kerry, while representing the Commonwealth of Massachusetts in the United States Senate, would have needed to raise an average of $948,502 per day for one year for his presidential campaign.[164] It is no secret that presidential candidates have teams of fundraisers raising money on their behalf, but the presidential candidates are not immune from the need to personally "dial for dollars" and attend countless fundraising dinners.[165] This leads to two obvious problems that the State of Vermont and the City of Albuquerque each invoked as justifications for the imposition of expenditure limits: the appearance of corruption[166] and the vast amount of time spent

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[162] CTR. FOR RESPONSIVE POLITICS, 2004 PRESIDENTIAL ELECTION, *available at* http://www.opensecrets.org/presidential/index.asp (last visited Oct. 23, 2005).

[163] *Id.* President Bush accumulated $374,659,453 in total receipts during the 2004 election cycle. *Id.*

[164] *Id.* Sen. Kerry raised $346,203,404 in total receipts during the 2004 election cycle. *Id.*

[165] *See, e.g.*, Anne-Marie O'Connor, *Kerry's California Coddling*, L.A. TIMES, Oct. 26, 2004, at A1.

[166] *Id.* Large fundraisers in President Bush's 2000 campaign were given the titles of Pioneer, Ranger, and Super-Ranger depending on the amount of contributions they were responsible for accumulating. *Id.* Of the fundraisers who were classified as Pioneers, Rangers, or Super-Rangers, "at least 146 of them got federal jobs or appointments, some in positions to regulate their industries; at least two got Cabinet posts, and twenty-four were made ambassadors." *Id.* This seems to qualify as "the appearance of corruption" to say the least. President George W. Bush is not alone in this behavior either. In 1988 five people who contributed at least $100,000 to the

fundraising rather than performing the tasks the office holders were elected to perform.[167]

Although the sums of money at stake in presidential races are unmatched, the time constraints of fundraising are just as pervasive in congressional races.[168] In practice, few incumbent members of Congress face serious opposition when they seek reelection.[169] Only about thirty of the 435 seats in the United States House of Representatives were competitive in the 2004 general election.[170] But those thirty House members in competitive districts are locked into a Sisyphean cycle marked by expensive reelection campaigns until they choose not to seek reelection or are defeated.[171] Even members of Congress in non-competitive districts are not immune from the arms-race mentality and often must engage in huge amounts of fundraising activity meant only to ward off potential challengers.[172]

B. *Historical Benefits of Expenditure Limits in Albuquerque*

Albuquerque's twenty-five year experiment with campaign expenditure limits provides a singular opportunity to study the effects of such limits.[173] Albuquerque voters are a unique sample

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Republican Party were nominated to be United States ambassadors. Carol Matlack et al., *Don't Look Homeward,* 22 NAT'L J. 1458 (1990).

[167] *See, e.g.,* PUBLIC CITIZEN, BUSH FUNDRAISING JUGGERNAUT MAKES CASE FOR MAJOR OVERHAUL OF PRESIDENTIAL PUBLIC FINANCING SYSTEM, *available at* http://www.citizen.org/congress/campaign/issues/pub_fin/articles.cfm?ID=10644 (last visited Oct. 23, 2005). Between November 3, 2003 and December 31, 2003, President Bush and First Lady Laura Bush were scheduled to attend twenty-two fundraising events. *Id.*

[168] *See generally* LARRY MAKINSON, SPEAKING FREELY: WASHINGTON INSIDERS TALK ABOUT MONEY IN POLITICS (2d ed. 2003).

[169] *Id.* at 13.

[170] Eric Slater, *Safe Seats in House Keep True Races Rare,* L.A. TIMES, Oct. 11, 2004, at A1. Only one of California's fifty-three House seats was seriously contested in 2004, and only two of New York's twenty-nine House seats were competitive. *Id.*

[171] *See* MAKINSON, *supra* note 168, at 17. In SPEAKING FREELY, former Representative Sam Gejdenson (D–Conn.) described his life in a competitive House seat, and said that he generally spent "two to three hours a day raising money." *Id.* Despite this huge amount of fundraising, Rep. Gejdenson ultimately lost his bid for reelection in 2000.

[172] *Id.* at 16. For example, former Representative Joe Scarborough (R–Fla.) spent $700,000 on his fourth congressional race in 2000 even though he won his primary with 77% of the vote and was unopposed in the general election. *Id.*

[173] Anthony Gierzynski, *Albuquerque Election Financing: An Analysis by Anthony Gierzynski, Ph.D., Professor of Political Science at The University of Vermont,* 6, *available at*

population because they have voted for more than a quarter century in municipal elections that were subject to expenditure limits and state and federal elections that were not.[174]

After a court enjoined the expenditure limits for one election cycle in 1997,[175] a group conducted a survey to gauge Albuquerque voters' opinions of the expenditure limits.[176] This survey supports the Vermont General Assembly's conclusion that expenditure limits increase voter interest and engagement.[177] Based on the voter survey, an overwhelming majority of voters found the city elections in Albuquerque to be "cleaner, fairer, less influenced by special interest money, and more accessible to non-wealthy candidates" than national and state elections.[178] Overall, 87% of respondents favored the spending limits while only 9% opposed them.[179] In addition to favoring these spending limits, a significant majority of respondents feared that removal of the limits would result in negative consequences.[180] Independent of the widespread

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http://www.nvri.org/library/cases/albuquerque/electionfinancinganalysis.pdf (last visited Oct. 23, 2005).

[174] *Id.*

[175] *Id.* at 8.

[176] Lake Snell Perry & Associates and John Deardourff/The Media Company, Public Perceptions of Campaign Spending Limits: Findings from a Survey of 400 Registered Voters in the City of Albuquerque, New Mexico (August 1998), *available at* http://www.nvri.org/library/cases/albuquerque/publicperceptions_Albuquerque_NM.pdf (last visited Oct. 23, 2005) [hereinafter Public Perceptions]. This telephone survey, conducted in August of 1998, interviewed a random sample of 400 registered voters in Albuquerque. *Id.* at 2. The sample was weighted to accurately reflect the registered voters in Albuquerque and the results of the survey have a margin of error of +/- 4.9%. *Id.* The City of Albuquerque submitted this poll as "exhibit 2" in *Homans. See id.* at 1; *see also* Homans v. City of Albuquerque (*Homans III*), 366 F.3d 900, 910 n.13 (10th Cir. 2004).

[177] Landell II, 382 F.3d 91, 115 (2d Cir. 2002).

[178] Public Perceptions, *supra* note 176, at 16. Seventy percent of respondents believed that local elections in Albuquerque were "fairer than state and national elections," and 74% found them to be "less influenced by special interests than state and national elections." *Id.* at 41.

[179] *Id.* at 19. These results are consistent across gender, age, economic, geographical, and partisan lines. *See id.* at 20-25.

[180] *Id.* at 32. In response to the question, "[p]lease tell me if the item I read to you would be very likely to happen, somewhat likely to happen, somewhat unlikely, or very unlikely to happen if these limits are removed," 83% of respondents worried that without spending limits, elected officials would be less responsive to ordinary citizens who are not donors; 79% believed that ordinary citizens would no longer be able to run a serious campaign for office in the absence of these limits; 77% saw an increased risk of undue influence or corruption at the hands of special interests if

public support for Albuquerque's expenditure limits, there are other policy arguments that are relevant to a discussion of the merits of campaign expenditure limits.[181]

1. Electoral Competition

One widely touted policy argument against expenditure limits is that they decrease competition in elections and increase the advantage of incumbency.[182] This argument proves untrue in practice however, because no incumbent mayor in Albuquerque won reelection between 1974 and 2001 when the limits were in effect.[183] In contrast, the average incumbent success rate for mayors in the United States seeking reelection was 88% in 1999.[184] This statistic shows that there was no incumbency benefit for mayors in elections conducted with expenditure limits in place.[185] For city council elections in the decade between 1989 and 1999, Albuquerque City Council members were successful in their bids for reelection 71% of the time compared with an 86% reelection rate for incumbent city council members nationwide between 1988 and 1996.[186]

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the limits were removed; 78% believed that the increased time required for fundraising would take away from the time available for the officeholder to do his or her job; and 59% said that they would have "less faith in the integrity of the election process in Albuquerque" if expenditure limits were removed. *Id.*

[181] *See generally* Public Perceptions, *supra* note 176.

[182] Gierzynski, *supra* note 173, at 6.

[183] *Id.* at 5-6. Between 1974 and 2001 there were seven elections for mayor, though the spending limits were enjoined in both the 1997 and 2001 races. *Id.* In this time period, incumbents ran and lost in four races. *Id.* In November 2001, Mayor Martin J. Chavez became the first Albuquerque mayor to serve multiple terms since the imposition of spending limits. *See id.*; CITY OF ALBUQUERQUE, MAYOR MARTIN J. CHAVEZ: BIOGRAPHY, http://www.cabq.gov/mayor/bio.html (last visited Oct. 23, 2005). However, he did not prevail in 2001 as an incumbent. *Id.* The Mayor's victory in 2001 occurred after the Tenth Circuit, on an application filed by his opponent Rick Homans, enjoined the spending limit. *See supra* note 132.

[184] Gierzynski, *supra* note 173, at 6. This incumbency advantage has remained consistent over time. *Id.* According to the National Conference of Mayors, of the 140 incumbent mayors seeking reelection in 2000, 126 were successful. *Id.* This is a rate of 90% nationwide in the year 2000 compared to 0% in Albuquerque over twenty-seven years. *See id.*

[185] *Id.*

[186] *Id.* (citing Susan MacManus, *The Resurgent City Councils*, *in* AMERICAN STATE AND LOCAL POLITICS: DIRECTIONS FOR THE 21ST CENTURY (Ronald E. Weber & Paul Brace eds., 1999)).

The only long-term, real-life experiment with expenditure limits has yielded no evidence that such limits create any advantage for incumbents in practice; if anything, these limits make bids for reelection more competitive. Every mayoral race in Albuquerque since 1974 has been contested, and in those races the average margin of victory in the first round was 5.4%.[187] Similarly, over 85% of city council races have had multiple candidates and among those races 63% were competitive and 56% were close.[188] By comparison, elections for seats in the New Mexico State Legislature that were not subject to expenditure limitations were opposed only 60% of the time and only 30% of those ended with a margin of victory within twenty points.[189] The evidence from Albuquerque therefore indicates that elections held subject to expenditure limitations were more competitive than those without such limitations.

2. Voter Turnout

Another benefit of Albuquerque's expenditure limits was that voter turnout was higher in Albuquerque during the years in which the limitations were in place as compared to other cities.[190] Cities like Albuquerque that hold city elections in non-general election years[191] tend to have turnout below 35%,[192] but in the period between 1974 and 1999 the average turnout for all city elections in Albuquerque was 40.2%.[193] Between 1989 and 1999 turnout of registered voters for city elections in Los Angeles, California was 23.9%, and 35% in Boston, Massachusetts.[194] The

[187] *Id.* The average margin of victory in runoff elections was 7.4% between 1974 and 2001. *Id.* The median figures for these races were 4% in the first round and 4.3% in the second round. *Id.*

[188] *Id.* Between 1989 and 1999, twenty-three of twenty-seven city council races had multiple candidates. *Id.* "Competitive" races had a margin of victory of less than 20% and "close" races had a margin of victory below 10%. *Id.*

[189] *Id.* at 6-7. These statistics relate to all state legislature elections in New Mexico between 1968 and 1995. *Id.*

[190] Gierzynski, *supra* note 173, at 7.

[191] *Id.* Non-general election years are years in which there are neither congressional nor presidential elections. *Id.*

[192] *Id.* For example, voter turnout in Pasadena, California in 1987 was 20%, and 33% in Sacramento, California. *Id.*

[193] *Id.*

[194] *Id.* at 7-8 (citations omitted).

average turnout in Albuquerque was 37.7% for the years between 1989 and 1999 in which the expenditure limits were in place.[195] In fact, voter turnout, as a proxy for voter interest and involvement, was the highest in the nation in Albuquerque while campaign expenditure limits were in place and dropped precipitously in the one year in which they did not apply.[196]

C. *Money*

Many opponents of campaign expenditure limits argue that limiting the funds that a candidate can legally spend on a campaign prevents the candidate from spending as much as he or she needs to spend.[197] If this were the case then logically most candidates for office in Albuquerque would have had campaign expenditures very close to the ceiling imposed by the city charter.[198] Instead, historical spending reports indicate that this was generally not the case,[199] and in fact, even in 1997 when the limits were enjoined for the first time, the winning candidate spent under $110,000.[200]

The most noticeable impact of campaign expenditure limits is that the limits kept the fundraising arms race at bay.[201] Spending per voter in Albuquerque mayoral and city council races was far

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[195] *Id.* at 8. In 1997, the campaign expenditure limits were enjoined and the turnout dropped to a twenty-three year low of 33%. *Id.* at 19. When the 1997 turnout numbers are included, Albuquerque's ten-year turnout average for city elections was still the highest in the nation at 35.1%. *Id.* at 8.

[196] Gierzynski, *supra* note 173, at 8. Prof. Gierzynski noted that his "research failed to uncover any city holding elections in odd numbered years that had higher turnout than Albuquerque" from 1989 to 1999. *Id.*

[197] *See id.*

[198] *Id.*

[199] *See id.* at 9, 23-26. Between 1989 and 1997 the winning mayoral candidate never violated that year's expenditure limit. *See id.* at 26. The same was true for city council races during that time period. *See id.* at 25.

[200] Brief of the City of Albuquerque at 2, Homans v. City of Albuquerque (*Homans II*), 217 F. Supp. 2d 1197 (D.N.M. 2002) (CIV-01-917 MV/RLP). The candidate with the greatest expenditures spent only $175,600, or a mere $880 above the 2001 limit. *Id.*

[201] *See* Decl. of Jim Baca in Opposition to Motion for Preliminary Injunction, ¶ 6, Homans v. City of Albuquerque (*Homans II*), 217 F. Supp. 2d 1197 (D.N.M. 2002) (CIV-01-917 MV/RLP) [hereinafter Baca Declaration]. Jim Baca was elected Mayor of Albuquerque in 1997 and served until he was defeated in his reelection bid in 2001. *Id.* ¶ 1. *See also* Gierzynski, *supra* note 173, at 10.

lower than comparable mid-sized cities around the country and even below per-voter campaign spending in most small cities.[202] By keeping the cost of campaigning down, Albuquerque ensured that middle and even lower-income citizens had the opportunity to run a competitive campaign for public office.[203] This meant the introduction of new voices, new ideas, and new candidates in elections and in the public debate.

Campaigns in Albuquerque also spent money more efficiently when expenditure limits were in place.[204] The purpose of campaigning, and thus campaign spending, is to reach voters and influence their vote[205] and an arms race inevitably breaks out when a candidate enters the field and spends vast sums of money to inefficiently saturate the airwaves with advertising on television and radio.[206] Rather than flooding the airwaves with advertising when the spending limits were in place, candidates in Albuquerque were more likely to use more direct means of voter contact[207] that tended to lead to more meaningful interaction

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[202] Gierzynski, *supra* note 173, at 10. From 1989 through 1999 the median spending per vote for mayoral races in Albuquerque was $4.72 and $1.54 for mayoral runoffs; for city council races those numbers were $2.12 and $1.24, respectively. *Id.* The median cost per vote for all non-runoff city elections in Albuquerque during that time period was $2.47. *Id.* According to the California Commission on Campaign Financing, the cost per vote in a sample of California local governmental units with populations between 150,000 and 1,000,000 (medium sized) was $8.46 throughout the 1980s, and $5.62 per vote in small California municipalities (under 150,000 population). *Id.* If adjusted for inflation these figures would be even larger. *Id.*

[203] *Id.* (citing SUSAN WELCH & TIMOTHY BLEDSOE, URBAN REFORM AND ITS CONSEQUENCES: A STUDY IN REPRESENTATION (1988)). Outside of Albuquerque, even incumbents cite the cost of campaigning and fundraising as a deterrent for running for city council. *Id.* at 11 (citing a Florida study that found that 23.1% of Florida's city council members cited campaign fundraising and an additional 21.5% cited campaign costs as deterrents from running for office).

[204] *Id.* at 13.

[205] *Id.* There are also reasonable overhead expenses that campaigns cannot avoid such as renting and supplying an office and paying a staff. *Id.*

[206] Baca Declaration, *supra* note 201, ¶ 5. Former Mayor Baca spent $43,888.26 on television advertising when he ran successfully as a challenger in 1997. *Id.* Baca cited an affidavit submitted on behalf of Homans, which claimed that an "effective television campaign" in Albuquerque would cost between $480,000 and $600,000. *Id.* ¶ 4. No candidate for mayor in Albuquerque had ever spent $600,000 on their entire campaign including Homans, who spent $552,188 on his unsuccessful campaign. *See also supra* note 132.

[207] *See* Baca Declaration, *supra* note 201, ¶ 3.

between voters and candidates and generally improved the quality of debate.[208]

When candidates know that they only need to raise a certain amount of money, they are free to get off the fundraising treadmill and work directly with the voters instead of spending so much time raising money and producing meaningless or negative campaign ads.[209] Expenditure limits would not compel candidates to fundraise with the lone intent of building a war chest to ward off potential challengers.[210] Ultimately, expenditure limits benefit candidates and voters by promoting more efficient campaigns and freeing candidates to spend more time with voters than donors.[211]

D. *Representation*

Candidates may spend inordinate amounts of time raising money and there may be an appearance of corruption, but the true threat to American democracy is how these two concerns combine and come to bear on fair representation in government.

1. Represent Whom?

Many U.S. Representatives and Senators, especially those from small, rural, and poor states, must often look outside their borders to raise the amounts of money required to run their campaigns in the manner in which they are accustomed.[212] Many members of Congress amass significant portions of the funds in their campaign war chests from PACs and other large donors from outside their home districts and states.[213] Many members also oblige themselves to spend a good deal of time fundraising for other members of their party as well, a task that draws them away from their districts and states even more often.[214]

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[208] *See* Gierzynski, *supra* note 173, at 14-15.

[209] *Id.* at 13.

[210] *Id.*

[211] *See id.* at 14-16.

[212] Matlack et al., *supra* note 166, at 1458.

[213] *Id.*; *see also* MAKINSON, *supra* note 168, at 41-48. Some politicians feel as though they are doing their constituents a favor by not bothering them with requests for contributions. Matlack et al., *supra* note 166, at 1458. The other side of this coin is that these politicians spend time and resources interacting with people and groups from outside their constituencies. *Id.*

[214] *See, e.g.*, BRADLEY, *supra* note 1, at 186-93.

Every citizen of every state is represented by one U.S. Representative and two U.S. Senators from the state in which they live.[215] But, if you are a wealthy contributor in Hollywood, for example, politicians will travel to attend your events, at which they will collect substantial contributions.[216] If a candidate spends as much or more time listening to the concerns of out-of-state contributors as compared to in-state voters, then, functionally, the out-of-state contributor has more representation than the constituent.[217]

The conventional wisdom on Capitol Hill regarding the effect of campaign contributions is that money does not influence congressional votes, but at the same time, legislators generally acknowledge that money does buy access.[218] In turn, this access can lead to alliances that go beyond mere access.[219] Less than one-quarter of one percent of the entire United States voting-age population made a contribution over two-hundred dollars to a

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[215] U.S. CONST. art. I, §§ 2-3.

[216] *See* Carol Matlack et al., *Money and Politics: A Special Report*, 22 NAT'L J. 1448 (1990). Candidates frequently travel to locales with high concentrations of very wealthy donors such as Manhattan and Los Angeles. *See id.*

[217] Bradley-Simpson Brief, *supra* note 156, at 7. Former Sen. Tom Daschle of South Dakota made more than twenty trips to Los Angeles as part of his 1986 campaign for the Senate. *Id.* The Senator made as many trips to California that year as he did to Sioux Falls, South Dakota. *Id.* Republican John Thune and Sen. Daschle spent a total of $36,005,713 on their U.S. Senate race. CTR. FOR RESPONSIVE POLITICS, 2004 RACE: SOUTH DAKOTA SENATE, *available at* http://www.opensecrets.org/races/summary.asp?ID=SDS1&Cycle=2004 (last visited Oct. 23, 2005). This amount equals 0.13% of South Dakota's gross state product in 2003. *See* BUREAU OF ECONOMIC ANALYSIS, US DEPARTMENT OF COMMERCE, *available at* http://www.bea.doc.gov/bea/regional/gsp (last visited Oct. 23, 2005). In 2004, 391,188 votes were cast in the U.S. Senate Race in South Dakota; therefore, senatorial candidates spent a total of $92.04 per vote. *See* SOUTH DAKOTA SECRETARY OF STATE, 2004 GENERAL ELECTION OFFICIAL RETURNS US SENATE, *available at* http://www.sdsos.gov/2004/04USsenate.htm (last visited Oct. 23, 2005). It is highly unlikely that candidates who have relied so heavily on out-of-state campaign contributions would be better to serve the people of South Dakota, or that they would primarily have the interests of South Dakota in mind when serving in office.

[218] MAKINSON, *supra* note 168, at 59. "You can guarantee that the ones who contribute are going to get access, no question about that." *Id.* at 61 (quoting Rep. Tom Bliley (R–Va.)). On the other hand, some members of Congress are known in the "fundraising community" to be of "questionable character" with regard to their willingness to have their positions influenced by contributions. *Id.* at 60 (quoting Rep. Rick Lazio (R–N.Y.)).

[219] *Id.*

congressional candidate.[220] More startling, when considering that these are the people with access and the people with whom members form "alliances," is that one study found that 99% of campaign donors were "non-Hispanic white."[221]

2. Represented By Whom?

While some members of Congress go out of their way to meet with and listen to low-income, minority, and other functionally disenfranchised communities, it is troubling that the need for campaign money distracts focus from constituencies that need attention and towards the donors with access.[222] Large segments of the population, including overwhelming majorities of the minority population, lack the disposable income to make large political contributions and, in turn, lack access to the candidate selection and policy-making processes.[223] Without the money to be "on the inside"[224] of the political process, ordinary citizens lack any meaningful voice in picking their leaders.

In *Bullock v. Carter*, the U.S. Supreme Court supported its ruling that excessive state filing fees for primaries are unconstitutional by recognizing, *inter alia*, that these fees limited

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[220] Brief of Amici Curiae The National Association For The Advancement of Colored People et al. at 9, City of Albuquerque v. Homans, *cert. denied*, 125 S. Ct. 625 (2004) (No. 04-413) [hereinafter NAACP Brief] (citing ADAM LIOZ, U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 15 (2003)). Additionally, the one-tenth of one percent of the population that gave over $1,000 accounted for more than 75% of the contributions to congressional campaigns in 2002. *Id.*

[221] *Id.*; *see also* John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUBLIC PERSPECTIVE 29 (2000) (reporting the findings of a nationwide survey of donors from the 1995-96 election cycle conducted by academics at the University of Akron, Georgetown University, and the University of Maryland). Another study looking at the 1972, 1988, and 2000 presidential primaries found that 96% of donors were non-Hispanic white and 86% of donors giving more than $200 had annual incomes above $100,000. NAACP Brief, *supra* note 220, at 9. These figures all go to show that campaign donors who unquestionably have access to elected representatives far greater than the average citizen are far from representative of the population as a whole and undoubtedly have different interests from "ordinary citizens." *See id.*

[222] *See id.*

[223] *Id.* at 10.

[224] MAKINSON, *supra* note 168, at 54 (quoting Rep. Joe Scarborough (R-Fla.)) ("[Y]ou're either on the outside or the inside, and the only thing that can get you on the inside is money.").

voter choice.[225] Since the Court in *Bullock* eliminated unreasonable filing fees, the costs of running in a primary and general race have increased so dramatically that the cost of actually running has now taken the place of a filing fee in acting as a gatekeeper preventing candidates from running without the support of a team of rich donors.[226] Expenditure limits are the only way of ensuring that candidates who lack either great personal wealth or wealthy supporters with disposable income are available options to voters on Election Day.

In *Grutter v. Bollinger*, the Supreme Court recognized a compelling interest in the "effective participation by members of all races and ethnic groups in the civic life of our Nation."[227] In the context of law school admissions, Justice O'Connor, writing for the Court, said, "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity" if we wish to have leaders with "legitimacy in the eyes of the citizenry."[228] If the admission of racial and ethnic minorities to elite law schools is vital to establishing the legitimacy of our leaders, then certainly legitimacy is at stake when the "admissions" process to public office is slanted toward the extremely wealthy. So long as candidates are permitted to spend unlimited amounts of money on their campaigns and minority communities lack the kind of wealth required to bundle millions of dollars in contributions,[229] the political "admissions" process will remain a barrier to racial and ethnic minority participation in the whole electoral process.[230]

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[225] Bullock v. Carter, 405 U.S. 134, 144 (1972):

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. *Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community,* whose favorites may be unable to pay the large costs required by the Texas system.

Id. at 143-44 (emphasis added). As a parallel, in 2002, 43% of the incoming members of Congress were millionaires. NAACP Brief, *supra* note 220, at 8.

[226] *See, e.g.*, *supra* note 10.

[227] Grutter v. Bollinger, 539 U.S. 305, 332 (2003).

[228] *Id.*

[229] *See* NAACP Brief, *supra* note 220, at 17-18.

[230] *See id.* The Court in *Bullock* recognized that the mere right to vote does not

E. *Federalism and the Guarantee Clause*

Justice Brandeis famously wrote in his dissenting opinion in *New State Ice Co. v. Liebmann*, that in the United States' federal system "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[231] By implementing carefully tailored campaign expenditure limits, the State of Vermont and the City of Albuquerque are engaging in precisely the type of experimentation that Justice Brandeis, and perhaps the Founders, had hoped.

Article IV, section 4 of the United States Constitution, guarantees every state a republican form of government.[232] In *Gregory v. Ashcroft*,[233] the Supreme Court held that, "the authority of the people of the States to determine the qualifications of their most important government officials . . . lies at 'the heart of representative government,'" and is a power guaranteed to the states by the Guarantee Clause.[234]

States have the right to run elections as they see fit within the bounds of the Constitution and the Voting Rights Act.[235] When a state seeks to experiment with a creative solution to a persistent problem like the campaign fundraising arms race, a state should be given a wide berth in which to make policy.[236] The Constitution

represent full participation in an election. *See id.* (citing *Bullock*, 405 U.S. at 144). A group lacking the ability to influence which candidates' names appear on the ballot is not fully participating in the electoral process but merely ratifying the choices of elite groups that have the money and power to limit the available candidates to those who are palatable to those wealthy interests. *See id.* The U.S. Constitution may not guarantee rights of political participation beyond speech and voting, but the interest in allowing and encouraging all people to fully participate in the political process must certainly be a compelling one. *See id.*

[231] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[232] U.S. CONST. art. IV, § 4. For a thorough discussion of the role of the Guarantee Clause in campaign finance reform, see Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767 (2003).

[233] Gregory v. Ashcroft, 501 U.S. 452, 463 (1991).

[234] *Id.* (quoting Bernal v. Fainter, 467 U.S. 216, 221 (1984)). *See also* Brief of Amici Curiae TherestOfUs.Org et al. at 9, City of Albuquerque v. Homans, *cert. denied*, 125 S. Ct. 625 (2004) (No. 04-413).

[235] *See id.*; 42 U.S.C. § 1971 (2005).

[236] *See* McConnell v. FEC, 540 U.S. 93, 191 (2003). The Court in *McConnell* "noted

charges states with the duties of administering elections[237] and the General Assembly of the State of Vermont saw fit to limit the expenditures of candidates for state office.[238] Over 90% of Albuquerque voters[239] approved a measure to amend the City Charter to limit campaign expenditures by candidates for mayor and city council.[240] In striking down this provision, the United States Court of Appeals for the Tenth Circuit in *Homans* read *Buckley* too narrowly and in turn hindered the rights of the several states and the people therein to regulate their own elections.[241]

F. *Corruption*

In *Buckley*, the Court found that self-financed candidates were not at risk of being corrupted by spending their own money on their campaigns,[242] but free-spending wealthy candidates do have an effect on the overall risk of corruption in an election. In *Wickard v. Filburn*, the Court ruled that regulation of wheat production under the Commerce Clause could reach farmers who produced wheat for their own use even though the actual wheat these farmers grew would not be sold in interstate commerce.[243] The Court held that in a sense, "home-grown wheat . . . competes with wheat in commerce."[244] Analogously, even though an independently wealthy candidate may only use his own money to finance his campaign, his spending directly influences the fundraising and spending habits of his opponents.[245] Where an

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[its] 'obligation to construe [a] statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness.'" *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 77-78 (1976)). "Aside from a constraint on overbroad pronouncements, the benefits to society that flow from allowing our legislatures to conduct the business of policy making through law weigh strongly in favor of clarifying that no *per se* barrier exists [to enacting campaign spending limits]." Brief of Amici Curiae Secretary of State of Iowa et al. at 9, City of Albuquerque v. Homans, *cert. denied*, 125 S. Ct. 625 (2004) (No. 04-413).

[237] *See* U.S. CONST. art. I, § 4, cl. 1.

[238] *See* discussion *supra* Part III.A.

[239] Gierzynski, *supra* note 173, at 4.

[240] ALBUQUERQUE CITY CHARTER, art. XIII, § 4 (2004).

[241] U.S. CONST. art. IV, § 4; *see also supra* notes 235-236 and accompanying text.

[242] *Buckley*, 424 U.S. at 53.

[243] Wickard v. Filburn, 317 U.S. 111, 128 (1942).

[244] *Id.*

[245] *See* Jim Rutenberg & Patrick D. Healy, *Bloomberg's Bill Near $50 Million for Race*

opponent is not also self-financed, or voluntarily subject to a public financing system, that candidate will be under increased pressure to raise more money, and thus be more vulnerable to additional corrupting forces, or more likely to ignore the duties of their office.[246] In other words, although "home-grown" money may not be inherently corrupting, it markedly increases the overall potential for corruption in an election.

Because *Buckley* and *McConnell* have definitively held that the prevention of corruption, or the appearance thereof, is a compelling justification for limiting contributions,[247] and it may be counted among potentially compelling justifications for expenditure limits, the actual existence of "the appearance of corruption" should not be overlooked when discussing campaign finance reform.[248] The 2005 bankruptcy reform legislation[249] is a shocking example of what one can charitably describe as the "appearance of corruption," and makes clear why every citizen should be concerned about enacting meaningful campaign finance reform.

In 2005, the Republican-controlled Congress passed a bill with the Orwellian title, the "Bankruptcy Abuse Prevention and Consumer Protection Act," which will stand like a monument to the influence of money on government. This bill was written by lobbyists for banking and credit card companies,[250] which gave $7,978,034 in direct contributions to candidates seeking federal office in 2004,[251] and was signed into law by President Bush, who

So Far, N.Y. TIMES, Oct. 8, 2005, at A1.

[246] *See id.* In the 1994 race for U.S. Senate in California, a self-financed candidate spent $28 million of his own fortune in an attempt to unseat Sen. Barbara Boxer. *Id.* In order to fight off this challenge, Sen. Boxer was forced to raise $14 million, "a sum that took so long to raise that she had little time for actual campaigning." *Id.*

[247] *See supra* notes 26-28 and accompanying text.

[248] *See Buckley*, 424 U.S. at 33.

[249] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified in scattered sections of 11 U.S.C.).

[250] *See* Editorial, *Standing Up to the Credit Card Industry*, N.Y. TIMES, Mar. 8, 2005, at A22; Paul Krugman, Editorial, *The Debt-Peonage Society*, N.Y. TIMES, Mar. 8, 2005, at A23.

[251] CTR. FOR RESPONSIVE POLITICS, FINANCE/CREDIT CARD COMPANIES: LONG TERM CONTRIBUTION TRENDS, *available at* http://www.opensecrets.org/industries/indus.asp?ind=F06 (last visited Apr. 20, 2005). Contributions from individuals and PACs in the banking and credit card industries contributed this amount of money overall, but 63% or over $5 million went to Republican candidates and only 36% or

received tens of millions of dollars in contributions in 2004 from banking and finance interests.[252] This law will make it harder for low and moderate-income debtors to declare bankruptcy because of unexpected medical bills or family emergencies, but will do nothing to regulate the credit card industry's practice of aggressively marketing credit cards and then all but concealing the interest rate structure and penalty fees that accompany them.[253]

An amendment by Sen. Mark Dayton (D–Minn.) would have prevented creditors from charging any consumer an annual interest rate above 30%.[254] Thirty percent would constitute usury under federal law, and under the laws of most states, however, technicalities and loopholes allow creditors to charge upwards of a 1,095% annual interest rate.[255] This amendment intended to close those loopholes that create windfall profits for credit card companies at the expense of hard-working Americans.[256] That Congress soundly defeated this amendment, along with many others that were quite reasonable for a bill claiming to provide "bankruptcy reform," shows the degree to which Congress was

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just shy of $3 million went to Democratic candidates. *Id.* Including contributions to parties and candidates, the banking, credit card, and retail industries gave more than $56 million in the 2004 election cycle. Kathleen Day, *Senate Passes Bill To Restrict Bankruptcy Credit Card Business Backed Measure to Collect More Debt*, WASH. POST, Mar. 11, 2005, at E01.

[252] CTR. FOR RESPONSIVE POLITICS, GEORGE W. BUSH (R) TOP INDUSTRIES 2004 CYCLE, *available at* http://www.opensecrets.org/presidential/indus.asp?id=N00008072&cycle=2004 (last visited Apr. 20, 2005). Among the top eleven industries contributing to President Bush's 2004 campaign were "Securities and Investment" ($8,811,245), "Misc. Finance" ($5,517,227), and "Commercial Banks" ($3,128,920). *Id.*

[253] *See* Kathleen Day, *Tighter Bankruptcy Law Favored; Bills Making It Harder to Erase Debt Set to Clear Congress*, WASH. POST, Feb. 11, 2005, at A05.

[254] 151 CONG. REC. S1981-82 (daily ed. Mar. 3, 2005) (statement of Sen. Dayton).

[255] *Id.*

> Inflation is currently running around 2 percent. The interest rate on three-month Treasury bills is 2.75 percent. The prime-lending rate is 5.5 percent. So 30 percent is exorbitantly high, but it is much less than the 384 percent that is being charged by money centers in Minnesota, or the 535-percent annual interest rate charged by centers in Wisconsin, or the 1,095-percent interest rate being charged by the County Bank of Rehoboth Beach in Delaware. That is not just predatory lending, that is "terroristic" lending.

Id. at S1981; *see also* 12 U.S.C. §§ 85-86 (2005).

[256] *See* 151 CONG. REC. S1981-82 (daily ed. Mar. 3, 2005) (statement of Sen. Dayton).

"allied"[257] with an industry that was a major contributor.[258]

It is hard to construct a scenario in which the above-described law, the only apparent benefit of which is a huge windfall to major political contributors, is not the payoff at the end of an enormous bribe. This law can be generously described as bearing the appearance of corruption that the *Buckley* Court found sufficient to justify contribution limits but insufficient to support limits on expenditures.

If the law of the land is that the government's interest in preventing corruption is insufficient to justify expenditure limits alone, then other justifications, such as time protection,[259] ensuring effective equal participation,[260] or creating a level playing field among candidates,[261] should be employed in order to validate campaign expenditure limits.

V. Conclusion

In our nation's youth it was accepted that governing and voting were rights and privileges reserved solely for propertied white males.[262] With the passage of the Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the United States Constitution, government may no longer withhold the right to vote from any citizen of the United States over eighteen years of age on the

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[257] *See* MAKINSON, *supra* note 168, at 59-61.

[258] *See supra* note 251 and accompanying text.

[259] *See* discussion *supra* Part IV.A; Landell II, 382 F.3d 91, 97 (2d Cir. 2002). The *Landell* Court found the combination of time protection and corruption prevention to be sufficiently compelling government interests to justify mandatory campaign expenditure limits. *Id.*

[260] *See* discussion *supra* Part IV.D; Grutter v. Bollinger, 539 U.S. 305, 332 (2003). The *Grutter* Court found that there was a compelling government interest in ensuring the "[e]ffective participation by members of all races and ethnic groups in the civic life of our Nation," sufficient to justify racial and ethnic preferences in law school admissions. *Id.*

[261] *See* R v. Jones, [1999] 2 Cr. App. R. 253, 255 (1999) (U.K.). In a case dealing with British campaign expenditure limits, Lord Chief Bingham of the British Criminal Division Court of Appeals wrote: "[t]he object, plainly, is to achieve a level financial playing field between competing candidates, so as to prevent perversion of the voters' democratic choice between competing candidates within constituencies by significant disparities of local expenditure. *Id.* While there are many differences between U.S. and U.K. elections, the principles of democracy should be universal.

[262] *See* Mobile v. Bolden, 446 U.S. 55, 103-04 (1980) (Marshall, J., dissenting).

grounds of race or sex.[263] While the franchise has been extended to nearly all citizens,[264] the majority of federal office holders remain affluent white men.[265] Despite being able to vote, low-

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[263] U.S. CONST. amends. XV, XIX, XXVI.

[264] *See* Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding California law that denies the right to vote to felons); *see also* Linda Greenhouse, *Supreme Court Declines to Hear Two Cases Weighing the Right of Felons to Vote,* N.Y. TIMES, Nov. 9, 2004, at A19. In forty-eight states, excluding Maine and Vermont, an estimated 3.9 million felons no longer have the right to vote. *Id.* Over one third of those disenfranchised in this manner are African-American men. *Id.* In most cases the disenfranchisement is for life unless clemency or a pardon is granted. *Id.* Also consider the "No Taxation Without Representation Act of 2002," S.3054, 107th Cong. (2002), which aimed "[t]o provide for full voting representation in Congress for the citizens of the District of Columbia, and for other purposes." The Senate Governmental Affairs Committee sent this bill to the Senate floor in 2002, where it was never brought to a vote. *Id.* Prior to ratification of the Twenty-Third Amendment in 1961, citizens of the nation's capital had no federal voting rights. DCVOTE-WASHINGTON, DC, HISTORICAL TIMELINE, *available at* http://www.dcvote.org/trellis/denial/dcvotingrightshis toricaltimeline.cfm (last visited Oct. 23, 2005). Citizens of Washington, D.C. now have the right to vote in presidential elections, but are limited to the number of electors allotted to the least populous state regardless of the population of the District. U.S. CONST. amend. XXIII. Citizens of the District of Columbia still have no voting representative in either house of Congress despite the fact that Congress retains exclusive power to legislate over the District. U.S. CONST. art. I, § 8, cl. 17. The District of Columbia is wholly unrepresented in the U.S. Senate, and is represented only by Eleanor Holmes Norton, a nonvoting delegate to the U.S. House of Representatives. CONGRESSWOMAN ELEANOR HOLMES NORTON, http://www. norton.house.gov (last visited Oct. 23, 2005).

[265] Neither major political party has ever nominated a racial minority for the office of President or Vice President, and Geraldine Ferraro became the first and only female to be nominated for either office when she was the Democratic Vice-Presidential nominee in 1984. ENCYCLOPEDIA BRITANNICA-WOMEN IN AMERICAN HISTORY, GERALDINE ANNE FERRARO, *at* http://search.eb.com/women/ articles/Ferraro_Geraldine_Anne.html (last visited Oct. 23, 2005). Since the founding of the United States in 1789, 1,875 Americans have served as U.S. Senators. A CHRONOLOGICAL LIST OF UNITED STATES SENATORS 1789-PRESENT, http://www.senate.gov/artandhistory/history/common/briefing/senators_chron ological.htm (last visited Oct. 23, 2005). In the eighty-five years since women were granted the right to vote by the Nineteenth Amendment in 1920, only thirty-three females have served as U.S. Senators. U.S. SENATE, WOMEN IN THE SENATE, *at* http://www.senate.gov/artandhistory/history/common/briefing/women_senators.h tm (last visited Oct. 23, 2005). From 1865, when the Thirteenth Amendment was ratified to end slavery, through 2005, only five African Americans have served as U.S. Senators, and overall only eighteen minorities have served as U.S. Senators. *See* U.S. SENATE, MINORITIES IN THE SENATE, *at* http://www.senate.gov/artandhistory/ history/common/briefing/minority_senators.htm (last visited Oct. 23, 2005). The Senate includes African Americans, Asian Americans, Hispanic Americans, and Native Americans in the "minority" classification. *Id.* The Congressional Black Caucus contains only forty-three members in the 109th Congress including Delegate

income and lower-middle income Americans, and minorities in particular, have not been able to translate the ability to vote into the ability to elect candidates from their own communities. It is reasonable to attribute this disconnect to the inordinate role of money in politics.[266]

There is no mistaking the symptoms. Political campaigns are addicted to money. Like drug addicts, campaigns[267] will never stop looking for their next fix. Every additional contribution can help the campaign buy one more thirty-second advertising spot. Because of this unquenchable thirst, candidates are driven to spend more and more time courting donors and less and less time legislating and interacting with constituents. The quality of debate decreases and voters are left with a nearly meaningless choice between two Potemkin candidates who only differ in party affiliation, and who voters only know from vapid or negative campaign ads.

The un-American side effect of this addiction is that only the people with the resources to run a big money race can get into a race and win. Qualified but under-funded candidates regularly drop out of races, and even more highly qualified civic minded individuals stay on the sidelines of politics because they have come to grips with the cruel truth of American politics: it is not how smart or qualified you are, it is how well funded you are that determines whether you are elected.

Previous treatments for the campaign fundraising addiction have focused on the pushers. BCRA, for all the benefits of reducing soft money, did not solve the arms race because there will always be another contributor and another fundraiser able to bundle huge amounts of money in smaller increments. So long as a campaign can get even a nominal benefit out of spending one more dollar, a contributor seeking access and influence will provide it.

The United States' electoral system is well on its way to

Eleanor Holmes Norton, the nonvoting delegate from Washington D.C., and only one senator, Sen. Barack Obama (D–Ill.). CONGRESSIONAL BLACK CAUCUS–MEMBERS, http://www.house.gov/watt/cbc/cbcmember.htm (last visited Oct. 23, 2005).

[266] *See generally* MAKINSON, *supra* note 168; *see also* discussion *supra* Part.IV.D.2.

[267] I distinguish campaigns from candidates because most candidates would attest to feeling uncomfortable with the need to raise as much money as campaigns tend to require.

overdosing on money. In the 2004 election cycle, the combined amount raised by all candidates for federal office across the country was a staggering $2,052,751,282.[268] This figure does not include amounts spent in state and local elections, or money spent on federal races by parties, PACs, and other independent third party expenditures.[269]

The exponentially increasing cost of political campaigns only matters if the people believe that there are citizens out there who are capable of governing better than our nation's current leaders. There are many very qualified and competent leaders in all levels of federal, state, and local government, but if our goal is a government of the people, by the people and for the people, then these true leaders would rise to lead in a world where money is not the primary hurdle to political success.

The rights guaranteed by the First Amendment are among the most critical to a free society and it is only with the highest degree of care and for only the most compelling societal interests that we dare tread close to the line that protects our freedoms of speech and association. It is with this level of care in mind that Justice Stevens wrote, "[m]oney is property; it is not speech."[270] While property rights bring with them a wide range of privileges, statutes often limit them. For example, the government regulates money as property through taxes and many other laws. An individual cannot use money to solicit murder or sex.[271] Money cannot purchase illegal drugs, human beings, stolen property, or

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[268] CTR. FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: STATS AT A GLANCE, *available at* http://www.opensecrets.org/overview/stats.asp?cycle=2004 (last visited Oct. 23, 2005). Included in this calculation were all candidates who filed reports with the Federal Election Commission: a total of 1,213 House candidates, 190 Senate candidates, and 15 presidential candidates. *Id.* The total cost of all federal races during the 2004 general elections (including spending by parties, PACs, and 527 Groups, among others, in addition to expenditures by all candidates) was approximately $4 billion. *Morning Edition* (National Public Radio broadcast), Nov. 8, 2004.

[269] CTR. FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: STATS AT A GLANCE, *available at* http://www.opensecrets.org/overview/stats.asp?cycle=2004 (last visited Oct. 23, 2005).

[270] *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

[271] *See, e.g.*, N.J. STAT. ANN. § 2C:34-1 (West 2005) (outlawing prostitution); *id.* § 2C:5-1(b) (solicitation of a criminal act is punishable as an attempt of such crime).

even alcohol on Sundays in many states.[272] Why should there be no limits on the influence of money on our democracy? "When big money is speech, then speech is no longer free."[273]

Faced with an untenable situation where money was taking a position of undue influence over policy and politics, the City of Albuquerque and the State of Vermont took the drastic step of taking away the temptation of engaging in a fundraising arms race. With no legal use for an extra dollar, candidates were able to move past the threat of a free spending opponent and focus on the job to which they were elected, or hoped to be elected. During Albuquerque's twenty-five year experiment with campaign expenditure limits, turnout was consistently the highest in the country, races were more competitive, and money was not the deciding factor in choosing leaders.[274]

The explosion of the campaign finance arms race is one of the greatest threats to the integrity of our democracy. The City of Albuquerque showed that campaign expenditure limits are a viable and beneficial means of controlling the arms race. Albuquerque acted as a laboratory of democracy and tested the expenditure limit theory successfully on the municipal level. Vermont is now attempting to run this experiment on the state level and the Supreme Court should allow the state to proceed. Time will tell if campaign expenditure limits are viable on the national level, but to extinguish this potential cure for many of the ailments of American democracy would do a terrible disservice to our people and our federal constitutional system.

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[272] *See, e.g.*, U.S. CONST. amend. XIII (outlawing slavery); N.J. STAT. ANN. § 2C:35-5 (making it illegal to produce, possess, or distribute controlled substances); *id.* § 2C:20-7 (prohibiting the purchase of stolen property); Sara B. Miller, *In Battle for Sunday, the 'Blue Laws' are Falling*, CHRISTIAN SCI. MONITOR, Dec. 5, 2003, at 1, *available at* http://www.csmonitor.com/2003/1205/p01s02-usju.html (last visited Oct. 23, 2005).

[273] THE BUCK *BUCKLEY* CAMPAIGN, *available at* http://www.buckbuckley.org (last visited Oct. 23, 2005).

[274] *See* discussion *supra* Part IV.B.