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Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials

*Mark C. Alexander**

I. INTRODUCTION

As candidates spend more money during their campaigns, they become more shackled to the machinery of fundraising. They spend increasing amounts of time dialing for dollars, attending fundraisers, and cultivating prospective donors. But these candidates, often already in office themselves, are consequently spending less time speaking with the people, studying legislation, and governing. In short, fundraising takes time away from elected officials in the performance of their duties.

This presents several particular problems. First, as candidates divert time and attention to fundraising, they do not engage in the critical conversation that is the essence of the campaign.¹ Next, and as a result of the first problem, candidates who are also already officeholders become nearly full-time fundraisers and neglect the people's business.² Due to the time taken for fundraising, the political process has so broken down that the people's will cannot be effectively served.

Some jurisdictions have responded to these problems by enacting reform measures that justify campaign fundraising and spending limitations by identifying the need to protect elected officials' time. This "time protection" rationale has received scant attention in

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1. Instead of talking to voters, debating an opponent, or engaging with the media, candidates turn heavily to fundraising, which skews the focus of the campaign.

2. Republican government suffers as a result, as representation is diminished and the people are no longer well served.

academia and the courts, but the issue is increasing in importance.³ There is now a circuit split as to the specific question of whether the time protection of elected officials is a compelling government interest that can be used to justify campaign finance reform measures, and the issue has been put to the U.S. Supreme Court for consideration.⁴ This is an idea whose time has come, and this article explains how time protection can become a powerful force for campaign reform.

According to *Buckley v. Valeo*⁵ and its progeny, through and including the recent decision in *McConnell v. Federal Election Commission*,⁶ any restraint on campaign finance reform must survive strict scrutiny, as it impacts core First Amendment activity. This Article ultimately shows that protecting the time of candidates and officeholders is a compelling government interest that can justify campaign finance reform measures, most notably expenditure limits.

The Article will proceed in three main stages to establish that there is a compelling government interest in protecting the time of elected officials and that the interest supports limits on campaign spending. Part II will detail the basic business of political campaigns for public office and will particularly emphasize the dimensions and implications of fundraising.⁷ Further this Part will present a view of the system based on recent research, including interviews of candidates and officeholders speaking freely about their experiences.⁸ This will

3. It was barely mentioned in the context of the landmark case *Buckley v. Valeo*, 424 U.S. 1 (1976), and its only significant academic treatment came in 1994, when Vincent Blasi raised it in a symposium article. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUM. L. REV. 1281, 1283 (1994). More than a decade has passed since then, but this idea has not been developed further in the literature, although it is just now getting some attention in the courts.

4. *Compare* *Landell v. Sorrell (Landell II)*, 382 F.3d 91, 129 (2d Cir. 2002), *cert. granted sub nom.* Vt. Republican State Comm. v. Sorrell, 126 S. Ct. 35 (2005) (holding that campaign expenditure limits can be constitutional) *with* *Homans v. City of Albuquerque (Homans II)*, 366 F.3d 900, 916 (10th Cir. 2004) (holding that campaign expenditure limits are not constitutional). The Supreme Court denied certiorari in *Homans II*, 366 F. 3d 900, 911 (10th. Cir. 2004), *cert. denied*, 543 U.S. 1002 (2004); *Landell II* is currently before the Court, docket numbers 04-1528, 04-1530, 04-1697, and the Justices heard oral argument on February 28, 2006.

5. *Buckley*, 424 U.S. at 24.

6. 540 U.S. 93, 95 (2003).

7. *See infra* Part II (explaining that fundraising consumes time and thus reduces the time available to politicians to perform the jobs they were elected to do).

8. The Center for Responsive Politics' compendium *SPEAKING FREELY*, published in several editions, including 1995 and 2003, provides a source for interviews with current and former members of the House and Senate, in which the members candidly and frankly address the role of money in politics. *See* LARRY MAKINSON, CENTER FOR RESPONSIVE POLITICS, *SPEAKING FREELY: WASHINGTON INSIDERS TALK ABOUT MONEY IN POLITICS* (2d ed. 2003) (tracking the flow of campaign dollars to federal candidates, parties, and political action committees); MARTIN SCHRAM, CENTER FOR RESPONSIVE POLITICS, *SPEAKING FREELY: FORMER MEMBERS OF*

provide a picture of how much money is spent, how candidates raise that money, and what candidates are *not* doing when they are out raising money. The picture presented shows candidates spending countless hours raising money by courting a limited group of individuals, instead of meeting voters, engaging opponents, debating or voting on legislation, and the like.

Part III will explain the constitutional dimensions of the problem and will reveal various compelling interests at every turn.⁹ First, as candidates spend so much time chasing money from a limited group of donors, campaigns—an essential component of American representative democracy—are distorted.¹⁰ As campaigns are part of democratic dialogue, this distortion raises a compelling concern. Second, many candidates are already officeholders—public servants paid with taxpayer dollars to do the people’s business—and the diversion of their time threatens the specific constitutional commitment to protect the time of Members of Congress in the exercise of core legislative functions, found in the Speech or Debate Clause.¹¹ Third, the money chase threatens the integrity of the American republic by skewing the entire process of representative democracy.¹² The average citizen is ignored at the expense of the few, on whom the candidate-officeholder is lavishing attention. Considered together, these three factors create a compelling government interest that can justify regulations on campaign activities.

Finally, Part IV will consider the attendant question of what follows.¹³ While not advocating any specific plan or law,¹⁴ this Part

CONGRESS TALK ABOUT MONEY IN POLITICS (1995), *available at* <http://www.opensecrets.org/pubs/speaking/speakingindex.html> (providing interviews with members of the House and Senate discussing campaign politics).

9. *See infra* Part III (exploring the opportunity the Supreme Court has to weigh in on the issue of campaign finance reform and the corresponding compelling governmental interest).

10. The average voter disappears from the radar screen of the candidate who is focused on the few, wealthy individuals who are likely to donate large sums. These individuals represent an economic elite who often live outside of the district that the candidates seek to represent.

11. The problem is that instead of doing the job they are paid to do for the people, they are spending inordinate hours raising money for their own campaigns. This tension tears at the ability of government to function fully. This is a common sense conflict of great import.

12. In a representative democracy power derives from the people whose will is done by elected officials in government. Legislators draft bills, debate legislation, and cast votes. Mayors, governors, and the president are entrusted with the execution of those laws. Instead of doing the people’s work, they are working on fundraising prospects. The distraction from duty is a time conflict.

13. *See infra* Part IV (discussing alternatives in campaign finance reform).

14. This Article is not endorsing or proposing any one level of spending, or any precise formula. Instead, it is a direct challenge to the proposition that *Buckley* provides a *per se* ban on expenditure limits, and specifically suggests a compelling government interest—time

will consider three major ways to remedy the problem that too much time is spent raising money. The first is to make it easier to raise large sums of campaign cash by removing limits on contributions.¹⁵ Although this could make it easier to raise money, it exposes the electoral system to corruption, the prevention of which has already been identified as a compelling government interest. It forces us to protect one value (time protection) at the expense of another (corruption prevention). In addition, it would further skew the problem of a reliance on the most wealthy who have the ear of candidates and officeholders, to the detriment of the broader conversation that ultimately should inform politics and government. Lifting contribution limits thus is not well-tailored to meet the compelling government interest in time protection.

The second alternative, public financing, addresses the problem by relieving candidates from the need to spend time raising money.¹⁶ The idea is that it is better for candidates not to have to chase money at all—let the government provide it, and the candidates can be free to stop dialing for dollars. While appealing on its surface, this approach is ultimately unsatisfactory because under the current legal regime, all public-financing schemes must be voluntary, and, therefore, they easily can be—and often are—ignored. Public financing thus fails to account for candidate opt out, resulting from the all-too-common phenomenon of an extremely wealthy individual or a singularly prodigious fundraising machine. Without mandatory compliance (which in itself would be a form of spending caps), this is an illusory option.

The third—and, as this Article concludes, best—response to the problem is campaign expenditure limits.¹⁷ These limits put the brakes on runaway spending and therefore can stop the time drain that jeopardizes the integrity of the electoral process. Limited campaign spending lessens fundraising needs. Reduced fundraising frees candidates and officeholders to spend more time in pursuit of conversations with the people, reading and voting on legislation, and the like—the wide open political debate that rests at the heart of American

protection—that would justify such limits. Under this new paradigm, federal, state, and local governments could enact campaign spending limits in order to protect the time of candidates and officeholders. Subsequent analyses should take this new analytical approach and ask whether the limits put in place serve the compelling government interest in time protection.

15. See *infra* Part IV.A (addressing limits placed on contributions as a means of campaign finance reform).

16. See *infra* Part IV.B (discussing a public-financing alternative and its drawbacks).

17. See *infra* Part IV.C (characterizing the spending limits alternative as the most narrowly tailored choice).

representative democracy. Of the three main remedial options, this Article ultimately argues that limiting campaign expenditures is the most narrowly tailored means available to protect the time of candidates and officeholders.¹⁸

II. THE CAMPAIGN FUNDRAISING PROBLEM

As campaigns become more expensive, fundraising becomes an ever-more time-consuming affair. Candidates and officeholders become, in effect, full-time fundraisers. They do so at the expense of so much else—opportunities to meet voters, to debate opponents, and to speak with the media. Officeholders miss committee meetings, do not spend ample time reviewing legislation, and constantly shoehorn the people's business into the time not filled by private fundraising. This Part examines the data on how much money is raised and spent in campaigns, and it rounds out the campaign finance picture by heeding the words of those who raise the money. The final image is one where fundraising is a priority at the expense of representative democracy and the functioning of the electoral process.

A. Increasing Campaign Costs

Campaign costs continually increase at a rate faster than inflation, and no end is in sight.¹⁹ Overall Congressional candidate fundraising increased 425% between 1978 and 2000, compared to 170% inflation during the same period.²⁰ The average victorious Senate campaign in 1986 cost just over \$3 million, compared to nearly \$7.4 million in 2000—a 154% increase, adjusted for inflation.²¹ Consider this

18. See *infra* Part V (concluding that campaign spending limits are the most effective and constitutionally sound way to protect the time of government officeholders).

19. The amount of money spent on campaigns is not *per se* excessive. Several billion dollars spent, for a wealthy country with a population approaching 300 million, is not such a large amount, per capita. While there are many other problems that arise as a result of these large sums being spent, the particular problem addressed in these pages is the amount of time that must be spent raising that money.

20. U.S. PUBLIC INTEREST RESEARCH GROUP, LOOK WHO'S NOT COMING TO WASHINGTON 9 (2005). From 1986 to 2000, the average cost of a successful campaign for the United States House of Representatives rose from \$359,577 to \$848,296. *Id.* Adjusted for inflation, this amounts to a 151 percent increase.

21. *Id.* The 1986 statistic is calculated by dividing the total spent by winning Senate candidates in the 1986 election by the number of Senators elected that term: thirty-three. Press Release, Federal Election Commission, Congressional Fundraising and Spending Up Again in 1996 (Apr. 14, 1997), <http://www.fec.gov/press/press1997/canye96.htm>. The average money spent by a victorious Senate candidate in 2004 was \$7.84 million. This figure was compiled from information made available by CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: WINNING VS. SPENDING, <http://www.opensecrets.org> (follow "2004 Election Overview" hyperlink under "Election Overview"; then follow "Winning vs. Spending" under "Races") (last

example: in 1992, the average Senator had to raise nearly \$13,000 each week during the entire six-year term in order to amass the amount that a winning Senate race would cost.²² In 1999, Senator Barbara Boxer estimated that for a successful Senate campaign in California, a candidate would need to raise \$10,000 *each day* of the entire six-year term.²³ In fact, she raised money at almost twice that rate—raising an average of nearly \$19,000 per day in the 2003–04 election cycle.²⁴ But Senator Boxer was not the leading fundraiser in the Senate that most recent cycle. South Dakota (one of the least populated states in the nation²⁵) was home to the largest fundraising in the 2004 Senate election cycle, as the two candidates raised a combined \$37.4 million.²⁶ Further, the 2004 presidential election shattered all previous fundraising records and both major party nominees opted out of the public financing system for their respective party's primary campaigns.²⁷ Combined, they raised a total of \$496.6 million in contributions from individuals.²⁸

visited Feb. 16, 2006).

22. HERBERT ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 54 (1992).

23. 145 CONG. REC. S12575, S12608 (daily ed. Oct. 14, 1999) (statement of Sen. Boxer). One of her former House colleagues, Rep. Thomas Downey of New York, said: “[T]omorrow I’m going to a breakfast for one of my colleagues who’s now a senator, who was just elected. One of my closest friends is Sen. [Barbara] Boxer from California. Now she has to have fund-raisers all the time. All the time . . . It is sick.” SCHRAM, *supra* note 8, pt. I, § 3, at 39–40 (quoting Rep. Thomas Downey (D-NY)).

24. For her 2004 re-election, Sen. Boxer raised a total of \$16.7 million. CENTER FOR RESPONSIVE POLITICS, OPENSECRETS: U.S. CONGRESS PROFILES, <http://www.opensecrets.org/politicians/summary.asp> (enter “Boxer” under “Search for a Member”) (last visited Feb. 16, 2006). Of that, in the 2003–04 cycle she raised \$13.8 million. *Id.* Divided evenly over two years and 365 days per year, this amount equals \$18,904 per day, every day, weekends and holidays included.

25. South Dakota ranks 46th in terms of population. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 2004–2005, *available at* http://www.census.gov/prod/www/statistical-abstract-2001_2005.html (select “table 18”).

26. CENTER FOR RESPONSIVE POLITICS, CONGRESSIONAL RACES, <http://www.opensecrets.org/races/index.asp> (last visited Feb. 16, 2006).

27. While there were many candidates on the Democratic side, there were no serious Republican contenders for the party's primary election other than the president. Therefore, President Bush raised these sums in the primary season even in the absence of a credible primary opponent.

28. FEDERAL ELECTION COMMISSION, FEC CANDIDATE SUMMARY REPORT: GEORGE W. BUSH, *available at* http://query.nictusa.com/cgi-bin/can_detail/P00003335/ (last visited Feb. 16, 2006); FEDERAL ELECTION COMMISSION, FEC CANDIDATE SUMMARY REPORT: JOHN F. KERRY, *available at* http://query.nictusa.com/cgi-bin/can_detail/P80000235/ (last visited Feb. 16, 2006). Put another way, the two candidates combined raised at least one million dollars per day for well over a year.

B. *The Campaign Money Chase*

In campaigns, as candidates have been spending more money, they have had to find ways to raise that money.²⁹ However, individual contributions have not kept pace, in part because of a federal regulatory system in which contributions are capped but expenditures are not.³⁰ The percentage of Americans who contribute to campaigns has remained relatively flat,³¹ and until just recently, contribution limits stayed constant, effectively losing nearly three-quarters of their value over the years.³² Needing more money, but facing limits on what any one person can give, Members of Congress have described a money chase that is more time consuming cycle after cycle,³³ occupying them all the time, wherever they go. This Section briefly describes the key

29. Candidates must find an increased supply of money in order to meet the increased demand from campaigns. Individual fundraising generates that supply. This relatively straightforward concept of income and expenditures is reflected in the words of Members of Congress. “[T]he fundraising demands grew geometrically in the 12 years that I was there. More and more time was being spent raising money, because the amounts of money required each cycle were greater.” MAKINSON, *supra* note 8, at 40 (quoting Sen. Richard Bryan (D-NV)). Fundraising is “‘sort of a necessary evil. You’ve got to raise the money to meet a given campaign budget” SCHRAM, *supra* note 8, pt. 2, § 2, at 74 (quoting Rep. Tim Penny (D-MN)). See also Paul S. Herrnson and Ronald A. Faucheux, *Candidates Devote Substantial Time and Effort to Fundraising*, July 7, 2000, available at <http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html> (“[A]s the price for office increases candidates become increasingly beholden to fundraising demands.”).

30. There was no increase in individual contribution limits for nearly three decades, between Federal Election Campaign Act (FECA) as amended in 1974 (\$1,000 per person per election cycle) and today’s limits, as set in McCain Feingold (\$2,000). This change is codified in the Bipartisan Campaign Reform Act of 2002 (BCRA). 2 U.S.C. § 441a(a)(1)(A) (2000 & West. Supp. 2002). Note also that the basic structure of the relevant federal law was re-shaped in large part by the Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). See *infra* text accompanying notes 80–85 (holding that the law limiting campaign expenditures was not sufficiently supported by a compelling governmental interest and violated the First Amendment).

31. “Very few Americans contribute to political parties and candidates in the United States, and the percentage who do contribute has remained relatively stable during the past twenty years, even as the costs of elections have increased. Consequently, candidates need to spend more and more time trying to raise money from a very narrow donor base.” Candance J. Nelson, *Spending in the 2000 Elections*, in FINANCING THE 2000 ELECTION 35–38 (David Magleby ed., 2002). “Failure to index contribution limits for inflation spawned an important new role for money brokers and intensified the money chase.” Thomas E. Mann, *Lessons for Reforms*, in FINANCING THE 2000 ELECTION, *supra*, at 239.

32. BCRA, enacted in 2002, raised limits from \$1,000 to \$2,000, the first increase since the 1974 FECA amendments. But \$2,000 in 2002 dollars is still a sharp decrease from the \$1,000 limit of 1974—that \$1,000 was the equivalent of \$3,649.64 in 2002. Even though the limit was doubled, a \$2,000 contribution in 2005 is only worth about half of what a \$1,000 contribution would have been worth in 1974.

33. Compare SCHRAM, *supra* note 8 (providing remarks of politicians regarding campaign financing), and MAKINSON, *supra* note 8 (discussing different Congress members’ viewpoints regarding the time it takes to adequately campaign), with Blasi, *supra* note 3, at 1282 (noting that a goal of campaign finance reform should be the time protection of officeholders).

attributes of that money chase to show that it is increasingly time consuming,³⁴ geographically far-flung,³⁵ and focused on an elite set of donors.³⁶

1. Time Demands of the Money Chase

In terms of time, for example, Representative Bill McCollum said, “When I was here in Washington I would go over to the NRCC [National Republican Congressional Committee] or the Senatorial Committee offices to make telephone calls [for] an hour, two hours every day. When I was home in Florida . . . that’s the bulk of what I did. It’s a very time-consuming process[.]”³⁷

House Minority Leader Robert Michel decried both the escalation of costs and the time taken to raise the money needed for a campaign.

“I ran my first campaign [in 1956] for \$15,000. And then by the time I got to my toughest campaign in ‘82, it was \$600,000 When I look around the country and see some of these multimillion-dollar races, I just have to be concerned about that. The time that you spend raising money, and the number of fund-raising events I was obliged to attend or at least stop by—gosh, you’d have five or six a night. It just wears you out doing that.”³⁸

The campaign money chase dominates candidates’ time every day, day after day.³⁹

2. Travel Demands of the Money Chase

Not only does the money chase take time, it also takes the candidate

34. See *infra* Part II.B.1 (discussing the time demands of the money chase).

35. See *infra* Part II.B.2 (discussing the travel demands of the money chase).

36. See *infra* Part II.B.3 (discussing the elite donor class of the money chase).

37. MAKINSON, *supra* note 8, at 36–37 (quoting Rep. Bill McCollum (R-FL)).

38. SCHRAM, *supra* note 8, pt. I, § 3, at 38 (quoting House Minority Leader Robert Michel (R-IL)). Even those who did not necessarily see a detrimental impact on daily operations saw the drain on time:

“I don’t think the campaign fund-raising affected the day-to-day operations of Congress. I think the one thing it did do was to take up a good deal of the amount of time of members of Congress, particularly those who came from very competitive districts, and those who were contemplating statewide races in large states.”

Id. at 43 (quoting Rep. Bill Green (R-NY)).

39. The system is “‘compromised by the fact that you have to spend so much time doing it.’” *Id.* at pt. I, § 1, at 16 (quoting Sen. Dennis DeConcini (D-AZ)).

“Someone in a relatively safe seat may be free of thinking about a campaign until the last six months or so of a two-year term. At that time, that person becomes a candidate and not a member of Congress for all practical purposes. Someone like me, in a very marginal seat, begins thinking about reelection a day or so after he is sworn in for a new term—if he wants to get reelected.”

Id. at pt. I, § 3, at 44 (quoting Rep. Jim Bacchus (D-FL)).

to great geographical distances. Candidates and elected officials cast a wide net in order to raise the money needed to run a successful campaign. They reach out beyond their immediate circles of friends, past voters and constituents, and outside their home region, in the pursuit of that precious commodity, campaign cash.⁴⁰ Returning to the example of South Dakota in 2004, 92% of the money raised by incumbent Senator Tom Daschle came from outside of the state, as did 78% of that raised by his opponent, Jon Thune.⁴¹ A breakdown of 2004 fundraising data shows a chase to several hot spots around the country with high levels of campaign contributions, with the New York City metropolitan area being the leader at nearly \$150 million, and Washington D.C. not far behind at \$135.4 million.⁴² Other stops on the campaign money tour include Los Angeles and San Francisco on the west coast, Chicago in the Midwest, and Boston and Philadelphia on the east coast.⁴³ Combined, these seven metropolitan areas account for over \$600 million in individual campaign contributions.⁴⁴ As a result, candidates spend much of their time flying back and forth across the country—from New York to Hollywood, with a stop in Chicago, perhaps—raising money.⁴⁵ As Senator Wyche Fowler commented: “It takes two to three years of constant travel—you cannot, under today’s system, raise [enough] money in your own state. And therefore, the time expands exponentially, because you’re crisscrossing the country”⁴⁶ And the crisscrossing takes candidates to people they never have met, and may never have reason to see again, but for the

40. SCHRAM, *supra* note 8, pt. I, § 3 (offering perspectives from former lawmakers on campaign fundraising). For the top 10 most expensive Senate races from 2004, reflecting the 20 major party candidates, the average candidate received 39.1% of her funds from out-of-state contributors. This data was compiled from information published by CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW, www.opensecrets.org (follow “2004 Election Overview” under “Election Overview” tab) (last visited Feb. 16, 2006).

41. CENTER FOR RESPONSIVE POLITICS, SOUTH DAKOTA SENATE: 2004 RACE PROFILE, www.opensecrets.org/races/index.asp (select “South Dakota”; then follow “Election Races” and select “2004”) (last visited Feb. 16, 2006).

42. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: TOP METRO AREAS, <http://www.opensecrets.org/overview/topmetro.asp> (last visited Feb. 16, 2006).

43. *Id.*

44. *Id.*

45. As one House member put it,

“[P]eople would be genuinely unhappy about how much time members have to spend on fund-raising. . . . And in many cases, because there is such competition for the dollars, you can’t do it over the phone. You’ve got to get on a plane and fly to New York or Chicago or Miami or Dallas or Los Angeles. Hollywood, Wall Street. And that’s a couple of day trip—a lot of schmoozing.”

SCHRAM, *supra* note 8, pt. I, § 3, at 40–41 (quoting Rep. Dennis Eckart (D-OH)).

46. *Id.* at 42 (quoting Sen. Wyche Fowler(D-GA)).

need for cash.⁴⁷ Senator Dennis DeConcini of Arizona reflected on a fundraising event as follows: “And I’m in New York. Beautiful apartment facing the park. I’d never been there before. Didn’t know the people who owned the apartment, who’d just raised me 46,000 bucks.”⁴⁸

3. The Elite Donor Class of the Money Chase

Not only are candidates chasing money outside of their districts, they are lavishing attention on a wealthy and elite donor class, taking time away from the many.⁴⁹ The Center for Responsive Politics reports, “[l]ess than one-tenth of 1 percent of the U.S. population gave 83 percent of all itemized campaign contributions for the 2002 elections.”⁵⁰ Donors who max out, i.e., give the maximum \$2,000 allowed under law, represent approximately one-tenth of one percent of the nation’s adult population.⁵¹ Candidates focus on these givers with programs like Rangers and Pioneers, who focus on raising hundreds of thousands of dollars from those who max out.⁵² This time is spent not with every day voters and constituents, but rather on the wealthy few who can help the candidate most quickly reach fundraising goals.

C. Conflicts With Job Performance

While the time and efforts spent raising money have increased, the number of hours in a day has not. Something must give.⁵³ Large

47. While exposure to a broad range of individuals can provide salutary benefits, the transactional approach of modern politics does not. The money chase becomes an end to itself, so that meetings become entirely transactional, and the question becomes: what can you give (or get) me, and what will be expected in return.

48. SCHRAM, *supra* note 8, pt. I, § 2, at 34–36 (quoting Sen. DeConcini (D-AZ)).

49. This terminology is effectively described and developed in Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 73 (2004).

50. Press Release, Center for Responsive Politics, Big-time Donors Small in Number (Dec. 11, 2002), <http://www.opensecrets.org/pressreleases/DonorDemographics02.asp>.

51. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: DONOR DEMOGRAPHICS, <http://www.opensecrets.org/overview/DonorDemographics.asp> (last visited Feb. 16, 2006). Contributions of \$200 or more come from about one-half of one percent (0.52%) of the nation’s population. *Id.*

52. During the Bush re-election campaign, those who pledged to raise \$200,000 were in a special club called the “Rangers,” with each typically targeting one hundred people to max out. Thomas B. Edsall & Sarah Cohen, *Bush Campaign Raises A Record \$49.5 Million; For Their Efforts, Fundraisers Also Gain*, WASH. POST, Oct. 15, 2003, at A1. The “Pioneers” are another group, first established in the 2000 election cycle, when the contribution ceiling was \$1,000, for those who could raise \$100,000 (presumably one hundred people giving \$1000 each). *Id.* Senator Kerry apparently had “Vice-Chairs,” who raised at least \$100,000, and “Co-Chairs,” who raised at least \$50,000. WhiteHouseForSale.org, Dean & Kerry Fundraising, <http://www.whitehouseforsale.org/demfundraising/> (last visited Feb. 16, 2006).

53. “Members, like everybody else, have only so much time in the day. And it’s packed

blocks of a candidate's time are spent fundraising,⁵⁴ as opposed to engaging with constituents, debating (literally or figuratively) opponents, or discussing ideas.⁵⁵ Candidates "hardly ha[ve] time to genuinely stop, look, and listen to the people [they are] going to represent."⁵⁶ Because they are consumed with fundraising, candidates do not have time during their campaigns to engage the issues or the voters.⁵⁷

In addition, testimonial evidence from Members of Congress reflects that they do not devote as much time to doing their jobs in service to the public as they would like because they spend so much time raising money.⁵⁸ The money chase is, in one Member's words, "[a] very real distraction from the real business of legislating."⁵⁹ It takes time away from the job and forces a choice: do the people's business or raise

and crowded with constituents, committee hearings, floor statements, oversight responsibilities, and too often, fundraising calls. And when you're balancing all those things together, especially those members in marginal and competitive races, they are forced too often to spend too much of their time dialing for dollars rather than sitting in their committee room and protecting the dollars of their constituents. You know, the dialing for dollars is to get somebody elected. The protecting the dollars is one of the primary legislative responsibilities. And too often, one comes at the expense of the other."

MAKINSON, *supra* note 8, at 39–40 (quoting Rep. Tim Roemer (D-IN)).

54. See, e.g., Jim Tankersley, *Senate Hopefuls Focus on Money*, ROCKY MTN. NEWS, June 11, 2004, at 24A (describing statements by former Representative Robert Schaffer that he was spending "120 percent" of his time fundraising in the Republican primary for Senate).

55. See Bob Warner, *Critics Tread on Street/Blast Mayoral Hopeful for Remarks on Fund-Raising*, PHILA. DAILY NEWS, Sept. 24, 1999, at 15 (quoting the mayoral candidate as saying that the continued escalation of fundraising has "changed the whole tenor of political campaigns," and that if the incumbent "had less money to spend on 30-second campaign ads, he would be more willing to engage in debates and other joint appearances, giving voters more chances to evaluate the mayoral candidates face to face.").

56. 133 CONG. REC. S7782 (daily ed. June 9, 1987) (Statement of Sen. Hollings).

57. See, e.g., SCHRAM, *supra* note 8, pt. I, § 3, at 42 ("I did raise a lot of money, particularly in my Senate race, and it just drained my time and ability to do anything else. It just crippled my ability to do my job properly in my final term, or to run an effective campaign beyond the fundraising part of it." (quoting Rep. Mel Levine (D-CA))).

58. Former Representative Bob Edgar commented that during an election "[e]ighty percent of my time, 80% of my staff's time, 80% of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise \$3,000 or \$4,000." Marty Jezer, et al., *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333, 341 (1993) (quoting PHILIP M. STERN, *THE BEST CONGRESS MONEY CAN BUY* 119 (1998)). Sen. Howard Metzenbaum echoed this sentiment and indicated that elected officials would prefer to spend their time serving the public:

"You'd like to be spending your time on legislation—on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign. So that which you should be doing doesn't always get the first priority."

SCHRAM, *supra* note 8, pt. I, § 3, at 43 (quoting Sen. Howard Metzenbaum (D-OH)).

59. SCHRAM, *supra* note 8, pt. I, § 3, at 38 (quoting Rep. Leslie Byrne (D-VA)).

money for the next campaign. “[Fundraising] just drained my time and ability to do anything else. It just crippled my ability to do my job properly . . . or to run an effective campaign beyond the fund-raising part of it.”⁶⁰ The time lost is time that could instead be spent doing the people’s business, such as studying legislation, debating policy, and voting on bills.

The money chase takes elected officials away from their work in other ways. Members of Congress are not allowed to make fundraising calls from their congressional offices⁶¹ and they therefore typically rent office space on Capitol Hill for those purposes.⁶² This usually involves an effective extension or conversion of their prior campaign fundraising operation immediately after election.⁶³ This sets up a strange ritual dance in Washington because the pull to raise money is so strong and Members of Congress are inexorably drawn to these fundraising bunkers. “I rented an office on Capitol Hill, and between votes [in the House] during the time I was running for the Senate, I just camped out in that office most of the time and made phone calls.”⁶⁴ Particularly during peak times, every free moment is turned over to the march for money, instead of the people’s business.⁶⁵

60. *Id.* at 42 (quoting Rep. Mel Levine (D-CA)).

61. 18 U.S.C. § 607(a)(1) (2000 & West. Supp. 2002).

It shall be unlawful for any person to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States. It shall be unlawful for an individual who is an officer or employee of the Federal Government, including the President, Vice President, and Members of Congress, to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election, while in any room or building occupied in the discharge of official duties by an officer or employee of the United States, from any person.

Id.

62. In addition, they will venture to the party headquarters and campaign offices on Capitol Hill for these purposes. MAKINSON, *supra* note 8, at 36 (noting the comments of Rep. Bill McCollum about traveling to the National Republican Congressional Committee, whose offices are on Capitol Hill, just two blocks from the House Office Buildings).

63. “We started the day after Election Day, and I kept the campaign finance office going year round, making calls, working on mailings, planning fund-raising events.” SCHRAM, *supra* note 8, pt. I, § 3, at 43–44 (quoting Rep. Bill Green (R-NY)).

64. *Id.* at 42 (quoting Rep. Mel Levine (D-CA)).

65. MAKINSON, *supra* note 8, at 36.

“[A]ny time I got an hour, literally, I would leave my [congressional] office and go up to the fundraising office to make calls. . . . Nothing came in unless I made a call. . . . And it’s not just one call, often you’d have to make many, many calls because someone was out of town. . . . So there was this constant flow back and forth of phone calls.”

Id. (quoting Sen. Richard Bryan (D-NV)).

While the government continues to operate, the fundraising demands and the running back and forth take a significant toll on the daily schedule of legislative business. Former Senate Majority Leader George Mitchell observed that virtually every day, as he was setting the legislative calendar, he would be called and asked not to schedule legislative business at certain times, due to fundraising obligations.⁶⁶ The demand was so great as to be able to stop the Senate entirely from doing its work: “If I put all the requests together, the Senate would never vote. I once had my staff keep a list of such requests on one day . . . and had I honored all of the requests, there could not have been a vote that day.”⁶⁷ Some just would routinely miss important votes due to conflicts with their fundraising activities.⁶⁸ In a survey of House and Senate members and their staffs, the Center for Responsive Politics found that 52 percent of the senators surveyed thought the demands of fundraising cut significantly into the time available for legislative work, and another 12 percent believed fundraising had some deleterious effect.⁶⁹

66. SCHRAM, *supra* note 8, pt. I, § 3, at 37–38.

“As Senate Majority Leader, one of my responsibilities has been to schedule the operations of the Senate. And I can say to you that there’s hardly a day in the past six years when I’ve been Majority Leader when one or more senators hasn’t called me and asked me not to have a vote at a certain time . . . One of the most common reasons is that they are either holding or attending a fund-raising event that evening, either in Washington or outside Washington . . .”

Id. (quoting Sen. George Mitchell (D-ME)); see also John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, WALL ST. J., Mar. 2, 1994, at A8 (noting that Senator George Mitchell “is often pestered by colleagues who don’t want floor votes to conflict with fundraisers, and sometimes obliges them”); Senator Richard Bryan has stated,

“There were many, many weeks in which no votes would be scheduled late. Or no votes would be held because the Democrats had their major fundraising event. . . .

And then the leadership was increasingly under pressure from the members: ‘Gosh don’t schedule a vote here, protect me, I’ve got to be in New York for this fundraiser or that.’ I mean that is the impact on the institution in terms of time management.”

MAKINSON, *supra* note 8, at 40 (quoting Sen. Richard Bryan (D-NV)).

67. SCHRAM, *supra* note 8, pt. I, § 3, at 38 (quoting Sen. George Mitchell (D-ME)). The requests “covered the period from nine a.m. until midnight.” *Id.*

68. See, e.g., Greg Krikorian, *California and the West; Campaign Cuts Into Campbell’s Voting Record*, L.A. TIMES, July 24, 2000, at A3 (detailing Rep. Campbell’s abysmal attendance record in Congress while campaigning for United States Senate). “Campbell says he has no choice but to miss votes in a system that demands huge amount of campaign money—a system he wants to change. And his opponent [Senator Diane Feinstein] is a well known, well financed incumbent.” *Id.*

69. See PETER LINDSTROM, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS—A SURVEY OF THE 100TH CONGRESS 92 (1988) (calculating the responses of congressional representatives); MAKINSON, *supra* note 8, at 39–40 (“[T]he dialing for dollars is to get somebody elected. The protecting the dollars [of their constituents] is one of the primary legislative responsibilities. And too often, one comes at the expense of the other.” (quoting Rep.

The 2004 presidential election cycle provides the best—or perhaps worst—example of the problem addressed in these pages, and how the number of hours spent raising these vast sums is time lost to the American people.⁷⁰ Both major party nominees, President George W. Bush and U.S. Senator John F. Kerry decided to forego the public financing available in the primaries. Together, they raised nearly half a billion dollars prior to accepting their respective parties' nominations.⁷¹ In effect, they raised money at a pace of at least one million dollars per day, every day for sixteen months, while also serving as federal officeholders.⁷² In order to do so, surely they could not have been performing all of their job functions as they might have otherwise, without the demands of fundraising.

Based on increasing campaign costs and the need for candidates to raise sufficient funds to meet those expenditures, candidates now face significant fundraising demands. Fundraising activity takes time away from candidates, many of whom are already officeholders, as they seek out money all around the country from a select few. This is time taken away from interactions with voters and, in the case of candidates who

Tom Roemer (D-IND)); SCHRAM, *supra* note 8, pt. I, § 3, at 38 (quoting Rep. Leslie Byrne (D-VA)).

70. Admittedly, each candidate has teams of full-time staffers and others, like Pioneers and Rangers, working on their fundraising, and their networks are national, so that no candidate is acting alone. But the amount of time spent fundraising is dedicated to so many different types of activities. The largest bulk is on telephone calls, but there is a significant donation of time to fundraising events themselves, managing teams of fundraisers and other administrative aspects of raising tens, or even hundreds of millions of dollars. In other words, candidates can always delegate some responsibilities, but in the end, they must put in the time themselves and, in one form or another “make the ask” and manage those who are managing the fundraising operation.

71. See CENTER FOR RESPONSIVE POLITICS, PRESIDENTIAL CANDIDATE GEORGE W. BUSH (R), <http://www.opensecrets.org/presidential/summary.asp?ID=N00008072> (last visited Feb. 16, 2006), for statistics on Bush's fundraising, and CENTER FOR RESPONSIVE POLITICS, PRESIDENTIAL CANDIDATE JOHN KERRY (D), <http://www.opensecrets.org/presidential/summary.asp?ID=N00000245> (last visited Feb. 16, 2006), for statistics on Kerry's fundraising. Major party candidates are entitled to a base of \$20,000,000 in public funds for the general presidential election, with a cost of living adjustment calculated with 1974 as the base year. FEDERAL ELECTION COMMISSION, PUBLIC FUNDING OF PRESIDENTIAL ELECTIONS BROCHURE (2005), <http://www.fec.gov/pages/brochures/pubfund.shtml#7>. In 2004, the cost-of-living-adjusted number came to \$74.62 million, which was paid to the campaigns of Pres. Bush and Sen. Kerry. *Id.*

72. Another way to look at it is that they were pulling in campaign cash at the rate of \$41,667 an hour, or \$694 every minute. These amounts are continuously rising. For example, in the 2000 primaries, sitting Vice President Al Gore, the eventual Democratic Party nominee, raised a total of \$33.9 million in individual contributions. FEDERAL ELECTION COMMISSION, RECEIPTS OF 1999–2000 PRESIDENTIAL CAMPAIGNS THROUGH JULY 31, 2000, <http://www.fec.gov/finance/precm8.htm>. Seeking the Republican Party's nomination in 2000, then-Governor George W. Bush raised \$91.3 million in individual contributions. *Id.*

are already officeholders, time stolen from the people's business. Public officials are consequently not doing the jobs they have been elected to do because of these fundraising demands, but are instead focused on raising money.

III. DEMONSTRATING A COMPELLING GOVERNMENT INTEREST IN TIME PROTECTION

This Part will evaluate the campaign money chase problem in the context of case law and constitutional jurisprudence. First, this Part will briefly discuss *Buckley v. Valeo*, the controlling United States Supreme Court decision in the campaign finance reform arena, which holds that campaign finance limitations must be supported by a "compelling government interest."⁷³ This Part will next describe how lower courts have defined "compelling government interest" in light of *Buckley* and will go on to reveal the circuit split regarding limitations on campaign expenditures and the time protection rationale.⁷⁴ Finally, this Part will examine the various reasons why the time protection rationale creates a compelling government interest in campaign finance reform.⁷⁵

A. *Buckley v. Valeo—Reforms Must Serve a Compelling Government Interest*

Government restrictions on fundamental liberties will be held unconstitutional unless they can survive strict scrutiny.⁷⁶ As the First Amendment protects the freedom of speech,⁷⁷ a fundamental liberty, the Court has held that any restrictions on free speech must survive this most exacting scrutiny.⁷⁸ When considering political speech, particularly in the campaign finance context, *Buckley* controls.⁷⁹ The

73. See *infra* Part III.A (discussing *Buckley v. Valeo* which held that campaign finance limit laws must meet strict scrutiny).

74. See *infra* Part III.B–C (examining the effect *Buckley* has had on the Court's definition of a compelling government interest and the development of a circuit split on time protection).

75. See *infra* Part III.D (examining the time protection rationale in light of a compelling government interest).

76. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 764–68 (2d ed. 2002).

77. The First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

78. But strict scrutiny must be strict in theory, not fatal in fact. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 237 (1995)). Furthermore, the Supreme Court has held that "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 641 (1994).

79. "Any judicial consideration of the constitutionality of campaign finance reform legislation

Buckley Court in effect equated money and speech, holding that laws restricting campaign contributions or expenditures must meet exacting scrutiny.⁸⁰ In *Buckley*, the Court faced a challenge to the Federal Election Campaign Act (FECA), and most notably for these purposes, challenges to provisions providing limits on campaign contributions and expenditures.⁸¹ The Court addressed this as a First Amendment concern, meriting the highest scrutiny—narrowly tailored means to achieve a compelling government interest.⁸² To further frame its analysis, as a broad matter of principle, the Court held that preserving the “integrity of our system of representative democracy” serves a compelling government interest.⁸³ Specifically, the Court identified FECA’s primary purpose—to limit actual and apparent corruption resulting from large individual financial contributions—and upheld contribution limits as narrowly tailored to serve this compelling government interest.⁸⁴ But the Court also held that the portion of FECA that limited campaign expenditures was not sufficiently supported by a compelling government interest and hence violated the First Amendment.⁸⁵

In FECA, as amended in 1974, Congress had created a parallel structure that limited both campaign contributions and expenditures.⁸⁶

must begin and usually ends with the comprehensive decision in *Buckley*.” *Kruse v. City of Cincinnati*, 142 F.3d 907, 911 (6th Cir. 1998). See also *Homans v. City of Albuquerque (Homans I)*, 217 F. Supp. 2d 1197, 1204 (D.N.M. 2002) (“*Buckley v. Valeo* is the ‘seminal case governing the constitutional review of campaign finance reform efforts, including expenditure limitations.”) (quoting *Landell v. Vt. Pub. Interest Research Group*, 300 F.3d 129, 141–42 (2d Cir. 2002)); *Citizens for Responsible Gov’t State PAC v. Davidson*, 236 F.3d 1174, 1186–1187 (10th Cir. 2000); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp. 2d 766, 767 (W.D. Mich. 1998).

80. *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (“[T]he constitutionality of § 608 (e)(1) [limiting campaign expenditures] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”).

81. *Id.* The challenge was brought by U.S. Senator Buckley and a variety of candidates, political parties, and contributors. FECA also provided for public financing of presidential campaigns and numerous reporting requirements, and some much less noteworthy provisions. *Id.*

82. *Id.* at 16.

83. *Id.* at 26–27.

84. *Id.* at 26 (“It is unnecessary to look beyond the Act’s primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.”).

85. The Court “f[ou]nd that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608 (e)(1)’s ceiling on independent expenditures.” *Id.* at 45.

86. *Id.* at 23 (“Section 608 (b) provides, with certain limited exceptions, that “no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000;”); *id.* at 39 (“The most drastic of the limitations restricts individuals and groups, including political parties that fail to place a candidate on the ballot, to an

But the *Buckley* Court struck down expenditure caps while leaving contribution caps in place,⁸⁷ setting a path to the problem that exists today. This unintended consequence arose because spending, unrestrained under FECA post-*Buckley*, has continued to rise rapidly. But with limits on contributions, the growing demand for money easily outpaces the ability to tap the restricted supply.⁸⁸ The result has been to undermine the integrity of representative democracy.⁸⁹

expenditure of \$1,000 'relative to a clearly identified candidate during a calendar year.' § 608 (e)(1). Other expenditure ceilings limit spending by candidates, § 608 (a), their campaigns, § 608 (c), and political parties in connection with election campaigns, § 608 (f)[.].

87. The Court saw different First Amendment implications in contributions as compared to expenditures, opening the door for differing treatment of their regulation. *See id.* at 23 ("[A]lthough the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."). The *Buckley* Court upheld contribution limits. *Id.* at 26 ("It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation."). But the Court struck down expenditure limits. *Id.* at 44.

We turn then to the basic First Amendment question whether § 608 (e)(1) . . . impermissibly burdens the constitutional right of free expression. The Court of Appeals summarily held the provision constitutionally valid on the ground that 'section 608(e) is a loophole-closing provision only' that is necessary to prevent circumvention of the contribution limitations. We cannot agree.

Id. (citation omitted).

88. *See supra* Part II.A (discussing the rising sums raised and spent in political campaigns).

89. *See, e.g.,* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 406 (Kennedy, J., dissenting).

The plain fact is that the compromise the Court invented in *Buckley* set the stage for a new kind of speech to enter the political system. It is covert speech. The Court has forced a substantial amount of speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits, limits which take no account of rising campaign costs.

Id. Justice Kennedy also identified covert speech as an unintended consequence of *Buckley*. "It is our duty to face up to adverse, unintended consequences flowing from our own prior decisions." *Id.* at 407. *See also* Thomas E. Mann, *Lessons for Reformers*, FINANCING THE 2000 ELECTION, *supra* note 31, at 238 ("These overriding realities [of the constant evasion of campaign finance laws] are encompassed in the infamous Law of Unintended Consequences: the intended purposes of campaign finance regulation will inevitably be overwhelmed by effects not desired or anticipated."); Blasi, *supra* note 3, at 1307-08:

The recent increase in time devoted to fund-raising did not evolve "naturally." Rather, it developed in response to the patchwork legislative scheme that was left standing after the selective invalidations of *Buckley v. Valeo*: no limits on overall spending, severe limits on the size of contributions, and no limits on independent expenditures for and against particular candidates. The war chest mentality was born of this regulatory residue. Had the 1974 campaign finance law at issue in *Buckley* either never been passed or been upheld in its entirety, the quest for contributions would look very different. Almost certainly, it would be far less time consuming because either candidates would not seek to raise so much money (if they couldn't spend beyond a set limit) or they could raise it much more efficiently (by means of large contributions).

B. *Compelling Government Interest in Spending Limits Post-Buckley*

What can be done to reverse the tide? Any responsive campaign finance reform, and specifically spending limits, must be narrowly tailored to meet a compelling government interest.⁹⁰ Still, that interest must be identified. This Section first will explore the possibility that a sufficiently compelling government interest in limiting campaign expenditures may continue to exist after *Buckley*.⁹¹ This Section then will consider the various circumstances in which courts have identified a compelling government interest since *Buckley*.⁹²

1. *Buckley* Leaves Open the Possibility to Limit Campaign Spending

While *Buckley* held that a sufficiently compelling government interest *had not been* identified to justify the expenditure limits, the possibility has remained that one *could be* developed.⁹³ For example, Justice Kennedy recently wrote: "I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting office holders to concentrate their time and efforts on official duties rather than on fundraising."⁹⁴ Similarly, Justice Breyer, in an opinion

Id.

90. The Court has used various ways to describe narrow tailoring. In general, "[i]f strict scrutiny is used, a relatively close fit is required: in fact, the government will have to show that the means is necessary—the least restrictive alternative—to achieve the goal." CHEMERINSKY, *supra* note 76, at 648. Strict scrutiny "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . ." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). In a university affirmative action context, the Court explained that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). However, "narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.* at 340.

91. See *infra* Part III.B.1 (discussing the possibility of a compelling government interest in limiting campaign spending).

92. See *infra* Part III.B.2 (examining other situations that courts have identified as compelling government interest since *Buckley* was decided).

93. See *Homans II*, 366 F.3d 900, 906–07 (10th Cir. 2004) ("'*Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional,' and . . . it remains possible to develop a factual record that would sustain such restrictions [I]t might be possible to devise a system of campaign-expenditure limits that would survive exacting scrutiny[.]" (quoting *Kruse v. City of Cincinnati*, 142 F.3d 907, 920 (6th Cir. 1998)).

94. *Shrink Mo. Gov't PAC*, 528 U.S. at 409 (Kennedy, J., dissenting). Justice Kennedy qualified this statement by hinting that perhaps he would vote with Justices Thomas and Scalia to strike down contribution limits. *Id.* Further, while some might read Justice Kennedy's vehement dissent in *McConnell* to mean he has joined Justices Thomas and Scalia on this issue, nothing in the *Shrink Mo. Gov't PAC* dissent really implicated the time-protection issue.

joined by Justice Ginsburg, argued that, particularly in light of post-*Buckley* developments, legislatures could find compelling reasons to enact campaign finance reform laws, so as to “protect the integrity of the electoral process.”⁹⁵

Lower court judges also note this opening. For example, a majority in the Second Circuit observed that, “after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.”⁹⁶ A concurrence in the Sixth Circuit offers a similar perspective: “It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, . . . is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.”⁹⁷ The door is open for change to enter.

2. Identifying a Compelling Government Interest

The Court has found a compelling government interest in myriad activities that relate to the healthy functioning of representative democracy. For example, in *First National Bank of Boston v. Bellotti*, the Court held, “Preserving the integrity of the electoral process . . . and ‘sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government’ are interests of the highest importance. . . . Preservation of the individual citizen’s confidence in government is equally important.”⁹⁸ The Court has also found a compelling government interest in: preventing voter intimidation and election fraud;⁹⁹ “preserv[ing] of the integrity of the electoral process and regulating the number of candidates on the ballot

95. *Id.* at 401 (Breyer, J., concurring).

96. *Landell II*, 382 F.3d 91, 108 (2d Cir. 2002), *cert. granted*, 126 S. Ct. 35 (2005) (affirming the time protection rationale as a compelling government interest).

97. *Kruse v. City of Cincinnati*, 142 F.3d 907, 920 (6th Cir. 1998) (Cohn, D.J., concurring). In the Tenth Circuit, Judge Lucero wrote that *Buckley* did not address the time protection rationale that is being urged here. *Homans II*, 366 F.3d 900, 911 (10th Cir. 2004), *cert. denied*, 543 U.S. 1002 (2004). But majorities in these two cases from the Sixth and Tenth Circuits ultimately disagree with the Second Circuit opinion. *See also* *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (following *Kruse* to strike down expenditure limits in state judicial elections).

98. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (striking down a law that prohibited banks and corporations from making certain political contributions and expenditures). *See also* *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n. 14 (noting that preservation of the integrity of the electoral process and avoiding voter confusion is a compelling government interest); *Storer v. Brow*, 415 U.S. 724, 736 (1974) (holding that the state may act to protect compelling “interest in the stability of its political system”).

99. *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

to avoid undue voter confusion,"¹⁰⁰ "avoiding confusion, deception, and even frustration of the democratic process at the general election;"¹⁰¹ "stabiliz[ing] of [the] political system;"¹⁰² and preventing erosion of public "confidence in the system of representative Government."¹⁰³ In sum, preserving the integrity of the electoral process is a compelling government interest "basic to a democratic society,"¹⁰⁴ broadly encompassing many specific activities and many important ideological concerns.¹⁰⁵

The Court has recognized other ways to protect the integrity of the system in a manner that would demonstrate a compelling government interest.¹⁰⁶ For example, in *Burson v. Freeman*,¹⁰⁷ the Court upheld

100. *Am. Party of Tex.*, 415 U.S. at 782 n.14 (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973)); *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

101. *Jeness v. Fortson*, 403 U.S. 431, 442 (1970) (citing *Williams*, 393 U.S. at 47 n.10).

102. *Storer*, 415 U.S. at 736 (upholding ballot access restrictions).

103. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

104. *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957) (reviewing a law regulating corporation and union contributions and expenditures in connection with federal elections).

105. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

The governmental interests sought to be vindicated by the disclosure requirements . . . fall into three categories. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. And, as we recognized in *Burroughs v. United States*, 290 U.S., at 548, Congress could reasonably conclude that full disclosure during an election campaign tends "to prevent the corrupt use of money to affect elections."

...

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The disclosure requirements, as a general matter, directly serve substantial governmental interests.

Id. (footnotes omitted).

106. See Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 955 (1988) ("In order to fully protect this interest in democracy, the Court has frequently accepted the government's asserted compelling interests in preventing election fraud and corruption as justifying various restraints on individual rights.").

107. 504 U.S. 191 (1992).

Tennessee statutes prohibiting vote solicitation and limiting the display of campaign materials within 100 feet of a polling place on Election Day,¹⁰⁸ holding that preventing voter intimidation and election fraud were compelling government interests.¹⁰⁹ Both pre- and post-*Buckley* case law have identified the stability of the system and integrity of the electoral process as compelling governmental interests.¹¹⁰

C. The Circuit Split

In addition to the compelling government interests identified above, the time protection rationale has been raised as a justification for limiting campaign spending. This Section discusses the conflicting treatments of that rationale in the circuits, to show that this issue is ripe for Supreme Court resolution.

1. *Landell v. Sorrell*: Time Protection is Sufficiently Compelling

In *Landell v. Sorrell*, the United States District Court for the District of Vermont reviewed the expenditure limitation provisions of the 1997 Vermont Campaign Finance Reform Act (Act 64).¹¹¹ Upon reviewing the full record, the court found that the quest for campaign contributions caused incumbents to spend excessive time trying to raise funds.¹¹² That redistribution of time to fundraising significantly reduced the amount of time spent legislating and attending to other official duties,

108. *Id.* at 211. The statutes in question were specifically designed to restrict election day political speech, and had to survive strict scrutiny. *Id.* at 198.

109. *Id.* at 206. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (holding that preventing corruption is a compelling government interest); *Buckley*, 424 U.S. at 26–27 (expressing a concern about protecting “the integrity of our system of representative democracy”); see also *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (discussing “the legitimacy of the State’s interest in fostering informed and educated expressions of the popular will in a general election”); cf. *Tashjian v. Republican Party*, 479 U.S. 208, 220 (1986) (addressing an argument that party labels confuse voters); *Democratic Party of U.S. v. Wisc. ex rel. LaFollette*, 450 U.S. 107, 125–26 (1981) (acknowledging that there is a compelling government interest in protecting the integrity of elections, but that interest does not outweigh a national party’s interest in electing its own delegates).

110. See *Storer v. Brown*, 415 U.S. 724, 736 (1974) (“It appears obvious to us that the one-year disaffiliation provision furthers the State’s interest in the stability of its political system. We also consider that interest as not only permissible, but compelling . . .”); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n.14 (1974) (“Appellants concede, as we think they must, that the objectives ostensibly sought by the State, viz., preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion, are compelling.”); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (“It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal.”).

111. *Landell v. Sorrell* (*Landell I*), 118 F. Supp. 2d 459 (D. Vt. 2000). Act 64 also includes contribution limits, and other campaign reforms that, while significant in their own right, will not be discussed here. VT. STAT. ANN. tit. 17, §§ 2801–2883 (2004 & West Supp. 2005).

112. *Landell I*, 118 F. Supp. 2d. at 482–83.

ultimately diminishing the overall representation provided.¹¹³

In passing Act 64, the Vermont legislature had determined, in part, that “candidates for statewide office were spending inordinate amounts of time raising campaign funds.”¹¹⁴ The evidence presented at trial demonstrated that “the need to solicit money from large donors at times turns legislators away from their official duties.”¹¹⁵ The court approved the legislative finding that “[a]s a result of the legislature’s vulnerability to the demands of large contributors, the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time interacting with voters.”¹¹⁶ The district court then considered whether Vermont’s spending limits were constitutional. Based on its review of the facts, the court held: “Spending limits are an effective response to certain compelling government interests not addressed in *Buckley*: (1) ‘Freeing office holders so they can perform their duties,’ . . . or, as Justice Kennedy put it, ‘permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising.’”¹¹⁷

The district court saw a compelling interest in maximizing the amount of time spent legislating and minimizing distractions to job performance, concluding that “the state proved that each of these concerns exist, and that Vermont’s expenditure limits address them.”¹¹⁸ On the facts, the court found that Vermont’s legislature identified a compelling interest in time protection and legislated in an appropriate manner to remedy the threat to its interest.¹¹⁹ Despite this finding, the district court decided that it could not hold the expenditure limits at

113. *Id.* at 468 (“Evidence supporting these conclusions came from both Plaintiffs and Defendants in the form of public perception, legislator perception, and expert opinion.”). Despite finding a compelling government interest in protecting this lost time, the court overturned Act 64’s expenditure limits, on a belief that principles of *stare decisis* prevented holding otherwise. *Id.* at 483.

114. *Id.* at 468 (quoting Vermont General Assembly Legislative Finding (a)(1)).

115. *Id.* Additionally, the court cited the testimony of Senator Cheryl Rivers, who testified that she “had been asked, contrary to her wishes, to solicit potential donors. She was assigned to call companies such as Electronic Data Systems . . . , a company that is not located in her district and that she would have no reason to contact apart from the need for donations to the party.” *Id.* at 469.

116. *Id.* at 470.

117. *Id.* at 482–83 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 482 (2000) (Kennedy, J., dissenting) (internal citations omitted)). The court noted that Justice Kennedy’s dissent, although not controlling, “reinforc[ed] the view that the constitutionality of expenditure limits bears review and reconsideration.” *Id.* at 482.

118. *Id.* at 483. Furthermore, the court realized that “[g]iven the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill.” *Id.*

119. *Id.*

issue to be constitutional because it determined that *Buckley* was controlling.¹²⁰

On appeal, the Second Circuit took several steps in reviewing the constitutionality of Act 64. First, the appellate court observed, as noted above, that *Buckley* left open the question of whether facts could justify finding a compelling government interest to support spending limits.¹²¹ After reviewing the lengthy record below, the Second Circuit held that as a matter of law, in addition to the well-established interest in preventing corruption and the appearance thereof,¹²² time protection is a compelling government interest.¹²³ The court was convinced that both as a matter of fact and as a matter of law, Vermont had sufficiently established a compelling government interest in “protecting the time of candidates and elected officials.”¹²⁴ And spending limits could serve this interest effectively, without improperly impeding campaigning or speech rights.¹²⁵

A vigorous dissent from Judge Winter, on the original panel to hear the matter, rejected the time protection argument, arguing that *Buckley* foreclosed this line of inquiry, in part because it considered the question three decades ago.¹²⁶ Further, Judge Winter argued that the time protection rationale is merely another way to limit spending for the sake of equality, as opposed to being an independent ground on its own. On denial of rehearing en banc,¹²⁷ Judge Walker dissented, reiterating Judge Winter’s arguments regarding time protection, and further arguing that expenditure limits improperly help entrench incumbents.¹²⁸

120. *Id.* Despite the court’s finding of a compelling government interest, it overturned the Act’s expenditure provisions because the court found itself “bound by the doctrine of stare decisis to adhere to Supreme Court precedent.” *Id.*

121. *Landell II*, 382 F.3d 91, 108 (2d Cir. 2002), *cert. granted*, 126 S. Ct. 35 (2005). See *supra* Part III.B.1 for a discussion of the time demands of campaign fundraising.

122. *Landell II*, 382 F.3d at 124–25. Because limits on contributions alone have proved insufficient to deter corruption, the Second Circuit further held that spending caps can also help serve that interest.

123. *Id.* at 124.

124. *Id.*

125. *Id.* at 130–31. The appeals court remained open as to the issue of what means would specifically be most narrowly tailored to fit the constitutionally-acceptable ends. *Id.* at 133–35. Thus, upon first ruling, the Second Circuit remanded to the district court. *Id.* at 135–37. The specific question of whether Vermont’s law is sufficiently narrowly tailored has not been resolved by the trial court, as the legal questions await resolution in the Supreme Court.

126. *Id.* at 192–94 (noting the time protection rationale) (Winter, J., dissenting). Interestingly, Judge Winter argued *Buckley* thirty years prior. *Buckley v. Valeo*, 424 U.S. 1, 5 (1976).

127. Judge Calabresi concurred in the denial of rehearing en banc, specifically so as to press the Supreme Court to reconsider the basic underpinnings of *Buckley* and this area of law.

128. *Landell v. Sorrell (Landell III)*, 406 F.3d 159, 167–175 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 35 (2005) (Walker, J., dissenting from denial of rehearing en banc).

2. *Homans v. Albuquerque*

Challenges to campaign finance reform laws in Albuquerque, New Mexico also provide an example of the dimensions and responses to the time protection issue. The City of Albuquerque adopted limits on spending¹²⁹ by candidates for city office through an amendment to the city charter in 1974.¹³⁰ The City had done so “[i]n response to the increasingly apparent need to reform the ways in which political campaigns are financed.”¹³¹ The City explained that “[t]he caps on campaign spending serve numerous critically important governmental interests, including . . . freeing elected officials and candidates from the endless burden of fundraising so that they may devote their time to the business of government.”¹³²

Albuquerque provides a unique long-term view of the successes of spending limits. The spending limits effectively protected the time of candidates and public officials and made for better campaigns. Under the spending limits, the City experienced vigorous campaigns for office that engaged the people.¹³³ Time that might have been otherwise reserved for fundraising was occupied with other activities, such as direct voter contact.¹³⁴ The citizens of Albuquerque experienced competitive elections, greater participation, and elevated voter turnout and public confidence.¹³⁵ In addition, the spending limits were well-

129. *Homans II*, 366 F.3d 900, 902 (10th Cir. 2004) (citing Albuquerque City Charter, art. XIII, sec. 4(d)).

130. *Id.* The spending limits applicable to the October 2, 2001 elections for mayor and city councilor were \$174,720 and \$17,056, respectively. *Id.* at 903 (citing Albuquerque City Charter, art. XIII, sec. 4(d)). Note also that these limits were put in place pre-*Buckley* but somehow managed to stay essentially intact until just recently. *Id.* In 1999, pursuant to an amendment to the City Election Code, the applicable spending limits were doubled to an amount equal to twice the annual salary of the office. *Id.* (noting that limits were in effect from 1974 to 1995, enjoined in 1997, and restored for the 1999 election).

131. *Id.*

132. Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction, *Homans II*, 366 F.3d 900, 902 (10th Cir. 2004) (No. CIV-01-917 MV), <http://www.nvri.org/library/cases/albuquerque/homans/Ahomansprelim.pdf>, at 1–2. See also Anthony Gierzynski, Ph. D., *Albuquerque Election Financing*, <http://www.nvri.org/library/cases/albuquerque/electionfinancinganalysis.pdf> (last visited Feb. 16, 2006) (citing Marc Bernado, *Election Code, Code of Ethics Win Approval*, ALBUQUERQUE J., Feb. 27, 1974, at A1).

133. See Gierzynski, *supra* note 132, at 4 (stating that limits did not favor incumbents and that “democracy in Albuquerque is actually as healthy, if not healthier than other cities”).

134. As the district court observed, “[c]andidates in elections where spending limits are imposed tend to spend more campaign money on actual voter contact.” *Homans I*, 217 F. Supp. 2d 1197, 1201 (D.N.M. 2002).

135. In Albuquerque mayoral elections, challengers were far more successful against incumbents than in mayoral elections in other cities without spending limits. *Id.* at 1200–01 (finding voter turnout in Albuquerque mayoral and city council elections healthy compared to

received and promoted public confidence in Albuquerque local government.¹³⁶ On the whole, Albuquerque's spending limits protected the time of candidates and officeholders and enhanced the political process.

Mayoral candidate Rick Homans challenged the law,¹³⁷ and argued that the spending limits violated his First Amendment rights.¹³⁸ The United States District Court for the District of New Mexico found as a matter of fact that Albuquerque had "demonstrated that these expenditure limitations are narrowly tailored to serve the compelling interests of . . . permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters [and] increasing voter interest in and connection to the electoral system."¹³⁹ But due to a constrained application of *Buckley*, the court ordered the limits repealed in 2001.¹⁴⁰

The case continued after the spending caps were rescinded, with the comparative experience of the 2001 elections thrown into the mix. The federal trial court made findings of fact favorable to the City, noting that

other cities and that small donors play much bigger role in campaign financing in Albuquerque than in comparable cities without spending limits).

136. A survey showed that 71% of Albuquerque voters believed the spending limits have improved the "fairness of elections by ensuring that ordinary citizens, not just the very wealthy, can run for office in the City without having to raise so much money from special interest groups." *Id.* at 1202. As a comparison, 57% of voters strongly believe that elections for federal office—without spending limits—are overly influenced by special interest money, while only 23% said the same of Albuquerque elections. *Id.* at 1201. Overall, 57% of surveyed voters "strongly favor the current spending limits." *Id.* at 1201–02.

137. Sander Rue, a candidate for city councilor, also challenged the Albuquerque law on similar grounds. *Homans II*, 366 F.3d 900, 902 (10th Cir. 2004). Following discovery, the district court granted Rue's motion for summary judgment on October 11, 2002. The district court's decision did not discuss the factual evidence submitted by the parties. Instead, the court held that the constitutionality of the spending limit was foreclosed as a matter of law by the decision of the Tenth Circuit, discussed *infra*, granting an injunction pending appeal to *Homans*, and by the *Homans* district court's subsequent final judgment. As the *Rue* proceedings deferred so heavily to the *Homans* matter, the *Rue* case will not be addressed further. Further, the final Tenth Circuit opinion consolidates the two cases for resolution together.

138. *Homans v. City of Albuquerque*, 160 F. Supp. 2d 1266, 1268 (D.N.M. 2001). The district court initially granted a temporary restraining order on August 20, 2001. *Id.* However, on September 1, 2001, the court denied a motion for a preliminary injunction against enforcement of the spending limit for the upcoming October election. *Id.* at 1274. The parties submitted the case to the district court for a ruling on the merits, based on the record compiled at the preliminary injunction hearing, together with additional evidence submitted by stipulation. *Id.* at 1268.

139. *Homans I*, 217 F. Supp. 2d at 1206. The district court also found that the limits served the City's interests in "deterring corruption and the appearance of corruption, promoting public confidence in government . . . and promoting an open and robust public debate by encouraging electoral competition." *Id.*

140. *Id.* at 1206–07.

“unlimited spending . . . has a detrimental impact on the local electoral process.”¹⁴¹ Fundraising consumed candidates and officeholders, as campaign spending skyrocketed without expenditure limits.¹⁴² As then Mayor Jim Baca commented: “As a result of this new money chase in this year’s mayoral election in Albuquerque, I am now forced to spend three hours every day making fundraising phone calls. I have never before had to do this in my political career.”¹⁴³ The Albuquerque experience affirmed the positive correlation between time protection and campaign expenditure limits.¹⁴⁴

On appeal, the Tenth Circuit offered a different perspective than the Second Circuit and viewed *Buckley* as an absolute bar to spending limits: “under *Buckley* such restrictions cannot be supported as a matter of law.”¹⁴⁵ Due to its perception that *Buckley* posed an insurmountable obstacle, the Tenth Circuit avoided much of the hard legal analysis of the time protection rationale. The Court did not, however, reject the time protection rationale; instead the Tenth Circuit held “that Albuquerque’s evidence, even when viewed in the light most favorable to the City, fails to demonstrate that expenditure limits are necessary to further a compelling state interest.”¹⁴⁶ One judge on the panel differed

141. *Id.* at 1202.

142. “As the cost of elections rise, candidates for office at every level of federal, state, and city government are under a great deal of pressure to engage in fundraising activities and to depend on the good will of their donors.” *Id.* at 1201.

143. *Homans II*, 366 F.3d 900, 912 (10th Cir. 2004) (citing 2 *Homans* Doc. 24, at 512).

144. *See Homans I*, 217 F. Supp. 2d at 1203–06 (noting the contributions and expenditures of the Albuquerque elections). Notwithstanding its view of the facts, the district court was “constrained” by the Tenth Circuit’s interpretation that *Buckley*, as a matter of law, imposes a *per se* ban on any expenditure limits. *Id.* at 1204–06. Accordingly, the district court entered judgment in favor of *Homans*’ First Amendment claim, granting a permanent injunction against further enforcement of the spending limit. *Id.* at 1204–06. The district court viewed a Tenth Circuit ruling granting an interlocutory injunction to *Homans* as precluding any other determination, holding that:

This Court is mindful that the decision of an appellate court on an emergency motion for an injunction pending appeal does not constitute a binding decision that plaintiff is entitled to permanent injunctive relief. Nonetheless, as a district court within the Tenth Circuit, this Court is bound to follow the Tenth Circuit’s interpretation of the law, and its application of the law to the facts.

Id. at 1206 (internal citations omitted).

145. *Homans II*, 366 F.3d at 914 (Tymkovich, J., affirming, concurring in part and concurring in the result). While at one point this opinion states: “the *Buckley* Court did not adopt a *per se* rule against spending limits,” the analysis nevertheless rejected, as a matter of law, the possibility that spending limits could be sustained under the First Amendment. *Id.* at 915. After noting the government interests on which the City relied to support its expenditure limits, the opinion states: “Since all . . . of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law, the court need not entertain the evidence submitted by the City.” *Id.*

146. The appeals court summed up this way:

somewhat, writing that the time protection interests identified by the City could provide a sufficient basis for the limits,¹⁴⁷ but he concluded that the City's factual evidence was insufficient to support its claim.¹⁴⁸

3. The Eighth, First, and Sixth Circuits

Three other federal appeals courts have weighed in on this issue, albeit without much analysis, and two have approvingly remarked that the time protection rationale can support campaign finance reform. The Eighth Circuit, in upholding Minnesota's voluntary spending limits, favorably observed that the time protection rationale is "well settled"¹⁴⁹ as a compelling government interest.¹⁵⁰ Further, the First Circuit upheld Rhode Island's public financing law in part because "such programs 'facilitate communication by candidates with the electorate,' [and] free candidates from the pressures of fundraising."¹⁵¹ The Sixth Circuit has not adopted the time protection rationale: "the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending."¹⁵² Given the lack of agreement among and within the circuits, the compelling nature of the time protection rationale and the

We do not intend by our holding—that Albuquerque has failed in the instant case to demonstrate a compelling state interest for its expenditure provisions—to discourage future efforts in reforming our electoral system; we merely hold that on the record before us, Albuquerque has failed to justify its expenditure limits.

Id.

147. *Id.* at 908. ("Buckley does not preclude the use of expenditure limits to further a state's anti-corruption interest in all circumstances."). *Buckley* did not address the "wholly separate" interest in preserving officeholders' time. *Id.* at 911. The court noted, "nothing precludes this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits." *Id.* at 913.

148. *Id.* ("Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to establish that its candidate-expenditure limits are necessary to serve a compelling state interest.")

149. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996).

150. *Id.* "[T]he State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning." *Id.*

151. *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (quoting *Buckley v. Valeo*, 424 U.S. 1, 91 (1976)).

152. *Kruse v. City of Cincinnati*, 142 F.3d 907, 916–17 (6th Cir. 1998). Writing for the court, Judge Kennedy determined that the defendants had not distinguished the expenditure limits put in place by a local ordinance from the portion of FECA that the Supreme Court had struck down in *Buckley*. *Id.* at 918. The City of Cincinnati had enacted its expenditure cap in order to assist candidates who had less access to wealth, but the court determined that *Buckley* had already addressed this issue, and determined that the government did not have a compelling interest in leveling the playing field for all potential candidates. *Id.* at 917. But again, while it did strike down expenditure limits, *Kruse* did not, however, address the specific time protection argument. *Id.*

constitutionality of spending limits is a question ripe for review.¹⁵³

D. The Time Protection Rationale Provides a Compelling Government Interest

Having now established both the possibility for review of *Buckley's* mandate and the courts' need for guidance on the issue, the following Sections delineate why time protection is a compelling government interest that supports campaign finance reform efforts, specifically, campaign spending limits. First, time protection safeguards the integrity of the electoral process by allowing candidates and elected officials to engage with voters and would-be constituents.¹⁵⁴ Second, it gives elected officials back the time to do the people's business.¹⁵⁵ Third, time protection defends the integrity of the republican government envisioned by the Framers and designed by the Constitution.¹⁵⁶

1. The Time Protection Rationale Enhances the Electoral Process

Simply considered, the campaign is a means to an end¹⁵⁷—the election of a representative in government. But the campaign is also so much more.¹⁵⁸ Campaigns are conversations that educate candidates and empower the people through political dialogue, enhancing representative democracy.¹⁵⁹ Fundraising redistributes candidates' time away from communications with everyday voters and would-be constituents to the pursuit of contributions from the few with money who can help fill campaign coffers. To the extent that candidates are in

153. The U.S. Supreme Court denied a petition for a writ of certiorari in the *Homans* case, but it is currently considering another petition for a writ of certiorari in the *Landell* case. *Landell II*, 382 F.3d 91 (2d Cir. 2002), *cert. granted*, 126 S. Ct. 35 (2005).

154. *See infra* Part III.D.1 (discussing time protection's effect on the electoral process).

155. *See infra* Part III.D.2 (discussing time protection's effect on officials' work performance).

156. *See infra* Part III.D.3 (discussing time protection's support of representative democracy).

157. In a perhaps mundane sense, campaigns are simply job interviews, a mechanism by which we sort out those who will do the job of representing us in a legislative body, or perhaps as the chief executive of a branch of government.

158. *See* William J. Gore & Robert L. Peabody, *The Functions of the Political Campaign: A Case Study*, 11 W. POL. Q. 55, 55 (1958) ("Campaigns are electioneering devices, means of getting candidates elected. But campaigns also embody traditional practices which manifest some of our answers to the most thorny aspects of the problems of representation.").

159. There are at least four identifiable conversations within campaigns: the people educate candidates as to their priorities; candidates educate the people as to their plans for governance; the people educate each other in conversations about the qualifications of candidates and the positions they hold; and candidates learn from each other and hone their positions in response to the give-and-take of the campaign. And this does not even include the essential role of the press in the process, which perhaps exponentially increases the array of conversations.

touch with some people, it is often by virtue of a transactional relationship with the wealthy and the residents of what might be called the campaign money belt.¹⁶⁰ The resulting skew away from the people, places, and events that would otherwise be the focus of the campaign poses a threat to the integrity of the electoral process.

Full-throated campaigns are integral to the American constitutional democracy and set the stage for full, active representation by encouraging dialogue, empowering the people, and educating candidates.¹⁶¹ Campaigns provide for an instrumental conversation between candidates and voters that is central to the “uninhibited, robust and wide-open” public debate¹⁶² that in many ways defines the republican form of government.¹⁶³ The system withers with untested assumptions and complete agreement of thought on all issues.¹⁶⁴

160. See *supra* Part II.B (discussing the time-consuming process of fundraising).

161. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (stating that the Supreme Court has “recognized repeatedly that ‘debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.’” (citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). As the *Buckley* Court observed, “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.” *Buckley*, 424 U.S. at 14–15. “[I]t can hardly be doubted that the constitutional [First Amendment] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Id.* at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Further, in *NAACP v. Claiborne Hardware Co.*, the Court “recognized that expression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’” *NAACP v. Claiborne Hardware Corp.*, 458 U.S. 886, 913 (1982) (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)). “[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.” *Id.* (citing *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

162. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

163. As Cass Sunstein has posited, “The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue.” Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1554 (1988). See also Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 *TENN. L. REV.* 291, 293 (1989) (“*Deliberative* politics connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed by them towards arriving at a reasonable answer to *some* question of public ordering . . . an answer that all can accept as a good-faith determination of what is to be done when some social choice is demanded by the circumstances.”).

164. Sunstein, *supra* note 163, at 1576 (“Modern republicanism is thus not grounded in a belief in homogeneity; on the contrary, heterogeneity is necessary if republican systems are to work.”). This modern analysis relates back to the Framers and, over time, the debate has encompassed great political and legal philosophers of many generations. See, e.g., Robert J. Lukens, *Discursing on Democracy & The Law—A Deconstructive Analysis*, 70 *TEMP. L. REV.* 587, 612–13 (1997) (“That [scholars rely] so heavily on the notion of participation by those who will be ruled by a particular law is by no means a new approach to discussing democracy. Democracy is, after all, fundamentally premised on citizen participation.”).

Professor Paul Kahn has linked these ideas with the Framers' efforts:

This revolutionary moment creates the possibility of a deliberative, constitutional politics: "I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare by any impressions other than those which may result from the *evidence of truth*." Through mutual deliberation, truth appeals to reason, not to "ambition, avarice, personal animosity and party opposition." Constitutional republican politics is, then, a paradigmatic case of the link between psychological and political order: It is a political form in which deliberation can become the basis for effective political choice.¹⁶⁵

Deliberation and democratic participation reflect the Framers' values and maintain the fundamental promise of the republic—representation by those who are chosen by the citizens. Campaigns are conversations that facilitate the political selection process. While deliberation is central,¹⁶⁶ a deliberative process is not a good unto itself. Rather, through the exploration, explication, and revision of ideas in public dialogue, ideas can be well-tested and refined in order to reach optimal outcomes¹⁶⁷ that reflect the will of the people.¹⁶⁸ As Professor Spencer

165. Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 461 (1989) (quoting THE FEDERALIST No. 1 (Alexander Hamilton)). In this sense, the Framers' quest "to form a more perfect Union," U.S. CONST. pmb., depended upon the involved citizen-participant to deliberate. This was required both for the citizens own self-fulfillment—in order to best seek and discover truth—and for the overall good of self-government of the country. See also Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2479 (1997) ("Democracy not only vests the choice of government officials in the citizens, it also presupposes that the citizens' choices will be informed. Only then are the people engaged in legitimate self-governance.").

166. While fundraising keeps candidates from interacting with voters and hearing their views, some also are concerned that restricting spending will restrict debate and deprive voters of needed information about candidates. But this argument assumes that the communication in a campaign is strictly a one-way street, with candidates disseminating their views to a passive public by broadcasting advertisements and sending them mailings. Of course spending limits look like restrictions on speech if that is the only vision of the function of a campaign. This Article and this Part reject the poverty of this model and instead proceed on the basis of an optimistic belief for an optimistic exercise—representative democracy. That optimism is sorely tested these days, and the people are not as engaged in this conversation as would be ideal. This presents a chicken-or-egg problem: are people apathetic because the system is not functioning well or is the system not functioning well because the people are apathetic? As campaign costs continue to spiral, without some intervention, the problem will only get worse. This Article is intended to show another way.

167. Sunstein, *supra* note 163, at 1567 ("[M]ost of the great liberal thinkers . . . placed a high premium on deliberation and discussion, and on the capacity of political dialogue to improve outcomes and to undermine unjustified disparities in power.").

168. See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the

Overton has noted, “The primary purpose of electoral competition is to produce government officials and policy outcomes that are responsive to the interests of citizens.”¹⁶⁹ Similarly, through this process, candidates can be tested to see who would be the best elected representative.

Campaigns also provide a public forum for the people to express views and sort priorities, fulfilling ideals of empowering the people-as-participants. Professor Robert Bennett postulates that a democratic conversation both informs the process and provides a sort of self-fulfillment to the citizen.¹⁷⁰ As the political theorist, Professor Benjamin Barber has argued that “talk remains central to politics, which would ossify completely without its creativity, its variety, its openness and flexibility, its inventiveness, its capacity for discovery, its subtlety and complexity, its eloquence, its potential for empathy and affective expression, and its deeply paradoxical . . . character that displays man’s full nature.”¹⁷¹ If we are to live in a political system that is entrusted to the people, then the people must find a meaningful way to exercise this responsibility. Without deliberation, self-government is mere surplusage and empty words.¹⁷²

security of the Republic, is a fundamental principle of our constitutional system.”).

169. Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 717 (2004). But Prof. Overton also notes that to the extent electoral competition serves to protect republican government, the current declining competition hurts the system. *Id.* at 716–18.

170. Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMM. 481, 501 (1997). “The conversational model posits that the backbone of democracy, the source of much of the popular respect it commands, and hence of much of its strength and stability, is to be found . . . in involvement of the electorate in democratic conversation.” *Id.* Further, “if meaningful democratic involvement is achieved more through conversation than through voting, we may well have a greater measure of such meaningful involvement with the two-stage ongoing process of representative democracy than we ever might hope for with any but the most intimate examples of direct democracy.” *Id.* at 520.

171. BENJAMIN R. BARBER, *STRONG DEMOCRACY* 174 (1984).

172. The Framers optimistically aspired for a well-informed citizenry as essential to the success of the participatory political system they created—a citizenry which was to be armed with information to discharge their solemn duties effectively. See Sunstein, *supra* note 163, at 1561 (“Madison suggested that republican government calls for more virtue from the citizenry than ‘any other form.’ In this sense, the very belief in virtuous representation resulted from some optimism about the citizenry.” (citing THE FEDERALIST NO. 55 (James Madison))). As Jefferson observed,

Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day. Although I do not . . . believe that the human condition will ever advance to such a state of perfection as that there shall no longer be pain or vice in the world, yet I believe it susceptible of much improvement, and most of all, in matters of government and religion; and that the diffusion of knowledge among the people is to be the instrument by which it is to be effected.

Letter from Thomas Jefferson to P.S. DuPont de Nemours (Apr. 24, 1816), in THOMAS

The campaign also is essential for educating candidates—preparing them to most effectively represent the people. In order to function fully, representative democracy requires that the people be able to educate and even instruct their elected officials so that the people's will may be done in government.¹⁷³ That time comes during the campaign. Interestingly, Professor Cass Sunstein has written that “early Congresses rejected a constitutional amendment that would entitle constituents to ‘instruct’ their representatives about how to vote. In those debates, Madison and others made it clear that the representatives’ task called for deliberation, and that task was inconsistent with a right to instruct.”¹⁷⁴ As the representatives need to deliberate amongst each other, the time for instruction from the people is the campaign.

While candidates should be engaged in these broad conversations, the money chase robs time for fundraising. They interact with a limited set of people in the course of campaigning, a set that is distinctly not representative of all voters or would-be constituents. This minimizes democratic conversation, threatens the integrity of the electoral process and diminishes the quality of representation.

In addition to the way in which time is taken away from the campaign debate, the campaign conversation itself is distorted because of the demographics of the donor class. Candidates are in contact with a disproportionate slice of the people—wealthy, and mostly out-of-district. In pursuit of money, time and attention are taken from the many and lavished on the wealthy in the campaign money belt. Professor Spencer Overton has offered a compelling analysis of the demographics of fundraising, arguing that the elite nature of the donor class ultimately undermines the democratic value of widespread participation.¹⁷⁵ Plus, to the extent that wealth is concentrated in certain areas of the country more than others, the money chase distorts the conversation.¹⁷⁶ This concern directly implicates the time protection rationale. Candidates and elected officials shower attention on these unrepresentative yet influential few, to the exclusion of spending time with the many, further threatening the integrity of the political

JEFFERSON POLITICAL WRITINGS 293 (Joyce Appleby & Terence Ball eds., 1999).

173. While it is impracticable for each person to speak with their legislator at the time of each vote, so there must come an earlier point in time to educate candidates and elected officials on the question of how to perform their duties.

174. Sunstein, *supra* note 163, at 1559.

175. Overton, *supra* note 49.

176. As candidates chase money outside their district, instead of meeting with voters, they talk with fundraisers concentrated in just a handful of cities. *See supra* notes 53–72 (describing the money chase); *supra* notes 40–48 (discussing the money raised from outside one's state).

process.¹⁷⁷

2. The Time Protection Rationale Lets Elected Officials Do Their Work

The time spent raising money creates a compelling problem of job performance as elected officials who should be doing the work of the people are not.¹⁷⁸ As demonstrated earlier in this Article, elected officials running for office face increasing campaign budgets and need to spend increasing amounts of time raising money.¹⁷⁹ They do that at the expense of doing the people's business.¹⁸⁰ In the words of Senator Dennis DeConcini: "I felt like I was cheating, that I was not putting in a full day's work for what I was really elected to do. I was not elected to come back [to Washington] and raise money for my next election."¹⁸¹ This time conflict raises compelling government interests, as every moment spent fundraising is time taken away from representing the people. Further, because the American Republic is founded on the notion of elected representatives serving the people, the money chase further undermines the system of representative democracy by preventing full dedication to that task.

When individual representatives neglect the legislative process in favor of fundraising, the people's right to have their chosen representatives engaged in the legislative process is jeopardized because those constituents are not fully represented.¹⁸² Time stolen for fundraising activities thus diminishes the representation provided by an individual elected official and the overall capacity of the body to function to its fullest.

177. As Prof. Overton writes, "[m]assive disparities in the distribution of wealth cause disparities in political participation." Overton, *supra* note 49, at 77.

178. Naturally, a large percentage of candidates will be current office holders. To start, there are incumbents seeking re-election, then there are typically other elected officials seeking to "move up" or move over due to term limits. As one example, an analysis of the 2004 election shows that 68 people ran for office as the Democratic or Republican nominee for 34 Senate seats. Of that group, 47, or 69.12%, were elected officials. CQ VOTING AND ELECTIONS COLLECTIONS: EXPERT ANALYSIS, DEMOGRAPHICS, AND DATA (2004), <http://www.cqpress.com/docs/2004Elections/2004Sen.htm>. See *supra* Part II.B (showing that many elected officials spend a substantial amount of time looking for campaign cash).

179. See *supra* Part II.A (discussing the amount of time candidates spend fundraising).

180. See *supra* Part II.C (discussing the effect of campaign fundraising on incumbent job performance).

181. SCHRAM, *supra* note 8, pt. I, § 3, at 40 (quoting Rep. Dennis DeConcini (D-AZ)). "[P]eople would be genuinely unhappy about how much time members have to spend on fundraising. Portions of every day are spent dialing for dollars." *Id.* (quoting Rep. Dennis Eckert (D-OH)).

182. See, e.g., *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966) (holding in a First Amendment case that the right of constituents to be "represented in governmental debates by the person they have elected to represent them" is an interest of the highest magnitude).

In addition to this common sense notion of conflict, the Constitution speaks to this problem, as it directly protects the core functions of legislators in the Speech or Debate Clause.¹⁸³ The text provides protection for Members of Congress as they carry out their essential functions as legislators, such as debating, voting, and attending committee meetings and hearings.¹⁸⁴ The excessive demands of fundraising take away the time of officeholders to perform these protected acts, undermining the integrity of the offices they hold. While the Clause was not included specifically in response to the time protection concern of modern-day campaigns, it further enforces our understanding of why it is compelling to protect the time of our elected representatives.¹⁸⁵

The Supreme Court held in *Powell v. McCormack* that the purpose of the Speech or Debate Clause is “to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.”¹⁸⁶ The Speech or Debate Clause has a broad mandate and is to “be read broadly to

183. U.S. CONST. art. I, § 6, cl. 1.

184. It reads “The Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House.” U.S. CONST. art. I, § 6, cl. 1.

185. The Clause was drafted into the Constitution to protect elected representatives.

“In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.”

Tenney v. Brandhove, 341 U.S. 367, 373 (1951) (quoting James Wilson II, WORKS OF JAMES WILSON (Andrews ed., 1936)). Freedom for elected officials to fully debate was an essential necessity in the formation of the Constitution.

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.

Tenney, 341 U.S. at 372. The Speech or Debate Clause is so important, in fact, that its protections have been extended to both State and local governments. *See id.* (extending Speech and Debate Clause to state government).

Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities.

Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998).

186. *Powell v. McCormack*, 395 U.S. 486, 505 (1969). Additionally, the Court held in *United States v. Johnson* that “[t]he legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the ‘practical security’ for ensuring the independence of the legislature.” *United States v. Johnson*, 383 U.S. 169, 179 (1966). The term “practical security” came from THE FEDERALIST, NO. 41 (James Madison), in discussing the reasons for drafting the Speech or Debate Clause.

effectuate its purposes[.]”¹⁸⁷ While the text uses the terms “speech” and “debate,” it protects more than just these two acts.¹⁸⁸ In that spirit, the Speech or Debate Clause has been held to protect many specific acts of legislative business.¹⁸⁹ Thus the Clause protects literal speech and debate, plus other specific acts essential to the legislative process.

While it protects many activities, there are limits on the Speech or Debate Clause.¹⁹⁰ Many acts taken in an official capacity, “includ[ing] providing constituent services, aiding individuals seeking government contracts and arranging appointments with government agencies, as well as communicating directly with the public through [various] media . . . [and] speeches delivered outside of Congress,”¹⁹¹ are not specifically protected by the Speech or Debate Clause. This distinction further emphasizes the notion that legislators in a republican government must be free to fulfill their public duties.

At its core, the Speech or Debate Clause ensures that Members of Congress are able to do their jobs. “Distracting or deterring even a few individual members of a collective legislative body can, of course, undermine the capacity of the body as a whole to do its lawmaking work”¹⁹² This is exactly the problem caused when fundraising

187. *Johnson*, 383 U.S. at 180 (citing *Kilbourn v. Thompson*, 103 U.S. 168 (1880) and *Tenney v. Brandhove*, 341 U.S. 367 (1951)). See also *Gravel v. United States*, 408 U.S. 606, 616 (1972) (holding that the Speech or Debate Clause is designed to assure the Congress “wide freedom of speech, debate and deliberation”); *Tenney*, 341 U.S. at 377 (“Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.”).

188. *Kilbourn*, 103 U.S. at 204 (“It would be a narrow view of the constitutional provision to limit it to words spoken in debate.”).

189. *Id.*

The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

Id.

190. As the Court explained, the Speech or Debate Clause “has not been extended beyond the legislative sphere.” *Gravel v. United States*, 408 U.S. 606, 624 (1972). The Court continued:

That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

Id. at 625.

191. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW VOL. 1* § 5-20, at 1016 (3d ed. 2000).

192. *Id.* at 1014.

takes officeholders away from doing their jobs—the people’s work.¹⁹³ The government has a compelling interest in protecting the time of elected officials who are increasingly compelled to spend large amounts of time fundraising instead of legislating, debating, and meeting with constituents.

3. The Time Protection Rationale Supports Representative Democracy

The excessive demands of fundraising erode the quality of representation provided and the time protection rationale speaks to this compelling interest. First, as just discussed, republican government is threatened by the fact that the people’s representatives are not able spend enough time doing their jobs to represent the people. But there is more to it than that. The money chase, and the time it takes from candidates and elected officials, poses a potential threat to representative democracy.¹⁹⁴ As time is taken away from effective and responsive job performance, representative democracy is diminished.

The actual time lost is just the beginning. The danger to representative democracy is layered, and various sources help us understand the nature of the threat. The Constitution and the basic structure of government reflect the Framers’ deep concerns about the quality of representation. As a baseline, Federalist 39 “define[s] a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.”¹⁹⁵ As time is taken from the many and given to the few—those with money and access to individuals who have and contribute money—the power is drawn away from the great body of people and redistributed to the select few. The resulting departure away from the “true north” of representative government is a compelling concern.

The philosophy of representative democracy has been enshrined in the Constitution and preserving this essential core of government is of

193. See *supra* Part II.C (discussing time conflicts with job performance caused by campaign fundraising).

194. HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 51 (1992). “And incumbents spend more and more time raising money, taking time away from their duties as elected officials.” *Id.*

195. THE FEDERALIST NO. 39 (James Madison). The terms representative democracy will be used interchangeably with republic. Madison also wrote: “The principle of self-government embodies, among other things, the precept that the people, the true sovereigns, are more to be trusted than their delegates, those who hold elective office.” See James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in THE WRITINGS OF JAMES MADISON, VOL. II, at 185 (Gallard Hunt ed., 1901).

the utmost importance. Members of Congress reflect representative democracy in action.¹⁹⁶ The people retain power by selecting their representatives to the national government. The Constitution makes a significant statement of commitment to protect this form of government in the States: “The United States shall guarantee to every State in this Union a Republican Form of Government”¹⁹⁷ The Guarantee Clause reflects a solemn obligation to the principles of representative democracy.¹⁹⁸ In addition, as the people exercise their power through their elected representatives, voting is the key mechanism by which they exercise their dominion and power over the government. That essential tool of democracy is protected throughout the Constitution.¹⁹⁹ Further, Supreme Court case law has stressed the importance of protecting the mechanisms and principles of representative democracy.²⁰⁰ In these myriad ways, the American Republic is committed to a political system where the people are kept in power, and elected officials specifically exercise that power.

Under the current system, there is a trade-off of time and a distortion of the way time is spent, away from the elected officials’ constituents. Not only is time taken away from campaigning and official duties, but those who contribute do not represent a typical slice of any elected official’s district.²⁰¹ Fundraising specifically requires candidates to call

196. See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States”); U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, *electd by the people thereof*”) (emphasis added).

197. U.S. CONST. art. IV, § 4.

198. See also Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767 (2003) (arguing that campaign finance reform could be justified by reference to the Guarantee Clause).

199. See U.S. CONST. amend. XV (protecting the vote for emancipated slaves); U.S. CONST. amend. XIX (protecting the vote for women); U.S. CONST. amend. XXIV (abolishing the poll tax); U.S. CONST. amend. XXVI (extending right to vote to eighteen-year-olds).

200. See, e.g., *Lucas v. Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 738–39 (1964) (applying Equal Protection Clause jurisprudence establishing the one-person, one-vote principle to Colorado Legislative apportionment); *WMCA v. Lomenzo*, 377 U.S. 633, 655 (1964) (declaring unconstitutional apportionment not substantially based on population); *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (holding that apportionment of seats in two houses invalid because it was not based on population and lacked rationality); *Wesberry v. Sanders*, 376 U.S. 1, 20 (1964) (holding unconstitutional apportionment of congressional districts making single congressmen represent two or three times more voters than other districts); *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (declaring unconstitutional statewide system of weighing rural votes more heavily than urban votes). See also, e.g., Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239 (2005) (arguing that dilution of power today due to the role of money in campaigns can be analogized to dilution of power rejected in the one-person, one-vote case law).

201. See *supra* Part II.B (discussing the campaign money chase).

on a select group of individuals with money and/or access thereto, who are spread out at certain money hotspots around the country.²⁰² To the extent that candidates and elected officials spend their time with these people, they are not able to learn what their constituents most want, and conversely, they are not able to educate their constituents about what is happening in the legislative arena.²⁰³ Elected officials serve their own personal goals of re-election at the expense of the time needed to serve the public good. As Professor Vince Blasi has argued,

An electoral system that leads most incumbents and challengers to spend large amounts of their time courting donors violates a norm that is important across a broad spectrum of theories of representation: that representatives must have the opportunity and the incentive to serve well the political objectives of the persons they represent, not just their own political objective of getting elected.²⁰⁴

The time focused on a select few people threatens the ultimate quality of representation provided to the many.

Candidates freed of the need to raise so much money ultimately can be more involved with the people, and broad participation can enhance the quality of representation.²⁰⁵ Widespread participation in government and the political process exposes decision-makers to a broad array of ideas and perspectives and increases the peoples' participation and buy-in into government.²⁰⁶ In this way time protection also serves First Amendment values. With less time devoted to fundraising, candidates and elected officials can spend more time engaged in core political speech.²⁰⁷ While there are many debates over what the First Amendment does protect, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."²⁰⁸ Discussion of public issues is integral to the American constitutional system. The First Amendment affords the broadest protection to such political expression in order to protect "uninhibited, robust and wide-open"²⁰⁹ public debate and the

202. See *supra* Part II.B.2 (describing travel demands of the money chase).

203. See *supra* Part II.C (discussing the issues with job performance as a result of campaign finance demands).

204. Blasi, *supra* note 3, at 1305.

205. Spencer Overton persuasively argues that widespread participation is one of the key underlying democratic values that must inform our analysis of campaign finance reform. "[T]he Justices aim to promote four democratic values: democratic deliberation, widespread participation, individual autonomy, and electoral competition." Overton, *supra* note 169, at 668.

206. See *id.* (describing the importance of widespread participation).

207. See *supra* Part II.B (describing the impact of campaign fundraising on elected officials).

208. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

209. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

“unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”²¹⁰ Focusing on time protection can reinvigorate the public discourse on public affairs, further strengthening American representative democracy.²¹¹

IV. WHAT FOLLOWS? ALTERNATIVES IN CAMPAIGN FINANCE REFORM

As demonstrated above, the time protection rationale provides a compelling government interest sufficient to justify some form of campaign finance regulation, but the question remains as to how best to reduce the amount of time needed to raise the money spent on a campaign. On the revenue side, we can consider ways to raise the money more quickly in order to meet the ever-increasing costs. On the expense side, we can consider ways to reduce the costs in order to match current revenue. Accordingly, several possibilities emerge: (1) completely eliminate contribution caps; (2) provide public financing for campaigns; and (3) limit campaign expenditures.²¹² This Part explores each of those possibilities and ultimately demonstrates that limiting campaign spending is the most narrowly tailored means available²¹³ to serve the compelling government interest in protecting the time of candidates and elected officials.²¹⁴

A. *Eliminating Contribution Limits: Recipe for Disaster*

One simple response to the concern that candidates spend more and more time in pursuit of money would be to let anyone give any amount desired. Instead of wasting time seeking money at a maximum of \$2,000 per person, the idea would be for candidates to ask just a handful

210. *Roth v. United States*, 354 U.S. 476, 484 (1957).

211. *See also* Blasi, *supra* note 3, at 1305 (“The availability of a coherent norm, derived from the constitutional concern for the quality of representation, makes the candidate-time-protection rationale for spending limits less problematic than the quality-of-public-debate rationale that was ruled illegitimate in *Buckley*.”).

212. The purpose is not to explore the infinite range of campaign reform proposals available, but this review of these three approaches best provides a broad framework for considering the practical ramifications of finding time protection to be a compelling government interest. Also note that term limits will not be considered, because they only prevent one specific individual from campaigning for one specific office at one specific point in time. Still, others will run for that office, and that office holder will likely run for a different one. Accordingly, term limits do nothing systemically to address the underlying concern of protecting the time of candidates and officeholders.

213. *See supra* note 90 (describing the application of strict scrutiny).

214. This Part illustrates yet another way in which this article further develops this idea, in a way that is distinct from Prof. Blasi’s work. This article more particularly explores the ramifications of the courts holding that time protection is a compelling government interest, in a manner that is fully different from Prof. Blasi’s article.

of individuals for million dollar checks. This is likely a fairly direct way to get at the problem of reducing time spent raising money, but its flaws make it the least appropriate alternative.

Buckley and history tell us that we would have significant worries about money and corruption under this alternative.²¹⁵ There is constant proof that money can have a corrupting influence on the system.²¹⁶ Contributors seek access, power and influence, and they get it.²¹⁷ During campaigns, contributors receive special attention from candidates, and during the legislative process, the successful candidates they support treat their contributors favorably.²¹⁸ Campaign money is potent and has the power to shape results.²¹⁹ Several studies have

215. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (addressing the FECA amendments passed in the wake of Watergate).

216. See, e.g., Albert Salvato, *Ohio Governor Fined Over Unreported Gifts*, N.Y. TIMES, Aug. 19, 2005, at A12 (reporting on Ohio Gov. Bob Taft pleading guilty of ethic violations involving unreported gifts); John P. Martin, *First guilty plea in Monmouth bribe cases*, THE STAR-LEDGER, Aug. 25, 2005, at 17 (reporting on first conviction among group of eleven local New Jersey officials caught in major corruption case).

217. As Charles Keating said, "One question . . . had to do with whether my financial support in any way influenced several political figures to take up my cause. I want to say in the most forceful way I can: I certainly hope so." Michael Kranish, *5 Senators Who Aided S&L Face Query in Gifts*, BOSTON GLOBE, Oct. 18, 1989, at 1.

218. The *McConnell* litigation carefully detailed these concerns, specifically in the context of large contributions to political parties. Judge Kollar-Kotelly, on the three-judge District Court panel wrote:

The record demonstrates that large donations . . . to the political parties provide donors with access to Members of Congress. The record is a treasure trove of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that contributions . . . are given with the expectation they will provide the donor with access to influence federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized.

McConnell v. FEC, 251 F. Supp. 2d 176, 492 (D. D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

219. There always will be a debate as to "whether contributions follow positions or positions follow contributions." Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J. L. & ECON. 345, 349 (2002) [hereinafter Stratmann, *Financial Services*]. See Jeffrey Milyo, David Primo, Timothy Groseclose, *Corporate PAC Campaign Contributions in Perspective*, 2 BUS. AND POLITICS 75, 85 (2000) (acknowledging the correlation between money and votes and equating it with bribery, but challenging the efficacy of corporate political contributions); Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder Jr., *Are Campaign Contributions Investment in the Political Marketplace or Individual Consumption? Or "Why Is There So Little Money In Politics?"* (Oct. 2002), available at http://itc.mit.edu/itel/docs/2002/Little_Money_Politics.pdf (arguing that campaign contributions are not a wise investment; rather they are a form of political participation). Compare Gary C. Durden & Jonathan I. Silberman, *Determining Legislative Preferences on the Minimum Wage: An Economic Approach*, 84 J. POL. ECON. 317, 328 (1976) (suggesting a strong correlation between contributions and voting patterns), with Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit*

documented the effect of money on the system and shown how money can buy votes²²⁰ and change legislative outcomes.²²¹ Despite best intentions, political actors are not angels,²²² and there is sufficient reason to be concerned that lifting caps on contributions would have a corrupting influence on the system.

Buckley wisely held that preventing corruption or the appearance thereof was a compelling government interest sufficient to justify campaign finance reform.²²³ It is no accident that the standard has withstood the test of time.²²⁴ Despite the ongoing criticisms of the *Buckley* decision,²²⁵ there is near universal agreement that preventing corruption or the appearance thereof is a compelling government

Model, R. ECON. AND STAT. 77, 83 (taking the opposite position and specifically refuting Durden and Silberman). For further exploration of this topic, see Alexander, *supra* note 200, at 251–55.

220. See Stratmann, *Financial Services*, *supra* note 219, at 368 (cross-referencing votes on financial services legislation against contribution patterns by PACs and interest groups from 1991–1998, concluding “interest groups ‘buy’ legislators’ votes with PAC contributions”). Another study examining agriculture-related votes reached similar conclusions. Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, 77 R. ECON AND STAT. 127, 129, 135 (1995) [hereinafter Stratmann, *Timing*] (“The results confirm the qualitative and quantitative importance of campaign contributions.”). See also Durden & Silberman, *supra* note 219, at 317 (suggesting a strong correlation between contributions and voting patterns).

221. Stratmann, *Timing*, *supra* note 220, at 127 (“Without campaign contributions farm interest would have lost in five of the seven votes that were won.”). See also Christopher Magee, *Campaign Contributions, Policy Decisions, and Election Outcomes: A Study of the Effects of Campaign Finance Reform*, 64 JEROME LEVY ECON. INST. OF BARD C. PUB. POL. BRIEF 5, 37 (2001) (stating that in terms of “House support for NAFTA, cuts in defense spending, and gun control . . . PAC money appeared to be decisive on these issues.”).

222.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST NO. 51 (James Madison).

223. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$ 1,000 contribution limitation. . . . To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.

Id. at 26–27.

224. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 136, 152–53 (2003) (rejecting dissenting Justice Kennedy’s “crabbed view of corruption, and particularly of the appearance of corruption, [which] ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation”).

225. For a discussion of this discontent, see for example, Alexander, *supra* note 198; text accompanying notes 196–202.

interest that justifies restrictions on campaign finance reforms.²²⁶ As the Supreme Court observed in *Nixon v. Shrink Missouri Government PAC*, “there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.”²²⁷ Completely uncapping contributions would fly in the face of that long-established case law and its compelling logic.

Further, removing contribution limits could result in a massive escalation in overall fundraising and campaign spending, posing additional problems. To the extent that candidates currently shower their attention on the few with money and access thereto, that would likely increase. The wealthiest of the wealthy political contributors would be bombarded by solicitations for funds in amounts exponentially greater than the current caps allow. If one candidate could quickly raise tens of millions of dollars, her opponent might be hard-pressed to do so without dramatically increasing the time spent doing so. Thus, the time drain could become even worse on one side of the election.²²⁸ In addition, the debate itself could be greatly skewed because those with money would be even more likely to determine the winners. Some candidates could remain in a race, entirely based on the support of a very small number of rich friends. But this would impoverish the overall debate that is essential to the integrity of the electoral process.²²⁹

Proponents of deregulation²³⁰ often argue that all money in campaigns is a form of political expression²³¹ and reject any reform proposals by saying that there should be no regulation of what they deem core political speech.²³² As Justice Thomas forcefully dissented

226. Although proving such is another matter that raises questions about the overall footing of the corruption rationale. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 120 (2004) (discussing public perception of corruption and the link to problems in the campaign finance system).

227. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 395 (2000).

228. This is a variant on the public financing problem discussed above. See *infra* Part IV.B (describing how public financing does not serve the time protection rationale as effectively as expenditure limits).

229. See *supra* Part III.B (discussing the compelling need to protect the electoral process).

230. See, e.g., Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1269 (1994) (discussing methods to prevent corruption); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1051 (1996) (discussing flaws in campaign reform efforts).

231. Limits on raising or spending money “operate in an area of the most fundamental First Amendment activities.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

232. While the First Amendment makes a clear command that “Congress shall make no law . . .” it is certainly not absolute, as there are regulations on all types of speech. U.S. CONST. amend. I.

in *FEC v. Colorado Republican Federal Campaign Committee*:

I continue to believe that [*Buckley*] should be overruled. “Political speech is the primary object of First Amendment protection,” and it is the lifeblood of a self-governing people. I remain baffled that this Court has extended the most generous First Amendment safeguards to filing lawsuits, wearing profane jackets, and exhibiting drive-in movies with nudity, but has offered only tepid protection to the core speech and associational rights that our Founders sought to defend.²³³

This position, however, is unsound. First, while *Buckley* equated money and speech, that underlying premise is flawed. After all, as Justice Stevens wrote, “[m]oney is property; it is not speech.”²³⁴ Further, while money can help effectuate speech, as it is used to pay for a great many communicative tools in a campaign, it should not be confused with core political speech. Justices Breyer and Ginsburg have disputed the money-equals-speech premise, arguing that money is not speech, but rather enables it.²³⁵ Likewise, the position has been coming under greater attack from scholars as well.²³⁶

But even without challenging the central premise of money-as-speech, the deregulation proponents’ position is ultimately unhelpful. A state should not be forced to abandon one set of compelling interests in order to pursue another if there is a way to reconcile them. As discussed below,²³⁷ by limiting both contributions and expenditures, the state can bring the equation back into balance and reduce the amount of time spent raising money. The state can protect the integrity of the electoral system with expenditure limits, but solely eliminating contribution caps creates no guarantee that spending would be manageable and that the attendant fundraising would take less of the limited time of candidates and officeholders. Instead we would face the

233. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465–66 (2001) (Thomas, J., dissenting) (citations omitted). In *Homans II*, the Tenth Circuit accepted this approach, as it rejected the time protection argument. *Homans II*, 366 F.3d 900, 913 (10th Cir. 2004).

234. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring). See also Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1241 (2000) (building on Stevens’s dissent to “contend[] that courts should consider both speech doctrine and property doctrine in developing a new way to look at campaign finance”).

235. *Shrink Mo. Gov’t PAC*, 528 U.S. at 400 (Breyer, J., concurring). Justice Ginsburg joined this opinion.

236. See, e.g., Eric L. Richards, *The Emergence of Covert Speech and its Implications for First Amendment Jurisprudence*, 38 AM. BUS. L.J. 559 (2001) (examining the negative effects of money on the political process and equating money with power, not speech).

237. See *infra* Part IV.C (discussing the interests served by placing spending limits on political campaigns).

widespread corruption that has haunted the system since Mark Hanna introduced big-time fundraising to American politics in 1896.²³⁸

B. *Public Financing: Paper Tiger*

At first blush, public financing could serve the goal of reducing the time spent raising money, but upon further exploration it does not serve the time protection rationale as effectively as expenditure limits. Public financing generally refers to voluntary public financing systems—those in which a candidate receives public funding if she chooses to abide by a spending cap.²³⁹ In a nutshell, the idea is that instead of making political campaigns privately funded affairs, let the money come from government. With government funding, there would be little or no need at all for private money, and therefore little or no need for private fundraising. In that sense, public financing can be seen as a well-crafted, constitutionally sound response to the time protection concern.²⁴⁰ But as candidates want more and more money to run their campaigns, under the current state of the law, voluntary public financing cannot combat the runaway spending, and candidates will constantly opt out. Thus, this option does not satisfactorily address the time protection problem.

While the jurisdictions that have enacted public financing have demonstrated a commitment to ending the money chase (perhaps because of time protection concerns), under the current legal regime, all

238. See, e.g., Bill Bradley, *TIME PRESENT, TIME PAST* 162–166 (1997) (discussing Hanna and his role in the presidential election of 1896). Interestingly, the official White House presidential biography page for President McKinley puts Hanna's involvement in the race in the first sentence, before even mentioning McKinley's name. See *The White House: William McKinley*, <http://www.whitehouse.gov/history/presidents/wm25.html> (last visited Feb. 16, 2006).

239. "Fourteen states provide direct public financing to candidates. An additional ten states provide minimal public financing to candidates and/or political parties, generally funded through taxpayer contributions to political parties through their tax returns." Common Cause, *Public Financing in the States*, <http://www.commoncause.org> (follow "Public Financing" under "Money in Politics" hyperlink; then select "Overview and Links to Public Finance Laws in the States") (last visited Feb. 16, 2006). See, e.g., HAW. CONST., art. II § 5; HAW. REV. STAT. ANN. §§ 11-208–209 (LexisNexis 2003); Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21-A, § 1015 (2003), *upheld in* Dagggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445, 472 (1st Cir. 2000); MINN. STAT. §10A.25 (2003), *upheld in* Rosenstiel v. Rodriguez, 101 F.3d 1544, 1553 (8th Cir. 1996); R.I. GEN. LAWS §§ 17-25-1, 17-25-30.1 (2004), *upheld in* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39–40 (1st Cir. 1993); N.J. ADMIN. CODE § 19:25-6.1–6.10, -12.1–12.11, -15.1–15.66, -16.1–16.9 (2004). Numerous municipalities have enacted public financing for their campaigns. See National Civic League, *Local Campaign Finance Reform* (2002), <http://www.ncl.org/nppp/lcfr/inventory.html> (listing cities with public financing).

240. *Buckley* and the subsequent case of *Republican National Committee v. FEC* upheld the system of public financing for the U.S. presidential campaigns. *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd mem.*, 445 U.S. 955 (1980); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976).

public financing is optional.²⁴¹ The government cannot require candidates to spend only the amount provided for via public funds, dramatically reducing the effectiveness of the program. At its core, that candidates cannot be forced to opt in makes public financing less narrowly tailored to serve the time protection rationale.

The relevant case law illuminates. To start, *Buckley* both approved public financing and, with its cramped perspective equating money and speech, held that mandatory spending limits would be unconstitutional.²⁴² In a subsequent action upholding the presidential election funding law, a lower court held, “as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters.”²⁴³ While the state may fund political campaigns and condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations,²⁴⁴ it may not compel compliance with such laws. The First Circuit confronted this question in *Vote Choice, Inc. v. DiStefano*,²⁴⁵ when it upheld Rhode Island’s voluntary public financing scheme. The law had been challenged, *inter alia*, on the grounds that certain incentives made the public funding voluntary in name but mandatory in effect. While rejecting the factual premise, the court did agree with the legal argument: “voluntariness has proven to be an important factor in judicial ratification of government-sponsored campaign financing schemes. Coerced compliance . . . would raise serious, perhaps fatal, objections”²⁴⁶ The inability to force compliance is the gaping hole

241. *Supra* note 239.

242. *Buckley*, 424 U.S. at 57–58. Further, the presidential election funding law, with only voluntary compliance, was upheld in *Republican Nat’l Comm.*, 487 F. Supp. at 283–86 (S.D.N.Y.). “Federal law . . . provided \$ 20,000,000 in public funding to presidential candidates who agreed to limit campaign expenditures to that amount. The court held that this scheme did not burden a candidate’s First Amendment rights because it simply provided an additional option for accumulating campaign funds.” *Rosenstiel*, 101 F.3d at 1549.

243. *Republican Nat’l Comm.*, 487 F.Supp. at 284.

244. *Buckley*, 424 U.S. at 57. As the First Circuit wrote in *Rosenstiel*, “The Supreme Court held that while the imposition of a mandatory limit on campaign expenditures violated a candidate’s First Amendment rights, a voluntary system under which candidates agreed to limit campaign expenditures in exchange for public financing of their campaigns was constitutionally permissible.” *Rosenstiel*, 101 F.3d at 1549.

245. *Vote Choice Inc. v. DiStefano*, 4 F.3d 26, 43 (1st Cir. 1993); *see also* *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 445, 466–67 (1st Cir. 2000) (upholding Maine’s public financing and specifically holding that there was no unconstitutional coercion). *Cf.* *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 19–20 (1st Cir. 1996) (invalidating law which limited independent expenditures to \$1000 per election as a violation of the First Amendment).

246. *Vote Choice*, 4 F.3d at 38–39 (citations omitted).

in the efficacy of public financing.²⁴⁷

Two current examples, from New York City and New Jersey, illustrate. New York has what many consider to be one of the most progressive public financing schemes in the nation.²⁴⁸ In the 2005 campaign for mayor, the incumbent, Michael Bloomberg—a billionaire who spent around \$75 million in winning the job four years ago²⁴⁹—spent \$84 million in successful pursuit of reelection.²⁵⁰ He outspent his Democratic opponent, Fernando Ferrer, by an approximate 9–1 ratio; Bloomberg raised \$5.3 million and received an additional \$3.9 million in public funding.²⁵¹ In New Jersey, there is public financing for gubernatorial elections, but both major party candidates for governor largely self-funded in the 2005 election.²⁵² Then-Senator Jon Corzine, the Democratic gubernatorial nominee, spent over \$63 million to win his Senate seat in 2000, \$60 million of which came from his own pocket.²⁵³ The Republican nominee, Doug Forrester, is also a multi-millionaire who many Republicans supported as a candidate because of his financial status, believing that he could provide enough of his own

247. This also suggests another policy option not specifically explored in these pages: public financing combined with mandatory spending limits. Such a scheme might prove to be an effective way to deal with the time protection concern. To the extent that *voluntary* public financing is ineffective, this highlights the importance of *mandatory* spending limits, supported by the time protection rationale.

248. See NEW YORK CITY CHARTER, chs. 46 & 49 §1136.1 (2004) available at <http://www.nyc.gov/html/charter/downloads/pdf/citycharter2004.pdf> (detailing limitations on campaigns in New York City); see also New York City Campaign Finance Board: Overview, http://www.nycffb.info/program_law/overview.htm (last visited Feb. 16, 2006) (providing an overview by The New York City Campaign Finance Board, the city agency which administers the program.); Tova Andrea Wang, The Century Foundation, *New York City's Campaign Finance Solution*, Nov. 17, 2003, <http://www.reformelections.org> (follow "2003–2004" under "News & Opinion" hyperlink) (discussing New York City's plan as "a testing ground in this area").

249. See Michael Cooper, *Mayoral Flaws (and Chances)*, N.Y. TIMES, Sept. 10, 2003, at B3 (discussing the recent approval ratings "slip" of Mayor Bloomberg and his pledge to spend in excess of the record \$75 million spent on the 2001 campaign); Jim Rutenberg, *Spending More, Mayor Refines Vote Strategy*, N.Y. TIMES, June 26, 2005, at A1 (discussing how Bloomberg, the Republican mayoral candidate, spent more than three times that of his Democrat rivals in the 2005 race and spent a record \$74 million in his successful 2001 campaign for mayor).

250. New York City Campaign Finance Board, Campaign Finance Summary 2005, http://www.nycffb.info/public_disclosure/summ_05.htm. Mayor Bloomberg had said publicly, perhaps strategically, that he does not intend to spend \$75 million for his reelection. Mike McIntire, *Race Shouldn't Cost \$75 Million Again, Mayor Says*, N.Y. TIMES, Nov. 24, 2004, at B8.

251. New York City Campaign Finance Board, *supra* note 250.

252. N.J. ADMIN. CODE § 19:25-15.1–15.66, -16.1–16.49 (2004).

253. See CENTER FOR RESPONSIVE POLITICS, CONGRESSIONAL RACES, <http://www.opensecrets.org/races/summary.asp>—(select "New Jersey"; select "2000" election cycle; follow "Senate" hyperlink) (last visited Feb. 16, 2006) (listing amounts raised by the various candidates for the 2000 New Jersey Senate race).

funds to mount a successful campaign.²⁵⁴ With these two individuals in the race, spending skyrocketed to a total of around \$75 million.²⁵⁵ In both situations, multimillionaires drove the need for more and more money.

Multimillionaire candidates and those with prodigious fundraising machines assume they should opt out of public funding plans that will not match what private funds or fundraising will generate.²⁵⁶ Whether by tapping into personal wealth or into a powerful fundraising machine, the prevailing sentiment seems to be, as long as you have the capability, spend more. Why? Because of the conventional wisdom that money buys success in elections: year after year, in around 90–95 percent of elections, the candidate who raises and spends the most money wins.²⁵⁷ With this trend, it is no wonder that campaign spending has continued to increase far faster than inflation,²⁵⁸ and no end is in sight. Accordingly, all candidates must come to the table ready to raise and spend untold millions.²⁵⁹

Without mandatory limits on publicly financed elections, all candidates remain free to spend unlimited amounts if they do not accept

254. David Kocieniewski, *Law May Bar Forrester Funds in Campaign*, N.Y. TIMES, Aug. 9, 2005, at B6. (“When Douglas R. Forrester made his improbable rise to the top of New Jersey’s Republican Party three years ago, his ascent was fueled largely by his wealth and willingness to spend millions of dollars on political campaigns.”); Tom Turcol & Cynthia Burton, *Forrester Campaign Could Lose His Own Millions*, PHILA. INQUIRER, Aug. 7, 2005, at B1. (“Forrester promoted his candidacy to key Republicans partly on his assertion that the party needed a wealthy, self-financed candidate such as him to compete with the wealthy Corzine, who also is financing his campaign.”).

255. Corzine apparently spent “about \$45 million” while Forrester spent \$30 million. Charlie Cook, *Forecast For GOP Looks Anything But Sunny*, NAT’L J., Nov. 12, 2005. See also *Winners And Losers Nov. 6–12*, N.Y. TIMES, Nov. 13, 2005, at D2 (reporting on the outcome of several elections). In 2002, 43 percent of newly elected Members of Congress were millionaires, as compared to only 1 percent of the U.S. population. Jonathan D. Salant, *Nearly Half of Congressional Freshmen Are Millionaires*, DETROIT NEWS, Dec. 25, 2002.

256. For example, in the 2004 presidential primaries, President Bush, Senator Kerry, and Governor Dean all eschewed public financing because they could raise far more privately than the amount available through public financing. See, e.g., CENTER FOR RESPONSIVE POLITICS, 2004 PRESIDENTIAL ELECTION, <http://www.opensecrets.org/presidential/index.asp> (listing the sources of campaign financing for the 2004 presidential election).

257. See, e.g., U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS (2003), available at <http://www.pirg.org/democracy/democracy.asp?id2=10366> (“Ninety-four percent of the candidates who raised the most hard money won their 2002 general elections. . . . General election winners out-raised losers by approximately 4-to-1.”).

258. See *supra* Part II.A (documenting spiraling campaign costs).

259. See, e.g., Jamin B. Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 320–24 (1993). In fact, without knowing who one’s opponent will be, the would-be candidate has to spend with the assumption that a massive war chest will be necessary to combat either type of opponent.

the public financing, as seen in New York City and New Jersey. Ultimately, if a state interest is truly compelling, there is something illogical about saying the state must rely on voluntary compliance to pursue it.²⁶⁰ The compelling government interest in candidate time protection will be not be served by optional public financing laws.

C. *Spending Limits: The Most Narrowly Tailored Alternative*

This article proposes that the most effective way to protect the time of candidates and officeholders is to impose limits on campaign expenditures.²⁶¹ Spending drives the need to raise money; as long as spending continues to escalate, the money chase will spiral and time will be lost. Capping the amount that any candidate can spend will correspondingly limit the amount of time spent raising money, thereby serving the compelling government interest identified earlier.²⁶²

In considering the constitutionality of expenditure limits, first recall that there is a significant question among the Justices as to the future of *Buckley*.²⁶³ Justice Kennedy's words in particular merit review: "For now, however, I would leave open the possibility that Congress, or a

260. Public financing also provides an unfortunate reality check: governments may not provide the kind of money necessary to fully fund their elections. Public financing is inadequate and provides a less narrowly tailored alternative because it may not be financially feasible for jurisdictions to provide the levels of public financing that would assure a sufficiently high rate of participation. To optimize voluntary participation, a jurisdiction may need to provide matching funds equal to what a non-participating opponent is spending (or close to it), and governments are not likely to put up the required money. Recall that President Bush, Senator Kerry, and Governor Dean all opted out of the public financing of the 2004 presidential primaries. *Supra* note 256. To the extent that a narrow tailoring analysis is required, we must consider what that means in this context. To be effective, a less restrictive alternative must be both plausible and feasible. *See, e.g.,* *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004) (affirming the district court's decision to enjoin enforcement of the Child Online Protection Act because of the likelihood of less restrictive alternatives); *United States v. Playboy Enter. Group*, 529 U.S. 803, 815–16 (2000) (discussing the standards for restrictions on access to indecent material). But a voluntary system of public financing inherently is ineffective, since any one candidate who chooses to opt out can effectively eviscerate the limits, decline public funding and spend unrestricted amounts, and because the amounts provided may be inadequate to the task.

261. *See also* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1769–70 (2001).

Expenditure limitations could also reduce the burdens and distractions of fundraising. Instead of devoting critical campaign time and effort to raising funds, candidates could spend more time on debates, campaigning, and meeting with the voters. This could improve the quality of campaigns, increase voter information, and, ultimately, enhance citizen participation and election day turnout.

Id.

262. This more forcefully advances Blasi's claim: "campaign spending limits justified by the objective of candidate time protection should not be presumed to be unconstitutional." Blasi, *supra* note 3, at 1324.

263. *See supra* Part III.B (addressing compelling government interest post-*Buckley*).

state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising.²⁶⁴ Spending limits tailored to time protection concerns respond to Justice Kennedy's call. Innovative change is possible, even without overturning the prevailing framework: this proposal responds to and works within the *Buckley* framework. While *Buckley* dictates that strict scrutiny must be employed,²⁶⁵ such scrutiny need not be—and in this context is not always—fatal.²⁶⁶ Nothing in *Buckley* imposes an absolute ban on campaign spending limits.²⁶⁷

Freeing candidates' time will open up campaigns, free time for the people's work to be done and improve representative democracy overall. As Professor Blasi has written, “[s]pending limits address a problem that is central to the system of representation ordained by the Constitution.”²⁶⁸ Allowing candidates to spend less time fundraising will permit them to engage with the people in other ways of their choosing.²⁶⁹ Freeing the time of incumbent officeholders will allow them to speak, debate, legislate and govern.²⁷⁰ The overall impact will help improve the functioning of representative democracy.²⁷¹

The time protection rationale not only serves the compelling government interest of time protection within the *Buckley* First Amendment framework, it affirmatively promotes speech interests. Moving candidates and officeholders away from limited conversations with the select few, to a broader conversation with all, enhances political speech at its broadest and finest. The time not spent fundraising can be used to engage in a wide variety of activities,

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

265. As a separate matter, the Court should at some point consider whether strict scrutiny is required when courts review campaign finance reform measures, or perhaps a lesser level of scrutiny is appropriate. Irrespective of the level of scrutiny required, the time protection rationale presents a compelling government interest.

266. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 653 (1990) (applying strict scrutiny and upholding restrictions on corporate expenditures in political campaigns); *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (applying strict scrutiny and upholding ban on certain electioneering activities near polling places). See also *supra* note 90 (discussing “strict-in-theory, fatal-in-fact” cases).

267. See *supra* note 93, for a discussion of why *Buckley* does not impose a *per se* ban on expenditure limits.

268. Blasi, *supra* note 3, at 1324.

269. See *supra* Part III.B (considering post-*Buckley* possibilities for a compelling government interest).

270. See *supra* Part III.C (describing the circuit split over the protection rationale).

271. See *supra* Part III.D (outlining how time protection is a compelling government interest).

including core political speech.²⁷² The “time freed from fund-raising creates new opportunities for speech. . . . To the degree that spending limits restore voter confidence in the quality of representation, the gain in citizen engagement can be computed in First Amendment terms.”²⁷³ Preserving the time of candidates thus furthers free speech.

Campaign expenditure limits maintain respect for the First Amendment value of campaign contributions. The *Buckley* Court held that “[a] contribution serves as a general expression of support for the candidate and his views[.]”²⁷⁴ To the extent that there is *some* communicative aspect of campaign contributions, campaign expenditure limits still allow such expression. Similarly, political contributions have an associational value. “Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals.”²⁷⁵ To the extent that political contributions involve precious speech and associational rights, expenditure limits respect those rights.

Further, it is so important to keep public officials in touch with their constituents, and fundraising can be a part of that—it is one way in which the people communicate with candidates and elected officials. As one Senator said,

“I felt that for all of us who were senators, and who were being treated as minor nobility, that the fact that we had to go ask people for money was very healthy. And that it gave you at least a slight degree of humility. . . . I think you should have to ask people to support you, and you should have to ask them to do so tangibly.”²⁷⁶

While there is an element of truth, this comment does not reconcile

272. While the money chase occupies too much time, it is not inherently evil. While fundraising is time consuming, the point of this Article is not to propose that campaigns must be balanced toward only “good” versus “bad” activities. The problem is that, by spending so much time in pursuit of money, the system suffers. By giving time back to candidates and elected officials, we give them the chance to do with it what they see fit. Republican democracy allows those choices but without reform, more and more time will be lost to fundraising.

273. Blasi, *supra* note 3, at 1324. Blasi continues, “[w]hen the conventional reluctance to look beyond one-dimensional notions of quantity in measuring speech effects is overcome, spending limits can be seen to advance First Amendment values in some ways, even while threatening them in other ways.” *Id.*

274. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). But a contribution is limited speech which “does not communicate the underlying basis for the support,” so “a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.” *Id.* at 20–21.

275. *Id.* at 22.

276. MAKINSON, *supra* note 8, at 38 (quoting Sen. Slade Gorton (R-WA)).

the fact that financial support is only one of a number of ways to support a candidate. Significantly, “given the unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor. . . . a large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person.”²⁷⁷ In other words, the \$2,000 maximum contribution from George Soros or Bill Gates probably does not indicate the level of emotional support as would a \$5 or \$10 donation from a person with fixed income who may be more likely to work phone banks, or canvass door-to-door.

Likewise, while money does reflect a commitment of resources and may purchase forms of speech, it is not pure speech. In Justice Stevens’ words,

Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.²⁷⁸

Campaign expenditure limits both respect the speech and associational values of contributions and fundraising, but also maintain the perspective on the importance of other modes of expression and the pitfalls of the current money chase.

Although there are many negative ramifications of the current fundraising system, fundraising is not inherently evil.²⁷⁹ But we have passed the saturation level,²⁸⁰ and as spending increases faster than

277. *Landell v. Sorrell*, 406 F.3d 159, 161 (2d Cir. 2005) (Calabresi, J., concurring in denial of rehearing).

278. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

279. Scholars like Rick Hasen, Jamin Raskin and John Bonifaz persuasively argue that the current system creates and perpetuates inequalities. See Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1164 (1994) (“Specifically, equal protection requires an inquiry into whether all citizens enjoy sufficient equality in the political field to participate meaningfully in public elections as voters, speakers, and candidates whenever they so desire.”); Raskin & Bonifaz, *supra* note 259, at 279–80 (“The purpose of this Article is to demonstrate that the current campaign finance regime is inconsistent with equal protection or, at the very least, warrants congressional action to vindicate equal protection.”). See also Alexander, *supra* note 200 (arguing that equality of participation in campaigns improves the quality of the representative democracy).

280. For example, in the 2004 Senate campaign in South Dakota, where the two major parties combined spent more money than in any other election, see *supra* note 26, spending had a terrible effect. As was reported in the week before the election, “[s]pending on the races has been enormous. . . . In South Dakota alone, outside groups have spent \$9 million in support of Mr.

inflation, there is no telling where it will stop. As fundraising occurs today, it skews the process, because candidates spend so much of their time chasing money from a limited pool of wealthy (and politically interested) individuals, many outside their district.²⁸¹ At a certain point—a point that has long ago passed—it takes too much time from other valuable, constitutionally-protected activities. And as long as spending goes up, it will get worse. Spending caps are directly responsive to this time protection problem, and they are more responsive than either eliminating contribution caps or providing public funds (without spending caps).²⁸²

There is no absolute formula to apply to design the perfectly tailored campaign expenditure limits, and determining the appropriate specific remedy will best be left to local determination. But to the extent that states are laboratories of democracy,²⁸³ experimentation of this sort should be allowed, even encouraged.²⁸⁴ In matters as important as the

Thune, whose campaign is so flush he is having trouble spending it all. ‘You reach a saturation point,’ said Dick Wadhams, Mr. Thune’s campaign manager.” Carl Hulse & Sheryl Gay Stolberg, *Races for House and Senate Have Been Nasty, Expensive and Focused on Local Issues*, N.Y. TIMES, Oct. 31, 2004, at A31.

281. See *supra* Part II.B (describing why candidates are spending increasingly more time raising campaign funds).

282. Of course, there is no single silver bullet to be found. As the Court and scholars have warned, “[m]oney, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.” *McConnell v. FEC*, 540 U.S. 93, 224 (2003). See also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (arguing that political money is like water in that it always has a place to go and is part of a broader “ecosystem”). Further, *Colorado Republicans* made clear that reviewing courts can carefully examine the relationship between party money and individual candidates, and *McConnell* furthered that notion by lashing out against attempts to circumvent the letter and spirit of campaign finance laws. See *McConnell*, 540 U.S. at 137 (approvingly citing lower level of scrutiny for contributions, so as to “provide[] Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process”); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 434 (2001) (“Parties thus perform functions more complex than simply electing their candidates: they act as agents for spending on behalf of those who seek to produce obligated officeholders.”). Further injections of reality into jurisprudence can help stem the tide of evasive funding schemes.

283. “Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth.” *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 788 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part) (citations omitted); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”).

284. See Roland S. Homet, Jr., *Fact Finding in First Amendment Litigation: The Case of Campaign Reform*, 21 OKLA. CITY U. L. REV. 97, 107–09 (1996) (noting some of the problems we face today can be seen as an unintended consequence of the court deciding *Buckley* without

functioning of our system of government, random experiments should not be taken on lightly. This is a course of action that has been proven to work: in both Vermont and Albuquerque, spending limits served to protect the time of candidates and officeholders.²⁸⁵ As governments pursue this course, they should be guided by the lessons from those jurisdictions. Further, while this article develops a foundation for the time protection rationale, it is not purely an exercise in theory. The specific issue of time protection and campaign expenditures is currently in the Justices' hands.²⁸⁶ There is significant confusion as to the matter in the lower federal courts, with a clear circuit split.²⁸⁷ The Court should recognize the constitutionally compelling nature of the time protection rationale. From there, lower courts can review specific plans, asking whether the reform in question is appropriately tailored to achieve the goal sought. Capping expenditures is essential to achieving this compelling government interest, and the time is right to explore the possibilities.

V. CONCLUSION

As candidates and officeholders spend more time in pursuit of campaign cash, they spend less time in communication with the people and in service of the public good. Protecting this time is more than just an important policy matter, it is a compelling government interest. The *Buckley* Court left the door open for the development of a new rationale that might satisfy strict scrutiny; in recent years there has been increased attention to this prospect on the Court; and now, there is a circuit split over the issue. Under the prevailing analysis, a compelling government interest is required to justify any campaign finance regulation. This Article has shown that the time protection rationale is a compelling government interest that safeguards the integrity of the political-governmental system. It serves to defend the integrity of campaigns, to

the full factual record).

285. See *supra* Part III.D (explaining why a compelling government interest exists in time protection). Recall that the Federal District Court in both *Homans* and *Landell* upheld the factual premise involved here; in *Homans*, the Tenth Circuit reversed based on its belief that *Buckley* would not allow any campaign spending caps as a matter of law. See *Landell II*, 382 F.3d 91, 121 (2d Cir. 2004), cert. granted, 126 S. Ct. 35 (2005) (holding that time protection is a compelling government interest); *Homans II*, 366 F.3d 900, 915 (10th Cir. 2004) (agreeing with the facts found by the trial court, but refusing to overturn *Buckley*).

286. *Landell II*, 382 F.3d 91 (2d Cir. 2004), cert. granted, 126 S. Ct. 35 (2005).

287. The Circuit split is clear between the Second and Tenth Circuits, which have explicitly considered and ruled on opposite sides of this question. Also the First and Eighth Circuits have weighed in favorably on the side of the Second Circuit position and the Sixth Circuit seems predisposed to the Tenth Circuit's side of the matter. See *supra* Part III.C (outlining the split amongst the circuits regarding the time protection rationale).

ensure that the people's business gets done, and to preserve the values of the American Republic. With that established, campaign expenditure limits are the most narrowly tailored means to protect the time of candidates and officeholders. They reduce the amount of money to be spent, and accordingly reduce the amount of time required to raise that money. Spending limits are more directly responsive than public financing, and they do not carry the significant corruption baggage of complete deregulation. In sum, campaign spending limits are a constitutionally sound approach to directly serve the compelling government interest in protecting the time of candidates and elected officials.